CHAPTER V

CONCILIATION

1. THE CONCEPT OF CONCILIATION

The Halsbury’s Laws of England defines Conciliation as a process of persuading the parties to reach an agreement.¹ Conciliation may comprehensively be defined as a non-adjudicatory and non-adversarial² ADR mechanism involving a settlement procedure wherein an impartial third party (conciliator) enables and steers the disputant parties to arrive at a satisfactory and acceptable settlement of a dispute. It is considered as an effective and meaningful alternative to litigation for resolution of disputes through the guidance and assistance of a neutral and impartial third party.³

Conciliation is a voluntary process and the conciliator has no authority to impose on the parties a solution to the dispute. Like any other ADR process the sanctity of conciliation is the mutual determination of the parties to amicably resolve their disputes through an ADR mechanism.⁴ The consensual nature of the dispute resolution process allows parties to join in a friendly search for an amicable solution, without procedural restraints or protracted battles over formal technicalities⁵ and the parties are encouraged to visualise options which provide solutions keeping in view their interests and priorities.⁶

² There is neither a claimant/plaintiff nor a respondent/defendant in conciliation and as a result its proceedings are non-adversarial in nature. See Sudipto Sarkar & V.R. Manohar (Eds.), Sarkar’s Code of Civil Procedure (Wadhwa and Company, Nagpur, 11th Edn., 2006).
⁴ Thus mutual agreement and not an imposed decision, forms the spirit of conciliation. V.A. Mohta and Anoop V. Mohta, Arbitration, Conciliation and Mediation 483 (Manupatra, Noida, 2nd Edn., 2008).
Generally, all civil disputes are suitable for conciliation\(^7\) and it affords an excellent ADR mechanism for amicable resolution outside the litigative process.

2. HISTORY OF CONCILIATION IN INDIA

Conciliation is not a new concept as far as India is concerned. Kautilya’s Arthashastra also refers to the process of conciliation.\(^8\) Various legislations \(^9\) in India have also recognized conciliation as a statutorily acceptable mode of dispute resolution and conciliation was in fact being frequently resorted to as a mode of dispute resolution under these specific legislations. However, apart from these statutory provisions dealing with specified categories of cases, conciliation in general as a mode of ADR lacked proper legislative framework and statutory backing.\(^10\)

In 1984 faced with the problem of surmounting arrears the Himachal Pradesh High Court evolved a unique project for disposal of cases pending in courts by conciliation. This was also been recommended by the Law Commission of India in its 77\(^{th}\) and 131\(^{st}\) reports and the conference of the Chief Justices and Chief Ministers in December 1993.\(^11\) The Malimath Committee had also \textit{inter alia} recommended the establishment of conciliation courts in India.\(^12\)

\(^7\) Ashwanie Kumar Bansal, \textit{Arbitration and ADR} 20 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).

\(^8\) V.A. Mohta and Anoop V. Mohta, \textit{Arbitration, Conciliation and Mediation} 535 (Manupatra, Noida, 2\(^{nd}\) Edn., 2008).

\(^9\) Section 12 of the Industrial Disputes Act, 1947 contemplates settlement of disputes through conciliation effected through conciliation officers appointed under the Act; Section 23 of the Hindu Marriage Act, 1955 and Order XXXII A, Code of Civil Procedure, 1908 enable the judge to effect settlement between the parties by recourse to conciliation.


In the mean time the UNCITRAL had adopted the UNCITRAL Conciliation Rules, 1980\textsuperscript{13} and the General Assembly of the United Nations had recommended the use of these rules, therefore, the Parliament of India found it expedient to make a law respecting conciliation, and the Arbitration and Conciliation Act, 1996 was enacted.\textsuperscript{14} Conciliation was afforded an elaborate codified statutory recognition in India with the enactment of the Arbitration and Conciliation Act, 1996 and Part III of the Act comprehensively deals with conciliation process in general. The chapter on conciliation under the Arbitration and Conciliation Act, 1996 is, however, essentially based on the UNCITRAL Conciliation Rules, 1980.\textsuperscript{15}

Thereafter post litigation conciliation was recognized as a mode of dispute resolution when section 89 was incorporated in the Code of Civil Procedure, 1908\textsuperscript{16} which affords an option for reference of \textit{sub judice} matters to conciliation with the consent of parties for extra judicial resolution.\textsuperscript{17}

3. PROCESS OF CONCILIATION

3.1 COMMENCEMENT OF CONCILIATION AND APPOINTMENT OF CONCILIATOR

The conciliation process commences when the disputing parties agree to conciliate and a neutral conciliator is appointed. The party initiating conciliation sends a written invitation to conciliate to the other party briefly identifying the subject matter of the dispute. Conciliation proceedings


\textsuperscript{14} See Preamble to the Arbitration and Conciliation Act, 1996.


\textsuperscript{16} Inserted by the Code of Civil Procedure (Amendment) Act, 1999 with effect from 01.07.2002.

\textsuperscript{17} Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616.
commence when the other party accepts in writing the invitation to conciliate.\textsuperscript{18}

Thus conciliation agreement should be an \textit{ad hoc} agreement entered by the parties after the dispute has actually arisen and not before.\textsuperscript{19} Even if the parties incorporate conciliation clauses in their agreements, still conciliation would commence only if the other party accepts the invitation of one party to conciliate in case of a \textit{de facto} dispute. Thus unlike in the case of an arbitration agreement, Part III of the Arbitration and Conciliation Act, 1996 does not envisage any agreement for conciliation of future disputes. It only provides for an agreement to refer the disputes to conciliation after the disputes have arisen.\textsuperscript{20}

In conciliation proceedings ordinarily there is one conciliator unless the parties agree that there shall be two or three conciliators. Even in case of plurality of conciliators they are supposed to act jointly. An uneven number of conciliators is not necessary in conciliation since the task of the conciliators is to make recommendations for a settlement and not to render binding decisions.\textsuperscript{21}

In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator and in conciliation proceedings with two conciliators, each party may appoint one conciliator. The parties may also request any institution or person to recommend suitable names of conciliators or directly appoint them and such person or institution while discharging this responsibility should have regard to aspects as are likely to secure the appointment of an independent and impartial conciliator.\textsuperscript{22}

\textsuperscript{18} S. 62, Arbitration and Conciliation Act, 1996.
\textsuperscript{20} \textit{Visa International Ltd. v. Continental Resources (USA) Ltd.}, AIR 2009 SC 1366.
\textsuperscript{21} See Commentary on Draft UNCITRAL Conciliation Rules.
\textsuperscript{22} S. 64, Arbitration and Conciliation Act, 1996.
3.2 PROCEDURE IN CONCILIATION AND ROLE OF CONCILIATOR

