ADRs: Fast Resolution To Commercial Disputes

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A choked-up legal system, together with recent amendments to the law, make it increasingly attractive for firms to go down the ADR route

"Long before laws were established, or courts were organised, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes."- Francis Kellor, 'American Arbitration: Its History, Functions and Achievements' (1948)

Disputes – within families, across firms, or between business and government – are inevitable, but in India, with its huge backlog of court cases, they can take anywhere from 10-20 years to resolve. Given this reality, there is a pressing need for alternate dispute resolution (ADR) mechanisms such as arbitration and mediation. ADR's cause has recently gained impetus from amendments in 2015 to the Arbitration and Conciliation Act 1996, which aim to expedite the process and make it more cost-efficient. These amendments plug certain lacunae in the earlier law, making institutional arbitration quicker and more cost-effective, limiting the scope for challenging arbitral awards, and improving the quality of decisions by ensuring arbitrator neutrality. In parallel, mediation – which is often speedier and cheaper than arbitration – also got a boost from the new Companies Act, which provides for mediation-based

Mediation: Advantages and Limitations

Mediation is an informal dispute resolution method that has the advantage of being flexible. Mediation obviates the need for the aggrieved parties to go to court, and research indicates that about 80 per cent of cases that go down this route get resolved at that stage itself. Consumer, contract, family and neighbourhood disputes can typically be addressed through mediation. The costs depend on the value and complexity of the claim, but are shared equally. A majority of cases that enter mediation run into a day or two. However, if an additional day is required, it is scheduled a few days in advance of the final session, or sometimes on two consecutive days.

The mediator's role is to help both sides come to an amicable solution, and to act as an impartial observer without making judgments or taking sides. Given their experience and knowledge of the industry and law, mediators help the parties define their issues and achieve clarity through joint and separate sessions. The aim is to help both parties understand the issues, and thus move closer to an amicable resolution. The process of mediation can only begin if both the parties jointly agree to it, and the single greatest determinant of success lies in ensuring that the real decision makers personally attend the meeting. It is a voluntary, confidential process, and the terms of discussion are privileged. This means that they are not to be shared with anyone outside the mediation hearing – not even if the mediation process fails. ■

Compared to litigation, arbitration offers the concerned parties a more efficient, faster, cheaper - and yet still standardised - means of resolving disputes

settlements for disputes pending before the NCLT and NCLAT.

Even as bottlenecks are present in the system, going forward, ADRs will remain critical to the dispute resolution process, with high litigation costs, the huge backlog of cases, and the need for privacy driving more and more firms in that direction. If it takes many years for the courts to deliver a judgment, ADRs allow timeframes to be compressed to 12-24 months. More critically, given the massive pressures on the Indian court system, it is in businesses' interest – nay, even a duty to the nation – to try and settle most, if not all, disputes through ADR mechanisms.

Why arbitration works

Arbitration has been the preferred means of dispute resolution for time immemorial, widely used in the West to settle differences between businesses or nations alike. With the process becoming formalised over time, its criticality has only increased. The United Nations Commission on Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration serves as a blueprint for most countries, and has greatly aided implementation in countries like Germany and India.

Going beyond local courts, arbitration offers the concerned parties a standardised procedure to obtain justice, which is makes it preferable to other dispute resolution mechanisms.

Most corporations have two underlying requirements in terms of dispute resolution:

1. Fast-tracked proceedings, awards and execution; and
2. Cost-effective proceedings that minimise the business impact

Clearly, arbitration meets these requirements, and fulfils several other needs

Deciphering the Arbitration Process

Simply put, arbitration is a method of resolving disputes of any nature outside of court. The parties in dispute agree to be bound by the arbitration decision, and elect to either institutional or ad-hoc arbitration. An arbitrator will look into the evidence and take a final call that is legally binding and valid in the court of law. As arbitrators are usually well versed with the subject matters and the judicial system, commercial disputes, particularly international business transactions, or even conflicts about terms of employment, can be resolved through arbitration. All told, the arbitration process typically takes 12-24 months, depending on the complexity or nature of the dispute, and involves the following steps:

Filing a claim: To initiate arbitration, the parties need to file a statement of claim. The claim must that outline the relevant facts and the request for remedies that are being sought.

Answering a claim: A respondent provides relevant facts and available defences to the demands made by the claimant.

Selecting an arbitrator: If arbitration is institutional, the parties receive lists of potential arbitrators and mutually select a panel to hear the case. In case of ad hoc arbitration, parties arrange for mutually selecting the arbitrator(s) themselves without the involvement of any institution.

Pre-hearing conferences: A telephonic conference may be held between the parties before the hearing.

Discovery: Documents are exchanged between the parties before the hearing.

Hearing of the case: The aggrieved parties meet with the arbitrator to hear the case.

