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Isn't conciliation a best alternative!

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Abstract
Settlement Agreement executed between the disputing parties through Conciliation process has the same status and effect as an Arbitral Award. Still, Conciliation ensures speedy and cost-effective settlement of the dispute unlike court litigation and arbitration. Conciliation has the potential to bring such desirable outcomes, which are always been missing, i.e. safeguarding the relationship and ensuring finality to the dispute. The only problem is its proper utilization by the disputants to its potential. The paper will analyse in details and compare Conciliation mechanism against court litigation and arbitration proceedings so that it's hidden worth can be unveiled.

Keywords: conciliation, arbitration, litigation, adjudicatory, adversarial, dispute, ADR, settlement

1. Introduction

The adjudicatory or adversarial mechanism ensures that the Winner gets it all and the Loser gets small. This means that under adjudicatory mechanism whether it is a Court Litigation or Arbitration, only one party (winning) can cherish the outcome and the other party (losing) is left with no other option than to criticise the decision and to look for further legal recourse.

When the parties enter into a commercial relationship, they come together with the understanding that they will work in a harmonious and mutually beneficial manner. However, upon existence of a dispute between them, if they decide to resort to the adjudicatory mechanism to settle their dispute, they take a step forward to part their ways.

The results are usually declared in a win-lose context. This is on the basis that in every dispute one side deserves victory, the other defeat; and that by so awarding and withholding the spoils and fruits of contest, the system is providing an answer, and an end, to the conflict. It also assumes that its petitioners have the same orientation, i.e., they will also correlate victory in legal proceedings to rightness in the cause, and thus the conflict will end. That is a far cry from reality. Rarely do litigants accept that their case is of no substance when they get an adverse court decree. They are quite sure that the judge does not know his stuff, or, if he does, has erred in their case, or that extraneous considerations have prevailed. We may also reflect on the fact that human affairs, relationships and transactions are far too complex to be bracketed into absolute determinations of black and white, victor and vanquished, fully right and completely wrong. Losers may thus have legitimate grounds for refusing to accept loss [1].

It ought to disturb us that the process focuses more on winning and less on establishing the truth. The elements which are not supportive of the case are camouflaged, submerged, glossed over or faintly admitted, only to be explained away. "The truth always triumphs" is meant to be a truism for the law courts, but in practice, lawyers and clients want a truth conducive to their success in the case [2].

The best legal advice was given in the Sermon on the Mount - "If someone sues you, come in terms with him promptly when you are both on way to court." The famous Judge learned HAND was the wisest of the judges in confessing that "he would as litigant dread a law suit beyond almost anything else, short of sickness and of death. "DICKENS said of the court of Chancery that there is not an honourable man amongst its practitioners who would not give, who does not often give the warning - suffer any wrong that can be done to you rather than come here". These opinions of learned men accurately reflects the mood of a common man towards the present judicial system [3].

Criticising the first comprehensive legislation on Arbitration, the Hon'ble Supreme Court in *Guru Nanak Foundation v. Rattan Singh & Sons* [4], observed that:

"Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in the courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary."

Thus, it is clear that adjudicatory mechanism has been criticised of being most dreadful nightmare in one's life. People are commonly heard advising others that no one should ever fall into the trap of hospitals and courts. The institution like courts was developed for adjudicating the disputes between the parties so that justice can prevail. However, the same adjudicatory mechanism has been constantly alleged to be sluggish, pricey and influenced.

So, is there any solution to this issue? The disputes are very common and can develop in any kind of relationship. We can't avoid disputes to breed, as this is not in our control. Therefore, we should contemplate whether there is any mechanism left which could be helpful and resolve the disputes between the parties and not yet corrupted with the system. Is Conciliation a solution? There is no hurry to jump to any conclusion instantaneously. Let us test this mechanism by discussing it further and then we decide whether the entire discussion attract us toward its direction or not.

2. What is Conciliation?

Conciliation may be defined as a process of settling of dispute without recourse to the Court of law or litigation. As a technique of ADR (Alternate Dispute Resolution), conciliation has acquired statutory recognition in the Arbitration and Conciliation Act, 1996 ("Act"). As against arbitration, it is neither based nor controlled by existence of a prior agreement between the parties. That apart, recourse to conciliation can be had even after parties have resorted to litigation and the case is pending before a court [5].

