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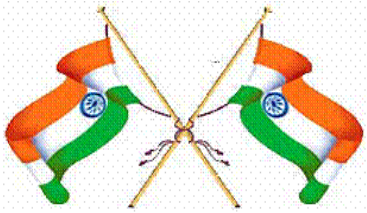

EDITOR'S NOTE

India has just celebrated its 64th year of independence on August 15th. There has been a call for change. In this edition, there is a critical analysis for change in the ADR system in India. It is based on the proposed amendments on the arbitration laws of India. It is wondered whether the change is possible by making the laws better, or does our mindset too require a change.

IIAM would continue its efforts to propagate ideas and programs that substantially improve the concept of ADR. We look forward to your continued support and patronage….

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An Argumentative Indian?

: ANIL XAVIER

"*The Argumentative Indian*" is a book written by the Indian Nobel Prize winning economist, Mr. Amartya Sen. The book brought together a selection of writings that outlined the need to understand contemporary India in the light of its long argumentative tradition. I have adapted the above title to highlight my argument seeking to preserve "Alternative Dispute Resolution" in its true spirit and nature and to shield ADR from the invasion of external forces.

"ALTERNATIVE" VERSUS "FORMAL" DISPUTE RESOLUTION:

ADR or "Alternative Dispute Resolution" has been described by many international authors as "Appropriate Dispute Resolution". This is mainly because the "Formal Dispute Resolution" process or the Court system (common law, Anglo-Saxon, and their continental European, civil law counterparts) are state institutions, conducting public, formal proceedings, that presuppose literacy, posture the parties in a conflictual, legal position-based, backward--looking fact finding processes that result in binary, win-lose remedies, subsequently enforced through social control over the losing party. It is procedure oriented and therefore consumes a lot of time and money. On the contrary, ADR offers flexibility of procedure and thus saves time and money. Litigation does not always lead to a satisfactory result. In contrast, ADR is mostly private, informal, oral, more collaborative, facilitative, future-looking, interest-based processes that bring parties to a calibrated, multi-dimensional, win-win remedy that is more durable.

But recently has ADR become more of "*court*-Annexed Dispute Resolution" rather than "Alternative" or "Appropriate" Dispute Resolution? At least in India!

Has ADR become more of "court-Annexed Dispute Resolution" rather than "Alternative" or "Appropriate" Dispute Resolution?

INDIAN LEGAL SYSTEM:

The Indian legal system is based largely upon the British common law model of jurisprudence. The legal system offers litigants different categories of courts, depending on the nature of the remedy being sought, in addition to appellate forums. Despite the various arenas in which justice may be sought, there are constant complaints that justice is not being served through the courts. Invariably, the victim or litigant is heard to say that "the wheels of justice" turn far too slowly, and many feel that this gives credence to the old adage that "justice delayed is justice denied". A large administrative structure has been developed to process the volume of case filings. Interim motions to delay trial have become common-place. In many cases, litigants will not see their day in court for 10 years after filing, with additional time added for appeals.

ADVENT OF ADR:

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 hazards and drivels. This lead to the enactment of the Arbitration Act, 1940 (mindful that there were some enactments on Arbitration even before this, but the 1940 Act consolidated the provisions).

The great advantage of arbitration has been that one could pick the decision makers and the rules and procedures. One could even pick the place. Going with arbitration also had the advantage of getting an answer in one or two years, which was better than litigating for five or more years. The number of people turning to arbitration increased.

The reason could be, as stated by former US Supreme Court Chief Justice Warren Burger, "The notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible."[1]

Apart from the inordinate delay and hostile atmosphere of court litigation, another reason for the acceptance of arbitration could be the legal culture and the similarity to traditional forms of dispute resolution that predate colonial influence. Centuries before the British arrived, India had utilized a system called the "Panchayat", whereby respected village elders assisted in resolving -community disputes. Also, in pre-British India, ADR was popular among businessmen and they resolved disputes using an informal procedure, which combined mediation and arbitration. For exam-ple, in Ahmedabad, an industrial center located in Gujarat State (Cen-tral India), leading cloth merchants banded together to form a business association authorized by its constitu-ents to resolve disputes between mem-bers, "Maskati Mahajan", as it was called, provided for respected businessmen (Mahajanis) to be available by turns on a daily basis to hear grievances and resolve disputes. This process was developed to discourage litiga-tion between members. It recognized the over-arching importance to cloth merchants of promoting their business interests. Another form of early dispute res-olution, used by one tribe to this day, is the use of "Panchas", or wise persons to resolve tribal disputes. Here, dis-puting members of a tribe meet with a "pancha" to present their grievances and to attempt to work out a settlement. If that is unsuccessful, the dispute is submitted to a public forum attended by all interested members of the tribe. After considering the claims, defenses, and interests of the tribe in great detail, the "pancha" again attempts to settle the dispute. If settlement is not possible, the "pancha" renders a decision that is binding upon the parties. The pancha's decision is informed by tribal law as well as the long-range interests of the tribe in maintaining harmony and prosperity.

