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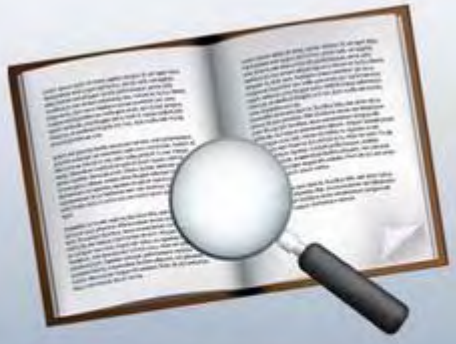

IN THIS ISSUE .....

EDITOR'S NOTE

What is the aim of popularizing mediation or ADR? I think first it would be to facilitate early resolution of dispute amicably before it develops into a graver dispute. Secondly it would also help to bring down court dockets and arrears, so that the Courts could have time to effectively deal with disputes pending before it. But then there seems to be a view that outside court mediation or private mediation is a competition to court system and to court-annexed mediations. Is it competition or is it complementing the courts in administration of justice? I think we need to modify our attitude. We need to see the big picture!

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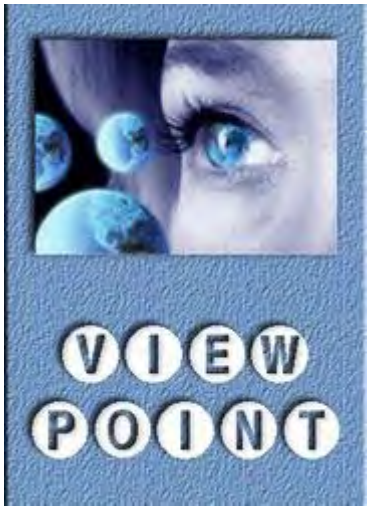

MEDIATION & BUSINESS MANAGEMENT: ROLE OF IIAM

ANIL XAVIER

Most of the commercial enterprises prefer consensual processes like negotiation and mediation for resolution of disputes. The prime reasons are that it yields more commercially rational results, remain in the control of the disputants, are confidential, and most importantly give emphasis on business rather than legal concerns. But in India, even though business communities were familiar and comfortable in using arbitration, mediation was something which they rarely understood or tried. In this paper the author analyses the misconceptions business people have about mediation and as to how we could make it more popular for the benefit of the business community, courts and lawyers.

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MEDIATION is a term known to everyone, but understood differently. As per the dictionary meaning "mediation" is a private informal dispute resolution process in which a neutral third party, called the mediator, helps disputing parties to reach an agreement.

But in the common parlance, mediation is mostly associated with "intercession" or "brokering". It means "to speak to someone in order to persuade him to show pity on somebody else or to help settle an argument". Most people also think that in mediation, parties have to compromise or "give and take", to arrive at a settlement.

For e.g., if 'A' owes Rs. 1000/- to 'B', a mediator could persuade and convince 'B' to settle at Rs. 750/-, if 'A' pays it today. At any rate the popular belief is that mediator has to make a break-through by persuading the party to arrive at a figure less than Rs. 1000/-, proposing settlement, advising him that if he goes for litigation the outcome may come after many years and it is always better for him to settle it today.

I would say these are all misconceptions about mediation. Highlighting the "compromise" factor in mediation gives it a negative impact, as people think it gives out the signal of "weakness". It is precisely because of this misconception most of the business people hesitate to give the first offer to mediate.

I think basically this confusion was set in because mediation is put under the segment of "ADR" or

This was the keynote address delivered by the author on the occasion of the launch of Goa Community Mediation Centre, India on June 22, 2014

Alternative Dispute Resolution, which also contains arbitration as one of the methods. We should understand that both arbitration and litigation are right-based or position-based processes, where a decision is made by a third party based on your legal rights and evidence. Basically these are adversarial methods of dispute resolution or simply adjudication. On the contrary mediation is an interest-based process, where the resolution is arrived at by the parties on a collaborative method to maximize mutual gain. Therefore the recent trend globally is to expand ADR as "Appropriate Dispute Resolution" and not "Alternative Dispute Resolution" as far as mediation is concerned.

Here we need to understand the difference between "settlement of dispute" and "resolution of dispute". Settlement is more akin to using pain killers and band aids to relieve the pain and stop the bleeding. When you stop taking the pain killers or remove the band aids, the pain and bleeding may very well resume. The word itself – settlement – implies a less than satisfying notion of accepting less – you settled for less.

