INSURANCE OMBUDSMAN SCHEME

A good step, but a lot remains to be desired

Background

The relationship between sellers and the buyers has since ages remained ticklish and even tense, at times. In a strict commercial sense, this relationship is signified by the movement or delivery of some goods or services from the seller to the buyer in consideration for a predetermined exchange from the buyer to the seller. This relationship remained amicable by and large, during the era of small markets in terms of area as well as volume. However the advent of mass production techniques during the industrial revolution resulted in a vertical and horizontal expansion of markets and spurt in demand. This persistent rise in demand and the resultant splurge swayed the equilibrium of market forces in favour of sellers, giving rise to oligopolistic markets, more commonly referred to as "sellers markets". Markets and marketers became organized while the consumers remained scattered and divided, thus leaving very little bargaining power in the hands of an average consumer. Off late, the apparently simple transaction has become the source of many complaints, controversies and complications.

The MRTP Act and the Standards of Weights and Measures Act also reflect the concern of the legislatures towards consumer protection

In addition to economic forces, the political and legal systems of the past also, despite their theories of welfare state, could not escape the capitalist hegemony and succumbed to the notions of 'laissez faire', thus promising much but offering very little towards consumer protection. This promoted dubious maxims like "caveat emptor" which subdued the basic issues touching consumer protection.

A long and arduous struggle followed with consumer movement gaining momentum, the world over. Stiff and organized resistance from consumer organizations against unfair practices of sellers compelled governments to give some serious thought to the issues of consumers and the recognition of fundamental consumer rights. The legal thinking and judicial attitudes also yielded to the higher claims of consumer interests, against the absolute freedom of contract.

In India, it was as late as 1980s that anything concrete towards consumer protection materialised, with the enactment of Consumer Protection Act, 1986, which affords speedy and cost effective remedy to consumers in cases of deficiency in service. The MRTP Act and the Standards of Weights and Measures Act also reflect the concern of the legislatures towards consumer protection.

The lack of movement of tangible goods in service industries makes them more prone to disputes. It is also difficult to determine objectively the quality of services, which leads to a higher degree of dissonance. This is more so in case of insurance since the sacrifice is real and immediate while the benefits are distant and contingent. This coupled with the flaws in concept marketing renders insurance an area highly vulnerable to disputes, which is evident in the fact that in a large number of complaints dealt with by the Consumer Forums, insurance companies figure as respondents, even in this era of nationalised sector.

The Malhotra Committee set up to recommend insurance sector reforms, while recommending privatisation of insurance sector, also acknowledged the need to protect consumers' interests and recommended setting up of the institution of ombudsman, with a view to reduce litigation. The aftermath of almost five years since the submission of its report — which if not shelved has surely gathered some dust—

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hasn't seen much of a change in circumstances, which led to the recommendations.

The recent notification of the Draft of Redressal of Public Grievances Rules, 1998 was one of the few concrete steps taken in the direction of implementing these recommendations and more importantly, creating a framework capable of tackling the hazards of liberalised insurance sector. It would be worthwhile to examine and analyse these Rules in the backdrop of the foregoing.

The Rules

The Draft Rules which have been notified in pursuance of powers conferred upon the Central Government by Section 114(1) of The Insurance Act, purport to set up an institution of ombudsman for both life and general insurance sectors. The objects of these Rules are to "resolve all complaints relating to settlement of claims on the part of insurance companies in a cost-effective, efficient and impartial manner." The government has reserved its right to exempt any insurance company from these Rules, upon being satisfied that its in-house grievance redressal machinery fulfils the requirements of these Rules.

The ombudsman, who shall be a person possessing judicial experience, shall be appointed by the Governing Body of the Insurance Council, from the panel proposed by a committee appointed by the Governing Body. He shall be appointed for a term of three years and shall receive emoluments equivalent to that of a High Court judge. The Governing Body shall also decide territorial jurisdiction and staff strength of the office of ombudsman.

Any person having a grievance against an insurer may complain in writing to the ombudsman, within whose jurisdiction the concerned office of the insurer is situated, stating out facts of the dispute and evidence, if any. Before making a complaint the insured is required to represent his case to the insurer concerned and only upon the rejection of his representation or the failure to reply to the representation within one month, shall a complaint lie with the ombudsman. Moreover no complaint which is made after one year of the cause of action or which is the pending subject matter before any Court or Consumer Forum, shall be maintainable.