The conciliator may request each of the parties to submit a brief written statement describing the general nature of the dispute and the points at issue, with a copy to the opposite party.\footnote{S. 65, Arbitration and Conciliation Act, 1996.} At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.\footnote{S. 65, Arbitration and Conciliation Act, 1996.}

The conciliator is supposed to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.\footnote{S. 67, Arbitration and Conciliation Act, 1996.} A conciliator assists parties by helping them to initiate and develop positive dialogue, clarify misunderstandings, create faith upon one another and generate a congenial atmosphere required for harmonious and cooperative problem-solving. In order to justify his position the conciliator must be an impartial person. The parties should be able to repose trust and confidence in him so as to enable them to share their secrets and their thinking process with the conciliator with the belief that the same will not be divulged to other party without specific instructions in that regard.\footnote{M. K. Sharma, “Conciliation and Mediation”, available at: www.delhimediationcentre.gov.in (last visited on 05.09.2010).} The process of conciliation, \textit{inter alia}, involves creating a constructive bonding between the parties to a dispute to steer them towards resolution.

The conciliator may conduct conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case and the wishes of the parties. The conciliator has wide procedural discretion in shaping the dynamic process towards a settlement.\footnote{P.M. Bakshi, “Conciliation for Resolving Commercial Disputes”, 1 \textit{Comp. L. J. (Journal)} 19 (1990); See also \textit{Haresh Dayaram Thakur v. State of Maharashtra}, AIR 2000 SC 2281.} The conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.\footnote{S. 66, Arbitration and Conciliation Act, 1996.} He is to be guided by principles of objectivity, fairness...
and justice giving due consideration 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.  

The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately. The conciliator may hold several joint or private meetings with the parties so as to enable the parties to clarify their cases and so as to persuade the parties to arrive at a mutually acceptable solution. This shows that depending upon the requirement from case to case basis the conciliator may or may not adopt a structured process in conciliation.

Unless the parties have agreed upon the venue of conciliation proceedings the conciliator is supposed to decide the venue of conciliation proceedings in consultation with the parties. Thus the conciliator is vested with extensive power to choose and mould the procedure to be followed by him untrammeled by the procedural laws, albeit in consultation with the parties. In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

The role of the conciliator is to assist the parties to arrive at an amicable settlement. The conciliator may, at any stage of the conciliation proceedings, himself make proposals for a settlement of the dispute. In the Indian context the conciliator therefore plays an evaluative role while

34 However Conciliation may be facilitative also. See M. K. Sharma, “Conciliation and Mediation”, available at: www.delhimediationcentre.gov.in (last visited on 05.09.2010). The difference lies in the approach adopted by the conciliator and the level of intervention. See
managing the process of conciliation as opposed to a mere facilitator. The conciliator assesses the respective cases of the parties and apart from acting as a facilitator suggests and advises the parties on various plausible solutions to the parties so as to enable the parties to choose the best possible and apt solution. He attempts to get the parties to accept the merits and demerits of their cases thereby leading them to a mutually acceptable solution. The conciliator, in this manner plays a more proactive and interventionist role in persuading the parties to arrive at a final settlement. In actual practice conciliator needs to be a person who is not only well-informed and diplomatic but can also influence the parties by his persona and persuasive skills. However, if the system of conciliation is to succeed as a proficient ADR mechanism professional training of conciliators needs to be a mandatory requirement.

3.3 THE SETTLEMENT AGREEMENT

When it appears to the conciliator that there exist elements of a settlement, which may be acceptable to the parties, he is supposed to 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 statutory provisions enjoin upon the conciliator to draw up and authenticate a settlement agreement. He should ensure that the


36 *Salem Advocate Bar Association v. Union of India*, AIR 2005 SC 3353; See also Anirudh Wadhwa and Anirudh Krishnan (Eds.), *R.S. Bachawat’s Law of Arbitration and Conciliation* (Lexis Nexis Butterworths Wadhwa, Nagpur, 5th Edn., 2010.


38 S. 73(1), Arbitration and Conciliation Act, 1996; See also *United India Insurance Co. Ltd. v. Ajay Sinha*, AIR 2008 SC 2398.

parties have full understanding of the settlement terms. The agreement must embody the terms and conditions of the settlement with clarity and precision. It is open to the parties to settle some of their disputes by conciliation and leave the unresolved disputes between them for resolution by other modes of adjudication.

The settlement agreement must also bear the signatures of the parties. Once the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

The settlement agreement drawn up in conciliation proceedings has 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 of the Arbitration and Conciliation Act, 1996. However it is only that agreement which has been arrived at in conformity with the manner stipulated and form envisaged and got duly authenticated in accordance with section 73 of the Arbitration and Conciliation Act, 1996, which can be assigned the status of a true settlement agreement and can be enforced as an arbitral award. Therefore a settlement agreement arrived in private conciliation proceedings can be enforced by executing the same in a civil court as if it were a decree of the court.

3.4 TERMINATION OF CONCILIATION PROCEEDINGS

A successful conciliation proceeding concludes with the drawing and signing of a conciliation settlement agreement. The signing of the settlement

---


46 As an arbitral award on agreed terms is also executable as decree of the court in terms of s. 36, *Arbitration and Conciliation Act*, 1996.
agreement by the parties, on the date of the settlement agreement terminates conciliation proceedings.

That apart, any party may terminate conciliation proceedings at any time even without giving any reason since it is purely voluntary process. The parties can terminate conciliation proceedings at any stage by a written declaration of either party. A written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, also terminates conciliation proceedings on the date of such declaration.47

4. ADVANTAGES OF CONCILIATION

4.1 COST EFFECTIVE AND EXPEDITIOUS PROCESS

Conciliation is an economical and expeditious mechanism for resolution of disputes in comparison to litigation and arbitration, which makes it an excellent ADR Mechanism. The cost management tools and expertise of the conciliator generally prevent multiplication of actual costs to the parties and seek to make it cost efficient.48 The conciliator follows a simplified procedure suited to the aspirations of the parties and keeping in mind the need for speedy settlement of the dispute.49 Moreover the time management tools applied by the conciliator prevent dragging on of conciliation proceedings for longer periods and ensure its conclusion within a reasonable time frame.50 The end result in conciliation is a negotiated settlement which is treated to be an arbitral award on agreed terms, thereby obviating the possibility of successive appeals and finally resolving the dispute in an expeditious and cost effective manner.

