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Settlement Agreement in a Private Dispute Resolution: An Analysis

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ABSTRACT

Settlement of disputes is an intrinsic requirement of any civilized society. Past four decades have witnessed Alternative Dispute Resolution methods gaining prominence in the field of dispute resolution. Arbitration is one of the well-known methods which involves a neutral third party referred to as an "Arbitrator" who decided the dispute in an adjudicatory manner. There is a quasi-judicial aspect to this conflict resolution procedure. Although the parties to the dispute resolution process are settling their disagreement in a private, out-of-court environment, they have little to no influence over how the case turns out. An arbitrator's award typically benefits one of the disputing parties, putting the other side on the losing side. In the same vein, if alternative dispute resolution techniques such as mediation and conciliation are examined, the results are mostly consent-based, with the impartial third party acting as a facilitator and suggestive agent. The corporate world has seen traction with these processes because they give the disputing parties the autonomy to reach a consent-based judgment.

In the light of the above, the paper shall analyze the significance, utility, and application of arbitration, mediation, and conciliation in the settlement of commercial disputes. Further, the researcher will analyze the scope settlement agreements which can be reached through conciliation or mediation in arbitration procedures.

Keywords*: Dispute, Arbitration, Mediation, Conciliation, Settlement, Consent, Award.*

I. INTRODUCTION

John Rawls rightly said "Justice is the first virtue of social institutions". Further, Law Commission of India observed that the best ways to ensure justice is dispensed should be speedy, cheap, simple, effective and substantial.[2] Alternative Dispute Resolution ("ADR") method which is considered to be speedy and effective is actually alternate method of the regular court proceeding. The court procedure which has been instituted by the state is long known for it its time consuming, tedious and costly nature. The ADR mechanism comes into picture to share some burden with the courts, therefore the process is not a replacement to regular courts

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[2] Law Commission of India, 77th Report (Delay and Arrears in Trial Courts) 1979

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but it supplements them. Better way of describing ADR can be by saying that this method is devoid of formal state law procedures.

Although Indian judiciary is the oldest and world renowned but it also well-known that pendency of cases is on the rise and our judiciary needs somebody to share the burden of clogging cases. ADR methods include various modes of dispute settlement which are arbitration, conciliation, mediation, negotiation, lok adalat[3] and various other hybrid procedures such as mini trials, neutral evaluation etc. Such procedures have increasingly become famous because they are less costly and more expeditious. Disputes which were earlier resolved by way of tedious litigation are increasing settled through these new methods. Such disputes include divorce, motor vehicle, medical, tax claims matters.[4]

There are two views possible while examining ADR process. First wider view includes the process of Arbitration within its scope. Second narrow view, excluded arbitration as well as litigation from the scope of ADR. This distinction draws it analogy from the fact that like litigation arbitration is also an adjudicatory mechanism which has all the court formalities in its functioning and the decision by the arbitrators is an imposed one. The narrow view takes into account only those processes of ADR wherein settlement is reached with the consent of the parties. This view finds establishment in the International Chamber of Commerce which uses the term ADR to mean Amicable Dispute Resolution.[5]

II. ARBITRATION, CONCILIATION AND MEDIATION- MEANING

In contrast to litigation, arbitration is one of the most famous of dispute resolution. Arbitration is a method of settling dispute, by referral to an impartial person known as arbitrator who is nominated to decide the dispute in judicial manner after hearing both the side. The dispute resolution process is quasi- judicial in nature. It also means that there is an intervention of third party but without having recourse to court. The arbitrator has to resolve all the questions of facts and law that exists in the dispute. Further the important point to note with regard to this method is that the award of the arbitrator is both final and binding in nature. That is to say that there is no appeal from the award by the arbitrator. The importance of arbitration can be emphasized by noting that almost all employment and commercial transaction contain an arbitration clause. The result being that all disputes arising out of above stated relationships are adjudicated through arbitration first, which is the reason why arbitration has been nicknamed as

[3] Anubhav Pandey, *All you need to know about Alternative Dispute Resolution (ADR)*, I pleaders, (May 9, 2017) , https://blog.ipleaders.in/adr-alternative-dispute-resolution/
[4] SUKUMAR RAY, ALTERNATIVE DISPUTE RESOLUTION, 5 (2012)
[5] R. D. RANJAN, A PRIMER ON ALTERNATIVE DISPUTE RESOLUTION, 46 (1st ed. 2005)

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"Businessman's method of resolving dispute".

