

P.G.S NATIONAL COLLEGE OF LAW, MATHURA
Arbitration and Conciliation Act, 1996 Unit-4

Q-1- Write short notes on any two of the following

(a) Termination of conciliation proceedings.

Section 76. Termination of conciliation proceedings - The conciliation proceedings shall be terminated

(a) by the signing of the settlement agreement by the parties, on the date of agreement; or

(b) by a written declaration of the conciliator, after consultation

with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

COMMENTS

Section 76 is enacted on the basis of Article 15 of the UNCITRAL

Conciliation Rules. This section is analogous to Section 32, Part I of the Act,

1996, however with one contradiction that "A conciliation is wholly a voluntary process therefore it can come to an end as and when desired to do so.

Section 76 lays down four situations, when the conciliation proceedings can be terminated. Although other than these prescribed grounds, there are grounds to terminate the conciliation proceedings that is, on death of a party

and may also be on death of a conciliator, but may not necessarily terminate

the conciliation proceedings as in case of appointing a new conciliator

provided the parties agree to do so. Under Section 76, the following are the ways to terminate the conciliation proceedings

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(i) clause (a) by the signing of the settlement agreement by the parties, on the date of the agreement, or

(ii) clause (b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration, or

(iii) clause (c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration, or

(iv) clause (d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

No time limit as such is provided under Section 76, that within what period the conciliation proceedings can be terminated. Because of a voluntary nature of the conciliation the parties are not required to state the reasons for termination of the conciliation proceedings

(b) Settlement agreement

Section 73. Settlement agreement.-(1) When it appears to the conciliator that there exists 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.

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

COMMENTS

Section 7 is enacted on the basis of Article 13 of the UNCITRAL, Conciliation Rules,

Section 73 prescribes procedure for successful completion of conciliation proceedings,

Section 73(1) provides that when the conciliator is able to formulate and is of the opinion that acceptable elements of settlement to the parties exist, then the conciliator will prepare the terms of possible settlement which shall be subjected to observation by the parties. The conciliator on receipt of formula which has undergone observation process by the parties, reformulate the terms of a possible settlement keeping in view such observations

Section 73(2) provides that in situation, the parties could come to a stage to accept the settlement proposed by the conciliator, the parties may draw up and sign a written Settlement agreement, It is at the discretion of the parties to make such agreement in writing or not, however, the parties may request the conciliator to draw up or assist in drawing up, the settlement agreement.

In this context, it is advisable to draw up such settlement agreement in writing, so that its contents are clear and relevant as to settlement terms, although there is no requirement as such that the settlement agreement must state reasons on which it has been settled under sub-section (2) Section 73(3) provides that the moment the parties sign the settlement agreement, it attains finality and would be binding on the parties and persons claiming under them respectively.

Section 73(4) provides that the conciliator is required to authenticate the settlement and would furnish a copy to each of the parties. If, there is more than one conciliator, all conciliators are required to authenticate the settlement agreement.

However, there is no provision in UNCITRAL Conciliation Rules, as contained in this sub-section (4).

(i) Settlement between the parties is binding having status of arbitral award

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The Apex Court in *Haresh Dayaram Thakur v. State of Maharashtra*, has held that the settlement between the parties is binding having status of arbitral award however it must be signed by the parties. It was not proper for the conciliator to hold some meeting and draw settlement by himself and send it to the court. In the present case the Apex Court observed that from the statutory

provisions, it is manifest that a conciliator is a person who is to assist the parties to settle the dispute between them amicably. For this purpose conciliator is vested with wide powers to decide the procedure to be followed by him untrammelled by the procedural laws like the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that there exists an element of settlement which may be

acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it known to the parties for their observations and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up a settlement agreement or request the conciliator to prepare the same and affix their signature to it. Under Section 73(3) the settlement agreement is signed by the parties and person claiming under them. It follows, therefore, that a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74 of the Act, 1996.

