

Arbitration & Conciliation: A Comparative Analysis

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Abstract - Alternate Dispute Redressal mechanisms like Arbitration, Conciliation, negotiation and mediation are growing swiftly as the preferred choice of methods instead of conventional court-room hassles. Arbitration and Conciliation have even received international recognition under The UNCITRAL Model Law and Rules on Arbitration and Conciliation, 1985. The same has been adopted to a large extent in India through the Arbitration and Conciliation Act, 1996. The law of Arbitration and Conciliation is nascent and developing. Precedents are playing a crucial part in this respect. International rules many-a-times differ from the domestic rules on Arbitration and Conciliation. The following paper seeks to outline the major & minute differences between Arbitration and Conciliation by in-depth study of the concerned Statutes, landmark international judgments as well as leading domestic judgments of the Supreme Court of India.

Keywords - Arbitration, Arbitrator, Arbitration Clause, Third party, Conciliation, Conciliator, Alternate Dispute Redressal, Formal Adjudication, UNCITRAL, Arbitration and Conciliation Act, 1996, Supreme Court, Legal Dispute, Legal Relationship, Settlement, Arbitral Award, Judgment, Neutrality.

INTRODUCTION:

ADR (alternative dispute resolution) are processes used to resolve disputes, either within or outside of the formal legal system, without formal adjudication and decision by an officer of the state. The term 'appropriate' dispute resolution is used to express the idea that different kinds of disputes may require different kinds of processes—there is no one legal or dispute resolution process that serves for all kinds of human disputing.

Mediation is a process in which a third party (usually neutral and unbiased) facilitates a negotiated consensual agreement among parties, without rendering a formal decision. In arbitration, which resembles formal adjudication the most, a third party or panel of arbitrators, most often chosen by the parties themselves, renders a decision, in terms less formal than a court, often without a written or reasoned opinion, and without formal rules of evidence being applied. The full panoply of processes denominated under the rubric of ADR now includes a variety of primary and hybrid processes, with elements of dyadic negotiation, facilitative, advisory and decisional action by a wide variety of third party neutrals, some-times combined with each other to create new formats of dispute processing.

Human conflict is inevitable. Most conflicts that result in legal action are resolved outside of the courtroom and many of the conflict that is resolved by the judges would best be resolved outside of court. Alternative Dispute Resolution (ADR) is the name given to methods of dispute resolution other than court-based litigation.

Global trend has progressed towards wide spread use of Arbitration and Conciliation as the most common methods of dispute resolution. Both are fundamentally different. However, the Union of India incorporates these methods as valid alternate methods of dispute resolution, by the ARBITRATION AND CONCILIATION ACT, 1996.

WHAT IS ARBITRATION?

In the terms of sub-section (1) (a), arbitration means "any arbitration whether or not administered by permanent arbitral institution". Law encourages parties as far as possible, to settle their differences privately either by mutual concessions or by the mediation of a third person. When the parties agree to have their disputes decided with the mediation of a third person, but with all the formality of a judicial adjudication, that may be, speaking broadly, called as arbitration. Arbitration, therefore, means the submission by two or more parties of their dispute to the judgment of a third person called the "arbitrator", and who is to decide the controversy in a judicial manner.

"Arbitration" is thus defined by Romilly M R in the well-known case of Collins v Collins:

"An Arbitration is a reference to the decision of one or more persons, either with or, without an umpire of a particular matter in difference between the parties."

The act does not provide definition of word Arbitration but its literally recognized meanings - settlement of differences or disputes by mutual understanding or agreement by the parties where the rights and liabilities of the parties are adjudicated which are binding on them, such settlement may be before the arbitral tribunal but not by the court of law

However, the definition in section 2(1) (a) of the said act is merely a clarification that the act covers institutional and ad hoc arbitration. This definition is based on the definition mentioned in clause (a) of article 2 of UNCITRAL model law. According to that provision the expression arbitration is defined as under:-

“.....Arbitration is the means by which the parties to dispute get the matter settled through the intervention of an agreed third person. Arbitration is a process that is carried out pursuant to an agreement to arbitrate the disputed matter.”

According to Halsbury -

“Arbitration means the reference of dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.”

Whatever be the type of dispute, the matter in dispute must be of a civil nature. Matters of criminal nature cannot be referred to arbitration. In most cases, reference to arbitration shuts out the jurisdiction of the courts, except as provided in the Act and since criminal courts cannot be deprived of their jurisdiction to try criminals, no criminal matter can be referred to arbitration.

The *Supreme Court has passed the following observation* on why arbitration should be preferred. “Arbitration is considered to be an important alternative dispute redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant has faith in the speedy process of resolving their disputes”.

WHAT IS CONCILIATION?