47 S. 76, Arbitration and Conciliation Act, 1996.
4.2 AUTONOMY AND CONVENIENCE OF PARTIES

Conciliation is flexible and convenient. The parties are free to agree on the procedure to be followed by the conciliator, the time and venue of the proceedings and thus eventually control the process. The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, convenience of the parties and the wishes the parties may express.\(^{51}\) A very commendable feature of conciliation is that the parties can withdraw from conciliation at any stage.\(^{52}\) Unless a party consents to the initiation and continuance of conciliation and accepts the resultant settlement agreement he cannot be said to be bound by the process, and he may walk out from conciliation proceedings at any time. This is unlike arbitration and litigation where decisions can be made even if a party walks out.\(^{53}\) The parties therefore not only control the procedure in conciliation proceedings but also the final outcome of the proceedings. Indeed party autonomy is a very laudable feature of conciliation.

4.3 CREATIVE SOLUTIONS/ REMEDIES

In litigation or arbitration what solution or resolution would be contained in the judgment or award is not within the control or prior knowledge of the parties and moreover the ultimate decision is based on a straightforward decision on merits keeping in view the rights and positions of the parties. In conciliation however the parties control the outcome and can incorporate terms and conditions in the settlement agreement as per mutual agreement. They can devise creative solutions for their disputes at one go which may not have been within the contemplation of an arbitrator or a judge. They can also decide how their rights and liabilities are going to be actually worked out on

---

\(^{51}\) S. 67(3), Arbitration and Conciliation Act, 1996.

\(^{52}\) Mukul Mudgal, “Conciliation: An Indian Perspective”, II (2) Nyaya Kiran (April 2003).

resolution of the dispute and chalk out ingenious modalities for complying with the basic terms of settlement.

4.4 PARTY SATISFACTION AND HARMONY

Unlike litigation and arbitration where one party wins and the other loses, in conciliation both parties are winners as the decision is acceptable to both. Both parties are in favour of the decision, as until both parties agree to a proposal, the settlement or agreement does not take place. Therefore it is a win-win situation for both the parties as both the parties are satisfied with the agreement. Such win-win situation enables them to retain good relationship for times to come unlike litigation and arbitration where the parties on account of the win-loss equation are not able to continue or rebuild their relationship. Even where the conciliation proceedings do not fructify into a settlement, they prove to be useful by enabling the parties to understand each other’s versions, positions and aspirations in a better perspective.

4.5 CONFIDENTIALITY

In contradistinction to judicial proceedings conciliation is a private closed door affair and therefore offers privacy and confidentiality. In fact confidentiality in conciliation proceedings is a statutory guarantee\(^54\) which makes conciliation an excellent dispute resolution mechanism.

The conciliator and the parties are supposed to keep confidential, all matters relating to the conciliation proceedings. The parties are also precluded from relying upon or introducing as evidence in subsequent arbitral or judicial proceedings views expressed or suggestions made by the other party in respect of a possible settlement of the dispute, admissions made by the other party in the course of conciliation proceedings, proposals made by the conciliator and the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.\(^55\)

\(^{54}\) S. 75, Arbitration and Conciliation Act, 1996.

\(^{55}\) S. 81, Arbitration and Conciliation Act, 1996.
Even during the course of conciliation proceedings where a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator is not supposed to disclose that information to the other party. This ensures that even in the eventuality of failure of conciliation proceedings neither party is able to derive undue benefit out of any proposal, view, statement, admission, etc. made by the opposite party during conciliation proceedings. The process of conciliation provides an opportunity for settlement of disputes without publicity. The conciliator is also precluded from acting 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 nor can he be presented by the parties as a witness in any arbitral or judicial proceedings.

4.6 ENFORCEABILITY OF CONCILIATION SETTLEMENT AGREEMENT

The settlement agreement drawn up in conciliation proceedings has 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 of the Arbitration and Conciliation Act, 1996. Thus the settlement agreement in conciliation is executable as a decree of the civil court. It is open to any party to apply for execution of the settlement agreement by filing an execution petition before the civil court. The expeditious enforcement of a conciliation settlement agreement in a summary manner i.e. by way of execution proceedings in a civil court is the principal advantage attached with conciliation.

56 S. 70, Arbitration and Conciliation Act, 1996.
57 S. 70, Arbitration and Conciliation Act, 1996.
60 S. 74, Arbitration and Conciliation Act, 1996.
61 S. 36, of the Arbitration and Conciliation Act, 1996.
5. CONCILIATION VIS-À-VIS MEDIATION

Mediation is nothing but negotiation facilitated by a third party who assists the parties in moving to resolution. Conciliation is also a process of arriving at a settlement with the assistance of a third party/conciliator.

The difference between conciliation and mediation has been an important issue in ADR jurisprudence. One obvious reason is that there are striking similarities between mediation and conciliation. The source of morality in both mediation and conciliation is the liberty and spirit of the parties to evaluate their respective cases, understand their interests and arrive at a negotiated settlement with the assistance of a neutral third party. Albeit, the two terms are used distinctly yet the fundamental philosophy and the basic process in both mediation and conciliation are similar. Both, conciliation and mediation can be described as negotiation facilitated by a third party. They both focus on amicable resolution of disputes and aim at maintenance of relationships between the parties. In fact, at times the two terms are used synonymously or interchangeably.

Article 1 of the UNCITRAL Model Law on International Commercial Conciliation, 2002 defines conciliation as a process, whether referred to by the expression conciliation, mediation or an expression of similar import,

---


67 Approved vide Resolution no. 57/18 of the United Nations General Assembly on 19 November 2002.
whereby the parties request a third person, or a panel of persons, to assist them in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationships.68

Byron A. Garner in his book *A Dictionary of Modern Legal Usages* states: The distinction between mediation and conciliation is widely debated among those interested in ADR. Though a distinction would be convenient, those who argue that usage indicates broad synonymy are most accurate.69

While in many countries no distinction is made between conciliation and mediation, in India the introduction of the term mediation and conciliation separately in section 89 CPC shows that theses terms are to be understood and treated differently.70 To some extent there may be overlapping between the two yet there is fine line of distinction between them as well.71

In this regard, it may be emphasized that the role of a conciliator is distinct from the role of a mediator. A mediator’s task is to primarily facilitate the negotiations and discussions between parties, and guide them to their own self-proposed solution. The mediator is usually regarded as having a

---

68 In respect of the UNCITRAL Model law on International Commercial Conciliation it has been stated that “in practice, proceedings in which the parties are assisted by a third person to settle a dispute, are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution. The Model Law uses the term “conciliation” to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of a legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used.” See *UNCITRAL Model Law on International Commercial Conciliation With Guide to Enactment and Use*, 2002; See also Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (Kluwer Law International, The Hague, 2nd Edn.)


facilitative role and will not provide advice on the matters in dispute. A mediator is therefore merely a facilitator. The conciliator however plays a more interventionist role, therefore for clarity and consistency it would be better if the process where the dispute resolution practitioner gives advice or plays a more interventionist role in addition to facilitating negotiations is designated as ‘conciliation’. 

