Arbitration

1. INTRODUCTION

Arbitration has a honourable and long record in the U. S. A. Conventionally , business have willingly consented to solve differences of opinion by obligatory arbitration rather than by alternative means as they need speed, proficiency, privacy, efficiency and impartial decision makers. Globally, mediation has been deployed as it facilitates business to circumvent feared biases form the courts and to have a ruling that is legally in different country than a court verdict would frequently be.

The Federal Arbitration Act [FAA] of 1925 has mandated U. S courts to allow petitions to force arbitration pursuant to such agreements.

Legal system has witnessed a new turn due to materialization of compulsory arbitration for the last twenty years. With the encouragement, support and approval of the U. S. Supreme Court, U. S Corporations are employing ADR mechanism by requiring their customers, students and workforce to decide future difference of opinion through compulsory arbitration, rather than through court. Though the mediation process has been in usage as a dispute solution procedure for thousands of years, it has been approved intentionally and willingly, usually by two or more business in the past. The spontaneous introduction of arbitration process in lieu of court formalities is a novel and most contentious event. Comments by critics over the mandatory consumer arbitration have been observed as fervent. There were negative criticisms against compulsory arbitration process. Some Courts have observed that by denying the plaintiff to approach to the court for redressal of his grievances is the denial of his constitutional rights and is more analogues to a rotten odour which is irresistible to the body diplomatic.

The U. S. Supreme court has given its approval in the guise of a “ national policy” favouring mediation and obliged the business to resort to mediation rather than the initiating legal action for resolving business disputes. Almost all leading newspapers in U. have come out with articles which have criticized the ‘ compelled arbitration’ of U. S legal system.

Mandatory arbitration in U. S is also having its own volley of supporters. But it is to be remembered there are exists inequitable arbitration sections in which corporations inflict non-neutral arbitrators or significantly restrict potential revivals and some advocate that just finding arbitration is more convenient for plaintiffs than the proceedings through the court .

Supporters are arguing that when the companies incorporate arbitration clause in boiler plate contracts , it actually facilitate the customers and workforce by offering them with a medium that is quicker, inexpensive and more assessable than lawsuit. One another advantage is that companies minimise their own dispute resolution costs and companies may attain cost savings which it can pass it on to the employees as additional benefits to them.

2. THE AIMS OF STUDY

A survey of more than 1000 of the largest U. S largest corporation had been conducted by PricewaterhouseCoopers LLP , and Cornell University during 1998 to find out mainly why U. S business prefer alternative dispute resolutions [ADR] techniques rather than approaching traditional system of litigation like approaching courts for redressal. The survey established that more than three fourth of business have utilised the arbitration process for resolving their disputes and there is a wide usage of ADR in employment and

commercial disputes. Why arbitration is is preferred. Perhaps, one of the main reasons is savings in time and money.

For instance, arbitration is generally used in the construction industry as expensive construction interruptions can be circumvented by employing faster mediation method instead of prolonged lawsuit course. Further, Judiciary and law-making agencies are frequently advising adversaries to take advantage of ADR process due to their surfeit on their calendars.

Large firms like BDO Seidman and Ernst & Young and small firms are using ADR clauses in their contracts with clients. Likewise, state agencies like New York and Massachusetts have appreciated its affiliates to implement ADR clauses in their contracts. The survey points out that no sooner the industry pursues ADR, its usage increases automatically.

Further, competitive pressures compelling business to minimise overheads and court-directed exercise of ADR to minimise backlogs can stimulate the use of ADR in the business in near future.

Over and over again the single biggest aggravation in disputes is the time it takes for hearing in the court. A court process will take a minimum of six to nine months of time to set in motion the hearing and involving a minimum expense of $100, 000. Disputes involving insurance industry claims settlements or for industry/stakeholder disputes, the parties to the dispute can resolve their disputes through negotiation and that is what an ADR process is really addressing.

Some examples of circumstances where the ADR process is found useful are illustrated here. ADR can be applied as a substitute to contentious mail

ballots, intervening on G-56 facility applications, custom processing disputes, and any other disputes that are commercially based. One of the salient features of ADR process is that it does not negate the rights of corporations or individuals to pursue regulatory process and actually both can be initiated simultaneously.