Part 3 of the Arbitration & Conciliation Act deals with Conciliation. Conciliation means settling of disputes without litigation. Conciliation is the process by which discussion between parties is kept going through the participation of the conciliator. S.61 points out that the process of conciliation extends to disputes, whether contracted or not. But the disputes must arise out of the legal relationship. It means that the dispute must be such as to give one party the right to sue and the other party the liability to be sued. The Act of 1940 used the word difference but in the new Act in place of difference the word dispute has been used. However, the word ‘Dispute’ has not been defined in the new Act of 1996. The word dispute under ordinary parameters implies an assertion of right by one party and repudiation by another party. The word ‘difference’ has a wider meaning but the word ‘dispute’ is more positive and the difference between the parties when assumed a definite and concrete form they became dispute.

Conciliation involves building a positive relationship between the parties. The conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure that is responsible for figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators.

ARBITRATION V. CONCILIATION: VITAL DIFFERENCES:

Though like arbitration, conciliation is also another means of settling disputes, they two differ in many vital aspects. The only similarity that appears between the two is that a third person is chosen or nominated by the parties to resolve their disputes.

The main points of difference between arbitration and conciliation may be stated as follows:-

The method of conciliation is generally applicable to existing disputes, while the mode of arbitration is available for existing as well as for the future disputes. While making a contract, they can input a clause wherein any dispute arising out of their contractual relationship in future can be referred to arbitration. Such a clause is binding on the parties. An arbitration agreement is governed by the doctrine of separability i.e., it is a binding contract in itself which accords compulsory execution as and when a dispute arises. {S. 7(2) of Arbitration and Conciliation Act, 1996}

The conciliation proceedings start by sending a written invitation and a written acceptance thereof in between the parties. The invitation may be accepted. {S.(62), Arbitration and Conciliation Act, 1996} or rejected by the other party as it has no binding effect, being an invitation only. The prior written agreement in arbitration commands a binding effect upon the parties and its breach by resorting to court, compels court to refer the matter to the arbitration and parties are bound by the arbitral agreement. In arbitration, the arbitration agreement itself suggests for redressal of disputes through arbitration and if any party approaches court, the other party may request the court to refer the matter to arbitration and court is bound to refer such matter to the arbitral Tribunal.

- While conciliation proceedings are in progress, there is a bar on parties from initiating arbitral or judicial proceedings as per section 77 of the new act 1996.
- Where parties fail to determine the number of arbitrators which should always be even, the act provides on such failure for a sole arbitrator. However, in case of conciliation, by default, only one arbitrator is enough. The parties however can appoint one conciliator each, these two need not appoint the third one. Parties may agree for two or three conciliators and maximum number of conciliators cannot exceed three. Where the number of conciliators is more than one, they as a matter of general rule should act jointly. In case of arbitrators there is no bar on their maximum number but the total should not be even number. When parties agree for three arbitrators, each party shall appoint one and these two shall appoint the third arbitrator who shall be presiding arbitrator. {S.10 and S.63, Arbitration and Conciliation Act, 1996.}

In Ethiopian Airlines v. Stic Travels (P.) Ltd., the Apex Court explained the scope of this provision,

“.....Two arbitrators shall appoint the third arbitrator who acts as chairman. He cannot be deemed to be an umpire even if one of the nominated arbitrators of party dies, no fresh right accrues to appoint fresh chairman.”

In *Narayan Prasad Lohia v. Nikunj Kumar Lohia*, the court again explained that the section 11 will apply mutatis mutandis if the parties fail to specify the number of arbitrators. Also, in a landmark ruling in the same case, the court said that it is not necessary to appoint a 3rd arbitrator, if the two arbitrators are in consensus of giving the same award or if under section 16, the parties to the dispute fail to raise objections in the beginning regarding a two member panel or tribunal, they are deemed to have waived their right.

- While the role of conciliator is to help and assist the parties to reach an amicable settlement of their dispute {Section 72}, the arbitrator does not merely assist the parties but he also actively arbitrates and resolves the dispute by making an arbitral award.
- Section 62 again says that a party sending application for conciliation must briefly identify the subject of the dispute. However, in an arbitration agreement, the substance of dispute must be clearly mentioned. Usually, the parties incorporate a clause saying that any dispute arising out of the contract must be referred to arbitration and damages will be awarded for the purposes of same only. This clause is of utmost importance. However, such clause's existence is not needed in case of conciliation.
- In case of conciliation a party may require the conciliator to keep the factual information confidential and not disclose it to the other party, however this is only a requirement on request as the conciliator is bound to share all such information with the other party which helps it to better represent its case and clarify positions of any allegations made on it. {S.72.}

But it is not so in arbitration as the information given by a party is subjected to scrutiny by the other party. Thus there is no question of confidentiality in case of arbitration awards. There is no confidentiality inter se the parties, however, all ADR systems are confidential procedures, they are not available to the public as precedents as referable records of case laws.

