Volume 2, Issue 9, September 2010

THE indian arbitrator

THE INDIAN ARBITRATOR

IN THIS ISSUE:

EDITORIAL:

Publisher:
Indian Institute of Arbitration & Mediation

Address:
G-209, Main Avenue,
Panampilly Nagar,
Cochin 682 036, India.

www.arbitrationindia.org
Tel: +91 484 6570101 / 6570102

EDITOR'S NOTE

We had received many feedbacks indicating that it is difficult to read online, when the page layout is designed in two columns. Accepting the suggestion, we are making some changes to the layout of the magazine. We hope the new format would make reading more comfortable.

We are thankful for the kind and wholehearted support we get from you. Your suggestions and comments would provide us the inspiration to do better.

Looking forward to your continued support…

For previous editions of The Indian Arbitrator, log on to http://www.arbitrationindia.com/htm/publications.htm

Compulsory Mediation for Family Disputes?

: VINI SINGH

Alternative Dispute Resolution systems are not only cost and time effective; they preserve the relationship between the parties by encouraging communication and collaboration. Maintenance of peace and harmony is the paramount consideration in resolving family disputes. The Indian family is considered strong, stable, close, resilient and enduring. Mediation can help preserve this character of Indian family and reform and complement the formal dispute resolution mechanisms. This article discusses the suitability of mediation for resolution of family disputes and suggests an amendment in Family Courts Act, 1984 for introducing compulsory mediation in family dispute resolution in India.

Family is a group of people affiliated by consanguinity, affinity or co-residence.[1] A family produces and reproduces persons-biologically and socially[2] and is the primary economic and political unit of the society.[3] Contemporary society generally views family as a haven from the world, supplying absolute fulfilment.[4] The family is considered to encourage intimacy, love and trust where individuals may escape the competition of dehumanizing forces in modern society from the rough industrialized world. The family now supplies what is "vitally needed but missing from other social arrangements", that is social security.

Family Dispute?

All families experience at certain times difficulties and stress, the conflicts within a family is termed as a family dispute. Such a dispute may include any matter like:

- Disputes between husband and wife
- Child/teenager's behaviour
- Children's education, health and welfare
- Contact with children (separated couples or extended families)
- Financial support for children (separated couples)
- Inability to communicate
- Lack of trust
- Lifestyle/environmental differences
- Money/debt

(Footnotes)

[1] See, Family, available at http://en.wikipedia.org/w/index.php?title=Family&oldid=349111428

[2] "Talcott parsons opines that families are factories where personalities are produced." See, "Functionalist View of the Family", available at, http://74.125.153.132/search?q=cache:422dE9XChpkJ:www.sociology.org.uk/pcfamfun.doc+talcott+parsons+ families+are+factories&cd =3&hl=en&ct=clnk&gl=in

[3] Refer, Supra, note 2.

[4] "The family, a strange little band of characters trudging through life sharing diseases and toothpaste, coveting one another's desserts, hiding shampoo, borrowing money, locking each other out of our rooms, inflicting pain and kissing to heal it in the same instant, loving, laughing, defending, and trying to figure out the common thread that bound us all together.~Erma Bombeck"

- Parenting differences
- Previous agreements broken down
- Property settlement (separated couples or older parents & adult children)
- Relationship breakdown
- Verbal abuse/swearing or bullying
- Property disputes

The Family Courts Act explains family disputes[5] as:

1. a suit or proceeding between the parties to a marriage for decree of a nullity marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

2. a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

3. a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

4. a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

5. a suit or proceeding for a declaration as to the legitimacy of any person;

6. a suit or proceeding for maintenance;

7. a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

Why is Mediation/Conciliation the best mechanism to resolve family disputes?

Litigation does not always lead to a satisfactory result. It is expensive in terms of time and money.[6] Its adversarial nature does not change the mindset of the parties and ends up in bitterness. Alternative dispute resolution systems are not only cost and time effective; they preserve the relationship between the parties by encouraging communication and collaboration.

(Footnotes)

[5] See, Section 7 of The Family Courts Act, 1984.

