

Conciliation Proceedings under the Indian Arbitration Conciliation Act of 1996 and CPC

—An Overview

Dr. V.Nageswara Rao
Professor of Law(Retd)
Osmania University
Co-ordinator, ICADR
Hyderabad

Introduction

Settlement of disputes through reference to third party is a part of the *volkgeist* of India since times immemorial. The Indian epics and folklore abound with examples of consensual procedures for the settlement of disputes at the grassroots level. The third party settlement ethos cannot be imposed from above and they can thrive only in soils and climes that are conducive to that culture. We owe it to the British that for more than a century settlement of disputes through judicial institutions by way of adversarial system has struck roots in India and proved to be successful to a great extent. All these years settlement of disputes between the subjects has been the State monopoly and it has virtually elbowed out the pre-existing unofficial and non-formal settlement procedures. The Indian Parliament passed the Arbitration and Conciliation Act of 1996 mainly to implement the UNCITRAL Model Law on International Commercial Arbitration of 1985 and UNCITRAL Rules on Conciliation of 1980 and to improve upon the Arbitration Act of 1940 to make the arbitration law more in conformity with the changed global investment and commercial climate. While the 1996 Act was not intended to supplant the tried and tested judicial system with the non-formal private arbitration or the purely consensual conciliation mechanisms, the new law certainly ushered in an era of privatization of the hitherto State monopoly over dispute settlement procedures and institutions in conformity with the global trend of liberalization of economic policies, privatization of industry and globalization of markets. This shift offers both an opportunity and a challenge to the judiciary ---an opportunity to utilize the ADR methods to lessen the stress of docket explosion and a challenge to improve its age-old dilatory procedures and sustain the people's faith in itself as an institution. Fortunately, the emergence of the ADR mechanisms were not viewed by the judiciary at the highest level in India as leading to any institutional conflict between the Courts and the ADR. On the other hand, the successive Chief Justices and the judges have commended and welcomed the new development as necessary and desirable. As was observed in *Mediterranean and Eastern Export Co. Ltd. V. Fortress Fabrics Ltd.* (1948) 2 All E R 186, "the day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators." In fact the recent amendments to the Indian Civil Procedure Code clearly signal a readiness to integrate the ADR methods into the existing court system by authorizing the Courts to have recourse to arbitration and conciliation in appropriate cases. This amalgamation of judicial system with arbitration and conciliation processes is indeed a historic and momentous development.

Rationale and Definition of Conciliation

It may be remembered that the UNCITRAL Model Law on arbitration and Rules on Conciliation were both made in the context of growing international trade and commercial relations against the back-drop of liberalization, privatization and globalization. UNCITRAL Rules on Conciliation of 1980 adopted by the General Assembly of the United Nations stated at the very outset that the General Assembly

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.” However, the Indian Arbitration and Conciliation Act in substantially adopting the UNCITRAL Model Law and Rules on international commercial arbitration and conciliation, has also covered “the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation.” (Preamble). Parts I, II and III of the Act dealt respectively with arbitration, enforcement of foreign awards and conciliation. As with arbitration so with conciliation, the Act covered both domestic and international disputes but international arbitration was confined only to disputes of “commercial” nature because of the reservations made by India to the relevant international conventions on international arbitration (See S. 2, Cl. (1)(f) , S. 44, S.53) and the same reservation was extended to international conciliation also, though there were no applicable international conventions on conciliation (See S. 1, Cl. (1). In fact, it was for the first time in the history of Indian legislation that a comprehensive legislation was made on the subject of conciliation. The Statement of Objects and Reasons of Arbitration and conciliation Bill, 1995 stated:

“ Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India....Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a mode for legislation on domestic arbitration and conciliation”.

The Act dealt with the enforcement of foreign awards in Part III *only* in relation to States which were parties to the New York Convention on the Recognition and Enforcement of Foreign Awards of 1958 (Part III, Chapter I and Schedule I), and the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927 (Part III, Chapter II and Schedules II and III). India made reservations to those instruments on the grounds of reciprocity and for confining the disputes to matters of commercial nature. Consequently, the Act did not deal with international arbitration or with international conciliation in general in relation to States that were not parties to the Geneva or New York Conventions. Arbitral awards given in the States that are not parties to those Conventions are treated as non-Convention awards, but even the awards made in States that are parties to the Conventions but are not covered by the reciprocity reservation might fall outside the purview of Part II. In fact the Act defines only “international commercial arbitration” in S. 2(1) (f) and applies the same definition *mutatis mutandis* to international commercial conciliation under S1 (2), ‘Explanation’ and the Act does not define or deal with international arbitration or international conciliation, as such. As the provisions of Part I of the Act apply “where the place of arbitration in India” (S. 2(2), it cannot obviously be taken to mean that the part would apply to conciliation, domestic or international, even if the venue of conciliation is in India. As Part I contains some important definitions of the terms like “court” etc, some ambiguity is created because of its non-application to conciliation. UNCITRAL dealt with arbitration and conciliation five years apart and in two separate documents, and the integration of these two into the 1996 Act might create problems of interpretation.

