CONCILIATION: AN EFFECTIVE MODE OF ALTERNATIVE DISPUTE RESOLUTION SYSTEM

Written by ***Aditi Bhargava***
Student, 5th Year BLS/LLB, Rizvi Law College, Mumbai University

ABSTRACT:

In the last few decades, ADR mechanism had burgeoned in the developing and developed countries alike. A recent study on ADR held in the United Stated and also in India suggests that the parties are generally pleased with conciliatory, comprehensive, and flexible procedures of ADR. Lately, Arbitration was considered to be a cheap and efficacious remedy under ADR system, however, now the situation is completely reversed. Arbitration proceedings have become more technical and expensive due to which the emphasis is now shifting to conciliation.

The basic aim to opt for ADR mechanism is to reach a settlement between the parties and no party should feel aggrieved by the decision.

INTRODUCTION

Conciliation means "settling of disputes without litigation". *It is a non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of negotiating a settlement based on an objective assessment of each other's position.*[1]

In the HALSBURY'S LAWS OF ENGLAND, the terms "arbitration" and "conciliation" have been differentiated as under:

"*The term arbitration is used in several senses. It may refer either to a judicial process or to a non - judicial process is concerned with the ascertainment, a declaration, and enforcement of rights and liabilities, as they exist, in accordance with some recognized system of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce,*

[1] Inter globe aviation ltd v. N. Satchinand 2011 (3) Arb LR 1 (SC)

what in the parties, and such a function is non- judicial. Conciliation is a process of persuading parties to reach an agreement, and is plainly not arbitration; nor is the chairman of conciliation boards an arbitrator."[2]

CONCILIATION: A BETTER MODE OF ALTERNATE DISPUTE RESOLUTION:

As stated earlier, Arbitration was considered to be a cheap and efficacious remedy, now the situation is completely reversed and arbitration proceedings have become too expensive and technical due to which the parties have to bear the cost of the lawyers as well as the fee of the arbitrators, which is indeed creating a hole in the pockets of the concerned parties.

In the same context, a reference may be made to the Judgment of the Supreme Court of India. In "*Guru Nanak Foundation vs Rattan Sing & Sons*"[3], it was observed:

"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. Informal forum chosen by the parties for expeditious disposal of their disputes by the decisions of the court has been clothed with "legalese" of unforeseeable complexity."

Due to the increase of the arbitration cost and technical procedures involved in it, the litigants have a feeling that they would have been better off, if there had been no arbitration clause and they could have just filed a civil suit, which entails only three steps as compared to the six steps involved in arbitration before the final decree.

Conciliation is a better alternative to the formal justice system. In conciliation, it is not necessary to enter into a formal agreement to select this mode of dispute resolution. As for the arbitration

[2] Halsbury's Laws Of England 4th Ed, Vol. 2, paragraph 502
[3] Guru Nanak Foundation V. Rattan Singh & Sons, AIR 1981 SC 2075.

clause is included in the agreement it is implied that the dispute will be referred to conciliation and if amicable settlement fails then, it will be referred to the arbitration.

In comparison to Arbitration, Conciliation is a non- binding procedure in which an independent person as a third party assists the parties to a dispute in reaching a mutually agreed settlement. It is necessary that the parties to the dispute should be brought face to face to interact with each other and with the conciliator to arrive at a settlement of the dispute. A benefit with conciliation is that in other proceedings decision is given by the presiding authorities and is binding but when it comes to conciliation there is an amicable settlement, where the parties themselves reach to a decision, the third party i.e. conciliator just help to arrive at a settlement & not dictating the terms of the decision.

Mediation is another mode of resolution similar to conciliation. Mediation is also an informal and non - adversarial process in which the third party i.e. mediator encourages and facilitates the parties in dispute to reach an amicable settlement. The mediator has no power to impose a decision or settlement on the parties. The terms "conciliation" and "mediation" are used interchangeably because, in both the process, a successful completion of the proceedings results in a mutually agreed settlement of a dispute between the parties.

The Difference between a mediator and a conciliator is that a mediator assists the parties to reach a conclusion for resolving the dispute and does not express his opinion on the same, whereas, a conciliator may express his opinion. In both of these methods, an independent person or persons are appointed to assist the parties to reach a settlement of their dispute. The only function of a conciliator or a mediator is to encourage the parties to reach a settlement.

