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The Consent Award in India: an Alternative Within an Alternative

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Abstract: Multi-tier Arbitration, also called Hybrid Arbitration, in India has not been introduced formally. It has been practiced in an ad-hoc manner. What comes close to hinting at the idea of hybrid arbitration in India is s.30 of the Arbitration and Conciliation Act 1996. This section makes it possible for the arbitral tribunal to encourage parties to settle their disputes by referring them to other ADR mechanisms, such as conciliation and mediation. Thus, s.30 represents a hybrid arbitration mechanism and reflects the acknowledgment by the legislature of providing parties a choice for resolving disputes through a consensual mechanism even if parties have referred their disputes to Arbitration. At the same time, parties retain the option of proceeding solely with arbitration and not referring their disputes to any other mechanism. Thus, parties still have the final say in resolving their disputes at any time and place they desire. Arbitrators have also been given the discretion to raise objections to the settlement reached between the parties, which they would have to state clearly. If, however, they accept the settlement, then as per the wishes of the parties, they may terminate the arbitration proceedings or enforce the settlement by passing an award based on that settlement. The author of this article has attempted to explain the very concept of the Consent Award, along with the mechanism of check and balance involved. The research methodology engaged by the author is explanatory, descriptive and analytical, for the author explains the whole process involved in reaching a consent award, and tries to assess the potentiality of the consent award in resolving the dispute with the help of the case-analysis method.

Keywords: Settlement. Consent Award. Multi-tier Arbitration. Consensual ADR mechanisms.

Introduction

This is surprising for s.30[1] of the Arbitration and Conciliation Act, 1996[2] does empower the arbitral tribunal to encourage parties, during an ongoing arbitration, to use other alternative dispute resolution mechanisms and attempt an amicable resolution of their disputes. The settlement so reached can be enforced as an arbitral award.

Thus, new alternatives are being sought to avoid arbitration and resolve their disputes through an amicable settlement. This is where hybrid arbitration provides a solution. Hybrid arbitration or multi-tiered arbitration, as the name suggests, refers to those mechanisms which combine arbitration with another ADR mechanism to give an option to the parties to circumvent the arbitration process by reaching a settlement before submitting the dispute to the mercy of arbitration.

The Indian Arbitration and Conciliation Act, 1996 governs the arbitration process in India. This Act, along with its several amendments, is a culmination of a great many legislations of the past. It consolidates the law governing both domestic and international arbitration, *viz*. the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The 1996 Act also governs conciliation proceedings as well. Section 30 of this Act contains the potential for formally introducing hybrid arbitration in India. Section 30 can be interpreted to envisage a hybrid arbitration mechanism wherein parties may first submit their dispute to arbitration, and the arbitral tribunal may refer the dispute for mediation or any other ADR mechanisms so that parties get the opportunity to reach a settlement which shall be enforced as an arbitral award. If the dispute is settled under s.30, the arbitral proceedings shall stand terminated. Still, parties will always have the option of requesting the arbitrator to pass a binding settlement award based on the terms recorded in the settlement.

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1 The Arbitration and Conciliation Act, 1996, s.30 (Settlement) which reads:

"(1) 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.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute".

2 The Arbitration And Conciliation Act, 1996 (Act No. 26 of 1996).

> This section acknowledges the possibility and need to resolve the dispute through other consensual ADR mechanisms rather than leave the disputes solely at the mercy of an arbitral award. This section thus provides a chance for the parties to attempt a settlement of their differences and thereby gain more control over the dispute resolution process by reaching a win-win solution.

The author through this article has tried to explore the new dimension in the field of arbitration, in the form of consent award, and critically analyse its scope, applicability, validity and effectiveness in dispute resolution mechanism.

The author used the primary and secondary data available such as legislation, books, leading judgements, annual reports, journals and articles published. The author, based on the data available, has attempted to bring out the effectiveness of arbitration in India, the problems associated with it, the preferences in choosing hybrid arbitration over arbitration, and the remedies to make arbitration an effective dispute resolution mechanism.

The author humbly proposes the adoption of hybrid arbitration i.e., merging arbitration with another more consensual dispute resolution mechanism, to be a worthy alternative to both litigation and sole arbitration. The author substantiates this stance by providing a detailed analysis of the popular forms of hybrid arbitration mechanism practiced around the world through the case-analysis method. Further, the author has dealt with in-depth analysis of s.30 of the 1996 Act, to illuminate a hereto dormant yet potent provision that encourages hybrid arbitration in India.

II A Potent Section

Until September 15, 2023, i.e., before the commencement of the Mediation Act, 2023, no particular law existed in India governing the settlements reached via mediation. A mention about mediation, however, is found in s.30 of the 1996 Act, as a mechanism for dispute resolution in the sphere of ADR. Section 30, thus is a potent section with a lot of potential, which unfortunately, has remained under-utilised.

s.30[3] of the Arbitration and Conciliation Act, 1996, extends the scope of the ADR mechanisms. It recognizes the mixing of arbitration, mediation and conciliation. It does not provide any specific time period when any other procedure could be initiated. The usage of words “at any time during the arbitral proceedings” in broader interpretation includes any instance before rendering the final arbitral award. The use of the term “other procedures” gives this provision a unique feature,

[3] *Supra* note 1.

providing scope for future ADR methods that could be developed. Any settlement under this provision has the same status and effect as that of an arbitral award.