[6] "The formal dispute resolution process is procedure oriented and therefore consumes a lot of time and money. ADR offers flexibility of procedure and thus saves time and money."

Maintenance of peace and harmony is the paramount consideration in resolving the family disputes. Conciliation and mediation are old institutions and indeed they are deeply rooted in social tradition of many societies, particularly in Asian culture and values. In India, family disputes were resolved by the elders of the family who acted as conciliators or mediators. Even today, elders of the family and in villages, the elder persons of the village have such a role. Panchayats also perform a similar function, and are preferred by villagers over courts due to their easy accessibility and prompt dispute resolution.[7] The philosophy behind ADR is amicable dispute resolution and mediation is one such process that provides a space to the parties to sit down and focus on what they really want, rather than think what they need to seek or what the law will let them fight for.[8]

Mediation is defined in Black's Law Dictionary as "a private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement."[9] Family dispute mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding, and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions, and reach their own agreements.[10] Thus the family mediator assists the participants to gain a better understanding of their own needs and interests and of the needs and interests of others.

References to mediation/conciliation in family dispute resolution can be found in the Family Courts Act, 1984, Civil Procedure Code, Hindu Marriage Act and the Legal Services Authorities Act, 1987 that recognises and gives a special status to Lok Adalats that have been very effective in mediating family disputes. The Family Courts Act was enacted with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.[11] Conciliation, speedy settlement, non-adversarial approach, multi-disciplinary strategy to deal with family disputes, informal and simple rules of procedures and gender justice are supposed to be the cornerstones of the philosophy of the Family Courts.[12]

The whole structure of family courts rests on the twin pillars of counselling and conciliation. The counsellors are required to not only provide counselling but to bring about reconciliation and mutual settlement whenever feasible.[13] Section 9 (1) of the Family Courts Act states that "In every suit or proceeding, endeavour shall be made by Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit." While Section 9(2) directs the family court to adjourn the proceedings if it appears that there is a reasonable possibility of settlement between the parties for such period as it thinks fit is necessary for taking the required measures for bringing about the settlement. These provisions however do not make mediation/conciliation compulsory.

Section 23 (2) of the Hindu Marriage Act, 1955 which contains similar provisions provides that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii)[14],

---

(Footnotes)

[7] See, Sharma, Dr. M.K., J., "Conciliation and Mediation", available at http://delhimediationcentre.gov.in/articles.htm.
[8] See, Sridhar M., Alternative Dispute Resolution: Negotiation and Mediation, p. 285, LexisNexis Butterworths (2006).
[9] Garner, Bryan A. Ed., Black's Law Dictionary, Seventh Edition (1999), West Group, St. Paul.
[10] See, "Model Standards for Practice of Family and Divorce Mediation", 39 Fam. & Conciliation Courts Rev. 121, available at Westlaw. See, Section 67 of Arbitration and Conciliation Act, 1996.
[11] See, Preamble, The Family Courts Act, 1984.
[12] See, Jamwal, N., "Have Family Courts lived up to expectations", Mainstream, Vol XLVII No 12, March 7, 2009.
[13] See, Ibid.
[14] Conversion to another religion.

clause (iii)[15], clause (iv)[16], clause (v)[17], clause (vi)[18] or clause (vii)[19] of sub-section (1) of section 13[20]. It also states that, for the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report. Here again, there is no compulsion to go for mediation before taking recourse to litigation.[21]

Similarly Section 89 of the Civil Procedure Code (Amendment) Act, 1999,[22] directs the courts to identify cases where an amicable settlement is possible, formulate the terms of such a settlement and invite the observations thereon of the parties to the dispute. Where the Court comes to the conclusion that mediation is the appropriate mode of settlement, it may itself act as a mediator and "shall effect a compromise between the parties".[23] The language of this section is mandatory in nature and it makes mediation compulsory.