(ii) When settlement agreement acquires status of arbitral award

In *Mysore Cements Ltd. v. Suedala Barmac Ltd.*, the Supreme Court

observed that it is not that every agreement or arrangement between the parties to the disputes, arrived at in whatever manner or form, during the pendency of conciliation

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proceedings that automatically acquires the status of a settlement agreement within the meaning of Section 73 of the Act so as to have the same status and effect as if it is an arbitral award, for being enforced as if it were a decree of the Court. It is only that agreement which has been arrived in conformity with the manner stipulated and in the form envisaged and got duly authenticated in accordance with Section 73 of the Act which alone can be assigned the status of settlement agreement, within the meaning of and for effective purposes of the Act, and not otherwise.

It was held by the Supreme Court that in spite of careful scrutiny, serious deliberations and analysis of the materials on record, particularly the memorandum of conciliation proceedings and the letter of consent, that either taken individually or even together they or any one of them can't legitimately claim to be entitled to or assigned the status of a settlement agreement within the meaning of Section 73, for the purpose of the Act. The Court expressed the view that they fall short of the essential legal pre-requisites to be satisfied for being assigned any such status. Thus, unless the legal requirements of Section 73 are complied with, a letter of consent furnished on the same day of a settlement arrived at during conciliation signed by both the parties and authenticated by the conciliators, is not enforceable as an arbitration award under Section 74 read with Sections 30 and 36 of the Arbitration and Conciliation Act, 1996.

(c) Appointment of conciliators.

appointment of a sole conciliator.

3. Appointment of a sole conciliator will comparatively be less expensive

4. A sole conciliator would provide speedy conciliation, because meeting of conciliators within short intervals is likely to cause delay.

Section 63(2) states that "where there is more than one conciliator, they ought, as a general rule, to act jointly". That means, subsection (2) emphasises on panel decision making where there is more than one conciliator. As a general rule, all conciliators have to conciliate jointly and should have their own strategic understanding, as to how, they have to settle the dispute.

Section 64. Appointment of conciliators.-(1) Subject to sub-section (2),

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(a) in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, 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.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,

a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person;

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

COMMENTS

Section 64 is enacted on the basis of Article 4 of the UNCITRAL Conciliation Rules. Section 64 provides the procedure for appointment of conciliators, there may be one conciliator or two or three conciliators. Section 64(1) provides that the parties have to decide the name of a

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Q-3- Discuss the Procedure after the commencement of conciliation processing.

Section 61. Application and scope.-(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. (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.

COMMENTS

Section 61 is on the pattern of Article 1 of the UNCITRAL' Conciliation

Section 61 deals with application and scope of conciliation machinery. Rules.

Sub-section (1) states that provision of this sub-section applies to all disputes whether such disputes are contractual or non-contractual, however, if the provision of any other law being applied for conciliation of dispute, the provisions contained in Part III would not be applied, thus leaving it open to the special law. The words "save as otherwise provided by any law for the time being in force" under sub-section (1) clearly state that where any other law is being applied for conciliation of disputes, the provision of Part III will not apply

Further, sub-section (1) states "unless the parties have agreed" which means the parties have been given freedom to follow the provision of Part III or may not adopt such provisions. Thus, the parties may bring the agreement to an end.

Part III shows importance to the voluntary conciliation and reflection of it can be seen in Section 61. In other words principle of part autonomy is the main object in the process of conciliation in Part III.

Section 61(2) provides that where by operation of law for the time being in force specified disputes may not be submitted to conciliation, Part III shall not be applied.

Section 61(2) is similar to Section 2(3) in Part I, which deals with arbitration. Similarly, Section 61(2) declares that "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". That means if the law

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which is in operation declares itself that certain disputes are not to be submitted for conciliation, Part III shall not be applied.

Section 62. Commencement of conciliation proceedings.- (1) The party initiating conciliation shall send to the other party a written invitation to conciliation under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

COMMENTS

Section 62 is enacted on the basis of Article 2 of the UNCITRAL Conciliation Rules.