In the Indian perspective also, in conciliation, unlike in mediation, the conciliator plays a more active role and may, at any stage of conciliation proceedings, make proposals for settlement of the dispute. Therefore in India a conciliator can play a more pro-active, interventionist and evaluative role, on account of his legal authority "to make proposals for settlement of the dispute" and to formulate and reformulate the terms of the settlement agreement.

Even the Indian Supreme Court has held that the mediator is a mere facilitator whereas the conciliator by making proposals for a settlement of the dispute and by formulating or re-formulating the terms of a possible settlement has a greater role than a mediator. The concept of conciliation under Indian law is therefore consistent with Rules for Conciliation promulgated by the UNCITRAL.

---


75 Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353, See also Anirudh Wadhwa and Anirudh Krishnan (Eds.), R.S. Bachawat’s Law of Arbitration and Conciliation (Lexis Nexis Butterworths Wadhwa, Nagpur, 5th Edn., 2010); See also See also S.S. Mishra, Law of Arbitration and Conciliation in India (With Alternative Dispute Resolution Mechanisms) (Central Law Agency, Allahabad, 1st Edn., 2007).

In the United States of America, however, the term conciliation has fallen into disuse and the expression mediation flourishes.\(^{77}\) There the expression mediation encompasses the proactive form of facilitated negotiation also.\(^{78}\) But the meaning of these words i.e. conciliation and mediation in India is the same as has been assigned under the UNCITRAL Conciliation Rules, 1980\(^{79}\) and the UNCITRAL Model Law on International Commercial Conciliation, 2002. But, in the USA a different approach is adopted in this respect, although no specific reasons can be attributed to this different approach and it appears that it is a matter of mere linguistic usage.\(^{80}\) One may even say that there is no national or international consistency on this aspect.\(^{81}\) However, in India this proactive, evaluative and interventionist technique of dispute resolution through facilitated negotiation has been statutorily termed as conciliation.\(^{82}\)

As far as the procedural aspect is concerned in the Indian context mediation is a process of structured negotiation involving different stages: introduction, joint session, caucus, agreement, etc. In conciliation the conciliator may or may not follow a structured process. The conciliator is free to follow his own procedure to suit the needs of the parties. Though the stages in a structured conciliation process are not strictly designated, in a manner as is done in case of mediation, there is no bar in doing so and even otherwise they are fundamentally the same.

\(^{77}\) V.A. Mohta and Anoop V. Mohta, *Arbitration, Conciliation and Mediation* 534 (Manupatra, Noida, 2\(^{nd}\) Edn., 2008); See also Latha K., “The Need for the Proper Utilization of ADR Facilities in India”, XLIII *ICA Arbitration Quarterly* 18 (October – December 2008).


\(^{79}\) UNCITRAL Conciliation Rules adopted on 23 July 1980 and recommended vide Resolution 35/52 adopted by the UN General Assembly on 4\(^{th}\) December 1980.


Thus the position, which emerges is that although there are striking similarities between mediation and conciliation yet there is a fine line of distinction between the two primarily with respect to the role of the conciliator. However in practice such distinctions tend to be blurred and in a given case it may be difficult to draw the line between mediation and conciliation\textsuperscript{83} and the term 'mediation' is many a time used interchangeably with 'conciliation'.\textsuperscript{84}

Of late a distinction is emerging that where the conciliator is a professional trained in the art of mediation the process of conciliation is referred to as mediation.\textsuperscript{85} It is said that a mediator possesses professional training in the art of facilitation and negotiation whereas a conciliator is a person who facilitates negotiation on an ad hoc basis without any specialized skills. This however is not correct as even a conciliator may possess specialized training in the art of facilitating dispute resolution. Conversely there is nothing in law which prevents a person trained in the art of negotiating settlements from being referred to or acting as a conciliator.

In the Indian context both the processes i.e. conciliation and mediation culminate into a settlement agreement, but in conciliation the settlement agreement is considered to be an arbitral award on agreed terms and is \textit{per se} executable as a decree of the court, whereas there is no such analogous statutory provision in case of mediation.\textsuperscript{86} The settlement agreement arrived between the parties in case of mediation is not \textit{per se} enforceable in a summary manner. In case there is no dispute pending before the court such an agreement can only form the basis of a suit and is not executable as a decree of the court.


\textsuperscript{84} The Delhi High Court has framed rules under clause (d) of sub-section (2) of S. 89, Code of Civil Procedure, 1908 which relates to mediation, yet it has classified the rules as the Mediation and Conciliation Rules, 2004 and although the legal principles pertaining to conciliation are already statutorily codified under the Arbitration and Conciliation Act, 1996.

\textsuperscript{85} R.V. Raveendran,“Section 89 CPC : Need for an Urgent Relook” 4 \textit{SCC Journal} 23 (2007).

\textsuperscript{86} In fact there is no comprehensive legislation on mediation in India like part III of the Arbitration and Conciliation Act, 1996 dealing with conciliation.
Earlier where a sub judice matter was referred to mediation in terms of section 89 of the Code of Civil Procedure, 1908 the settlement agreement arrived at in mediation proceedings was also not per se executable. It had to be crystallized into a decree of the court and that process was also not immune from hassles and problems. However the Supreme Court in Afcons case\(^{87}\) has rephrased section of the Code of Civil Procedure, 1908 by judicial interpretation, whereupon the settlement agreement arrived at in mediation pursuant to section 89 of the Code of Civil Procedure, 1908 is to be deemed as an award of the Lok Adalat which is executable as a decree of the court. This however is applicable only to court referred mediation in terms of section 89 of the Code of Civil Procedure, 1908.

Thus the expeditious enforcement of a conciliation settlement agreement in a summary manner i.e. by way of execution proceedings is the principal advantage attached with conciliation.\(^{88}\) To begin with the term conciliation was used more widely in India, while of late it is is gradually falling into disuse and the term mediation has become more fashionable\(^{89}\) However conciliation too is an extremely beneficial ADR mechanism in the Indian context and needs to be resurrected as one of the important components of the ADR system.

6. CONCILIATION IN DELHI

Conciliation as a mode of dispute resolution is frequently resorted to at the pre litigation stage in Delhi. Various public sector\(^{90}\) and private companies in Delhi have incorporated clauses in their agreements agreeing to refer any

\(^{87}\) In Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616; See also Surinder Kaur v. Pritam Singh, 154 (2008) DLT 598.

\(^{88}\) See ss. 74, 30 and 36, Arbitration and Conciliation Act, 1996; See also Avtar Singh, Law of Arbitration and Conciliation (Eastern Book Company, Lucknow, 7th Edn., 2005); See also R.V. Raveendran, “Section 89 CPC : Need for an Urgent Relook” 4 SCC Journal 23 (2007).

