Paper 6

Conciliation and ADR in India

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Introduction : ADR in India

History of ADR in India

India has had a long history of ADR; the earliest recorded instances date back to several centuries before Christ. Many of these forms exist with little change in the interiors and rural India. Bodies such as the *panchayat*, a group of elders and influential persons in a village deciding the dispute between villagers are not uncommon even today. There are also instances of disputes between persons of two different villages being settled by a body of individuals drawn from the disputants'villages, a third village or a combination of the two. The disputants are required to present their cases before the *panchayat* which will attempt to resolve the dispute. The working of the *panchayat* is such that it would be difficult to classify it as a mediator, a conciliator, an arbitral tribunal or a judicial body. While all disputes are heard by the *panchayat* it dons different forms, depending on the circumstances and the situation. If the facts disclose a clear legal obligation, it would act as a 'judicial' body to decide the rights of the parties and enforce the decision by sanction. On the other hand, it may persuade one of the parties to act in a particular manner in a situation where the petitioner has no real claim in law but appeals to the righteousness of action to seek relief. This may be seen as the first indication of the process of conciliation in India. The disputants would ordinarily accept the decision of the *panchayat* and hence a settlement arrived consequent to conciliation by the *panchayat* would be as binding as the decision that was on clear legal obligations. One ought to understand that the decision of the *panchayat* was always to be followed, irrespective of the source of the decision. *The panchayat* has, in the recent past, also been involved in caste disputes. One may compare some activities of the panchayat to that of the 18th. century English guilds since the caste system began with a classification based on the profession of its members.

The Muslim rule in India saw the incorporation of the principles of Muslim law in the Indian culture. The *Kazi* was the designated judicial officer who decided disputes between individuals. There are many recorded instances where the *kazi* has decided a case beyond the law by getting the disputants to agree to a solution that has been arrived at by conciliation, without actually giving that colour to the decision. Thus the decision from the authority of the *kazi* would be binding on the parties before him, it may just be that the decision is more acceptable and the disputants go back with the feeling that the decision was just and neither lost.

ADR in modern India

In the not so distant past too, conciliation has been effectively used in dispute resolution. The most prominent and effective use of conciliation has been in the Industrial Disputes Act, 1947 (the I.D. Act). Conciliation has been statutorily recognised as an effective method of dispute resolution in relation to disputes between workmen and the management of the industry. The I.D. Act makes it attractive for disputing parties to settle disputes by negotiation, failing which by conciliation by an officer of the Government before resorting to litigation. Several provisions set the scene for conciliation to be successful:

1. The conciliation is by an officer of the Labour Department in the Government.[1]
2. The parties may not go on strike or declare a lock-out during the period of conciliation.
3. The conciliation officer shall make all efforts to settle the disputes by conciliation[2].
4. The agreement reached in the process of conciliation shall be certified by the conciliation officer as a fair settlement[3].
5. Such a settlement shall bind all the other trade unions that are party to the dispute and are invited to participate in the conciliation but prefer to stay away from the conciliation process.[4]
6. The settlement is a self-executing document and the breach of the settlement by the management is a ground for recovery of dues under a simplified summary process.[5]

All parties in an industrial dispute that has had the misfortune of being litigated know that it is a tedious process that could go well beyond the lifetime of some of the beneficiaries. It is this factor that has contributed greatly to the success of conciliation in industrial relations. There are however certain abuses of the process and the benefits of the agreement arrived in the course of conciliation that are used to supress the trade unions which do not 'cooperate' with the management. This however does not diminish the effectiveness of the process.

