NATIONAL LAW SCHOOL -TRILEGAL INTERNATIONAL ARBITRATION CONFERENCE 2023

PANEL-II: CHALLENGING AN AWARD BASED ON THE TRIBUNAL'S TREATMENT OF EVIDENCE

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I. INTRODUCTION

The conference commenced with a warm welcome address by **Arth Doshi** *(Joint-Convener*, Moot Court Society*).* He set the stage for this panel discussion. This session aimed to explore the complexities surrounding the arbitration process and the crucial role played by evidence in shaping the outcomes.

To introduce the distinguished speakers, **Professor Sahana Ramesh** (Associate Professor of Law, NLSIU) took the stage as the session's moderator. With her extensive expertise in the field and deep understanding of the subject matter, Professor Ramesh provided brief backgrounds about the esteemed panellists, shedding light on their remarkable achievements and contributions:

1. Dr. Friedrich Rosenfeld (Partner, Hanefeld, Lecturer at Bucerius Law School, NYU-Paris).
2. Ms. Shanelle Irani (Senior Associate, Wilmer-Hale).
3. Mr. Ganapathy Subbiah (Partner, Khaitan and Co.).
4. Ms. Tine Abraham (Partner, Trilegal)

II. OPENING REMARKS

Post the introductions, the panel commenced with an enlightening address by **Dr. Friedrich Rosenfeld**. Dr. Rosenfeld provided valuable insights into the normative framework governing evidentiary matters in arbitration. His speech highlighted the discretion enjoyed by arbitrators and the unique nature of the framework in the realm of international commercial arbitration.

His remarks were significant in setting the tone for the panel discussion as it sought to explore the discretion enjoyed by the arbitrations as well as the constraints faced by them in terms of due process obligations. He led the discussion with the different kinds of approaches followed while examining evidence.

III. DISCRETION AND TAILORED EVIDENTIARY APPROACHES

Dr. Rosenfeld emphasized that arbitrators possess significant discretion in determining the admission of evidence, which is not subject to post-award review. Unlike other legal processes, arbitration lacks binding rules concerning witnesses, expert inquiry, and document production.

Tribunals have the authority to tailor the evidentiary approach specific to each dispute, considering commercial actors' diverse views. This discretion, guided by the International Bar Association (IBA) rules, allows tribunals to create tailor-made regimes for specific disputes, ensuring a balanced resolution of disputes.

But this discretion is not absolute. There are certain constraints in the form of due process obligations which were discussed by **Dr. Rosenfeld**.

IV. DUE PROCESS OBLIGATIONS

While arbitrators have discretion in evidentiary matters, they are not without regulation. **Dr. Rosenfeld** highlighted the existence of due process obligations, which can potentially lead to post-award relief. He outlined two fundamental due process obligations:

a. ***Right to be Heard:*** Each party has the right to be heard and present its case. This includes the opportunity to submit documents and counter the evidence of the opposing party. Tribunals have an obligation to consider and take into account the submissions made by the parties. Failure to engage with the evidence presented may constitute a breach of the right to be heard. **Dr. Rosenfeld** provided an example of a German case where a tribunal treated disputed areas as undisputed, leading to a violation of the right to be heard.

b. ***Right to Equal Treatment:*** Parties have the right to equal treatment throughout the arbitration process. This includes the allocation of time, deadlines, and other procedural aspects. **Dr. Rosenfeld** raised the question of whether this right has a substantive dimension beyond formal equality. He illustrated this with an example where a party was denied the opportunity to present its own witness, even though that witness was the only one who could have had relevant information about the dispute, leading to unequal treatment.

The question which then arises concerns the balancing of these obligations with the discretion possessed by the arbitrator.

