PROFESSIONAL PROGRAMME

GROUP 2
ELECTIVE PAPER 7.1

ARBITRATION, MEDIATION & CONCILIATION

PART I – ARBITRATION & CONCILIATION

PART II – MEDIATION

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

STUDY MATERIAL

PROFESSIONAL PROGRAMME

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Timing of Headquarters :

Monday to Friday
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Public Dealing Timings :

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Laser Typesetting by :
AArushi Graphics, Prashant Vihar, New Delhi

PROFESSIONAL PROGRAMME

ARBITRATION, MEDIATION & CONCILIATION

Arbitration is a legally binding process where the parties involved present their argument to one or more impartial individuals called arbitrators without the intervention of the court. After considering the arguments and evidences put forth by both parties, the arbitrator(s) render a judgement known as an award that is legally binding. When parties desire to settle their disagreement outside of court, arbitration is frequently chosen.

Mediation is a confidential process facilitated by a person known as mediator. The mediator tries to communicate with parties, identify their interests, and explore potential solutions to settle the dispute effectively and amicably. In contrast to arbitration, the mediator helps the parties reach a compromise rather than imposing a resolution. It is widely used in conflicts related to workplace and community.

Conciliation is a process similar to mediation, but with an additional interventionist role of the conciliator. Like a mediator, the conciliator assist for better communication and find the solution between the parties. It is widely used in conflicts related to labour and industrial disputes. In general, arbitration, mediation, and conciliation offers an alternative route to resolve the dispute without the intervention of the court. They offer the parties faster and less expensive outcomes than litigation.

Arbitration, Mediation & Conciliation jointly called as ADR mechanism, plays an important role in reducing the burden from the judicial systems. These methods have the potential of becoming lucrative emerging areas for the profession of Company Secretaries.

For this purpose, the course contents of this study material have been so designed as to provide practical orientation and develop necessary acumenship in conducting ADR proceedings. Only those laws and practices have been included which are of direct relevance to the work of a Company Secretary. Further, the literature available on the subject has been found to be unwieldy and it has, therefore, been our endeavour to make the study material tailored made.

This study material has been published to aid the students in preparing for the Arbitration, Mediation & Conciliation paper of the CS Professional Programme. It is part of the educational kit and takes the students step by step through each phase of preparation emphasizing key concepts, principles, pointers and procedures. Company Secretaryship being a professional course, the examination standards are set very high, with focus on knowledge of concepts, their application, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. This study material may, therefore, be regarded as the basic material and must be read along with the Bare Acts, Rules, Regulations, Case Laws.

The legislative changes made upto May 31, 2023 have been incorporated in the study material. In addition to Study Material students are advised to refer to the updations at the Regulator's website, supplements relevant for the subject issued by ICSI and ICSI Journal Chartered Secretary and other publications. Specifically, **students are advised to read "Student Company Secretary" e-Journal which covers regulatory and other relevant developments relating to the subject,** which is available at academic portal https://www.icsi.edu/student-n/academic-portal/. In the event of any doubt, students may contact the Directorate of Academics at academics@icsi.edu.

The amendments to law made upto 31st May of the Calendar Year for December Examinations and upto 30th November of the previous Calendar Year for June Examinations shall be applicable.

Although due care has been taken in publishing this study material, the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

PROFESSIONAL PROGRAMME

Group 2

Elective Paper 7.1

ARBITRATION, MEDIATION & CONCILIATION

SYLLABUS

OBJECTIVES

- To provide understanding, application and expert knowledge of Alternate Dispute Resolutions.
- To develop global experts in the area of Alternate Dispute Resolution systems.

