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Conciliation: an Extra - Judicial Means of Disputes Settlement

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ABSTRACT

Litigation in India can be endless, therefore foreign corporations seeking to do businesses in India takes adequate precaution at the outset. In any democratic society for protecting and enhancing the rights of the people, it is the judiciary which plays an important role besides legislative and executive body and India is not an exception. Desire for quick and affordable justice is universal. Justice should be speedy, simple, cheap, affective and substantial. Conciliation is an alternative dispute resolution mechanism which has been given statutory recognition by incorporating provisions in Sections 61 to 81 of Part III of the Arbitration and Conciliation Act, 1996.

KEYWORDS Alternative, Conciliation, Dispute Resolution

Introduction

Desire for quick and affordable justice is universal. Right to speedy trial is a right to life and personal liberty of every citizen guaranteed under article 21 of the Constitution, which ensures just, fair and reasonable procedure. According to data available with the apex court, the number of pending cases with the Supreme Court is 64,919 as on December 1, 2014. The data available for the 24 High Courts and lower courts up to the year ending 2013 showed pendency of 44.5 lakhs and whopping 2.6 crores, respectively. Of the over 44 lakh cases pending in the 24 high courts of the country, 34,32,493 were civil and 10,23,739 criminal. Denial of 'timely justice' amounts to denial of 'justice' itself. Two are integral to each other. Timely disposal of cases is essential for maintaining the rule of law and providing access to justice which is a guaranteed fundamental right. However, as the present report indicates, the judicial system is unable to deliver timely justice because of huge backlog of cases for which the current judge strength is completely inadequate. On an average a court takes more than decade to decide a civil suit, which ultimately results in 'justice delayed is justice denied.' Since independence, Indian judiciary has suffered from an overwhelming backlog of cases. Further, complexities and inadequacies of court redressal mechanism leads to zeal for Alternative Dispute Resolution Mechanism.

In 1996, the Indian Legislature accepted the fact that, in order to lessen the burden on the courts there should be a more efficient justice delivery system in the form of arbitration, mediation and conciliation as an Alternative Dispute Resolution (ADR) options in appropriate civil and commercial matters. With a view to implement the 129th Report of Law Commission and to make conciliation more effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are formed, for settlement either through arbitration, conciliation mediation, judicial settlement or Lok Adalat. Thus, in order to expedite justice delivery system, in 2002, the CPC was amended to make ADR an integral part of the judicial process. In terms of the newly inserted section 89 of CPC, if it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement. Alternative Disputes Resolution, as the name suggest, is an alternative to the traditional process of dispute resolution through courts. It refers to a set of practice and techniques to resolve disputes outside the courts and conciliation is one of those.

Conciliation Procedure

Conciliation is an alternative dispute resolution mechanism with the help of conciliator. Conciliator assists the disputing parties to explore potential solutions and find a mutually acceptable solution by lowering tensions and improving communications. Conciliation is an alternative dispute resolution mechanism which has been given statutory recognition by incorporating provisions in Sections 61 to 81 of Part III of the Arbitration and Conciliation Act, 1996.

Section 62 of the Arbitration & Conciliation Act, 1996, requires that the party initiating conciliation should send to the other party a written invitation to that effect and conciliation proceedings will commence after the other party accepts invitation in writing. However, there will be no conciliation proceedings if the other party rejects the invitation or does not reply within thirty days from the date of receiving invitation. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their commercial, financial and / or personal interests. In conciliation proceedings, a trained, qualified but neutral person, facilitates negotiations between disputing parties and assists them to understand their conflicts at issue and their interests in order to arrive at a mutually acceptable agreement.

The chief elements in the conciliation process are the identification of the causes of the dispute and the creation of options to resolve the conflict. In this technique, the parties are encouraged to visualize options which provide solutions keeping in view the interests and priorities of the parties in question. In conciliation process, there are discussions among the parties and the conciliator with a view to explore acceptable and equitable resolutions by creating options for a settlement which is acceptable to all parties. The conciliator helps the parties in finding various options to arrive at a solution which is compatible to both parties. Thus, this is the risk free process which is and binding on the parties till they arrive at and sign the agreement which has the effect of arbitration award and is legally tenable in any court in the country.

Difference between Conciliation and Arbitration

'Third person' is nominated by the parties to resolve their dispute is the only similarity between conciliation and arbitration. Arbitration is less formal than litigation, and conciliation is even lesser formal than arbitration.Conciliation means bringing two opposing sides together to reach a compromise in an attempt to avoid taking a case to trial. Arbitration, in contrast, is a contractual remedy used to settle disputes out of court. In arbitration the two parties in controversy agree in advance to abide

by the decision made by a third party called in as a mediator, whereas conciliation is less structured. In case of arbitration, a prior 'agreement in writing' to submit to arbitration disputes which have arisen or which may arise in future, is necessary, whereas a conciliation may be resorted to without the existence of such prior agreement and it generally relates to disputes which have already arisen. Since there is a prior arbitration agreement between the parties, both of them are bound by the agreement, but in case of conciliation written invitation is made by one party, the other party may or may not accept the same.