Conciliation is a process to resolve the dispute between the parties with the help of third neutral person. Such neutral person is called as Conciliator who helps the parties into the dispute to reach to a settlement. Upon reaching to a mutual settlement, the parties enter into a Settlement Agreement stating the terms agreed between them. Such a Settlement Agreement becomes binding on the parties and even the Act recognise it equivalent to an arbitral award and thus binding on the parties.

The UNCITRAL Conciliation Rules, 1980 had been recommended by the General Assembly of the United Nations, accordingly, the Indian Parliament found it important to enact a law relating to conciliation, which gives birth to the Act in 1996. The conciliation provision under the Act is broadly based on the UNCITRAL Conciliation Rules, 1980.

Consequently, in 2002, the Code of Civil Procedure, 1908 ("CPC") was amended to incorporate ADR as an integral part of the judicial process. Regarding the newly inserted provision under Section 89 of CPC, if the court considers that there exist an element of settlement, which may be acceptable to the disputing parties, the court may frame the terms of a possible settlement and can refer the same for conciliation.

3. Recognition of Conciliation's worth

To protect the justice system, it was felt desirable to develop and introduce alternative mechanisms having the capability to resolve complex issues between the parties without knocking the doors of the Court, so that the parties can be saved of the harassment being faced by them soon upon initiation of any dispute. Conciliation is one such mechanism which does not involve adjudicatory or adversarial method of settlement of dispute and purely based on the mutual settlement between the parties with the help of a conciliator.

While initially, conciliation was statutorily recognized by the CPC, the Industrial Disputes Act, 1947 (Section 12) and the Hindu Marriage Act, 1955 (Section 23), it was unable to gain popularity mainly due to the lack of a proper structure and statutory backing as it was more in the nature of a court annexed conciliation. The concept of pre-trial conciliation was put into practice by the High Court of Himachal Pradesh in 1984 based on the Michigan Mediation in the USA, which was widely appreciated by the Law of Commission of India in their 77th and 131 reports [6].

One of the methods which can be devised for relieving the courts of the heavy load of cases is the adoption of the system of conciliation of civil cases. Settlement of cases by mutual compromise is quite often a better method of ending the civil dispute than the alternative of fighting the case to the bitter end, by taking up the matter in appeal from one court to the other. The latter method, apart from burdening the parties with heavy financial expenditure, also quite often leaves a trail of bitterness. Results more in consonance with justice, equity and good conscience can sometimes be achieved by having a mutual settlement of the dispute than by having a court decision one way or the other [7].

The Law Commission of India [8] has categorically discussed the importance of the system and appreciated the efforts of Himachal Pradesh High Court by stating:

Chief Justice of Himachal Pradesh High Court, Justice P.D. Desai, being aware that the system is over-stretched and bursting at the seams, with a view to salvaging the system coupled with a burning desire to make the system result-oriented assisted by an uncanny vision, has used this provision so successfully that the scheme of Conciliation Court framed by him and successfully operated by him may now be accepted by all courts. Not confining the conciliation process to the suits to which rule 5B would apply, the Chief Justice has made it applicable to all types of litigation set out in the scheme under the heading 'Identification and Transfer of Cases to the Conciliation Courts'. Frankly speaking, hardly any litigation of civil nature is left out of the purview of the Conciliation Court. He has not only successfully worked the scheme but obtained results which are very encouraging.

4. Main features of Conciliation

a) Conciliation mechanism is non-binding and voluntary in nature and purely depends on the parties to agree with the settlement terms drawn up by the conciliator.
b) Conciliation is non-adjudicatory in nature, as there is no plaintiff/ Claimant or defendant.
c) Conciliation is flexible as it allows the conciliator to have discretion in deciding the procedure to be adopted.
d) Conciliation process can be initiated at any stage of the dispute, whether it is yet to be initiated or pending before the court/ arbitration or even after pronouncement of the decision/ award.
e) Conciliation mechanism (in India) is not bound by CPC and Indian Evidence Act, 1872 [9].
f) The Settlement Agreement has the same status and effect as of an arbitral award (under the Arbitration & Conciliation Act, 1996) [10]

