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INDIAN LEGAL NEWS

NPAC's Arbitration Review : A call for mediation in investment treaty disputes!

Bar & Bench August 21 2019

NANI PALKHIVALA ARBITRATION CENTRE

Kshama Loya

In the universe of commercial disputes, the institutionalization of mediation appears to have taken center stage. With India becoming the most frequently sued country in international

investment treaty disputes, there is a pressing need to re-think and reinforce mediation as a key means to settle investor-state disputes, facilitate the investor-State relationship, and plug the leakage of the Exchequer through international arbitral awards on damages and costs.

The recently introduced Singapore Convention seeks to achieve a laudable objective of finality and enforcement of mediated settlement agreements for international commercial disputes. It reiterates that parties shall not be deprived of their right to avail of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon. Almost every bilateral investment treaty provides for an amicable resolution of disputes through negotiation and/or mediation. However, the ghost of non-finality and non-enforceability haunt these harmonious mechanisms.

While according finality to mediated settlement agreements in investment treaty disputes might be difficult considering the complex interplay of public-private interests, nature, and need for regulatory State action, and extent of investor impact, it is not impossible to devise a framework where mediation can be effectively employed to reduce investment treaty cases.

It may not be necessary to adopt mediation in its popular avatar where a third person assists disputing parties to facilitate resolution. In the investment treaty context, mediation could adopt various forms such as facilitating a dialogue between the investor and the State on possible consequences of a potential State measure, opening a platform for the free flow of options that are less restrictive or more proportionate for adoption by the State to mitigate investor impact, among other forms. While public consultation before the adoption of a State measure is advised in some bilateral investment treaties, mediation after the adoption of a State measure would assist in a more specific, private and confidential dialogue between the State and the investor to resolve potential disputes.

Given the long-term commitment and interdependent nature of relationship between foreign investor and State, there is an increasing need for a shift from the adjudicatory way in which investment treaty disputes are approached - to a way that is enabling, effective, economical, and achieves the best outcome for both parties. Arbitration with its combative nature, coupled with costs, has not proven to be helpful to foster and reinstate investor-State relationships.

One (author included) might argue that the need for mediation in treaty disputes is more pressing than that in international commercial disputes, considering the extensive impact on foreign relations, national exchequer and policymaking in the former while the latter deals with a limited arena of impact on commercial interests of the parties alone. However, to make mediation effective will involve building a robust framework comprising of expert mediators, national legislations enabling and recognizing mediated settlements, with narrow rigours of resistance and greater acceptance. Mediation might prove to be the most effective means for resolving investment treaty disputes, with arbitration as its pillion rider in the event of failure – or so the author duty bound ever prays!

Kshama Loya is a Leader at Nishith Desai Associates and focusses on international investment and commercial arbitration.