Level of Knowledge : Expert Knowledge

Part I : Arbitration & Conciliation (70 Marks)

1. **Arbitration: An Introduction:** History of Arbitration along with all amendments ● Structure of Arbitration & Conciliation Act (A&C Act) ● How is arbitration different from other modes of dispute resolutions? ● Features and advantages of Arbitration ● Types of Arbitration (Institutional vs. Ad Hoc) ● General Principles of Arbitration (introduction to process of arbitration) ● Other pertinent statutes such as Limitation Act, Interest Act
2. **Commercial Transactions:** Introduction and Practical Aspects of Contract Law ● Types of Contracts and Concepts related to Negotiation and Conciliation ● Modes of Discharging Contract ● Critical Clauses ● Breach of Contract: Related Provisions ● Damages under Contract Law ● Drafting of Commercial Contracts and Other Documents
3. **Arbitration Agreement/Clauses and related concepts:** Arbitration Agreement ● Scope of Arbitration Clause ● Seat, Venue, Choice of Arbitrator, Language, applicable rules, fees, timelines, qualification of arbitrators, prior mechanisms, ● Choice of Law (Procedural, Substantive and governing law of arbitration agreement) l Post Contract Arbitration agreement ● Arb-Med-Arb clauses
4. **Arbitration Institution:** National & International Institutions ● Bye laws of the Institutions ● Incorporation/ Establishment of Arbitration Centre
5. **Arbitration Procedure:** Invoking Arbitration and Notice to parties ● Finalisation on name of Arbitrators mutually ● Finalisation on name of Arbitrators by court ● Filling of Pleadings ● Fixation of Issues ● Witnesses and Evidence ● Interim reliefs ● Final Arguments ● Award
6. **Appointment of Arbitrator and Other Aspects:** Common methods to appoint a sole arbitrator/ arbitral tribunal: As per arbitration clause by mutual agreement of parties or by approaching the court under section 11 of A&C Act. ● What if parties don't operate as per contract? ● Appointment in case of Institutional Arbitration ● Challenging the Arbitrator's appointment ● Selection and Appointment of Arbitrators from the Point of View of the Parties ● Powers, Duties and Role of Arbitrators ● Grounds for conflict under Arbitration and Conciliation Act, 1996 ● Where to file the petition - Pre and Post 2015-Amendment ● Waiver of rights to object ● Arbitration Tribunal and Jurisdiction Issues ● Kompetenz Kompetenz principle

7. **Pleadings:** Statement of Claim ● Statement of Defense ● Counter Claim

8. **Arbitral Proceedings and Evidence in Arbitration :**

   Part A: Statement of Claim, Defense and Rejoinders: Oral hearings, Documentary Evidence and Written Proceedings ● Drafting of the above important submissions ● Importance of leading evidence ● Affidavit of Admission/Denial by Parties ● Criteria for identification of witnesses - expertise, key personnel, credibility and credential, non-signatories ● Number of witnesses ● Exclusion of oral hearings and fast-track arbitration

   Part B: Evidence by affidavit: What facts need to be led through affidavit ● Drafting of Affidavit ● Case Study on preparation of documents for Arbitral Proceedings

9. **Preparation and Execution of Arbitral Award:** Essential ingredients of an Award ● Domestic v. Foreign Awards ● Drafting of Execution Petition ● Types of Award ● Award of Arbitration and Enforcement of Arbitral Awards ● Drafting of Arbitration Awards ● Case Study on Execution of Domestic Award/Foreign Award

10. **Challenge to Award:** Time period of challenge ● Grounds of challenge ● Power of court to modify the award l Drafting of Petition for setting aside an arbitral award ● Case Study on challenging Awards

11. **Appeals:** Orders against which appeal can be filed ● Appeal against refusal to refer parties to arbitration ● Appeal against interim relief granted by the court ● Appeal against interim award of the tribunal ● Appeal against refusal to set aside an arbitral award ● Case Study on Appeal against Award

12. **Fast Track and virtual Arbitration:** What, Why and How - Fast Track Arbitration ● Required Documents and Drafting ● Steps and Procedure in Virtual Arbitration ● Case Studies Related to Fast Track Arbitration

13. **Arbitration under Investors' Grievances Redressal Mechanism of Stock Exchanges:** Introduction ● Investors' Grievances Redressal Mechanism ● Arbitration Proceedings under the mechanism ● Procedure ● Regulatory Actions ● Surveillance Actions ● Case Studies on Arbitration under Stock Exchange Grievance Redressal Mechanism

