Tackling Commercial Disputes- A New Perspective

Medhiyaa Ramesh
SASTRA Deemed to be University, Thirumalaisamudhram
Thanjavur, India

S.Vaijayanthee
SASTRA Deemed to be University, Thirumalaisamudhram
Thanjavur, India

ABSTRACT:

A contract is an agreement which is capable of being made enforceable in a Court of Law. The unique feature that sets the Law of Contracts apart from the rest, is the element of discretion exercised by the parties in forming the terms and conditions of the agreement within the legal framework. The construction of contracts gives scope to the parties, in terms of determining the rights and remedies that they can seek in case of a dispute. Contractual disputes between parties may often arise either due to a breach or misinterpretation of the conditions. A commercial dispute arises out of every kind of transaction that establishes a commercial relationship. Therefore, it can be stated that all contractual disputes are commercial disputes but not all commercial disputes are contractual disputes. Dispute resolution techniques are prescribed and governed by various legal provisions. Apart from the traditional dispute resolution method of litigation, a parallel known as Alternative Dispute Resolution (ADR) which is a wide spectrum of out-of-court forum is drawn. These include mediation, arbitration, conciliation and adjudication. Alternative Dispute Resolution (ADR) is a speedy, streamlined process that ensures procedural efficiency and confidentiality. It also eases the burden of the judiciary by reducing the backlogs, a major drawback of the judicial system. According to Section 12A of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's Act, 2015 amended recently, pre institution mediation is a mandatory pre-requisite or any aggrieved party approaching the commercial court with a pecuniary jurisdiction of Rs.3 Lakhs. This Act was established to set up commercial courts at the district and state level and govern them in a manner that guarantees speedy commercial litigation. This article will discuss commercial dispute resolutions that are available, the legal provisions and institutions that govern it, both at the national as well as international level. In addition to this, the article will address and reevaluate the issue of whether the commercial aspect of the legal system in India is effective enough to provide justice in an impartial and a prompt manner, for justice delayed is justice denied.

Keywords: *Contracts, commercial disputes, commercial dispute resolution, alternate dispute resolution, Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's Act, 2015.*

I. INTRODUCTION

It is a well-established fact that in this fast progressing and competitive world, we do not want anything slowing us down and seeking remedies is no exception. The Indian Judiciary stands out in being the independent organ out of the three organs of the government. But the major drawback that the Indian Judiciary faces is 'docket explosion'. 'Docket explosion' is when the rate of the institution of cases is greater than that of the disposing of cases. Time and again, recommendations are being made, and measures are taken to mitigate this particular drawback. The main principle underlying the need for an effective judicial system is brought through the legal maxim "Ubi jus ibi remedium"-for every wrong the law provides a remedy. This emphasizes that the law guarantees every person the right to seek remedies. It is important that justice is served promptly without any delays for, "delayed justice is denied justice". This article deals with contractual and commercial disputes and discusses the non-conventional techniques for tackling them. Various recommendations will be suggested

pertaining to the enhancement of the existing mechanisms by eliminating each and every setback inherent in its functioning.

II. CONSTRUCTION AND INTERPRETATION OF CONTRACTS:

Section 2(h) of the Indian Contract Act, 1872 defines a 'Contract' as an agreement which is capable of being made enforceable in a court of law. Therefore, contracts are constructed when two or more people come together to form a consensus by exercising their discretion in forming the terms and conditions that include the rights and duties of each of the parties during both the performance of the contract and also in case a dispute arises. A dispute may arise due to reasons such as delays on the contract completion, modifications to specifications without consent, misinterpretation of the ambiguous terms and conditions framed. Therefore, it is important for the parties to be prudent and carefully construct and decide the terms and conditions of the contract to ensure that they have provided for not only all foreseeable disputes that may arise but also see to that no disputes arise out of avoidable circumstances. Parties must be aware of the customs and the norms usually followed in the field of the as well as the dispute resolution mechanisms available in general before the construction of contracts. Disputes are either commercial or contractual in nature. Commercial disputes and contractual disputes though used interchangeably, it is important to establish the difference between the two.