Another well-known method after arbitration comes conciliation. Conciliation is the process that makes use of a neutral impartial third person, who gives his assistance to the parties in dispute and helps them reduce their differences and reach an amicable solution. The main aim of the conciliator is to keep the discussion process between the parties going, so that the parties can reach a compromise solution rather than a solution in accordance of law. The conciliator can indicate to the disputants their strengths and weaknesses along with repercussions that may arise if they fail to settle their dispute, but the conciliator shall not generally make any recommendation or suggestion. Parties can opt for conciliation prior to going for arbitration or litigation. Therefore we can say that conciliation is non- adjudicative, non- binding procedure wherein conciliator who plays an impartial role has no authority to bind the parties by any solution, his only role is to facilitate communication between the parties with object of reaching an agreeable solution.

Last two decades have seen stark increase in use of conciliation/ mediation as process of dispute resolution. Lately the same is gaining popularity in business related disputes and many countries have made legislation with respect to the same. This led UNCITRAL to work on Model Law on International Commercial Arbitration in the year 1998 which came into force in November 2002.

Mediation can be said to be the "ancient art of peace making". Out of all the methods of ADR, mediation is the one which is used the most to solve minor disputes like disputes between friends and spouses to all sort of major disputes such as dispute between two nations. In the process, a neutral person known as mediator helps the disputant parties to reach an amicable solution. Often the terms "mediation" and "conciliation" are used interchangeably because both the processes aim at reaching a mutually agreeable solution at the completion. In one sense mediation means creating circumstances wherein the parties can communicate with each other to resolve their differences and reach a mutually agreed solution. On the other hand, mediation suggest a pro- active role played by the mediator to introduce proposals and suggestions which may lead to settlement between the parties. Mediator has often been referred to as *confidential advisor*. The mediator cannot force his judgment or will upon the parties, he can only provide assistance to the parties in reaching a desirable solution for both parties. Most of the time lawyers who have been dealing in specific areas of law such as family matters, use their expertise and knowledge to guide the parties. Mediator explain the advantages and disadvantages of reaching a mutually acceptable solution based on his mediation experience and if parties have faith in the mediator, they may accept or reject his advice.

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III. SETTLEMENT AWARD- ANALYSIS

Section 30[6] of the Arbitration & Conciliation Act 1996 corresponds to provisions under UNCITRAL Model law[7] and UNCITRAL Arbitration Rules[8]. The old Arbitration Act 1940 does not contain any provision to such effect, but the law was the same.[9] An award which merely embodied a compromise of the parties themselves was a valid award.[10] Accepting a compromise is an adjudication of the case as is a decree of the court founded on a compromise.[11] An award remains an award even though it approved an arrangement put forward by the parties and was in accordance of their wishes.[12] The rule that an award is not open to objection is on the sole basis that it merely reproduces an agreement between the parties, and it applies only where the consent of the parties is regarded by the arbitrator as evidence of the fact that settlement proposed is fair to all.[13] If the existence of compromise is disputed, the arbitrator can go into that question and if he finds the compromise to be valid, he can give his award in terms of the same.[14]

The soul of the provision under the Indian law lay down the guideline for arbitral tribunal, wherein the tribunal can with the agreement of the parties encourage resolution of the dispute by way of mediation, conciliation or any other procedure at any time during the pendency of arbitral proceedings. Arbitral tribunal has been permitted to use its discretion to use power under this section. The above stated power of the arbitrator shall not be against the spirit of arbitration agreement. Further section 30(2) states that if the dispute is resolved through any of the methods other than arbitration, the tribunal shall terminate the arbitral proceedings and if requested by the parties it may record the settlement in form of arbitral award. The arbitral award thus framed shall have the same effect as any other arbitral award.[15] The arbitral award shall also be subject to other provisions of the Act (Part I) and shall be treated as final and binding upon the parties to dispute and persons claiming under them.