14. **Conceptual Framework of International Commercial Arbitration:** Domestic v. International Arbitration – from the A&C Act's purview ● Role of Private International Law in Indian Council of Arbitration ● International Commercial Arbitration ● The role of national courts in the international arbitration process ● The evaluation of international arbitral institutions and their rules ● The drafting of an international arbitration clause and submission agreement ● Consideration of arbitration as a dispute resolution process in the domain of international trade ● International Experience in Online Dispute Resolution: Government Run Online Dispute Resolution (ODR) Platform, Court Run ODR Platform, Private Run ODR Platform ● Procedure adopted by ODR in Brazil, South Korea, Hongkong, China, UK, USA ● Singapore International Arbitration Centre ● International Centre for Settlement of Investment Disputes (ICSID) arbitrations and current issues in international commercial arbitration (e.g. confidentiality and consolidation) ● London Court of International Arbitration

15. **International Law of Arbitration:** Law and practice of international commercial arbitration ● UNCITRAL Arbitration Act/Rules ● CIArb- UK Model rules on International Arbitration ● Model Laws on International Commercial Arbitration ● Asia Pacific Centre for Arbitration & mediation (APCAM) Rules and accreditation system and International Arbitration ● The International Bar Association (IBA) Rules on conflict of Interest ● International Chamber of Commerce (ICC) Rules on International Commercial Arbitration ● New York Convention ● Geneva Convention ● UN Convention on Recognition and Enforcement of Foreign Arbitral Awards ● Case Study on International Commercial Arbitration

16. **Emerging Aspects:** Role of Company Secretaries and Related Provisions ● Arbitration Vs. Insolvency and Bankruptcy Code: A Comparative Study ● Future of Indian Arbitration: Prospects and Challenges ● Online Dispute Resolution ● Important Case Laws and Recent Amendments

17. **Introduction of Conciliation:** Introduction ● Important Definitions ● Nature and Modes of Conciliation ● Law Relating to Conciliation

18. **Conciliation Proceedings:** Process of conciliation ● Procedural Aspects ● Appointment, Roles and Responsibilities ● Drafting terms of settlement under Conciliation ● Settlement Agreement ● Status and effect thereof ● Drafting of Conciliation Clause/Agreement ● Sections 61 to 81 A&C Act ● Case Study on Domestic Conciliation

19. **Conciliation for Micro Small and Medium Enterprises:** Importance of conciliation for MSME ● Conciliation procedure ● Case Study on Conciliation under MSME

20. **International Perspective:** Comparative Study of Conciliation ● International Rules on Conciliation ● Case Study on International Conciliation

Part II : Mediation (30 Marks)

21. **Mediation : An Introduction:** Basics of Mediation ● Socio-Philosophical Roots of Mediation ● Pre litigation Mediation ● Adhoc and Institutional Mediation ● Private and Court Referred Mediation ● Understanding of Conflicts and their resolutions

22. **Negotiation Skills and Communication:** Specific Negotiations ● Importance of Dialogue ● Negotiation Techniques ● Communication in Mediation and Negotiation ● *Interest* v. *Position* (*Iceberg Concept*)

23. **Process of Mediation:** Legal Status of Mediation ● Models of mediation - rights based - interest based - facilitative - evaluative - settlement oriented - therapeutic - transformative and other models ● Theory of mediation ● Process of mediation ● Role Play and assimilation ● Drafting Mediation clause / Agreement

24. **Various Modes and scope of Mediation:** Types of Mediation including Commercial Mediation, Civil and commercial mediation ● Court Annexed and Private Mediation ● Employment mediation ● Online Mediation and use of Artificial Intelligence ● Observational and Reflective Practice ● Stages of Mediation ● Role of a Mediator ● Mediation Clauses in Commercial Agreement ● Overview of Corporate & Commercial Negotiations ● Stages of Mediation ● Mediation checklist ● Initiation ● Mediation Confidentiality and Neutrality ● Mediated settlement agreement