- A settlement agreement may be made by the parties themselves and the conciliator shall authenticate the same. An arbitration award on other hand is not merely a settlement agreement but it is judgment duly signed by the arbitrator. This is the reason why arbitration is called as most resembling a court room procedure of litigation.
- The conciliation proceedings may be unilaterally terminated by a written declaration of a party to the other party and the conciliator, but arbitration proceedings cannot be so terminated. { S.32 & S.76 }

S.76 lays down four ways of the termination of conciliation proceedings. These are -

- (i) The conciliation proceedings terminate with the signing of the settlement agreement by the parties.
- (ii) The conciliation proceedings stand terminated when the conciliator declares in writing that further efforts at conciliation are no longer justified.
- (iii) The conciliation proceedings are terminated by written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated.
- (iv) The conciliation proceedings are terminated when a party declares in writing to the other party and the conciliator that conciliation proceedings are terminated.

As a general rule, the parties cannot initiate arbitral or judicial proceedings during the conciliation proceedings in respect of a dispute which is the subject matter of the conciliation proceedings.

The process for termination of arbitral proceedings is different. They can be found under section 32 of the Arbitration and Conciliation Act, 1996.

Termination of proceedings.- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where----

- (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,
 - (b) the parties agree on the termination of the proceedings, or
 - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) Subject to section 33 and sub-section
- (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

In the *case of Maharashtra State Electricity Board v. Datar Switch Gear Ltd.* the court observed that it is impossible to catalogue the circumstances in which the arbitral tribunal may hold that it is either unnecessary or impossible to continue the arbitral proceedings. Generally, it may include such conduct by a party, in a consistent course which renders the proceedings physically impossible to conduct.

- Conciliator is subjected to certain disabilities under section 80 of the act and he cannot act as a arbitrator or as a council or a witness in any arbitral or judicial proceedings but there is no such disabilities imposed on an arbitrator or parties to arbitral proceedings.
- The arbitration proceedings or awards may be used as evidence in any judicial proceedings but the conciliation proceedings cannot be used as evidence in any arbitral or judicial proceedings. This is also provided for in section 81 of the act.
- Last but not the least, an arbitrator has to decide according to law, failing which the award can be cancelled or appealed rightfully by the aggrieved party but a conciliator can conciliate irrespective of law. He is not bound by certain enactments i.e., Civil Procedure Code, Evidence Act etc. {S.66}

CAN A CONCILIATOR ACT AS AN ARBITRATOR IN THE SUBSEQUENT ARBITRATION PROCEEDINGS?

The **UNCITRAL Model Law and Rules on Arbitration and Conciliation** is a cornerstone for arbitration tribunals worldwide. Almost 145 countries have till date ratified this convention and adopted it in their domestic arbitration law.

Article 19 of the act clearly specifies that a conciliator shall not be an arbitrator in the same dispute for which he/she conciliated. **Section 80 of Arbitration and Conciliation Act, 1996** is similar to this provision and based on it. It reads as under,

Role of conciliator in other proceedings: - Unless otherwise agreed by the parties: ----

(a) The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

Thus, a conciliator as a general rule of international practise cannot act as an arbitrator. However, if the parties are willing and have agreed in writing that their conciliator can also be their arbitrator in the same dispute resolution, then this privilege cannot be denied. Now, the conciliator will be bound to follow the substantive and procedural law and give his award in accordance with law. The Permanent Court of Arbitration in their annual law journal in 1994 (written by Fuller and Fuller) expressed the advantages of enabling a conciliator of the same dispute to act as an "Amicus Curiae" in the arbitration proceedings or appoint him/her as one of the arbitrators in the panel. This was said in view of the new ADR and more refined techniques being adopted such as "med-arb" or "negotiation award" to gain maximum out of these alternate processes. **Professor Kirti Kannan terms** this opinion as undue stretching of the teenage processes of ADR. However, no such provision has been so far made as the risk factor of losing neutrality in the proceedings cannot be ruled out.

In the **case of Alcove Industries Ltd. V. Oriental Structures Engineers Ltd.**, the court explained that under section 12 the arbitrator must submit in writing at the outset, such facts which may give rise to justifiable doubts to his independence or impartiality. An arbitrator who has conciliated for Respondent 1 before cannot arbitrate, even in a separate dispute resolution where the same party is involved.

In the **case of Welspun Corp. Ltd v. Micro and Small, Medium Enterprises Facilitation council, Punjab and Ors.**, Justice Kannan held that the council appointed by the state to conciliate in the dispute, on the termination of the conciliation proceedings, shall have power to act as an arbitrator if there is an arbitration clause, agreement or contract between the parties. Thus the council can arbitrate in the given dispute.

Therefore, the conciliator can act as an arbitrator in certain cases if the Arbitration clause doesn't lay any bar. However, this is not be followed as a general rule and it must be ensured that neutrality of presiding conciliator and arbitrator is ensured.

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