

Settlement of commercial disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises.

The undersigned is directed to invite attention towards various guidelines issued from time to time by the Department of Public Enterprises (DPE) on the above mentioned subject and to say that a need was being felt for quite some time to revise wherever necessary, amalgamate/merge/ consolidate these guidelines into a single one. After due consideration and superceding the existing guidelines on the subject, the new dispensation is as under:

I. CREATION OF PERMANENT MACHINERY OF ARBITRATORS (PMA)

With a view to expedite the settlement of disputes relating to commercial contract(s) between Central Public Sector Enterprises (CPSEs) per se, and also between CPSEs and Government Departments, the Government of India created a Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises in 1989. One Legal Adviser-cum-Joint Secretary in the Department of Legal Affairs, nominated by the Law Secretary to function in the PMA is appointed by the Secretary in-charge of Department of Public Enterprises as sole Arbitrator in each case.

II. NEED FOR PMA

There had been growing number of litigations with the Courts/ Tribunals relating to commercial transactions between the Central Public Sector Enterprises (CPSEs) inter se, or CPSEs and Government Departments. The practice of disposal of these cases was not only expensive due to high fees charged by the advocates/lawyers for pleading the cases and other expenses incurred in this regard, but also time consuming. The other prevailing practice of conciliation, arbitration etc. were also ad hoc arrangement and not delivering the goods up to the expectations. With a view to expedite settlement of disputes and reduce avoidable expenditure in this regard, a need was felt to institutionalize the prevailing system of arbitration. Commissions/Committees like Law Commission, Central Vigilance Commission, Committee of Secretaries etc. had also examined this aspect and made certain recommendations/suggestions which were carefully examined in consultation with the Ministry of Law. The Government after due consideration of all aspects, decided to set up the PMA in the Department of Public Enterprises.

III. ENTITLEMENT

(i) In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between CPSEs, Banks, Port Trusts etc. inter se, or CPSE and the Government Department(s) hereto (except a dispute or difference concerning the Railways, Income-tax, Customs and Excise duties), such dispute or difference shall be referred by either party for arbitration to the PMA in the Department of Public Enterprises through the Secretary to the Government of India in-charge of the DPE.

(ii) The mechanism of PMA is primarily meant for Central Government Departments/organizations/enterprises. Therefore, the disputes between State Government Departments/organizations will not be entertained by the PMA. However, if the contract involves a Central Government Department/Organization with any State Government Department/Organization and both the parties have signed Arbitration Clause in favour of PMA as per annexure referred to in subsequent paragraph V(i), in such a situation the PMA shall entertain such dispute(s) for arbitration, if any such reference is received. In case of

dispute(s) with a CPSE which has been privatized due to disinvestment or other-wise, it shall also be entertained by the PMA if the same relates to the contract(s) entered into by the parties before privatization, as merely change of ownership of a PSE would not debar the company from the obligation of following PMA procedure.

IV. MONETARY LIMIT

There is no monetary limit as such for making reference of disputes to the PMA. However, it would be advisable if the parties exercise their own discretion in this regard as both the parties are to equally pay an initial cost of Rs. 20,000 each for making reference of dispute to the PMA which is non-refundable in any case but will be adjusted with final cost to be fixed by the Arbitrator as per the rates stipulated in a subsequent paragraph. There shall not be much advantage in referring disputes of a small amount of the value of less than Rs. 50,000/- to PMA and such disputes may be settled by the parties by mutual consultation.

V. REFERENCE

(i) As far as possible parties should try to resolve as many points of dispute as they could amicably by mutual consultation and only those points stating the amount involved be referred to the PMA that could not be settled mutually despite best efforts from both sides. To ensure prompt disposal of dispute(s) by the PMA, both the PSEs and the Government Departments shall refer the existing dispute(s) to the PMA at the earliest and not later than two months of arising of dispute. If any arbitrator has already been appointed in any dispute that should immediately be cancelled. Both the parties will also ensure the inclusion of an Arbitration Clause (if not already done so) in favour of PMA (as given in Annexure) in all the existing and the future contracts/supply orders between the parties. PMA shall not entertain the disputes referred to it without the proper Arbitration Clause.