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[6] Section 30(1) "Settlement"- "It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement."
[7] Article 30, the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[8] Article 34, the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[9] DR. AVTAR SINGH, LAW OF ARBITRAITON AND CONCILIATION(INCLUDING ALTERNATIVE DISPUTE RESOLUTION SYSTEMS), 235 (8th ed. 2007)
[10] Darbari Law v Wasu Malik AIR 1920 Lah 220; Rama Naidu v. Narayanappa AIR 1925 Mad 562; Dulan Bai v Sanderson AIR 1938 Nag 132; Shankar v Govinda AIR 1920 Nag 43
[11] Rama Naidu v Narayanappa, supra.
[12] Sricharan Bhandari v Makhan Lal AIR 1919 Cal 42; Gobardhan Das v Jaikishan Das ILR (1900) 22 All 224; Natva Bai v Natvar Lal AIR 1953 Bom 386
[13] Karnlala Venkata Krishanama v. Kandula AIR 1920 Mad 195
[14] Hanu Ram v Dhanna Singh AIR 1928 Lah 915
[15] S. K. ROY CHOWDHURY & H. K. SAHARAY, LAW OF ARBITRATION AND CONCILIATION, 350 (4th ed. 1996)

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Section 30(1) gives statutory approval to the jurisdiction of the tribunal with main aim of promoting resolution of disputes between the parties through settlement. It may be called an "opt- out" clause as the provision gains applicability only when there is an agreement between the parties. The section is enacted broadly to encourage dispute settlement by one way or another. The section goes on to say that such a settlement shall not be incompatible with the arbitration agreement. The section provides express clarity when it says that by prompting settlement between the parties, the tribunal shall not be bypassing the arbitral procedure that parties have agreed upon. The parties have the freedom to settle their dispute in any manner and at any time, as it suit them. But if at any time during the pendency of the arbitral procedure, the parties wish to resolve their dispute through mutual settlement then it is expected out of the tribunal to not only encourage them but also use either mediation, conciliation or any other alternative dispute resolution method to facilitate such settlement.

The settlement under this provision of the act may be induced by the tribunal or self-initiated by the parties to the dispute, but it is commendable as reaching to an amicable mutually acceptable solution helps in maintaining and improving the relationships between the parties. The most desirable result of any arbitral proceeding is reaching to an amicable solution, and also it avoids the situation wherein a final and binding solution by a third party is forced upon the parties. It further negates the possibility of situation when the parties feels that it is at the losing end. The use of additional means of dispute resolution such as conciliation and mediation in an arbitration is increasing and therefore provision must be made in any modern arbitration law to accommodate such practices and to further their goal of an amicable of the dispute at hand.[16] In order to make the settlement agreement enforceable, it is necessary, under nearly all legal systems to record it in the form of arbitral award. Therefore, on the agreed settlement, the statute specifically confers the status and effect of an arbitral award under section 31 with respect to the substance of the dispute.

The position of the arbitrator under the 1940 Act was that an arbitrator is not a conciliator and cannot ignore law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound and apply the law; and if he does not he can be set right by the court provided error appears on the face of the award.[17]

If the parties can agree to come to some settlement in relation to the principal issues, no

[16] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTION, pp 182- 186 (1st ed. 2000)
[17] Associated Engg. Co. v Govt. of Andhra Pradesh AIR 1992 SC 232

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exceptions can be taken thereto as the parties have a right of self-determination of the forum, which shall help them to resolve the conflict, but when it comes to some formal differences between the parties, they may leave the matter to the jurisdiction of the conciliator. Arbitrator can adopt the role of a conciliator only at the final stage of the proceeding.[18]

IV. ADVANTAGES OF SETTLEMENT AWARD

The object and purpose of settlement under section 30 the act is to settle all the disputes arising out of the main contract in one go rather than in piece- meal. This settlement has to be done while the arbitration proceedings are still going on.[19]

The settlement award shall have the same status and effect on merits as any other arbitral award on the substance of the dispute.[20] It can be corrected[21] by the tribunal on request of the parties or on its initiative. It can also be interpreted by the tribunal on the request by the parties.[22] The tribunal can also make an additional award on the request of the parties, as to claims presented in the arbitral proceedings and omitted from the arbitral award.[23] It is also reviewable by a court on the grounds set forth in section 34(a). The award will be final and binding on the parties and persons claiming under them respectively.[24] Moreover, it shall be enforceable under the Code of Civil Procedure 1908, in the same manner "as if it were a decree of the court".[25] The provisions of Part I relating to awards shall apply equally to the settlement award. However, the requirement of stating reasons upon which it is based, is not mandatory in case of settlement award.[26]