Even if the new Mediation Act, 2023 has received the assent of the Hon'ble President of India on September 14, 2023, and is now the first Act formalizing mediation in India, the potentiality of the very provision, i.e., s.30 of the 1996 Act is yet being underestimated. There is no mention of any process or protocol that may be followed in mediation conducted as a part of multi-tier arbitration.

However, s.12A,[4] Chapter IIIA,[5] The Commercial Courts Act, 2015 provides for Pre-Institution Mediation and Settlement and contemplates that the trivial commercial matters must be first referred to mediation, and the settlement arrived at, shall be tantamount to an arbitral award in respect of the status and effect, under s.30 of the 1996 Act. This reflects the importance of s.30 of the 1996 Act and emphasizes the utter requirement of its acknowledgment.

Settlement under the 1996 Act

Section 30 of the Indian Arbitration and Conciliation Act is inspired by Art.30 of UNCITRAL (United Nations Commission for International Trade Law) Model Law, which provides that parties may resolve their disputes by reaching a mutual settlement during the arbitration proceedings. The settlement so reached must be recorded as an arbitral award to ensure its enforcement.[6] Section 30 of the UNCITRAL model law welcomes a settlement award reached post the initiation of

[4] The Commercial Courts Act, 2015, s.12A (Pre-Institution Mediation and Settlement) which reads:

"(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre- institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

[5] Ins. by Act 28 of 2018, s.10 (w.e.f. 3-5-2018).

[6] WADHWA, Anirudh; KRISHNAN, Anirudh. *Justice R S Bachawat's Law of Arbitration and Conciliation*. 6th ed. Lexis Nexis, p. 1619, 2018.

arbitral proceedings.[7] Section 30 of the Arbitration and Conciliation Act comes into play when parties reach a settlement during the arbitral process and governs the procedure for recording the settlement as an arbitration award.[8]

Section 30 empowers the Arbitral tribunal to make it possible for the parties to settle their disputes outside the conventional litigation process by adopting any of the prevalent ADR mechanisms, such as Mediation, Conciliation, etc., in between the arbitration proceedings. Though s.61 of the present Arbitration and Conciliation Act, 1996 provides statutory recognition to conciliation as an independent mechanism for termination of disputes germinating from legal relationships, be it contractual or non-contractual relationships, s.30 permits the adoption of conciliation or mediation in ongoing arbitral proceedings.[9] This section thus encapsulates the concept of Arb-Med and particularly Arb-Med-Arb,[10] and reflects a growing recognition for the adoption of consensual ADR mechanism for resolution of disputes.

s.30 provides for two forms of settlements. First is the settlement, which terminates the arbitral procedure and also terminates the mandate of the arbitrator. Secondly, a settlement agreement reached between the parties who subsequently request the arbitration tribunal to deliver the same as an arbitral award under s.31. This form of settlement does not terminate the arbitrator's mandate, and the mandate continues till the arbitrator passes the arbitral award. However, the arbitrator's mandate continues only upon the request of the parties and the mandate is terminated without the request of the party.[11] Such a settlement has the legal sanctity of an arbitral award and is final and binding on the disputing parties. It can be enforced as a decree of the court as provided for by the Code of Civil Procedure, 1908.[12]

s.30(1) confers upon the Arbitral tribunal a statutory mandate to nudge parties to conclude their dispute through a settlement. But in the end, it is the

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7 REDRERN, Alan; HUNTER, Martin. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford University Press, United Kingdom, p. 514, 2015. Moreover, art.36(1) of the UNCITRAL Rules provides for a settlement to be recorded by an order or by an award: "If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."

8 *Prawinchandra Murarji Savla* v. *Meghji Murji Shah* (1998) 2 RAJ 273: 1998 (Supp.) Arb LR 314 (Guj.), in WADHWA, Anirudh; KRISHNAN, Anirudh. *Justice R S Bachawat's Law of Arbitration and Conciliation.* 6th ed. Lexis Nexis, p. 1620, 2018.

9 PARANJAPE, N. V. *Law Relating to Arbitration and Conciliation in* India. 8th ed. Central Law Agency, p. 245, 2018.

10 PANCHU, Sriram. *Mediation Law and Practice: The path to successful dispute resolution.* 3rd ed. Lexis Nexis, p. 229, 2022.

11 *Tahirbhai Abdullabhai* v. *Md. Hussain* (2005) 1 RAJ 23 (Bom), in WADHWA, Anirudh; KRISHNAN, Anirudh. *Justice R S Bachawat's Law of Arbitration and Conciliation.* 6th ed. Lexis Nexis, p. 1620, 2018.