In the USA, 'conciliation' is described as 'mediation' in which, *it is said that emphasis is, in comparison with conciliation, on the more positive role to be played by the neutral in assisting the parties to arrive at an agreed settlement.*[4]

One of the most important advantages of choosing conciliation is that though the settlement in conciliation could not be reached then the evidence leaded, the proposal made during the

[4] India Law Journal

proceeding cannot be disclosed in any other proceeding including arbitration proceedings as well. This protection is provided by the Arbitration and Conciliation Act; hence, the parties may opt for conciliation without any risk.

Conciliation is as old as the Indian history, the *panchayat* system works in the villages is also a form of conciliation proceeding. The Indian system places a lot of importance on the resolution of disputes by negotiation. Under the Arbitration and Conciliation Act, 1996, conciliation has the statutory sanction. The best example where conciliation played an integral role is of the Beagle channel dispute which is a highly politically sensitive case. It was over the ownership of certain islands in the entrance to the channel between Chile and Argentina. The process was astounding because it was very flexible to accommodate the changing political environment of both the countries and the mediator used his tools to great advantage. This process indeed saved the fragile peace between the countries and allowed them to create an agreement which has lasted till date.

PROCEDURE

The process of Conciliation for resolution of a dispute can be opted by either party. In this process, one party invites the other to resolve the dispute through conciliation, hence it is said that the conciliation proceedings initiated. In the same case, when the other party accepts such invitation, the conciliation proceeding is said to be commenced. On the contrary, if the other party rejects such invitation, there can be no conciliation proceedings for the resolution of the dispute.

Mostly, only one conciliator is appointed for the conciliation proceedings but in the case where the parties fail to arrive at a mutual agreement on the sole conciliator, then they may take the help of any international or national institution for the appointment of the conciliator. They may appoint a panel of 3 conciliators, each party appoints one and the third conciliator is appointed by the mutual consent of the two appointed conciliator. This process is similar to the one in arbitration for the appointment of an arbitrator.

Unlike arbitration, in conciliation, the third conciliator is not referred to as "Presiding Conciliator". He is just termed as the third conciliator. It is the duty of the conciliator to be impartial and conduct the proceedings in the same manner. He should follow the principles of good equity, conscience, fairness, and justice. The conciliator is not bound by the procedures and evidence nor does the

conciliator pass an award or order. His main agenda is to bring an acceptable agreement between the parties on the dispute between them. The said agreement is then signed by the parties and the conciliator for authentication.

In some legal systems, the agreement between the parties has been given the status of the award and if in the conciliation proceeding, no consensus could be achieved between the parties, then the parties may resort to arbitration for the amicable settlement of the dispute.

In conciliation, a conciliator may also act as an arbitrator if the parties expressly agree to such terms. These proceedings are very confidential in nature, therefore, the rules of the conciliation procedure in most of the institutions has provided that the parties or the conciliator shall not rely on or introduce as evidence in arbitration proceedings.

This concept has received statutory recognition for being an effective method to reconcile the parties involved in the dispute, instead of going for time-consuming litigation. This is in a way similar to the American concept of mediation. However, to achieve popularity in the well developed and economically advanced countries, a structured procedure and statutory sanction are necessary for the growth of the Conciliation procedure.

CONCILIATION AND AMERICAN JUDICIAL SYSTEM

The process of conciliation is now adapted in America and other countries as well. Conciliation courts set up in America is a place where aggrieved people go to resolve legal disputes in a simple and informal manner. These courts do not have any jury trials, adjudication or judicial verdicts.

Conciliation court in the American judicial system is referred as “small claims court” or “the people’s courts”. These courts undertake to resolve non-criminal disputes and each country has its own conciliation court. As stated in the American judicial system, a filling fee is to be paid before bringing any dispute before the conciliation court. Though, if the concerned party shows its inability to pay the said fee, then the court may allow the proceeding without the payment. The party which wins the case receives its money back. The party disagreeing with the decision of the

conciliation court has the power to appeal against the decision of the conciliation court to the district court.

In American judicial system, conciliation & mediation is used in the same meaning. The line of differences between the two concepts is very thin. They are interchangeable expressions. In both the cases, successful proceedings result only when there is a mutually agreed settlement between the disputed parties. In some jurisdictions, mediation is considered to be distinct from conciliation as according to them mediation has more emphasis on the positive role of the independent party than in conciliation. Nevertheless, this concept of mediation should not be a factor for distinction as the role of the independent party depends upon the nature of the dispute, willingness of the parties and the skills of the independent party.