Apart from the unilateral complaints of the insured persons, The Rules also provide for bilateral reference of disputes through mutual agreement between the insurer and the insured, in which case the ombudsman shall act as a counsellor or mediator. The ombudsman will then make his recommendations on the subject matter, which if acceptable to the insured, shall be satisfied by the insurer.

In case of complaints, the ombudsman shall pass an award within three months of filing of complaint. Here also the insurer shall satisfy the award only upon its acceptance by the insured. Thus the recommendations as well as awards, have been made binding on the insurers, but subject to their acceptance by the complainant.

In addition to the above referred complaints, the ombudsman is empowered to receive and consider:-

- any total or partial repudiation of claims by the insurer.
- any dispute in regard to premium paid or payable in terms of the policy,
- any dispute on the legal construction of the policies in so far as such disputes relate to claims,
- delay in settlement of claims,
- non-issuance of any insurance document to customers after receipt of premium.

However the ombudsman will not be empowered to award any compensation in excess of the actual amount of losses suffered by the complainant by an insured peril, subject to a limit of Rs.20 lakhs. This also covers ex-gratia payments, which the ombudsman may award.

An Advisory Committee comprising of not more than five persons notified by the Government shall assist the Insurance Regulatory Authority (IRA) in reviewing the performance of ombudsman from time to time. The IRA in consultation with Governing Body shall come out with proposals to improve the functioning of ombudsman. The ombudsman on his part, shall furnish an annual report in which he will review the quality of services provided by the insurers and recommend steps for improvement thereof.

The Insurance Council also shall suggest measures to the ombudsman with a view to enhance utility of his annual report and further the objects of these Rules.

Analysis

A perusal of the Rules easily reveals a striking ambiguity on the role of ombudsman. It is not sufficiently clear whether the intention is to create an executive authority or a quasi-judicial authority; whether the role of ombudsman is that of a conciliator, arbitrator or an adjudicator. While the provisions on appointment [Rule 6], remuneration [Rule 7] and staff [Rule 11] indicate the intention to create a quasi-judicial authority, the essential powers required by such authority are very much lacking and the expressions like "the ombudsman may receive and consider..." [Rule 12(1)], "the ombudsman shall act as a counsellor and mediator..." [Rule 12(2)], the ombudsman shall make his recommendation..." [Rule 15(1)] indicate that the ombudsman shall merely act as a conciliator (and not even an arbitrator) with executive powers; something in line with Conciliation Officer under the Industrial Disputes Act. The recommendations or even the awards are nowhere made binding in express terms, thus leaving serious doubts about the authoritative value of the institution.

To aggravate this anomaly, Rules 15(2), 16(5) and 17 provide an option to the complainant to accept or reject the recommendation/award, both in case of joint reference by mutual agreement as well as in case of unilateral complaints, while no such option is available to the insurers. This squarely violates the basic principles of natural justice, as it is a well established fiction of law that when a dispute is jointly referred to a third-party, the decision of that third-party has to be binding, either on all the parties to the reference or on none. Again it is pertinent to note that the word used in Rule 15(2) is "recommendation" and not "award" which if construed in the literal sense, cannot bind any of the parties.

As against this, Rule 16 which deals with the outcome of unilateral complaints, contains the word "awards" (and not recommendation) which again, if construed literally, would bind all parties to the exclusion of none. However here also the complainant has been allowed to exercise his sweet will to accept or reject the award, thus following the lines of Rule 15(2). Thus despite the fact that the words "recommendation" and "award" differ literally and are used to prescribe the outcome of two different situations, their enforceability is left to the sole discretion of one party viz. the complainant.