\(^{89}\) O.P. Malhotra and Indu Malhotra, The Law and Practice of Arbitration and Conciliation (Lexisnexis Butterworths, Delhi, 2nd Edn., 2006); See also V.A. Mohta and Anoop V. Mohta, Arbitration, Conciliation and Mediation 534 (Manupatra, Noida, 2nd Edn., 2008).

\(^{90}\) ONGC was the first public sector undertaking to use conciliation for the settlement of their dispute with Hyundai Heavy Industries Private Limited. See O.P. Motiwal, “Development of Law of Conciliation in India”, XLIX ICA Arbitration Quarterly 2 (January - March 2011).
disputes to conciliation. 91 Such conciliation clauses provide for settlement of disputes through conciliation 92 prior to taking recourse to judicial or arbitral proceedings. 93 The parties may have their own conciliators and conduct conciliation in accordance with Part III of the Arbitration and Conciliation Act, 1996 or avail the services of any institution providing facilities for resolution of disputes through conciliation. There are various such institutions in Delhi offering institutional conciliation as a mode of dispute resolution.

6.1 ICADR CONCILIATION IN DELHI

The International Centre of Alternative Dispute Resolution provides institutionalized conciliation services in Delhi for resolution of disputes. The ICADR has also framed ICADR Conciliation Rules, 1996 dealing with appointment of conciliators, commencement and conduct of conciliation proceedings, etc.

The matter can be referred to conciliation by ICADR by virtue of an agreement providing for the reference of a dispute to conciliation by ICADR. On some occasions, even where the matter is not referred to institutional conciliation to ICADR, the conciliators on ICADR’s panel are engaged by various government departments and PSUs for conduct of ad hoc conciliation. The ICADR has its own fixed schedule of conciliator’s fee and administrative fees chargeable on the basis of the amount in dispute. ICADR also charges fees for appointment of conciliator and fees for providing infrastructure/ facilities separate on a daily basis. 94 The fees charged ICADR in conciliation

---

91 Empirical research conducted shows that 40% of the respondents had come across such clauses in the contracts executed by private companies which provide for recourse to mediation at the preliminary stage for dispute resolution.

92 Empirical research conducted also shows that in this domain of pre litigation dispute resolution conciliation surpasses mediation and that is because of its apparent advantages.


94 Eg. In domestic commercial conciliation where the amount in dispute does not exceed Rs. 5 lacs, the ICADR charges conciliator’s fees of Rs. 15,000/- per conciliator, administrative fees of Rs. 7500/- , appointment fee of Rs. 7500/- and facilitation fee of Rs. 2500/- per day.
matters is the major factor which results in lower number of references to institutional conciliation.\textsuperscript{95}

Nonetheless ICADR provides facilities of institutionalized conciliation in Delhi which are being utilized by the disputant parties, though only to a limited extent.

\section*{6.2 ICA CONCILIATION IN DELHI}

The Indian Council of Arbitration (ICA) also provides facilities for resolution of disputes by institutional conciliation in Delhi. The ICA has framed rules known as the Rules of Conciliation of the Indian Council of Arbitration\textsuperscript{96} dealing with appointment of conciliators, commencement and conduct of conciliation proceedings, confidentiality etc. The ICA maintains a list/panel of professional conciliators for facilitating conciliation between parties.

The ICA also charges fixed fee as per Rules 26 and 27 and the schedule of fees of the Rules of Conciliation of ICA on the basis of the claim amount.\textsuperscript{97} The ICA has been providing quality conciliation services which are being frequently utilized by the disputant parties.

\section*{6.3 FACT CONCILIATION IN DELHI}

The FICCI Arbitration and Conciliation Tribunal (FACT) also provides facilities for resolution of disputes by institutional conciliation in Delhi. The FACT has a Conciliation Committee whose duties are to select conciliators of FACT and supervise the work of the registrar, who appoints conciliators in individual cases where the parties are not able to arrive at a consensus on the choice of conciliator. FACT maintains a panel of professional conciliators who conduct conciliation in a strictly professional, ethical and confidential manner.

\textsuperscript{95} As per the ICADR, Annual Report, 2009-2010 the ICADR’s New Delhi centre received 4 cases for conciliation.

\textsuperscript{96} The Rules are based on the UNCITRAL Conciliation Rules, 1980

\textsuperscript{97} Eg. In conciliation where the amount in dispute does not exceed Rs. 5 lacs, the ICA charges conciliator’s fees of Rs. 30,000/- per conciliator, administrative fees of Rs. 15000/- and special facilitation fee of Rs. 5000/- per day and other misc. expenses.
The FACT has also framed the rules known as the Rules of Conciliation of the FICCI Arbitration and Conciliation Tribunal (FACT) dealing with appointment of conciliators, commencement and conduct of conciliation proceedings, confidentiality etc. FACT charges fee for conciliation in terms of the FACT Conciliation Rules.  

One of the main reasons that conciliation in Delhi is not used as widely as it should be is that institutional conciliation is quite expensive. In high stake matters corporate and business entities are resorting to institutional conciliation frequently, however when it comes to individual disputants or small business entities, while the parties are willing to spend on a process which involves adjudication of their dispute, they are somewhat reluctant to incur expenditure on a process which merely brings about an amicable settlement.

6.4 PRE LITIGATION AD HOC CONCILIATION IN DELHI

Ad hoc conciliation at the pre litigation stage is an extremely beneficial ADR mechanism. It is better than mediation since a conciliation settlement agreement is executable in a summary manner as a decree of the court in contradistinction to a mediation settlement agreement. However it is used only to a limited extent. The corporates usually prefer institutional conciliation, though in some cases private companies and PSUs go in for conciliation conducted by ad hoc conciliators appointed by the parties by mutual accord. However in case of individual disputants it seldom happens that such individuals are not aware of the existence and utilities of the process of conciliation and hence statutory conciliation remains unexplored.

However it can be expected that with increase in awareness conciliation may gain momentum as a resolution process especially at the pre litigation stage.

---

98 Eg. In conciliation where the amount in dispute does not exceed Rs. 5 lacs, the FACT charges conciliator’s fees of Rs. 30,000/- per conciliator, administrative fees of Rs. 15000/- and special facilitation fee of Rs. 2500/- per day and other misc. expenses.
6.5 CONCILIATION UNDER SPECIFIC LEGISLATIONS IN DELHI

Conciliation is a statutorily acclaimed mode of settlement under various legislations. The Hindu Marriage Act, 1955 enjoins upon the court to make every endeavour to bring about reconciliation between the parties with the discretion to refer the matter to any third person for the purpose of effecting reconciliation.