Resolution is different. It implies completion; its goal is to resolve the matter. If settlement treats the symptoms and stops the bleeding and pain, the goal of dispute resolution is to find out the underlying causes of the problem and cure the disease. There is permanence and thoroughness to dispute resolution. The parties are happy with the outcome and there is a win-win situation.

Mediation is the only mechanism which helps resolution. It is the only process which focuses on needs, empowerment, restructure perspectives or relationships and seeks to resolve not only the underlying problem, but to add value. Here, in fact dispute is considered as an opportunity.

This is basically the reason why mediation was used to resolve disputes which has a relationship or emotional factor in it. But ultimately it was perceived that it could be used only for resolving family or neighborhood disputes.

I do agree that mediation is still the best method for resolving family disputes, but we should also understand that any dispute arising between parties who had an earlier relationship, either personal or business, has got a relationship factor in it and while resolving the dispute the relationship issue needs to be addressed. A resolution without addressing it will not be an enduring one.

This is precisely why by the end of the 20th century a radical change happened in the economical thinking of the business world. A global consensus was arrived at among large and small companies, regardless of their business activity or industry segment, that in addition to looking into their traditional business tools, they also need to add a social element into their decision making process.

Overall, the business community realized that long term sustainability was directly affected by the company's ability to operate in a socially responsible manner. They created something called "Company's Sustainability Index", which included among others, "economic efficiency", "dispute management" and "corporate governance".

Various researches on the connection of the productivity and network system proved that a company is able to run for long time in an efficient way if it collaborates with other market participants. Any business or commercial dispute has to be resolved in the best interest of the parties involved and preserving the mutual relationship.

It couldn't be more correct: companies should not be in the litigation business, but in the business of doing business.

It needs to be understood that conflict has the potential to be constructive, by bringing to surface issues, interests, perspectives, and concerns that need to be addressed so that the organization can move forward more efficiently and effectively. Large organizations such as GE, DuPont, Renault etc. has even gone to the extent of creating internal procedures to prevent, identify and try to solve problems through ADR methods before they evolve into a dispute state. And this is a trend that is likely to continue, as efficiency and productivity are as important as ever.

Another reason for change of this strategy was to convert the system to "front-loading" dispute resolution resources. Basically dispute resolution processes are divided into two categories – processes in which the parties retain control over the procedure and outcome and processes in which they give up that control. The first category includes "consensual" processes, such as negotiation or mediation and the second category includes "adjudicative" processes like arbitration or litigation.

Most of the commercial enterprises prefer consensual processes. The prime reasons are that it yields more commercially rational results, remain in the control of the disputants, are confidential, and most importantly give emphasis on business rather than legal concerns.

But this is the scenario globally. What is happening in India? As I said earlier there is a great amount of confusion about mediation, its process and its functioning.

Even though business communities were familiar and comfortable in using arbitration, mediation was something which they rarely understood or tried. As I had mentioned earlier, most parties thought offering to mediate would be perceived as a sign of weakness. If you have a strong case why should you mediate?

Even though the Arbitration & Conciliation Act, 1996 brought out the provision for mediation or conciliation and gave legal backing for its outcome, the awareness was very limited and it was not effectively utilized.

Thereafter when Section 89 of the Code of Civil Procedure was inserted and brought into effect in 2002, which was an attempt to blend the judicial and non-judicial dispute resolution mechanisms, the concept of mediation gained some visibility. Section 89 provided provision for settlement of pending court cases outside the court.

I should say that the Court-annexed mediation system was successful to some extent in bringing down court dockets and pendency. But I think more emphasis or priority was given on the statistics of settlements, with a view to bring down court dockets and pendency rather than on the quality of the mediation process, so that the parties

would voluntarily opt for the process in future in case of disputes and thereby reduce the huge number of new filings in courts. Court-annexed mediations are mostly done to comply with a court order, with often no expectation of finality. The imposition of strict time guidelines on the process, resulted in less thought given to process management and more thought given to court compliance, making it just another formality. The joy, excitement and creativity of mediation is absent, whereby the interest for the party to opt for voluntary mediation in future is lost. The compulsory and time bound process has also given an impression that mediation is also part of the court system, creating an additional step in the litigation menu. I feel lot of reforms are required in this area.