Arbitration had an image synonymous with obstructions, astronomical costs and delays. The procedure was tedious and many times it took years for final resolution of disputes.

DECLINE OF ARBITRATION:

But unfortunately, due to lack of proper training for arbitrators and due to constant misuse of the provisions of the Arbitration Act and its procedures, users of arbitration often had to resort to judicial process to correct or suspend arbitral procedures. The concept of arbitration had a further set-back due to lack of proper rules and guidelines and allegations of bias and disproportionately huge expenses involved in arbitration. The court interferences during and after the course of arbitration were numerous and the very purpose of arbitration, being a fast and fair process of dispute resolution, had serious set-backs. Arbitration had an image synonymous with obstructions, astronomical costs and delays. The procedure was tedious and many times it took years for final resolution of disputes. Due to extensive interventions from Courts and due to widespread allegations of bias of arbitrators and disproportionately huge expenses involved in arbitration, many state governments banned arbitrations in government contracts.

This created a fair amount of hesitation and apprehension in the legal and business communities to opt for arbitration. Once a person gets into it, he finds it difficult to come out of it. He gets exhausted financially and physically. In fact the Supreme Court of India, while referring to the 1940 Act, observed that "the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep" in view of "unending prolixity, at every stage providing a legal trap to the unwary."[2]

REVIVAL OF ADR:

India undertook major reforms in its arbitration law as part of the economic reforms initiated in 1991. Simultaneously many steps were taken to bring judicial reforms in the country, the thrust being on the minimization of court's intervention in the arbitration process by adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration. The focus of

(Footnotes)

[1] Keynote address by former U.S. Supreme Court Chief Justice Warren Burger in the "National Conference on the Causes of Popular Dissatisfaction with Administration of Justice" conducted under the sponsorship of the American Bar Association in 1976.

[2] Supreme Court of India in its decision dated 29/09/1981 in "Guru Nanak Foundation Versus Rattan Singh and Sons" (AIR 1981 SC 2075)

the government has been as much on the simplification of the law as on its rationalization in order to meet the requirements of a competitive economy.

India was also a party to the Convention Establishing the Multilateral Investment Guarantee Agency, which provides for settlement of disputes between State parties to the Convention and Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration.

The Arbitration & Conciliation Act, 1996 was enacted by the Parliament, consolidating and amending the law relating to domestic arbitration, international commercial arbitration and conciliation. The Act had several advantages over the 1940 Act. Major thrust and legislative intent of the new Act was to reduce excessive judicial intervention. Section 5 of the Arbitration and Conciliation Act, 1996, provides that no court shall intervene except where so provided by Part I of the Act. Hence the purpose of section 5 is to achieve a certainty as to the maximum extent of judicial intervention. However, this does not fix the limit of the jurisdiction of the court to control and support the arbitral process but describes the spirit in which the jurisdiction should be exercised when found to exist. Added to this Section 8(1) of the new Act, makes it mandatory for any judicial authority to refer the parties to arbitration and to stay legal proceedings if started, where the subject matter of the suit is a matter covered under an arbitration agreement. Section 34, which deals with setting aside of arbitral awards has also made setting aside extremely limited. Thus the new Act accentuates the quest of arbitration to achieve "speed and efficiency", coupled with maximum independence from court intervention.

The new Act also for the first time gave statutory recognition to "mediation". Though the term used was "conciliation", it could be used interchangeably with mediation, as the concept and spirit was the same. The settlement agreement was given the same status of an arbitral award and therefore given the deemed status of a court decree. As per the provisions of the Act, the arbitrator was also encouraged to use mediation or conciliation during the arbitral proceedings to encourage settlement of disputes. Therefore the primary object was to promote amicable settlement of disputes outside court.

POSITION OF INDIAN COURT SYSTEM:

Indian courts continued to suffer from a serious backlog of cases. Judicial resources have been insufficient to handle the caseload. Adding to the problem was the absence of case man-agement programs that provided for close judicial supervision over the progress of lawsuits. There has been constant criticism that court-system operated under a totally run-down and obsolete system which has far outlived its utility and purpose. Further the courts had poor infrastructural facilities and at any given point of time at least 20 - 30 per cent of the vacancies to the judiciary lie vacant. Umpteen numbers of commissions had been set up to go into these issues but the problem seems to only expand and grow and no solution seems to be in sight. The Law Commission alone had submitted about 170 reports to improve and better the system but sadly nothing much has been done to implement them.

