EFFECT OF MEDIATION PROCESS IN ARBITRATION

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Abstract

In the developed nations, mediation (called Conciliation in some countries) is a popular means of commercial dispute resolution. As a positive step, the concept of mediation can be brought within the scope of arbitral process. In this article, the author highlights the essential role of an Arbitrator in bringing out a settlement between the parties by facilitating mediation. The most important factor underlining the usage of Mediation in Arbitration is that it will speed up the process and save time and cost with a Possible Settlement Award or Award on Agreed terms. Parties' autonomy is safeguarded when arbitrators facilitate mediated settlement. To achieve a win-win situation and to focus on compromise, the author concludes that mediation is really an effective tool in arbitral process.

INTRODUCTION:

Alternative Dispute Resolution (ADR) promulgates arbitration, mediation or conciliation that might be more satisfactory than what is offered by the conventional judicial systems. Observer's views are that the proportion of each country's economic life that is bound up with international/cross border aspects is growing steadily in a rapid manner. We are not economists who pursue the study of commercial activity in aggregative terms, using statistical analysis of national exports, imports, balance of payments and other movements. Institutional approach leading to a study of the kinds of organizations that take part in international business, their decision making structures and purposes they are trying to achieve when they make decisions about the location and direction of their profit-making activities, is most suitable in the perspective of ADR practitioners and lawyers.

In India, the **"Panchayat system"** in which decisions are handed down under a shady tree was most prominent in resolving disputes between traders and villagers from ancient days. The Village headman presides and decides and his decisions are enforced, and failing compliance would result in the offender's removal from the society. This is the core module of ADR system in India.

GLOBAL BUSINESS BACKGROUND FOR DISPUTE RESOLUTION:

Abundant natural resources play a major role in attracting investors surpassing the judicial scenario. Overwhelmingly a better judicial system prevails in the investor's mind among the competitors with reluctance over national courts of the host country. We could review about choices that must be made as between different methods of doing business and on the types of legal risks that are built into each of them. General and Schematic sense of how Global business operates, who acts in it, what their motivations are and what their chief forms of transactions are, have to be understood.

PLAYERS:

Personal contact between individuals of different nations coming into contact with people of another nation was the model of the international/cross border commercial transaction. Individual sympathies with strong element of national prejudices were the psychological background for international trade or for the disputes that arose from it. During 1990s, large organizations, like multinational corporations, have taken over a vast portion of global economic activity. These corporations attempt to decentralize many aspects of their functioning, particularly those that require more adaptation to local peculiarities such as labour relations and government lobbying since, government of the home corporations tend to interfere occasionally so as to make the corporations an overseas agent for policies of its own. This would help such corporations to take refuge in its nationality and appeal to the home government for help in dealing with the demands of other governments.

TYPES OF COMMERCIAL TRANSACTIONS:

Various international dealings tend to produce their own characteristic patterns of disputes and put different kinds of strain on courts. Most important of those emerges from

1. Sales
2. Licensing
3. Foreign Direct Investment
4. Joint Ventures
5. Development Agreement
6. International Loans

The confusions and uncertainties that beset litigation in national courts where cross border matters are at stake, are so confounding that it is no surprise that parties think of Alternative Dispute Resolution (ADR) whenever they enter into contracts/agreements with counterparts from other countries. In such private arrangements it seems to find not only certainty but also privacy, speed, economy, neutrality and commercial/technical expertise. It is an undisputed fact that ADR mechanisms are flourishing rapidly.

ARBITRATION:

Arbitration is a quasi-judicial process in which a neutral person sits as a private judge and resolves the disputes between the disputants in a confidential manner.

"Arbitration is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons such as (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound".[1]

The concept of Arbitration was described as “If one party resolves to demand what the other resolves to refuse, the dispute can be determined only by **arbitration**; and between powers who have no common superior, there is no other arbitrator than the sword”. [2]

The main system of ADR, Arbitration gradually came to be recognized as a means of settling disputes and helped in taking the burden off from the regular legal system. On the global front there seemed to be special needs for arbitration, for the creation of specialized neutral bodies that could deal with problems that belonged wholly to neither of the systems of law of the nations to which the parties belonged. Further, various legal systems had special fears of international arbitration because it was associated in their minds with the superior economic bargaining power of large foreign corporations. Huge resistance prevailed to international arbitration, especially in developing and least developed countries. The culmination of these tensions and pressures was the production of a convention on recognition and enforcement of foreign arbitral awards[3] which assures national support to international arbitration. Protection under this convention was available only to proceedings that meet the following criteria:

1. “Commercial” as defined by the national system of the parties,
2. Significantly foreign, and
3. State in which the arbitration is to be held must be a signatory state.

