FAST TRACK ARBITRATION IN INDIA: AN ASSESSMENT OF GROUND REALITIES

Tanisha Das

Student of KIIT School of Law

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Abstract

Various forms of justice delivery mechanisms have been made available to the public at large. One of them is the procedure for Fast Track Arbitration which is presumed to provide a speedy justice delivery system because Indian courts are plagued by various cases. However, this system also has certain ills that need to be given heed to. The article begins by presenting a brief background of Fast Track Arbitration in India. Subsequently, the procedure for opting for Fast Track Arbitration in India is examined along with comparative analysis in the next part to understand how an expedited process functions in other jurisdictions. The next part includes the discussion of fundamental principles of arbitration and also includes elucidation of whether Fast Track Arbitration is derogatory to these principles. The penultimate part examines what are the possible factors that can prohibit reaching a successful award. The last part of this research paper includes a recommendation from the author that can enhance the scope of Fast Track Arbitration in India.

Introduction

With the delay in delivery of justice and the dysfunctional condition of the courts across the world, Arbitration has unfolded as an effective tool for dispute resolution for matters concerning commerciality. Indian courts are plagued by many such hindrances namely, inapt legislations, inexperienced judges, undue political influence, that are the root cause of the malady of 'Misrule of Law'. But, a fact that the Indian states have and are constantly trying to improve institutional capabilities and the basic structure of statehood cannot be disregarded. Since India has now become the hub for foreign investments,[39] it is a prerequisite for Indian Arbitration Law to be in line with international standards. The probability of getting stuck in litigation matters will pull down any investor's morale.

Hence it was pertinent to bring about a certain mechanism that would provide an easy solution to the disputing parties. Keeping in view of a promising future for India as a favourable destination of arbitration, the Arbitration and Conciliation Act, 2015, (hereinafter referred to as "the Act") accepted the recommendation of the 246th Law Commission Report of having an expedited process of arbitration.[40]

The Backdrop

To study the Act, a committee was set up by the Law Commission in 2010. The committee brought forward certain lapses in the Act that was to be taken care of. One such issue with the act was to diminish the judicial interference in arbitration proceedings. Although the courts have passed a plethora of judgments bracing arbitration as an independent dispute resolution method, putting this into action seemed a far-fetched reality. Another issue with the Act was the need for stringent timelines while determining an Arbitral Award. It was then suggested by the committee to have an expedited process of Arbitration. The method of Fast Track Arbitration came in through the Arbitration & Conciliation (Amendment) Act, 2015 ("Amendment Act, 2015") under Section 29A and 29B. It

[39] Gireesh Chandra Prasad, *India receives record $81.7 bn FDI in FY21*, LIVEMINT, (May. 24, 2021, 8.48 PM) https://www.livemint.com/companies/news/india-receives-record-81-7-bn-fdi-in-fy21-11621869104603.html

[40] LAW COMMISSION OF INDIA, REPORT NO, 246, Amendment to Arbitration & Conciliation Act 1996, Rep No. 246 (last visited on May. 31, 2021). https://lawcommissionofindia.nic.in/reports/report246.pdf

prescribes that an arbitral tribunal following the Fast Track method must render the award with 6 months only. Like many commercial contracts entered between the people of the country, time is an essence in this procedure.

Fast Track Procedure in India

The Fast Track procedure was introduced through the amendment act by way of Section 29B that is based solely on the documents to streamline measures provided in the Act. This section provides that parties may adopt Fast Track arbitration before or at the stage of tribunal constitution. It upholds the principle of party autonomy[41] in a sense, that it does not give power to the courts to impose a Fast Track Procedure. It can only be initiated through an agreement from the disputing parties.[42] The parties in dispute may also, through consensus appoint a sole arbitrator.[43] On the contrary, the parties can also choose to appoint a full tribunal with diverse expertise, unlikely to be possessed by a sole arbitrator. Further, the only basis of a Fast Track procedure is written pleadings, documents, and submission, without any oral hearings. Oral hearings are conducted only if there is a unanimous request or if the tribunal deems it necessary.

Under Section 29B, an award has to be pronounced within six months. This time frame of 6 months can be extended to a period not exceeding 6 months, with the consent of the parties.[44] In the event, if the award is not made within 6 months or the extended time, the mandate of the arbitrator shall terminate unless the court has extended the period. This section does not include any provisions regarding interim measures, reasonable in line with the essence of this section being speedy resolution and resorting to interim measure will delay proceeding as established hereunder. Hence it can be inferred that this method of arbitration be would accurate for settling construction disputes in which the project needs to be resumed as quickly as possible. It could also be appropriate to settle disputes arising out of a transaction involving simple legal questions and no pertinent question of fact that calls for an expert's advice. Such arbitration will be effective in resolving disputes involving small amounts such as consumer disputes or high-value transactions where both parties are not willing to get down to elongated litigation. Therefore, a Fast Track procedure is only successful if there is cooperation and willingness among the parties.