5. Conciliation Process

For easier understanding, the process broadly involved in the Conciliation can be divided and depicted as under:

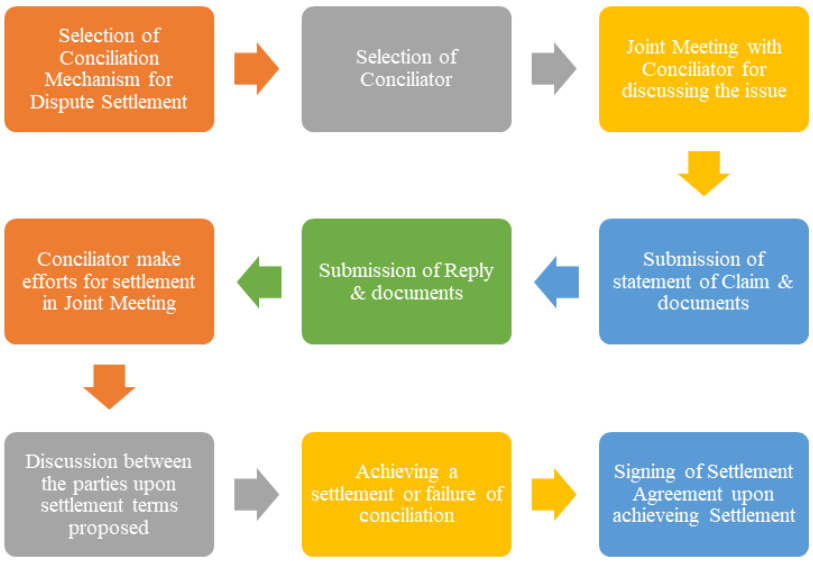

Fig 1

6. Conciliation over Adversarial form of Dispute Settlement

6.1 Win-Win

The commercial organizations operates on a philosophy that stakeholders (vendors, contractors, consumers etc) are contributing significantly for the growth of the organization and therefore, entering into a legal battle with its stakeholders is not beneficial for its commercial interest. Too much litigation with the stakeholders can prove to be fatal for the organizational growth, as their important dealers, vendors, customers, agents, etc. may stop dealing with them. The goal should be to create a mutually beneficial association with all its stakeholders and thus for resolution of disputes, adapts a process which creates a win-win situation.

The compromising, win-win character of Conciliation is a key benefit, since it ensures the maintenance of congenial business relationship, however, resorting to the adversarial mechanism for resolution of the dispute may rupture the relation. Conciliation enhances the prospect of the disputing parties to continue their business relationship during and even after the proceedings as it fosters long term relationships. Therefore, preference should be given to the conciliation mechanism where the intent of the parties is to preserve their existing commercial and contractual ties.

6.2 Cost Effective

Arbitration fees/ expenses and litigation expenses incurred by Central Public Sector Enterprises (CPSEs) in India on Arbitration and litigations during 2014-15 and 2015-16 are as under [11]:

Arbitration expense incurred in 50 CPSEs (Sample)

Table 1

Financial year	Arbitration cases	Arbitration fees / expenses incurred (Rs. In crore)
2014-15	1347	717.09
2015-16	1483	737.09

Litigation expenses incurred in 50 CPSEs (Sample)

Table 2

Financial year	Cases	Legal expenses incurred (Rs. In crore)
2014-15	38,381	144.25
2015-16	39,849	163.24

From the above table it can be seen that the litigation expenses incurred by simply 50 CPSEs during 2014-15 and 2015-16 were more than 850 crores each year this figure is alarming.

On the other hand, Conciliation is significantly cheaper than adjudicatory method of dispute settlement. Unless, the parties to the dispute agrees otherwise, the costs of the conciliation proceedings are borne equally between them. In a court case, normally the parties are require to pay: Court Fee while filing the case and then Advocate Fee and Senior Advocate Fee (if engaged) for years together till the conclusion of the matter. Since, a case normally prolong for number of years altogether, the travelling and other petty expenses involved in attending the hearings accumulate to the huge cost. Similarly, in an arbitration matter, the parties are require to shell out money in the way of Arbitrators Fee, Advocate Fee, Venue charges (ad-hoc arbitrations)/ Administrative expenses (Institutional arbitration) during the lifetime of the arbitration matter, which most likely lands into the court of law by way of a challenge to the arbitral award. Such a challenge, again involve fresh cost as a court litigation. Thus, arbitration simply surges the entire cost of litigation by including the cost of arbitration in the cost of court case.

