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EDITOR'S NOTE

We hope the draft criteria for IMI Intercultural Competency Certification for Mediators published in the previous edition was useful. The EC Directorate-General for Health and Consumers (DG SANCO) had formulated a Consultation Paper on the use of ADR schemes to resolve disputes related to commercial transactions and practices in the EU. The IMI Comments on EC Consultation Paper is included in this edition. The 2nd part of the Comments will be included in the next edition. We hope these guidelines and comments will enhance our outlook on the ADR procedures.

We look forward to your comments.

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

Interim Measures under the Indian Arbitration Act

: BARCELONA PANDA

In arbitral proceedings, the need often arises for provisional remedies or other interim measures of reliefs. Even though the basic philosophy of Arbitration is against Court intervention, for many reasons such judicial interventions are inevitable. Under the Indian Arbitration Act, the Courts not only have the power to grant interim measures, but this power, in most cases, is wider than that of the Arbitral Tribunal. The Author looks at the powers, scope, pros and cons of the provision for interim measure in the Indian Arbitration Act vis-à-vis the UNCITRAL Model Law.

INTRODUCTION

In arbitral proceedings, the need often arises for provisional remedies or other interim measures of reliefs because, in reality, arbitral proceedings are no less adversarial than litigation in public courts. When a dispute arises, aggrieved party is always concerned with protecting his interest either in movable or immovable properties. Party is always interested in taking timely action against another party or parties so that his or her interest in the properties is protected. This prompt and timely action makes other party or parties unable to play any sort of mischief by way of tampering with properties. Thus Arbitration and Conciliation Act, 1996, under Section 9 gives parties power to approach Courts for seeking interim measures. Often it sounds against the basic philosophy of Arbitration for allowing Court's intervention, but for many reasons such judicial interventions are inevitable.

INTERIM MEASURES: CONCEPT

Interim Measures are granted during the pendency of adjudication of a dispute and are usually in the form of injunctions, specific performance, pre-award attachments etc. By definition, 'interim reliefs' are temporary or interim in nature and are granted in advance of the final adjudication of the dispute by the arbitral tribunal.

(A) Types of interim measures:

Provisional remedies and interim relief come in many forms, depending on the parties involved and context of the dispute. Interim reliefs may be broadly classified into the following categories[1]:

(Footnote)

[1] See, Lira Goswami, Interim Relief under the Arbitration Act, 1996. (Goswami) Speech at New Delhi: 2000, available at www.arbitration-icca.org/media/0/12119958380600/2000.pdf

(a) Reliefs which are procedural in nature e.g., inspection of property in possession with third parties or compelling the attendance of a witness.

(b) Reliefs which are evidentiary in nature and are required to protect any document or property as evidence for the arbitration; and

(c) Reliefs which are interim or conservatory in nature and are required to preserve the subject matter of the dispute or the rights of a party thereto or to maintain the status quo and to prevent one party from doing a particular act or from bringing about a change in circumstance pending final determination of the dispute by the arbitrators.

These reliefs can be provided by granting an interim injunction, appointing a receiver, making of an attachment order or any other interim order for securing the amount in dispute or for the preservation, custody or sale of the property in dispute. During the pendency of a proceeding in a court, a party may make an application for grant of an interim measure(s) and the court may grant such measure(s) as permitted under the procedural rules governing the powers of the court or those that it may derive through its inherent powers.[2]

The principle governing the grant of interim measures is the use of judicial discretion by a Court while taking into consideration questions pertaining to balance of convenience, the applicant's ability to make out a prima facie case and most importantly the irreparable harm that would be caused in the event the measure is not granted.

Under Indian Law, court's have both the express power of granting interim measures under Order 39 Rule 1 and Rule 2 of the Civil Procedure Code as well as their inherent power under section 151 to grant an interim measure other than that specified under Order 39, Rule 1 and 2.[3]

(B) Interim measures under Arbitral Proceedings:

Arbitration is a forum for adjudication that is a departure away from courts and in fact, court interference has been considered a bane to its development.[4] However, under arbitration procedural statutes and rules, courts not only have the power to grant interim measures but this power, in most cases, is wider than that of a Tribunal.