12 BANSAL, Ashwinie K.; KAUSHIK, Rahul. *Arbitration and ADR.* 3rd ed. Universal Law Publishing Co. Pvt. Ltd., New Delhi, p. 75, 2012.

parties who get to decide whether they want to proceed with a settlement or not. However, such promotion of a settlement does not entitle the arbitral tribunal to bypass the arbitral procedure mutually decided by the parties. The parties thus get to resolve their disputes at any time and in any manner, they choose.[13]

In the end, parties are free to decide how to end their disputes finally. However, if the parties opt for attempting a settlement during the arbitral proceedings, then they must be encouraged to do so by the tribunal, which is dutybound to facilitate the settlement process through the adoption of mechanisms such as mediation or conciliation or other suitable ADR mechanisms.[14]

Section 30(2), after applying the rule of purposive construction, would permit the recording of the settlement of any part of the dispute irrespective of some issues remaining unresolved.[15] This section further creates a distinction between a party's right to terminate the arbitral proceedings post reaching a settlement and the right of parties to get their settlement to be recorded as an award.[16]

The arbitrator can raise objections to the settlement reached and has been equipped with complete discretion to accept the settlement or reject the same thereby ensuring the validity of the agreed settlement in the light of the Principle of Natural Justice.[17] In such instances, the arbitrator must state the full facts of the case along with the objections which the arbitrator has and which impedes the arbitrator from agreeing to the parties' request to record the settlement. Failure to do so could be construed as misconduct by the arbitrator.[18] Arbitrators must not be under any kind of pressure to put their signatures to the settlement arrived by the parties, for it is possible that the settlement might contain terms that are in conflict with binding laws or public policy, such as fundamental notions of fairness and justice, etc.[19]

If the arbitrator agrees to record the settlement and raises no objections to the same, then the arbitrator must record the settlement in the form of an arbitral award. If parties merely inform the arbitrator that they have settled and do not request a recording of the settlement, then the arbitrator must terminate the arbitral proceedings save there are other issues that require to be arbitrated.[20]

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13 MALHOTRA, O. P.; MALHOTRA, Indu. *The Law and Practice of Arbitration and Conciliation*. 2nd ed. Lexis Nexis Butterworths, p. 938, 2006.
14 *Supra* note 13.
15 *Supra* note 6.
16 *Ibid.*
17 *Id.* at 1621.
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

Settlements reached by conciliation can be challenged under s.34. In such cases, the term 'arbitration' would be read as conciliation. However, Mr. Panchu[21] feels that such challenges would be rare, especially in those cases where parties have reached a mutually consensual settlement.[22]

In ***Oil and Natural Gas Corporation Ltd.*** **v.** ***Oil Field Instrumentation***,[23] the Hon'ble Bombay High Court had held that if the proceedings under s.30 result in an award, then the aggrieved party must raise objections against the award at the earliest. However, the courts can condone the delay if the court feels that sufficient cause for the delay exists and condonation aligns with the interest of justice.[24]

In ***Nathan Steels Ltd.*** **v.** ***Associated Constructions***,[25] the Hon'ble Supreme Court held that when the parties arrived at a settlement, it is not an option for any of the parties to the settlement to reject the settlement by calling the settlement a mistake and then proceed to invoke the arbitration clause. If such conduct is permitted, it would violate the sanctity of a contract as the settlement is also a contract entered into by the parties.

However, the bare reading of s.30 doesn't clarify if the arbitrator should, on their initiative, proceed with the conciliation process and conduct the same, or should the arbitrator merely encourage parties to explore this option and leave it to them.[26] Sr. Adv. Sriram Panchu, in his book, observes that the former interpretation would be more beneficial than the latter, thereby giving more comprehensive options for the arbitrator.[27] However, consent of the parties is required before the dispute is referred to mediation, conciliation, etc., during the arbitration proceedings.[28] It must further be noted that as per s.80 of the 1996 Act,[29] the conciliator cannot be an arbitrator without the consent of the parties.[30]

Mr. Panchu argues that amalgamating arbitral and consensual roles in one person can create possibilities of compromise on confidentiality and efficiency, primarily, when the process is handled carelessly.[31] The same has been reiterated

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21 Senior Advocate Sriram Panchu, Internationally recognized Indian Mediator, Senior Advocate and Arbitrator.
22 *Supra* note 10 at 292.
23 2004(3) Arb LR 368 (Bom).
24 KOHLI, Hari D. *New Case Law Referencer on Arbitration and Conciliation Act.* Universal Law Publishing Co. Pvt. Ltd., New Delhi, p. 207, 2008.
25 *1995 Supp. (3) SCC 324.*
26 *Supra* note 10 at 288.
27 *Ibid.*
28 *Id.* at 289.
29 *Supra* note 1, s.80 (Role of conciliator in other proceedings), which reads:
"Unless otherwise agreed by the parties,
(*a*) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;
(*b*) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings".
30 *Supra* note 10 at 289.
31 *Supra* note 10 at 289.

by Delhi High Court in ***Alcove Industries* v. *Oriental Structural Engineers***[32], wherein it was observed that parties might not be able to have honest discussions with the arbitrator who also plays the role of the conciliator for the arbitrator might get influenced by the information received in the conciliation session which might pollute the arbitral award.

