Best Way to Resolve Business Dispute

An Opportunity for Chartered Accountants in Practice

K.G. Mujawdiya

< EXECUTIVE SUMMARY >

◆ Evolution of Alternative Dispute Resolution (ADR) mechanism may find its roots to very-very slow Judiciary system of the country, with people becoming more and more concerned about their rights, the burden of fresh litigations is ever increasing on the courts. The agony of persons seeking justice get aggravated when the case stretches itself year after year and in most cases spanning across a decade. It is estimated that over 2.5 crore cases are pending with around 8000 courts in our country. No doubt litigation is proving to be most expensive, time consuming and frustrating expensive to resolve dispute.

Now a days aggrieved parties tend to go for alternative dispute resolution method. There are two alternate methods of resolving disputes without resorting to litigation. These are Mediation and Arbitration. Enactment of the Arbitration and concilation Act, 1996 is also a big leap in this direction.

In the present days, litigation is the most harmful method for resolving any dispute. It has outlived its usefulness as a way of resolving most disputes. Litigation is the most expensive, very time consuming, wasting vital business energy which can be better used elsewhere. It destroys the relationship between the disputing parties for all times to come.

The author is a member of the Institute. The views expressed herein are the personal views of the author and do not necessarily represent the views of the Institute.

It is experienced that in U.S., it takes maximum 5 years to solve a dispute through the court. Whereas, in our Country, it takes 10 years or more before the case reaches the trial stage. Therefore, it is generally said that the outcome of Civil cases in our Country is seen by the next generation.

In the words of the great Economist 'Chankya' "If you want to destroy a country, you destroy its judicial system or make it inefficient".

It has been estimated that there are over 250 Lacs cases pending in about 8000 courts in our Country. While the number of the fresh institution of cases has

steadily increased however the rate of disposal of the cases, especially at lower levels, has remained static or worse. Consequently, the result has been an increasing backlog and further determination of the pendency period. Hence, the dictum JUSTICE DELAYED IS JUSTICE DENIED is drawing lot of attention of law abiding citizens in the Country.

With the spread of literacy and the considerable increase in the level of awareness of social, economic and political rights by large sections of the population, the courts have come under tremendous pressure. The same is reflected by the number of cases which are taken to the courts and the increasing number of cases pending with the courts.

The present litigation system is too costly, too time consuming, too painful, too destructive and too inefficient for a truly civilized world. Therefore, it is felt that surely there must be a better and more positive way of resolving disputes.

Alternative Dispute Resolution (ADR) is the basic idea of resolving disputes between the members of the community specially business disputes through the intervention of men of goodwill and standing with the community and abiding by their verdict is not new to the Indian ethos.

There are two alternate ways of resolving disputes without resorting to litigation. These are Mediation and Arbitration;

MEDIATION

In the Mediation process, a representative of each side meets with a neutral, experienced mediator, usually a retired judge or a very experienced professional like a Chartered Accountant or a Company Secretary in practice etc. The session begins with each side describing the problem and the resolution they desire from their point of view. Once, each side's respective positions are known, the mediator then separates them into private rooms beginning a process of 'shuttle diplomacy', shuttling back and forth between the rooms. As the Mediator continue to move back and forth, the parties move closer and closer together. Unlike the courtroom or arbitration, the mediator has no power other than the sheer force of his presence and personality, the compelling force of his arguments, his neutrality and experience with the issues being asserted.

The settlement agreement is the result of compromise and negotiations. The end product is the agreement of both the sides for an amicable settlement of the dispute. Both sides feel they have won and feel good about the outcome. It gives win-win feeling to both the parties.

The real key is the skill of the mediator, his wisdom, trustworthiness, honesty, creativity and energy which plays a very important role during the mediation proceedings. Privacy is also a very important factor in Mediation.

Thus, the best way of resolving disputes amongst the business community, whether those are from the same country or different countries, is through mediation. The next best alternative is Arbitration.

ARBITRATION:

Like the courtroom, Arbitration requires at least one and often three neutral arbitrators. Hence, again, for the advantages of efficiency, minimization of expenses, usually a retired judge or professionals like C.A. or C.S. in practice should be appointed as arbitrators. A retired judge is recommended because he possesses rich experience of handling litigations. While, a C.A. or C.S. in practice is known for his expert knowledge in various commercial laws and is a trusted professional who functions like a facilitator between the Company and the public.