Though, it has been realised that a total curtailment of the court's power to grant interim measures during the pendency of arbitration cannot be envisaged and it is necessary to allow the court to grant interim measures, courts have, keeping in mind the new changes in legislative thinking, reduced their interference in arbitration proceedings. However it is not possible to completely do away with the role of the court as the nature of interim injunctions make it necessary to go to a court of law and it is possible that the very purposeof seeking an interim measure may be defeated.

(Footnote)

[2] P.M. Bakshi, Mulla-The Code of Civil Procedure, 12th ed., p. 1007.

[3] Ibid, Under Indian Law there was a conflict of judicial opinion on the question whether Court's could issue a temporary injunction through the use its inherent power u/s 151 of the Code of Civil Procedure when the case did not fall with the purview of Order 39 Rules 1 and 2. The matter was settled in *Manohar Lal v. Seth Hira Lal*, (1) SCR 450, wherein the Supreme Court of India held that a Court had power u/s 151 to issue injunctions for matters not falling in Order 39, Rules 1 and 2.

[4] Arthur Marriott, Q.C., Indian and International Arbitration, (Marriott), Address delivered on 6th May. 2002 at New Delhi.

Iron rusts from disuse;
Water loses its purity from stagnation...
Even so does inaction sap the vigor of the mind.
~Leonardo da Vinci~

INTERIM MEASURES GRANTED BY COURTS UNDER SECTION 9 OF THE ACT

(A) Section 9 of the Indian Act:

It appears that the scope for application of an interim measure under section 9 of the Indian Act is as wide as the scope under Article 9 of the UNCITRAL Model Law. Section 9 allows a party to seek those interim measure laid down under sub-clause (a) to (d) as well as 'any other measures' a court deems appropriate under sub-clause (e).[5] Moreover, section 9 does not limit the grant of interim measures to the subject matter of the dispute and secondly, sub-clause (e) grants courts the discretionary power to grant such interim measures as appears just and convenient.

The interesting difference between Article 9 and Section 9 is that Article 9 states that it shall not be incompatible for a party to apply to a court, leading to the inference that the UNCITRAL Model did not really encourage applications to courts but just held that such applications did not suffer from incompatibility. Section 9, on the other hand, does not read on the road of incompatibility but, in effect, grants leave to the parties to apply to a court for seeking an interim measure.

(B) Time for invoking the Court's jurisdiction (under the Indian Act):

One of the controversies that emerged after the passing of the Indian Act was with regard to the point of time when an application could be made to a court for granting interim relief. This controversy was finally settled by the Indian Supreme Court in its high-water mark judgment in *Sundaram Finance vs. NEPC.*[6] The Madras High Court while interpreting Sec. 9 had ruled that in cases of prior referral under section 9 at least a notice for commencement of Arbitration was necessary.

Justice B.N. Kripal ruling on behalf of the Court overruled the judgment of the High Court and held that an application under section 9 could be made even prior to sending notice for commencement of the Arbitration to the other party. Holding otherwise, according to Kripal J. would be rendering the meaning of the words 'before ... the arbitral proceeding' otiose. In his judgement, Kripal J. keeping in view, Article 9 of the UNCITRAL Model Law opined that Article 9 clarifies the mere request to a court by a party to an arbitration agreement for an interim measure 'before or during arbitral proceedings' and it would not be incompatible with the arbitration agreement, meaning thereby that the arbitration proceedings could commence after a party had approached the court for an order for interim protection.[7]

The Supreme Court, in *Sunderam Finance Ltd. v. NEPC India Ltd.*[8], held that Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the Tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service.

(C) The UNCITRAL Model Law – Article 9:

Article 9 of the UNCITRAL Model Law dealing with arbitration agreements and interim measures granted by courts lays down as under:

> *'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure'.*

Article 9, as can be seen, is expansive for it allows a party to request from a court an interim measure of protection, without limiting such measures to 'the subject matter of the dispute', as in the case of Article 17 meaning thereby that under the UNCITRAL Model Law courts may order any measures including pre-

(Footnote)

[5] Section 9: Interim measures etc. by Court.

