Commercial Arbitration in India

Dr. Pankaj Kumar Gupta  
Associate Professor  
Centre for Management Studies,  
JMI University, New Delhi (India)  
pkg123@eth.net

Sunil Mittal  
Corporate Consultant - Legal  
& Researcher on Arbitration  
New Delhi (India)  
sunidelhi123@yahoo.co.in

Abstract - Commercial arbitration in modern times is an efficacious alternative dispute resolution technique in business community vis-à-vis conventional mechanism of court litigation. Knowledge and exposure to effective arbitral practices could be a very effective tool in redressal of disputes that generally arise between different stakeholders in business firms. We examine the current status of litigations pending at courts and explore the use of commercial arbitration to develop a low cost and effective dispute resolution settlement mechanism. We argue that arbitration mechanism at present is not used effectively in Indian companies for disputes resolution. It is an imperative on part of policy makers to work a practical and effective incentive mechanism for use and application of arbitration in place of present routine court litigation. Professionals associated with the business firm can play a creative and strategic role in promoting use of commercial arbitration in dispute resolution.

Keywords: Commercial Arbitration, Alternative Dispute Resolution, Court Litigation

JEL classification: K2, K29, K39

I. INTRODUCTION

Every business enterprise is subject to variety of disputes whether intentional or unintentional and financial and other implications of such disputes vary from one company to another company depending upon the facts and circumstances of each case. Disputes could be defined, classified and interpreted from different perspectives for different stakeholders including shareholders, suppliers, workmen, customers and so on. Give the rapid development in India the caseloads for already overburdened courts have increase manifold leading to notoriously slow adjudication of commercial disputes. Routine court litigations have been posing a serious threat to free decision-making in the business firms since they cause uncertainty of dispute settlement because of inherent nature of longtivity in the settlement process. There is now a widespread recognition and acceptance of commercial arbitration as a tool for resolving disputes among various stakeholders in the business vis-à-vis routine court litigation. Arbitration is a method of settlement of disputes by way of an alternative to the normal judicial method, which is activated by instituting legal proceedings in court of law. Out of various forms of alternative dispute resolution (ADR) including conciliation, mediation and negotiation, arbitration has emerged as one of the most dominant and widely accepted form of ADR. Commercial arbitration has widely been recognized in different parts of business world as a means of dispute resolution particularly from 1980s and 1990s (Lavin, 2009). Firms in global commerce routinely agree to submit their disputes to private arbitral panels, and states routinely require firms to honor their agreements (Movensian, 2008). The concept of commercial arbitration is not so new and has been used since centuries in different civilizations. It is this concept of “Panch Parmeswar” (meaning, decision of five learned persons when dispute referred to them, is equal to decision of God), which has been widely accepted and applied since ages in Indian traditional life. Even in ancient Rome and Greek civilizations, arbitration was prevalent since sixth Century B.C. Pound (1959) states that Roman law does not prohibit submission of disputes relating contracts to the decision of the persons and since the rules exists to their effect and enforcement (Paranjape, 2006). Similar evidence can be found even in Colonial India under the Bengal regulations of 1772 that provides the parties to refer the disputes relating accounts to arbitration. Given the Industrialization and rapid growth of economies in the last few decades, the need and urgency of fast and effective dispute resolution mechanism has been strongly felt. The present volume of business has led corporations to rethink about the application of commercial arbitration in sorting out disputes in contracts because of the facts that business decision-making could be prompt when there is absolute clarity in the mind of stakeholders about the dispute resolution mechanism in case of problem, if any. This is particularly true in context of fast developing economies where legal systems are still lethargic, ineffective and costly due to various reasons.

The prime legislation that deals with the arbitration and conciliation procedures is Arbitration & Conciliation Act of 1996 in India. Under this Act, complete power has been conferred on the Arbitral Tribunal constituted under the provisions of the Act. This Act proceeds on the basis of law adopted by United Nations Commission on International Trade Law (UNICITRAL). It provide for transparent, flexible, speedy and effective mechanism for resolution of disputes among the parties to the agreement. This Act of 1996 is to promote settlement of disputes outside of court in an efficient manner for mutual benefit serving convenience to all disputing parties. Therefore, role and interference of
the courts in the process of arbitration has been kept at minimum. Since, the arbitration is related to commercial activities, The Supreme Court of India (All India Reporter, 1961) observed that activities such as exchange of commodities for money or other commodities, carriage of persons and goods by road, rail, air or waterways, contracts, banking, insurance, transactions in stock exchange, supply of energy, postal and telegraphic services etc. may be called as commercial intercourse within the meaning of Article 301 of the Constitution which relates to freedom of trade, commerce and intercourse. This paper examines the present status of disputes management in commercial organizations, highlights the importance of disputes handling mechanism under the Arbitration & Conciliation Act of 1996 and attempts to establish it (the Act) as a superior alternative to the disputes handling through conventional litigation mechanism through Court of law.