Section 62 provides that any party to dispute may commence conciliation without the term "claimant" or "plaintiff" and such terms are not to be used in conciliation. Section 62(1) provides that any party to dispute wishing to initiate

conciliation has to fulfil the following conditions-

1. The party initiating conciliation should send a written invitation to other party. Such a written invitation should mention the subject of dispute

2. The party initiating conciliation should state that the invitation is under Part III.

3. The invitation must briefly identify the subject of dispute.

Section 62(2) states that "Conciliation proceedings shall be commenced when the other party accepts in writing the invitation to conciliation". Thus, verbal or oral acceptance has not been recognised under Section 62(2). Under this sub-section (2) when the other party accepts the invitation in writing to conciliation he makes an agreement to conciliate.

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However he may refuse in writing, not to conciliate, in such a case conciliation proceedings will not be commenced.

Section 62(3) provides-"If the other party rejects the invitation, there will be no conciliation proceedings". There is no time limit prescribed under Section 62, however, the party who is initiating conciliation thereby sends the invitation in writing to the other party, specifying time limit in the invitation within which the other party has to convey his willingness to conciliate rather his acceptance to conciliate or rejection not to conciliate and accordingly conciliation proceedings may or may not be commenced.

Although, sub-section (4) provides 30 days time from the date on which, the party is initiating conciliation to receive a reply from the other party or within such other period of time as may be specified in the invitation. If, the party does not receive a reply within the aforesaid period of time, he has an

option to select or reject the invitation to conciliation by sending intimation in writing accordingly.

As per the UNCITRAL Conciliation Rules Paragraph (2) of Article 21-if such acceptance is made orally, it is advisable that it be confirmed in writing

Thus, Section 62 emphasises that the invitation or the acceptance must be made in writing for obvious reason to avoid communication gap and for records purpose

Who is conciliator

According to the Chambers 21st Century Dictionary the expression "conciliate" means to win over someone, to overcome the hostility of someone, to reconcile (people in dispute) etc.

Black's Law Dictionary, 7th Edition defines-... conciliation as settlement of a dispute in an agreeable manner, a process in which a neutral person meets with the parties to a dispute (often labour) and explore how the dispute might be resolved."

According to Halsbury's Laws of England, 4th Edition-"Conciliator" is described as a person persuading parties to reach an agreement

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It is to be noted that whereas decision of the arbitrator is binding on the parties, the finding of a conciliator is recommendatory in nature.

According to the Supreme Court' if no specific question of law is referred, the decision of the arbitrator on that question is not final. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply it. **Section 63. Number of conciliators.**-(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

COMMENTS

Section 63 is based on Article 3 of the UNCITRAL Conciliation Rules.

Section 63 deals with numbers of conciliators. Section 63(1) states that "there shall be one conciliator unless the parties agree that there shall be two or three conciliators. Thus sub-section (1) clearly indicates its preference for a sole conciliator but also provides freedom to the parties to dispute to appoint two or three conciliators, however by mutual agreement.

WHY SOLE CONCILIATOR ?

Under Section 63(1) a sole conciliator is preferred for the following reasons-

1. A sole conciliator will be likely to win faith of the parties.
2. Scope of conflicting opinion between the conciliators is reduced by appointment of a sole conciliator.
3. Appointment of a sole conciliator will be less expensive comparatively.

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4. A sole conciliator would provide speedy conciliation, because meeting of conciliators within short intervals is likely to cause delay.

Section 63(2) states that "where there is more than one conciliator, they ought, as a general rule, to act jointly". That means, sub-section (2) emphasises on panel decision making where there is more than one conciliator. As a general rule, all conciliators have to conciliate jointly and should have their own strategic understanding, as to how, they have to settle the dispute.

