Conciliation in India: An Overview

Introduction

The Arbitration and Conciliation Act, 1996 ("**the Act**") is based on the UNCITRAL Model Law on international commercial arbitration and conciliation. While the Act was not intended to displace the judicial system, the new law ushered in an era of private arbitration and conciliation. It was also the first time that a comprehensive legislation was made on the subject of conciliation in India.

This bulletin will provide an overview of the conciliation proceedings in India along with the relevant provisions under various statutes.

1.0 Conciliation under the Act

The UNCITRAL Rules on Conciliation, 1980 recognized "*the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations"* and that adoption of uniform conciliation rules by *"countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations*."[1] Accordingly, these rules were closely followed by the Indian legislators to formulate conciliation rules under Part III of the Act.

1.1 Principles of conciliation

The procedure laid down in Part III of the Act reflects the following broad principles: (1) *non-adversary nature of conciliation proceedings* – there is no claimant or plaintiff in conciliation proceedings, (2) *voluntary nature of proceedings* – any party can commence and discontinue the proceedings, (3) *flexible procedure* – the conciliator has the discretion to adopt any procedural law to ensure speedy and inexpensive conduct of proceedings, and (4) *decisions are recommendatory* – disputes are settled by mutual agreement and not by imposed decisions.

1.2 Definition of conciliation

The term conciliation is not defined in the Act. However, simply put conciliation is a confidential, voluntary and private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. This method provides the disputing parties with an opportunity to explore options aided by an objective third party to exhaustively determine if a settlement is possible. Like arbitration, the Act covers both domestic and international disputes in the context of conciliation. International conciliation is confined only to disputes of "commercial" nature. As per the Act, the definition of *international commercial conciliation* is

[1] Resolution 35/52 (Conciliation Rules of the UN Commission on International Trade Law) adopted by the General Assembly on December 4, 1980

exactly similar to that of international commercial arbitration.[2] Accordingly, the Act defines international commercial conciliation as conciliation proceedings relating to a dispute between two or more parties where at least one of them is a foreign party.[3] The foreign party may be (1) an individual who is foreign national, (2) a company incorporated outside India, or (3) the government of a foreign country.

1.3 The role of a conciliator

Per section 80 of the Act, the conciliator does not decide for the parties, but strives to support them in generating options in order to find a solution that is compatible for both of them, thereby fulfilling the mandate of section 67 of the Act under which the main function of the conciliator is to assist the parties to reach an amicable settlement.[4] For achieving this, a conciliator is obliged to (1) act in an independent and impartial manner, and (2) abide by the principles of objectivity, fairness and justice.[5] Section 67(4) specifically enables the conciliator to "*make proposals for settlement of the dispute … at any stage of the conciliation proceedings.*"

The above provisions make it clear that the conciliator, apart from assisting the parties to reach a settlement, is also permitted and empowered to make proposals for a settlement and formulate/reformulate the terms of a possible settlement.

2.0 Conciliation vis-à-vis Arbitration

While arbitration is considered private when compared with the court system, conciliation is even more private than arbitration. As litigation and arbitration are both means of adjudication, the judge and the arbitrator render their verdicts and impose them on the parties. While the parties to an arbitration proceeding are given considerable freedom in terms of deciding the venue, date, arbitrator, etc., they have no control over the decision making process except in the case of award on agreed terms.[6] In contrast, parties to a conciliation proceeding have the privilege to negotiate and arrive at an amicable settlement with the assistance of a conciliator in a less formal setting.

Secondly, while section 7(2) requires that an arbitration agreement be in writing, there is no such express provision regarding conciliation in the Act. However, this does not hold much relevance as the process of conciliation commences with the written offer and acceptance to conciliate by the parties.[7] Conversely, in arbitration, even in the absence of a prior written agreement, if the parties appoint the arbitrator and proceed with arbitration, the requirement of section 7(2) is taken as complied with.