It must be remembered that a settlement agreement reached between the parties during arbitral proceedings is made by the arbitrator, whereas a settlement agreement, as referred to under s.73 of the Act[33] is made by a conciliator. Such a settlement is, therefore, a result of undertaking an independent conciliation exercise.[34] However, the conciliation process envisaged under s.30 is to be more informal and flexible as compared to the conciliation exercise as mentioned under part III of the Act.[35]

If the dispute is settled by recourse to s.30, the arbitral proceedings will stand terminated. Still, parties have the option of requesting the arbitrator to pass an arbitral award on agreed terms recording the settlement. However, if the parties feel the need for enforcement due to a lack of trust in each other or to be extra cautious, they can request the arbitrator to make an award on the agreed terms under s.30(2) of the Act. Enforcing the settlement is a prudent act, for if in the future a party refuses to abide by the settlement agreement, the opposite party would have to take recourse through filing a suit of specific performance of contract or seeking damages for breach of contract, both of which are more time consuming than the enforcement of the settlement via an arbitral award.[36] It is also pertinent to note that the requirement of enforcement of the conciliation agreement arises only when conciliation is resorted to during the arbitral process. On the other hand, the settlement reached under the conciliation process as provided for by the

[32] *2008 (1) ARBLR 393 Delhi.*

[33] *Supra* note 1, s.73 (Settlement agreement), which reads:

"(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall 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.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties."

[34] TRIPATHI, S.C. *Arbitration & Conciliation Act, 1996 with Alternative Means of Settlement of Disputes*. 8th ed. Central Law Publications, Allahabad, pp. 243-244, 2017.

[35] *Supra* note 12 at 74.

[36] *Supra* note 10 at 290.

Arbitration and Conciliation Act, 1996 has the binding nature of an arbitral award based on the agreement (as mentioned under s.74 of the Act[37]).[38]

Termination of Proceedings

The arbitration tribunal shall mandatorily cease to continue the arbitral proceedings once the parties inform the tribunal that they have arrived at a settlement because the settlement terminates the tribunal's mandate as nothing remains to be decided anymore by the arbitral tribunal. Parties are to take responsibility in determining the modalities to implement the settlement terms. It is pertinent to note that such a settlement does not have the same decisive finality as an arbitral award.[39]

It is not mandatory to record the settlement as an award. However, parties may record the settlement as an award to be on the safer side. It is, however strongly recommended that parties possess some document recording the terms of their settlement agreement so that there are no ambiguities amongst the parties as to what they have agreed to. This may take the form of an exchange of correspondence or a written settlement agreement if not recording the settlement as an arbitral award.[40]

In ***Kapila Textiles v. Madhav***,[41] the Hon'ble High Court of Karnataka observed that a compromise reached between the parties per se cannot be accepted as an arbitral award as per s.30 of the Arbitral and Conciliation Act, 1996. The same would become an arbitration award only after the tribunal – after receiving a written request from the parties – delivers the settlement agreement as an arbitral award as provided under s.31. Therefore, s.30 itself provides for a self-check mechanism to establish whether the settlement arrived at between the disputing parties can be termed as an arbitral award or not.

III From Settlement to Award

The importance of mediation as an alternative dispute resolution mechanism can be gauged by the words of Senior Advocate Mr. Sriram Panchu, who calls mediation the flagship of ADR processes wherein ADR does not stand for

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37 *Supra* note 1, s.74 (Status and effect of settlement agreement), which reads:
"The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30".

38 PANCHU, Sriram. *Mediation Practice & Law: The Path to Successful Dispute Resolution*. 1st ed. Lexis Nexis Butterworths Wadhwa, Nagpur, p. 290, 2011.

39 *Supra* note 13 at 942.

40 *Ibid*.

41 AIR 1963 Mys. 39.

Alternative Dispute Resolution mechanism but for Appropriate Dispute Resolution mechanism.[42]

The immense popularity of mediation stems from its emphasis on parties' needs and interests and provides full disclosure of competing interests. It gives parties significant autonomy and thereby confers on them the right of self-determination. Parties themselves work out a settlement that is mutually acceptable to both of them and considers all their interests. Furthermore, procedural flexibility and strict commitment towards privacy are also what make mediation an attractive dispute resolution mechanism over traditional litigation and arbitration.[43]

A unique way of making mediation settlement binding is provided for in s.30 of the Arbitration and Conciliation Act of 1996. This section enables the arbitral tribunal to encourage parties to opt for a mediation settlement to resolve their disputes if the tribunal feels that the dispute can be resolved in such a manner. Such a settlement is then recorded by the arbitral tribunal and enforced as an arbitration award. This means that an award that contains a compromise between the parties themselves is not an invalid award, provided the arbitrator is assured that the settlement is fair to all parties. If, however, the existence of compromise is contended, then the tribunal can go into the question, and if the settlement is found to be valid, the tribunal can give the award in terms of the settlement.[44]

By enabling the arbitration tribunal to encourage the parties to undertake the path of settlements via mediation, the legislature might have also hinted at the adoption of the Med-Arb, Arb-Med and Arb-Med-Arb[45] processes wherein the mediation settlement is enforced by the med-arbitrator as an arbitration award, thereby making the settlement binding on both the parties.