Recording the settlement in the form of an arbitral award on agreed terms is advantageous because enforcement of an award is likely to be more straightforward than bringing proceedings to enforce the terms of the settlement itself. In other words, equating an award on agreed terms with an "ordinary" award (i.e. the one rendered by the tribunal), is of relevance not only for future enforcement and recognition procedures, but also for possible setting- aside procedures.[27] Particularly, if an award is to be enforced abroad, it may be recognized and enforced as a New York Convention award; it is, therefore, necessary that the settlement is recorded in the form of

[18] United India Insurance Co. Ltd. v. Ajay Sinha (2008) 7 SCC 454
[19] Maharashtra Industries Dev. Corp. Ltd v. Goverdhani Const. Co., 2009 (3)RAJ 376
[20] Section 30(4), the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[21] Section 33(1)(a) and (2), the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[22] Section 33(1)(b) and (2), the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[23] Section 33(4) and (5), the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[24] Section 35, the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[25] Section 36, the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[26] Section 31(3)(b), the Arbitration and. Conciliation Act, 1996, No. 26, Acts of Parliament, India.
[27] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTION, 185 (1st ed. 2000)

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an award.[28] Furthermore, it is desirable to put the terms of settlement in the form of an enforceable award when there is an element of future performance[29]. Although most settlements involve immediate implementation of the agreed terms, it is nevertheless not unusual for there to be provision for payment by instalments or for some future transaction between the parties to be carried out.[30]

ADR represents only a change in forum, not in the substantive rights of the parties. The primary objective of the ADR system is avoidance of vexation, expenses and delay, and promotion of the idea of "access to justice". ADR techniques can be used at any time even when a case is pending before a court of law. If recourse is made to ADR as soon the dispute arises, it may confer maximum advantages on the parties, it can be used to reduce the number of contentious issues between the parties. It can provide a better solution to disputes are more expeditiously at lesser cost than litigation. The disputes are kept as a private matter and promote creative and realistic business solution. ADR program is flexible and not afflicted with rigorous rules of procedure and evidence. The freedom of parties to litigation is nt affected by this proceeding. ADR procedure helps in reducing the work load by judiciary thereby helping them to decide the cases which are more importantly to be decided by the courts.

The advantages of arbitration as against litigation have been variously indicated to be:

a) the arbitration allows the parties to keep private the details of the dispute;

b) the parties can choose their own rules and procedure;

c) time and cost can be saved to a great extent;

d) the time and place of the hearing can be chosen as per the convenience;

e) the ability of the parties to choose their own judge permits the choice of an expert in the field who is more able to view the dispute in its commercial settings.

When it comes to the question of delay and costs, if arbitration is possible by following a procedure which either eliminates or restricts oral hearing, and again if it is possible that is held not as a part time evening sitting but held continuously for several hours a day until the matter is concluded, then certainly arbitration has greater advantage time- wise compared to litigation. Litigation in our courts, in spite of the best efforts of those involved in the justice deliver system, is bursting in its seam. The delays are endemic and taking into account the appeal procedures,

[28] RUSSELL, ARBITRATION, 260(21st ed. 1997)
[29] O. P. MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION pp 677- 684(1st Ed. 2002)
[30] REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 385 (3rd ed. 1999)

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no litigant can expect finality within a reasonable time.

Further, the 'arbitral tribunal' is expected to conduct the arbitration proceedings giving due regard to the rule of law or rules of principles of natural justice where there exists dearth of legal principles. It is because of this fact that arbitration holds greater prospects in comparison to the legal recourse. It allows greater chances of engaging in informal procedure which can be tailored in a best suited way applicable to a particular dispute or the parties. Especially, it gives bounteous opportunities to the 'arbitration tribunal/ to adopt the appropriate procedure to take evidence and with respect to other issues, particularly where they parties are from different countries residing in far- flung places, arbitration may guarantee abridged instrument of commencement and service of process. The advantages of alternative dispute procedure further encompass the fact that if the parties agree for out of court settlement of the dispute then it make an escape way for the parties from cumbersome procedure of appeal, execution procedure under Civil Procedure Code.