Expedite Procedure under different arbitration institution

To bring about efficiency in time and cost, the Fast Track arbitration procedure was first introduced by the Geneva Chamber of Commerce in the year 1992. Under the International Chamber of Commerce, the amendment rules of 2017, used the term 'Expedited procedure rules' to imply the 'Fast Track Arbitration'. The ICC 2017 rules are a set of default rules that binds any party to dispute. This procedure is automatically applicable to cases where the amount in dispute does not exceed US$ 2 million unless the parties decide to opt out.[45] For all the claims which are higher than the US $ 2 million, parties have the option to initiate expedited procedure through an agreement. Besides the ICC Rules of 2017, the Arbitration Rules of Singapore International Arbitration (SIAC Rules), states that a disputing party to initiate an expedited procedure may apply with the Registrar first.[46] The SIAC rule differs from ICC rules considering threshold. The threshold for SIAC is US$ 6 million. Aside from these, the International Centre for Dispute Resolution (ICDR) has a much lower threshold of only US$ 250,000." The Japanese counterpart also has a fixed monetary value of 50,000,000 Japanese Yen for a Fast

[41] Irene Welser & Susanner Wurzer, *Formality in International Commercial Arbitration- For Better or for Worse?* AUSTRIAN ARBITRATION YEARBOOK (2008).
[42] O.P MALHOTRA, FORWARD TO LAW AND PRACTISE OF ARBITRATION, (1st ed. 2002).
[43] Arbitration and Conciliation Act (Amendment) Act, 2016.
[44] *Id.*
[45] International Chamber of Commerce, Rules of Arbitration 2017, *available at* https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/ (last visited 31 May 2021).
[46] Rule 5.1, Singapore International Arbitration Centre, Rules of 2016, *available at* https://www.siac.org.sg/our-rules/rules/siac-rules-2016 (last visited 31 May 2021).

Track arbitration procedure to hold good.[47] Conclusively, the expedited procedure is initiated if the dispute is within an acceptable monetary threshold and whether the rules apply automatically or by express consent of the parties.

One of the common principles in all expedited procedures, namely, The ICC, SIAC, and, ICDR is the appointment of a solo arbitrator. The SIAC for that matter, vests the power of appointment of an arbitrator with the court president. The whole process of Fast Track arbitration ensures simplification of the procedure and rendering of awards within a strict timeframe. Both ICC Rules and the SIAC Rules[48] confirm that the award must be given within 6 months from the date of the last signature by the tribunal.[49] The Japanese Commercial Arbitration Association, 2019 states the award to be rendered within three months of the appointment of the arbitrator. However, it does not lay any compulsion on the time limit of the award rather, calls for reasonable efforts from the arbitrator. Likewise, the SCC and the ICDR impose cut-off dates – the final award to be rendered within three months starting from the day the case was first referred to the arbitrator in the case of SCC and in ICDR it is 30 days after the oral hearing. Therefore, the expedited procedures contain the essence of Fast-Track arbitration but are determined differently through various arbitration institutions. The basis of implementation of the Fast Track procedure is a novel attempt to solve disputes on an urgent basis.

Is Fast Track procedure aligned to the Fundamental Principles of Arbitration?

The fundamental principles of arbitration include party autonomy, due process, the neutrality of the arbitrator, and finally the enforceability of the arbitral awards. But the driving force behind choosing arbitration as a means of dispute resolution is because of cost-efficiency and strict timeframe. In this section of the research paper, we shall look into how these fundamental principles apply to Fast Track arbitration, and we shall also discuss the practical aspect of it through cases that have been decided by the arbitral tribunals.

The principle of party autonomy is the most attractive factor of arbitration as a dispute settlement mechanism. Based on this principle the parties are at freedom to choose arbitration for settlement of disputes. Fast Track arbitration also upholds the principle of party autonomy. This mechanism of dispute settlement is chosen by the disputing parties out of a free will. While the parties are free to establish certain procedural limitations to reflect their interest in a speedy process, there is a certain risk to balance between parties' interest in the Fast resolution of the dispute and the general fairness of the proceedings.[50] The principle of party autonomy also includes under its ambit the decision to choose the applicable law (substantive and procedural) to the arbitration proceeding. There have been very less circumstances where an arbitrator has given a choice of law. However, the role of an arbitrator is highly crucial in determining the course of the proceedings once it has commenced. In the absence of binding guidelines from the parties or applicable institutional rules, the arbitrator has the right- and obligation – to decide upon the arbitration rules as he or she deems fit.[51] The arbitrator's freedom to choose the applicable law is limited by the principles of international public policy. Therefore, in cases that involve a substantive question of law and require in-depth knowledge of the law, the parties to the arbitration or the appointing authority prefer the arbitration who has a good knowledge of the applicable law. Because of the nature of a Fast Track arbitration procedure, there is usually not a lot of time available to decide on the choice of law. Hence, the matter is solely decided on the pleadings submitted by the parties under a specific national law.