Ideally, mediation has to be within the comfort zones of parties and should be used before taking legal positions, so that they can creatively work out the resolutions, which is the main ingredient in a successful mediation practice. Mediation should be considered as the first option and only if such an amicable resolution is impossible that one should look at adjudicatory options. Disputes should not begin in Courts, but should end in Courts.

In fact this was emphasised by the Supreme Court of India in a very recent decision. In May 2014, a judgment by a bench comprising of Hon'ble Justice Nijjar and Hon'ble Justice Sikri highlighted the need for early resolution of disputes in order to "stop the negative factor from growing and widening its fangs which may not be conducive to any of the litigants". The court also held that the beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of the parties and, therefore, create a win-win situation, but also develop an outcome which cannot be achieved by means of judicial adjudication. The bench was of the firm opinion that mediation is best form of conflict resolution.

This is a letter from a Grandma: Today I went up to a local Christian bookstore and saw a "Honk if you love Jesus" bumper sticker. I bought it and put it on my bumper.

I was stopped at a red light at a busy intersection, just lost in thought about the Lord, and I didn't notice that the light had changed. It is a good thing someone else loves Jesus, because if he hadn't honked, I'd never have noticed! I found that lots of people love Jesus! Why, while I was sitting there, the guy behind me started honking like crazy, and then he leaned out of his window and screamed, "For the love of God! Go! Go! Jesus Christ, go!" What an exuberant cheerleader he was for Jesus!

Everyone started honking! I just leaned out of my window and started waving and smiling at all these loving people. I even honked my horn a few times to share in the love!

I saw a guy waving in a funny way with only his middle finger stuck up in the air. I asked my teenage grandson in the back seat what that meant, and he said that it was probably a Hawaiian good luck sign, or something. Well, I've never met anyone from Hawaii, so I leaned out of the window and gave him the good luck sign back. My grandson burst out laughing... Why, even he was enjoying this religious experience!

A couple of the people were so caught up in the joy of the moment that they got out of their cars and started walking towards me. I bet they wanted to pray or ask what church I attended, but this is when I noticed that the light had changed. So, I waved to all of my brothers and sisters, grinned, and drove on through the intersection.

I noticed that I was the only car that got through before the light changed again, and I felt kind of sad that I had to leave them after all of the love that we had shared, so I slowed the car down, leaned out of the window, and gave them all the Hawaiian good luck sign one last time as I drove away.

Praise the Lord for such wonderful folks! Love Grandma.

But for making pre-litigation mediation popular and successful, you require efficient and trained mediators who can perform on global standards, with internationally regulated ethical norms and code of conduct. This enhances the credibility, acceptability and respect for the mediator and the mediation process.

This mission was taken up by the Indian Institute of Arbitration & Mediation (IIAM). IIAM had taken up the cause of promoting institutional arbitration and mediation for efficient, successful and credible dispute resolution system outside litigation from 2001 onwards. IIAM is guided by an Advisory Board headed by Hon'ble Justice M.N. Venkatachaliah, former Chief Justice of India.

IIAM is the only institution in India approved by the International Mediation Institute (IMI) at The Hague, Netherlands, which is formed for the purpose of certifying international standards for mediators and for implementing the Global Mediator Competency Certification. IIAM is also part of the IMI Independent Standards Commission, preparing benchmarks for mediator accreditation. The IMI has also endorsed the IIAM Community Mediation Service and has deputed its Board member in the IIAM Advisory Board.

IIAM is also a member of the Asian Mediation Association (AMA), which brings together the leading mediation centres in the Asia-Pacific region. AMA also formulates guidelines for Mediation training courses and mediator accreditation within the Asian countries. IIAM is also the Country Representative for Mediation World, UK.

On the arbitration front, IIAM is a member of the Asia Pacific Regional Arbitration Group (APRAG), which is the regional federation of arbitration institutions.

Based on the IMI guidelines and ethical norms, IIAM has trained and accredited mediators, who are professionally qualified to mediate any dispute by structured mediation on international standards. The Goa Community Mediation Centre will also have the service of such accredited mediators.