II. COMMERCIAL ARBITRATION - AN EMERGING DISCIPLINE

Bernstein (1998) defines arbitration as a "mechanism for the resolution of disputes which take place usually pursuant to an agreement between two or more parties, under which parties agree to be bound by the decision to be given by the Arbitrator according to law or, if so agreed, other considerations, after a fair hearing such decision being enforceable by law." Arbitration is, therefore, a process of dispute resolution between the parties through Arbitral Tribunal appointed by the parties to the dispute or by the court at the request of concerned party. Precisely, it is an alternative to litigation as a method of dispute resolution. Russel (2001) describes arbitrator as a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award).

Arbitration is recognized through arbitration clause incorporated in contracts. Christopher and Naimark (2005) say that 90% of international contracts include an arbitration clause. A&CA, 1996 provides that the arbitration clause can be specifically enforced by the machinery of the Act. Saville (1993) state that arbitration clause is different from other clauses of the contract and an arbitration remedy clause in a commercial contract is an agreement inside an agreement. The parties make their commercial bargain but in addition thereto agreed on private tribunal to resolve any issue that may arise between them.

Conventionally, legal departments in large business organizations handle disputes compared to smaller firms, where the matters are tackled in proprietary manner. The manner the disputes are handled has undergone a substantial paradigm shift from prestige type to strategic type. The dispute handling from a strategic perspective reflects a tactical move to derive benefits or generate opportunities in complex business environment. The burgeoning cost of litigation in terms of time, money and efforts has resulted into recognition of arbitration as an alternative mechanism and top management of companies have now started paying attention to this managerial activity. Companies have started applying arbitration as a tool and have now started reaping its benefits in dispute resolution. The emergence of number of institutions both national and international, in field of arbitration has resulted into various structural measures to align dispute management, strategic planning and development of appropriate teams to handle arbitral issues in different business environments and industries. In India, Arbitration and Conciliation Act, 1996 (hereinafter referred as “Act”) vest powers to judicial authority to refer parties to arbitration where there is an arbitration agreement. Section 8 (1) of the Act provides that a judicial authority before which an action is brought in a matter, which is subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

The existence of a statutory mechanism thus, puts pressure on commercial arbitration mechanism leading to a situation of dilemma for business enterprises to undertake commercial arbitration in a serious and effective manner for business disputes resolution. Globalization of economy in general and maturity in legal system in particular are also facilitating an integrated view of the dispute management through arbitral process. As a result, many professionally managed enterprises are using arbitration as a proactive tool to add value, rather than a defensive measure to minimize the negative impact of disputes in the court of law. This in turn helps the top management to exercise greater control over the business operations, enhances organizational capabilities and business decision making in an effective manner.

As a measure of corporate governance, boards of companies are ensuring that there should be well-defined arbitration policy in place while undertaking high value contracts. This is particularly of paramount significance in infrastructure projects involving huge capital investments. Stakeholders are concerned about the growth of business performance in a hassle free and dispute free manner. Despite of this realization only few companies in its real intent have fully realized the importance of the concept of commercial arbitration. There are large number of companies especially government owned enterprises who have adopted arbitration as an effective tool for their disputes resolution. Dispute Management is responsibility of every key person in the organization irrespective of nomenclatures.

The integrated view in dispute management over conventional routine litigation enables firm to reap benefits by opting for offensive legal strategy instead of defensive and time gaining move. We hypothesize that dispute management in contractual matters through arbitration is not yet fully developed as far as India is concerned as well as many other developing countries are concerned, which may adversely affect integrated approach towards dispute resolution. Research studies that have been conducted on Indian companies on this issue are rare to find. Rogers (2003) show that various international treaties, conventions, national legislations, and even institutions have been formed to provide the framework for international arbitration. UNICITRAL has also designed a model law is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It
covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award (www.unicitral.org, 2010).