The matrimonial courts in Delhi have since long utilized the process of conciliation between the parties to matrimonial disputes. Chamber meetings are frequently held by the judges so as to counsel the parties and persuade them to reconcile their differences and arrive at an amicable settlement. Proceedings are also conducted in camera so that the process of conciliation can be utilized in a more effective manner. Experience shows that the effort has yielded good results.

The availability of limited time with judges, however, has been a major constraint in judicial conciliation proceedings. Now with the establishment of mediation centres such disputes requiring greater time and effort are normally referred to the court annexed mediation centres.

---

99 Section 23 (3) of the Hindu Marriage Act, 1955 reads as follows “...Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties...”; This has been emphasized by the Supreme Court in Jagraj Singh v. Birpal Kaur, A.I.R. 2007 SC 2083.

100 Section 23 (3) of the Hindu Marriage Act, 1955 reads as follows: "...For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report..."

101 In Delhi courts of Additional District Judges are earmarked for adjudication of matrimonial disputes under the Hindu Marriage Act, 1955.

102 The judge retires to his chamber attached to the court and privately meets the parties jointly or one at a time in his chamber where the atmosphere is much more congenial for the process of conciliation.

Of late Family Courts have also been established in Delhi\(^{104}\) in conformity with the mandate of the Family Courts Act, 1984. The Family Courts Act, 1984\(^{105}\) also enjoins upon the judges in the first instance to assist and persuade the parties in arriving at a settlement.\(^{106}\) The family court judges also employ the generic process of conciliation while assisting the parties to arrive at a consensual resolution.\(^{107}\)

Conciliation also continues to be utilized as a mode of dispute resolution under the Industrial Disputes Act, 1947 in Delhi. It has been statutorily recognized as a method of dispute resolution in relation to disputes between workmen and the management of the industry.\(^{108}\) In fact conciliation has been formalized as a regular drill in labour relations.\(^{109}\) The Industrial Disputes Act, 1947 provides for appointment of ‘Conciliation Officers’\(^{110}\) charged with the duty of mediating in and promoting the settlement of disputes.

---

\(^{104}\) Two Family Courts are functioning at Dwarka, four Family Courts are functioning at Rohini, two Family Courts are functioning at Saket and one Family Court is functioning at Patiala House Court in Delhi.

\(^{105}\) Section 9(1) of the Family Courts Act, 1984 reads as follows: “...In every suit or proceeding, endeavour shall be made by Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit....”

\(^{106}\) To this extent the conciliation has got much recognition in the matter of settlement of family disputes. See also Law Commission of India, 222nd Report, Need for Justice-dispensation through ADR etc., 2009; This has also been emphasized by the Supreme Court in *Balwinder Kaur v. Hardeep Singh*, AIR 1998 SC 764; See also Anil Malhotra and Ranjit Malhotra, “Alternative Dispute Resolution in Indian Family law – Realities, Practicalities and Necessities”, available at: http://www.iaml.org (last visited on 01.06.2012).


\(^{110}\) All Labour officers, Asst. Labour Commissioners and Dy. Labour Commissioners, have been appointed as conciliation officers in Delhi; Recently the conciliation talks between Air India management and pilots were going on before the Deputy Labour Commissioner at Delhi. See “AI pilots, management make no headway in conciliation talks”, *The Times of India*, New Delhi, July 6, 2012.
industrial disputes\textsuperscript{111} and ‘Conciliation Boards’ for promoting settlement of industrial disputes.\textsuperscript{112} A conciliation officer is a friend philosopher and guide of the disputing parties.\textsuperscript{113} The conciliation officer is supposed to investigate the dispute without delay with the object of bringing about a settlement.\textsuperscript{114} In an industrial dispute in respect of public utility service there is an obligation on the conciliation officer to hold conciliation proceedings.\textsuperscript{115}

Conciliation proceedings under the Industrial Disputes Act, 1947, have however failed to achieve the purpose to the desired extent.\textsuperscript{116} Delays, indifferent attitudes and lack of commitment on the part of the conciliation officers, adjournments are all inevitable symptoms of the governmental structure, which has weakened the voluntary fabric.\textsuperscript{117}

Furthermore on account of the attitude of unrealistic demands on the part of the workers, the authoritarianism on the part of the managements\textsuperscript{118} and lack of trust between the parties and distrust of parties in the conciliation officer, the conciliation system in the present form is unable to promote realization of genuine conciliation goals.\textsuperscript{119} Another important aspect which has led to failure of the conciliation process is the lack of training of conciliation officers.

\textsuperscript{111} S. 4, Industrial Disputes Act, 1947; S. 12, Industrial Disputes Act, 1947 prescribes the duties of Conciliation Officers.

\textsuperscript{112} S. 5, Industrial Disputes Act, 1947.


\textsuperscript{115} S. 12(1), Industrial Disputes Act, 1947.

\textsuperscript{116} In an empirical study 80\% of the respondents were dissatisfied with the efficacy of conciliation proceedings under the Industrial Disputes Act, 1947.


\textsuperscript{118} In fact the Delhi Mediation Centre has found that in labour matters where the workmen and management have adopted resolute stands have been generally found to be not fit for mediation. See Delhi Mediation Centre, Annual Report (2006-2007).

\textsuperscript{119} Debi S. Saini, “Failure of Conciliation: Perceptions and Realities”, 28 (2) IJIR 105 (October 1992); The conciliation officer has also been described as toothless tiger. See P.R. Rakshit, “Conciliation Officer – A Toothless Tiger under I.D. Act, 1947 – A Realistic and Legalistic Approach”, Lab. I.C. (Journal) 97 (2000).
conciliation officers. Further there have also been instances of corruption amongst the conciliation officers. All this has evoked a concern with respect to the efficacy of conciliation in industrial disputes yet conciliation continues to be an available option, though not very successful, in industrial disputes.

7. ISSUES PERTAINING TO CONCILIATION

7.1 INADEQUATE USE OF CONCILIATION IN DELHI AT THE POST LITIGATION STAGE.

Conciliation in general may also prove to be an effective post litigation dispute resolution mechanism. It is one of the prescribed mechanisms under section 89 CPC also. However it is hardly used as a dispute resolution mechanism at the post litigation stage. One of the major reasons for the scant use of conciliation is the fact that conciliation and mediation are strikingly similar and at the post litigation stage the process of mediation flourishes in Delhi in contradistinction to the process of conciliation. The process of mediation on account of its wide publicity by the courts overshadows conciliation in Delhi.