In pre-litigation mediations, we also have an added advantage in India. The Arbitration & Conciliation Act provides for voluntary conciliation and a settlement agreement entered into by the parties out of the process and signed by the mediator, has been given the same status of a court decree as per Sec. 74 of the Act. So after the settlement has been made, it becomes binding on the parties and if a party defaults in complying with the settlement agreement, it could be executed in a court as if it is a decree passed by the court. So this gives an added edge to the process.

I feel that there is a responsibility for all of us to see that personal and business matters are resolved as far as possible outside courts, so as to give valuable judicial time to the courts to address important public and legal issues, thereby expediting justice delivery and bringing down delay and arrears.

In many international jurisdictions the Civil Procedure was amended requiring the party to a civil dispute to mediate before approaching the court. I think if such an amendment is made in our Code also, it would be a great step to reduce new filings in court and bring down pendency.

For corporates, opting for mediation is also an expression of their social commitment and best governance. IIAM in partnership with the India International ADR Association has formulated a concept of "Pledge to Mediate" among companies and organisations as part of promoting best governance and speedy justice. The pledge is cost-free and not legally binding, but by doing so, the signatory makes a public, policy statement indicating its commitment to the promotion of amicable settlement of disputes.

There is no doubt that lawyers have an invaluable and indispensable role in our justice system. I would say that lawyers are in the driving seat and more powerful than the Judges in this regard, as lawyers could steer the

direction in which the justice system should go. When a client approaches the lawyer seeking for the redressal of a grievance or resolution of dispute, the lawyer can help them to resolve it either outside the court system by way of mediation or arbitration or can opt for litigation. So, I would say that the lawyers have the deciding power to channel the disputes outside the court system or through the court system, thereby either helping the system to bring down court docketing, delay and arrears or piling up and congesting the system.

The success of mediation also depends on the proactive role of the lawyers. Even though mediation is a party-oriented process where the power is vested with= the party to come to a resolution, as I said earlier, there is a fair amount of confusion and lack of understanding about the process. The lawyer has a role to advise the parties about the benefits of mediation. Moreover to get the best possible outcome, the lawyers' expertise in the mediation and negotiation process helps the client to maximize the result. That is why internationally, mediation advocacy is gaining importance. It is in fact giving them more work and income, as mediation gives them the best chance to show their expertise to the clients as to how they could strategize negotiations effectively to get the best resolution quickly and advance their business interests.

THE TALE OF TWO SEAS

You may probably know that the Dead Sea is really a Lake, not a sea. It's so high in salt content that the human body can float easily. The salt in the Dead Sea is as high as 35% - almost 10 times the normal ocean water. And all that saltiness has meant that there is no life at all in the Dead Sea. No fish. No vegetation. No sea animals. Nothing lives in the Dead Sea. And hence the name: Dead Sea.

It is fascinating to know that the Sea of Galilee is just north of the Dead Sea. Both the Sea of Galilee and the Dead Sea receive their water from river Jordan. And yet, they are very, very different.

Unlike the Dead Sea, the Sea of Galilee is pretty, resplendent with rich, colourful marine life. There are lots of plants. And lots of fish too. In fact, the Sea of Galilee is home to over twenty different types of fishes.

Same region, same source of water, and yet while one sea is full of life, the other is dead. How come? The River Jordan flows into the Sea of Galilee and then flows out. The water simply passes through the Sea of Galilee in and then out - and that keeps the sea healthy and vibrant, teeming with marine life. But the Dead Sea is so far below the mean sea level, that it has no outlet. The water flows in from the river Jordan, but does not flow out. There are no outlet streams. It is estimated that over 7 million tons of water evaporate from the Dead Sea every day leaving it salty, too full of minerals and unfit for any marine life. The Dead Sea takes water from the River Jordan, and holds it. It does not give. Result? No life at all.

Think about it. Life is not just about getting. Its also about giving. We all need to be a bit like the Sea of Galilee. We are fortunate to get wealth, knowledge, love and respect. But if we don't learn to give, we could all end up like the Dead Sea. The love and the respect, the wealth and the knowledge could all evaporate. Like the water in the Dead Sea. If we get the Dead Sea mentality of merely taking in more water, more money, more everything the results can be disastrous. It is a good idea to make sure that in the sea of your own life, you have outlets. Many outlets. For love and wealth - and everything else that you get in your life. Make sure you don't just get, you give too.

Open the taps. And you'll open the floodgates to happiness. Make that a habit. To share. To give. And experience life. Experience the magic!