V. LIMITATIONS AND BALANCING EFFICIENCY WITH DUE PROCESS

Due process obligations place certain limitations on discretion. However, these obligations do not unduly restrict the efficiency of the arbitration process. Arbitrators can resist parties' attempts to introduce evidence at the eleventh hour or seek time extensions. Additionally, courts

have recognized that not every due process violation warrants setting aside an arbitral award. Deference is given to tribunals due to their proximity to the evidence and expertise in the subject matter.

To summarise, **Dr. Friedrich Rosenfeld**'s address provided valuable insights into the effect of the appreciation of evidence on arbitral awards. Arbitrators enjoy discretion in determining the admission of evidence, tailored to each dispute's needs. However, this discretion is not without limitations imposed by due process obligations. The right to be heard and the right to equal treatment ensure fairness in the arbitration process. Courts exercise deference to tribunals, and minor infringements of due process do not automatically invalidate awards. The delicate balance between efficiency and due process is crucial for the effective resolution of international commercial disputes through arbitration.

Dr. Rosenfeld's analysis of the International Commercial Arbitration framework was followed by **Ms. Shanelle Irani**, who described provisions in the English Arbitration and Conciliation Act,1996 dealing with the issue.

VI. LEGAL AVENUES IN ENGLAND FOR CHALLENGING THE AWARD

The avenue for challenging awards on the basis of the tribunal's treatment of evidence lies in Section 68 of the Act, which allows parties to challenge arbitral awards on the ground of serious irregularity. Under S.68, the court is empowered to not only set aside the award but also remit the same to the tribunal for reconsideration. S.68(2)(a) mentions non-compliance of the tribunal with its general duties as one of the grounds for serious irregularity. Codified in S.33, these general duties include the duty to "act fairly and impartially as between the parties" and the duty of "giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". These act as avenues for parties to seek post-award relief, much like the 'due process obligations' that **Mr Rosenfield** identified to exist in the UNCITRAL Rules and the NY Convention.

VII. DIFFICULTY IN MEETING LEGAL STANDARDS

To succeed in a challenge under S.68, the threshold is extremely high. Even if parties establish that the tribunal appreciated evidence in an incorrect manner and violated its duty under S.33, they need to further demonstrate that substantial injustice was a result of such ill-treatment. In

fact, this threshold is so difficult to reach that there has been no situation so far where mistreatment of evidence by the tribunal has been accepted as a valid ground to challenge awards under S.68.

Mr. Ganapathy Subbiah analysed the question from the perspective of Indian law, both in doctrine and in practice. His primary focus was on the over-reliance on the Indian Evidence Act ('I.E.A') and the Civil Procedure Code ('C.P.C') before arbitral tribunals and a lack of arbitration-specific expertise in civil court judges in India.

VIII. RELIANCE ON I.E.A AND C.P.C

S.19 of the Act deals with the determination of rules of procedure to be followed by the tribunal. This section exempts arbitral proceedings from being bound by the Indian Evidence Act and the Civil Procedure Code and allows parties to agree on the evidence-treatment procedure to be followed by the tribunal, failing which the tribunal is allowed to conduct proceedings in the manner it considers appropriate. While establishing such a procedure, the tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. However, in reality, most arbitral tribunals in India comprise of members involved largely in the civil justice system throughout their careers (for example, former civil court judges). Thus, in most proceedings, lawyers argue through principles sourced from the I.E.A or the C.P.C since these are legislations that the tribunal members are the most familiar with.

IX. LACK OF ARBITRATION-SPECIFIC EXPERTISE IN CIVIL COURTS

An additional reason for tribunals gravitating towards the usage of the I.E.A and the C.P.C stems from the fact that civil courts retain the power to set aside awards under S.34 of the Act. In law, the exercise of this power is broadly allowed only in exceptional circumstances, which includes patent illegality of the award or violations of public policy. However, in reality, courts often set aside arbitral decrees on trivial irregularities, including omission to stamp the arbitration agreement. Thus, as a precautionary measure, proceedings before arbitral tribunals are conducted in accordance with procedural rules that are least likely to appear unusual to the judges of the civil court, i.e., the I.E.A and the C.P.C.