As per the present statistics, 53,229 cases are pending before the Supreme Court of India as on September 30, 2009, an aggregate of 40,18,914 cases pending before the High Courts and 2,71,20,108 cases in the subordinate courts as on June 30,2009.[3]

The Indian Parliament in its wisdom thought that ADR could be used as an effective tool to cut down the mounting arrears of cases. The Code of Civil Procedure was amended and a new Section 89 was introduced, which provided for settlement of disputes outside Court, through (a) arbitration, (b) conciliation, (c) judicial settlement including settlement through Lok Adalat, or (d) mediation[4]. The reason behind inserting Section 89 was that cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws, delays and the limited number of Judges available, it was imperative that resort should be had to ADR Mechanism with a view to bring to an end litigation between the parties at an early date[5]. It was virtually a mandate by the Parliament to courts that conciliation and mediation should be regular processes in every case. The intention was to make court process as effective and speedy as possible. All that this means is that effort has to be made to bring about an amicable settlement between the parties, before ultimately going to trial.

For this purpose, the Supreme Court of India constituted a committee headed by Mr. Justice M. Jagannadha Rao, former Judge of the Supreme Court of India, to ensure that the amendments become effective and result in quicker dispensation of justice. The Civil Procedure Mediation Rules, 2003, which was drafted by the Committee, was expected to go a long way in dispensation of effective and meaningful administration of justice to the litigating public[6].

(Footnotes)

[3] Annual Report 2008-09 of the Supreme Court of India

[4] Amendment Act 46 of 1999, dated 30/12/1999 w.e.f 01/07/2002 (S.O.No.603(E) dated 06/06/2002)

[5] Supreme Court of India in "Salem Advocate Bar Association, Tamil Nadu Versus Union of India" (AIR 2003 SC 189)

[6] Supreme Court of India in "Salem Advocate Bar Association, Tamil Nadu Versus Union of India" (AIR 2005 SC 3353)

Apart from this, the Arrears Committee of the Supreme Court of India also strongly recommended mediation as an alternate method of dispute resolution. It was found by the Committee that mediation had a salutary impact in the disposal of cases and if it is given the necessary thrust and encouragement, it can bring about the necessary reforms needed for quick disposal of cases.[7]

Against this backdrop, Indian courts have utilized a number of alter-native dispute resolution processes to provide access to justice. Full-time Mediation Centres have been established in various High Courts as well as District Courts.

PRACTICAL SCENARIO:

Even though the main purpose of the 1996 Act was to encourage ADR method for resolving disputes speedy and without much interference of the Courts, which was precisely the reason why the Arbitration Act, 1940 was frowned upon, with the passage of time, some difficulties in the applicability of the 1996 Act was noticed. The Supreme Court and various High Courts interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which leads to conflicting views. In some cases, courts have interpreted the provisions of the Act in such a way which defeats the main object of the legislation – like, taking in international arbitrations within the purview of Indian courts against the provisions of Part I, enhancing the scope of interfering with arbitral awards, rendering institutional arbitration ineffective etc.[8]

Therefore, it had become necessary to remove the difficulties and lacunas in the Act so that ADR method may become more popular and object of enacting Arbitration law may be achieved. A Consultation Paper was released by the Ministry of Law & Justice, Government of India on 8th April 2010 suggesting amendments to the Arbitration & Conciliation Act, 1996.[9]

But the real question is – Would the amendment bring about the required change?

For this, we may have to identify the "real" causes which lead to more and more interferences by courts in ADR. Otherwise the proposed amendment of 2010 will have the same fate as Arbitration Act, 1940 and Arbitration & Conciliation Act, 1996.

GROUND ISSUES:

Arbitration:

Most of the arbitrators in India are retired judges. Another group of arbitrators appointed by government departments, government companies and government organizations are serving officers of such departments or organizations. Even certain private companies adopt this system of appointing their own directors or officers as arbitrators. And importantly most of the arbitrations are ad-hoc, thereby administered by the arbitrators themselves.