JURISDICTION OF ARBITRAL TRIBUNAL TO DIRECT PRODUCTION OF EVIDENCE

SONAKSHI SHARMA

This article focuses on the power of the arbitral tribunal to call for documentary evidence. Section 19 of the Arbitration Act shows that the Arbitral Tribunal is not bound to follow the CPC and the Evidence Act. Furthermore, as per Section 19 (4), the Arbitral Tribunal has only the power to determine the admissibility, relevance and materiality of a document. Additionally, Section 27 lays down specific power to seek assistance from the Court in getting evidence by way of production of documents. This paper aims to identify the difference between the 1940 and 1996 Acts read with the UNCITRAL Model Law, Code of Civil Procedure and the Evidence Act and ventures to find out whether the Arbitral Tribunal does in fact have the jurisdiction to direct the production of documentary evidence.

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Introduction

There are numerous ways of settling a commercial dispute. On one hand there exists the traditional remedy of litigation and on the other, the trending Alternative Dispute Resolution Mechanisms. The increasing costs of litigation, not only of lawyers' fees and expenses, but also of management and executive time[1], procedural delaying tactics and overcrowding of courts[2], has mounted to a rising demand of ADR.

Arbitration has been the most acclaimed and successful ADR Mechanism due to its effective remedial and enforcement nature. In India, the Arbitration and Conciliation Act 1996, which is widely based on the UNCITRAL MAL, is a huge leap from its' preceding 1940 Act, hence more internationally sound.

It is a settled principle of law and practice that the Arbitral Tribunal has absolute power[3] to rule on its own jurisdiction.[4] This point of law has also been reiterated as "*Competence/competence*"[5] principle that prescribes the Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.[6]

(Footnotes)

[1] A. Redfern, M. Hunter, *et. al., Law and Practice of International Commercial Arbitration*, 4th Edn., Sweet & Maxwell, London, 2004, p. 41

[2] Nearly 70,000 cases adjudicated upon monthly by the Supreme Court of India, available at <http://supremecourtofindia.nic.in/pendingstat.htm> (Viewed on 10-10-2013)

[3] *Bharat Heavy Electricals Ltd.* v. *Silor Associates* CM(M) No.1084/2013 & C.M. No.16013/2013, Order Dated Octer 11, 2013, High Court of Delhi (Unreported)

[4] The Arbitration and Conciliation Act 1996, Section 16

[5] Supra 1, p. 300

[6] UNCITRAL Model Law, Article 21

It has been ruled by the Apex Court "*that an arbitrator cannot be equated with the Court of law. Whereas the Court has an inherent power, an arbitrator does not have. It is a tribunal of limited jurisdiction. Its jurisdiction is circumscribed by the terms of reference."*[7] Therefore, whether the Arbitral Tribunal does in fact have the jurisdiction to direct production of documentary evidence under the present Act is a question of deliberation.

Relevant Provisions under the 1996 Act & the Corresponding Laws

Chapter V of the 1996 Act pertains to the provisions regarding conduct of the Arbitral Proceedings. The relevant sections are Sections 19 and 27, where the former deals with determination of rules of procedure and the latter is for taking the Courts' assistance in obtaining evidence.

Section 19. Determination of rules of procedure.

1. *The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
2. *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
3. *Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
4. *The power of the arbitral tribunal under sub- section (3) includes the power to determine the admissibility, relevance, materiality and weight of' any evidence.*

This Section expressly provides that the Arbitral Tribunal shall neither be subject to the CPC, 1908 nor Evidence Act, 1872, apart from the necessity of conducting its proceedings within the parameters of Natural Justice.[8] The purpose of arbitration is to provide expeditious forum for resolution of dispute, thus any technicality of procedure does not vitiate arbitral awards.[9] Section 19 of the Act is partly corresponding to Sections 1[10] and 3[11] of the Evidence Act, 1872 which provides *inter alia* that the said Act does not apply to proceedings before an Arbitrator and in defining 'Court', states that it shall not include Arbitrators. Section 19 of the 1996 Act is based on Article 19 of the UNCITRAL MAL.[12]

(Footnotes)

[7] *MD, Army Welfare Housing Organization* v. *Sumangal Services (P) Ltd.* (2004) 9 SCC 619