Moreover, where a decision of an authority constituted by law is made binding on any of the parties, legal fiction requires the incorporation of an express right to appeal for the party claiming to be aggrieved by the decision, in the law itself. In its absence the insurers, on whom the recommendations as well as the awards are ostensibly binding, will have no legal remedy against the same, since the courts have consistently maintained that unless the law otherwise provides, no inherent right to appeal can be presumed. The insurers will also be unable to invoke the residuary appellate remedy under Article 136 of the Constitution, since appeals under this Article are maintainable only against the awards, judgements, orders etc. passed by a Court or Tribunal. The institution of ombudsman as envisaged by these Rules falls nowhere near the definition of a court or tribunal.

Everything said and done, the Rules also do not provide for the consequences of non-compliance of awards or recommendations of the ombudsman, on the part of the insurers.

In the wake of above anomalies it would not be difficult to visualise a probable situation in the event of these Rules being notified as they are, in a liberalised insurance sector having more (if not many) insurers in the field than they are at present, with a substantially expanded consumer base, where none of the insurers in the event of disputes would be forthcoming to jointly refer disputes to the ombudsman, thus resulting in a plethora of complaints, which in absence of adequate powers to the ombudsman to summon parties as well as documents, are more likely to be received frivolously or at least casually, ending up in a huge pile of pending complaints. The fate of whatever little disposal that might ensure, will also remain chequered since the Rules are totally silent on the consequences of non-compliance of awards by unscrupulous insurers. It is worthwhile to note that even the nationalised insurance sector, has witnessed a few instances of contempt of summons and even the awards of Consumer Forums, despite their judicial character being known to one and all in the industry, inviting heavy strictures from the judiciary.

The Rules, if challenged on grounds of illegal deprivation of the right to appeal and the discrimination as regards the binding effect of awards, bear a slender chance of succeeding a judicial review. Thus an institution designed to attain noble ends might itself

end up in a cloud of controversy, thus rendering the entire exercise of creating it, futile.

Apart from the major flaws elucidated above, the Rules also suffer from certain minor inconsistencies that need to be attended. The provison to Rule 2 empowers the Central Government to exempt an insurance company having a satisfactory in-house grievance redressal machinery. This appears inconsistent with the objects of the Rules cited in Rule 3, which are to resolve the complaints in a cost-effective, efficient and impartial manner. It is difficult to presuppose the same degree of impartiality on the part of an in-house machinery comprising of the employees of the same company, which can be expected from an independent ombudsman not related to any insurer. Such subjective powers to the executive, tend to prejudice the very sentiment underlying the consumer welfare legislation and should be dropped.

Last but not the least, the frequent reference to one or the other authority or committee and their reports and recommendations revolving around the ombudsman, hardly escape attention. If anything, this only indicates the multitude and altitude of the cluster culture to which our entire system has been subjected over the years which has made it rigid to the extent of obstinacy. Multiplicity of controls and procedures, despite the noble intentions behind them, have never yielded anything better than multiplicity of paper, pains and problems.

Suggestions

Keeping in view the need to remove the above inconsistencies, as well as to ensure a system which commands confidence of all parties concerned, the following modifications to the Rules are suggested.

1. The subjective powers to the executive to exempt should be removed to make the Rules applicable to all insurers without exception.

2. The objects should be extended to "other services required to be provided by the insurers", in addition to "settlement of claims."

3. The various authorities referred to in the Rules should be done away with. The IRA and not the Insurance Council, should have exclusive powers relating to the appointment, remuneration, removal, staff and review of the office of ombudsman. This will ensure efficient functioning and better accountability of the institution. To attain the above in a more effective manner, as well as to avoid legal complications, IRA should first be made a statutory authority. The IRA Act should itself incorporate these Rules.

4. The role of the ombudsman should be clearly defined. He may act as an arbitrator (ambiguous expressions like counsellor and mediator should be removed) if called upon to do so by parties to the dispute. The arbitration award (and not recommendation) should be made binding on all parties to the reference. No appeals against such awards should be allowed except on the grounds of malafide/arbitrary exercise of powers. The application of Arbitration Act should be excluded.

5. Alternatively a system of private arbitrators may be promoted to ensure speedy settlement of disputes. The IRA may prepare a panel of private arbitrators. Appeals against awards of private arbitrators may be preferred to the ombudsman.