It certain industries like oil industries, the employment of ADR process is not yet picked up perhaps the reason may due to lack of a degree of skepticism and awareness caused by previous bad experiences in the regulatory process. In addition, there is a fallacy that parties will be compelled into a decision by a non-technical mediator or counsellor. But these misconceptions are unwarranted as ADR process is the structured approach to dispute resolution and it facilitates the avenue for two parties to freely negotiate a settlement. Usually, ADR process will involve a mediator / facilitator who may be technically expert in the relevant field along with a professional mediator.

The three salient features of the ADR process are offers savings in cost, time savings and control over the outcome. An effective and efficient ADR process will offer resolution of disputes in less than a month or issue passed to an administrative tribunal for its findings.

It is understood that ADR offers a golden opportunity to enhance the business environment and regulatory atmosphere in any industry at a low cost.[2] The main aim of the study is to mainly focus on significance of the ADR process and how it is more useful than the conventional court system to redress the grievances of the aggrieved parties.

3. JUSTIFICATION FOR STUDY

ADR is often used when the normal negotiation process fails. It refers to a variety of streamlined resolution techniques designed to resolve disputes more economically and efficiently. The main justification to prefer ADR is that most of the cases go into litigation settle before the actual proceedings commence. ADR offers a structured way to resolve differences easier and often at primarily at lesser cost. ADR helps the system more efficient by helping aggrieved to settle upfront.

The justification of usage of arbitration process is illustrated by the following example. For instance, according to the American Air Force ADR reference book, during the past five years more than 400 Department of Defence appeals brought before the Armed Service Board of Contract Appeals were moved onto the ADR track rather than using standard litigation procedures. Of these cases, 95% were successfully resolved through the ADR process. In any given year, the number of claims on the docket ranges from 200 to 400 with amounts at risk of more than a billion dollars. In American Air force, ADR is being justified to minimise the waiting period which is being solved at the lowest level and at the earliest possible time. In Air force, ADR technique usage has helped to resolve disputes by more than 400 percent. This illustration alone shows the justification of ADR process in contracts than resolving the same through normal court litigation process.[3]

In arbitration, the neutral third party examines the evidence and reviews documents and then makes a decision that binds both parties. Some clauses that call for arbitration require that parties' first resort to arbitration mainly to keep the cost down and resolving through a single arbitrator is more cost savings. Whereas where the complex issues are involved or huge amounts

are involved or matter of precedent-setting, it is justified to incur extra cost and to call for a panel of three arbitrators. Arbitration is justified in better way of obtaining a fair and well-reasoned decision.

The use of arbitration justifies that parties to arbitration must accept that the award given by the arbitrator is final and binding. In few cases, parties have attempted to draft contractual provisions according the courts express power to review arbitrator’s award as to the law, but the courts have declined to enforce these provisions. Thus, the court action in cases mentioned above justifies that usage of arbitration process will really result in savings in time and money. In the absence of contrary agreement, the arbitration clause in a contract binds only the signatories to the contract. However, a purchaser who wants to avoid multiple proceedings should ask for a clause requiring that all of the supplier’s subcontractors agree in writing to arbitration.

Normally, arbitrators are not bound by the stricter rules of evidence that apply in court proceedings. For instance, hearsay evidence, in which documents in effect substitute for witness, may be permitted. . Further, parties are willing to submit a dispute to arbitration, but are concerned that excessively loose rules of evidence could deprive of a fair trial. They can request arbitration clause that state that in conducting the hearing, the arbitrator will be bound by a particular code of evidence, such as the Federal Rules of Evidence.[4]

The parties to arbitration can limit by inserting an arbitration clause which provide that the arbitration will be governed by that particular body of law by

inserting appropriate provision that the arbitration will be governed by that particular state or nation’s body of law.

The arbitration agreement should define the type of relief that may be awarded by the arbitrator. Contract may also provide that arbitration should not award punitive damages or consequential damages. In some cases, the agreement may provide that the arbitrator may award money damages but cannot direct specific performance of a contract.

Some study also reveal that in arbitration program there was no reduction in the rate of cases going to trial , and an increase in the time of disposition of cases. MacCoun concludes that alternative dispute resolution programs seems to offer improvements in the fairness of the process , but do not necessarily increase economic efficiency and in some cases , may even make it still worse.