Mediation/Conciliation is a very effective method of family dispute resolution. It is more attractive than litigation because it empowers the parties to devise an agreement which meets their specific needs.[24] It empowers the parties to choose alternative options which a court may not offer as a remedy, for example separated couples arguing over custody of their children can formulate their own unique parenting plans.[25] The emphasis in mediation is to find out a workable solution unlike adversarial system which focuses on who is right and who is wrong and generally ends up in bitterness, thereby diversifying the capacity for resolving conflicts in society.

(Footnotes)

[15] Unsoundness of mind.
[16] Virulent or incurable leprosy.
[17] Venereal disease in a communicable form.
[18] Renunciation,
[19] Civil death.
[20] Grounds for divorce.
[21] See, 59th Report of the Law Commission of India.
[22] "Read with Order X Rules 1-A, 1-B and 1-C, which are are applicable where at the first hearing of the suit the Court ascertains from each party or the counsel whether the parties admit or deny the allegations of fact as are made in the plaint or the written statement. After referring to the admissions and denials, the Court shall direct the parties to the suit to opt for either mode of the ADR as specified in Section 89 (1) i.e. Arbitration and Conciliation, Lok Adalat or Mediation."
[23] "Section 89 lays down that where it appears to the Court that there exists an element of settlement, which may be acceptable to the parties; the Court shall formulate the terms of settlement and give time to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer to either (i) arbitration (ii) conciliation (iii) Judicial Settlement including the settlement through Lok Adalat or (iv) Mediation. As per sub-section (2) of Section 89 as amended when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act, 1996 shall apply. When the Court refers the dispute to Lok Adalat for settlement by an Institution or person, the Legal Services Authorities Act, 1987 alone shall apply. It is only in the case of mediation that the Court itself shall effect compromise and shall follow such procedure as may be prescribed by Rules made by the High Court under Section 122 read with Section 130 of the Code of Civil Procedure."
[24] See, Section 73 of The Arbitration and Conciliation Act, 1996.
[25] See, Supra, note 8, at p. 287.

Mediation requires co-operation between the parties which eventually helps reduce hostility between the parties[26] and results in stable agreements that are likely to inspire long term compliance by the parties because of their consent in the outcome.[27] The purpose of mediation is to preserve relationships and the focus is on future and future relationships rather than on acts of the past.[28] Such features of mediation make it ideal for disputes involving child/teenage behaviour and for child custody disputes.[29]

Another advantage offered by mediation is that it helps one party to understand the view of the other.[30] So even if the parties do not reach a settlement and go for an adversarial process, they can get their disputes resolved speedily. Thus mediation is a win-win situation.[31] Further, mediation/conciliation proceedings are confidential and the confidentiality also extends to the settlement agreement except where disclosure is necessary for purposes of implementation and enforcement.[32]

Unlike arbitration and court trials, mediation is not a determination but a facilitated negotiation.[33] Parties to mediation are free to evaluate the law and the facts and to walk away when neither of them likes the deal that is offered. Family disputes are personal in nature and require such choices which mediation can very well provide. The whole process of mediation is party controlled and offers flexibility.[34]

Mediation costs less both emotionally and economically which makes it more satisfactory than other dispute resolution mechanisms. It tackles conflict and emotional stress as opposed to the impersonal and uncaring way in which formal litigation system handles these disputes.[35] Formal legal systems often intimidate illiterate people, mediation can help such people make a informed decision in a comfortable environment.

Time to make mediation in family disputes mandatory

The development of mediation in resolution of family disputes in India holds enormous promise, and will definitely strengthen the system's capacity to deliver justice.[36] The Indian family is considered strong, stable, close, resilient and enduring. Mediation can help preserve this character of Indian family and reform and complement the formal dispute resolution mechanisms.

Making mediation mandatory for resolution of family disputes will provide a tangible manifestation of the court's commitment to a settlement seeking approach.[37] Also, it will reduce the backlog of cases while providing the parties a healthy alternative. The Family Courts Act must be amended suitably and a compulsory mediation clause must be inserted. To maintain the voluntary nature of mediation, a provision may be made which requires the parties to record acceptable reasons before the court for not opting for mediation.[38] The Hindu Marriage Act may also be amended and mediation can be made mandatory except for the exceptions provided under Section 23(2).