III. NOT ALL COMMERCIAL DISPUTES ARE CONTRACTUAL DISPUTES:

A contractual dispute is when an issue arises due to the infringement of terms, conditions, and definitions of an agreement between both the parties. It may arise between suppliers and retailers, between partners, between parties to a contract based on a particular model or law. Resolving these disputes is not costly and time-consuming. **It primarily arises as a result of breach of contract.**

Types of Contractual Disputes:

1) **Non-Compete Agreements:**

Business contract disputes primarily devolves around employment issues. Employees are hired on the condition that the employee would not work for the benefit of the competitor business and an infringement of this term would be against the organization's rules giving rise to a dispute.

2) **Company Contracts:**

Written agreements are the base for business and an act contrary to the agreement gives rise to a dispute.

3) **General Liability:**

A dispute arising out of general liability is one of the most dangerous disputes for business. A physical injury or harm to either one of the parties or both the parties is bound to happen and when that happens, business can

and will be held liable or accountable. The subject matter of the dispute, however, will be the extent of the fault or mistake, whether the fault is completely or partially on the company, etc. any injuries that occur because of the business directly/ indirectly has the potential to result in a legal dispute. Commercial disputes deal with ordinary transactions of merchants, bankers, financiers and traders, enforcement and interpretation of documents relating to transactions and construction and infrastructure of agreements.

How do they arise?

1) **Breach Of Contracts:**

A breach of contract occurs when one or more parties have failed to fulfill the obligations or responsibilities as outlined in the contract. The degree of the breach is the deciding factor as to how it will be resolved.

2) Intellectual Infringement:

Intellectual property usually consists of trademarks, patents and other trade secrets. They are intangible in nature and despite the stringent security, they are being stolen or being used without permission. This is termed as intellectual infringement.

3) Breach Of Fiduciary Relationship:

Fiduciary duties include the duty to act in good faith and to maintain confidentiality. A breach of fiduciary responsibility occurs when one party breaks the trust that the other party has on it. For example, if the parties to a contract fail to deal with each other honestly then it is termed as a breach of fiduciary relationship.

While contractual disputes as clearly stated above arises out of breach in contractual terms, commercial disputes stem out of disagreements between two or more businesses, usually concerning a contract or a property. Therefore, it can be stated that **All contractual disputes are commercial disputes but not all commercial disputes are contractual disputes.**

Irrespective of the dispute's origin**,** it can be resolved by traditional courtroom litigation, Alternative Dispute Resolution (ADR) and special courts established by the Commercial Courts Act, 2015. However the emphasis is laid on ADR and Commercial Courts as a new perspective to tackling commercial disputes.

IV. ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW

Alternative Dispute Resolution (hereafter referred to as ADR) is an 'umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve issues between them'. [1]It is also known to be a wide spectrum of out- of -court dispute resolution mechanism that complements the traditional litigation process rather than replace it. It is said to guarantee those affected and seeking remedies for

[1]National Alternative Dispute Resolution Advisory Council, Australia.

those conflicts arising out of contractual and commercial disputes, a straight forward process among all other benefits.

There are different types of ADR techniques:

1. Arbitration
2. Mediation
3. Conciliation
4. Negotiation
5. Ombudsman is one of the most common ADR techniques in practice.

The main objective of introducing and establishing ADR techniques was for it to compliment the traditional court system by reducing the burden off the courts and solving disputes without bringing them to the courts. To complement an already existing system, it is important for the new alternative to be better in aspects that the other system lacks. In theory, the system of ADR is said to have an edge over litigation in terms of confidentiality, cost, time, procedural efficiency, streamlined process, and rigidity.