(ii) After entering upon the reference, the Arbitrator will call for the papers, comments/statements from the parties and will hear the parties in person as and when he deems necessary. The Arbitrator shall ordinarily fix the meeting in Delhi unless, for reasons to be recorded in writing, he decides otherwise. No outside lawyers shall be allowed to appear on behalf of the parties to argue their cases before the Arbitrator but the parties can take the help of their own full time Law officers. (Subject to the aforesaid, the Arbitrator, and the Law Secretary will determine the procedure as the case may be).

(iii) The Arbitrator will also submit a quarterly report to the Secretary (DPE) on the number of cases registered, awards published, fee received and general progress of cases.

VI. FEES

(i) The Arbitration cost in respect of a commercial dispute settled through the PMA is required to be shared equally by the concerned disputing parties. In this connection each of the parties to a dispute will be required to make an initial deposit of Rs. 20,000/-, when a prima-facie case of dispute is established and the same is approved for referring to the Arbitrator of PMA for settlement. This initial cost will be adjusted in the final cost of Arbitration. The Arbitrator will work out the final cost of Arbitration based on the amount of dispute as per the following formula:

(a) Rs. 40,000 or 1% of the disputed amount up to Rs. 50,00,000, whichever is higher, to be equally shared by the parties.

(b) Rs. 50,000 + ½% of the disputed amount of above Rs. 50,00,000 but up to Rs. 5 crore to be equally shared by the parties.

(c) Rs. 2.5 lakh + ¼% of the disputed amount beyond Rs. 5 crore to be equally shared by the parties.

(ii) The Arbitrator in the PMA will intimate the parties the estimated amount of Arbitration fee to be borne equally by them and paid within a month of intimation to the parties or within such time as may be allowed by the Arbitrator. All payments should be made to the Government of India through Demand Draft in favour of D.D.O., Department of Public Enterprises, payable at New Delhi.

(iii) The Arbitrator in the PMA, if he considers appropriate, may allow fee concession up to 10% of the total fee worked out based on the laid down formula for the sick and continuously loss making CPSEs subject to arranging payment within one month of the order of the Arbitrator in the PMA.

(iv) The party(ies), who fail to pay the arbitration fee within the stipulated period, will have to pay an additional interest on the late fee, which may or may not be waived by the Secretary(DPE). The interest on late fee will be charged at the rate of 10% of the final cost for delay up to one month and 15% for subsequent delay up to six months. If any of the parties further fails to make payment of the arbitration fee within six months of the intimation given by the Arbitrator in PMA, the publication of the award may be cancelled and the initial deposit will be forfeited. It will also be the responsibility of the concerned Administrative Ministry/Department to ensure the payment of the arbitration fee either by the concerned party or by them who will arrange the funds and enable the defaulting party to make payment of the arbitration fee without delay.

(v) In case any of the parties has made full payment of the fee and another has failed despite continuous follow up and as a result of which publication of award is cancelled, the fee in addition to the initial deposit may be refunded to the party concerned. However, Government will not pay any interest on such amount.

VII. COMPROMISE

In case both the parties decide to settle the dispute mutually before the Award is published, they can be allowed to do so. In such case, the initial cost (Rs. 20,000 paid as deposit by each of the parties) shall be forfeited and the case will be finally closed on receipt of details of the settlement arrived at by the parties in writing. In case the parties do not provide requisite details, the Arbitrator may decide to publish the Award and in such a situation the parties will be required to pay the arbitration fee worked out by the Arbitrator.

VIII. NATURE OF AWARD

The Arbitrator shall make his award within six months after entering upon the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the parties may allow. The Arbitrator shall make a speaking award. The Award may be published on plain paper. The Arbitrator may also, if he thinks fit, make an interim award.

IX. EX PARTE AWARD

The Arbitrator may make his Award ex-party when a party(ies) fail to furnish the particulars required from them, and/ or do not appear in person in spite of being given two chances to do so. Even in that case, the parties shall be bound to meet the cost of arbitration equally.