(Footnotes)

[26] See, "Family Mediation in Europe: Recommendation No. R.(98)", 37 Fam. & Conciliation Courts Rev. 257, available at Westlaw.

[27] See, Chodosh, H.E., "Mediating Mediation in India", available at http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf. See also, Infra, note 29;

[28] See, Infra, note 33.

[29] Refer, Pavlowski, R., "Alternative Dispute Resolution for Hague Convention Child Custody Disputes.", 45 Fam. Ct. Rev. 302, available at Westlaw. [30] See, Supra, note 8.

[31] See, Tondo, C; Coronel, R; Drucker, B, "Mediation Trends", 39 Fam. Ct. Rev. 431, available at Westlaw.

[32] See, Section 75 of The Arbitration and Conciliation Act, 1996.

[33] See, Arnold, T., "Mediation Guide- A Practical How to Guide for Mediators and Attorneys", available in, Rao, P.C.; Sheffield, W., Alternative Dispute Resolution: What it is and How it works, p. 210, Universal Law Publishing Co. Pvt. Ltd.

[34] See, Ibid. See, Chandra, S., "ADR : Is Conciliation the Best Choice", available in Rao, P.C.; Sheffield, W., Alternative Dispute Resoltion: What it is and How it works, p. 82, Universal Law Publishing Co. Pvt. Ltd.

[35] See, Supra, note 8.

[36] Refer, "222nd Report of Law Commission of India- Need for Justice Dispensation through ADR", available at, http://lawcommissionofindia.nic.in/reports/report222.pdf

[37] See, "The Family Dispute Resolution Mechanism in England and Wales", [2003] HKLRC 1, available at, http://www.hklii.org/hk/other/hklrc/reports/2003/03/4.html.

[38] "A similar provision exists in the Family Laws Act, 1996 of England." See, Ibid.

To make the process of mediation fruitful, provisions may be made regarding standards to be followed during mediation proceedings. For this purpose a reference to Part III of The Arbitration and Conciliation Act, 1996 shall be very helpful specifically with regard to the role to be played by the conciliator. According to Section 67 the conciliator is supposed to act in an independent and impartial manner while facilitating an amicable settlement between the parties. And he is to observe objectivity, fairness and justice and has to give due consideration to the rights and obligations of both parties.

Mediators facilitate communication and cooperation between the parties, they help them in identifying the issues, clarifying priorities, exploring areas of compromise and find points of agreement, resolution of family dispute requires therapeutic counselling[39] as well, it is therefore imperative that mediators should be skilled[40], well trained and informed. Provisions regarding qualifications for a family dispute mediator can also be specified. Qualified mediators will also increase the credibility and popularity of mediation.

Provisions must also recognise local mediators because a local mediator who knows the local conditions and the parties may resolve the dispute in a much better way than a stranger. In Indian context, such recognition will facilitate alternative dispute resolution as people are comfortable and satisfied when their stories are heard in an informal local process.

If the parties find that the informal procedure is unfair or they are unable to reach to a settlement, they can always approach the formal legal system, therefore compulsory mediation is safe enough.

Compulsory Conciliation under Section 12 of the Industrial Disputes Act, 1947 has played a very vital role in establishing and maintaining industrial harmony by preserving relationships. The success of compulsory conciliation in resolving industrial disputes is another incentive for introducing the same for resolution of family disputes. Further, compulsory mediation in family disputes has had considerable success in countries like U.K. and Australia, who have a well developed infrastructure for carrying on family dispute resolution by mediation, India must also make a similar attempt.

Conclusion

Mediation is a collaborative, party controlled, confidential, informed, impartial, balanced and safe, self responsible and satisfying alternative dispute resolution mechanism. It offers unique and dynamic resolution of disputes and preserves relationships.

It is time to introduce compulsory mediation in family dispute resolution as it will not only reduce the backlog of cases but will also provide substantial justice to the parties particularly in Indian context where the family structure is such that members of a family are too interdependent.