The High Court of Delhi has notified the Mediation and Conciliation Rules, 2004 on 11th August, 2005 and has established the Delhi High Court Mediation and Conciliation Centre, which shows the fundamental consciousness of the utility of the process of conciliation as an ADR mechanism and its similarity to mediation yet the procedure which is utilized is primarily designated as mediation and term conciliation has been rendered redundant. At the district courts in fact the centres have been designated as Mediation Centres only and there is not even a reference to conciliation. Thus conciliation is not utilized to its full potential at the post litigation stage.

120 In this respect the system of conciliation under the Industrial Disputes Act, 1947 needs to learn from the experiences of the Delhi Mediation Centre.
121 The courts in Delhi issue mediation pamphlets along with summons to be distributed amongst the litigating parties so as to create awareness with respect to mediation and its availability as an ADR process at court annexed mediation centres.
122 The LCIA India has altogether ignored the expression conciliation and has framed only rules regarding mediation.
7.2 SCOPE OF CHALLENGE TO CONCILIATION SETTLEMENT

The conciliation settlement agreement has 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 of the Arbitration and Conciliation Act, 1996.\textsuperscript{123} Section 30 (4) of the Act provides that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute. Section 36 of the Act provides that the arbitral award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court after the time for making ‘an application to set aside the award under section 34 of the Act’ has expired, or such application having been made, it has been refused.

Logically speaking there appears to be no rationale for permitting a petition for setting aside an arbitral award on agreed terms but under the law as it stands no exception is carved out for an arbitral award on agreed terms. An argument therefore may be advanced that section 36 is applicable to all arbitral awards, including an arbitral award on agreed terms. Therefore a petition for execution of an arbitral award on agreed terms cannot be filed unless the time for making an application to set aside the award under section 34 of the Act has expired. The necessary corollary is that a petition for setting aside of an arbitral award can also be preferred. This argument may be reinforced by the absence of any exception clause in section 34 of the Act with respect to an arbitral award on agreed terms.

Since by a legal fiction a conciliation settlement agreement is to be deemed as an arbitral award on agreed terms, a petition under section 34 of the Arbitration and Conciliation Act, 1996 cannot be said to be beyond comprehension in respect of a conciliation settlement agreement. In case such a petition is entertained, that would directly affect the enforceability of a conciliation settlement agreement and resultantly gives a severe blow to the efficacy of conciliation proceedings.

\textsuperscript{123} S. 30, Arbitration and Conciliation Act, 1996.
Interpretation in the other direction can provide one possible solution. A legal fiction treats a conciliation settlement agreement as an arbitral award but there is nothing in the Act which in such cases impels the court to consider conciliation as arbitration or a conciliator as an arbitral tribunal and therefore even if such a petition is filed it would be restricted to only two grounds (which do not make any reference to the procedure of arbitration or the arbitral tribunal) viz. incapacity of the parties and the award being opposed to public policy thereby limiting the scope of any such challenge.

Another possible solution of this issue would be to amend the Arbitration and Conciliation Act, 1996 by providing in section 36 of the Act that an arbitral award on agreed terms/ a conciliation settlement agreement would be enforceable straightaway\(^{124}\) and secondly by specifying that section 34 of the Act would not be applicable to an arbitral award on agreed terms/ a conciliation settlement agreement. This would obviate the possibility of any kind of challenge to a conciliation settlement agreement.

7.3 NO SUSPENSION OF LIMITATION PERIOD IN PRE LITIGATION CONCILIATION

The object of pre litigation conciliation is to make an attempt for amicable resolution of the dispute between the disputant parties at the pre litigation stage itself. In case the conciliation proceedings fructify into a settlement agreement the same would be executable as a decree of the court. In case the matter is not settled the parties are always at liberty to approach the courts for judicial determination of their disputes or take recourse to arbitration.

However, undoubtedly the process of conciliation from the stage when one party enters a request for conciliation to the stage of final termination of proceedings is likely to take some time. The time span may extend even to a few months also, which might result in extinguishment of the limitation period

to take recourse to litigation or arbitration in the meantime. This would result in undue hardship for a party in such a case.

The UNCITRAL Model Law on International Commercial Conciliation, 2002 enunciates a model clause\(^{125}\) for states, which wish to adopt a provision on suspension of limitation period during conciliation proceedings.\(^{126}\)

This provision is significantly missing in the Indian Arbitration and Conciliation Act, 1996. It is for the legislature to step in and fill up this lacuna by amending the Arbitration and Conciliation Act, 1996. Till such time that an amendment is effected on the lines of the UNCITRAL Model Law on International Commercial Conciliation, 2002 the pre litigation conciliation can be carried out effectively by devising a strict and brief schedule so that the time spent on conciliation proceedings does not, by and large, result in extinguishment of the limitation period. Further although the Act bars arbitral or judicial proceedings during the pendency of conciliation proceedings\(^{127}\) yet the ban is not complete and a party may initiate arbitral or judicial proceedings during the pendency of conciliation where, in his opinion, such proceedings are necessary for preserving his rights.\(^{128}\)

### 7.4 AWARENESS

Despite all its benefits conciliation is not resorted to frequently by the masses in Delhi. It is also very easy for private individuals to take recourse to conciliation for settlement of their disputes as it is an informal and simple process.

\(^{125}\) This model clause stipulates that when conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of conciliation is suspended and where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.


\(^{127}\) See also M. K. Sharma, "Conciliation and Mediation", available at: www.delhimediation centre.gov.in (last visited on 05.09.2010).

\(^{128}\) S. 77, Arbitration and Conciliation Act, 1996.
However the lack of awareness seems to be the foremost reason for the scant use of the process of conciliation. Although much hype has been created about mediation, conciliation has been neglected despite the fact that the concept of conciliation is well entrenched in the Indian statutory framework whereas mediation is a concept imported from the United States of America. Very often people are not at all aware about the existence and availability of this process of conciliation, what to talk about the procedural aspects and the advantages associated with the process of conciliation.

Therefore first of all awareness and consciousness needs to be created amongst the masses with respect to the existence, availability and advantages of the process of conciliation as an ADR mechanism for amicable resolution of disputes.

8. NEED FOR STATE SPONSORED PRE LITIGATION CONCILIATION

In the United States of America numerous commercial disputes do not enter the courts because they are resolved at the pre litigation stage. The ever-surmounting arrears pose a perplexing problem before the judicial system in Delhi and one of the conceivable strategies to counter this situation is to somehow put a check on the number of lawsuits instituted. In Delhi also pre litigation conciliation is the need of the hour and the statutory provisions are also well in place for pre litigation conciliation.

A standardized or institutionalized, state sponsored/ court annexed, pre litigation conciliation mechanism appears to be a viable solution in this direction, which if established, would definitely result in better implementation of ADR in Delhi. The reasons for the need of such a mechanism are similar and need not be reiterated.  

