WEARING TWO HATS

.... By Mr. Sriram Panchu

A couple of years back, a learned Chief Justice appointed me as the arbitrator under Sec 11 of the Arbitration and Conciliation Act, 1996. He however told the counsel that they were to inform me that he wanted me to also try mediation.

This was an ideal case for me to employ a hybrid process: Med-Arb or Arb-Med. The former process is initiated with a mediation, and if no settlement is reached the arbitration follows. In the latter it is reversed – the arbitration takes place with a mediation following.Hybrid processes combine the advantage of both individual processes and have an increased potential to lead to a definite resolution.

However, there are certain problems associated with these conjoint processes which is the reason why purists do not favour them. Essentially the difficulty is one of confidential disclosures that take place in the separate confidential sessions in mediation. In Med-Arb, parties are likely to share confidential information with the mediator. If mediation fails and he takes on the mantle of arbitrator, such information could affect the arbitral award. Similarly, in an Arb-Med the information gleamed in mediation can affect the award. Such an outcome would be unfair and prone to challenge, rightly so.

This is not an issue where the mediation/arbitration are being conducted by different persons. However, there is a greater dynamic and efficacy if the same person conducts both. The parties will have the benefit of quicker closure at the hands of one trusted neutral who is well acquainted with the facts. And they will not have to pay twice. However, as mentioned above the problem of confidentiality is acute when the same neutral person is to perform both functions.

In the case where I was appointed arbitrator, we discussed the matter to see how these twin processes could be combined at the first session. Med-Arb was ruled out since it appeared this mediation would not succeed unless separate sessions could be held with the parties for confidential discussions.

Arb-Med was then considered. But how were we to respect confidentiality and at the same time ensure that both processes worked smoothly in sequence?

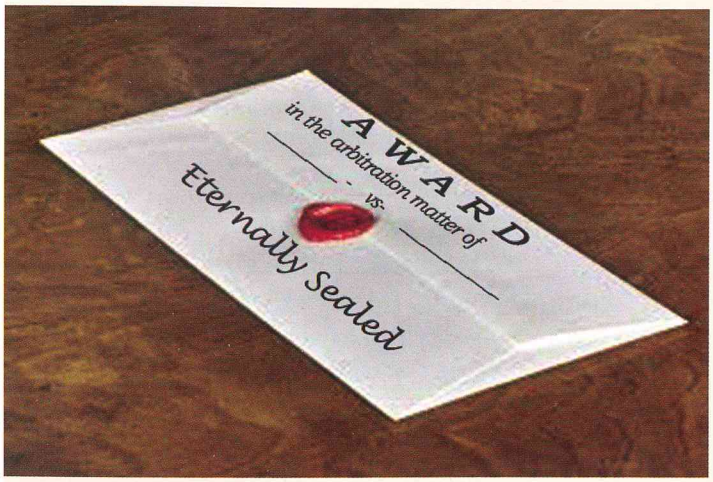
We then devised a method which enabled us to obtain the benefit from each process, and avoid the disadvantages that may result from combining the two.

I first functioned as the arbitrator. Pleadings and documents were filed. No oral evidence was considered necessary. Counsel advanced arguments in full, including citation of authorities.

After this was over, I wrote out the essence of the award containing my decision on the merits of the case viewed in a legal aspect. I put this one sheet of paper in an envelope, sealed it, signed across the flap, and asked both counsel to do likewise.

The arbitral decision being now made, it was now open to the parties to talk settlement for which purpose they could have confidential meetings with me, secure in the knowledge that whatever was said now would not affect the award.

The basic differences were as to the quantum of interest claimed by one, and the scope of damages claimed by the other. In the private sessions the mediator focused on interests, legal realism and BATNA, and encouraged mutual give and take. It did not take long for both parties to scale down their claims. They knew that even with a favourable arbitral award they would still have difficulty in enforcement. And during the hearing each one realized the problems of their respective cases. And they knew that I knew, and that it would be reflected in the award. Given all these factors, settlement was not surprising.



It took just a little longer to draw up the settlement agreement which consisted of four sentences. It was signed, a cheque was given, and the parties resumed a cordial relationship which they had shared before the dispute began. They shook hands before leaving, the ultimate test of settlement. The envelope was consigned to the shredder, its content privy to me; the lawyers were good enough to restrain their natural curiosity as to its contents.

In this way, by devising the strategy of keeping the arbitral award secret pending the outcome of mediation, the disadvantage of confidentiality can be overcome. The benefits of mediation as a process in which the outcome is within the control of the parties are also amplified in the face of the uncertainty of an arbitral award that is in the hands of a third party. However, if the mediation had failed, at least the parties would have an award and not have to start the process all over again.

All benefited. The parties ended their dispute and were saved more loss of time, money and relationships. The lawyers had their full say in the arbitration process. And I was saved the labour of writing the award.