Section 64. Appointment of conciliators.-(1) Subject to sub-section (2),

(a) in conciliation proceedings with one conciliator, the parties

may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, 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.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person :

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

COMMENTS

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Section 64 is enacted on the basis of Article 4 of the UNCITRAL Conciliation Rules.

Section 64 provides the procedure for appointment of conciliators, there may be one conciliator or two or three conciliators.

Section 64(1) provides that the parties have to decide the name of a sole conciliator, whereby on agreement one conciliator is appointed to conduct conciliation proceedings (clause (a)). However, according to clause (b) where two conciliators are appointed by the parties to conduct conciliation proceedings, each party is authorised to appoint one conciliator. But, under clause (c) of sub-section (1), where three conciliators are appointed to conciliate each party is authorised to appoint one conciliator and the third conciliator by name and by the agreement between the parties he will be appointed to act as the presiding conciliator in conciliation proceedings.

Under the Act, the presiding conciliator is not authorised to take binding decision, in case of differences of opinion between the conciliators, however, the parties by an agreement may confer such power to the presiding conciliator. The obvious purpose behind this is to have speedy and smooth conciliation.

These above-mentioned provisions are subject to the provisions contained in sub-section (2) of Section 64.

Section 64(2) provides freedom to the parties to make an approach with a request to any institution which has its known reputation for rendering conciliation services or any eminent person in the field of conciliation to recommend suitable individuals to conduct conciliation. Under this sub-section (2), clause (b) the parties are permitted by an agreement in this respect to appoint one or more conciliators directly by such an institution a

person who is providing expertise services in the area of conciliation. Though, the term "suitable" is not defined under Section 64(2), but what is suitable is the subject matter for the parties to decide.

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It is provided that each party may appoint conciliator independently without taking opinion of the other party, it is a direct appointment by the party or the parties who jointly agree that an institution or a person may be appointed conciliators (two or more), directly.

Proviso to sub-section (2) of Section 64 provides guidelines to the institution or person, who is requested by the parties to recommend or appoint conciliators. Such institution or person is required to give due regards to consideration while recommending or appointing conciliators in respect of their independent and impartial conciliation. Also, while appointing a sole or third conciliator in connection with international commercial conciliation it is advisable to take into account the nationality of a conciliator, vis-a-vis the nationalities of the parties.

No time limit is laid-down for appointment of conciliators under Section 64, however it is expected that the parties to dispute would take the earliest initiative to settle their disputes by way of taking services of the professional conciliators.

Section 65. Submission of statements to conciliator.-(1)

The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds

in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidences to the other party. (3) At any stage of the conciliation proceedings, the conciliator

may request a party to submit to him such additional information as he deems appropriate. Explanation. In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, or two

or three conciliators as the case may be.

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COMMENTS

Section 65 is enacted on the basis of Article 5 of the UNCITRAL Conciliation Rules. Section 65 deals with the conduct of conciliation upon appointment of conciliator or conciliators.

Section 65(1) provides that when the conciliator has been appointed, he will make a request to each party asking him to submit a written statement summarily describing the nature of dispute and specified points of issue. Under sub-section (1) each party will send a copy of such submission of statement to the other party. The parties are not required to submit their statement of pleadings as such in details as required in the arbitral proceedings under Section 23 of the Act, 1996.

Such submissions of statement by the parties to the conciliator is intended to provide him informations about general nature of dispute.

Section 65(2) provides that it is at the discretion of the conciliator to call upon any parties to submit a further written statement to clarify his position and also to support his grounds of the facts, it may be supplemented by any other documents, evidences, if the party thinks appropriate. It is required under this sub-section (2) that any thing submitted by the party to the conciliator, a copy of the same documents will be sent to the other party.

Section 65(3) provides that the conciliator is further enabled to request for additional informations by the parties at any stage of the conciliation proceedings, if, the conciliator is of opinion that it is necessary for the purpose to expedite the conciliation proceedings.

Section 66. Conciliator not bound by certain enactments.-The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).