III. CONVENTIONAL METHODS OF DISPUTE REDRESSAL

The conventional court mechanism has been widely criticised by researchers and practitioners (Venugopal, 2007). Venkatachaliah (2000) report that Indian courts have failed to meet the expectations of the masses for various reasons – (a) outdated and age old laws particularly relating to business environment, (b) bureaucratic hassle in appointment of judges resulting into lacs of vacancies in the judicial positions across the country, (c) lack of complete infrastructure in terms of staff, proper court accommodations, office equipments, libraries, (c) inadequate court procedures and rules, (d) outdated, cumbersome, inflexible and technical procedures under civil laws and (d) lack of expertise to handle technical and commercial matters. In a very leading case of Supreme Court of India remarks- “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 to the Arbitration Act, 1940”. Indian Arbitration Act 1940 was introduced to address the issues, which cannot be sorted out effectively in a time bound manner by the routine court procedures. However, there were serious lapses in the enactment since the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyer laugh and legal philosopher weep (AIR, 1981).

The experience were bitter later which is evident from the observation of Supreme Court of India, in 1989 - “We should make the Arbitration law simple, less technical and more responsive to the realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done.”

The subsequently introduced Arbitration & Conciliation Act, 1996 (A&CA, 1996) in India encompasses the features that inter-alia include – (a) recognition of conciliation as a means of settling commercial disputes, (b) arbitration award accorded the status of Decree of court under Code of Civil Procedure, (c) assistance of institutions like Indian Council of Arbitration in appointment of arbitrator and administrative assistance. The A&CA, 1996 was tuned to the model law adopted by UNCITRAL. It recognizes the arbitrator skills in appointment process, abolishes the erstwhile umpire system, makes arbitrator relatively free in decision making and simultaneously holds responsible for damages which may be contractual or tortuous or both in nature.

Code of Civil Procedure and Indian Evidence Act do not bind Arbitral proceedings, 1872 thus making it free from the rigors of tedious court procedures and awards made regarding international commercial arbitration under New York Convention and Geneva Convention are enforceable in India. However the A&CA, 1996 does not addresses, the number of challenges relating to appointment of arbitrator, cost delays and court interventions (Hilmer, 2007) contrary to the view of Mansingh (2010) that India has effective arbitration law in practice. The bill to amend the Act is in process of making and presentation before the parliament. Also, the question of a two tier arbitral mechanism is pending with the Supreme Court (Sharma, 2009). Venugopal (2007) narrates that at the time when the Act was introduced there was a three-tier court system, ending with a limited appeal to the Supreme Court, was groaning under the unbearable burden of a huge backlog of cases, pending disposal, at all levels of the court system. There were over 30 million cases pending in the subordinate courts, about 4 million in the High Courts and above 30,000 cases pending in the Supreme Court of India.

Zekos (2001) states that Courts are not the only or primary system of adjudication. The dispute resolution field encompasses conflict resolution in countless institutions outside the courts as well. Courts have encouraged parties to use different systems of dispute resolution and have enforced the decisions from those procedures. By ordering ADR, courts create and regulate a private ADR market. Government agencies and substantive legal rules motivate private organizations to acquire their own internal conflict management systems. Courts make available the structure for the system of binding arbitration by providing machinery for staying trials, ordering arbitrations and enforcing arbitration awards. For instance, the US legal system is more fragmented than the legal systems of other industrial democracies, and this division is traced to deeply rooted social, economic and political values of individualism and distrust of concentrated government power.

IV. COMMERCIAL ARBITRATION VS. COURT LITIGATION

We argue that the biggest advantage of sorting out disputes through Arbitration over Court litigation is its Neutrality and Mutuality. This may be in respect of – (a) Place of arbitration, (b) Language to be used, (c) Procedure or Rule to be applied, (d) Nationality of Arbitration (in case of international commercial arbitration), (e) Legal representation, (f) Appointment of Arbitrators as per requirement of the nature of dispute, (g) Element of confidentiality.

Arbitration costs incurred by the concerned parties include the arbitrator’s fees, rent for arbitration venues, administrative/clerical expenses, and professional fees for the representatives of the parties and witnesses. Though these costs differ significantly between ad hoc and institutional arbitrations, yet the critics indicate an exploration of and effective mechanism for case presentation to arbitrators. International Chamber of Commerce study shows that costs that went to a final award in 2003 and 2004 include the largest part of the total cost of ICC arbitration proceedings incurred by the parties in presenting their cases (www.iccwbo.org). The cost borne by the parties to present their cases was 82% of the total cost
apart from arbitrators’ fees and expenses and administrative expenses of ICC representing 16% and 2% respectively. It follows that if the overall cost of the arbitral proceedings is to be minimized, special emphasis need to be placed on steps aimed at reducing the costs connected with the parties’ presenting of their cases. In ad hoc arbitration fees of the arbitrators are not regulated, but decided by the arbitral tribunal with the consent of the parties consisting of high profile arbitrators such as retired Supreme Court and High Court judges, charging higher fees. The costs are especially high in case of large companies where the parties decide the venue. This challenges the usefulness of arbitration over court litigation.

