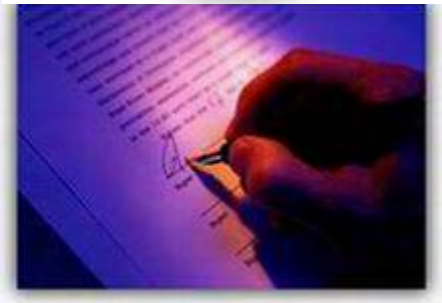
Volume 3, Issue 2, February 2011

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 are happy to inform you that IIAM has been formally invited as a member of the Asian Mediation Association. The membership would be approved in the AGM to be held on the 23rd of this month. This year's topic for the AMA Conference is "Rediscovering Mediation in the 21st Century". As you are aware IIAM has also emphasised "Mediation" as the top priority for 2011. We are sure that once the movement of mediation spreads in the right direction, our world would become a better place to live. We welcome all our members to participate in the 2nd AMA Conference to be held on the 24th and 25th of this month.

Looking forward!

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

ADR Mechanism in India

: SUJAY DIXIT

The technique of ADR is an effort to design a workable and fair alternative to our traditional judicial system. In a developing country like India with major economic reforms under way within the framework of the rule of law, strategies for swifter resolution of disputes for lessening the burden on the courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution (ADR) by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation and negotiation. The author looks at the advantages of the Indian Arbitration Act.

The Concept & its efficacy:

"*It is the spirit and not the form of law that keeps the justice alive.*" LJ Earl Warren

The concept of Conflict Management through Alternative Dispute Resolution (ADR) has introduced a new mechanism of dispute resolution that is non adversarial. A dispute is basically 'lis inter partes' and the justice dispensation system in India has found an alternative to Adversarial litigation in the form of ADR Mechanism.

New methods of dispute resolution such as ADR facilitate parties to deal with the underlying issues in dispute in a more cost-effective manner and with increased efficacy. In addition, these processes have the advantage of providing parties with the opportunity to reduce hostility, regain a sense of control, gain acceptance of the outcome, resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case. The resolution of disputes takes place usually in private and is more viable, economic, and efficient. ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. (Sometimes a fifth type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation).

Need of ADR in India:

The system of dispensing justice in India has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. It is in this context that a Resolution was adopted by the Chief Ministers and the Chief Justices of States in a conference held in New Delhi on 4th December 1993 under the chairmanship of the then Prime Minister and presided over by the Chief Justice of India.

It said: "The Chief Ministers and Chief Justices were of the opinion that Courts were not in a position to bear the entire

burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial".

In a developing country like India with major economic reforms under way within the framework of the rule of law, strategies for swifter resolution of disputes for lessening the burden on the courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution (ADR) by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation and negotiation.

Impact / Resulting Acts of ADR:

The technique of ADR is an effort to design a workable and fair alternative to our traditional judicial system. It is a fast track system of dispensing justice. There are various ADR techniques viz. arbitration, mediation, conciliation, mediation-arbitration, mini-trial, private judging, final offer arbitration, court-annexed ADR and summary jury trial.

These techniques have been developed on scientific lines in USA, UK, France, Canada, China, Japan, South Africa, Australia and Singapore. ADR has emerged as a significant movement in these countries and has not only helped reduce cost and time taken for resolution of disputes, but also in providing a congenial atmosphere and a less formal and less complicated forum for various types of disputes.

The Arbitration Act, 1940 was not meeting the requirements of either the international or domestic standards of resolving disputes. Enormous delays and court intervention frustrated the very purpose of arbitration as a means for expeditious resolution of disputes. The Supreme Court in several cases repeatedly pointed out the need to change the law. The Public Accounts Committee too deprecated the Arbitration Act of 1940. In the conferences of Chief Justices, Chief Ministers and Law Ministers of all the States, it was decided that since the entire burden of justice system cannot be borne by the courts alone, an Alternative Dispute Resolution system should be adopted. Trade and industry also demanded drastic changes in the 1940 Act. The Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly.