Thus, the main issue that **Mr. Subbiah** identified with the procedure before arbitral tribunals is the lack of arbitration-specific expertise in both arbitral tribunals and civil courts. He suggested that a dedicated arbitration bench in civil courts would encourage parties to use tailor-made procedural rules suitable for their specific disputes.

Finally, **Ms. Tine Abraham** provided a practical perspective to the issue in two ways: *firstly*, by providing an overview of arbitral proceedings in practice and its implications on the treatment of evidence by arbitral tribunals. *Secondly*, by highlighting the difficulties in challenging awards in India.

X. FORMATION OF ARBITRAL CONTRACTS

a. `disputes between large conglomerates.
b. disputes involving smaller companies and private parties.

While the former involves extensive negotiations resulting in sophisticated contracts which include extensive procedural regulations; the latter comprises of arbitration agreements that are hurried together, which makes the prescription of procedural rules in the contract a rarity. In the absence of prescribed rules, most tribunals subscribe to familiar principles of the I.E.A and C.P.C.

XI. PRACTICAL DIFFICULTIES IN CHALLENGING AWARD

Ms Abraham pointed out two difficulties in the usage of S.34 to challenge arbitral awards. *Firstly*, public policy is an extremely dynamic concept in India, with judgements regularly altering its composition. Thus, practically, it is difficult to utilize the same for arguing whether an award must be set aside or not. *Secondly*, the ground of patent illegality, while available for domestic arbitrations, is not available as a ground to set aside international arbitral awards. This restricts the avenues available to parties to set aside arbitral awards before Indian courts.

XII. QUESTION-ANSWER SESSION

During the question-and-answer session, participants raised pertinent inquiries regarding the evidentiary aspects of international commercial arbitration. Here are some key points discussed:

A. Evidentiary Value of Expert Opinion:

Dr. Rosenfeld clarified that expert opinions hold evidentiary value and are considered as part of the overall evidence in arbitration. However, the tribunal may exercise discretion in determining the relevance and weight of expert testimony. The opposing party should also have an equal opportunity to present its own expert evidence.

Ms. Shanelle Irani gave an example of a case where expert evidence was ignored, but that did not amount to patent irregularity as the evidence lacked relevance to the dispute at hand.

B. Emergency Arbitration and Expert Evidence:

In the context of emergency arbitration, the need for expert evidence is generally not present since the focus is on obtaining interim relief. **Mr Ganapathy Subbiah** states that in cases of emergency arbitration, the urgency of the situation often precludes the extensive gathering and presentation of expert opinions.

C. Straying from Procedure in Agreements:

When parties have agreed upon a specific procedure for arbitration, it is uncommon for them to outline detailed guidelines. **Dr. Rosenfeld** emphasized that arbitration laws provide significant autonomy to arbitrators, allowing them to adapt and shape the procedure based on the specific circumstances of the case. However, if a tribunal deviates significantly from the agreed procedure, it may be subject to challenge on grounds of violating due process principles. **Mr Subbiah**, however, said that these instances are not common at all because parties rarely clarify or set-out the specific procedure in the agreement itself.

D. Applicability of Evidence Act to Arbitration:

While the I.E.A does not directly apply to arbitration proceedings, there may be instances where an arbitral tribunal chooses to consider it. The decision ultimately lies with the arbitrators and their interpretation of the relevant laws. It was noted that the choice to apply the Act may depend on the arbitrator's background and familiarity with legal frameworks beyond the Arbitration Act.

E. Challenging the Appointment of an Arbitrator:

When challenging the appointment of an arbitrator, parties need to provide evidence that substantiates their claim of bias or lack of impartiality. Hearsay evidence is generally not sufficient and must be supported by additional corroboration. The level of impartiality and the timing of the discovery of potential bias are factors that may be considered in evaluating such challenges.