On the other hand, the cost involved in the Conciliation method simply includes (i) The reasonable fees of the conciliator (ii) The travel and other out-of-pocket expenses of the conciliator and (iii) the cost of arranging the meeting venues. Moreover, these costs are also normally shared between the parties in an equal proportion. The entire cost involved in conciliation proceedings is much lesser than cost involved/incurred in litigation and arbitration proceedings.

6.3 Expeditious

The Hon'ble Delhi High Court judgement in the case of *Rakesh Kumar v. Cideas Investment India Pvt. Ltd* [12]. dealt with the issue of delay in arbitration matters: The arbitration award was published on 09.12.2000. The award was challenged in District Court under Section 34 of the Act and the judgement was rendered on 05.10.2015. Subsequently, this judgement of the district court was challenged before the Delhi High Court, which was dismissed by High Court on 11.12.2015. Thus, it took nearly 15 years for the arbitration matter to finally be concluded.

An effort has been made by the Arbitration & Conciliation (Amendment) Act, 2015 by incorporating Section 29A in the Act, which provides for stricter timelines for making the award in the matter. However, still considering the impracticability of the imposed timelines for the conclusion of the arbitration matters, an amendment has been proposed in the 2018 Bill [13] to make the said timeline effective from the date of completion of pleadings., thereby, increasing another six months. Further, the Bill proposed to remove the time restriction for international commercial arbitrations.

On the contrary, Conciliation process is very fast paced as against litigation/ arbitration. The matter is settled at the threshold of the dispute, avoiding protracted litigation efforts at the courts. As conciliation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation. Parties save money by cutting back on unproductive costs such as traveling to court, legal costs of retaining counsels and litigation and staff time.

6.4 Finality

Litigation seldom concludes in the court where it was first filed. It is just the beginning of the litigation phase. Every order/ judgement is prone to challenge before the higher court. The main purpose of the appellate process is to correct faults and miscarriage of justice, but they are often turned out to redo the entire contest. Accordingly, the final outcome gets postponed and makes the litigants incur fresh costs and suffer again with the waiting period. As the matter prolongs, the stakes involved in the issue tends to get higher because various other costs gets added to the original stake, *i.e.* the costs of litigation and the interest amount. Conclusiveness is elusive until the bank account is empty; indeed, some disputes have subsumed whole estates.

Thus, it can be a long march on the litigation highway. Worse, even if one has traversed a long way, it is not certain that the end is in sight. This is starkly illustrated by decisions in final appeal or review which, on some point, send the case back to a lower court to begin all over again—making parties experience the kind of sinking feeling one gets when one is near the end of a snakes-and-ladders game and that fateful throw of the dice brings one down from 98 to 13 [14].

The limited grounds of challenge contained under Section 34 of Arbitration and Conciliation Act, 1996 reflect the very jurisprudence on which the Arbitration Law is formulated, i.e. trust in the arbitral process. It is abundantly clear that courts have no power to see the merits of the matter. However, this basic proposition was put to test and suffered a major setback in the case of *ONGC vs. Saw Pipes Limited* [15]. In this case the Supreme Court succumbed to the temptation to 'correct' perceived errors in the award. The court was concerned with an award which disallowed liquidated damages. The law related to liquidated damages is contained in Section 74 of the Indian Contract Act, 1872. The Court came to the conclusion that the arbitral award, in so far as it disallowed liquidated damages on the ground that they have to be proved, was legally flawed. In this process it held as a matter of law, that an arbitral award can also be challenged on the ground that it contravenes 'the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract'. Further, the court expanded the concept of public policy to add that the arbitral award would be contrary to public policy if it is 'patently illegal'. An earlier Supreme Court judgment, by a larger bench (*Renu Sagar Power Co. vs. General Electric Corporation*) [16] had construed the ground of 'public policy' narrowly and confined to the 'fundamental policy of Indian law or the interest of India or justice or morality'. The Supreme Court in Saw Pipes case distinguished Renu Sagar case on the ground that the said judgment was in relation to a foreign award. The reasoning given was that in foreign arbitration, the award can be set aside/ suspended by the competent authority under their relevant law, whereas in domestic arbitration no such recourse is available and the award attains finality, thus there is a greater need for judicial scrutiny.