Thus "The Arbitration and Conciliation Act, 1996" came into being. The law relating to Arbitration and Conciliation is almost the same as in the advanced countries. Conciliation has been given statutory recognition as a means for settlement of the disputes in terms of this Act. In addition to this, the new Act also guarantees independence and impartiality of the arbitrators irrespective of their nationality. The new Act of 1996

brought in several changes to expedite the process of arbitration. This legislation has developed confidence among foreign parties interested to invest in India or to go for joint ventures, foreign investment, transfer of technology and foreign collaborations.

The advantage of ADR is that it is more flexible and avoids seeking recourse to the courts. In conciliation/ mediation, parties are free to withdraw at any stage of time. It has been seen that resolution of disputes is quicker and cheaper through ADR. The parties involved in ADR do not develop strained relations; rather they maintain the continued relationship between themselves.

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration:

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract, regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or panels of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do accept to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

Once the period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

Conciliation

Conciliation is a less formal form of arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.

Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

When it appears to the conciliator that elements of settlement exist, he may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.

Note that in USA, this process is similar to Mediation. However, in India, Mediation is different from Conciliation and is a completely informal type of ADR mechanism.

Mediation

Mediation, a form of alternative dispute resolution (ADR) or "appropriate dispute resolution", aims to assist two (or more) disputants in reaching an agreement. The parties themselves determine the conditions of any settlements reached— rather than accepting something imposed by a third party. The disputes may involve (as parties) states, organizations, communities, individuals or other representatives with a vested interest in the outcome.

Mediators use appropriate techniques and/or skills to open and/or improve dialogue between disputants, aiming to help the parties reach an agreement (with concrete effects) on the disputed matter. Normally, all parties must view the mediator as impartial.

Disputants may use mediation in a variety of disputes, such as commercial, legal, diplomatic, workplace, community and family matters.

A third-party representative may contract and mediate between (say) unions and corporations. When a workers' union goes on strike, a dispute takes place, and the corporation hires a third party to intervene in attempt to settle a contract or agreement between the union and the corporation.

Negotiation

Negotiation is a dialogue intended to resolve disputes, to produce an agreement upon courses of action, to bargain for individual or collective advantage, or to craft outcomes to satisfy various interests. It is the primary method of alternative dispute resolution.

Negotiation occurs in business, non-profit organizations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life. The study of the subject is called negotiation theory. Those who work in negotiation professionally are called negotiators. Professional negotiators are often specialized, such as union negotiators, leverage buyout negotiators, peace negotiators, hostage negotiators, or may work under other titles, such as diplomats, legislators or brokers.

Lok Adalat:

While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach.

It roughly means "People's court". India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, where by mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences.

There is no court fee and no rigid procedural requirement (i.e. no need to follow process given by Civil Procedure Code or Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 because it is a judgement by consent.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.

Lok Adalat (people's courts), established by the government, settles dispute through conciliation and compromise. The First Lok Adalat was held in Chennai in 1986. Lok Adalat accepts the cases which could be settled by conciliation and compromise and pending in the regular courts within their jurisdiction.

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.

Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.

Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat as the scope for compromise through an approach of give and take is high in these cases.

Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

(Author: Sujay Dixit is a law student, studying in the 6th Semester at NILU Ahmedabad)

Whoever you are, there is some younger person who thinks you are perfect.
There is some work that will never be done if you don't do it.
There is someone who would miss you if you were gone.
There is a place that you alone can fill."
~Jacob M. Braude~

Article

New Evolution in European Cross-border Mediation

- The introduction of 'European Mediators'

: PHILIPE BILLIET & EWA KURLANDA

Mediation practice for civil and commercial cross-border disputes in Europe has reached its turning point. Currently, there is no common set of rules in Europe on the conditions to become an accredited mediator. Thanks to the EMTPJ Project this practice will greatly evolve over the coming years. The authors expect that the EMTPJ Project will significantly change the landscape of cross border mediation in Europe as it introduces European Mediators into the European mediation practice.

Introduction

A succesful mediation entails huge advantages over litigation. One can, for instance, think of protecting future business relationships, the confidential nature of the mediation proces, the voluntary nature of a mediation, its speediness, lower costs compared to litigation and possible synergy effects between disputing parties.

However, the current mediation practice in Europe still seems to be insufficiently adapted to the ever increasing international business relationships within the European Community. This article will demonstrate that the problem essentially lies in the absence of European-wide accredited mediators.