Conciliation vis-à-vis Arbitration under the 1996 Act

While arbitration is more privatized than judicial settlement, conciliation is more privatized than arbitration. As judicial settlement and arbitration are species of adjudication, the judge and the arbitrator render their verdicts and impose them, with or without the consent or in spite of dissent, on the part of the parties. While the parties to arbitration are given considerable freedom to regulate the modalities, barring some non-derogable provisions, at various stages of the arbitral proceedings, they have no control over the decision making process except in the case of award on agreed terms. Secondly, while S 7(2) of the Act requires that “an arbitration agreement shall be in writing”, there is no such express provision in Part III regarding conciliation. But that does not make any practical difference as the process of conciliation starts with the written offer and written acceptance to conciliate on the part of the parties. Conversely, in arbitration, even in the absence of a prior written agreement, if the parties appoint the arbitrator and proceed with the submission of written claim and defense and continue with the proceedings till they culminate in the award, the requirement of S. 7(2).under 4 (c) should be taken as complied with. Thirdly, while it would be possible to parties to enter into an arbitration agreement even before the dispute has arisen under S.7 (1) (“all or certain disputes which have arisen or which may arise”), it would appear from the language of S. 62 that it would not be possible for the parties to enter into conciliation agreement even before the dispute has arisen. S. 62 provides:

1. The party initiating conciliation shall send to the other party a written invitation to conciliate under this part, briefly identifying the subject of the dispute.
2. Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

The above provision clearly requires that the conciliation agreement should be an ad hoc agreement entered into *after* the dispute has arisen and not before. A conciliation agreement entered into before the dispute has arisen may have the effect of ousting the jurisdiction of the Courts in relation to the subject matter of the dispute and such an agreement can be saved only by making an amendment to S 28 of the Indian Contract Act as it was done in 1972 to save the arbitration agreement. After the enactment of the 1996 Act covering both arbitration and conciliation, there can be no objection, either theoretical or practical, for not permitting the parties to enter into a conciliation agreement regarding the settlement of even future disputes ousting the jurisdiction of the courts. This is particularly so in the light of the fact that the Act treats the conciliation settlement agreement authenticated by the conciliator on par with award on agreed terms which in turn is treated on par with any arbitral award. (See, SS 74 and 30).

Fourthly, S 30 of the 1996 Act permits the parties to engage in conciliation process even while the arbitral proceedings are on. They may do so on their own and settle the dispute through conciliation or authorize the arbitrator himself to use mediation or conciliation and settle the dispute. The arbitrator would record the settlement in the form of an arbitral award. However S.77 of the Act bars the “initiation” of any arbitral or judicial proceedings in respect of a dispute which is the subject matter of conciliation proceedings, except for the purpose of “preserving” their rights. The term “initiation” in S 77 clearly supports the provision in S. 30. That is, when the arbitral or judicial proceedings are on, the parties are even encouraged to initiate conciliation proceedings but when the conciliation proceedings are on they are barred from initiating arbitral or judicial proceedings. The *raisons de etre* of the provision (S.16 of the Draft) were given in the “Commentary on the Revised Draft UNCITRAL Conciliation Rules: Report of the Secretary General” as follows:

- “74. Article 16 deals with the delicate question whether a party may resort to court litigation or arbitration whilst the conciliation proceedings are under way....
75. Article 16 emphasizes the value of serious conciliation effort by expressing the idea that, under normal circumstances, court or arbitration proceedings should not be initiated as might adversely affect the prospects of an amicable settlement. However, the article also takes into account that resort to courts or to arbitration does not necessarily indicate an unwillingness on the part of the initiating party to conciliate. In view of the fact that, under article 15(d), an unwilling party may terminate the conciliation proceedings at any time, it may well be that, if a party initiates court or arbitral proceeding, he does so for different reasons.
- 76 For example, a party may want to prevent the expiration of a prescription period or must meet the requirement, contained in some arbitration rules, of prompt submission of a dispute to arbitration. Instead of attempting to set out a list of possible grounds, article 16 adopts a general and subjective formula: “...except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.”

From the above it can be seen that the real purpose of provisions in SS. 30 and 77 of the Act was, firstly, to encourage resort to non-formal conciliation in preference to the formal court and arbitral proceedings. Secondly, resort to arbitral or judicial proceedings was permitted as an exception to meet the cases of requirements of the general law of limitation or of “time-bar clauses” like the *Atlantic Shipping Clause Atlantic Shipping and Trading Company v. Dreyfus and Company* ((1992) 2 AC 250) or interim measures of protection.