V. ADHOC AND INSTITUTIONAL ARBITRATION

An arbitration procedure may either be ad hoc arbitration or institutional arbitration. Ad hoc arbitration is usually considered more flexible, cost and time effective and more tailor-made to the parties’ need, but it also suffers from a lack of clear procedure and administration. In addition, the intent to build up an ad hoc arbitration bears the risk of drafting inoperative arbitral clauses and an award rendered under ad hoc proceedings may fail recognition and enforcement because of mistakes slipped in the procedure. Parties may choose ad hoc arbitration thinking that they will be able to conduct their arbitration faster, as it suits them better and with less expense or because they fear of the existence of a bias in an institution in favor of the other party. Ad hoc arbitration however is inseparably linked to two conditions: party cooperation until the very end of the proceeding and the existence of a favorable legal system at the place of arbitration, to support the proceedings.

Arbitrations conducted in India are mostly ad hoc. The concept of institutional arbitration, though gradually creeping in the arbitration system in India, has yet to make an impact. The advantages of institutional arbitration over ad hoc arbitration in India need no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost effectiveness of the arbitration process (Sarna, Onam and Kaushik, 2009).

Institutional arbitration is a better choice to ad hoc arbitration in India because of the requirement to agree to the procedures in ad hoc arbitration implying the necessity of cooperation between the parties and time involvement. Also, in institutional arbitration the institution already establishes the procedural rules and fees are also fixed and regulated under rules of the institution. Further more, ad hoc arbitration suffers from the problem of infrastructure. In institutional arbitration, the arbitral institutions maintain a panel of arbitrators along with their profile and parties can choose the arbitrators from the panel. Such arbitral institutions also provide for specialized arbitrators (Sarna, Onam and Kaushik, 2009).

The recognized arbitral institutions in India are the Chambers of Commerce (organized by either region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR).

Since ad hoc proceedings are by definition confidential and only a small part of the ad hoc proceedings exist in evidence, is impossible to affirm what percentage of the total arbitral proceedings were conducted ad hoc or institutional.

However, according to the literature, in the last few decade arbitral institutions grown in their activity and new institutions were also established. It is also beyond any dispute that arbitration conducted by and under the rules of a well-organized international institution, although might be slower, more expensive and more rigid than ad hoc, offers the clear advantage of experience and administration together with pre-established and well-tried procedural rules, administrative and technical assistance at hand, physical facilities and support services, appointment of the arbitrators, final review and perspective of a valid award, ensuring the fulfillment of basic requirements for easier recognition and enforcement in national courts.

The probably biggest advantage of institutionalized arbitration is “a certain measure of convenience and security”, essential because it is almost impossible to determine in advance the nature of a future dispute, the most suitable procedure or the parties’ willingness to cooperate at that stage. Thus, it is better to leave all these aspects to an experienced institution rather than drafting a long and costly arbitration agreement that covers all the possible aspects. The second most important advantage of institutional arbitration is that “the prestige of the institution strengthens the credibility of awards and thus facilitates both voluntary compliance … and enforcement”.

In context of the above-presented complex pros and contras, it is hard to claim that institutional arbitration is superior to ad hoc proceedings or vice versa. Evaluation can only be made on a case-by-case basis and will always depend on the circumstances and on the arbitrating parties. Professionals are of the view that administered arbitration is generally preferable, given the advantage of the services and the security offered by institutions valuable vis-à-vis ad hoc arbitration. However, since this is a continuously changing practice field shaped by the need of the disputing parties, and also due to the existence and general recognition of the UNCITRAL Rules, both mechanisms may be combined in an optimal way.