6. In case of unilateral complaints, the ombudsman should act as an adjudicator. For this the ombudsman should be declared a quasi-judicial authority by investing in him some of the trappings of a Civil Court with regard to:-

    * summoning persons;
    * examining them on oath;
    * discovery and production of documents;

7. The ombudsman should be declared a deemed Public Servant within the meaning of IPC.

8. The ombudsman may also be empowered to award compensation in excess of actual indemnity, towards pain, suffering, harassment etc. albeit within prescribed limits (say a percentage on the actual amount of indemnity).

9. Any party to the dispute may appeal to the High Court against ombudsman's award.

10. The Rule empowering the ombudsman to grant ex-gratia payment should be dropped, since it is an issue to be decided at the sole discretion of

the insurer not being a contractual obligation.

11. A standard policy condition stipulating the reference of a dispute on the quantum of indemnity to an arbitrator, appears in almost all the policies in vogue today. By invoking this condition insurers may challenge unilateral complaints on this issue. To avoid this, either the IRA should direct insurers to insert an exception to this standard policy condition, allowing a reference to ombudsman even on amount of claim settled or the Rules should contain an express provision overriding such policy conditions.

12. It should be compulsory for all insurers to constitute an in-house grievance redressal machinery under a Chief Grievance Officer, who should be made directly answerable to IRA.

13. A mention of the name and address of the Chief Grievance Officer as well as the ombudsman having jurisdiction over the policy issuing office, on all policy documents, should be made compulsory.

Conclusion

Going by the dictionary meaning of the term ombudsman, he is a person who merely investigates complaints against government departments or large organizations, thus confining his role to that of an inquiry officer. It is perhaps in this context that the Rules are silent on the enforceability of awards of ombudsman. But at the same time the manner in which one way enforceability of awards is perceived, amounts to sheer travesty of natural justice. A grievance redressal system which affords discriminating rights to the parties involved, in addition to leaving many loose ends, might also fetch very little credence amongst the insurers as well as consumers and may even be rendered redundant in the long run. After all results matter and not intentions.

At a time when our past experience is not encouraging enough to consolidate or even sustain our faith and confidence in the systems and concepts pursued so far, thus enticing radical changes in our philosophy and ideology, it is high-time we learnt our lessons by ensuring that a liberalised and deregulated market, also serves consumers' interests. Thus while granting operational freedom to the market players, it is also essential to attain a perfect equilibrium amongst the diverse pulls and pressures, especially for the meek masses, who have hitherto been reeled by the market dynamics.

This in our case can only be achieved through a machinery, by whatever name called, which is equitable enough to be unassailable and powerful enough to be effective, both in theory as well as practice. This is the least we should have learnt from our tryst with destiny so far. ✠

GIC ready to sell 10.95% ITC stake to Bat

General Insurance Corporation is ready to part with its 10.95 per cent stake in tobacco major ITC in favour of parent company BAT Industries of UK, notwithstanding the dilly-dallying attitude of the Centre on the issue. GIC chairman Devdutt Sengupta said, "We view our investment in ITC as pure investment and will not mind selling the shares to BAT at an appropriate price." The willingness of the corporation to sell its ITC stake assumes significance in view of the reported reluctance of the Government to grant a permission to Unit Trust of the India to offload its holding in ITC to BAT.

The UTI-BAT deal could not come through because the then advisor to the finance minister, Mohan Guruswamy, put a spoke in the wheel by advocating that the price being paid by the foreign collaborator was inappropriate. Subsequently, the deal was put off. With Guruswamy out of office, the willingness of GIC to sell its stake in the ITC will find some takes in BAT which had been wanting to increase its stake in the Indian company. GIC has the second-largest institutional shareholding in the ITC after UTI, which holds 15.90 per cent.

Apart from UTI and GIC the third-largest institutional shareholder in the company is Life Insurance Corporation (LIC) with 8.47 per cent equity. BAT holds 37.14 per cent stake in the tobacco major and for long has been wanting to increase its stake to more than 51 per cent. Although the issue of Indian Insurance Companies holdings take in the tobacco firms has been questioned on ethical grounds Sengupta sees no harm in making such investments. According to the GIC chairman," we had been buying ITC shares to secure decent returns on investments" And, he added, "We will not mind to sell the ITC stake at right price." When asked, what would be the appropriate price, he said," we will have to work that out."