(Footnotes)

[39] Refer, Supra, note 33

[40] "A mediator must be patient, attentive, reliable, neutral, persuasive, compassionate and wise."

(Author: Vini Singh is a 4th year law student of Hidayatullah National Law University, India)

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.

Article

Corporate Disputes and ADR Methods

: K.RAJESH KUMAR

Corporate disputes constitute a major portion of commercial disputes lying in various judicious forums. In the case of corporate disputes, the underlying legislations should provide for resolving disputes informally. Even the Memorandum and Article of Association of companies should recognize the settlements reached through mediation, arbitration and conciliation to settle disputes among the members where public interest is not affected and the informal dispute resolution methods will be an effective remedy to the situation. In this article an attempt is made to analyze the scope of disputes and resolution mechanisms under the Indian Companies Act.

The Companies Act, 1956 (hereafter referred to as "the Act") is the principal legislation dealing with the incorporation of companies and its day to day management in India. It is a self contained legislation providing for all aspects of its functions and effective provisions to protect the rights and interest of all those who deal with the company. Though the company is a legal entity and it has separate existence apart from its members, it operates through human interference and ultimately owned by several individuals. Company form of organization is a vehicle designed to carry limitless people to pool their investment and to deploy it for some useful and profitable purposes. Since there are people from different walks of life, there are ample opportunities for difference of opinions resulting in serious disputes.

Mechanism under the Act

Under the Act, a quasi judicial forum by the name Company Law Board is established under Section 10E of the Act to redress certain kind of grievances and to protect the interest of the affected parties. The Board has its principal bench at Delhi and has four additional Benches located in four regions of our Country. Each additional Bench has jurisdiction over several states assigned to such benches. It has its own regulations to decide and deal with its business. The Board has inherent powers derived from the Act in the matters relating to management of companies. A separate tribunal, namely, National Company Law Tribunal and an appellate tribunal will be replacing the Company Law Board (CLB) shortly to deal with the subject matters presently dealt with the CLB and the appeals arising out of its orders.

Nature of Disputes.

As we know the company has two forums; one is board of directors and the other is share holders. The day to day management of the company is vested with the board of directors and they are in control of its affairs and the custodian of the resources of the company. They are in a

fiduciary position and they shall manage the company for the benefit of all the share holders. Share holders cannot interfere with the day to day management of the company. The Act has exhaustive provisions to protect the interest of the share holders. They can exercise their rights according to the provisions of the Act to protect their interest.

Disputes arise in a company where difference of opinion arises among the members of the board of directors *interse* or between people in control (majority) and other share holders (minority). The scope of disputes is high in companies which are in the nature of joint ventures of one or more parties for carrying a particular object. In the case of joint ventures the parties to the joint venture agreement are obliged to perform certain contractual obligations for the effective implementation of the Joint Venture project. In such situations, the role of the parties have a twin face, one is pure contractual obligations arising out of the agreement among them and the other is the share holding and management rights derived from the Act and the Memorandum and Articles of Association of the company. Usually the agreement between the parties provide for resolution of dispute through arbitration. Omission or commission of certain acts of one or more parties often paves the way for corporate disputes. Many a time it will be a breach of contract committed by one party and his failure to cure the defect even after notice from the other side, which ends up as dispute where the company is also made a party.

Provisions of the Companies Act to protect the interest of share holders.

Sections 397 to 399 are often invoked by the aggrieved parties to take legal protection from the other parties through Company Law Board (CLB). These provisions are commonly referred to as "prevention of oppression and mismanagement". Section 397 is dealing with oppressive acts and empowers the members of a company to apply to the CLB for suitable orders to remedy the oppressive acts. The members can invoke this provision where they have a complaint that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. If on an application filed by such members, the CLB is of the opinion (a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts of would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up; the CLB may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Let us also see the provisions applicable to mismanagement. Section 398 of the Act deals with the mismanagement aspects of company management. Here also the share holders are entitled to apply to the CLB when they feel (i) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company: or (ii) that a material change has taken place in the management or control of the company where by an alteration in its Board of Directors or in the ownership of the company's shares and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interest of the company.