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[2] Explanation to section 1(2) of the Act states that "*the expression "international commercial conciliation" shall have the same meaning as the expression "international commercial arbitration" in clause (f) of sub-section (1) of section 2*"
[3] Section 2(f) read with the explanation to section 1(2) of the Act
[4] Under section 73 of the Act, a conciliator can formulate terms of a possible settlement and can also reformulate the terms of settlement after receiving the observations of the parties
[5] Sub-sections 1 and 2 of section 67 of the Act
[6] Section 30 of the Act
[7] Section 62 of the Act stipulates that a conciliation proceeding shall commence only when a written invitation issued by one party to commence conciliation is accepted by the other party

Thirdly, section 30 of the Act permits the parties to engage in conciliation process even during the course of arbitral proceedings. They may do so *suo motu* or under the directions of the arbitrator. In case the conciliation concludes successfully, the arbitrator is to record the settlement in the form of an arbitral award. Such an award, which is prepared on agreed terms, is given similar status to that of any other award.[8] However, section 77 of the Act bars any arbitral or court proceedings in respect of a dispute which is the subject matter of conciliation proceedings.[9] This essentially means that during arbitral or court proceedings, the parties are encouraged to initiate conciliation proceedings, but once conciliation proceedings commence, they are barred from initiating arbitration or approaching the court. Clearly, the purpose of sections 30 and 77 of the Act is to encourage parties to resort to non-formal conciliation proceedings in preference to the formal court and arbitral proceedings.

3.0 Conciliation under the Civil Procedure Code, 1908 ("CPC")

A 1999 amendment to the CPC enabled the courts to refer pending cases to arbitration, conciliation and mediation to facilitate early and amicable resolution of disputes.[10] Prior to the amendment of the CPC, the Act did not contain any provision for reference by courts to arbitration or conciliation in the absence of the agreement between the parties to that effect. However, pursuant to the insertion of section 89 in the CPC, a court can refer the case to arbitration, conciliation, judicial settlement[11] or mediation, "*where it appears to the court that there exist elements of settlement which may be acceptable to the parties.*" Section 89 of the CPC empowers the court to formulate the terms of settlement and give them to the parties for their observation and after receiving the observations, reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement or mediation. Once a court refers a case to conciliation, the provisions shall not apply and the parties shall be bound by the provisions of the Act. This allows the parties to terminate the conciliation proceedings in accordance with section 76 of the Act,[12] even if the dispute has not been resolved, thereby rendering the entire dispute resolution process futile.

4.0 Advantages of conciliation

When compared with arbitration and litigation, following are the advantages of conciliation:

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[8] Section 30 of the Act

[9] Section 77 of the Act states that "*the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings.*" The only exception to this if such proceedings are necessary to preserve the rights of the party, such as restraining the opposite party through an injunction from doing an act

[10] Section 89 of the CPC

[11] The term "judicial settlement" has not been defined under the CPC. Per the Supreme Court of India in ***Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd.*** (decided on July 26, 2010), judicial settlement is a reference made by a court to another court or judge to assist the parties to enter into a settlement. In such cases the court or judge to whom the dispute has been referred for judicial settlement shall not act in its/his capacity as a court of law or a judge, and shall act in accordance with the provisions of the Legal Services Authority Act, 1987

[12] Section 76 of the Act states the following grounds on which conciliation proceedings can be terminated: (1) when the parties enter into a settlement agreement, or (2) when conciliator declares that the proceedings are futile, or (3) on the joint request of the parties, or (4) at the request of one party

- It is more flexible, inexpensive and informal.
- Parties are directly engaged in negotiating a settlement.
- Conciliation enhances the likelihood of the parties continuing their amicable business relationship during and after the proceedings. The reason is that the parties are in a conciliatory mode, away from the hostile environment of a court or an arbitral tribunal where exhaustive arguments take place and reach a mutually acceptable settlement done volitionally, and in a congenial manner. Thus, the end result of a conciliation proceeding is that both parties are relatively pleased with the final outcome.
- In our view, the chances of an appeal after the conclusion of conciliation proceedings are considerably lower as a mutual settlement is arrived at between the parties. However, there is no judicial precedent establishing this.

Conclusion

The introduction of conciliation as a means of alternate dispute resolution in the Act is definitely a positive step towards encouraging parties to opt for it. Taking into consideration the time effort and money involved in pursuing cases before a court or an arbitrator in India, conciliation should act as the perfect means for resolving disputes, especially those of commercial nature. Hence, parties should prior to initiating arbitration or judicial proceedings, opt for conciliation as a means for resolving disputes. In case conciliation proceedings fail, only then should the disputants look at arbitration or litigation to resolve the dispute.

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