However, it is pertinent to note that in most cases, parties themselves comply with the terms and conditions of the mediation settlement. This has been vouched for by Mr. Sriram Panchu, who, in a webinar organized by the Youth Bar Association of India, proudly declared that an overwhelming majority of mediation settlements do not generally go to the courts for enforcements. This is because in a mediation settlement, both parties feel that they have signed an agreement that is in their best interest, and thus, they find no need for the interference of the courts, and go about enforcing it themselves. It is only in rare cases that a mediation settlement

42 PANCHU, Sriram. On the Mediation Process. Law Commission of India on ADR/Mediation, New Delhi, 2003.

43 Justice Dr. D. Y. Chandrachud, "Mediation – Realizing the Potential and Designing Implementation Strategies". See generally AHUJA, V. K. *Krishna and Mediation*. 1st ed. National Law University and Judicial Academy, Assam, pp. 46-74, 2023.

44 SINGH, Avtar. *Law of Arbitration and Conciliation*. 11th ed. Eastern Book Company, p. 294, 2021.

45 See FERREIRA, Daniel B.; GIOVANNINI, Cristiane J. The Multi-Tiered and Hybrid Clauses of Conflict Resolution as a Solution to Times of Uncertainty: Some Experiences of Comparative Law. Revista Eletrônica de Direito do Centro Universitário Newton Paiva, n. 42, pp. 366-376, 2020.

undergoes the process of enforcement as one party deviates from the terms of the settlement. He adds that in his 30 years of mediation experience, he has not had even one instance wherein the parties felt the need to seek the enforcement of the settlement. If ever enforcement has been opted for, it has been done only in those cases wherein one party found it difficult to fulfil their obligations due to changes in their circumstances. However, even in such circumstances, parties prefer to come to the mediation table again to rework the settlement to meet their new needs. This shows that mediation settlements are generally adhered to due to the trust between the parties, both not wanting to ruin their relationship with each other by disobeying their obligations.[46]

On the other hand, arbitral awards, once passed, are final and binding on the parties, and no party can deviate from the award. The award, like a decree of the court, constitutes *estoppel per rem judicatam*, which prohibits parties from raising the issues decided in the arbitration award through re-arbitrating or litigating in future litigations between the same parties and, or their privies.[47]

Therefore, hybrid arbitration constitutes benefits of both consensual ADR mechanisms (mediation/conciliation) and non-consensual ADR mechanisms (arbitration), thereby giving parties an immense opportunity to resolve their dispute with the help of a wide range of self-driven solutions and adequate control over the process.

Moreover, when the tribunal is satisfied with the settlement's existence and if the settlement itself states that an award may be made on the terms contained therein, the tribunal does not require any additional request to deliver the settlement as an award.

IV Recording the Settlement as Arbitral Award

When the parties strongly feel that the surrounding circumstances of their case mainly necessitate enforcement of the settlement under s.36 or under a provision corresponding to s.48 of the 1996 Act in any jurisdiction which is a

46 PANCHU, Sriram. *Singapore Convention: The Way Forward*. 10th Session of the Virtual Summer School, held on (July 29, 2020, at Youth Bar Association of India Webinar), *available at:* https://www.youtube.com/watch?v=7Kv6pLdzQk0 (last visited on July 07, 2022). See MASON, Paul E. A Convenção de Cingapura e seus benefícios para o Brasil. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, n. 4, pp. 181-193, 2021. See also COMETTI, Anna K. F; MOSCHEN, Valesca R. B. The Singapore Convention in the framework of the Investor-State Dispute Settlement System. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 4, n. 7, pp. 37-57, 2022.

47 IKEYI, Nduka; MADUKA, Tochukwa. The Binding Effect of a Customary Arbitration Award: Exorcizing the Ghost of Agu v. Ikewib. Journal of African Law, SOAS, University of London, vol. 58, n. 2, pp. 328-349, 2014.

signatory to the New York Convention,[48] the parties are required to request the arbitral tribunal to deliver the settlement as a consent award.[49]

This is a pertinent step to be followed as the Arbitration and Conciliation Act contains no provision to enforce such settlements. What can be enforced under this Act or a corresponding statute in a country party to the New York Convention are only arbitral awards be they domestic international awards or foreign international awards. Thus, the arbitral tribunal, on the desire of the parties, must deliver a settlement as a consent award. However, the tribunal can refuse to do so if it has any objections to the same.[50]