One main thing we have to look over. Most of the arbitration institutions, centers and courts are run by Chambers of Commerce, Business Associations and Trade Blocks. It is essential to go through this unwritten rule. How could traders and business people decide on disputes? Parties to the disputes are master of the issues involved. They know the pros and cons of their dealings and future business relationship. **Dispute Resolution should be seen as a simple win-win situation allowing continuity and not an everlasting battle.** The investment climate, the first criteria for a business, has a space for Dispute Settlement information, even though in the last, but considered as the final key for investment approval. It is fortunately an increasingly improbable contractual scenario. The arbitration process has a binding nature and it can also be preceded by mediation process.

MEDIATION:

In the developed nations, mediation (called Conciliation in some countries[4]) is a popular means of commercial dispute resolution[5]. Mediation is a dispute resolution process which helps the parties to end their problem more efficiently and at less cost than the existing adversarial processes.

The major advantages of mediation includes

1. Effective Management over the outcome.
2. Flexibility
3. Confidentiality
4. Rapidity
5. Cost Effective
6. Safeguarding of cordial relationship (Win-Win situation)

Surprisingly, it has the major disadvantage of being non–binding in nature. Moreover, people from different culture often resolve internal and external conflicts in different ways[6].

Here, I like to examine the impediments in mediation in use and ways to overcome them, more particularly, med-arb procedure. Med –arb is a variation of the mediation process in which the mediator changes role if the matter does not settle in mediation and becomes an arbitrator with the task of making a binding determination[7].

In executing the Med –Arb procedures there exists some practical difficulties. The foremost is the reliability of the same mediator acting as arbitrator in the second stage. Furthermore, it adds to the question of impartiality and the integrity of the adjudicative role of an Arbitrator who earlier mediated the same dispute. As a positive step the concept of mediation can be brought within the scope of arbitral process.

ROLE OF AN ARBITRATOR:

The prime question is, whether the same individual can act as both Arbitrator and Mediator. In this article, I like to highlight the essential role of an Arbitrator bringing about a settlement between the parties by facilitating mediation. Constructive is the Legislation in India, *"it is not compatible with an arbitration agreement for an arbitral tribunal to encourage settlement of disputes and with the agreement of parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement"*.[8]

It is relevant to address the question of whether the arbitrator can act as mediator in a dispute. Mediation, a term derived from west, which is a facilitating process has a long history. Its success rate speaks for itself more particularly from the Quotes of the Father of our Nation "I realize that the true function of a lawyer was to unite parties … A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul".[9] The social and economical advantage makes mediation a widely accepted mechanism of dispute resolution. Arbitrators appointed to adjudicate a specific dispute can put on the mediator's hat, but if the mediation break down there is a possible risk that the award may be subject to challenge on the grounds of lack of impartiality or concerns about natural justice.

ROLE OF MEDIATION IN ARBITRATION:

To make ADR a flexible and useful mechanism for disputants and the commercial process in general, it is significant to scrutinize new ideas and consider better solutions. Really, the most important factor underlying the usage of Mediation in Arbitration is that it will speed up the process and save time and cost with a **Possible Settlement Award** or **Award on Agreed terms**.

In India as earlier said, it is traditionally seen as a cultural value known as Panchayat System, which always encourages dialogue and further refine it. Even now it is effectively followed where the Court system can't reach as in Paadu System.[10]

In General variation, this process is broadly categorized as follows by David Elliott[11]:

"1. Mediate first and if it fails, arbitrate
2. Start arbitration proceeding and allow for mediation at some point during the arbitration
3. Mediate some issue and arbitrate others
4. Mediate, then arbitrate some unresolved issues, then return to mediation
5. Mediate if unsuccessful; ask for an advisory opinion by the mediator which is binding as an award, unless either party vetoes the opinion within a limited period of time.
6. Mediation if unsuccessful, followed by a final offer by each side, coupled with limited argument, following which the mediator turned arbitrator, must choose one or other offers."