Subsequently, this article will explain how this issue has gradually been dealt with. The authors will conclude that reactions have now reached a turning point under the EMTPJ (European Mediation Training for Practitioners of Justice) Project. The authors expect that the EMTPJ Project will significantly change the landscape of cross border mediation in Europe as it introduces European Mediators into the European mediation practice.

Problem : Legal status of settlement agreement depends on the national or private accreditation of the mediator

Several national legislations in Member States attach specific legal consequences to settlement agreements obtained through the intervention of an accredited mediator. These consequenses are different from legal consequences of settlement agreements that were entered into through the intervention of a non-accredited mediator.

Currently, there is no common set of rules in Europe on the conditions to become an accredited mediator and in each Member State different conditions exist to become one. In certain Member States the conditions are set out by the

Regulator, while in other Member States the conditions are set out by private mediation providers.

The fact that different mediation cultures exist in Europe is often used to defend the upholding of this practice. However, the idea gains field that this practice enables unwanted forms of protectionism in preventing foreign mediators to effectively operate on the national market. The latter idea has provoked increased advocacy to implement the freedom of establishment for mediators throughout the European Union.

Reaction of the European Commission: Harmonization steps

In 2004, the European Commission issued a voluntary code of conduct for mediators. This code of conduct has no binding force and can voluntarily be subscribed to by different mediation providers. The code sets out a body of ethical rules to follow when conducting mediator activities. Unfortunately, this non-binding instrument did not create a practice under which mediators who respect these rules can effectively provide mediation services throughout Europe.

Subsequently, the European Commission realized that more must be done in light of the free movement of persons and the proper functioning of the internal market concerning the availability of mediation services in cross-border disputes. The answer to this problem was the issue of the European Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This Directive aims to harmonize mediation practices for the said cross border disputes in Europe and is to be fully implemented by the Member States by 21st May 2011.

One particularity about this Directive is that, instead of imposing a specific practice on the European market, its broad formulations allow the European Commission to support a bottom-up approach by which the European market organizes itself within the borders that are set out in the said Directive.

In response, the market-driven EMTPJ Project arose under the auspice of the European Commission. Under this project, mediation trainings are provided which incorporate, as far as possible, varied conditions for accreditation and different mediation cultures existing within the European Union.

The Lighter Side

Three guys were fishing on a lake one day, when Jesus walked across the water and joined them in the boat. When the three astonished men had settled down enough to speak, the first guy asked humbly, “Jesus, I’ve suffered from back pain ever since I took shrapnel in the Vietnam war. Could you help me?”

“Of course my son,” Jesus said. When Jesus touched the man’s back, the man felt relief for the first time in years. The second man, who wore very thick glasses and had a hard time reading and driving, asked if Jesus could do anything about his eyesight. Jesus smiled, removed the man’s glasses and tossed them in the lake. When the glasses hit the water, the man’s eyes cleared and he could see everything distinctly.

When Jesus turned to heal the third man, the guy put his hands up and cried defensively, “Don’t touch me! I’m on long-term disability.”

Solution: The introduction of European Mediators

The purpose of the EMTPJ Project is to introduce 'European Mediators' into the European mediation practice. These mediators should, in so far as achievable, be able to intervene as fully accredited mediators in all civil and commercial cross-border disputes throughout Europe.

The introduction of European Mediators is widely considered as a turning point for European cross-border mediation practices. The intensive training to become an European Mediator takes 12 full days and a first group of participants have already graduated in August 2010 at the University of Warwick (UK). Next training sessions are scheduled for September 2011 and will take place at the HUB University of Brussels (Belgium). More information is available on www.emtpj.eu.

Conclusion

Mediation practice for civil and commercial cross-border disputes in Europe has reached its turning point. Thanks to the EMTPJ Project this practice will greatly evolve over the coming years. It is expected that local protectionism of certain mediation providers will gradually fade out, as the mediation providers which recognize the EMTPJ Project will benefit from increased numbers of cross-border mediations.