1)AN INTERNATIONAL OVERVIEW

Alternative Dispute Resolution's growth around the globe has been a slow process throughout. During the nineteenth and the into the early twentieth century, arbitrations between imperial powers such as the British, Dutch, Portuguese and Soviet tended to be pursuant in terms of national and commercial interests between states under the public international law. International arbitration became the mainstream concern it is today, only after the dismantling of the above-mentioned empires and consequent establishment of the number of independent nation-states. Mediation, unlike arbitration is a more recent phenomenon which started in the United States around the 1970s as a solution to the rapid increase in the number of civil and commercial disputes. In the UK, with the advent of the Woolf Reforms, 1999 which gave way to Civil Procedure Rules, commercial mediation received judicial support.[2]In California, the Civil Procedure Code [3] has set out extensive provisions pertaining to the appointment of a referee in case of a dispute. When the parties to a contract have voluntarily agreed that any dispute between them will be resolved by judicial reference, the court will appoint a referee '(t)o hear and determine any or all of the issues in an action or proceeding, whether of fact or of law' and to issue a decision.[4]

2)ALTERNATIVE DISPUTE RESOLUTION IN INDIA:

Alternative dispute resolution is gaining more momentum in India owing to the efficiency in terms of cost,

[2]The Role Of ADR In Commercial Dispute Resolution: A Brief Overview
[3] The California Code of Procedure
[4] The California Code of Procedure 638.

money and time. Arbitration and mediation have always been on the upraise as it perfectly fits in with the existing scenario of the country. Additionally, the code of civil procedure has laid down that the cases must be encouraged to go in for ADR[5]. Under the first schedule, it is the duty of the courts to assist the parties in arriving at a settlement for both the parties and the second schedule allows the parties to refer to an arbitrator, before the judgment is pronounced. Arbitration is the process where an issue is submitted to one or more arbitrators mutually appointed by both. It facilitates quick and speedy disposal of cases, and its flexible nature makes it stand out from the rest. The arbitrator's decision is final and binding. Its confidentiality instigates the parties to approach this mechanism. In Brijmohan vs Union of India,[6]the fast track scheme was introduced, disposing of 7.94 lakh cases out of 15.28 lakh cases then. Arbitration proceedings are governed by the Arbitration and Conciliation act 1996. The arbitration and conciliation act 1996 covers both domestic and international arbitration where at least one party is not an Indian national.

V. THE ESTABLISHMENT OF A SPECIAL LEGISLATION: THE ARBITRATION AND CONCILIATION ACT, 1996

The act was enacted as an attempt or opportunity to bring about a holistic approach to alternative dispute resolution. The source of the act was the United Nations Commission on International Trade Law (UNCITRAL) model law on international commercial arbitration. The parties to the contract must refer to arbitration in accordance with the arbitration agreement between the parties empowering the arbitrators to ensure the satisfaction of the award and to empower them to decide on their jurisdiction, if the parties choose not to frame conditions and terms of the agreement based on the arbitration act. This feature highlights the flexibility of this mechanism. Additionally, the arbitrators are given the power and authority to decide on matters where the courts do not and cannot intervene. The act also imposes on the arbitrators to give reasons for their award when the parties specifically state that they are not necessary.

VI. COMPARATIVE STUDY OF PRE AND POST AMENDMENT:

The pro-arbitration approach was on the rise even before the amendment. The arbitration amendment takes into consideration several findings of pro-arbitration landmark judgments to eradicate the flaws, defects and inefficiencies that the act had prior to the amendment. The 1996 act contained three schedules and later with the enactment of the amendment, the arbitration and conciliation act has several amended provisions and a total of eight scheduled in the 2019 amendment act. The amendment act would apply to court proceedings incorporated after amendment irrespective of an award received prior to the amendment.[7]As per the newly introduced

[5]Section 89(1), the Civil Procedure Code,1908
[6](2012)6 SCC 502.
[7]New Tirupur Area Development Corporation Limited vs State of Tamil Nadu.

Section 23 (4) the statement of claim and defense shall be completed within a period of six months from the date of appointment of arbitrators and as per the amended section 29(1), the award in the matter of international commercial arbitration must be delivered within 12 months from the date of completion of pleadings. However, prior to the amendment, no time limit was there to file written submissions before an arbitral tribunal. In terms of confidentiality by way of insertion of Section 42A the arbitrator, arbitral institution and the parties to the arbitral agreement shall maintain secrecy. Section 9 of the act based on Article 9 of the UNCITRAL model holds that the court's power would be exercised even before an arbitrator has been appointed, but pre-amendment the power could be exercised, only if a request for arbitration has been made. The amendment clearly mentions that the arbitral tribunal requires the parties to attempt first to receive an interim order under section7 before going to the court for an interim order. Interim protection is no longer entertained.