X. APPEAL

The Award of the sole Arbitrator under the PMA shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such further reference, the Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary shall decide the dispute. The decision of the Law Secretary/Special Secretary/Additional Secretary shall bind the parties finally and conclusively. The aggrieved party may file an appeal before the Law Secretary within the period as recorded by the Arbitrator in the Award for implementation. This time limit may be kept in view while filing an appeal before the Law Secretary. The Law Secretary, after giving an award on the appeal, will return the records of the case to the PMA. The Arbitrator may also, if thinks fit, make an interim award. However, there shall be no appeal to the Law Secretary against the interim award and both the parties are to await the final award by the Arbitrator.

XI. CHANGE OF ARBITRATOR

In the event of the sole Arbitrator dying, neglecting or refusing to act or being unable to act for any reason, it shall be lawful for the Secretary to the Govt. of India in-charge of the DPE, to appoint another person in place of the outgoing Arbitrator to act as sole Arbitrator. The new Arbitrator so appointed shall as far as practicable proceed from the stage where it was left by the outgoing arbitrator.

XII. BANK GUARANTEE

In commercial transactions sometimes a PSE has to stand Bank guarantee. An incidence occurred in a dispute where the bank guarantee holder PSE approached the guaranteeing bank for encashment of the bank guarantee. Such action creates an embarrassing situation to the Government, which in its turn has given counter bank guarantee. This matter was considered in DPE and it was decided that all PSEs should effect encashment of bank guarantee only as a last resort when efforts to resolve the differences/ dispute fail and that too, after giving due notice/information to the concerned public sector enterprise. In such situations, all the PSEs should refer the dispute to this Department and cooperate with the Arbitrator of PMA for early settlement.

XIII. CLEARANCE FROM COMMITTEE ON DISPUTES

It has to be ensured that no litigation involving such disputes is taken up in a Court or a Tribunal without the matter having been first examined and given permission/clearance by the High Power Committee generally known as Committee on Disputes (COD) set up in the Cabinet Secretariat on the directions of the Supreme Court in Civil Appeals Nos. 2058-59 of 1988 between ONGC and the Collector of Central Excise, Mumbai. In case, litigation in Court/Tribunal becomes absolutely necessary, the aggrieved party(ies) will seek the permission of the COD for which the concerned Ministry/Department or the concerned PSE/Bank/Port Trust through their administrative Ministry/Department or directly may make a reference with a self-contained note in the prescribed format to the designated authority in

the Cabinet Secretariat (Under Secretary – Coordination) for placing the same before the aforesaid Committee for decision.

2. All the administrative Ministries/Departments concerned with management of Central Public Sector Enterprises/Banks/Port Trusts etc. are requested to bring these guidelines to the notice of all concerned organizations under their administrative control for strict compliance. It is also requested that they may ensure and monitor the implementation of the award of the Arbitrator by the parties as per his directions. Presidential directives as per Annexure referred to in paragraph 1V(i) above, may be issued to incorporate the provisions in the Articles of Association or other relevant regulations of concerned organization(s) at the earliest.

ANNEXURE

Arbitration Clause to be included in all the commercial contracts entered into by the Public Enterprises/Government Departments etc.

In exercise of the powers conferred by Article.....of the Articles of Association of the (name of the CPSE/Bank/Port Trust etc.)/ Section..... of theAct of setting up of the (name of the CPSE/Bank/Port Trust etc.), the President of India is pleased to direct that all disputes relating to all commercial agreements (except income tax, customs, excise duty and also concerning Railways) between (name of Company/Corporation/Bank/Port Trust) and (name of another Public Sector Undertaking /Government Department/Bank/Port Trust etc.) shall be referred to the Permanent Machinery of Arbitrators (PMA) set up in the Department of Public Enterprises. The President is further pleased to direct that the following Arbitration Clause shall be included in all current and future contracts/agreements etc. and that in respect of ongoing contracts they should be suitably amended to include such a clause:

“In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary, when so authorized by the Law Secretary, whose decision shall bind the Parties finally and conclusively. The Parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator”.

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