Request by the Parties

The Arbitral Tribunal can record the settlement award only if the parties request for the same to the tribunal.[51] Article 34(1) of the UNCITRAL Arbitration Rules stipulates specifically the requirement of a request for recording the settlement to the tribunal be made by 'both parties', while this section uses the phrase 'if requested by the parties.' This seems to suggest that the UNCITRAL Arbitration Rules assumed that an arbitration can be between two parties only, whereas this section appears to have contemplated a multi-party arbitration.[52]

The language of the proviso further makes it unclear as to whether or not the request can be made by only one party or whether a joint request by parties is a mandatory requirement. One view is that a single party can also request to convert the settlement into an award and make the settlement award binding and enforceable.[53]

Having a mandatory requirement of requiring both parties to approach the tribunal to pass a settlement award makes the entire process vulnerable to either party backing out and jeopardizing the process.[54] One solution to this dilemma can be that the declared will of both parties to agree on a settlement award evidenced during the proceedings is sufficient to enable a single party to approach the tribunal for delivering the settlement as an award. This appears to be correct because the expression 'the parties' in the context of s.30(2) is compendiously used to cover one or more parties.[55]

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48 See DRAHOZAL, Christopher R. The New York Convention and the American Federal System. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 1, n. 1, pp. 37-54, 2019.
49 *Supra* note 13 at 942.
50 *Ibid.*
51 *Id.* at 938.
52 *Ibid.*
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*

Sometimes, identical words in a particular provision can be subjected to different interpretations. Thus, the first part of s.30(2), mentions the word 'parties' which means all the parties involved in the arbitral proceedings. This is because the settlement must be between all the parties. In the second part of sub-section (2), the word 'parties' has been stated, which must be interpreted to imply any of the parties. When parties to a dispute reach a settlement, it implies an implicit request to record the settlement unless the settlement itself provides for concluding the arbitral proceedings (in lieu of the settlement) without passing an award. Thus, if the arbitral tribunal is satisfied as to the existence of the settlement, then – unless the settlement itself provides that the proceedings be terminated without passing an award – on a formal request made by some of the parties, the tribunal can deliver the settlement with an arbitral award.

Therefore, if the provision is not correctly interpreted, it will only cause hardship and grave inconvenience to the parties. It will further run contrary to the very object of sub-section (1) of section 30 of the Arbitration Act, which calls for the arbitral tribunals to encourage settlements.

In ***Union of India* v. *Hanuman Parshad & Brothers***,[56] the Hon'ble Apex Court held that it was held that in order to enable the arbitral tribunal to make an award on agreed terms, there has to be a request from the parties to be made to the arbitral tribunal.

Rendering a Consent Award: A Right Or an Obligation of the Tribunal?

The primary task of any arbitral tribunal before delivering a consent award is to determine whether or not it is competent to hear the dispute in question in the first place. This is important because the recording of settlement by arbitrators only leads to the disposal of disputes wherein arbitrators do not go into the merits of the disputes when recording the settlement. Thus, arbitrators must not proceed to record settlements of those cases which are either non-arbitrable or beyond their capabilities to resolve. Once the tribunal is satisfied with its competence to hear a dispute, it must proceed to examine other factors that may influence their decision to or not to record the settlement arrived at by the parties.[57]

The power and responsibilities of the Arbitral Tribunal can be ascertained from both the domestic law of the land and the terms of the arbitration agreement/ clause between the parties. The conversion of settlement agreements into awards

[56] 2001 (8) SCC 476.

[57] KRYVOI, Yaraslau; DAVYDENKO, Dmitry. Consent Awards in International Arbitration: From Settlement to Enforcement. Brooklyn Journal of International Law, vol. 40, n. 3, p. 838, 2015.

can be impugned, particularly if such agreements are found to be in violation of mandatory positions of the domestic law of the land.[58]

It is pertinent to note that the UNCITRAL Model Law expressly empowers arbitral tribunals to raise objections against recording settlement agreements as arbitral awards if the tribunal feels that parties have not settled a genuine dispute and that the consent award can be prone to misuse for improper purposes.[59]

In ***Mohammedhussain Abdullabhai and Others* v. *Shabbirbhai Abdullabhai and Others***,[60] the Hon'ble High Court of Bombay observed that before taking action on the contention of the parties of reaching a settlement under s.30(2) of the Arbitration and Conciliation Act, 1996, the tribunal must reassure itself of the presence of a settlement agreement under s.30(1) of the 1996 Act as s.30(1) does not mandate the settlement reached between the parties to be in the form of a written agreement signed by the parties. The arbitrator must follow this step because, as per s.30(2) the mandate of the arbitration tribunal ends as soon as the parties reach a settlement, and the arbitration proceedings are to be discontinued. Thus, the arbitrator has the authority to determine the existence of the settlement between the parties on the issues referred to the arbitral tribunal. This interpretation is in line with the provisions of s.30(2), and if this interpretation is not taken, s.30(2) itself would become redundant. The section implicitly mandates that the arbitrator should decide as to whether a settlement exists on the issues referred to the tribunal.