[6] AIR 1999 SC 565.

[7] Ibid. at p. 569

[8] AIR 1999 SC 565

award attachments, third party compliance etc.[9] Article 9, also lays down that granting of an interim measure by a court does not negate the applicability of an arbitration agreement and is not contrary to the intention of parties agreeing to submit a dispute to arbitration. Thus no party can turn around and nullify an arbitration agreement on the ground that a court taken on the dispute for the limited purpose of granting interim measures under Article 9.

However, unlike the Indian Act, Article 9 does not provide for a specific time prior to the commencement of the arbitration when a dispute may be referred to a court. But being a facilitating provision, it must be interpreted in such manner as would assist its operation and not be so construed as to debar such prior referrals as allowed under the Indian Act.

(D) The need for balanced intervention by Courts:

Arbitration procedural rules contain provisions by which a party may seek recourse to courts for grant of interim measures. The need for the court's role is felt in relation to enforcement of interim measures granted by Arbitral Tribunals, as well as, granting those interim measures that were beyond the scope of the Tribunal. The reason for expressly allowing parties to take recourse to courts is on account of the fact that constitution of an arbitral tribunal can be a time consuming process.[10]

The Court will generally take into account the following considerations while granting interim relief under section 9:

1. The party applying for interim relief must establish a prima-facie case.
2. The balance of convenience should be in its favour.
3. The party will suffer irreparable loss or injury if the interim measure is denied to it.
4. The exercise of discretion has to be in beneficial manner depending upon the circumstances of each case.[11]

(E) General factors for interim relief:

A party seeking to obtain an interim measure (particularly before the arbitral tribunal has been constituted) must ensure that by taking steps in a court and thereby submitting to the jurisdiction of the domestic court it does not waive any rights it has under the arbitration agreement. The ability to obtain an interim measure will generally depend upon the procedural law governing the arbitration and the law in the jurisdiction in which the interim measure is sought to be enforced.

(Footnotes)

[9] See confirmation of the same under the UNCITRAL Arbitration Rules.

[10] See, Indian Act, Section11.In cases of a sole arbitrator there must be unanimity in agreement between the parties and in case of a three member arbitral tribunal both the representing arbitrators need to agree on the presiding arbitrator

[11] *Newage Fincorp (India) Ltd. V/s Asian Corp Securities Ltd.* 2001 (1) RAJ page 170.

Generally, an applicant party needs to establish the following factors:

- There is an "urgent need" for the interim measure;
- Irreparable harm will result if the measure is not granted;
- The potential harm if the interim measure is not granted substantially outweighs the harm that will result to the party opposing the measure if the measure is granted; and
- There is a substantial possibility that the applicant will ultimately prevail in the dispute.

SCOPE OF COURTS' JURISDICTION TO GRANT INTERIM RELIEF

Sub section (2) of section 2 provides in a clear and unambiguous language that Part I shall apply where the place of Arbitration is in India. However, the Delhi High Court, *Dominant Offset (P) Ltd vs. Adamovske Strojirny*[12] where the arbitration took place at London, held that Part I also applies to International Commercial Arbitration conducted outside India.

However, the Division Bench of Delhi High Court in *Marriott International Inc. vs. Ansal Hotels Limited*[13], where arbitration proceedings were held at Kuala Lumpur in Malaysia, held that Part I of the Act shall apply to all arbitrations where the place of arbitration is in India.

Moreover, in *Max India Ltd v General Binding Corp.*[14] The Division Bench of the Delhi High Court upheld the decision of the Single Bench of the High Court regarding the jurisdiction of Indian courts to grant interim relief in international commercial arbitrations. The division bench uphold the judgment of single judge and came to the conclusion that as per the decision in *Bhatia International v. Bulk Trading Co.*[15] it was settled law that Part 1 of the Arbitration and Conciliation Act would apply to all arbitrations, including international commercial arbitrations held outside India, unless the parties by express or implied agreement excluded all or any of its provisions.