One most important advantage of arbitration as an alternative to the courtroom is that the parties retain the control on their dispute resolving process.

Opting for Arbitration, when Mediation does not work, offers the disputant parties a final and binding forum for resolving their dispute. It is an efficient, inexpensive and speedy remedy as compared to litigation.

It is also important to note that an arbitration award can be quickly converted into a court judgment for enforceability purposes.

The major difference between mediation and arbitration is that in mediation and arbitration is that in mediation an experienced professional acts as mediator/facilitator in helping the parties reach a negotiated settlement of their dispute. The mediator makes no decision and does not impose his views of what a fair settlement should be. In arbitration, neutral professionals make a decision instead of the parties. Therefore, Arbitration is to some extent, similar to the court. While Mediation is preferable because it is quicker, less expensive, less

stressful, more private and parties retain full control over the outcome (as compared to the arbitration or the courtroom) as the parties themselves ultimately make the decision.

With the opening-up of the Indian Economy and at the same time, the Indian large corporates becoming multi-national, there was a pressing need for alternative dispute resolution mechanism. This need was all the more pressing and emergent in view of the fact that the foreign investors were highly sceptical about the delays in the courts because of the enormous pendency of cases and at the same time misuse of the provisions of the Code of Civil Procedure, (ACT V) of 1908, The Indian Evidence Act, 1872 etc.

In fact, the huge pendency of legal cases was one of the deterrent factors in the inflow of foreign investments in India which has now become very crucial for achieving faster growth of the nation.

To overcome these, The Arbitration and Conciliation Act, 1996 was enacted which marks the beginning of a new era in the history of legal and judicial reforms in India. It consolidates and amends the law relating to domestic Arbitration, International Commercial Arbitration and Enforcement of Foreign Arbitral Awards. It also defines the Law relating to conciliation and matters related thereto. It is not just another piece of law, but an important legislation, having potential to bring about qualitative changes in the way the role of law is perceived and the way in which the administration of justice is carried out. The new law will contribute significantly in reducing the accumulation of cases in courts by the settlement of disputes in an amicable manner without going to the court. The enactment will enhance confidence among business organizations including the international community about the efficacy of arbitration in India. It will go a long way not only in facilitating the dispute resolution in an amicable manner but also accelerating the process of globalisation of the trade, commerce, business and industry of India.

The important features of the new Act are as under:

1) The judicial authority is empowered to refer the parties to the Arbitration.
2) The grounds on which an Award of the Arbitrator may be challenged before the court have been cut down.
3) The Powers of the Arbitrator(s) have been increased.
4) The Arbitral Tribunal is competent to rule on its own jurisdiction.
5) The parties to the arbitration are not allowed to use obstructive tactics to delay the arbitration proceedings.
6) The judicial authority is empowered to appoint an arbitrator on the failure of the other party or appointed arbitrators to appoint a arbitrator/third arbitrator.
7) The time limit for making an award has been deleted and the Arbitrators are expected to give the award expeditiously.
8) The Act provides a separate Chapter for the enforcement of the Foreign Awards.
9) The new Act has added a new chapter to deal with the Conciliation proceedings to resolve the disputes.

The Conciliator tries to bring the parties together so that they can discuss their disputes and resolve the same and hence there is no Award. In Conciliation, the attitude is "hive and take" whereas in arbitration the attitude is "I win, you lose" hence either defensive or offensive. This is a new concept which has been added in the new Act and is based on the United Nations Resolution on International Trade Laws (UNICITRAL) Models.

In view of the above, the need of the hour is that a network of professionally managed institutions rendering arbitration, conciliation and other ADR services will have to be strengthened in the Country to provide the necessary infrastructure and a reservoir of well trained and competent persons to render these services. It is equally important that the Trade and Industry be made aware of the usefulness of solving disputes through the ADR mechanism. It is also essential that ADR is taught as a regular subject not only in law courses but also as part of the syllabus for professional courses like C.A., C.S., I.C.W.A. etc.

The professional institutions like the Institute of Chartered Accountants of India, the Institute of Company Secretaries of India etc. need to play a very crucial and leading role by providing intensive training to their members to deal with the ADR mechanism most efficiently so that this vast opportunity is thrown open to these members. ■

> Mistakes are the portals of discovery
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> —*James Joyce*