The United Nation General Assembly, through the resolution of the 4th December 1980 has adopted the Rules of Conciliation and further recommended the use of the rules in International Commercial disputes. The majority of the countries have adopted the model law and the rules prepared on the International Commercial Arbitration & Conciliation by the UNCITRAL.

Similarly, based on the laws and rules, India had adopted and enacted the same as "The Arbitration & Conciliation Act 1996". The Inter-National Chamber of commerce has also implemented the ICC Rules of optional conciliation for the amicable settlement.

CONCILIATION AND INDIAN JUDICIAL SYSTEM

The Indian judicial system is facing problems of mounting arrears of pending cases and a need of disposing of them. Recently, Arbitration was considered to be the method which will help to achieve amicable settlement within time. However, due to the technical aspect of arbitration, this process is also time taken. Hence, the importance of conciliation in the present scenario is increasing as this is considered to be the best alternative.

The Himachal Pradesh High court undertook the project of disposing of the pending cases by conciliation & insisting on pretrial conciliation in fresh cases. This idea was based on the mediation in Canada & Michigan. The said project had great success in Himachal Pradesh. The Law

commission of India in its various reports (77th & 13th) has appreciated the project in Himachal Pradesh and recommended the other States to follow the same path. Conciliation in India has received statutory recognition under the Arbitration & Conciliation Act 1996, which is further based on the UNCITRAL model due to which it can be used for both domestic as well as international commercial disputes.[5]

The Himachal Pradesh High Court experiment has opened a new path for the concept of conciliation in India. Before this experiment, conciliation was a process which was adopted on the willingness of the parties but now based on the High Court's experiment, it has been induced in a court process where it is mandatory for the parties to conciliate for settlement and if it fails then they may approach the courts. Recent studies suggest that the Mumbai High Court is also taking the initiative to adopt the Himachal Pattern of pre – trial conciliation.

PROBLEMS IN INDIA

Despite the fact that conciliation services are accessible to common prosecutors through the development of Lok Adalats (boards of conciliators) and Conciliation Committees, a few issues stay unsolved.

In the first place, India by and large needs mandatory mediation, for example, early impartial assessment used in the United States which is particularly helpful when imposed shortly after litigation is initiated. Conciliation in India requires the assent of both sides or request of one party and the decision by the court that the matter is reasonable for conciliation.

Second, the subject of dispute that might be sent to Lok Adalats is constrained to automobile-accidents and family matters.

Third, the conciliation procedure ordinarily includes the legal advisors, not the parties themselves. This issue is very limited in writ procedures in which the government is the responding party, as counsel claims to lack authority to decide the terms of the settlement.

[5] IOSR Journals Vol. 4 Issue 3

Fourth, current conciliation proceedings don't require the parties to meet and present preceding entering either conventional case settings or their choices. No joint proclamation of the particular purposes of difference is required. The non-attendance of the meeting, gathering as well as joint statements prerequisite is required. The absence of a meeting, gathering or joint statements prerequisites permits contending sides to remain protected from each other.

Fifth, the Lok Adalats themselves have encountered build-up, and a few respondents consent to conciliation as a method for further delaying the litigation procedure.

Lastly, there is no set time or point in the suit procedure at which a choice is made, by the courts, the parties or generally with respect to referral of the case to some form of ADR.

Conclusion

Be that as it may, the progress of conciliation depends upon the attitude of the parties, the ability of the conciliator and the best possible condition for servicing the conciliation procedure. The state of mind required for conciliation ranges, on the one end from the side of the parties to arrive at a mutual agreement, however there might be mental reservation in making the primary move, to the absence of any complaint to such settlement, so that the conciliator may have scope to prompt the parties to seek conciliation.

On a logical perception, interdependence is the sign of conciliation process. For sound business relationship common understanding and to unravel the question through settlement are the possible qualities. At the point when parties are having a good business relationship, he will undoubtedly succeed in conciliation.

The need is to build up a will to suit the other party’s interest, a confidence in the other’s objects and ability develop the desire to sit together and respond and to tackle out the distinction amicably. In this manner, it is desirable to resolve the dispute by conciliation.