---

129 Justice K.G. Balakrishnan, Chief Justice of India, has also referred to Pre Litigation ADR in his address at the National Meet on Mediation and Conflict Resolution on 26th March, 2008. See Delhi Mediation Centre, 2 Mediation Newsletter (May 2008).
In the year 1984, the Himachal Pradesh High Court, under the leadership of then Chief Justice P.D. Desai, had evolved a project for disposal of pending cases by conciliation, insisting on pre-trial conciliation in fresh cases and this model was widely acclaimed.\textsuperscript{130} However it is matter of dismay that the legislature has not stepped in so as to accord statutory recognition to any such state sponsored pre litigation conciliation mechanism.\textsuperscript{131}

The advantages of conciliation have already been expounded and need not be reiterated. Therefore, such a pre litigation dispute resolution mechanism employing conciliation as the process of dispute resolution would undoubtedly give prolific results and would radically decrease the burden on the courts. From a practical point of view pre litigation conciliation is therefore of greatest importance.\textsuperscript{132}

The object is to make an attempt for amicable resolution of the dispute between the disputant parties at the pre litigation stage itself. In case the conciliation proceedings fructify into a settlement agreement the same would be executable as a decree of the court. The parties would be saved from the undue harassment of litigation at the same time avoiding the wastage of time and money. Pre litigation conciliation would not only prove to be economically beneficial but would also ensure maximum confidentiality. The overburdened judicial system would also be saved from being loaded with one more case. In case the matter is not settled the parties are always at liberty to approach the courts for judicial determination of their disputes or take recourse to arbitration.

One thing is aptly clear that such a state sponsored/court annexed pre litigation conciliation mechanism, if established would go a long way in

\begin{itemize}
\item \textsuperscript{130} V.A. Mohta and Anoop V. Mohta, \textit{Arbitration, Conciliation and Mediation} 18 (Manupatra, Noida, 2\textsuperscript{nd} Edn., 2008).
\item \textsuperscript{131} It has been reported that a Pre Litigation Conciliation Bill, 2004 was tabled in the West Bengal Legislative Assembly in the year 2004 - See XXVIII (32) \textit{People’s Democracy}, August 08, 2004, available at: http://pd.cpim.org. (last visited on 25.07.2009).
\item \textsuperscript{132} P.M. Bakshi, “Conciliation in Indian Law”, 2 \textit{Comp. L.J. (Journal)} 50 (1996).
\end{itemize}
keeping a check on judicial arrears as well as offering an efficacious mode of ADR at the pre litigation stage itself.

9. EPILOGUE

Conciliation is an ADR mechanism where the ADR neutral known as the conciliator steers the disputant parties towards a negotiated settlement. Conciliation has a well entrenched statutory framework in India and is governed by the provisions of part III of the Arbitration and Conciliation Act, 1996.

Conciliation is strikingly similar to mediation as both the processes can fundamentally be described as facilitated negotiations and in fact at times the two terms are used synonymously in various jurisdictions. In India however the introduction of the two terms separately in section 89 CPC has necessitated the development of a fine line of distinction between mediation and conciliation.

The conciliator in the process of conciliation as is understood in India plays an evaluative and interventionist role and is statutorily authorized to make suggestions and propose plausible solutions to the parties while mediation is regarded as an ADR process which is primarily facilitative. The principal advantage in conciliation is that a conciliation settlement agreement is treated to be an arbitral award on agreed terms and is executable as a decree of the court under the Arbitration and Conciliation Act, 1996.

It is primarily because of this advantage that conciliation overshadows mediation as an ADR mechanism at the pre-litigation stage in Delhi. There are various institutions operating in Delhi such as ICA, FACT, ICADR, etc. which provides state of the art infrastructure, professional conciliators and excellent facilities for conciliation. There are various companies and PSUs which incorporate conciliation clauses in their contracts and go in for conciliation at the pre litigation stage, conducted either by ad hoc conciliators appointed by the parties by mutual accord or by institutions providing conciliation services.
However the situation is diametrically opposite when it comes to post litigation conciliation. Though conciliation is resorted to under the Hindu Marriage Act, 1955 and the Family Courts Act, 1984 for resolution of matrimonial disputes by the courts themselves, however in general, the process of mediation overshadows conciliation as a dispute resolution process under section 89 CPC and in fact conciliation has been rendered redundant.

One of the reasons is that the process as it has been interpreted today requires the consent of both the parties for being referred to conciliation in a sub judice matter by the court. Secondly, after such reference is made to an external conciliator, the matter moves out of the realm of the court house requiring the parties to incur extra expenditure on such out of court conciliation.

The prime reason is, however, the judiciary’s choice of mediation over conciliation. ‘Samadhan’ at the Delhi High Court is the Delhi High Court’s Mediation and Conciliation Centre. The rules framed by the Delhi High Court are described as the Mediation and Conciliation Rules, 2004. Despite this conciliation is rarely resorted to at ‘Samadhan’. At the district courts the same Mediation and Conciliation Rules, 2004 are applicable yet there are no facilities for conciliation and here in fact the centres have been designated as Mediation Centres only with no reference to conciliation. The Mediation and Conciliation Rules, 2004 contemplate that conciliation should also be offered as a dispute resolution process to the parties.

The process of mediation has therefore been given wide publicity and recognition in Delhi as a court sponsored mode of dispute resolution and since both conciliation and mediation are generically similar, the process of mediation is extensively used at the post litigation stage and flourishes in Delhi whereas conciliation remains practically unexplored in this arena although conciliation offers similar advantages and much more at the pre litigation stage.
Conciliation however, is an excellent ADR mechanism and offers distinct advantages such as a well entrenched statutory framework, flexibility of procedure, a more interventionist role for the conciliator, a settlement which is executable as a decree of the court and statutory guarantee of confidentiality. In fact the more interventionist role of the conciliator would prove to be an added advantage in parties who belong to the poor strata or are not aware of their rights and liabilities. There is absolutely no reason as to why the conciliation cannot be utilized as an effective ADR mechanism simultaneously with mediation.

The state should endeavour to provide a state sponsored, state funded, court annexed conciliation mechanism like mediation at the mediation and conciliation centres attached to the courts in Delhi and give adequate publicity and importance to conciliation as an ADR mechanism at the post litigation stage. At the pre litigation stage also conciliation can be utilized at a mode of dispute resolution if the mediation and conciliation centres diversify and expand their role to offer pre litigation services. In fact it can be of great use specifically for the ADR centres mooted by the Delhi Dispute Resolution Society.

Conciliation has therefore great potential in Delhi as an ADR mechanism, however, it is not being utilized in Delhi to its full potential. Therefore there is an urgent need to appreciate the utility of this ADR process and take necessary measures for advocating, propagating, popularizing and utilizing conciliation as an ADR process in Delhi.