25. **Role of Mediation in other ADR domains:** Arbitration ● Commercial Courts Act ● Conciliation proceedings

26. **Emerging aspects:** Mediation Bill and upcoming Law ● Mediation under various statutes

27. **Rules relating to mediation:** Rules made by High Courts and Supreme Courts ● Practices and Rules of Institutional Mediation ● Case Study on Domestic Mediation

28. **International aspects:** United Nations Convention on International Settlement Agreements Resulting from Mediation ● Singapore Convention on Mediation ● International Negotiations and Diplomacy ● Influence and Importance of Culture ● World Culture *vis a vis* Organizational Culture ● International Rules ● Singapore Mediation settlement agreement ● Case Studies on International Mediation

ARRANGEMENT OF STUDY LESSONS
ARBITRATION, MEDIATION & CONCILIATION
GROUP 2 • ELECTIVE PAPER 7.1

PART I : ARBITRATION & CONCILIATION

Sl. No.	Lesson Title
1.	Arbitration: Introduction, Agreements and its Institutions (Topics 1, 3 & 4)
2.	Commercial Transactions (Topic 2)
3.	Arbitration Procedure, Appointment of an Arbitrator and Other Aspects (Topics 5 & 6)
4.	Arbitral Proceedings, Pleadings and Evidence (Topics 7 & 8)
5.	Preparation and Execution of Arbitral Award (Topic 9)
6.	Challenge to Award and Appeals (Topics 10 & 11)
7.	Emerging Aspects: Fast Track and Virtual Arbitration (Topics 12 & 16)
8.	Arbitration under Investor's Grievances Redressal Mechanism of Stock Exchanges (Topic 13)
9.	Conceptual Framework of International Commercial Arbitration (Topic 14)
10.	International Law of Arbitration (Topic 15)
11.	Introduction to Conciliation and its Importance for MSMEs (Topics 17 & 19)
12.	Conciliation Proceedings and International Perspective of Conciliation (Topics 18 & 20)

PART II : MEDIATION

13.	Mediation: An Introduction and its Process along with Rules (Topic: 21, 23 & 27)
14.	Negotiation Skills and Communication (Topic 22)
15.	Various Modes and Scope of Mediation including Role of Mediation in other ADR Domains (Topics 24 & 25)
16.	International and Emerging Aspects under Mediation Law (Topics 26 & 28)

LESSON WISE SUMMARY
ARBITRATION, MEDIATION & CONCILIATION

PART I : ARBITRATION & CONCILIATION (70 MARKS)

Lesson 1 – Arbitration: Introduction, Agreements and its Institutions

Conflicts between two or more parties can be settled by arbitration outside of the judicial system. Arbitration has its origins in the past, when conflicts between people or organisations were frequently settled by an unbiased third party. This third party may have been a respected member of the community or a religious leader in some cultures. Due to the burden of cases on judicial system, Arbitration has become a popular form of resolving the conflict amongst businesses, consumers, individuals etc. It is commonly utilised in a variety of conflicts, including ones involving labour, construction, and international commerce. One of the main benefits of arbitration is that it is frequently quicker and less expensive than litigation while also giving the parties more freedom and control over how the issue will be resolved. Therefore, it is necessary to study Arbitration, Agreements and its institutions.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to understand:

- History of Arbitration in India
- Structure of Legislation for Arbitration and Conciliation
- General Principle of Arbitration
- Arbitration Agreements
- National and International Institutions for ADRs.

Lesson 2 – Commercial Transactions

In contracts of a commercial nature, arbitration as a method of dispute settlement has shown to be advantageous. Any contract or agreement wherein the rights and obligations are of a civil character may benefit from using arbitration as a dispute resolution method. In addition to being specialists in corporate law, Company Secretaries also have superior knowledge of business principles and contract laws because of the nature of their line of work. One of the prominent reason for the Arbitration proceedings is disputes arisen in the course of commercial transactions. Therefore, students should understand the commercial transactions in detail for becoming a seasoned professional in this area.

