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Analysing the Provisions Regarding Conciliation Under the Arbitration and Conciliation Act, 1996

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ABSTRACT

Conciliation is as old as the Indian history. In Mahabharata when both parties were determined to resolve the conflict in battle fields, Lord Krishna made efforts to resolve the conflict. Now also, the panchayat system works in the villages. The Indian system places a lot of importance on resolution of disputes by negotiation which is purely conciliatory. Conciliation is essentially a consensual process. Under the Arbitration and Conciliation Act 1996[1], it has the statutory sanction. The best example where conciliation played an integral role is of the highly politically sensitive case of the Beagle channel dispute over the ownership of certain islands in the entrance to the channel between Chile and Argentina. The mediator was the Vatican. The process was remarkable because it was flexible enough to accommodate the changing political environments in both countries and the mediator used a range of tools to great advantage. This process served to protect a fragile peace between the countries and ultimately allowed them to create an agreement that has lasted until this day.

Introduction

The Arbitration and Conciliation Act, 1996, as the name itself suggests, deals with two types of proceedings; domestic arbitration and conciliation proceedings. While provisions relating to domestic arbitration are contained in Part 1 which includes Sections 1 to 43, the conciliation

proceedings which includes Sections 61 to 81[2] (Part II deals with enforcement of foreign awards). On perusal of the provisions of the Act, it is apparent that there is a clear distinction in the statute between arbitration proceedings and conciliation proceedings.

Conciliation', as defined in Halsbury's Laws of England[3], "*Is a process of persuading parties to reach an agreement, and is plainly not arbitration, nor is the chairman of a Conciliation Board an arbitrator*."

Conciliation undoubtedly is the most accepted form of alternative dispute resolution mechanism. It is essentially a non-judicial power as against arbitration which may be in a judicial or non-judicial form. Briefly speaking conciliation may be defined as a process of setting of disputes without recourse to Court of law or litigation

Objective

1. The purpose of conciliation proceedings is to reach an amicable, swift and cost-efficient settlement of a dispute.
2. If the parties to a dispute formally agree to submit it to conciliation, ICMA assigns a member of its panel of conciliators as conciliator to the case. The members of this panel are persons of high integrity with wide experience of the international capital market. They are appointed by ICMA's executive committee on an annual basis.
3. The place of the conciliation proceedings is to be agreed upon by the parties, failing which it is determined by the conciliator.
4. The conciliator hears the case and then recommends a settlement proposal to the parties. Following a settlement, or, if no settlement can be reached, the conciliator closes the conciliation proceedings and notifies ICMA and the parties accordingly.
5. The costs of conciliation proceedings, including the remuneration of and the costs incurred by the conciliator as well as ICMA, are normally borne in equal parts by the parties concerned.

Application And Scope- Section 61

1. This part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings.
2. This part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

Number and Qualifications of Conciliators- Section 63

Section 63 fixes the number of conciliators. There shall be one conciliator. But the parties may by their agreement provide for two or three conciliators.

Appointment of Conciliators- Section 64

1. If there is one conciliator in a conciliation proceeding, the parties may agree on the name of a sole conciliator.
2. If there are two conciliators in a conciliation proceeding, each party may appoint one conciliator.
3. If there are three conciliators in a conciliation proceeding, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Principles of Procedure

I. Independence and impartiality – Sec 67(1): The conciliator should be independent and impartial.

II. Fairness and justice – Sec 67(2): The conciliator should be guided by principles of objectivity, fairness and justice. He should take into consideration, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices.

III. Confidentiality – Sec 75, 70, proviso: The conciliator and the parties are duly bound to keep confidential all matters relating to the conciliation proceedings. Similarly, when a party gives an information to the conciliator on the condition that it be kept confidential, the conciliator should not disclose that information to the other party.

IV. Disclosure of information – Sec 70: When the conciliator receives an information about any fact relating to the dispute from a party, he should disclose the substance of that information to the other party. The purpose of this provision is to enable the other party to present an explanation.

V. Cooperation of parties with conciliator – Sec 71: The parties should in good faith cooperate with the conciliator.

VI. Place of meeting – Sec 69(2): The parties have freedom to fix by their agreement the place where meetings with the conciliator are to be held. Where there is no such agreement, the place of meeting will be fixed by the conciliator after consultation with the parties. In doing so the circumstances of the conciliation proceedings will have to be considered.

VII. Communication between conciliator and parties - Sec 69(1): The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may do so with the parties together or with each of them separately.

Procedure of Conciliation

The conciliator is not bound by the rules contained in the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Though the conciliator is not bound by the technical rules of procedure, he should not ignore the principles of natural justice.

I. Commencement of conciliation proceedings – Section 62

The conciliation proceedings are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of the dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If the other party rejects the invitation, there will be no conciliation proceedings. If the party inviting conciliation does not receive a reply within 30 days from the date he sends the invitation, he may elect to treat this as rejection of the invitation to conciliate. If he so elects, he should inform the other party.

II.Submission of statements to conciliator – Section 65

The conciliator may request each party to submit to him a brief written statement. The statement should describe the general nature of the dispute and the points at issue. Each party should send a copy of such statement to the other party. The conciliator may require each party to submit to him a written statement of his position and the facts and grounds in its support. It may be supplemented by appropriate documents and evidence.