VII. THE GROWTH OF MEDIATION IN INDIA:

Meditation, on the other hand, is a non-binding process where a third party called a mediator helps the parties to reach the settlement. Pre institution mediation has been mandatory before proceeding to file a commercial dispute by way of Section 12A as an amendment to the commercial court's act 2015. A lot of cases have been resolved by means of mediation and it’s been on the upraise. Even in the recent decision passed by the Delhi HC in Turning point vs Turning point Ltd, It was held that the Appellant and the respondent should have negotiated their differences by method of mediation.

VIII. CONCILIATION AS A COMMERCIAL DISPUTE RESOLUTION:

Part three III of the Arbitration and Conciliation Act,1996 deals with disputes arising out of legal relationships pertaining to whether it's contractual or not and the best way to resolve these differences is to adopt the method of conciliation - a non-binding process where a third party called a conciliator helps the parties to resolve the differences between them and to ensure that the parties are happier with a settlement than an award. A distinguishing feature of conciliation is that the process helps the parties to reach the root of the difference, and figure out the real problem that led them to disagree with each other. Besides coming up with an amicable solution, the parties need not resort to litigation after, the settlement has been made final. ADR in India has been showing consistency in its growth. But for this growth to make an impact, certain shortcomings in the system as such need to be eliminated.

IX. RECOMMENDATIONS TAKING INTO ACCOUNT THE LIMITATIONS:

1) Awareness:

People are hesitant to approach any out-of-court mechanism for the sole reason of not being aware of the functioning of it. Therefore, it is important to create an awareness in the minds of the public about the

availability of an alternative apart from the court-room litigation. The local communities can be educated on how and when each ADR should be approached in accordance with the different situations in each case byways of 'Legal Aid Camps'. The student community can be informed about the same through the inclusion of the non-conventional methods of tackling commercial disputes as a part of the curriculum. Institutions can be made aware of these techniques and intricacies of it by learned legal advisors of the firm.

2) Structure:

In India, the process of ADR inevitably ends up in courtroom proceedings with the mechanism in itself having little to no impact on the whole resolution process. Hence, it is important for the ADR mechanism to be well structured independently apart from being connected to the traditional courts, to ensure that the purpose of the establishment of such mechanism is not defeated .i.e, the disputes are resolved without the involvement of courts. Another handicap is that the implementation and the execution is over-emphasized that results in supervision taking a back seat. To overcome this, a Board or a Committee comprising of both public or private practitioners and members from the judiciary can be constituted to examine and identify problems in the system and come up with solutions to eradicate the inefficiencies and discrepancies that are identified.

3) Competency Of Professionals:

The legal fraternity is not well equipped nor do they have sufficient expertise in the field of ADR. The system is known to be one that deals with disputes with the aid of middlemen. The Indian system of Alternative Dispute Resolution lacks middlemen. It is important to equip the lawyers with extensive, comprehensive training on all matters related to ADR. This training should cover everything from cost/time effectiveness of using ADR in daily practice, to specific techniques. The system's functioning can be improved if it has members trained exclusively in the field rather than have existing adjudicators take up cases. If these recommendations are incorporated and limitations eliminated, the system of ADR, rather than being an 'Alternative Dispute Resolution' can become the '**Appropriate Dispute Resolution'** and can do justice not only to the people seeking remedies but also to the establishment of the system to make up for the flaws in the traditional system of dispute resolution. The other non-conventional technique to tackle commercial disputes is to introduce specialized courts.

