A step towards institutionalisation of ADR in india?

By Chakrapani Misra

Arbitration is by general consensus the preferred mode of dispute resolution for the business fraternity worldwide. The global trend is to minimise the Court's role in the arbitral process. However, Indian courts have come under widespread criticism for some of their decisions under the aegis of the existing legislation, the *Arbitration and Conciliation Act,* 1996. In order to remove the consequent "difficulties and lacunas in the Act so that ADR method may become more popular, and the objective of enacting arbitration law may be achieved", the Ministry of Law and Justice issued a Consultation Paper on proposed amendments to the Act.

Appointment of arbitrators

One amendment sought to be enacted by the Law Ministry regards Section 11 of the existing legislation, dealing with the appointment of arbitrators in cases where parties are not ad idem. Amongst the plethora of judicial pronouncements available on the subject, most notable is the judgment rendered by the seven-Judges Bench of the Supreme Court of India in *SBP Co. vs. Patel Engineering Ltd (2005),* holding that the power exercised by the Chief Justice of the High Courts or the Chief Justice of India under this section is a judicial power and not an administrative power, ie. the Chief Justice (or his designate) is empowered to look into certain preliminary aspects such as the merits of the parties' claim, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. This decision also renders such an Order appealable under Article 136 of the Constitution. Unsurprisingly, the judgment has earned severe criticism from jurists as well as the business community for lending a litigious colour to the appointment process.

The Consultation Paper has tried to deal with this hurdle by encouraging institutional arbitration as the primary mode of resolving commercial disputes. It has presented a lengthy analysis of the benefits of institutional arbitration, and proposed that amendments be made in order to ensure that, the Patel Engineering dictum notwithstanding, institutional arbitration is an option in cases where an application is made for the appointment of an arbitrator in respect of "Commercial Dispute of specified value" (ie. disputes of value less than INR 5 crores). The Paper also proposes replacing "Chief Justice" with "High Court" or "Supreme Court" as the case may be, and seeks to provide for expeditious disposal of applications made for appointment of arbitrators and 'endeavour' to dispose of the matter within 60 days from the date of service of notice on the opposite party.

Conclusion

Though the efforts made by the Ministry to promote institutional arbitration are laudable and definitely reassuring to the corporate world, their limited applicability may be a dampener. The proposed amendments do not resolve the controversy created by Patel Engineering. Further, the proposed amendment regarding disposal of any application for appointment of arbitrators, worded as it is ("endeavour shall be made…"), may prove edentulous in practice.

Khaitan & Co.
One Indiabulls Centre, Tower 1, 13th Floor
841 Senapati Bapat Marg, Elphinstone Road
Mumbai 400 013, India
Tel: (91) 22 6636 5000
Fax: (91) 22 6636 5050
Email: mumbai@khaitanco.com
Bangalore Kolkata Mumbai New Delhi