[47] Art. 84, Japan Commercial Arbitration Association, Rules of 2019 *available at* https://www.jcaa.or.jp/en/arbitration/rules.html (last visited 31 May 2021).
[48] *Id* at 8.
[49] Art 31(1), International Chamber of Commerce, Rules of Arbitration 2017.
[50] Johannes Trappe, *The Arbitration Proceeding: Fundamental Principles and Rights of the parties*, 15 JOURNAL OF INTERNTIONAL ARBITRATION 98 (1998).
[51] Art. 20, International Chamber of Commerce, Rules of Arbitration 2017.

Procedural interventions are rare in an arbitration proceeding. In particular, expediting the arbitral proceedings must not deprive either of the parties their right to present the case or the arbitral tribunal, of the time and means to consider the case properly.[52] Various factors must be paid attention to especially in a Fast Track procedure. For example, the pleading should be made available to both parties giving them equal opportunity to respond, the order of the arbitrator shall be communicated without any delay.[53] "Sufficient time" might be understood subjectively, but it must reflect the parties' choice of an accelerated dispute resolution mechanism. The assumption of limitation of procedural laws while choosing Fast Track Arbitration is not acceptable. The principle of giving each party a sufficient opportunity to present its case is both mandatory and fundamental, even though both parties accepted expedited arbitration proceedings does not alter this fact.[54] The importance of consent was highlighted by the Delhi High Court in the case of Crayons Advertising Private Limited v. Bharat Sanchar Nigam Limited 2018[55] where the arbitrator appointed was to carry as per the Fast Track Arbitration under Section 29B of the Act. However, the arbitrator failed to pronounce an award within 6 months that lead to the expiry of the mandate. One of the petitioners did not give consent for an extension of the time rather was disinterested in extension. A new arbitrator was appointed by the court and the mandate of the first arbitrator stood terminated. The High Court held that, if the parties want to extend the time for making an award, then it must be done by a consensus of both the parties at dispute. The pertinence of consensus was also highlighted in the case of HPCL Petrol Pump versus Chairman-cum-Managing Director Hindustan Petroleum and Ors. (2018) where it was held that the court cannot direct parties for Fast Track Arbitration, a mutual agreement is required between parties for the same.

[52] Eva Muller, Fast Track Arbitration: Meeting the Demands of the Next Millennium, JOURNAL OF INTERNATIONAL ARBITRATION 6 (1998).
[53] Johannes Trappe, supra note 12
[54] Annette Magnusson, *Fast Track Arbitration – The SCC Experience* (2008).
[55] 2018 (2) ARBLR 252 (Delhi)

An Arbitrator's Neutrality is paramount in both regular and Fast Track Arbitrations. A slight pointing of finger at an arbitrator, even at the early stage of tribunal formation would deem to be challenged by the opponent. In this situation, a party should be prepared with an eligible candidate if the opponent raises questions against the first arbitrator.[56] The success of any arbitral award depends primarily on the ability of the arbitrator to be decisive rather than being biased. The procedural constraints, if any, of the parties must not be a roadblock to a favourable result.

Hidden Risks of a Fast Track Arbitration procedure

Unenforceability

There are various characteristics of Fast Track arbitration that all contribute to being advantageous namely, cost efficiency, accelerated pronouncement of awards without the intervention of unnecessary procedural follow-ups that is generally followed in arbitral procedures, etc. Since the concept of Fast Track arbitration is extremely premature in the Indian counterpart, there have not been many arbitral pronouncements that can be referred to for research. It remains dubious whether the aim of Fast Track arbitration - to speed up the procedure - would hold good when a dispute involves a huge sum of money. Along with this, there are several other sorts of risks attached to this kind of arbitration. While the fact remains undisputed that a decision or award in case of a Fast Track arbitration is a win-win situation, however, it must not be forgotten that any decision arrived at is only beneficial insofar when its enforceability is ensured. Here we shall understand what are the potential roadblocks for rendering a Fast Track arbitration award. In a well-mastered arbitral proceeding, the biggest hiccup would be the unenforceability of the award. As known, the enforceability of any foreign arbitral

[56] Emmanuel Gaillard, *The Role of Arbitrator in determining the Applicable Law*, THE LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION 205 (Newman & Hill ed., 2004)

award is guided by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention 1958. If any arbitral award is rendered not in compliance with Article V of the New York Convention, in particular Section 1(b), stating violation of the right to a due process and Section 2(b), which deals with public policy, the awards are unacceptable.[57] Another primary reason for rejection of the awards so rendered, can be the failure to comply with the fundamental principles of any arbitration that is, void ab initio.