The ad-hoc arbitrations by retired judges have become synonymous with astronomical costs and delays. A normal arbitration session does not last for more than 2-3 hours. Sittings are scheduled in gaps of weeks and months, because of the non-availability of time for the arbitrators. Since the arbitration is administered by them, even preliminary sittings and completion of pleadings takes months, if not years. While judges are certainly neutrals in their roles as jurists, after years on the bench, judges are accustomed to the formality and deference that goes with their judicial office. They are accustomed to giving orders and having their orders obeyed, and they generally have been very impatient with the informal, emotional venting and alternative procedures. The attempt for amicable resolution is absent. It takes years together to complete the proceedings. (I am mindful that not all of the retired judge arbitrators are like this and many of them are as brilliant, efficient and comparable as any other professional international arbitrators).

The other major segment of arbitrators – employee arbitrators also does not give much credibility to Indian arbitrations. "*Nemo debet esse judex in propria causa*" – a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract.[10] But since the Indian Arbitration Act does not prohibit such arbitrators, the parties with

(Footnotes)

[7] Annual Report 2008-09 of the Supreme Court of India

[8] For some of the controversial decisions, see:
Bhatia International Vs. Bulk Trading - (2002) 4 SCC 105
Venture Global Engineering v Satyam Computers Services - 2008(1) SCALE 214.
SBP Co. Vs. Patel Engineering Ltd.- (2005) 8 SCC 618
Oil & Natural Gas Corpn. Ltd. v. Saw Pipes Ltd. - (2003) 5 SCC 705

[9] For details, see: http://www.arbitrationindia.com/pdf/arbitration_amendment_2010.pdf

[10] Supreme Court of India in State of Karnataka Versus Shree Rameshwara Rice Mills (AIR 1987 SC 1359)

higher bargaining power could enforce such arbitration agreements. Therefore unfortunately, the courts have also held that if a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/ statutory corporation/ public sector undertaking containing an arbitration agreement providing that one of its Secretaries/ Directors shall be the arbitrator, he can not subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party.[11] But at the same time, the courts have also observed that contractors in their anxiety to secure contracts from government/ statutory bodies/ public sector undertakings, agree to arbitration clauses providing for employee-arbitrators. But when subsequently disputes arise, they balk at the idea of arbitration by such employee-arbitrators and tend to litigate to secure an "independent" arbitrator. It will be appropriate if governments/ statutory authorities/ public sector undertaking reconsider their policy providing for arbitration by employee-arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in Arbitrators. A general shift may in future be necessary for understanding the word "independent" as referring to someone not connected with either party. That may improve the credibility of Arbitration as an alternative dispute resolution process.[12]

At the same time the high costs charged by retired judge arbitrators have also added to the problem. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. Therefore the Supreme Court had opined that it is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held.[13]

Mediation:

ADR has greatly expanded over the last several years in India, to provide easy, quick, cheap and efficacious justice to the litigants. Mediation has become an important step in this direction. In order to give momentum to mediation, the then Chief Justice of India constituted a Committee, known as the "Mediation & Conciliation Project Committee" on 09/05/2005. The Project Committee proposes to lay down uniform mediation rules applicable throughout India. There seems to be an inordinate concern for the courts to establish mediation structure and procedures and thereby to control the system. Opinions and suggestions were heard that mediations should be done only under the aegis and supervision of courts. There seems to be a tendency amongst court-annexed mediators to feel that referred matters have to be "settled", so as to exemplify their expertise as a mediator. There seems to a feeling that judges also encourage "settlement" because it helps to reduce backlogs. The idea seems to be, "Don't worry about the definition of mediation, when parties are referred to mediation, someone bang their heads, knock some sense into them and get them to settle". It seems the courts are looking for more mediators, who would be serving as the brokers between the system and the parties.

WHAT DO PEOPLE NEED?

Within this world, the focus is not just on winning but on advancing the overall commercial needs and objectives. If the company prevails in a dispute but the commercial goals are not advanced – and advanced in a timely fashion – then we have still fallen short in the eyes of the business. There is no need to explain why businesses like speed, are impatient with delay, and abhor unnecessary cost. The duration of a financial dispute can have direct economic consequences for a business, whether in terms of delay in the collection of amounts owed, or the setting of financial reserves that must be posted under accounting rules and which impair the reporting of profits until the final resolution of the dispute. And time has a direct and negative impact on the cost of adjudication, as businesses know from experience that the longer it takes to resolve a dispute, the more effort and resources that will inevitably be expended on it.[14]

No matter how sophisticated the clients are, they approach lawyers or courts with stories of injustice and not stories about the law. We cannot turn a blind-eye on the fact that ADR was developed due to the frustration people had by a legal system which "was too formal, adversarial, expensive, and inflexible". These global climatic forces, plus other market developments

(Footnotes)