The dispute or difference of opinion among the parties either as share holders or directors of a company often leads to situations where one group is taking steps resulting in imbalance in management or ownership of shares with a view to take control of the company. This will happen when number of directorship of one group is increased without strictly following the provisions of the Act, removing directors of the other side, arbitrarily allotting shares to himself or his nominees leveled at reducing the others stake in the company and hence making him a minority and infringing his rights with the might of the majority formed contrary to the agreements among them, which is a clear breach of contract.

Though a breach of contract cannot be remedied by the Tribunals established under special enactments like CLB, it has inherent powers in dealing with the matters specifically provided under the Act. In another sense only the tribunal can remedy the acts which are in violation of the law as well as the specific protection guaranteed under the Act. Though the agreement between the parties specifically has an arbitration agreement to settle all disputes and matters relating to interpretation of the provisions of the agreement, the parties resorts to approach the Tribunal for remedy without recourse to any alternative dispute resolution methodology. Where there is an arbitration agreement, and a party to such agreement approach a judicial

authority, the other party may apply to the judicial authority to refer the parties to arbitration. Section 8 of the Arbitration and Conciliation Act 1996, empowers the judicial authority to refer the parties to arbitration. However, there are several occasions where the courts have held that they have jurisdiction on matters before them even though there is an arbitration agreement among the parties and denied to refer the disputes to arbitration on technical grounds.

Judicial view on Arbitration Agreement. (Applicability of Section 8)

The Chennai Bench of CLB has examined the applicability of section 8 of the Arbitration and Conciliation Act 1996 in an application filed in the matter of Sporting Pastime India Ltd., and others V Kasturi and Sons Ltd., (reported in 2007 137 CompCas 821 CLB).

Section 8 of the Act, 1996 reads thus: (1) A judicial authority before which an action is brought in a matter which is the 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. (2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. (3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. By virtue of Section 8 of the Act, 1996, it is mandatory for, the judicial authority, before which an action has been brought in a matter, being the subject matter of an arbitration agreement, to refer the parties for arbitration provided, (a) the application under this section is made any time before submitting the first statement on the substance of the dispute; and (b) the judicial authority is satisfied that there is a valid arbitration agreement. Sub-section (3) provides that an arbitration may be commenced or continued and an arbitral award be made in spite of (a) application made under Sub-section (1) and (b) pendency of the issue before the judicial authority.

However, Supreme Court in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya (2003), 5 Supreme Court Cases 531, while interpreting Section-8 enunciated the following among other principles. "(i) The suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, the subject matter of the suit lies outside the arbitration agreement and also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The entire subject of the suit should be subject to the arbitration agreement. (ii) There is no provision in the Act, 1996 suggesting that when the subject matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators. (iii) There is no provision dealing with the situation where some parties to the suit are not parties to the arbitration agreement."

Relying on the above judgment of the Apex Court and of several High Courts, CLB Chennai Bench rejected the company application to refer the matters complained before it under section 397/398 in the above case. The CLB among other things observed that the grievances alleged in the company petition if established could be remedied under section 402 of the Act and therefore outside the scope of arbitral tribunal. The company, one of the parties in the petition was not a party to the agreement based on which arbitration was already in progress between the parties.

Scope of Alternative Dispute resolution Methods

Though the legal provision is thus established by several judgments as above, the basic question remains that there was a "difference of opinion". The oppressive acts alleged by one party would not have surfaced at all in the public domain, if there was a consensus among the disputing parties. The effectiveness of alternative dispute resolutions in the style of mediation/ conciliation lies at the initial stage of differences itself. The process and procedures of specific tribunals like CLB are easier than normal Civil Courts, still it is cumbersome and time consuming. In the case of corporate disputes, the ongoing disputes will severely damage the normal functioning of a company – its business gets affected, there will be damage to its image and good will. Presently we are living in a highly competitive environment and each business entity shall work hard to maintain its place. The valuable time and scarce resources are being wasted in unnecessary legal battles – the

results of which some times are uncertain. Even where specific protections/ provisions are available in the underlying law, one shall try to resolve the disputes through informal methods wherein the interests of both parties are protected. The alternative dispute resolution methods will help not only to solve the differences of parties in a more convenient method but it will keep the human relations out of damage to a great extent.