In ***Bhatia International v. Bulk Trading S.A. and another***,[61] the Hon'ble Supreme Court of India held that the conventional way of interpreting statutes is to decipher the drafter's intention of the said statutes. In case, the language of the statute can be subjected to multiple interpretations, the court must adopt that interpretation, which is in consonance with the true intention of the legislature.

Similar sentiments were echoed, in ***Shanon Realites Ltd.* v. *Sant Michael***,[62] wherein Lord Shaw stated, that where the words of the statute do provide room for alternate constructions, that interpretation should be chosen, which ensures the smooth working of the system which the concerned law governs. Any other interpretation which induces confusion or friction in the operation of the system must be rejected.

In ***Sanjeev Narula* v. *Tata Capital Financial Services Ltd.***,[63] the Hon'ble High Court of Delhi held that questioning of a consent award for want of jurisdiction after

58 *Supra* note 57 at 839.
59 *Id.* at 840.
60 LNIND 2017 BOM 566.
61 (2002) 4 SCC 105.
62 [1924] AC 185 (PC).
63 LNIND 2017 DEL 2727.

the said consent award has been set in motion and acted upon by the parties, would constitute an abuse of process of the law and is impermissible.

Therefore, it is clear that the arbitral tribunal is not always bound to convert a mutual settlement into a consent award, until and unless the tribunal is absolutely convinced about the genuineness of the interests of the parties involved and the final resolution of the dispute. A consent award differs from a regular award, for the arbitral tribunal does not consider the merits of the disputes while passing the consent award. It only passes the settlement agreement of the parties as an award.[64]

Refusal to record Settlement as Award

Generally, arbitral tribunals are legally obligated to record the settlement reached between the parties as a settlement award. However, the statute also permits them to refuse to accede to the parties' request if the tribunal has any objection to this. However, there is a want of clarity as to the grounds which the tribunal can use to refuse the recording of settlement as an award.[65]

However, this provision can act as a safety valve in ensuring that the agreed award procedures are not misused by the parties, such as by incorporating terms that might be intended to mislead the parties. The law has provided the arbitral tribunal with discretionary powers to record or refuse the recording of the settlement award. Still, the wordings that have been used indicate that the measure has to be used only as a last resort and not as general practice. If, therefore, the arbitral tribunal refuses to make the agreed award without a valid reason, the Act does not provide any specific mechanism for forcing it to do so. Moreover, the matter can hardly fall within any of the grounds outlined in s.34(2) of the 1996 Act.[66]

At the same time, the Act also empowers the parties to terminate the mandate of the arbitrator(s), claiming the *de jure* or *de facto* inability of the arbitrators to perform their functions or that they have been performing their duties with unnecessary delays and thus have not been efficient in discharging their duties.[67]

Status and Effect of the Settlement Award

When the settlement is recorded as a settlement award, it stands on the same legal footing as an arbitral award with respect to the substance of the dispute. It can be corrected by the tribunal through a formal request by the parties or via

64 *Supra* note 57 at 832.
65 *Supra* note 13 at 943.
66 *Ibid.*
67 *Id.* at 944.

its own initiative. The tribunal can also interpret the award if the parties request the tribunal to do so. These awards can be subjected to judicial scrutiny under the grounds prescribed in s.34(2) of the Act. Like an arbitral award, settlements awards are legally binding on all the parties involved and can be enforced as a decree of the court under the Code of Civil Procedure, 1908.[68]

In ***Morgan Securities & Credits (P) Ltd.*** **v.** ***Morepen Laboratories Ltd.***,[69] the Hon'ble Delhi High Court held that awards based on settlement agreements possessed the same legal sanctity as regular arbitration awards and that there was no distinction between the two with respect to their effect on the substance of the dispute.

Though acknowledging the efficacy of the unenforced mediation settlements,[70] the fact remains that when parties reach a mutually agreed settlement, the majority of them prefer to have the same recorded as a consent decree or award before the court or tribunal, to provide it with recognition and consequent sanction under law.[71]

Recording of a settlement award is beneficial as the process of enforcement of the award becomes more straightforward because parties need not initiate court proceedings to get their settlement awards enforced. This is especially true when the award needs to be enforced in a foreign jurisdiction, as the award can be recognized and enforced as a New York Convention award. Therefore, it is generally recommended to record the settlement as a settlement award, which ensures a smooth future enforcement of the award by eliminating the need to approach the courts to implement the award.[72]

Recording of the settlement award is particularly beneficial when there are obligations of future performances on the parties towards each other as per the terms of the award, such as payment by instalments or any future transactions amongst the parties which need to be done, etc.[73]

68 *Supra* note 13 at 944.

69 2006 SCC Online Del 774: (2006) 3 Arb LR 159.

70 On multiparty mediation in Brazil see FERREIRA, Daniel B; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. BRICS Law Journal, v. VIII, n. 3, pp. 5-29, 2021. DOI: https://doi.org/10.21684/2412-2343-2021-8-3-5-29. See also AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão. Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 4, p. 57-66, 2020.