III. Conduct of conciliation proceedings – Section 69(1), 67(3)

The conciliator may invite the parties to meet him. He may communicate with the parties orally or in writing. He may meet or communicate with the parties together or separately. (Sec 69(1)) In the conduct of conciliation proceedings, the conciliator has some freedom. He may conduct them in such manner as he may consider appropriate. But he should take into account the circumstances of the case, the express wishes of the parties, a party's request to be heard orally and the need of speedy settlement.

IV. Administrative assistance – Section 68

Section 68 facilitates administrative assistance for the conduct of conciliation proceedings. The parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.

Settlement

I.Settlement of dispute – Sec 67(4), 72, 73

The role of the conciliator is to assist the parties to reach an amicable settlement of the dispute. He may at any stage of the conciliation proceedings make proposals for the settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of reasons. (Sec. 67(4)) Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator the suggestions for the settlement of the dispute. (Sec. 72)

II.Status and effect of settlement agreement – Sec 74

Section 74 provides that the settlement agreement shall have the same status and effect as an arbitral award on agreed terms under Section 30. This means that it shall be treated as a decree of the court and shall be enforceable.

Restrictions on Role of Conciliator – Section 80

Section 80 places two restrictions on the role of the conciliator in the conduct of conciliation proceedings:

1. Clause (a) of Section 80 prohibits the conciliator to act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute which is subject of the conciliation proceedings.
2. Clause (b) of Section 80 prohibits the parties to produce the conciliator as a witness in any arbitral or judicial proceedings.

Termination of Conciliation Proceedings – Section 76

Section 76 lays down four ways of the termination of conciliation proceedings. These are:

1. The conciliation proceedings terminate with the signing of the settlement agreement by the parties. Here the date of termination of conciliation proceedings is the date of the settlement agreement. (Sec 76(a))
2. The conciliation proceedings stand terminated when the conciliator declares in writing that further efforts at conciliation are no longer justified. Here the date of termination of conciliation proceedings is the date of the declaration. (Sec 76(b))
3. The conciliation proceedings are terminated by written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated. Here the date of termination of conciliation proceedings is the date of the declaration. (Sec 76(c))
4. The conciliation proceedings are terminated when a party declares in writing to the other party and the conciliator, that the conciliation proceedings are terminated. Here the date of termination of conciliation proceedings is the date of the declaration. (Sec 76(d))

Costs – Sec 78

Costs means reasonable costs relating to the following:

1. The fee and expenses of the conciliator and witness requested by the conciliator with the consent of the parties
2. Any expert advice requested by the conciliator with the consent of the parties
3. Any assistance provided to sec 64(2)(b) and sec 68
4. Any other expenses incurred in connection with the conciliation proceedings and the settlement agreement. (Sec 78(2))

Case Laws Relating to Conciliation

1. Haresh Dayaram Thakur v. State of Maharashtra and Ors.[4] While dealing with the provisions of Sections 73 and 74 of the Arbitration and Conciliation Act of 1996 in paragraph 19 of the judgment as expressed thus the court held that- From the statutory provisions noted above the position is manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably.

2. Mysore Cements Ltd. V. Svedala Barmac Ltd.[5]

It was said that Section 73 of the Act speaks of Settlement Agreement. Sub-section (1) says that when it appears to the Conciliator that there exist elements of 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 observation. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations

3. S. Ramesh vs The Commissioner of Labour[7]

Respondent, who is the Conciliation Officer, issued notice of conciliation, fixing the first meeting of conciliation that in the impugned orders in all these cases, the Conciliation Officers in fact adjudicated the issue on merit.

Difference Between Conciliation and Arbitration

Russel, in his Book on Arbitration[10] has brought out the distinction between functioning of an arbitrator and conciliator in the following words:

"*An arbitrator is not a conciliator. He cannot ignore the law, or misapply it in order to do what he thinks is just and reasonable. Unlike a conciliator, an arbitrator, is a tribunal constituted by parties to decide disputes in accordance with the law.*"

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

- As a corollary of this, it follows that there being a prior arbitration agreement between the parties, both are bound by the agreement. But in case of conciliation, since a written invitation is made by one party, the other party may or may not accept the same.
- While the role of conciliator is to help and assist the parties to reach an amicable settlement of their dispute, the arbitrator does not merely assist the parties, but he also actively arbitrates and resolves the dispute by making an arbitral award.
- The conciliation proceedings may be unilaterally terminated by a written declaration by a party to the other party and the conciliator, but arbitration proceedings cannot be so terminated.
- Last but not the least, an arbitrator must decide according to law, but a conciliator can conciliate irrespective of law.

Conclusion

The introduction of conciliation as a means of alternate dispute resolution in the Act is a positive step towards encouraging parties to opt for it. Taking into consideration the time, effort and money involved in pursuing cases before a court or an arbitrator in India, conciliation should act as the perfect means for resolving disputes, especially those of commercial nature.

Conciliation is unquestionably a better option than arbitration as the experience in past few years has shown that arbitration is neither inexpensive nor time saving. In cases where court has been given the authority to review the outcome, the advantage does not appear to be real on account of first spending time before the arbitration tribunals and then in courts. Conciliation is a more amicable way to settle disputes without harming the personal relations

as well. Thus, the pros of Conciliation are categorically more than arbitration which asserts my stand that it is for the better.

References

1. The Arbitration and Conciliation Act of1996.
2. The Arbitration and Conciliation Act of 1996.
3. Halsbury's Laws of England.
4. AIR 2000 SC 228.
5. AIR 2003 SC 3493.
6. 7 August, 2009 Madras High Court.
7. Russel, in his Book on Arbitration.