[11] Supreme Court of India in Indian Oil Corporation Ltd. & Others Versus M/s. Raja Transport (P) Ltd. (2009 (8) SCC 520)

[12] Supreme Court of India in Indian Oil Corporation Ltd. & Others Versus M/s. Raja Transport (P) Ltd. (2009 (8) SCC 520)

[13] Supreme Court of India in Union of India Versus M/s. Singh Builders Syndicate (2009 (4) SCC 523)

[14] The View from an International Arbitration Customer: In Dire Need of Early Resolution. Michael McIlwrath and Roland Schroeder ("The Indian Arbitrator" Vol:2, Iss.6 - Reprinted from (2008) 74 Arbitration 3 –11)

such as the increasing acceptance of non-litigious forms of dispute resolution have popularized ADR. New York Times columnist and author, Thomas Friedman, sees this as the market becoming more adaptable to market needs. In his bestseller, "The World is Flat" he talked of *triple convergence*. For those who read the signals, change their mindsets and prepare well, this is not Armageddon. There will always be a certain place for court action, but dictionaries will be re-written to cite litigation, not mediation, as the definition of Alternative Dispute Resolution.[15]

BE THE CHANGE?

"*You must be the change you wish to see in the world*" – Mahatma Gandhi

It has been a fashion statement recently that India should be made an international arbitration hub. Would everything be put in place by the proposed amendment suggested by the Consultation Paper released by the Ministry of Law & Justice?[16] Unless the ADR system is professionalized, institutionalized and "globalized" and unless ADR users and practitioners understand its true spirit and purpose, it would be difficult for India to claim the status as an international arbitration (ADR) hub.

We have to understand that the very features that had made arbitration attractive and popular in the first place was its speed, low cost, simplicity and finality. We have to implant professional institutional arbitrations with professional, independent and neutral arbitrators and capable secretarial service. The users of arbitration, especially with higher bargaining power have to ensure that they opt for institutional arbitration, rather than employee-arbitrations. Fortunately, the Consultation Paper has proposed to empower the Central Government to prescribe by rules, guidelines on conflict of interest on the lines of IBA Guidelines[17], whereby appointment of neutral and independent arbitrators are secured. The Consultation Paper also promotes institutional arbitration and makes it mandatory for commercial disputes above certain specified value. But the whole point is, when would the amendment take place. The amendments were recommended by the Law Commission by its 176th Report in the year 2001!

Another important aspect is the role of courts. Arbitration proceedings and Arbitral Awards are not a prelude to court proceedings by way of appeals against the award. Arbitration proceedings are a separate/ alternative forum selected by the parties for expeditious redressal of their disputes because of the finality attached to such decisions. Courts in all jurisdictions have to uphold such finality rather than to upset it.

Mediation or Conciliation is a technique of ADR to resolve a dispute outside court. We should not forget that the system of mediation was not evolved by legal experts. The concept of dispute resolution or "mediation theory and practice" was invented by village elders, sociologists, community activists, psychologists etc. So let us give credit where credit is due. Of course, not forgetting the fact that modern mediation was evolved and developed in 1976 by a gathering of legal scholars and jurists.[18]

The concept of mediation has to remain outside the ambit of "court system" to retain its innocence, beauty and magic. Mediators should come from all walks of life. I do agree that mediators have to be professionally trained and the ethical guidelines and code of conduct have to be adhered to. We have to ensure that mediators follow guidelines to protect the neutrality, confidentiality and voluntariness of the mediation process. But this is not something that has to be taken over by the courts. ADR is not something attached to courts. Institutions like the International Mediation Institute (IMI)[19], The Hague have made efforts in putting up high competency standards for mediators throughout the world. We have to adopt such standards putforth by independent and expertise organisations, so that the system is professionalised and a uniform standard prevails throughout the world.

It is common knowledge that the existing legal system is not able to cope up with the ever increasing burden of civil litigation. Our courts are no longer able to provide solutions in such situations because they are overburdened with cases and have no time to devote to issues which should receive priority. The deficiency lies in the adversarial nature of judicial process which is time consuming and more often procedure oriented. Ideally therefore courts of law should just handle constitutional issues, criminal matters and appeals.