As far as the position of the Indian Law is concerned, this decision seeks to clarify the scope of the powers of an Indian court to grant interim relief in international commercial arbitration. The rule that seems to emerge is that when the parties have specifically intended that: (a) the law governing the contract; (b) the rules governing the arbitration; and (c) the court's jurisdiction and the place of arbitration are outside India, then it would signify that the Indian court's jurisdiction and applicability of Part 1 of the Act (which contains the power of the Indian courts to provide interim measures) are excluded.

(A) Sec. 9 as an exception to Sec. 5:

Section 5 of the Act no doubt forbids any intervention by any judicial authority, but any such exclusion of jurisdiction is only in matters, which are not otherwise specifically provided for. Section 9 of the Act is, however, an exception to the general rule contained in Section 5 in as much as the former specifically empowers the Civil Court concerned to pass suitable orders on the subject and in relation to matters stipulated therein. There is, therefore, no merit in the contention that Section 5 would exclude the jurisdiction of the Civil Court otherwise competent to entertain applications and pass orders in regard to the stipulated matters under Section 9 of the Act.[16]

(Footnotes)

[12] 1997 (2) ALR 335, Similar view was again taken by Delhi High Court in the case of *Olex Focas Private Limited vs. Skoda export co. Ltd.*, (AIR 2000 Delhi 161).

[13] AIR 2000 Delhi 377

[14] FAO (OS) 193/2009 Delhi High Court. Max India Ltd had filed a petition under s.9 seeking to restrain General Binding Corp (GBC) from implementing the terms of an agreement that it had entered into directly or through its holding company with Cosmo Films regarding the sale of its commercial prints finishing business. The agreement specifically provided that the Singapore courts had jurisdiction to resolve any disputes between the parties subject to Arbitration under the Singapore International Arbitration Center Rules. Max India had invoked the arbitration clause and duly served notice on GBC. Pending the arbitration Max India argued that it had the right to file S.9 application in India itself.

[15](2002) 4 S.C.C. 105.

[16] Yenepoya Minerals And Granites Limited, Mangalore And Anr. Vs Maharashtra Apex Corporation Limited, Bangalore [2004(2) Arb. LR 47 (Karnataka) (DB)(Karnataka High Court) decided on 05-01- 2004]

(B) Circumstances preventing court from granting interim relief:

The Bombay High Court in *Nimbus Television & Sports Vs D G Doordarshan*[17] opined that if the interim relief prayed for u/s 9 would amount to granting final relief frustrating the arbitration proceedings such a relief cannot be granted by the court.

In *Navbharat Ferro Alloys Ltd. vs. Continental Glass Ltd.*[18], the Delhi High Court held that when the claim is for money, the sale of materials cannot be ordered as an interim relief. However, it is submitted that an order of interim measure of protection can be passed by a competent court for sale of property where such property forming the subject matter of the dispute is perishable in nature.

The Bombay High Court, in *Anil Construction vs. Vidharbha Irrigation Dev. Corpn*[19], held that the benefit of section 9 cannot be availed of by a party, which has no intention to appoint the Arbitral Tribunal. The provision cannot be availed by a party for restraining the other party from approaching the Arbitral Tribunal.

The Delhi High Court, in *Arun Kapur v. Vikram Kapoor and others*[20], after considering the decision of an English court in *Channel Tunnel group Ltd. vs. Balfour Beatty construction Limited*[21] observed as follows:

> "*It is cardinal rule that if the party invokes preliminary alternative remedy before the Arbitral Tribunal, it is debarred from invoking the jurisdiction of the court under Section 9 of the Act. Ordinarily if the arbitrator is seized of the matter the interim relief should not be entertained and the parties should be advised to approach the arbitrator for interim relief unless and until the nature of relief intended to be sought falls outside the jurisdiction of the arbitrator or beyond terms of the agreement or reference of disputes. Otherwise, the very object of adjudication of disputes by arbitration would stand frustrated. A party should always be discouraged to knock the door of the Court particularly when the arbitrator is seized of all the relevant or even ancillary disputes.*"

(C) Is parallel application u/s 9 as well as u/s 17 possible?