In arbitration as the information given by a party is subjected to scrutiny by the other party, thus there is no question of confidentially in case of arbitration awards whereas in conciliation party may require the conciliator to keep the 'factual information' confidential and not disclose it to the other party. The conciliation proceedings may be unilaterally terminated by a written declaration by a party to the other party and the conciliator, but arbitration proceedings cannot be so terminated. "Main difference between arbitration and conciliation is that in arbitration proceeding, award is the decision of the Arbitral Tribunal, while in the case of conciliation the decision is that of the parties arrived at with the assistance of the conciliator".

Advantages of Conciliation

In conciliation disputing parties are free to choose the timing and place of meeting, language and content of the conciliation proceedings, thus it ensures autonomy of the parties participating in conciliation. The parties are free to choose their conciliator; and selection is normally on the basis of experience, professional and personal expertise, his availability. However, he needs to be impartial and independent irrespective of being selected by any of the parties. Conciliation proceedings are time and cost efficient, since they are informal, flexible by nature and can be conducted in a time and cost-efficient manner. Normally in conciliation, parties agree on confidentiality, thus, disputes can be resolved discretely and business secrets will remain confidential. Confidentiality is maintained throughout the proceedings with respect to information exchanged, the offers and counter offers of solutions made and the settlement arrived at. Also, information disclosed at a conciliation meeting may not be divulged as evidence in any arbitral, judicial or other proceeding.

Unlike arbitration, parties need not have a prior agreement to refer their dispute; rather cases may be registered on the spot after written consent from both parties. In conciliation proceedings, the parties are free to withdraw from conciliation, without prejudice to their legal position, at any stage of the proceedings. Conciliation enhances the possibilities of the parties continuing their amicable business relationship during and even after the proceedings. Parties to the conciliation proceeding are prohibited from initiating any arbitral or judicial proceedings.

The Success Rate of Conciliation

In conciliation proceedings, role of conciliator is restricted to guide the parties to a settlement; final decision is arrived at by the parties with the assistance of the conciliator. The process of conciliation being flexible and more or less informal, the parties readily enter upon conciliation and reach an agreement on a settlement of dispute, the agreement so reached has the status and effect as if it was an arbitral award. Section 74 of Arbitration and Conciliation Act, 1996, provides that status and effect of settlement agreement will have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30. The Parties are directly engaged in negotiating a settlement. In most of the countries which have adopted conciliation as an alternative method of resolving disputes, the success rate is extremely high. In India, with the enactment of the Arbitration and Conciliation Act, 1996, the Parliament has given recognition to alternative forms of dispute resolution. A settlement reached through conciliation as it is termed in the Act has the same status and effect as an arbitration award, and thus is enforceable as if it were a decree of court. The commercial disputes, where it is not essential that there should be a binding and enforceable decision, are amenable to conciliation. Where the parties in dispute want to safeguard and keep intact their commercial relationships for future, conciliation is the most suitable option dispute resolution.

Concluding Remarks

In any democratic society for protecting and enhancing the rights of the people, it is the judiciary which plays an important role besides legislative and executive body and India is not an exception. However, for any progressive society, dispute should be resolved so far as possible at minimum cost both in terms of money and time and justice should be speedy, simple, cheap, and substantial. Having dissatisfied with the formal and adversarial justice system by court, alternative dispute resolution mechanism was evolved which gives people involvement in the process of resolving their dispute. Conciliation is extra judicial, means to settle disputes in a friendly manner. In a developing country like India, where the backlog of the court is keeps on mounting, conciliation can pay an important role in reducing the burden of the courts. However, even two decade after enactment of Arbitration & Conciliation Act 1996, the Act has failed to serve the purpose what its legislators intended it to be.

Besides reducing the burden on the Courts and giving speedy justice to people, alternative dispute resolution mechanism has been introduced for a number of other reasons. Alternative disputes resolution mechanisms are relatively inexpensive in comparison with the ordinary legal process. These mechanisms, therefore, help litigants who are unable to meet the expenses involved in the ordinary process of dispute resolution through Courts. Furthermore, ADR mechanisms enhance the involvement of the community in the dispute resolution process. Conciliation offers a more flexible alternative to arbitration as well as litigation, for resolution of disputes in the widest range of contractual relationships, as it is an entirely voluntary process. Our judicial system is neither ineffective nor alone responsible for huge backlog of pending cases. We must not forget the increased inflow of cases in all courts of the country. Litigation is not the only means of resolving disputes. We need to re-look and strengthen our own available alternative mechanism with positive framework.

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8. The Arbitration and Conciliation Act, 1996 - Section 75 – Confidentiality - Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.
9. The Arbitration and Conciliation Act, 1996 - Section 74(d) - Termination of conciliation proceedings -The conciliation proceedings shall be terminated by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.
10. The Arbitration and Conciliation Act, 1996 - Section 77-Resort to arbitral or judicial proceedings - 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 except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.