Litigation in India - the need for ADR

Like every developed legal system, India too has a reputation for long winding procedures and an elaborate system of revisions and appeals from the order of the court of first instance. While the rationale is to ensure that the plaintiff has the satisfaction of the knowledge and erudition of the best legal minds, the price for this is the delay in finality of proceedings. There have been attempts to simplify the appeals' procedure but the sheer number of cases seems to overwhelm the system. In the background of this and the fact that India is presently at a critical stage of its development, one needs to rethink the dispute resolution mechanisms of the past so that those contemplating investment in India are satisfied that they will get the benefit of international dispute resolution procedures in India. In the absence of this, those looking to investing in India may evaluate the legal risk and conclude that exit is dependent on the outcome of laborious litigation. One may be led to believe that a legal system that is slow is a risk to be considered while deciding to invest since it affects the investment in such a way that the investor may not only lose control of the investment but also finds the exit from the difficult situation closed. An example of a limitation on the investor imposed by the government while granting approvals for investment in India is that the governing law of the contract be Indian law. Unless Indian law is as effective as some of the legal systems of other nations, investors would not be comfortable investing in India. The restriction on the choice of law is also a restriction on ADR techniques and choice of forum for ADR. Consequently, unless India provides a good system of dispute resolution, it would be difficult to attract and retain investment. It is expected that the investor would look

[1] Section 2(d).
[2] Section 12(2).
[3] Section 12(3).
[4] Section 18(3).
[5] Section 33-C.

to ADR rather than litigation to settle disputes in Indian since it is not certain if the judiciary is competent to deal with complex investment disputes and if the laws are sufficiently comprehensive to deal with them. The advantages of a developed system of ADR in India include:

1. Choice of judges/experts who understand international business, commercial transactions and are not lost in the language of the law. In addition, the parties are sure that the chosen person(s) will have the expertise to resolve the dispute to the satisfaction of the parties. At the very least, one is sure that the dispute will not be decided by a person who is totally ignorant of the relevant laws, business practices and commercial aspects of the transaction.

2. One expects that the chosen person(s) will not only understand the transaction better and more easily but also appreciate the underlying motivations and expectations that led the parties to enter into the transaction and act the way they did.

3. Most transactions are founded on timing. Once the timing is lost, the transaction makes little or no sense to the parties. In this situation, the remedy also has to be considered in the same tone. A remedy that would be acceptable to the parties at a certain point in time may be unacceptable at another. The expert who applies ADR is expected to understand these positions of the parties and guide the procedure to the solution accordingly. It is not expected that the judge, a generalist would understand such considerations of the parties.

Judicial approach to ADR in India

The judiciary, in its zeal to ensure justice for all has been extremely protective about its supervisory role in the ADR process. Since the only ADR that the judiciary has known so far has been arbitration, its approach to arbitration is relevant for the present enquiry. Conciliation has had a very limited application in India.[6] The higher judiciary has looked upon the arbitral tribunal as a subordinate court and treated it as such. It appears that the judiciary believes that the judicial power of the State is vested exclusively in the judiciary and therefore it is necessary for it to exercise supervision over the functioning of the arbitral tribunal.[7] It has, on occasions, been extremely protective about the freedom to the arbitral tribunal. For example, the court would not leave it to the arbitrators to finally decide on their jurisdiction[8], whereas a subordinate court is empowered to decide on its jurisdiction. This has been reversed by the Arbitration and Conciliation Act, 1996 which specifically empowers the arbitral tribunal to decide on its jurisdiction.[9] Therefore, while on the one hand the judiciary is happy to let the arbitrators decide matters at the first instance, it would not allow the arbitrators to be beyond the supervision of the courts. It is to be seen if the new legislation which limits the scope of judicial review changes the position.

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[6] India's experience with conciliation is dealt with later in this paper.
[7] *See for example*, **F.C.I.** v. **Joginderpal Mohinderpal**, (1989) 2 SCC 347.
[8] *See,* **Union of India** v. **G.S. Atwal & Co.,** (1996) 3 SCC 568.
[9] Section 16.

Arbitration and Conciliation Act, 1996.

The Arbitration and Conciliation Act, 1996[10] is an attempt by Parliament to take a holistic approach to alternative dispute resolution in India. In the past, domestic and international arbitrations were dealt with separately under different legislations; the Arbitration Act, 1940 dealt only with domestic arbitrations. Foreign arbitral awards were further classified on the basis of the New York and Geneva Conventions and governed by the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937 respectively. The Act is cast in terms of the UNCITRAL Model Law on International Commercial Arbitration[11] and seeks to break away from the regulated and supervised forms of ADR as have been in existence in India. The need to provide flexibility to the parties in a legal relationship to decide for themselves the mode of settlement of their differences has finally been recognized. While the major changes have been in the area of arbitration, it is noteworthy that conciliation has received recognition. The Act seems to have been a reaction to the response of the judiciary to ADR in the past. There are several provisions that clearly seek to settle certain issues that have been the subject of great contention before the Supreme Court of India. The salient provisions of this Act in the matter of arbitration are:

1. Limited judicial intervention.[12]

2. Duty of the court where a suit is filed, upon application in this behalf, to refer the parties to arbitration in accordance with the arbitration agreement between the parties.[13]

3. Power of the arbitrators to award interest from the date of the cause of action till the date of the satisfaction of the award.[14]

4. Empowering the arbitrators to order interim measures for the protection of the subject matter or to ensure satisfaction of the award.[15]

5. Empowering the arbitrators to decide on their jurisdiction.[16]

6. Equating the arbitral award to a decree of a court.[17]

7. Limiting the number of statutory appeals from the award to one.[18]

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[10] Hereinafter the Act.
[11] United Nations Commission on International Trade Law, 1966.
[12] Section 5.
[13] Section 8.
[14] Section 31(7)
[15] Section 17.
[16] Section 16.
[17] Section 36.
[18] Section 37(3).

Since the basic premise for the courts to strike down certain actions of the arbitrators was that they were not empowered to act in a certain manner to decide on certain matters, the Act specifically empowers the arbitrators in these areas and consequently, certain decisions of the court may be nullified to the extent to which they differ from the provisions of the Act. While granting the arbitrators more powers, the Act also imposes on them the duty to give reasons for their award, unless the parties specifically agree that no reasons need be given.[19] This would make the arbitrators open to criticism from the courts who had, until now, refused to interfere in most cases of non-speaking awards since they had little material to go by.

Conciliation

The Act, for the first time in India, provides for recognition of conciliation in commercial disputes[20]. Part III of the Act provides for "...conciliation of disputes arising out of legal relationships, whether contractual or not and to all proceedings relating thereto."[21] This provision similar to that relating to arbitration, is arguably, the most important issue and needs careful attention.

The choice of the method of ADR is a function of the kind of relationship and the nature of the dispute between the parties.[22] The Act clearly applies only to commercial arbitrations and conciliations. From the description of the scope and application in section 61 one needs to understand if only legal obligations may be the subject of conciliation. Can differences of opinions that have an impact on the relationship between the parties be the subject matter of the conciliation? If the subject matter of the dispute is the legal obligation of the parties then a choice of the ADR mechanism is clearly available: the parties may choose either arbitration or conciliation. To equate conciliation to arbitration on so simplistic an analysis is to grossly understate the relevance of conciliation. While it is no doubt true that conciliation could be used in place of arbitration and parties may be happier with a settlement than an award, it must be recognised that conciliation has one special characteristic, *i.e.,* it can go to the root of the difference, the real problem between the parties that had led them to disagree with each other. This is best explained with an illustration:

In a joint venture agreement between an Indian and an American company, each holding 50% of the shares in the Indian joint venture company, certain matters are "reserved" *i.e,* decisions on these matters may be taken only if the directors nominated by both the parties vote in favour of the resolution in a meeting of the Board of Directors. Typically these would

[19] Section 31(3).

[20] Order XXXII-A of the Code of Civil Procedure, 1908 provides for a judge, in certain matters relating to the family, to make efforts to settle the dispute amicably and adjourn the proceedings to enable the parties to reach a settlement.

[21] Section 61.

[22] *See further*, Tania Sourdin, "Matching Disputes to Dispute Resolution Processes - The Australian Context", and Frank E.A.Sander, "Dispute Resolution within and Outside the Courts - An overview of the US Experience" in P.C. Rao and William Sheffield (eds.) **Alternative Dispute Resolution: What it is and How it Works**", ICADR, New Delhi, 1996.

include expansion of the capital base, diversification of activities, creation of subsidiaries, mergers and acquisitions, creation of liabilities exceeding a certain amount, *etc.* If the American partner wishes to expand the equity base of the joint venture company so that it may undertake larger projects or expand its activities but the Indian partner is unable to match the capital contribution required to maintain the ratio of shareholding due to unavailability of free resources at that point of time, the Indian partner will instruct its nominee directors to vote against the resolution even though it agrees, in principle, that the company needs additional funds for the expansion. The Indian partner may wish to increase the debt exposure of the joint venture company, which the American partner may view as an *ad hoc* response, rather than as a long-term solution.