Even on the orders of tribunals established for specific purposes like CLB's as seen above, the aggrieved party may often prefer appeals to the High Courts and ultimately to the Supreme Court. This again drags the solution and both the parties will be bleeding heavily due to the time overrun and the cost. Whereas under mediation, the differences can be solved on the basis of give and take policies of the parties on the guidance of the mediator. As it is a voluntary settlement the parties will honour their respective obligations than finding rescue provisions through repetitive appeals. Even matters which qualify to be a fit and proper case to complain of oppression and mismanagement within the meaning of section 397/398 of the Act, could be solved outside the legal forums particularly in situations where there is a contractual obligation between the parties and the matters alleged arise out of breach of contract or trust.

Lack of Awareness, the deterrent.

The reasons for increasing disputes and legal fighting are the result of lack of awareness of alternative methods. More awareness should be created among the public to encourage them to resorts to alternative methods for solving their disputes. The Arbitration and Conciliation Act 1996 helped to a great extent to refer disputes to arbitration. However, many a time there are differences of opinion on selection of arbitrators and warrants the interference of High Courts to appoint an arbitrator. It points to a direction where a change in the attitude of the people is required. Alternative Dispute Resolution Centers have to be established in all potential areas and the courts and tribunals should give more stress to mediation and conciliation methods to create visibility of this system and encourage people to approach the court as only the last resort and only after they exhaust other alternative methods.

In the case of corporate disputes, the underlying legislations should provide for resolving disputes informally. Even the Memorandum and Article of Association of companies should recognize the settlements reached through mediation, arbitration and conciliation to settle disputes among the members where public interest is not affected and the informal dispute resolution methods will be an effective remedy to the situation.

(Author: K.Rajesh Kumar ACS, is an Associate Member of the Institute of Company Secretaries of India and an Associate Member of the Chartered Institute of Arbitrators, London. He can be reached at rkumaracs73@gmail.com)

The Lighter Side

Rajiv and Mona are flying to Australia for a two-week vacation to celebrate their 40th anniversary. Suddenly, over the public address system, the Captain announces, "Ladies and Gentlemen, I am afraid I have some very bad news. Our engines have ceased functioning and we will attempt an emergency landing. Luckily, I see an uncharted island below us and we should be able to land on the beach. However, the odds are that we may never be rescued and will have to live on the island for the rest of our lives!"

Thanks to the skill of the flight crew, the plane lands safely on the island.An hour later Rajiv turns to his wife and asks, "Mona, did we pay our Rs 5lakh deposit cheque yet to ICICI Bank?''

"No, sweetheart", she responds. Rajiv, still shaken from the crash landing, then asks, "Mona, did we pay our ICICI Bank Master Card balance yet?'' "Oh no! I'm sorry. I forgot to send the cheque", she says. "One last thing, Mona. Did you remember to send cheques for the ICICI auto loan to them this month?" he asks. "Oh, forgive me, Rajiv", begged Mona. "I didn't send that one, either". Rajiv grabs her and gives her the biggest hug in 40 years. Mona pulls away and asks him, "So, why did you hug me?" Rajiv answers, "They'll find us!"

Supreme Court of India refers border row to mediators

The Supreme Court of India has for the first time referred the 22-year-old border dispute case between Assam and Nagaland for mediation and said "adjudication cannot resolve such differences that have become a routine affair". Several disputes, including border rows and water sharing, among states are pending before the apex court. With this move, the court hopes to sort out such cases.

Supreme Court of Philippines to form mediation committee for Hacienda Luisita dispute

The Supreme Court of Philippines is set to create a special committee to mediate between the concerned parties in the ongoing Hacienda Luisita land dispute. The dispute has been going on between the Hacienda Luisita Inc. (HLI) and the farmer beneficiaries for over a decade, but once again came into focus when Benigno Aquino III - whose family owns the hacienda - was elected president.