In common law jurisdiction, these variations itself appears to be a disadvantage due to lack of structure and the idea of the same individual changing roles from that of a mediator to arbitrator creates a haphazard situation. Private caucus is the fundamental principle in mediation. This process is impossible in arbitration. It is pertinent to highlight at this juncture that both mediation and arbitration is a good means for settling commercial disputes.

The guiding principle of the arbitrator shall be to promote timely and fair settlement failing which; they would proceed to adjudicate the dispute in accordance with the law. Further, it is the elementary principle in which the English Arbitration Act, 1996 Part I is founded–"obtained fair resolution of disputes by an impartial tribunal without unnecessary delay and expansion"[12] and " the parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest"[13]. It is appropriate to say that an effective mechanism by which settlement of

disputes can be achieved is by way of Mediation. Surely, this is a distinct alternative to judicial process and judicial reforms rely wholly on it.

The role of arbitrator in Mediation:

Arbitrator should not act in a dual capacity. However, the risk must outweigh the benefits. “There is clearly risk to all when an arbitrator steps down from that role and enters a different arena and is to perform a different function. It is a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking.”[14]
Arbitrators who have been removed from office for attempting to act as mediator are no more than particular example of arbitrators who have crossed the boundary of “Natural Justice” [15]

Some National Arbitration Legislation has gone so far as to include a provision for arbitrators to act in a dual capacity. Article 35(1) says,” the members of an arbitral tribunal may, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute. Article 35(2) After the members of an arbitral tribunal use the techniques referred to in sub-section (1), they may resume their role as arbitrators without disqualifiacation”.[16]

The process in mediation is broad and much can be influenced by the approach of the arbitrator acting as mediator in the arbitral process. The disputants are directly involved and speak freely in an informal manner and thus the quality of information flows between parties which can pave the way for amicable settlement. Even though a private meeting is essential in mediation involved arbitration process, there could be pre-agreed rules as to how to deal with the information obtained. This would remove impartiality and bias.

CONCLUSION:

The vital paradigm, the parties' autonomy is safeguarded when arbitrators facilitate mediated settlement. It would further remove impartiality and bias subject to pre agreed rules and procedures by the parties.

To achieve a win-win situation and to focus on compromise, mediation is an effective tool in the arbitral process. Further, when the mediator becomes arbitrator and is empowered, he is surely capable of avoiding the risk of bias. The settlement table could be effectively brought out in mediation by the facilitator to expand the scope of positive dialogue. Another important advantage in this is that the parties would surely lay the ground work for the final phase, arbitration, which is binding. Surely, the dual role would stimulate dialogue and receive comments and suggestions to make dispute resolution more user friendly.

End notes:

1. http://en.wikipedia.org/wiki/Arbitration
2. Quote by Mr. Samuel Johnson, English poet, Critic and Writer
3. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
4. Report of the Secretary – General, UNCITRAL Working Group on Arbitration, 33rd Session at www.uncitral.org
5. Report of the UNCITRAL Working Group on Arbitration, 33rd and 34th Session at www.uncitral.org
6. Walter A. Wright, "Cultural Issues in Mediation: A Practical Guide to Individualistic and Collectivist Paradigms," – www.texasadr.org/cultural.cfm (1998)
7. Henry Brown and Arthur Marriott, "ADR Principles and Practice", Page No.147, Second Edition published by Sweet and Maxwell, 1999
8. Section 30 (1), Arbitration and Conciliation Act, 1996, India

9. Gandhi – An Autobiography -The Story of My Experiments with Truth published by Navajivan Trust, 1927
10. It is a system practiced among fisherman folks in Pulicate Lake for resolving the disputes relating fishing boundaries among various villages
11. David C. Elliott, “Med/Arb: Fraught with Danger or Ripe with Opportunity?” (1996)
12. Arbitration 175, Journal of the Chartered Institute of Arbitrators, UK Section 1(a) of English Arbitration Act, 1996
13. Section 1(b) of English Arbitration Act, 1996
14. Judge Lloyd in Glencot vs Barrett
15. Jonh Uff, “Dispute resolution in the 21st Century: Barriers or Bridges?” (2001) 67 Arbitration 4-16, Journal of the Chartered Institute of Arbitrators, UK
16. New Arbitration Act, Alberta, Canada