X. ESTABLISHMENT OF SPECIALISED COURTS:

The reasons for the establishment of specialized courts are two-fold. Firstly, specialized courts to an extent can be referred to as or be synonymous to competent courts. Not all judges in the adjudication proceedings in the main judicial hierarchy may be well aware with the intricacies inherent in certain privacy laws. Therefore, it is important for the effective procedural efficiency in handling cases of a particular nature, that the case be taken

by or allotted to a specialized and competent body constituted exclusively for the same. Secondly, it is to ease the already existing strain on the courts. This ensures speedy delivery of justice to every court's optimum potential. The objective behind establishing commercial courts in India owes more to the latter than the former.

XI. COMMERCIAL COURTS ACT, 2015:

The Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's Act, 2015 was enacted to introduce a hierarchy of the specialized courts of commercial nature with a pecuniary jurisdiction of Rs.1 Million. The hierarchy consisted of Commercial Court at District level and a Commercial Division in the High Court, having ordinary original civil jurisdiction to deal with *Commercial Dispute.* All appeals from the orders of the Commercial Court/Commercial Division would lie before the Commercial Appellate Divisions to be set-up in all High Courts. [8]The Legislation underwent an amendment and was re-titled as the Commercial Courts Act, 2015.

XII. THE AMENDMENT: A CATALYST

1) It Aims To Lessen The Specified Present Value Of Rs.1 Million To Rs.3 Lakhs:

By reducing the pecuniary jurisdiction, it has enabled to accommodate a lot more cases in the commercial courts. This ensures and guarantees those aggrieved parties of a commercial dispute of a lesser value, the prompt delivery of justice. It is also a step towards instilling faith in the minds of the people with respect to the effectiveness of the functioning of the judicial system.

2) Establishment Of Hierarchy Of Commercial Courts And Appellate Bodies:

The commercial courts have been divided into those at the level of the District Judge and below the level of the District Judge. Commercial courts at the level of the District Judge deals with the case of higher value while those below the District Judge deals with cases of lower value. By establishing an organized hierarchy, the parties have a more clear understanding of the stream-lined process which is necessary for them to approach the courts with full awareness.

3) Pre-Institution Mediation:

The introduction of the pre institution mediation process [9]provides an opportunity to the parties, to amicable settle disputes through an out-of-court mechanism involving a mediator. This eliminates the drawback of the 'docket explosion' inherent in the Indian Judiciary and helps in quick disposal of cases. The dispute can be resolved with the parties understanding each other's position and will also enable them to continue their commercial relationship without much hindrance.

[8]Rajani Associates, What does the Commercial Courts Act,2015 do?, 2016.
[9]Section 12A, Commercial Courts Act,2015.

The above mentioned are some of the few highlights of the amendment. This proves that the amendment has indeed been a catalyst to achieving the objectives of the Act- to effectively and efficiently handle cases so as to reduce the burden of the courts and also to establish a competent authority specialised in the field so as to provide the most fair and just remedies by analysing and examining the dispute thoroughly without any bias and also in total adherence with the principles of natural justice. Though the amendment has been a step towards the development and growth of the system, there are a few areas that could be improved.

XIII. RECOMMENDATIONS TO IMPROVE THE EFFICIENCY OF SUCH COURTS:

1. Setting up of more number of commercial courts.
2. The process continues to remain lengthy which may result in a delay of the disposition of cases. Therefore, a few steps in the process could be eliminated and the process more simplified.
3. Increase in the number of trained adjudicators specialized in the commercial field.

XIV. CONCLUSION

Through this article, the various commercial dispute resolution techniques have been highlighted, the pros and cons of each mechanism discussed and recommendations to overcome the limitations have been suggested. It has been established that in the case of commercial disputes, tradition courtroom litigation is not a solution enough and it is important for other "apt" alternatives to be analyzed and implemented taking into account the existing political, cultural, social, economic scenario prevailing in the country. The difficulty in the successful implementation of these mechanisms lies in the mindset of the people who are not ready to accommodate contemporary mechanisms. The challenge also lies with the Executive and the Judiciary in complementing the Legislature in its functioning as the duty of the government does not end with creating different legislations but also continues through the implementation process until the justice is delivered in case of a dispute pertaining to the particular legislation. Therefore, it is important that all the three organs of the government complement each other in its functioning.