The Indian partner may perceive this action as a threat by the American partner to supress the Indian partner by forcing the dilution of its control in the joint venture company. This may be the first sign of insecurity of the Indian company and the beginning of the loss of trust between the partners. Once the resolution fails, the American partner may not be very interested in the joint venture as it sees that the company is unlikely to grow in a manner that it expects. It may also perceive the Indian company as lacking in vision and ambition. This may be a natural inference by the persons who make the policies and direct the activities of the American partner. If the American partner is allowed to continue to hold this view, it would sour the relationship between parties that was based on the understanding of equality.

The difference of perception of the situation could not be the subject of arbitration since there is no breach of any obligation of the parties under the joint venture agreement. There is no obligation on the parties to vote in a particular manner on issues that are in the list of reserved matters. At best the parties could allege that the other did not act in good faith and in the best interest of the joint venture company. This however, could be a matter that could be referred to conciliation. The parties could express their concerns and feelings in the matter to the conciliator who could help them find a solution to the problem after understanding their concerns. It may be that the parties have not been able to communicate their understanding of the situation to each other adequately, have failed to understand each other's perception of the situation, have a difference of opinion regarding the future of their relationship or differ in their vision for the joint venture company. In most of these cases, conciliation will help them communicate their views so that, at the very least, the air may be cleared for a review of the relationship.

In the present illustration, a possible solution that may be acceptable to both parties could be an expansion of the capital base of the company by a fresh issue of shares to the American partner with a right to the Indian partner to purchase half the shares at an agreed price(or formula) within a fixed period of time in the future. Thus, though the Indian partner may hold fewer shares for a short while, the American partner may continue to treat the Indian partner as a full and equal partner thereby putting to rest the fear of the Indian partner that the increase in the share capital is a ploy to dilute its control in the joint venture.

Whether the 'difference of opinion' in the above illustration qualifies for the benefits under section 61[23] of Part III of the Act is therefore an issue. It would if one takes a view that it is a proceeding relating to disputes arising out of a legal relationship. The Supreme Court of India has held that the phrase "arising out of" is of the widest amplitude and should not be read restrictively.[24]

Whether the fact situation in the illustration would qualify as a 'dispute' would be the next level of enquiry. While dealing with the issue of the date from which limitation runs in a matter to be referred to arbitration, the Supreme Court was required to determine the date when the dispute or difference arose. It held that the "...dispute or difference arises on unequivocal denial of claim of one party by the other party as a result of which the claimant acquires the right to refer the dispute to arbitration."[25] If one were to expect that the courts would interpret the word "dispute" in the context of conciliation in a similar manner, it may be necessary for the agreement containing the conciliation agreement to confer a right on the parties to resort to conciliation in situation where the difference of opinion, which may not be a breach of any legal obligation, is likely to affect their relationship. This would ensure that the parties have always a course of action to resolve their differences and are not left without a chance to resolve such differences that could be fatal to the joint venture company (in the illustration above).

Conciliation v. Arbitration

While one has a choice of ADR techniques in most situations, it may be that some techniques are better suited for certain situations. A comparison of conciliation and arbitration is sought to be made to highlight the situations in which conciliation would be preferred to arbitration, after listing certain characteristics of conciliation that distinguish it from arbitration.

Conciliation is different from arbitration and hence is better suited in certain situations:

1. Decisions of parties in a relationship arising out of 'non-legal obligations' situations are not arbitrable.

2. Certain decisions based on the 'unfettered', and 'unrestricted' rights of the parties affecting the relationship between them.

3. Minor breaches or breaches of legal obligations that would not normally lead to termination or large-scale liabilities but cause a loss of faith between the contracting parties are better dealt with by conciliation than arbitration.