It is expected that, at the end of this lesson, students will, inter alia be in a position to:

- Types of Contracts with reference to Commercial Transactions
- Concepts relating to Negotiation and Conciliation
- Damages under Contract Law
- Drafting of Commercial Contract and other documents
- Role of Company Secretary & Arbitration.

Lesson 3 – Arbitration Procedure, Appointment of an Arbitrator and Other Aspects

Arbitral process means the procedures and steps involved in resolution of a dispute through arbitration. The selection of arbitrators, who are impartial during the process is also a crucial step in the arbitration process. For any arbitration process, the parties are free to select any arbitrator(s) they like. The objectivity or independence of Arbitrator is of utmost importance.

Further, the decision of Arbitral tribunal is known as Arbitral award. A variety of measures, including monetary compensation, consent, injunctions, and other kinds of relief, may be granted to the parties by the judgment. The award may be interim, partial, or final depending on the disagreement.

Therefore, it is necessary to study the concept relating to process to be followed during arbitration, appointment of impartial arbitrator along with its challenges, Awards etc.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to understand:

- Invocation of Arbitration
- Appointment of Arbitrators
- Process of Arbitration
- Awards
- Powers, Duties and Role of Arbitrators.

Lesson 4 – Arbitral Proceedings, Pleadings and Evidence

After the initiation of an arbitration reference, the parties are required to submit their claims to the Arbitral Tribunal. The tribunal is entrusted with the task of finding the facts. To aid the process, the parties submit their claims and defences to the tribunal which are generally called as pleadings. To further the process and decide on the question of the claim and defence, Evidences are to be produced to the tribunal. Evidence disclosure might bring to light the parties' different legal cultures, which in turn shapes their expectations of what they must reveal. Any tribunal, including courts, arbitrations, and adjudications, must follow the "Rules of Evidence" while making decisions. In order to substantiate the work assigned to the Arbitrators, it is necessary to study the Proceedings of Arbitration including Pleadings and Appearances.

It is expected that, at the end of this lesson, students will, inter alia be in a position to understand:

- Statement of Claims and Defense
- Written Proceedings
- Presentation of Evidences
- Witnesses
- Evidence by Affidavits.

Lesson 5 – Preparation and Execution of Arbitral Award

Award is the decision of Arbitral Tribunal on a matter submitted to them by the Parties. The Tribunal prepares and passes the Arbitral Award. While passing an award, the tribunal should ensure to make it as exclusive as possible. There should not be any lacuna which may hinder and impact the execution of the Awards. Without execution, there is no point obtaining an award of the tribunal. Therefore, a professional working in the area of Arbitration must be conversant with the process of execution.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to understand:

- Essential ingredients of an Award
- Type of Awards
- Drafting of Arbitral Award
- Preparation of Execution Petition
- Enforcement of Domestic and International Awards.

Lesson 6 – Challenge to Award and Appeals

There are a few reasons that can be used to overturn an award, and they mostly have to do with the arbitration process and natural justice norms. A person who is the subject of a domestic Award must file an application with the Court pursuant to Section 34 of the Act as soon as possible to contest the decision. If not, the Award might be carried out as a decree by the person in whose favour it was made. On the other side, a person who has had a foreign Award issued against him is ineligible to contest it in India. Further, an appeal can also be filed from the certain orders such as refusing to refer the parties to arbitration, granting or refusing to grant any measure, setting aside or refusing to set aside an arbitral award etc.

Therefore, the objective of this lesson is to *inter alia* introduce the students regarding:

- Grounds of challenge of Arbitral Award
- Orders against which an appeal can be filed
- Drafting of Petition for setting aside an arbitral award
- Time Period of Challenge.

Lesson 7 – Emerging Aspects: Fast Track and Virtual Arbitration

The lengthy procedure and amount of time required to arrive at a conclusion or award is one of the key challenges in pursuing dispute resolution through any technique. Arbitration is a creative and adaptable process that can speed up the resolution of conflicts. In this scenario, Fast track arbitration can be very beneficial in resolving disputes quickly and efficiently. It is especially helpful in commercial contexts where parties may need to quickly resolve conflicts in order to prevent any serious financial or reputational harm.

