Commercial Disputes Resolution - Mechanisms

By ©Ashok Sharma

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> *"Litigation has become an inevitable stage in the life cycle -slightly beyond adolescence but before maturity. It is virtually impossible to survive litigation and remain solvent. But it is occasionally possible to endure it and remain same. As a modern ordeal by torture, litigation excels, it is exorbitantly expensive, agonizingly slow, and exquisitely designed to avoid any resemblance to fairness or justice, let. In strange and devious* ways *it does settle disputes - to everyone's' dissatisfaction. "*
>
> **- J.S.Aurbach**

In today's' complex commercial world, disputes between the parties are an inevitable fact of life which just can not be wished away. Unless disputes between the contracting parties are resolved amicably they inevitably lead to litigation.

A good disputes' resolution system must fulfill four objectives: Speed. Cheapness. Finality and Justice.

Dispute resolution between the contracting parties, it not amicably settled may take place in one of the following modes:-

A. Civil action in a court of appropriate jurisdiction;

B. Arbitration:

C. Alternative Dispute Resolution (ADR).

A. <u>Civil Action;</u>

A party can take legal action for redressel of its grievance against another party by filing a civil suit in a court of law having jurisdiction in the matter. The procedure for such civil suit is

provided in the Code of Civil Procedure. 1908 (CPC).

Given the astronomical pendency of cases in civil courts (over 25 million cases pending at the higher courts and lower courts level) inexorable delays are bound to take place in disposal of cases. Average time taken for disposal of a case by a civil court is 12 to 15 years. Though elimination of delays and backlog of Indian courts have been subject matter of discussion and examination by various Committees but without much success.

B. <u>Arbitration:</u>

A contract normally contains an arbitration clause for resolution of disputes whereby both the contracting parties agree to refer the disputes or difference whatsoever arising between them under that contract to be settled by the arbitration in accordance with the stipulated mode of arbitration Civil Contracts normally have a clause for providing an arbitration.

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Due to high cost, inefficiency and delay of litigation in a civil court made a way for development of arbitration as an effective, quicker and cheaper mode of dispute resolution. Gradually even-lament about court litigation came to be repeated about arbitration as well. The words of Justice Krishna lyyer regarding arbitration are worth pondering:-

* Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum. Less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act, 1940 (Act for short). However, the way in which the proceedings under the act are conducted and without any exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the act have become highly technical accompanied by unending pro lixtiy,at every stage providing legal trap to the unvary imformation forum chosen by the parties for expeditious disposal of there disputes as while the decisions of the courts being clothed with the legalese of unforeseeable complexity*

From a model of extreme and frequent judicial interference and scrutiny under the Indian Arbitration Act, 1940 an effort was made to move the absolute extreme non-interference coupled with conclusively of arbitration under the new Arbitration and Conciliation Act 1996

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Some of the main features of the Arbitration and Conciliation Act 1996 are summarised hereinbelow:

1. **Challenges to Arbitration Award virtually eliminated :-**

The entire gamut of challenges to an award under section 30 and 33 of 1940 Act is over.

The entire jurisprudence for bias, misconduct or virtually any error which could lead to the challenge to or upsetting of an arbitration award has been done away with. The grounds of challenges of an award under the New Arbitration and Conciliation Act are very limited and can be broadly divided into three categories:

(a) Procedural Grounds of challenge-eg denial of natural justice. Lack of notice

(b) Jurisdictional grounds of challenge –eg incapacity to enter into arbitration agreement

(c) Substantive grounds of challenge e.g- disputes not capable of settlement by arbitration, violation of public policy of India

In the old Arbitration Act 1940, misconduct of an arbitrator had become a very common ground of challenge. The removal of arbitrators or challenge of the award on the ground of bias or misconduct had become common which gave rise to a joke.

I. Under the Arbitration and Conciliation Act of 1996 recording of reasons has been made mandatory in the Award unless parties specifically agree otherwise.

ii. The arbitrators under Section 17 of the Arbitration & Conciliation Act 1996 have been given powers regarding interim measures for protection besides, wider powers to grant interim measures are provided u/s 9 of the 1996 Act to the courts.

iii. Under the New Arbitration Act the number of arbitrators has to be an odd Number. i.e. 1 or 3. In view of this, for contracts involving heavy financial stakes. It may be advisable to provide for arbitration by three members Arbitral Tribunal

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(One Arbitrator to be nominated by each party and Presiding Arbitrator by the two

Such Arbitrators or the Court as the case may be). In case where financial stakes May not be large, the contract may provide for arbitration by a sole arbitrator to be nominated.

Ministry of Commerce (MOC) vides OM No.37 (l) 98-TPD dtd. 1-6-99 has recommended that the ICA arbitration clause may be used in the commercial contracts of the PSUs Department of Public Enterprises (DPE) has recommended that all dispute* between PSU's inter se or between PSU and a government department should be resolved by arbitration by Permanent Machinery of Arbitration .

C. ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR consists of several techniques developed for resolving commercial disputes involving a structural process with third party intervention. Given high cost of litigation as well as arbitration. ADR is emerging as an accepted rule oil reform and dispute management in America and European continents. In the far east countries (Arab, China and Australia) Conciliation has long been the preferred method for resolving disputes. Some of the advantages of the ADR are:-

1. It can he used at any rime even when there is a case pending in a court before arbitrators.

2. It can be used to reduce the number of contentious issues between the

3. It can provide proper and expeditious solution of commercial disputes at lesser cost than regular litigation.

4. ADR can be used with or without a lawyer. A lawyer if involved, however can play a very useful role in identification of the contentious issues relevant to strong and weak points in the disputes and rendering advice during negotiations and overall presentation of his clients' case.

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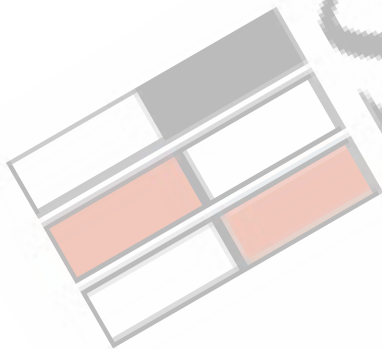

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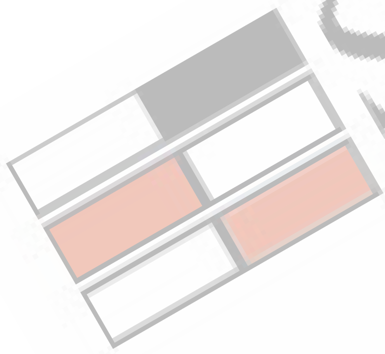

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