ADR was evolved and has remained popular because it served the needs of the people with problems and

(Footnotes)

[15] A Perfect Storm is Gathering - Jan Eijsbouts, Hans Peter Frick, Bengt Gustafson, Marina Kaldina, Wolf von Kumberg, Michael Leathes, Deborah Masucci, Erik B. Pfeiffer, Philip Ray, Roland Schroeder, Steve Weatherley and R. Bruce Whitney

[16] For details, see: http://www.arbitrationindia.com/pdf/arbitration_amendment_2010.pdf

[17] For details, see: http://www.int-bar.org/images/downloads/guidelines%20text.pdf

[18] Roscoe Pound Conference of 1976

[19] For details, see: http://www.imimediation.org

resolved those problems quickly and inexpensively as possible."[20] It has always remained as an "alternative" dispute resolution mechanism and "out of court". But it is definitely a good "tool" for the courts to divert the pending cases out of court to encourage settlement of disputes and bring down the backlog of cases. It should be used for the benefit of litigants whose cases are pending in courts for several years without any foreseeable outcome. But making ADR into an integral part of court system is not intended by the legislature or by the community. It would result in explosion of court docketing, rather than reduction of backlogs.

The application of mediation to the legal dispute resolution process is not intended to replace or supplant the need for public adjudication and normative judicial pronouncements on the critical issues of the day, but to complement and preserve that core normative purpose of the judicial system. Judges may see mediation as potentially undermining their authority to make public judgments and normative pronouncements. But it is not intended to be so. The Supreme Court of India has opined, "It is quite obvious that the reason why Section 89 has been inserted (in the Code of Civil Procedure) is to try and see that all the cases which are filed in Court need not necessarily be decided by the Court itself. Keeping in mind the laws delays and the limited number of Judges, which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end to litigation between the parties at an early date."[21] The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section.[23]

With explosion of knowledge and super specialisation being the order of the day it is no longer safe to assume that a civil court judge could be a repository of knowledge on specialised subjects like medical negligence, insurance, patents and trade marks, cases involving engineering contract disputes to name a few. Therefore parties to a dispute would welcome arbitration by a tribunal where at least one of the chosen arbitrators would be knowledgeable in the subject under which the dispute arises.

People are happier having control of the outcome, without the court making the decisions for them. As Justice Sandra Day O'Connor explained, "The courts should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.[23]

FUTURE:

As international business and investments has drastically increased in India, in case India becomes the hub of international commercial arbitrations it will reduce arbitration costs of parties, who presently sustain heavy expenditure on account of arbitrations conducted abroad. It is therefore advisable for an international client governed by the international commercial arbitration under the Arbitration & Conciliation Act, 1996 to prefer India as the place of arbitration so that resultant award would be considered as domestic award and avoid the risk and hurdle for enforcing the same as a foreign award under Part II of the 1996 Act. The requirement for bringing in such international arbitrations depends on the availability of institutions with international standards, which can provide internationally approved infrastructure, qualified and accredited arbitrators and capable professional and secretarial assistance.

And mediation, it has to develop independently and professionally with international standards, and retain its original and innovative style as an out of court method of dispute resolution. It has to remain as hands-on, party-driven, high-touch dispute resolution, a genuinely new product for a new market.

"Alternative Dispute Resolution" has to remain as such, or as "Appropriate Dispute Resolution" and never as "*court*-Annexed Dispute Resolution".

This is an argument from an Indian, placed for judgment……..

(Author: Anil Xavier is a lawyer and an IMI Certified Mediator. He is a charter member and currently the President of the Indian Institute of Arbitration & Mediation (www.arbitrationindia.org). He is also a member of the Independent Standards Commission of the International Mediation Institute, the Hague. He can be reached at anilxavier@arbitrationindia.com)

(Footnotes)

[20] Keynote address by former U.S. Supreme Court Chief Justice Warren Burger in the "National Conference on the Causes of Popular Dissatisfaction with Administration of Justice" conducted under the sponsorship of the American Bar Association in 1976.

[21] Supreme Court of India in Salem Advocate Bar Association, Tamil Nadu Versus Union of India (AIR 2003 SC 189)

[22] Supreme Court of India in "Afcons Infrastructure Ltd. & Another Versus Cherian Varkey Construction Co. (P) Ltd. & Others" (CDJ 2010 SC 637)

[23] Roscoe Pound Conference of 1976

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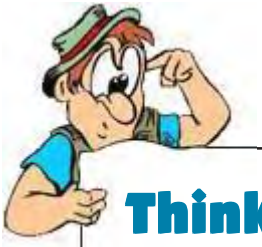

Think ... THE VIRUS

Two men were diagnosed with a deadly virus. They were told that the cure would change their life forever. Their families might disown them, and friends could turn their backs on them.

One man decided to decline the offer; he didn't want to be left out of anything. At first everything seemed ok. He drank with his friends and family and ignored what the doctors said.

Time went past and life took a turn for the worst. The virus began to consume his life. He had to quit his job and lost his source of income. The people he called friends didn't help, they told him it was his problem not theirs. Everyday was a struggle for life. His days were long and painful. On his deathbed his last words were, I should've taken the cure.