The Court can exercise power under section 9 to grant interim measures even during the pendency of application under section 17 before the Arbitral Tribunal. Remedy available to a party under section 17 is an additional remedy and is not in substitution of section 9.[22]

(Footnotes)

[17] All Mah. L R 1998(2) page 6
[18] [1998, 1 ALR 492]
[19] 2000 (1) M L J 38
[20] 2002 (1) ARB. L R 256
[21] 1993 (1) ALL E R 664
[22] *Atul Ltd Vs Prakash Industries Ltd*, 2003(2) RAJ 409 Delhi)

Recently, a two-member bench of the Supreme Court, in the case of *Firm Ashok Traders vs. G.D Saluja*[23] held that

(1) An application under Section 9 is neither a suit nor an application for enforcing a right arising from a contract – Prima facie the bar enacted by Section 69 of the Partnership Act, 1932 is not attracted to an application under Section 9 of the Act.

(2) Only a party to an arbitration agreement is qualified to make an application under Section 9. A person not a party to an arbitration agreement cannot make an application under Section 9.

(3) When application under Section 9 is filed before the commencement of arbitral proceedings, the applicant must be able to satisfy the Court that arbitral proceedings are positively going to commence within a reasonable time. There should be proximity between the application and the arbitral proceedings.

DRAWBACKS EXPERIENCED IN THE PROVISIONS FOR INTERIM RELIEF

The Law Commission of India in its 176th report published in 2001 noted a number of loopholes in the provisions for interim relief in the 1996 Act which were exploited by the parties after the Act came into force.[24]

Provisions contained in section 9 regarding the availability of interim relief even before the arbitration proceedings commence had been misused by parties. It so happened that after obtaining an interim order from the court, parties did not take initiative to have an arbitral tribunal constituted. This allowed them to reap the benefits of the interim order without any time limit.

The Law Commission in its 176th report, observed that very often, in the past, Parties had used underhand means to destroy evidence which they felt could go against them during the Arbitral Proceedings or had attempted to concoct witnesses and tamper with evidence, in the possession of a third party. As a result, there is an immediate need to change the provisions of the existing section, so that the Tribunal could get more powers to deal with such situations.

(A) Difficulties in granting interim measures in Arbitration:

The contractual nature of arbitration gives rise to several unique difficulties.

1. Non-enforceable nature of interim measures granted by an arbitral tribunal is an accepted disadvantage that an Arbitral Tribunal faces when granting interim relief and without any coercive enforcement powers[25]

2. A common difficulty in arbitration occurs when resolution of the dispute involves a third party against whom no order of the Tribunal shall be valid for the reason of lack of jurisdiction.[26]

3. When interim measures of protection are needed against one of the parties to the arbitration, issues arise as to the availability of such remedies when they are sought at early stages in an arbitral proceeding.[27]

(Footnotes)

[23] 9th January, 2004(AWLJ 175)

[24] 176th Report of the Law Commission of India *available at:* www.lawcommission.nic.in/lawcommission_176th_report.pdf

[25] David St. John Sutton, John Kendall, Judith Gill, Russell on Arbitration, 21st ed., Sweet and Maxwell, (Russell,) pp. 386-387.

[26] See Bernardini, The Powers of the Arbitrator, in Conservatory Measures. Also See, Lord Mustill, Comments and Conclusions, in Conservatory & Provisional Measures in International Arbitration, 9th Joint Colloquium (ICC Publication 1993) (hereinafter Conservatory Measures).

[27] See Lawrence W. Newman and Michael Burrows, Provisional Remedies in Aid of Arbitration, 212 N.Y. L.J., Dec. 29, 1994, at 3 (hereinafter Newman II).

4. Parties to arbitration also face difficulties when one party seeks interim relief at an early stage of the proceeding. In arbitration, it is typically difficult to obtain such relief expeditiously, because the Arbitral Tribunal has not yet been constituted. Thus, most parties in need of this immediate assistance seek the aid of national courts for this emergency relief.[28] If a party seeks to delay the opposing party's request for an injunction or attachment, that party can slow the process considerably by taking a long time to select an arbitrator.