Final decision and awards: Post the hearing, the arbitrator(s) examine the facts and announce their final decision. ■

Past concerns about arbitration - in particular, a lack of clarity about the process itself, as well as its costs and local applicability - have largely been addressed

as well. In most cases, the two parties mutually decide on the arbitration process and procedures, which ensures that neither feels wronged by the arbitration itself. Being a voluntary submission, it aims to dispose cases quicker and more efficiently, ensuring that the business impact is minimised. Parties can elect for ad-hoc or institutional arbitration, both of which provide flexibility and a certain amount of control in the administration of the arbitral proceedings. In terms of cost, this can range from 5 to 10 per cent of the disputed amount, with lawyers' fees typically accounting for 70-80 per cent of the total, and the legal institution and arbitrators making up the remainder. Whether the mechanism adopted for resolution is litigation, arbitration or mediation, the obligation of lawyers' fees remains constant. However, since the parties have greater control over the procedures, and assuming there is willingness to settle the matter, the time required to settle a dispute is shorter than in regular (i.e., non fast-tracked) court cases. This means that the cost on lawyers can be considerably lower if one uses ADR mechanisms.

In the past, arbitration faced several challenges that impeded its development as a viable means of settling disputes. What drove many corporations to litigate instead was a lack of clarity of the arbitration process itself (proceedings, arbitrators, awards, costs, etc.); fears that arbitration would cost more; and uncertainty around the execution of awards in one's home country. However, with the advent of the UNCITRAL model, the rules of arbitration have been largely formalised. Fears about high costs have gone away with clearer rules in institutional arbitrations around fee structures for arbitrators. Further, 157 countries have signed the New York Convention on Foreign Arbitral Awards, taking away some of the execution-related concerns.

A dynamic, informal process

Arbitration may be an informal process, but that's what makes it so dynamic. It is by far the most flexible, formalised form of dispute resolution, where parties choose the applicable law, the location for hearings and other proceedings, and which arbitration rules are to apply. Because the resolution process is so flexible, it bodes well for parties choosing to resolve their conflicts this way.

Arbitration resolves commercial disputes at about half the cost of litigation, and has the same binding effect on the parties as a court decree. The fact that the world's largest conglomerates are choosing to arbitrate is proof enough to establish that it is the most sophisticated way to resolve commercial disputes. As an emerging method of dispute resolution, it is the most promising, business-friendly and efficient way of disposing of corporate differences.

The rising effectiveness of arbitral awards

Arbitration comes with the possibility of an arbitral award being passed in a jurisdiction where neither party has a presence. For corporations, this used to be one of the main question marks around the validity of the process. Many felt that the courts would need to approve such awards for them to be executed in the parties' respective countries. In recent times,

however, several landmark cases have helped assuage such fears. These include *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronic Pty Ltd*[1], in which an Australian court upheld the decision of the arbitral tribunal while stating that arbitral awards must be set aside only if fundamental norms of justice and fairness are breached. In *Transocean Shipping Agency Pvt Ltd v Black Sea Shipping & Ors*[2], even as there were some political discrepancies, the Bombay High Court and the Supreme Court upheld the award. (That said, an award can be set aside in India on the basis of 'public policy' requirements – a valid exception under the New York Convention.) Finally, in *Newspeed International Ltd v. Citus Trading Pte Ltd*[3], the Singapore High Court indicated a strict approach to the finality of awards and limiting the possibility of re-litigation.

On the whole, the deepening formalisation and enforcement of arbitral awards owes much to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, and the 1958 New York Convention. Further, the United States Arbitration Act recognises the proposition that arbitral awards should be enforceable anywhere, regardless of where they are made. In Europe, Brussels Regulation 44/2001 enables the claimant to enforce the judgment sought in an EU member state to enforce it in another member state without issuing separate proceedings. However, if the judgment has been sought from a non-EU member, other statutory or conventions would apply.

A host of recent cases demonstrate that arbitral awards can be - and are being - enforced even outside home countries. Moreover, the timeframes involved are both clear and reasonable

Clear timeframes for awards

In business, time is of the essence. Shorter timeframes for settling disputes is a major factor that any business would appreciate. Accordingly, the Singapore International Arbitration Centre (SIAC) rules state that an award is to be shared with the Registrar for his confirmation within 40-45 days of the last date of hearing, or the date on which there was a closure of the proceedings. International Chamber of Commerce (ICC) rules provide six months from the closure of hearings, and the American Arbitration Association (AAA) grant no more than thirty calendar days. The Indian Arbitration and Conciliation Act is unique in this regard, allowing for timeframes that depend 'upon the reference', which is defined in the rules as the date the arbitrators have received their appointment in writing. This feature of the Indian Act makes for one of the most desirable set of rules to follow for Arbitration. Expedited procedures are also available under any of the three rules – the SIAC, AAA or Indian rules.

Looking ahead, for ADR to gain further traction in India – as it must, for reasons of national as well as self-interest – business contracts must provide for alternate dispute resolution. Ensuring that contracts contain these relevant clauses will go a long way in providing multiple options for the expeditious settlement of disputes, which are plainly in the ascendant. In this hypercompetitive world, patent or IP infringement, technology-investment, and corporate governance disputes will remain contentious areas. Many technology cases, moreover, are too technical for the majority of judges, and ADR allows parties to select the more tech-savvy legal experts to resolve disputes. Finally, by moving disputes from the courts to arbitration, businesses bring down the risk of exposing confidential information that can jeopardise their commercial interests. ■

[1] [2014] FCA 1214 (Austl.)
[2] [1998] RD-SC 23 (14 January 1998)
[3] Newspeed International Ltd. v. Citus Trading Pte. Ltd (2003) 3 SLR 1