



ARBITRATION AND CONCILIATION

Arbitration in Retreat? The Government's Memorandum and its Challenges

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The Government of India through the Ministry of Finance vide its [memorandum](#) dated 3rd June 2024 (hereinafter referred to as “Memo”) on Arbitration and Mediation in Public Procurement Contracts has sent shockwaves across the legal fraternity and stakeholders alike. The memo in question is a set of guidelines issued for contracts of domestic procurement by the Government and its entities and agencies (including Central Public Sector Enterprises [CPSEs], Public Sector Banks [PSBs] etc. and Government companies) reflecting the government’s true view on Arbitration. The memo begins rather innocuously by explaining the benefits and merits of arbitration in comparison to other forms of dispute resolution. Thereafter it gets to its real purpose i.e. setting out the most controversial guidelines for dispute resolution through arbitration and promotes entities to pursue mediation for dispute settlement. The guideline which is most bothersome is the monetary limit to be set-out in the arbitration clause viz., arbitration may be restricted to disputes with a value of less than Rs. 10 crores and arbitration clauses covering disputes with value exceeding Rs. 10 crores shall be based on careful application of minf and with the approval of senior officials of the government entities as prescribed in Clause 7 (iii) (b) of the Memo. The authors seek to discuss the said guideline as the theme of this article.

India has come a long way in terms of its arbitration landscape after the introduction of the Arbitration and Conciliation Act in 1996. It is noteworthy to reflect that the legislation is by and large based upon the UNCITRAL Model Law on International Commercial Arbitration (1985). The reason for adopting the model code into our national legislation was to bring the arbitration law in India in consonance with the arbitration law prevailing in most part of the world at the time. It was also a sign of India’s commitment to becoming a partner of the developed countries in the arbitration landscape and improving our standing in the Rule of Law index. Thereafter, successive governments introduced a host of measures to shape the legislation more progressive and in sync with the global law on arbitration. The watershed moment in the Indian arbitration jurisprudence arose in the year 2015 wherein several key amendments were made to the Arbitration and Conciliation Act, 1996 one such notable amendment was doing away with the ‘automatic stay’ granted after the filing of a challenge/appeal against any award which was the case prior to 2015. The government did not restrict itself only to legislative measures, it also encouraged establishment of several arbitration centres across major cities in India with the object to enable international arbitrations in India and to make India a preferred seat for such arbitrations. The Arbitration Bar of India was also recently established with the intent to encourage cooperation and promote arbitration as mode of dispute resolution in the country.

Despite these positive steps forward, the Memo now challenges India’s commitment to encouraging an arbitration-friendly environment and achieving global recognition as a destination for international arbitration. The rationale behind the guideline is also quite cryptic at the very least. If arbitration struggles to resolve disputes involving amounts exceeding Rs. 10 crores, how can it ensure effectiveness for disputes involving lesser amounts? The Memo suggests mediation as an alternative to arbitration, yet mediation is not an adjudicative process but rather a platform for parties to mutually achieve consensus. Therefore, the only real alternative to arbitration as a mode of dispute resolution would be litigation in the domestic courts. The issue of pendency of cases is something which has been extensively commented upon and it would suffice to say that such government disputes now sans any arbitration would add on to the existing burden of pendency on our courts. The ousting of arbitration clauses as contemplated in the memo, does more harm than it does good because for all practical reasons parties resort to mediation before, during and after the arbitration proceedings have concluded it would be a misconception to assume that the existence of an arbitration clause in any manner whatsoever deters parties from resorting to mediation. Thus, it becomes clear that there is no cogent reasoning for the government to issue such a guideline at a time when the law around arbitration has been strengthened several lacunas in it were filled by judicial or legislative intervention, this move would have a cascading effect on the positive measures. The Memo has faced criticism and calls for its withdrawal have been voiced by the Arbitration Bar of India (ABI) and numerous other stakeholders.

Conclusion

The government should urgently reconsider the Memo and its specific guidelines, taking immediate action before many procurement agreements proceed without arbitration clauses or restrictions based on dispute quantum. The government’s decision cannot be isolated and will be perceived as its overarching stance on arbitration as a method of dispute resolution.