Conversely, consensual agreements under the Conciliation mechanism tend to deliver some grade of satisfaction on the psychological level so that they are more readily, easily and comfortably adhered to by the parties to the dispute than those decisions which have been imposed by an arbitrator/ judge in adjudicatory mechanism.

One of the significant feature of Conciliation is the fact regarding signing of the conciliatory agreement between the parties to the dispute giving an undertaking stating that they will not resort to any kind of legal recourse before any legal forum. This is one of the most remarkable and striking feature of Conciliation as it brings finality to the litigation, which all other methods of dispute settlement fails to achieve.

7. Conclusion

Hopefully, by now we are able to decide upon the issue raised in the beginning of this paper and can safely conclude by mentioning that Conciliation has a great potential to provide a lasting solution to a dispute.

Since, the Settlement Agreement signed by the parties to the dispute has the same status and effect as an Arbitral Award, Conciliation may be particularly suitable where the parties to the dispute desires to safeguard their commercial relationships. Organisations often enter into contractual relations for carrying out their projects. They float Tenders inviting Bids, evaluate Bids and finally award the Contract. This consumes time and funds. Hence, it is best to maintain cordial relations so that this time consuming procedure need not be undertaken again and again.

The success of Conciliation process depends upon the factors affecting it. It is necessary for both the parties to accept the conciliation process with open mind and have to put up the issues accordingly. An essential factor for success in the

conciliation proceedings is the personal appearance of the parties, or their representation by someone having full power to reach agreement.

It has been observed that the scheme of things does not encourage participation of legal counsel during the conciliatory process. In fact organisations do not encourage engagement of legal professionals or former judges of the lower court/ High Court/ Supreme Court to act as conciliators so as to avoid getting the process completely legalistic.

Also, one of the most important aspects in case of Conciliation is the signing of the conciliatory agreement thereby considering the settlement as full and final, binding on the parties. This is one of the most striking and remarkable feature of Conciliation (as an effective ADR mechanism) as it brings an end to the litigation. It is open to any party to apply for execution of the settlement agreement by filing an execution petition before the civil court. The expeditious enforcement of a conciliation settlement agreement in a summary manner i.e. by way of execution proceedings in a civil court is the principal advantage attached with conciliation [17].

Conciliation possess great benefits as an ADR mechanism, however, it is not being properly utilized by the disputants to its potential. Accordingly, there is a need to urgently appreciate its utility and take necessary measures for propagating, advocating, popularizing and thoroughly utilizing Conciliation as an ADR method.

8. References

1. Panchu Sriran, Mediation Practice and Law – The Path to Successful Dispute Resolution (2015, 2nd Edition).
2. ibid
3. Markanda, Law relating to Arbitration & Conciliation (2009, 7th Edition)
4. AIR 1981 SC 2075
5. Paranjape NV. Law Related to Arbitration & Conciliation in India, 2016.
6. Bachawat, Arbitration and Conciliation (2010, 5th Edition)
7. Law Commission of India, 77th Report titled Delay and arrears in trial courts, pg 26 available at http:// lawcommissionofindia.nic.in/51-100/index51-100.htm
8. Law Commission of India, 129th Report titled Urban legislation mediation as alternative to adjudication, pg 44 available at http://lawcommissionofindia.nic.in/101-169/index101-169.htm
9. Section 66 of Arbitration and Conciliation Act, 1996
10. Section 74 of Arbitration and Conciliation Act, 1996
11. Report of 3rd Pay Revision Committee (For Central Public Sector Enterprises) retrieved from http://dpe.gov.in/sites/ default/files/3rd_PRC_Report_TWO.pdf-
12. MANU/DE/4280/2015
13. The Arbitration and Conciliation (Amendment) Bill, 2018 available at http://www.prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2018-5280
14. Panchu Sriran, Mediation Practice and Law – The Path to Successful Dispute Resolution (2015, 2nd Edition)
15. 2003 (5) SCC 705
16. 1994 Supp (1) SCC 644
17. Section 74, 30 and 36 of Arbitration and Conciliation Act, 1996