[8] C. R. Datta, *Law Relating to Commercial & Domestic Arbitration (Alongwith ADR),* 1st Edn., Wadhwa and Company, India, 2008, p. 306; *Chandrabhan Bilotia* v. *Ganpatrai & Sons* AIR 1944 Cal 127

[9] *Uttar Pradesh Power Corporation Ltd.* v. *Universal Insulators & Ceramics Ltd.* 2006 (3) ALJ 10 (DB)

[10] *Section 1. It extends to the whole of India [Except the State of Jammu and Kashmir] and applies to all judicial proceedings in or before any Court, including Courts-martial,… but not to affidavits presented to any Court to any Court or Officer, not to proceedings before an arbitrator.*

[11] *Section 3. Interpretation clause … "Court"- includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.*

[12] Available at < http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf> (Viewed on 08-11-2013)

This current position of law is a departure from the corresponding provision under the 1940 Act 1940. Paragraph 6 of the First Schedule read with Section 41 of the Arbitration Act, 1940 provide the following:

Section 41. Procedure and powers of Court.

Subject to the provisions of this Act and of rules made there under-

(a) the provisions of- the Code of Civil Procedure, 1908 , (5 of 1908) shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court: Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

Paragraph No. 6 of the First Schedule reads as under:

"The parties to the reference and all persons claiming under them shall subject to the provisions of any law for the time being in force, submit to be examined by the arbitration or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require."

The provisions under the present Act do not give any power to an Arbitral Tribunal to compel attendance of witnesses, who may refuse to attend and give evidence or produce documents.[13]

Section 27. Court assistance in taking evidence.

1. *The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*

2. *The application shall specify-*

    a. *the names and addresses of the parties and the arbitrators,*
    b. *the general nature of the claim and the relief sought,*
    c. *the evidence to be obtained, in particular,-*
        i. *the name and addresses of any person to be heard as witness or expert witness and a statement of the subject matter of the testimony required;*
        ii. *the description of any document to be produced or property to be inspected.*

3. *The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.*

4. *The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.*

(Footnotes)

[13] Supra 12, p. 605

5. *Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of 12 the arbitral tribunal as they would for the like offences in suits tried before the Court.*

6. *In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.*

This Section corresponds to Article 27 of the UNCITRAL MAL.[14] Sub-sections (3) and (4) correspond to Section 43(1) of the Arbitration Act 1940 with some variations. Sub-section (5) of the current law corresponds to Section 43(2) of the old law of 1940 and sub-section (6) is a verbatim reproduction of Section 43(3) of the Arbitration Act 1940:[15]

43. Power of Court to issue processes for appearance before arbitrator.

1. *The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.*

2. *Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.*

3. *In this section the expression "processes" includes summonses and commissions for the examination of witnesses- and summonses to produce documents.*

(Footnotes)
[14] Supra 13
[15] Supra 12, p. 604

Power to Direct Production of Documentary Evidence

Under the Arbitration Act 1899, the arbitrator had no power to summon witnesses and procure their attendance. If the parties went in for private arbitration under the Act, it was for them to produce witnesses before the Arbitrators. The fact that under private arbitration under the Arbitration Act, 1899 the court had no power to summon witnesses was a grave defect in law. Hence the legislature changed the law while it was enacting the 1940 Act.[16]

Vide Paragraph 6 of the First Schedule read with Section 41 of the Act if 1940, jurisdiction was vested with the Arbitral Tribunal to direct discovery of documents as is evident from the paragraph quoted above and the CPC was specially made applicable. The text of the 1940 Act indicates that the Arbitral Tribunal was subject to the provision of the CPC and did possess the power to by itself direct production of evidence necessary for the arbitral proceeding.

Whereas, the current Act, provides that the Tribunal is bound by neither the CPC nor the Evidence Act. Section 19(4) in unambiguous words provides that the power of the Arbitral Tribunal in the proceedings is confined to determining the admissibility, relevance and materiality of a document. Simply put, once the documents are already on the record of the Tribunal, thereafter it can rule as per Section 19(4), making the condition of the documents to be on record mandatory.

Section 19(3) of the 1996 Act, provides for procedure to be followed by the Tribunal 'subject to this Part' which also includes Section 27. Perusal of Section 27(2) sub-clause (ii) of the Act shows that a specific power has been given to the Court which can be invoked with the approval of the Tribunal to seek assistance thereof for getting evidence by way of production of documents. This is a distinct approach from the 1940 Act making the 1996 Act independent of its erstwhile form and structure. As per Section 43 of the 1940 Act the Arbitrator could have taken the aid of the Court in having the summons issues to the parties or their witnesses, but now the provision goes a step further when it enables recording of evidence through the Court rather than by the Arbitrator itself.