The other man decided to take the cure. From then on his life changed. His family betrayed him, and said it was a waste of money. They didn't talk to him anymore because they didn't believe in what he was doing. His friends left because he couldn't do all the stuff he used to do. At first he cursed the doctors for the way people were treating him.

After time he began to get better. He was getting promoted because he was able to focus on his job. His family apologized for the way they treated him. He got new friends that helped him daily. Life to him was a gift. He thanked God daily that he decided to take that cure.

That virus is like our problems.

If we hold on to them and ignore them they will begin to consume us. They will take over our life and no matter what we do, we won't be able to get rid of them.

If we give our problems to God he can heal us. He is the cure for any problem we might have. Yes we might be treated differently, but in the end we can say thank you God.

~ Christopher Deschene ~

Internalizing Mediatory Efforts in Construction

: CHANDANA JAYALATH

The 'neutral' approach is therefore versatile from forming strategic direction to the creation of an atmosphere conducive for 'talks for talks'. These neutrals interpret commercial and contractual issues in line with the contract documents,

Construction by definition is a project having a definite duration with time to start and finish of inter-related activities and involves numerous parties, who must work in unison - though temporarily. Also, some of the problems that arise in the execution of the project are not foreseeable or, even if they are foreseeable, their magnitude may not be foreseeable. On account of the higher number of participants in a typical construction project, there are correspondingly a higher number of contract agreements concurrently in effect. The greater number of participants results in fragmentation of responsibilities in the supply chain. As it invariably involves parties having different requirements and perceptions, the tendency is always to have interests in conflict.

The usual prescription is that any dispute shall in the first instance be referred to and settled by the Engineer. Traditionally, a period of 90 days is allowed for this decision, which shall be final and binding upon the Employer and Contractor until completion of the works. It is not a matter for the Contractor to stop work even in disagreement with the decision or whether the disgruntled party's intent is to invoke the next step in the dispute gauntlet. Only if the Engineer fails to comply with the above 90 days allowance or if the Employer or Contractor has a reason to dispute the Engineer's decision, either party may refer the dispute to a Competent Court of Justice, subject to a notice of intent once again. Parties have no choice other than the path to Courts in some civil codified jurisdictions where the customized bespoken forms upon very old standard conditions have been widely adopted in the administration of construction contracts. These Courts eventually rely on Court-appointed experts in the context of highly technical or commercial issues.

Considering the time factor, cost elements and more over the controversial nature of the issues in dispute, parties sometimes refer their disputes to what is aptly called Claims Compensation Committees as a shortcut for justice. The jurisdiction retained with these committees to adjudicate construction disputes is not clear to many practitioners, however. Another tendency is to look for alternatives, one of which is amicable settlement that gives extra opportunity for the disputants to revisit their issues with an in-house expertise. Quite often this mechanism helps the disputants to arrive at a consensus within the confines of the Employer's premises, being a resultant concern about the interrupted progress, the dual role of the Engineer (Employer's agent and independent certifier) and the propensity to obtain interim awards and temporarily-binding decisions.

Eventually believing in a process in which they are able to retain some kind of control over the outcome of their dispute, rather than a Court order, the Employers with some upper hand out of contractual framework refer their matters to a third neutral or a panel of neutrals. Not to be pessimistic all the time, these neutrals will first evaluate the case independently and thereon a recommendation that best fits the party's requirements. Either facilitative or evaluative their role is, they do not

operate in a vacuum but with technical, legal, financial and other departments hand in hand. There is no prior agreement for these neutrals to intervene, but eventually come up with options rather than decisions, to which the parties may either accept or reject. Such an arrangement in fact avoids somewhat rigid formalities in arbitration or litigation in toto. Indeed, they closely resemble expert inputs and give advisory opinions when parties seek guidance on technical matters that is preventing a further dispute. Therefore, these neutrals function as a dispute preventing device permanently installed for the duration of the contract – in a way similar to a dispute review board, but not exactly the same.

Accordingly, when a dispute does arise, it is given early attention and addressed contemporaneously which avoids the commonly encountered situation of the Engineer being too busy to address a voluminous claim. Because of the familiarity with the project, facts are better understood by them in administering the dispute. This is important when in many projects; the same staffs rarely remains till completion which often deprive any arbitrator the access to first-hand know-how of events. With such individuals a greater certainty prevails and the materials relevant to the issue can be dug out much easier than ever since. Parties who act in good faith are likely to comply with a recommendation just as they would accept a decision anyway.