5. The Tribunal's jurisdiction to grant interim measures may be limited by the governing law of the arbitration.

CONCLUSION

It is submitted that lacunas in the provisions of interim measures should be set right by legislative initiation. Six years have passed but the Amendment Bill, 2003 has not been made into law because the Legislature feels that there are many other important issues like enforcement of interim orders and Costs of proceedings which need to be taken care of before making these Amendments to Ss.9 & 17.

The system of dual agency for providing relief needs to be abolished or otherwise some enforcement mechanism be provided for enforcement of the interim measures of protections ordered by the Arbitral Tribunal. It would be better that application of interim measures is put to the Arbitral Tribunals as they are seized of the subject matter under dispute. Only when a party is not able to get relief from the Arbitral Tribunal, it should be allowed to knock the doors of the Court. This will be in line with the objectives of the Act to minimise the intervention of the Court in arbitral proceedings.

One aspect in all the statutes /rules is common: they follow the policy of minimal role to be played by Courts. Thus, one of the ways by which courts may determine whether they are required to interfere in granting an interim measure is by keeping in mind the powers exercisable by the Tribunal, thereby ascertaining whether in a given case the interim relief claimed by the applicant can be granted by the Arbitral Tribunal. If held in the affirmative, the next question they would be required to answer is whether the said relief can be granted quickly and effectively as the situation demands and herein unless the applicant is able to demonstrate that the delay will cause irreparable hardship or injury, in which case the court may intervene in order to meet the ends of justice, the court should, in all other circumstances, refrain from interfering and direct the parties to seek relief from the Arbitrators.

(Footnotes)

[28] See Richard Allan Horning, Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (In Toto), 9 Am. Rev. Int'l Arb. 155 (1998)

(Author: Barcelona Panda is a 4th year student of Hidayatullah National Law University, Raipur)

The Lighter Side

A taxi passenger tapped the driver on the shoulder to ask him a question.

The driver screamed, lost control of the car, nearly hit a bus, went up on the sidewalk, and stopped inches from a shop window.

For a second everything went quiet in the cab, then the driver said, "Look, don't ever do that again. You scared the daylights out of me!"

The passenger apologized and said he didn't realize that a little tap could scare him so much.

The driver replied "Sorry, it's not really your fault. Today is my first day as a cab driver. I've been driving hearses for the last 25 years."

Article

IMI Comments on EC Consultation Paper:

On the use of ADR schemes to resolve disputes related to commercial transactions and practices.(Part -1)

: IRENA VANENKOVA

This is a comment by the International Mediation Institute (IMI)[1] on the 18 January 2011 Consultation Paper of the EC Directorate-General for Health and Consumers (DG SANCO) on the use of ADR schemes to resolve disputes related to commercial transactions and practices in the EU. The Consultation Paper defines ADR as any out-of-court dispute resolution mechanism. This embraces complaint processes, ombuds schemes and other mechanisms in different sectors, trades and countries for handling individual and collective consumer redress.

IMI believes that mediation should not be categorized with other "ADR" processes. Unlike complaint processes, ombuds schemes, arbitration etc, all of which have a vital place in effective dispute management, mediation is recognized by, or assimilated into, the civil justice systems of many countries, for example through court-connected programmes. Moreover, although mediation can be used long before a formal dispute crystallizes, often mediation happens once a dispute arises in a recognized form, even though litigation has not begun. Mediation therefore provides a last-chance opportunity when other "ADR" mechanisms have been tried but have failed to resolve a dispute. The DG SANCO Consultation Paper is aimed not only at consumer disputes with companies (whether collective or not) but also at disputes that SMEs have with one another. Mediation provides a non-contentious pre-trial dispute resolution solution in both categories and should therefore be addressed separately from other ADR mechanisms. IMI generally supports the comments of the European Justice Forum insofar as they relate to those other forms of ADR.

Accordingly, IMI offers the following comments on the 16 questions posed by the Consultation Paper with a focus only on mediation.