Further, due to the technology advancement, professionals are also expected to resort to remote hearings for various reasons such as cost saving, time saving and accessibility. Therefore, a professional should know the intricacies of Fast Track and Virtual Arbitration Processes.

It is expected that, at the end of this lesson, students will, inter alia be in a position to:

- What, Why and How - Fast Track Arbitration
- Steps and Procedure in Virtual Arbitration
- Role of Company Secretaries in Arbitration
- Future of Indian Arbitration: Prospects and Challenges
- Online Dispute Resolution.

Lesson 8 – Arbitration under Investor's Grievances Redressal Mechanism of Stock Exchanges

An essential instrument for defending the rights of investors in the securities market is the Investor's Grievance Redressal Mechanism. This method is thought to be more expedient, affordable, and informal than typical court litigation. Investors have the option to register complaints under a number of different headings, such

as non-settlement of deals, failure to deliver securities, unfair and dishonest business practises, and breaches of stock exchange rules. All stock exchanges are required by SEBI to establish a "IGRC" (Investor Grievance Redressal Committee). In order to cater the services under securities market, a professional should understand the mechanism provided for Arbitration under Investor's Grievances Redressed Mechanism.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to:

- Investor's Grievance Redressal Mechanism (IGRM)
- Investor Grievances Redressal Committee (IGRC)
- Arbitration Process at Stock Exchanges
- Surveillance actions.

Lesson 9 – Conceptual Framework of International Commercial Arbitration

International arbitration is a form of dispute resolution in which at least one of the parties is a foreign individual, a foreign corporation with foreign incorporation, a foreign association or group of people with foreign central management and control, or a foreign government. International commercial arbitration is an alternative dispute resolution process that enables private parties to avoid litigation in national courts. It is used to settle disputes arising out of international business transactions. The area of Arbitration has not only spread domestically but also across boundaries. Therefore, understanding the framework of International Commercial Arbitration can give a professional competitive edge over the other.

The objective of the lesson is to *inter alia* introduce the students regarding:

- International Arbitral Institutions
- Domestic Arbitration vs. International Arbitration
- National courts in the international arbitration process
- Government Run Online Dispute Resolution (ODR) Platform
- ODR in China, UK, USA etc.
- London Court of International Arbitration.

Lesson 10 – International Law of Arbitration

The Arbitration is resorted to for many disputes which arise between the international parties. Therefore, it becomes pertinent for a professional to understand international laws and rules dealing with Arbitration. The International law of Arbitration involves both civil and common law procedure which help parties to reconstruct their procedure of arbitration so that their dispute to the contract can be resolved.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to understand:

- Law and practice of International Commercial Arbitration
- Asia Pacific Centre for Arbitration & mediation (APCAM) Rules
- International Chamber of Commerce (ICC) Rules
- Foreign Arbitral Awards
- UN Conventions on Enforcement of Foreign Arbitral Awards.

Lesson 11 – Introduction to Conciliation and its Importance for MSMEs

Due to the rising load on civil courts, numerous laws mandate that parties in a dispute first seek to settle their differences through conciliation before bringing their case to arbitration or the civil courts. This reduces the workload of the civil courts and saves time simultaneously. The Micro, Small, and Medium-Sized Enterprises (MSMEs) sector is one of the most crucial sectors for India's economic growth, particularly in light of the challenging conditions caused by the COVID-19 pandemic, which prompted the Central Government to implement specific financial stimulus programmes for this sector. Therefore, a professional can work as a conciliator under MSMED Act, 2006.

The objective of the lesson is to *inter alia* introduce the students regarding:

- Law relating to conciliation
- Nature & Mode of Conciliation
- Conciliation Proceedings
- Importance of Conciliation for MSMEs.