71 KANUGA, Sahil; PANCHMATIA Raj. Mediated Settlements: The Way Ahead for India. Bar and Bench, May 27, 2019.

72 *Supra* note 13 at 945.

73 *Ibid.*

V Settlement v. Consent Award

Consent awards can be of two types. If all the issues have been mutually resolved, the resulting settlement so recorded as an award shall be the final award. If, however, only a few of the issues have been resolved and others remain unresolved, the resulting award shall be a partial award. It is, however pertinent to note that irrespective of the nature of the settlement, the issues which have been dealt with in the settlement award shall be final and binding on both the parties and shall be *res judicata* as between the parties. The mandate of the tribunal will be terminated, and the tribunal will become *functus officio* with regard to these issues. This highlights the major difference between a settlement and a settlement award, for the former is merely a contract between the parties, whereas the latter is a final adjudication on the issues recorded in it and has effects. Thus, in case a future dispute arises between the same parties on the issues already decided, the effect of a consent award will not be the same as compared to a settlement agreement between the parties.[74]

Respecting party autonomy is the cornerstone principle behind hybrid arbitration. The parties reach a settlement and then submit the draft of the proposed consent award to the tribunal. This shall especially be the case wherein the parties explicitly stipulate in their settlement agreement that the agreement is conditional upon issuance of the final award. Parties would have to undergo further proceedings to get the settlement recorded as a settlement award. If, however, the settlement is unconditional, then parties need not worry about future proceedings.

If the agreement is conditional upon the issuance of a consent award, then there will be the possibility of further proceedings. In that situation, the parties and the tribunal should provide that, if the consent award is not delivered, the tribunal would resume the arbitral proceedings and issue a final arbitration award.[75]

VI Enforcement Under the New York Convention

The absence of any definition for 'Arbitral Award' and 'Consent Award' in The New York Convention has raised many doubts as to whether enforcement of a consent award under the Convention is legally possible or not. The question can be answered only by considering the nature of the award, i.e., whether a consent award is in the form of a genuine arbitral award, or is just a mere contract between the parties.[76]

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74 BUHLER, Michael W.; WEBSTER, Thomas H. *Handbook of ICC Arbitration*. South Asian Edition. Thomson, Sweet & Maxwell, p. 381, 2010.

75 *Ibid.*

76 *Supra* note 57 at 850.

The UNCITRAL Model Law on International Commercial Arbitration defines 'award' and provides that an award based on the terms agreed by the parties shall have the same effect in law as that of a regular arbitral award adjudicating the merits of the dispute.[77]

If the award is repudiated or suspended in its place of origin, foreign courts shall proceed as per their national law in determining whether to recognize and enforce the award in question or not.[78]

The parties waive their chance of appealing the award when they request the tribunal to record their settlement as an arbitral award. The only exception arises if the award is impugned for violation of public policy. Such a 'waiver' by the parties originates from the principle of prohibition of contradictory behaviour by all parties to the proceedings.[79]

Therefore, when parties have been committed participants throughout the arbitral proceedings and submitted their settlement agreements to the tribunal for issuing the same as a consent award, the parties must be estopped from appealing against the award on grounds of procedural violations.[80] However, if the settlement agreement includes terms other than those mentioned in the arbitration agreement, then the tribunal must refuse to issue the award for want of jurisdiction.[81]

Consent awards are born out of choices and compromises between the parties, and are backed by the desire to achieve an internationally enforceable award. Understanding the difference between consent awards and "regular" arbitration awards helps the parties in successfully navigating their way from reaching a settlement to enforcing it.[82]

VII Conclusion

To conclude, s.30 of the Arbitration and Conciliation Act, 1996, recognizes the need for resolving disputes through consensual methods rather than arbitration solely. The section encourages both the arbitrators and parties to explore the option of settlement wherein parties would get more control over the procedure and outcome and reach a win-win solution.[83] Neither the parties nor arbitrator need to give reasons for their support and consent to the settlement.[84]

77 *Supra* note 57 at 851.
78 *Id.* at 853.
79 *Id.* at 850.
80 *Ibid.*
81 *Id.* at 854.
82 *Id.* at 868.
83 *Supra* note 38 at 291.
84 *Ibid.*

The procedure permitted under s.30 thus provides for hybrid arbitration in the Indian context even if the same does not fit into the definitions of "Med-Arb" or "Arb-Med" or several other practiced forms of hybrid arbitration. Despite its benefits being known the world over, it is surprising that the Indian law community has failed to realize the potential of hybrid arbitration, which has been embedded in black letters of the law. The time has come to reverse this trend, as hybrid arbitration has the power to introduce significant reforms in the conventional justice system.

Settlement of disputes by reaching an amicable agreement by the parties through their initiative or with the encouragement of an arbitral tribunal is highly recommended as an amicable resolution of disputes and avoids the imposition of an award made by the third party, which further avoids a win-lose situation, wherein one party loses face.[85] Consensual mechanisms generally lead to win-win solutions which help in preserving the relationships between the parties.[86]

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85 *Supra* note 13, at 939.
86 *Ibid.*

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