(Footnote)

[1] The International Mediation Institute (IMI) is a Foundation (*stichting*) based in The Hague and classified in the Netherlands as an *ANBI – Algemeen Nut Beogende Instellingen* (ie an *Institution Aimed At The Common Good*). IMI's mission is to establish high competency and quality standards for mediators worldwide and to promote understanding and acceptance of mediation by disputants worldwide. IMI exists for the benefit of all stakeholders in the field of mediation, including all disputants, mediators and providers, trainers and educators, judiciary and Government institutions and does not pursue an agenda on behalf of any particular stakeholder group. IMI does not provide mediation services in the marketplace and is funded by donations.

Consumer & Business Awareness of ADR

(1) What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?

Consumers and businesses both need to understand the key aspects of mediation including how and why it works, the neutrality of the mediator, confidentiality, costs and the non-binding nature of the process. Without that understanding, acceptance will be low. Because mediation happens in private, and outcomes - even when made public – are rarely attributed to mediation, the public appreciation of mediation is not high.

Consumer, business and government bodies could give mediation more credibility:

- Members of ECC-Net, BEUC and other consumer groups could better explain how mediation works through consumer bodies, citizens advice centres, etc and promote access to quality mediation services, indicating which businesses support mediation, via credible consumer leaders and consumer product and service analysis sources.

- A public register could be maintained at national and EU levels listing subscribers to a public pledge[2] to use mediation before court action in all appropriate instances.

- Trade bodies and other business organizations could urge members to include simple multi-step dispute resolution clauses in all terms of business with consumers.

- Governments could fund creation of short videos[3] portraying the mediation process and other informative and promotional materials to enhance understanding of mediation.

- Government agencies could include multi-step mediation clauses in all procurement and other contracts to demonstrate that they practice mediation proactively.

- Governments could sponsor schemes within the national judicial process to encourage use of mediation, and make mediation a mandatory step prior to any judicial hearing (please see response to Q7, below).

(Footnotes)

[2] Inspiration can be drawn from the CPR *Corporate Policy Statement on Alternatives to Litigation* signed by 847 businesses. A similar CPR pledge has been signed by over 1,500 law firms http://cpradr.org/About/ADRPledge/LawFirmPledgeSigners.aspx

[3] Although it features a B2B scenario (easily adapted to a C2B case), see, for example: http://www.inta.org/Mediation/Documents/INTAMediationQuickTime.htm and http://www.inta.org/Mediation/Documents/INTAMediationWindowsMP.htm

(2) What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGOs in raising consumer and business awareness of ADR?

In addition to the roles suggested in Q1 above, ECC-Net is well-placed to offer an information, co-ordinating and convening service to secure best practice sharing and a degree of commonality in approach.

Complaints and ombuds schemes often have terms of reference that exclude certain cases, and their services do not necessarily resolve all disputes that they can handle. The schemes and their regulators need to explain to consumers what options they have if their dispute remains unresolved. Instead of merely directing them to court action, they should strongly encourage mediation before any court action.

Helplines can be enormously useful to consumers and SMEs. The UK's National Mediation Helpline[4], operated under the authority of the Ministry of Justice, is an instructive and credible model for impartial advice and guidance.

(3) Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient ways?

It would be more effective to encourage businesses to subscribe to a pledge (see Q1) and to indicate when they are part of a mediation scheme rather than compel them to do so. Many businesses need to be educated in mediation techniques in order to appreciate mediation as a competitive advantage and actively want to highlight their inclination to avoid rather than foster disputes. Compulsion before education usually fails to have the desired effect except when integrated into judicial process. Some form of kitemark or logo would work well, especially if linked to a pledge as described under Q1 above, and backed by relevant trade or industry bodies. Requiring consumers to agree to subsidized or free mediation via legal aid schemes would be valuable since many will not have experienced mediation and may otherwise reject the idea through lack of experience or understanding.

(4) How should ADR schemes inform their users about their main features?

Websites. Most responsible subscribers to dispute resolution schemes will indicate their endorsement and commitment on their own websites and link to a place where objective and impartial information will be available. Additionally, while each country is different, some have umbrella organizations for independent advice bodies.[5]

Involvement of Traders/Suppliers

(5) What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?

