

CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES

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One of the questions constantly asked by many is as to what is meant by conciliation and mediation, whether they are the same and, if not, whether there are any differences?

Conciliation and Mediation

Whether, in common parlance, there is some difference between conciliation and mediation or not, it is however clear that two statutes by Parliament treat them as different. (a) In the year 1996, the Arbitration and Conciliation Act, 1996 was passed and sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of 'mediation' or 'conciliation'. Sub-section (1) of sec. 30 permits the arbitral tribunal to

“use mediation, conciliation or other procedures”,
for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of 'conciliation' and 'mediation' as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with sec. 89.

Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals

with ‘Conciliation’ there is no definition of ‘conciliation’. Nor is there any definition of ‘conciliation’ or ‘mediation’ in sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999).

Conciliation

In order to understand what Parliament meant by ‘Conciliation’, we have necessarily to refer to the functions of a ‘Conciliator’ as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to ‘Conciliation’ by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of ‘conciliation’ under sec. 89 because, it says that once a reference is made to a ‘conciliator’, the 1996 Act would apply. Thus the meaning of ‘conciliation’ as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the ‘conciliator’ may request each party to submit to him a brief written statement describing the “general nature of the dispute and the points at issue”. He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned

and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account “the circumstances of the case, the wishes the parties may express, including a request for oral statements”. Subsection (4) is important and permits the ‘conciliator’ to make proposals for a settlement. It states as follows:

“Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”

I shall briefly refer to the other provisions before I come to sec. 73. Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to reformulate the terms’ after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

“Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After

receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.”

The above provisions in the 1996 Act, make it clear that the ‘Conciliator’ under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”. This is indeed the UNCITRAL concept.

Mediation:

If the role of the ‘conciliator’ in India is pro-active and interventionist as stated above, the role of the ‘mediator’ must necessarily be restricted to that of a ‘facilitator’.

In their celebrated book ‘ADR Principles and Practice’ by Henry J. Brown and Arthur L. Mariot (1997, 2nd Ed. Sweet & Maxwell, Lord on Chapter 7, p 127), the authors say that ‘mediation’ is a facilitative process in which “disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.”

In yet another leading book on ‘Dispute Resolution’ (Negotiation, Mediation and other processes’ by Stephen B. Goldberg, Frank E.A. Sander

and Nancy H. Rogers (1999, 3rd Ed. Aspine Law & Business, Gaithesburg and New York)(Ch. 3, p. 123), it is stated as follows:

“Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of ‘teeth’ in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others’ views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Prof. Robert Baruch Bush and Prof. Joseph Folgen (ibid, p 136) say:

“In a transformative approach to mediation, mediating persons consciously try to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. In stead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties’ own efforts to do so.”

The meaning of these words as understood in India appears to be similar to the way they are understood in UK. In the recent Discussion Paper by the Lord Chancellor's Department on Alternative Dispute Resolution (<http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm>) (Annexure A), where while defining 'Mediation' and 'Conciliation', it is stated that 'Mediation' is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be 'evaluative' or 'facilitative'. 'Conciliation', it is said, is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. But it is also stated that the term 'conciliation' is gradually falling into disuse and a process which is pro-active is also being regarded as a form of mediation. (This has already happened in USA).

The above discussion shows that the 'mediator' is a facilitator and does not have a pro-active role. (But, as shown below, these words are differently understood in US).

The difference between conciliation and mediation:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a 'conciliator'. We have seen that under Part III of the Arbitration and Conciliation Act, the 'Conciliator's powers are larger than those of a 'mediator' as he can suggest proposals for settlement. Hence the above meaning of the role of 'mediator'

in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties.

Brown quotes (at p 127) the 1997 Handbook of the City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation “is a process in which the Conciliator plays a proactive role to bring about a settlement” and mediator is “a more passive process”.

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a ‘mediator’ rather than a ‘conciliator’. Brown says (p 272) that the term ‘Conciliation’ which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term ‘mediation’. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use ‘conciliation’ to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, ‘Advisory, Conciliation and Arbitration Service’ (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to ‘employment’, the term ‘conciliation’ is used to refer to a mediatory process that is wholly facilitative and non-evaluative. The definition of ‘conciliation’ formulated by the ILO (1983) is as follows:

“the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.”

However, according to the ACAS, ‘mediation’ in this context involves a process in which the neutral “mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia (see www.nadrac.gov.au) in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms “conciliation” and “mediation” are used in diverse ways. (The ‘New’ Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words ‘conciliation’ and ‘counselling’ have disappeared in USA. In USA, the word ‘conciliation’ has disappeared and ‘mediation’ is used for the neutral who takes a pro-active role. For example:

“Whereas the terms ‘conciliation’ and ‘conselling’ have long since disappeared from the literature in reference to dispute resolution

services in the United States and elsewhere, these terms have remained enshrined in Australian family laws, with ‘mediation’ grafted on as a separate dispute resolution service in 1991.”

Conversely, policy papers in countries such as Japan still use the term ‘conciliation’ rather than ‘mediation’ for this pro-active process (see www.kantei.go.jp/foreign/judiciary/2001/0612 report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21st Century). NADRAC refers, on the other hand, to the view of the OECD Working Party on Information, Security and Privacy and the Committee on Consumer Policy where ‘conciliation’ is treated as being at the less formal end of the spectrum while ‘mediation’ is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

“Art 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute....”

In an article from US entitled “Can you explain the difference between conciliation and mediation” (<http://www.colorado.edu/conflict/civil-rights/topics/1950.html>), a number of conciliators Mr. Wally Warfield, Mr. Manuel Salivas and others treat ‘conciliation’ as less formal and ‘mediation’ as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a ‘conciliator’. The above article shows that in US the word ‘mediator’

reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, 'Conciliation' is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role (see <http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm>) The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the 'mediator' in US.

I have thus attempted to clear some of the doubts raised as to the meaning of the words 'conciliation' and 'mediation'. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role. While examining the rules made in US in regard to 'mediation', if we substitute the word 'conciliation' wherever the word 'mediation' is used and use the word 'conciliator' wherever the word 'mediator' is used, we shall be understanding the said rules as we understand them in connection with 'conciliation' in India.