Conciliation under the Civil Procedure Code Amendment Act 1999

As mentioned at the out set, the recent amendments made in 1999 to the Civil Procedure Code have introduced provisions to enable the courts to refer pending cases to arbitration, conciliation and mediation to facilitate early and amicable resolution of disputes. The 1996 Arbitration and Conciliation Act does not contain any provision for reference by courts to arbitration or conciliation in the absence of the agreement between the parties to that effect. Under that Act arbitration and conciliation are purely consensual and not compulsory. But under the newly added S 89 of CPC, the Court can refer the case to arbitration etc “where it appears to the court that there exist elements of settlement which may be acceptable to the parties.” The Court can formulate the terms of settlement and give them to the parties for their observation and after receiving the observations, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation etc. As can be seen from the language of the S. 89, the initiative and the role of the Court is considerable in the whole process. Here, the Court is not ascertaining the agreement of the parties but only their observations, because if there is agreement between the parties at the stage of formulation of possible terms of settlement, the Court can as well make it the basis of its judgement and there would be no need for further negotiations under the aegis of arbitration or conciliation. But once the Court refers the case to arbitration or conciliation, that reference creates a legal fiction that it is deemed to be a reference under the provisions of the 1996 Act and the provisions of that Act would take over from the provisions of the CPC under which the reference was made. Thus, if the parties choose to do so, the conciliation proceedings so commenced by Court’s reference under S 89 of CPC can be terminated by the parties or the conciliator under S 76 of the 1996 Act.

Salem Bar Association Case and the Draft ADR and Mediation Rules, 2003

As was seen above, the Court can also refer the case to mediation under S89, Cls 1(d) and 2(d). When the Court decides to refer the case to mediation “the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed”. It is respectfully submitted that this provision is amenable to the interpretation that it is for the Court itself to “effect a compromise” and follow the procedure prescribed for the purpose. If the Court for one reason or the other cannot itself effect a compromise, the only option it would have is to refer the parties to conciliation etc. In its historic judgement in *Salem Bar Association v. Union of India*, the Supreme Court has directed the constitution of a committee to frame draft rules for mediation under S. 89(2)(d) of the CPC. Consequently, the Committee presided over by Mr Justice M. Jagannadha Rao, Chairman of the Law Commission of India has prepared a comprehensive code for the regulation of ADR process initiated under S 89 of CPC. which consists of two parts---Part I: ADR Rules 2003 consisting of “the procedure to be followed by the parties and the Court in the matter of choosing the particular method of ADR” and Part II: Mediation Rules, 2003 consisting of “draft rules of mediation under section 89(2)(d) of the Code of Civil Procedure”.

It is interesting to note that Rule 2(b), proviso clearly states that the Court in the exercise of its powers under S.89(1)(a) to (d) read with Rule 1A of Order X “shall not refer any dispute to arbitration etc without the written consent of all the parties to the suit” and Rule 4 calls this the exercise of the option by the parties. But, under Rule 5 (f) and (g), the Court is given the power to refer the parties under certain circumstances to ADR methods even if all the parties do not agree. This is in consonance with the letter and spirit of S. 89 of CPC. Rule 4 also requires the Court to do a sort of counseling in enabling the parties to choose the correct method of ADR depending on the nature of the case and the relationship between the parties that needs to be preserved. Rule 4(iv) may be reformulated to say “where parties are interested in reaching a compromise which might lead to the final settlement”. Unlike the 1996 Act, Rule 4 gives a workable definition of the terms arbitration, conciliation, mediation and judicial settlement. Under Rule 6(2), if the ADR methods fail and the case is referred back to the Court, the Court shall proceed with the case in accordance with law.

A welcome feature of these Rules is that they provide for a detailed scheme for the conduct of training courses in ADR methods for lawyers and judicial officers under the auspices of the High Courts and the District Courts, and the preparation of a detailed manual of procedure for ADR. The manual will describe various methods of ADR, the choice of a particular method, the suitability of a method for any particular type of dispute etc. The Manual shall particularly deal with the role of conciliators and mediators in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody cases. With a view to enhancing awareness of ADR procedures and for imparting training in them, the Rules provide for the conduct of seminars and workshops periodically (Rule 7). Thus these provisions prepared a blueprint for the building up of a body of trained professionals who are sensitized to efficiently handle cases in future, as that task requires specialized training and expertise of a high order.

Part II of the Rules contain a carefully prepared scheme for the appointment of mediators, empanelling of mediators, their qualifications and disqualifications and the proper selection of the mediator to suit a particular case etc. They also contain provisions regarding the actual conduct of mediation which, *mutatis mutatis*, apply some of the provisions of the 1996 Act relating to conciliation. A notable feature

of these provisions is that Rule 19 imposes an obligation on the part of the parties to make an effort in good faith to arrive at a settlement, and this is intended to prevent the whole process from being reduced to a sham. This is also in conformity with the pronouncements of the International Court of Justice in cases like the *North Sea Continental Shelf Cases* (ICJ Reports, 1969). The Rules also deal with cases where the parties succeed in arriving at a solution through the ADR processes only regarding some of the issues and not all. In such cases the Court may incorporate the partial settlement in its judgement and decide the other issues according to law. Very importantly, the Rules also lay down a code of ethics to be followed by the mediator in the proper conduct of the proceedings so as to arrive at a fair and just settlement in an impartial and dignified manner so as to instill confidence in the parties in himself and the credibility of the process in general.

Archived

Archived

Archived