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[23] *Supra n.8.*

[24] **Tarapore & Co.** v. **Cochin Shipyard**, (1984) 2 SCC 680, 715; **Renusagar Power Co. Ltd. v. General Electric Company,** (1984) 4 SCC 679.

[25] **State of Orissa** v. **Damodar Das**, (1996) 2 SCC 216.

4. Operational issues that are not arbitrable but affect the continuing relationship between the contracting parties.

5. Operational issues that have become such that lines of difference are drawn and have turned into unrectractable positions without the other side giving in. Arbitration in such cases would only make matters worse and only foreclose any possibility of working together.

6. The conciliator may not follow the law strictly; he may persuade the parties to come to a settlement on principles of *ex aeque et bono* or *amiable compositeur*.[26]

7. Commercial practices giving rise to actions that have in fact happened but are sometimes not easy to prove as 'facts' in accordance with the rules of evidence in court or arbitration. Parties may not admit these facts in arbitration or litigation since they know that these cannot be proved by the other. In conciliation however, these may be admitted and justice may be done, as it should be.

8. All proceedings in conciliation are confidential. Statements, concessions and admissions made, and documents produced are to be used only for the conciliation. These may not be used as the basis of claims in subsequent arbitrations or litigation. In addition, the conciliator may not be the arbitrator in the same matter and hence a party that admits a position in conciliation may demand proof of the facts alleged from the other party in arbitration or litigation.

9. The end result in a conciliation is acceptable to both parties since it is not imposed like an award/decree.

10. Consequently the possibility of better compliance increases tremendously.

11. Conciliation is more easily acceptable since the outcome of arbitration and/or litigation is both uncertain and imposes an unwarranted additional expense.

12. Conciliation does not close the option of arbitration or litigation until settlement is signed by the parties.

13. The settlement is treated on par with a decree of a court and consequently, may be executed as such.

14. Subsequent to the Act, the cause of action, *i.e.,* the matter in conciliation, may be said to have merged with the settlement becoming final and therefore, neither of the parties may resort to litigation or arbitration on those matters, as an afterthought. This proposition has been affirmed by the Supreme Court of India in a matter where the dispute was settled by

[26] One may venture to hypothesize that the above six factors may be the reasons for conciliation to be preferred to arbitration in respect of industrial disputes under the I.D. Act.

the parties and one of them sought to arbitrate the difference that was settled. The court was of the view that a party may not seek arbitration on a matter after agreeing to a settlement since all differences may be said to have been disposed of by the settlement and no dispute would exist.[27] Thus there would be no scope for appeals. Conciliation brings a finality that arbitration sometimes does not.

Conclusion

Conciliation has been successful in India through a system that has become popular as *Lok Adalat* (people's court). These were initially *ad hoc* bodies composed of eminent persons, lawyers, judges, social activists, government officials and para-legals who would endeavour to help the parties who in the pre-litigation process reach a settlement.[28] The Lok Adalats have also been useful to the judiciary since courts have referred parties to these Lok Adalats when it is felt that a dispute could be better resolved there. The success of the Lok Adalats is seen in the number of cases that are settled: upto 31st. March 1996, more than 13,000 Lok Adalats have been held in India where were 5 million cases have been settled. Of these, 278, 801 cases of motor accident claims accounting for 8,612 million Rupees were paid to the claimants.[29]

In a sense, Lok Adalats have achieved the status of ADR. That courts allocate a day in a fortnight or month to hear matters that the parties have agreed to settle out of court through the Lok Adalat is sufficient evidence of its popularity. It may also be a statement about the people's choice of dispute resolution mechanisms, their discontentment with the judicial system - its uncertainties and delays. That may be the cue for us to attempt to settle disputes through conciliation, now that even the judiciary has begun to see merit in it.

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[27] *See*, **Nathani Steels Ltd**. v. **Associated Constructions**, 1995 Supp(3) SCC 324; **P.K. Ramaiah & Co.** v. **N.T.P.C.,** 1994 Supp (3) SCC 126; *see also,* **State of Maharashtra** v. **Nav Bharat Builders**, 1994 Supp(3) SCC 83.

[28] These have been institutionalised by the National Legal Services Authority Act, 1985.

[29] Source: National Legal Sevcies Authority, New Delhi, 1996.