An Arbitral Tribunal does not have the power to compel the attendance of a witness or call for documents by itself. For recording any fresh evidence, it has to go via the Court, either by an application on its own motion or on the request by one of the parties.[17]

It has been held that on the same evidence, the Court might arrive at a different conclusion than the arbitrator, but that in itself is not a ground for setting aside the award.[18] An Arbitrator is the sole judge of quality and sufficiency of evidence and the Court cannot look into it.[19] It is also not open to the Court to reassess the evidence to find if the arbitrator has committed any error or to decide the question of adequacy of such evidence.[20] The Court cannot make a roving enquiry as to which document is material and which should or should not be accepted.[21] It is true that appreciation of evidence by the Arbitrator is not a matter which the Court questions and an Arbitrator is a sole judge of the quality and quantity of the evidence but it does not mean that the Court is left with no option except to order the request made under Section 27 of the Arbitration and Conciliation Act, 1996.[22]

(Footnotes)

[16] P. C. Markanda, *Law Relating to Arbitration & Conciliation,* 7th Edn., LexisNexis, India, 2009, p. 555

[17] A party without obtaining the approval of Arbitral Tribunal, applied to the Court under Section 27 of the Act for taking evidence. Held, such application is not sustainable. *Satinder Narayan Singh* v. *Indian Labour Co-operative Society Ltd.* 2008 (1) Arb LR 355 (Del)

[18] *State of Rajasthan* v. *Puri Const. Co. Ltd.* (1994) 6 SCC 485

[19] *Natwarlal Shamaldas & Co.* v. *Minerals and Metals Trading Corp. of India Ltd.* AIR 1982 Del 44

[20] *Eastern and North East Frontier Railway Co-op. Bank Ltd.* v. *B. Guha and Co.* AIR 1986 Cal 146

[21] *Shankarlal Majumdar* v. *State of West Bengal* AIR 1994 Cal 55

[22] Justice S. B. Malik, Justice J.D. Kapoor *et. al., Commentary on The Arbitration and Conciliation Act,* 6th Edn., Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2013, p. 422-423

Therefore, it is safe to say no discretionary power is vested in the Arbitral Tribunal to direct production of documents under the statute. The Supreme Court[23] stated that where the Special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. Applying the same principle, as Section 27 empowers the Court of Law to direct production of evidence; it hence excludes the jurisdiction of the Arbitral Tribunal to do so.

Conclusion

There exist a variety of laws, rules and regulations worldwide on this debatable issue of whether the Arbitral Tribunal has the jurisdiction to direct production of documentary evidence or it must go via the channel of the Court of Law. In India, the legislators have chosen and deliberately drifted from the provisions of the Arbitration Act, 1940 which vested power in the Arbitral Tribunal to direct production of documentary evidence. When Sections 19 and 27 of the Arbitration and Conciliation Act, 1996 are read together, it is obvious and apparent that the Statute drafters intended for the Arbitral Tribunal to not have any power with respect to directing production of evidence barring the application made to the Court of Law, either on its own motion or on a request made to it by the parties. Therefore, it is an absolute withdrawal of powers from the hands of the Tribunal that limits its jurisdiction to matters of quality and quantity of evidence alone and not extending to production of the evidence. The Tribunal does not possess any remedial measure against defaulting parties, persons or authority. When a person is directed by the Tribunal to produce any evidence and such person acts in contempt, the Tribunal does not have any authority to compel such production, leaving the proceedings stalled and the Tribunal helpless, effectively resorting to the Court to take action against such contempt.[24] Hence, in a certain aspect, assistance of the Court to procure evidence in the first instance becomes quintessential.