The most effective means of ensuring mediation is used is for judicial systems to embrace mediation as a procedural precursor to litigation (ie make mediation a mandatory pre-trial process step). Please see response to Q7 below.

Regarding compliance, because mediation is consensual and any outcome is achieved voluntarily, there is typically a very high level of compliance by the parties and mediated settlement agreements generally include compliance aspects. Where mediated settlements risk non-compliance by one or more parties, the settlement could be converted into a consent judgment or writ of execution in some countries.

Another means of persuading disputing parties to take advantage of mediation is to lower the financial threshold through public and other subsidy of mediation in the consumer field (please see answer to Q11 below). Legal Aid schemes for consumers should require mediation as a precursor to any litigation and

(Footnotes)

[4] http://www.nationalmediationhelpline.com/

[5] See for example: http://www.adrnow.org.uk/

adverse cost consequences (eg withdrawal of legal aid) for failing to participate in good faith should be made clear.

Businesses, including SMEs, could make much greater use of multi-step dispute resolution clauses in standard terms of business and contracts, helping themselves, as well as their customers, to reduce exposure to time-consuming complaints and disputes. Such multi-step clauses could, for example, include negotiation, voluntary referral to a complaints process, and/or an ombuds process, and if these fail to resolve the matter, then to mediation, and if mediation should fail the case could then be referred to arbitration.

(6) Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?

It would generally not be necessary to make adherence to a mediation scheme mandatory. If mediation is incorporated into civil justice systems as a necessary precursor to litigation via court-connected schemes (as recommended in the response to Q7, below), this will naturally encourage businesses to introduce ADR much earlier in a dispute's life cycle. This would benefit consumers and others with whom they fall into dispute.

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Think ... The 100 Dollar Bill

A well known speaker started off his seminar by holding up a $100 bill in a room of 200 people, and asked, "Who would like this $100 bill?" Hands started going up.

He said, "I am going to give this $100 bill to one of you, but first let me do this...." He proceeded to crumple the $100 up.

He then asked, "Who still wants it?". Still the hands were up in the air.

"Well".....he replied, "What if I do this?".....and he dropped it on the ground and started to grind it into the floor with his shoe. He picked it up, now crumpled and dirty. "Now who still wants it?" he asked. Hands still shot up!

"My friends, you have all learned a very valuable lesson. No matter what I did to the money, you still wanted it...because it did not decrease in value. It was still worth $100."

Many times in our lives, we are dropped, crumpled, and ground into the dirt, by the decisions we make, and the circumstances that come our way. We feel as though we are worthless. But no matter what has happened or what will happen, you never lose your value!

Dirty....clean.....crumpled....or finely creased..... you are still priceless to those who love you. The worth of our lives comes not in what we do or who we know, but by WHO WE ARE.

You are special....don't ever forget it. Count your blessings.....NOT your problems.

~Author Unknown~

Resolve Babri case through mediation

Chief Justice J.S. Khehar of Bangalore High Court said that high-profile cases like the Babri Masjid dispute can be resolved through mediation rather than in a court of law. It is his personal view as such cases could be better resolved if they are referred to mediation.

Young Arbitration Practitioners in Paris

The French Arbitration Committee (CFA) has set up a young practitioners group in Paris for lawyers and academics who are under 40 years old and have a professional interest in French international arbitration law.

Compulsory Mediation for Insurance Disputes

New legislation in Italy requires parties in civil and commercial disputes to attempt to resolve their differences through mediation. Once the mediation process is completed, the matter can then be heard before a judge in the civil court. The new mandatory mediation particularly includes disputes relating to Insurance contracts, Banking and financial contracts; and Medical negligence and libel by the press or advertising media.

Court okays class actions despite arbitration clauses

Disgruntled customers in British Columbia can pursue class-action lawsuits against big companies even if they've signed away that right in consumer contracts, Canada's top court ruled Friday. In a 5-4 split decision, the Supreme Court of Canada overruled a 2009 Court of Appeal decision in part by ruling that the province's consumer-protection law provides an opening for customers to get around an arbitration clause in service contracts.

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