Lesson 12 – Conciliation Proceedings and International Perspective of Conciliation

Conciliation is becoming more popular as a conflict resolution technique as it may be a good substitute for arbitration. Conciliation can be seen as an effective form of dispute resolution since it is swift, economical, and values joint decision-making. With the guidance of a conciliator, the parties to a disagreement identify the problems and make an effort to come to an amicable resolution through the process of conciliation. To work in this area, a professional should understand the procedure of conciliation and opportunities available internationally.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to understand:

- The process of Conciliation Proceedings
- Drafting of Conciliation Clause/Agreement
- Drafting terms of Settlement under Conciliation
- International Rules on Conciliation.

PART II : MEDIATION (30 MARKS)

Lesson 13 – Mediation: An Introduction and its Process along with Rules

Mediation is a process of resolving disputes or conflicts between two or more parties through the assistance of a neutral third party, often denoted to as a mediator. The mediator helps the parties communicate and negotiate in order to support them to reach a resolution that is acceptable to both sides. Finding a resolution that pleases everyone concerned while avoiding the necessity for expensive and time-consuming legal actions is the aim of mediation.

The Indian judicial system has also made a considerable contribution to the promotion and encouragement of mediation as a means of resolving disputes.

It is expected that, at the end of this lesson, students will, inter alia be in a position to:

- Basics of Mediation
- Process of mediation

- Pre litigation Mediation
- Private Mediation vs. Court Ordered Mediation
- Adhoc Mediation and Institutional Mediation
- Understanding of Conflicts and their resolutions
- Negotiation in Mediation.

Lesson 14 – Negotiation Skills and Communication

The goal of negotiation is to defend the interests of the parties through compromise. This is in contrast to the approach taken by the judiciary, which seeks to defend an individual's right by upholding it or requiring restitution for it. The safeguarding of the parties' relationship is the main focus of negotiation. Without excellent communication, mediation or negotiation cannot be successful. Transferring information is the goal of communication during negotiations. The manner in which the parties act throughout the negotiation will influence the styles and methods that the negotiators choose to obtain a resolution. Therefore, understanding the topics of this lesson is necessary for the professionals inclined towards working as a Mediator.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to:

- Specific Negotiations
- Negotiation Techniques and Styles
- Communication in Mediation and Negotiation
- Interest v. Position (Iceberg Concept).

Lesson 15 – Various Modes and Scope of Mediation including Role of Mediation in other ADR Domains

Mediation before approaching the courts by way of civil and commercial litigation is important as it helps the parties to negotiate with one another to reach a jointly advantageous resolution. In the legal system, this type of alternative dispute resolution is frequently utilised to settle conflicts between two or more parties that has real-world consequences. The mediator's job is to break down barriers through communication, help with issue identification, alternative exploration, and facilitation of mutually agreeable agreements to settle the disagreement. However, the parties alone have the authority to decide. A professional company secretary can aid parties to resolve the disputes outside the court.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to:

- Mediation in Civil and Commercial Litigation
- Court Annexed and Private Mediation
- Online Mediation and use of Artificial Intelligence
- Role of Mediators
- Overview: Corporate and Commercial Negotiations
- Role of Mediation in other ADR domains
- Mediation Confidentiality and Neutrality.

Lesson 16 – International and Emerging Aspects under Mediation Law

Mediation is a casual and relaxed process that involves in it discussions and deliberations between the parties. The process offers with an opportunity to explore various possible outcomes by the parties with the aid and assistance of a mediator, who acts as a neutral impartial third person. It is common knowledge that the Indian justice system is largely adversarial. Yet, judicial and quasi-judicial forums continue to grapple with systemic inadequacies and rising case pendency. To resolve this, the government has taken several measures including promotion and development of alternate means of dispute resolution. Mediation across boundaries is also becoming a new area of professional services. Therefore, understanding the Emerging and International aspects can enhance the knowledge of a professional and can enlarge an area which is still unexplored.

It is expected that, at the end of this lesson, students will, *inter alia* be in a position to:

- Upcoming Mediation Law
- Mediation under various statutes
- Singapore Convention on Mediation
- International Rules
- Singapore Mediation settlement agreement.