Production of a document and its admissibility are two distinct factors, fundamental rule of procedure and evidence. Section 19 read with Section 27 of the 1996 Act, does not empower an Arbitral Tribunal to direct production of any documents. Such jurisdiction is empowered with the Court well within the law laid under Section 5.[25]

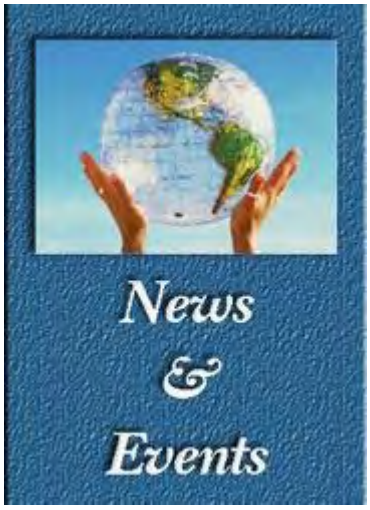
(Footnotes)

[23] *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.* AIR 2011 SC 2649; (2011) 8 SCC 333

[24] *Union of India* v. *Bhatia training Industries* AIR 1986 Del 195

[25] *Section 5. Extent of judicial intervention. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*

NEWS & EVENTS



COCHIN CHAMBER CONFLICT MANAGEMENT CELL

The Cochin Chamber of Commerce and Industry (CCCI) in partnership with IIAM and IIADRA has launched its in-house Conflict Management Cell (CMC), which could be used by its members for managing their conflicts between customers or dealers or members interse. IIAM would be providing accredited mediators who would function under the IIAM ethical norms and code of conduct formed under the guidelines of the International Mediation Institute. The CCCI also signed the “Pledge to Mediate” on this occasion, whereby the Chamber and its members will explore the use of mediation as the first option to resolve any disputes, before pursuing other ADR processes or litigation. Justice A.K. Jayasankaran Nambiar, Judge High Court of Kerala inaugurated the CMC. Mr. C.P. Mammen, President CCCI, Mr. Anil Xavier, President IIAM and Mr. G. Shrikumar, President IIADRA spoke on the occasion.

NO PLAN TO STOP EX-JUDGES FROM TAKING UP ARBITRATION IN INDIA

A Private Bill was brought before the Rajya Sabha seeking banning of retired Judges in taking up arbitration work. The Law Minister, Mr. Ravi Shankar Prasad said if the government put a ban on retired judges taking up arbitration work, the window of alternative arbitration mechanism would be lost and therefore the government will not take such a decision.

MANDATORY MEDIATION IN PAKISTAN

The law ministry has prepared a draft law for an Alternate Dispute Resolution System under which disputing parties in civil and commercial matters would be required to first get their issues settled through mediators, failing which they could proceed with the normal course of law. The draft law envisages that in civil and commercial cases, all courts of original jurisdiction shall require from parties to first go for mediation prior to permitting the cases to be tried. No appeal or revision of a decree or order of any settlement arrived at with the consent of the parties would be allowed.

DISPUTE RESOLUTION FOR STATE DIVISION

The Government of India has constituted a Dispute Resolution Committee (DRC) for removal of difficulties in the interpretation of the Andhra Pradesh Reorganisation Act, 2014, by the two successor States and for resolution of disputes between them. The committee will be headed by Union Home Secretary with the Chief Secretaries of Andhra Pradesh and Telangana. The Centre felt the need for establishment of a structured mechanism to address the issues as they arise before they turn into disputes.

Upcoming Training Programs from

INDIAN INSTITUTE OF ARBITRATION & MEDIATION
institution for dispute resolution & management

MEDIATION TRAINING PROGRAM

It is now manifestly clear to both entrepreneurs and practitioners that a comprehensive professional exposure to negotiation and mediation is necessary to engage in cutting edge and high quality practice for effectively making deals and resolving conflicts. Effective conflict resolution skills is the key to prevent destructive conflict, enabling lawyers and consultants to better assist their clients in business deals and disputes. Mediation has become a truly global profession, earning international recognition.

The training program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. The program will enhance the understanding and ability to negotiate and resolve conflicts, as well as provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. Through discussion, simulations, exercises and role-plays, the program will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution. The training also gives emphasis on the code and ethical standards of mediation. As per IIAM Mediator Accreditation System, based on the International Mediation Institute, The Hague (IMI) standards, a candidate having successfully completed Mediation Training Program will be categorized as Grade B Mediator and eligible for empanelment with IIAM.

For further details about the training program, please see the link: http://www.arbitrationindia.org/htm/events.html.

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is an ongoing 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 mail to training@arbitrationindia.com

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Consider the postage stamp:
Its usefulness consists in the ability to stick
to one thing till it gets there.
~Josh Billings~