Procedural limitation

An expedited process may offer obvious advantages, but this might seem too attractive. Therefore, parties must carefully ascertain whether their case is suitable to be heard under such an arbitration procedure. In certain cases, oral hearings are necessary to clarify issues in dispute. It would get really difficult for the parties to present their case when essential procedures like hearing, cross-examining, etc. are omitted and award is solely rendered on documents or written witness statements. Due to a procedural constraint in Fast Track arbitration, there is a possibility that the arbitrator may give away the decision without providing any rationale. The losing party would try to set aside the award by arguing that the arbitrator observed due to lack of process. The conclusion being Fast Track arbitration is not suitable for every kind of conflict. For some cases, there also might be a need for an expert, and generally, Fast Track arbitrations operate without any experts which could fail the mechanism.

Sole Arbitrator

Arbitrators are a vital part of a Fast Track procedure. For achieving a successful outcome, the role of the arbitrator is crucial as well as demanding. Finding a good arbitrator may seem a trivial task at the beginning, but it can be hectic because the best minds present in this arc do not sit around without work. On the contrary, their schedules of sought-after arbitrators are usually dull that they cannot seriously promise to meet all of the demands that Fast Track requires.[58] Moreover, sometimes a sole arbitrator might not even fulfil the purpose. They might lack the requisite expertise, proficiency, and knowledge needed to conclude. The main aim of arbitrators in these proceedings would be to render an award, this "speedy" approach may not be appropriate for both parties.

Parties to Arbitration

As discussed above, the consensus is paramount in any arbitral procedure. If one party is willing to proceed with the expedited process and the other is reluctant to cooperate, the overall proceeding of a Fast Track procedure will be at peril. It is sometimes seen that the defaulting party tries to evade the Award by arguing that he has been deprived of his right to be heard, especially if no rules have been set forth before the commencement of the procedure. Thus, when there are non-cooperating parties there is a higher risk that the awards will be set aside. The parties to arbitration should have an open mind and most importantly be realistic. They must realize that a procedure of this kind can be very demanding too. Files and documents have to be assembled and simultaneously verified, strategic aims have to be set from the very beginning. Parties should therefore bear in mind that when opting for Fast Track arbitration the actual work begins well before the proceedings are initiated.

What can be done to refine Fast Track Arbitration in India

The first and foremost step at enhancing the prospects of Fast Track arbitration is strengthening the management

[57] *See also*, Article 34, Section 2 (a) (ii) and 2 (h) (ii) of the UNCITRAL Model Law of International Commercial Arbitration concerning the setting aside of an arbitral awards, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf (last visited on 10 June, 2021)

[58] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTISE OF INTERNATIONAL COMMERCIAL ARBITRATION 6-43 (2004).

of the arbitral institutions. This must include setting up modern communication technology, essential tools for conducting online procedures for parties in some other territory, and that arbitral institution should be accessible virtually to users through a website. This shall also include strict adherence to guidelines issued by the institution such as meeting deadlines for document submissions, communication of essential information to the parties must be done appropriately etc. Thus, both experience and intuitions are needed to find the right balance between maintaining a tight schedule while at the same time getting a full picture of the case.

Ultimately the awards should be clear and precise to minimize the risk of challenge or unenforceability. It should not be laid out in superfluous pages containing redundant facts and references. Rather it should be drafted keeping in mind the nature of a Fast Track arbitration and the basic purpose for which it has been initiated by the parties. Before the final award is rendered, a draft award should be prepared before an oral hearing to ensure any affirmations if made by the tribunal or parties can be included quickly. Ultimately it the crisp and faultless award makes Fast Track sustainable. A challenge to the final awards completely frustrates the future of the Fast Track method of dispute resolution.

8. Conclusion

It is concluded that Fast Track arbitration is best suited where there is a need to resolve disputes sans the intention of the parties to present the case in scrupulous details. So it is best to avoid this procedure when there is a requirement for an external expert to assess the risks. It is also a difficult procedure to opt for in situations that include multiple parties. It all boils down to the understanding of the parties. Therefore, the arbitral procedure must include an initial check mechanism that would ascertain whether Fast Track arbitration is the right method for the dispute. If the parties are not sure whether to agree on Fast Track arbitration, they must be informed about the entire procedure through this mechanism. This will ensure that the parties have sternly accepted the procedure and that the parties will not go to "square one" or go for a "new" arbitral tribunal. At the very least what is pertinent here is to set out the time limit and the consequences if the frame is not met with.