

India Inc prefers to use arbitration in disputes

LUBNA KABLY, TNN | Nov 6, 2013, 06.06AM IST

MUMBAI: The term 'caveat emptor' or 'let the buyer beware' could take on a new meaning. Unknowingly, along with a big-ticket purchase, the buyer often walks off with a standard customer agreement replete with an arbitration clause. As courts have taken divergent stands on access to the consumer court for buyers covered by arbitration and with grounds for challenging an arbitration award being limited, such a clause, in case of dispute, could haunt the buyer.

For instance, in the US, many buyers are increasingly realizing the ill-effects of binding arbitration clauses. In the Indian context, the jury is out on whether arbitration will help the buyer. The answer lies in its fair and transparent administration.

"The use of arbitration clauses in consumer contracts is on the rise — it is commonly found in consumer contracts for broadband or cable connection subscriptions, insurance policies, gift redemption offers, or home or car loans from finance companies. The speedy resolution mechanism offered via arbitration as compared to resolution of disputes by civil courts makes it a popular choice for India Inc," says Punit Damodar, partner, Kanga & Co. According to a Samsung spokesperson, "Generally, Samsung has arbitration clauses as part of both its customer and supplier contracts. It believes in arbitration as a dispute resolution platform, as against litigation."

In sectors such as insurance, the use of arbitration clause has a history. "Insurance offerings were once covered by tariffs and required that disputes (largely relating to quantum) be resolved via arbitration. Even as insurance offerings have been de-tariffed since 2007, it is customary to continue with the arbitration clause," explains Lokanath Kar, head (legal), ICICI Lombard General Insurance.

An illustrative list compiled by TOI shows that arbitration clauses vary — a few companies did not respond to TOI's queries. In some cases, the sole arbitrator is appointed by the company itself, in others an arbitration panel is set up, with each party nominating an arbitrator and the third arbitrator in turn is appointed by the two nominees.

Ashok Sharma, a Delhi-based advocate specializing in arbitration, admits that appointment of a sole arbitrator by a company may reek of unfairness. "However, this is a standard practice adopted by many companies and the sole arbitrator is a domain expert of that particular industry," he explains.

AVOIDING LEGAL TANGLE

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- **Bharti Airtel** | Buyers of broadband connection covered, co appoints the sole arbitrator
 - **ICICI Lombard General Insurance & Oriental Insurance** | Sole arbitrator is mutually appointed to settle quantum disputes, else an arbitration panel is set up
 - **Mahindra Finance** | Arbitration is adopted on termination of car loan contract and vehicle repossession
 - **Samsung India** | Appointed sole arbitrator to settle any disputes in a gift redemption offer

Kar adds, "It helps both the insurer and the claimant to have experts appointed as arbitrators to hear and adjudicate a techno-financial contract such as insurance." At ICICI Lombard, a sole arbitrator is appointed with mutual consent. If this isn't feasible, then a panel is set up. Courts have nipped the possibility of any bias creeping in on part of the sole arbitrator in favour of the appointing company. "Lately, courts have held that if an arbitrator is appointed in several arbitration matters by the same company, the buyer can move to the court for his removal," says Damodar.

As opposed to consumer court fees, which run only into a few thousands, arbitration can cost much more. "Typically, the arbitrator's fees are shared and given the shorter tenure of disposal as compared to consumer courts which can take two-three years, arbitration proves effective,"

says Sharma.

The legal fraternity is divided in its views on whether a parallel remedy with the consumer courts is available.

"The remedy under the Consumer Protection Act is in addition to and not in derogation of any other law. However, there are diverging opinions and the answer depends on the facts and circumstances of each case," explains Vyapak Desai, partner at international law firm Nishith Desai Associates.

"The Supreme Court, in an order issued in 2012, observed that the arbitration remedy is not the only remedy available, rather it is an optional remedy. A buyer can seek reference to an arbitrator or approach the consumer court. However, if he opts for the former, it may be possible to say that he cannot subsequently file a complaint under the Consumer Protection Act. Owing to varying judicial pronouncements, this cannot be perceived as the set tenet," adds Desai.

A buyer stuck with an unfavourable arbitration award can challenge it at the judicial level. But there is a catch: Courts will interfere with an arbitral award only on limited grounds — such as the award being against public policy, or if it is perceived as being made without application of mind. "The interference by the court is limited and not generally available like an appeal in a civil case," sums up Damodar. According to a PwC survey (2013), 91% of the 71 Indian companies surveyed were considering arbitration as the preferred route for dispute resolution.

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