## **"Government's New Arbitration Guideline: Can it undermine ADR Mechanisms?**

Ministry of Finance, Department of Expenditure recently issued an Office Memorandum titled "*Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement"*. This Memorandum has been criticized for its perceived implications and its potential impact on arbitration practices within the context of domestic public procurement contracts and also as being contradictory to Government's own policy to encourage ADR mechanism for speedy and economic justice.

The Memorandum recommends that "*Arbitration as a method of dispute resolution should not be routinely or automatically included in procurement contracts/ tenders, especially in large contracts. As a norm, arbitration (if included in contracts) may be restricted to disputes with a value less than Rs. 10 crore. This figure is with reference to the value of the dispute (not the value of the contract, which may be much higher)"*.

This restriction can undermine the flexibility and effectiveness of arbitration in handling disputes across a wide range of contract values. Arbitration is valued for its ability to provide efficient and tailored resolutions to disputes, irrespective of their monetary value and the expertise required for specific sectors such as infrastructure. Imposing such type of limits or conditions might discourage parties from including arbitration clauses in contracts where higher-stake disputes could arise. Handling such high stake disputes through litigation can result in prolonged legal proceedings, exacerbating delays and increasing costs for all parties involved.

Although the Memorandum further recommends that *"Government departments/ entities/ agencies are encouraged to adopt mediation under the Mediation Act, 2023 and/ or negotiated amicable settlements for resolution of disputes*.", but mediation may not be effective in matters where the parties are not willing to come to a compromise. So, there can be incorporation of Med-Arb clauses within government contracts. This approach advocates for a dual-phase dispute resolution mechanism where mediation precedes arbitration.

Therefore, in our view, the limits set in this Memorandum should be reconsidered to bring it in line with the Government's aim to promote ADR mechanism including arbitration and mediation both, as these mechanisms are less adversarial and are capable of providing a better substitute to the conventional methods of resolving disputes. The use of ADR mechanisms is expected to reduce the burden on the judiciary and thereby enable timely justice dispensation to citizens of the country. The availability of ADR mechanisms for resolving disputes will also build confidence in foreign investors to invest in India, which will in turn attract more foreign investments, create more job opportunities and improve the financial condition of India. This will indirectly contribute to the success of "Make in India" campaign.

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