V. CONCLUSION AND SUGGESTIONS

Apart from arbitration, there are some other dispute resolution methods utilized by parties to settle the disputes amongst themselves. Such methods are not *strictu sensu* arbitration, though the separating line is not always traceable. Whether a certain mechanisms adopted by the parties to resolve their dispute is arbitration or not will depend upon the intention of the parties and facts and circumstances of the case. Bombay HC in one the decisions emphasized on the test as to whether the intention of the parties was to avoid disputes or to resolve them. Thus it would not be wrong to say that object aimed to be achieved by Section 30 of new act depends on the intention of the parties. Without the consent of parties, the arbitrator cannot proceed with other methods of alternate dispute resolution to resolve the dispute.

Lately there has been a development of hybrid version of arbitration which is known as Med-Arb (Mediation- Arbitration) or Arb- Med (Arbitration- Mediation). It is a process whereby the mediator assumes the role of arbitrator in case of the failure of mediation process.[31] This process has its birth in the contract itself which is formulated prior to dispute arising between parties. This new arrangement of alternative dispute resolution has its own advantages and disadvantages. The major pro of Med- Arb is the fact that it is the process wherein the person who adjudicates upon the issue is the same person who attempted to mediate the dispute between the parties in the very first place. As the adjudicator is well aware of the facts and

[31] HENRY J. BROWN AND AUTHOR MARRIOTT Q.C., ADR PRINCIPLES AND PRACTICE (Sweet & Maxwell, 3rd ed. 2012)

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issues in the case, it will turn out to be cost effective as well as time effective for the parties. Even though the advantage seems to be an overpowering one, but the process is not devoid of the disadvantages. The biggest disadvantage is that both the processes of arbitration and mediation requires different sets of skills, talents and methodology. Mediation basically aims at helping the parties to arrive at self- determined solution with mediator's help, whereas arbitration aims at imposing a solution on the parties which is arrived at by a neutral third party. Other than this, there is also a fear amongst the parties that the information provided by them during the Med- Arb process may be used unfairly if parties ended up in litigation.

The drawbacks of the above stated process have been successfully resolved in many countries through legislative intervention. For instance the Arbitration Act enacted by New South Wales includes a section[32] which clearly gives an opportunity to the parties to step out of Med- Arb. The same person who has acted as a mediator will not act as an arbitrator, in case of failure of mediation until and unless parties give a written consent on or after the termination of the mediation proceedings. After the failure of the process, parties are free to move forward with the agreed arbitral mechanism, with the involvement of person other than the one who acted as the mediator. The problem related to using the information prejudicially in case parties end up in litigation may still be solved by legislative enactments prohibiting the parties to use such information during the trial.

The only issue that cannot be avoided is the fact that parties may use this process of Med- Arb to gauge the strength and weaknesses of the opponent's case. But this is basically the problem that Mediation also suffers from and which cannot be avoided. This is also the reason why parties avoid the Med- Arb process, and show an inclination towards the converse process i.e. Arbitration- Mediation (Arb- Med). In this process after the arbitral award is passed on conclusion of the arbitration process it is sealed till the conclusion of mediation. If mediation turns out to be successful the arbitral award is destroyed. These alternate processes can prove to be successful only if the approach of parties and their lawyer's centers around truth, re-conciliation and peaceful settlement of the dispute.[33]

ADR has become popular in recent years because it is timely, more efficient and more cost effective than the traditional, formal redressal mechanism. The use of conflict prevention also tends to mend or improve the overall relationship between the parties, because the focus is largely on the community or disputant's interest, while litigation focuses on the positions. In

[32] Commercial Arbitration Act, Number 61 New South Wales, Section 27D(4), 2010
[33] RAJIV SHAKHDER, ALTERNATIVE DISPUTE RESOLUTION THE INDIAN PERSPECTIVE, 146-153 (Shashank Garg 1st ed. 2018)

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addition, the parties can draft the agreement or solution themselves and they are generally more committed to the agreement compared to a judge or hearing officer imposing a solution. ADR process also can allow the parties to develop a more flexible or creative solution than is generally possible in courts or formal hearing or appeals.

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