Christopher (2006) states that the number of proceedings administered by leading international institutions has doubled between 1993 and 2003, and even tripled for the American Arbitration Association. Bhardwaj (2007) raises concern on another vital area where India is lagging behind other countries is lack of institutional arbitration in India. Globally, the International Chamber of Commerce, American Arbitration Association, London Chamber of International Arbitration, etc. has contributed to the growth of a body of law, which can be properly called as Arbitration Jurisprudence. Institutional Arbitration has essentially developed as a result of specialized arbitral institutions with a permanent Secretariat which overseas arbitration and where arbitration proceedings are conducted. India should
emerge as a hub of International arbitration since we have better legal skills than those in other parts of the world.

VI. COMMERCIAL ARBITRATION - IMPERATIVES

Commercial arbitration adoption and implementation require structural changes in the existing framework. Malhotra (2009) advocates the constitution of Dispute Resolution Boards incorporated by the express consent of the employer and the contractor to monitor and scrutinize the execution of the construction project at various stages of completion. Arbitration award requires a control through well-defined public policy (Rao, 2008). Commercial arbitration requires an active support from judicial mechanism and their scale of intervention should be clearly laid down. Even in case of international commercial arbitration it is accepted that arbitration needs the support of national courts to be effective (Daniel, 2010). Online arbitration can facilitate the faster resolution of disputes coupled with the cost and reduction of efforts. International commercial arbitration has also entered the global culture of the Internet and a few arbitration associations provide all their arbitration services online, such as the resolution of domain name disputes under the support of the World Intellectual Property Association. Mainstream local, regional and international arbitration associations also offer various online services, including online resources and the ability to file cases online, carefully protected by sophisticated and pass-protected gateway services (Rao, 2008). We feel that apart from lawyers, professionals like engineers, medical professionals, and management practitioners can play a vital role by exercising their specialized knowledge and vast experience. Also, universities can play a major role by promoting research in this area and creating dedicated university departments.

Fast track arbitration is also required in case of disputes such as infringement of patents, copyrights, trademarks, destruction of evidence, activities in violation of patent, trademark laws, construction disputes in time-bound projects, licensing contracts etc.

In case of Indian firms, it is a dire necessity to recognize Alternative Dispute Resolution (ADR) through commercial arbitration as a subtle tool in effective management of business enterprises. This essentially requires developing and maintaining expertise of this kind with the growth of business. Also, such kind of strategic role in an organization shall be assigned to senior management person who is well versed with the nature of that business and in-depth knowledge of the legal frame prevalent in conventional type of litigation mechanism and arbitration mechanism.

VII. CONCLUSION AND REMARKS

It can be seen that adoption of commercial arbitration route by Indian business firms in true spirit is a long way to go. In order to develop this culture extensive training on commercial arbitration to people involved in management of the business enterprises is required particularly in developing countries like India. Different chambers of commerce and institutions involved in imparting arbitration as a part of their curriculum. Besides business enterprises shall also take help of these universities and institutions in conducting courses on commercial arbitration for their enterprises. This process will strengthen not only corporate governance but will also make business decision making robust. The present arbitration system in India is still has loopholes and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of commercial disputes. The concerned channels like arbitrators, judges and lawyers should make efforts to change general attitude of people towards arbitration.

Government shall also work out more incentives for resolution of disputes by means of arbitration. Whereas, recovery suit is filed in court requires deposit of court fees as certain percentage of claim amount, which can be avoided if arbitration is initiated. Government shall realize without failure that use of arbitration can help in reducing the burden of litigation on judiciary. The government should disseminate knowledge of the benefits of alternate dispute resolution mechanisms to foster growth of an international arbitration culture amongst lawyers, judges and national courts. Judiciary in India is under scathing attack for the pendency of millions of cases in different courts due to which as a result Legal system has become subject of mockery. Position does not seem to be any way better in most of developing economies. It shall also be appreciated that commercial arbitration must be perceived and implemented in strategic way rather than as a routine litigation exercise. For this purpose, government machineries shall appropriately educate and train its business community about the commercial arbitration.

Contrary to the developed countries where the manner of settling disputes has substantially evolved separately across various industry sectors, there is no marked difference in arbitration practice from one industry to another in India. Due to the technical complexities and long term nature of relationships between parties in these industries, arbitration in construction and IT industry disputes are characterized by certain peculiarities quite distinct from other industries. There is no marked difference in the arbitration practice based upon the size of the industry (Sarna et. al. 2009). There is need to amend the law which would give value to the law.

We conclude that there is an urgent need for corporate India to make intensive efforts in holding seminars, conferences and research endeavors in the field of commercial arbitration. It will pay rich dividend to Indian Business community over the time by making doing business hassle free.

REFERENCES