(Authors: Philipe Billiet is a lawyer at Verwal and Ewa Kurlanda is the Legal adviser at Mott Mc Donald)

Think ... Keep Life in Balance

It's nice to relax on a regular basis. Yet a life of nothing but relaxation would be unbearably miserable. It is extremely fulfilling and energizing to put forth great effort and to make things happen. Yet if that's all you ever do, your spirit will surely become worn away.

Life is best when it is balanced. Night and day, warm and cool, wet and dry, effort and rest all benefit from each other and from the natural balance that permeates all of life. Are you plagued by frustrations, or weariness, anxiety, doubt, confusion or lack of motivation?

Then the chances are very good that something in your life is out of balance. Often, the best way to get something done is to stop working on it for a while. And the best way to fully enjoy the time when you're not working is to practice discipline, diligence and commitment during the times when you are working.

Your life is blessed with many different aspects. Keep them all in balance, and they will all be of much greater value to you.

~Ralph Marston~

"One of the best ways to persuade others is with your ears - by listening to them"
~ Dean Rusk ~

Bradman son considers Mediation over name

Sir Donald Bradman's son may try mediation over the alleged exploitation of the legendary cricketer's name. John Bradman and two other executors of Sir Donald's estate are suing law firm Allens Arthur Robinson, claiming it breached its contract and was negligent in assigning Sir Donald's name to the Bradman Foundation.

Mr Bradman's displeasure with the law firm became public in 2005 when the foundation licensed an Australian food company to market 'Bradman' chocolate chip cookies in India. The family at the time described Bradman as "a loved and missed family member, not a brand name like Mickey Mouse" but the foundation counterclaimed that it had confidence Sir Donald would have approved the venture.

Indian Supreme Court advices lawyers to follow Mahatma Gandhi

The Supreme Court of India asked advocates to follow Mahatma Gandhi and persuade their clients not to go in for litigation and instead resolve the disputes through arbitration and mediation. A bench opined that court cases drag on for years ruining both parties.

2nd AMA Conference - Rediscovering Mediation in the 21st Century

Organised by: ama Asian Mediation Association

Sheraton Imperial Hotel
Kuala Lumpur, Malaysia
24-25 February 2011

The 2nd AMA Conference will be held in Kuala Lumpur, Malaysia at the Sheraton Imperial Hotel from 24-25 February 2011. The theme for this conference is "Rediscovering Mediation in the 21st Century". The keynote address will be delivered by YBhg Tan Sri Razali Ismail, Former United-Nation Secretary-General's Special Envoy (2000-2005); Pro-Chancellor of Universiti Sains Malaysia, on "*The Role of the UN Secretary-General's Special Envoy to Myanmar in Mediating between the Government of Myanmar and Daw Aung San Suu Kyi*".

For further details see; http://www.arbitrationindia.com/htm/events.html

Swiss Supreme Court rules on Arbitrators' fees

The Swiss Federal Supreme Court has issued a landmark judgment on Arbitrators' fees, ruling that tribunals do not have the power under the Swiss Rules of Arbitration to issue binding awards on how much they should be paid.

EU Mediation Directive: implementation and key changes

The Ministry of Justice UK has confirmed that the EU Mediation Directive will apply only to cross-border disputes. The Civil Procedure Rules are being amended and a statutory instrument is being prepared to give effect to new rules on the enforceability of mediated settlement agreements, the confidentiality of mediation and the suspension of limitation periods while parties mediate.

Hong Kong enacts new Arbitration Ordinance

The long-awaited new arbitration ordinance was recently enacted in Hong Kong and is expected to come into force in the first half of 2011.

The ordinance heralds significant reform of the arbitration regime in Hong Kong and reflects the Government's attempt to promote Hong Kong as a regional center for international arbitration.

New Mediation Law in Ontario

Ontario enacted the Commercial Mediation Act, 2010. The purpose of the Act is to facilitate the use of mediation to resolve commercial disputes. Ontario is the second Canadian province after Nova Scotia to adopt such legislation.

The Act is based on the UNCITRAL Model Law on International Commercial Conciliation (2002). One of the major advantages of the Act is that it is easier to enforce a settlement agreement. On registration of a settlement agreement, it has the same effect as a judgment of the court. The agreement can then be registered in other provinces in Canada and in some foreign jurisdictions under applicable reciprocal enforcement of judgment rules.

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