IMI Advisory Council

International Mediation Institute, The Hague has convened its Advisory Council comprising some of the world's most inspiring thought leaders in the dispute resolution and negotiation field. The Advisory Council has a strategic review, advisory and enabling function to help support and guide the IMI Board in the achievement of its global mission. The initial members of the Council are Lord Woolf of Barnes (Chair), Sheikha Haya Rashed Al Khalifa, Prof Tommy Koh, William K Slate II, Prof William Ury, and Minister Aleš Zalar.

Country Representative of Mediation World in India

Indian Institute of Arbitration & Mediation has become the Country Representative - India for Mediation World, UK. Mediation World is the definitive guide to mediation developments around the world. Sponsored by the British Government and others, the site is a unique resource designed to make up-to-date information on mediation developments in every country. You can send us your article related to mediation or ADR, which you would like to publish in the Mediation World website. For more information, please see: http://www.mediationworld.net/india/representatives

Discussion is an exchange of knowledge;
Argument is an exchange of ignorance
~ Robert Quillen ~

Germany and Pakistan collaborates for mediation training

The Karachi Center for Dispute Resolution (KCDR) Pakistan, established with the approval of the High Court of Sindh signed a contract with the Consulate General of the Federal Republic of Germany to promote the concept of mediation through the training of 500 judges of Sindh Judiciary and 100 practicing lawyers Karachi in mediation skills.

China adopts new mediation law

The National People's Congress Standing Committee adopted the country's first mediation law and it will take effect on January 1 next year. This marks a milestone in the development of the country's mediation system in its role in settling civil disputes. Mediation of civil disputes has been a tradition for thousands of years in China. Statistics from the Ministry of Justice show that mediation organizations nationwide have successfully settled nearly 28 million civil disputes of the more than 29 million cases they were involved in over the past five years. Despite the important role of mediation organizations at all levels, there has never been a law to regulate their practice except for a set of regulations issued by the State Council in 1954. The latest law has legalized civil mediation procedures and clarified the right of mediators and the parties involved.

New Alternative Dispute Resolution Program in Egypt

The International Finance Corporation (IFC) has launched its Alternative Dispute Resolution Program in Egypt, which promotes mediation as a tool to improve the country's investment climate. The program's objectives are to transform the practice of mediation/reconciliation to become an alternative effective method for resolution of trade and financial disputes in Egypt. Despite Egypt's significant economic reforms over the past years and the country's relatively advanced judicial system, contract enforcement remains one of the main bottlenecks in business operations. According to the World Bank's "Doing Business Report 2010," contract enforcement is one of the country's worst indicators, where Egypt ranked 148 out of the 183 economies. The report noted that it takes a minimum of 1010 days to enforce a contract in Egypt; the enforcement cost being approximately 26 percent of the value of the claim.

Arbitrators boycott professional exams

The Kingdom of Cambodia is setting up a National Arbitration Centre to allow businesses to resolve disagreements outside the court system. The Ministry of Commerce had issued a letter asking candidate arbitrators to take exams ahead of their official appointment. But candidates say the Ministry's order does not comply with a previous government sub-decree, which informed candidates to apply for positions at the National Arbitration Centre directly after completing their training. The fifty four prospective arbitrators boycotted professional exams stating that the tests are not a legal requirement. Thus the arbitrators who are set to work within the system have themselves become subject to dispute.

Bangalore CJ offers free service to mediation centre

The new Chief Justice of Karnataka High Court, Justice Jagadish Singh Khehar has offered his service to mediation centre, free of cost.

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

Think ... Never give up on anything!

Its Madness....

To hate all roses, because you got scratched by one thorn.
To give up all your dreams, because one did not come true.
To lose faith in prayers, because one was not answered.
To give up on your efforts, because one of them failed.
To condemn all your friends, because one of them betrayed.
Not to believe in love, because someone was unfaithful.

Remember that, another chance may come up.
A new friend, A new love, A new life.
Never give up on anything!