Ineffective dispute resolution

Decision to prioritise settlement over arbitration process is short-sighted and damages long-term economic interests

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ON JUNE 3, the Finance Ministry announced a surprising policy decision. After trying to promote India as a hub for arbitration for decades, the Government of India now feels that arbitrations do not work for them and that the arbitration clause should be dropped from all future government/government-controlled entities' contracts (except in relation to minor disputes of a value of Rs 10 crore or less).

The new policy is set out in the form of an Office Memorandum and provides that the government departments/ entities/ agencies should, "... amicably settle as many disputes as possible... in overall long-term public interest, keeping legal and practical realities in view, without shirking or avoiding responsibility or denying genuine claims of the other party."

To facilitate amicable settlement, the government agencies will constitute "high-level" committees composed of former judges/retired senior officials to vet or approve such settlements. If settlement efforts do not work out, the dispute will be left to the courts for adjudication.

The core reason given for this dramatic shift in policy is the government's perception that arbitrators often lack integrity and collude with private parties and the resultant award becomes difficult to dislodge (given the limited grounds available in law to challenge an arbitral award on merits).

The government's change of stance in abandoning arbitration and pitching all its hope in its ability to settle disputes "without shirking or avoiding responsibility or denying genuine claims" is fundamentally flawed and rests on misplaced wishful thinking. It will also prove to be a costly mistake and a major impediment in bridging the infrastructural gap, rendering projects bankable and achieving the five trillion-dollar economy aspiration.

One may start with the government's perceived lack of trust in arbitrators. First, arbitrators are meant to be independent and impartial and decide disputes on merits. They are not there to toe the government line or do its bidding. If the government is looking for "yes men", it is looking for biased arbitrators and destroying the sanctity of the arbitral process. The government should be insightful enough to recognise that adverse orders do not necessarily mean that the tribunal has been compromised. The correct conclusion to draw is that the government, its agencies and officials have fallen short in meeting their legal obligations and must, therefore, face the legal consequences. The government's alleged inability to find men and women of integrity and trust them to do the right thing cannot be a reason to abandon a widely accepted dispute resolution method and replace it with a dysfunctional one.

Moreover, if the government does not trust arbitrators as such (though it usually nominates former Supreme Court or High Court judges as arbitrators), why would it repose greater trust in its officials in negotiating a settlement? It matters little that the settlement is approved by a "high-level" committee (comprising inter alia of former judges) as it is and will remain a voluntary, administrative decision. A mediator (if involved) cannot advocate any particular position. He or she can only facilitate (and not recommend) any settlement. In terms of transparency and accountability, a settlement can never rest on an equal footing with an award which is issued following a judicial process and by a process known to law (failing which it is liable to be challenged, including on the grounds of bias, fraud or corruption).

Further, the government is surely overestimating its ability to settle disputes anything close to the scale and extent required. The government is rule-driven and its officials are answerable to multiple (internal and external) authorities. It is also answerable to courts for any arbitrary or discriminatory decision. The decision-makers are not immune to any later questioning by criminal investigating agencies. It is naive to imagine that the decision makers (no matter how senior in the hierarchy) will fearlessly sign off and agree to liability which can run into several hundred crores. This will be a road to nowhere.

The government's current attitude can be seen from its 2023 Vivad se Vishwas - II scheme for contractual disputes, which stipulates that even when an arbitral award is rendered, the government may, instead of honouring the award, agree to a 35 per cent discount on the sum awarded by way of a settlement. It is anybody's guess what its attitude would be when it is on a clean slate and there is no pronouncement of liability by an independent tribunal authorised by law to settle the dispute.

Finally, if there is no settlement, the aggrieved party is left to the mercy of the courts. There can be no two opinions that the courts are not equipped to handle heavy commercial disputes in any sensible way. The courts are so overworked that they are barely able to deal with the award challenge proceedings (where the scope of judicial review is minimal). The 2015 Amendment to the Arbitration Act, prescribes that award challenges shall be disposed off expeditiously "and in any event" within one year. The reality is that these challenges linger for around five years or so in the court of first instance alone. What would be the fate of an original suit with substantial stakes, voluminous documents, intricate facts and expert witness testimony (and where witnesses need to be directly questioned by the judge)?

Arbitrations may not be perfect, but they are clearly more workable than court litigation. To ask the private party to take its dispute to court is to turn a blind eye to reality and throw the litigant under the bus. Effective dispute resolution methods are a necessary adjunct to economic growth.

It is clear that the government has not thought this through, including how it can better address its concerns and what it can do to improve arbitrations.

The policy change is short-sighted and needs a swift reversal.

The writer is an advocate and specialises in arbitration cases