This 'neutral' approach is therefore versatile from forming strategic direction to the creation of an atmosphere conducive for 'talks for talks'. These neutrals interpret commercial and contractual issues in line with the contract documents, principles of quantity surveying and accepted norms, customs and traditions of the construction industry and form opinion as to contractual eligibility, validity and quantum of claims in terms of cost, time and otherwise. They critically appraise the public interests involved within the issues if any under investigation, conduct sensitivity analysis of each approach to ultimate outcome using logic and reasoning. Although this is not truly a scientific mediation, these mediatory efforts have been hided in the dispute settlement process in between the Engineer and the Courts. With no contractual machinery in support, however, it has now become a fact of life in public projects where the disputants are unwilling to call their Employer a disputant.

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Promoting Student Authors

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

India scuttles move to put arbitration awards beyond purview of courts

A strong attempt by some countries, led by the US and some European nations, to force India to disallow appeals in arbitration awards was recently defeated by an Indian delegation. At the recently-held session of the United Nations Commission on International Trade Law (UNCITRAL) in New York, the Indian delegation was surprised when an attempt was made to push the adoption of revised version of Arbitration Rules, 1976 even though some of the clauses of the proposed law went against the prevailing Indian laws. India's successful attempt to counter the move was supported by representatives from Argentina, Canada and Malaysia. Among the proposals put forward by the Western bloc was to put all arbitration awards beyond the purview of national courts if the parties to the arbitration agreement agreed to waive their right to take recourse to a court of law. If passed, this would have effectively meant that all future arbitration awards would be self executing, even if they were found to be perverse or against public policy or national interest. After strong lobbying, India managed to defer the clause and ultimately it was made part of annexure as a model clause, which may be adopted by parties in the arbitration agreements if the applicable law permits.

Australia's First Global Disputes Centre Opens in Sydney

Australia is set to become a global player in the booming market for cross border dispute resolution following the opening of the Australian International Disputes Centre in Sydney. Jointly funded by the Australian and NSW state governments and Australia's only international arbitration administrator, the Australian Centre for International Commercial Arbitration, the state of the art facility will allow national and foreign companies to resolve commercial disputes outside the court system without resorting to costly and lengthy litigation. A PricewaterhouseCoopers survey, 'International Arbitration: Corporate attitudes and practices', revealed 73% of corporations prefer to use arbitration to resolve their cross-border disputes rather than transnational litigation and saw arbitration as a means to successfully preserve business relationships.

Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.For more details on CDM, mail to training@arbitrationindia.com

New Arbitration inititaive by UAE

With litigation in courts conducted in Arabic and with advocacy restricted to local lawyers, United Arab Emirates is aiming to promote effective dispute resolution, particularly in the form of international commercial arbitration. A new draft Arbitration Law is expected to be passed this year. English language procedures and option of selecting governing based on contract, is expected to give a substantial boost for international businesses.

Caution in setting aside Awards

The Supreme Court of India has cautioned High Courts against interfering with well-reasoned awards passed by arbitrators. A Bench consisting of Justices R.V. Raveendran and H.L. Gokhale said: "The court, while considering the challenge to an arbitral award, does not sit in appeal on the findings and decision of the arbitrator. The arbitrator is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and interpreting the provisions of the agreement. If he does so, the decision of the arbitrator has to be accepted as final and binding."

Arbitration Act applies to non-commercial disputes also

The Supreme Court of India has stated that the Arbitration and Conciliation Act would apply to all civil disputes, and not merely to commercial disputes. It set aside the view of the Karnataka High Court in the case, H Srinivas Pai Vs. H.V Pai, in which the High Court remarked that the law will apply only to "commercial agreement matters and international commercial matters". Contradicting the High Court view, the Supreme Court ruled that the applicability of the Act does not depend upon the dispute being a commercial dispute. Reference to arbitration and arbitrability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute. There can be arbitration agreements in non-commercial civil disputes also.

The Lighter Side

A woman goes to the doctor, beaten black and Blue.

Doctor: "What happened?"

Woman: "Doctor, I don't know what to do. Every time my husband comes home drunk he beats me to a pulp."

Doctor: "I have a real good medicine for that. When your husband comes home drunk, just take a glass of sweet tea and start swishing it in your mouth. Just swish and swish but don't swallow until he goes to bed and is asleep."

Two weeks later the woman comes back to the doctor looking fresh and reborn.

Woman: "Doctor, that was a brilliant idea! Every time my husband came home drunk, I swished with sweet tea. I swished and swished, and he didn't touch me!"

Doctor: "You see how much keeping your mouth shut helps?"