Pre-Arbitration Steps: Contractually Prescribed Pre-Arbitration Mediation, Emergency Awards and Court Ordered Interim Relief

Two important considerations at the time of drafting arbitration agreements and in the preparatory stages of an arbitration relate to procedures that must precede the invocation of an arbitration i.e., the contractually prescribed pre-arbitral steps and measures that a party may require to secure in advance any potential award that may be rendered in an arbitration.

This article discusses some pre-arbitral interim measures that can be helpful in securing an award, considerations as to choosing the forum to approach for these measures and the issues presented when such measures are required before a contractually prescribed pre-arbitral procedure (such as mediation or conciliation) is completed. In that context, the considerations that apply at the time of drafting an arbitration agreement are also discussed briefly.

PRE-ARBITRAL INTERIM MEASURES

The intent of pre-arbitral interim orders is to ensure, among other things, that the arbitration and eventual award are not frustrated by a party, such as by putting their assets out of reach before the award is issued or seeking to restrain the arbitration, and to reduce the timelines for enforcement of the award. Some of the pre-arbitral interim orders parties could obtain to secure an award are for custody or attachment of the subject-matter in dispute, freezing orders in relation to properties that may be required to satisfy an award, orders for disclosure of assets, deposits, attachment of bank accounts, interim specific performance to mitigate further loss in an on-going contract, security for costs and anti-suit injunctions to prevent the respondent from seeking an injunction restraining the arbitration proceedings.

These pre-arbitral measures can be time critical in circumstances where delays could be exploited by a respondent to bring substantial harm to the claimant – such as if

assets are alienated to third parties who are not bound by the arbitration agreement, if assets are transferred to non-reciprocating territories where the award may not be recognised or if an anti-arbitration injunction is obtained by the respondent (which may require considerable time and effort to vacate), to name a few.

Once the appropriate pre-arbitral measures are determined, the next question that arises is the forum that should be approached for those measures. If the parties opted for an *ad hoc* arbitration seated in India, the available option at the pre-arbitral stage is an application under Section 9 of the Arbitration and Conciliation Act, 1996, as amended (the "**Act**") to the jurisdictional court in terms of Section 2(1)(e) of the Act. Section 9 relief is generally also available in foreign seated arbitrations, unless it has been expressly or impliedly excluded.

In institutional arbitrations, depending on the rules of the arbitral institution chosen, the pre-arbitral measures that may become available are expedited formation of the arbitral tribunal itself or a request for appointment of an emergency arbitrator. The requesting party is required to show exceptional urgency to succeed in the request. In either event, if successful, the request for interim relief is then made to the emergency arbitrator or arbitral tribunal appointed.

Most arbitral institutions process requests for expedited formation of the arbitral tribunal and for appointment of an emergency arbitrator on a quick timeline, but a note of caution for awards of emergency arbitrators is that the Act is yet to formally recognise them and our courts have expressed divergent opinions on their legitimacy. The Delhi High Court held that an emergency award cannot be enforced under the Act, and the Bombay High Court has noted that a party can approach a court under Section 9 of the Act for the same interim measures as those granted in an emergency award (in which case the time and expense of obtaining the emergency award appears futile).

Accordingly, an emergency award may be useful if it is intended to be enforced against assets in, or persons subject to, a jurisdiction that recognises such awards but its efficacy should be examined in the context of the case if it is intended solely to be enforced in India. Equally, another important aspect is that Indian law does not expressly prescribe avenues to challenge emergency awards, which can be problematic given that emergency arbitrators issue awards on an expedited timeline and based on consideration of the limited record available at the preliminary stages of the arbitration.

PRE-ARBITRATION MEDIATION OR CONCILIATION

Finally, a difficulty presents itself when an arbitration agreement makes it mandatory to undertake a pre-arbitration mediation or conciliation but the claimant may be put to disadvantage(s) by waiting for that procedure to be completed. The determination of whether and how to obtain early interim measures in this scenario can be a potential minefield.

While courts in other jurisdictions (such as in England) do not generally view non-compliance with pre-arbitral mechanisms favourably, some Indian courts have taken the view that pre-arbitral steps are almost empty formalities and do not preclude a party from invoking the arbitration and approaching a court, for instance, for an application for appointment of an arbitrator or protective interim relief. A consistent approach among Indian courts is not discernible.

In complex commercial disputes, invoking arbitration is usually a last resort and after assessing whether the dispute can be resolved without initiating an adversarial arbitration proceeding. The formal invocation of a pre-arbitral step alerts the opponent that the claimant is prepared to engage in an adversarial proceeding thereafter and this, in turn, may prompt the opponent to consider mechanisms to arrange their affairs such that they may successfully resist the claimant's efforts.

Given this and also the liberal approach in India towards compliance with pre-arbitral mechanisms in the context of commercial contracts (not involving statutorily prescribed pre-arbitral steps), it would be worthwhile to carefully assess, when drafting an arbitration agreement, whether pre-arbitral steps serve any purpose at all in the context of the contemplated transaction and if these pre-arbitral steps may have unintended consequences (such as delaying a party in obtaining pre-arbitral measures that may be required in a potential dispute scenario).

When considering appropriate pre-arbitral measures, the frame of the arbitration agreement is critical in determining whether the *dispute* between the parties can be said to have arisen before the contractually prescribed pre-arbitral step is completed, and therefore whether an arbitration is reasonably in prospect. If so, a party should be able to seek pre-arbitral measures while simultaneously progressing the pre-arbitral mediation or conciliation.

If the answer is in the negative, however, the question arises as to whether the pre-arbitral step precludes a party from obtaining pre-arbitral measures, and if so, the comparative advantage of complying with the prescribed pre-arbitral step vis-à-vis obtaining pre-arbitral measures. In such a scenario, three significant determinations

are required, namely: (i) whether pre-arbitral measures are available for the perceived dispute (or an application seeking such measures would be considered premature or repudiatory of the pre-arbitral mediation or conciliation requirement); (ii) the forum that should be approached to obtain pre-arbitral measures (the jurisdictional court, or if institutional mechanisms of emergency arbitration or expedited formation of the arbitral tribunal are available without invoking arbitration); and (iii) the consequences of giving the pre-arbitral step a miss.

CONCLUSION

The determinations regarding pre-arbitral steps and interim measures are riddled with intricacies of the applicable law(s) and contractual requirements, any applicable rules of arbitration and the strategic objectives intended to be achieved through the arbitration. The courses of action intended to be available on these aspects is best considered at the drafting stage of an arbitration agreement, and the recommended course is best developed at the pre-arbitral stage to avoid unwelcome surprises when enforcing an award.

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