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PART I : ARBITRATION & CONCILIATION

LESSON 1

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PART I

ARBITRATION & CONCILIATION

Arbitration: Introduction, Agreements and its Institutions

Lesson 1

KEY CONCEPTS

■ Arbitration Agreements ■ Alternate Dispute Resolution (ADR) ■ Protocols and Conventions ■ Recognitions and Enforcements ■ Model Law ■ Supplementary Provisions ■ Modes of ADRs ■ Advantages of ADRs ■ Ad hoc Arbitration ■ Institutional Arbitration ■ Fast Track Arbitration

Learning Objectives

To understand:

- Genesis of Alternate Dispute Resolution (ADR)
- Arbitration and Conciliation Act
- Difference between various ADR Methods
- Benefits of ADR Mechanism
- Nature of ADR system
- Laws effecting the system of ADRs
- Arbitration Agreement/ Clauses
- Essentials elements to understand the process of ADRs
- National and International Institutions
- Bye Laws of Institutions for ADRs
- Establishment of Arbitration Centre

Lesson Outline

- History of Arbitration in India
- Adoption of model law in India
- Structure of Arbitration & Conciliation Act (A & C act)
- Amendments made to Arbitration and Conciliation Act, 1996
- Modes of Dispute Resolutions
- Selecting the appropriate method
- How is arbitration different from other modes of dispute resolutions
- Features and advantages of Arbitration
- Arbitration Agreement
- How to draft an effective Arbitration Agreement?
- Essential elements of an Arbitration Agreement

- Arb-Med-Arb Clause: connecting the dots between Arbitration and Mediation
- Key elements of an Arbitration Proceeding
- Types of Arbitration
- Pertinent statutes to the Arbitration Process
- Laws applicable in an Arbitration
- Seat of Arbitration
- Language of Arbitration Proceedings
- Qualifications of the Arbitrators
- Arbitration Institutions
- Bye laws of the Institutions
- Incorporation/ establishment of Arbitration Centre
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Code of Civil Procedure, 1908
- Foreign Awards (Recognition and Enforcement) Act, 1961
- Arbitration and Conciliation (Amendment Act), 2021

HISTORY OF ARBITRATION IN INDIA

Introduction

It has been noted that misunderstanding and conflict commonly arise whenever two people get together for the purpose of transaction or business. Such misunderstanding & conflict needs resolution, which should be quick and effective. Apart from litigation, there are other alternative methods of dispute resolution which are quick and effective in nature. Arbitration is one such method.

Fundamentally arbitration is a dispute resolution mechanism through which the parties to the dispute sort out their dispute through a third person called the arbitrator. The origin of Arbitration can be traced back to the reign of King Solomon, who used the biblical theory to settle disputes between two mothers where each one was claiming the right on the baby boy and the issue was who the true mother of a baby boy was.

Subsequently, all rulers used arbitration to resolve commercial and territorial disputes. For India, Arbitration is not a new concept; it has been in use since the Vedic times. The law for Arbitration has been continuously evolving and developing throughout our country's history. During the industrial Revolution there was rapid growth in worldwide business and commerce. To keep up with the rapid economic growth and in order to avoid drawn out litigation, arbitration is seen as the preferred dispute resolution mechanism. Presently, the judicial system is still struggling with the high pendency of on-going cases because of which a speedy redressal has become a dream for litigants, who fears the litigation because of the delay in resolution of issue.

As arbitration process promises a speedy remedy to the parties, it is considered as one of the most efficient dispute resolution method. However, arbitration has its own shortcomings. These drawbacks of the arbitration

process are corrected time and again in order to develop a smooth and efficiently functioning process. Whenever laws relating to arbitration are enacted, some loopholes are noticed, which led to the enactment of the present Arbitration and Conciliation Act, 1996 which is based on the UNCITRAL model. This act has further been amended in 2003, 2015, 2019 and 2021.

Evolution and Development of Law of Arbitration in India

Laws of Arbitration in Ancient Times [1]

1) Arbitration under Hindu Law

For India, Arbitration is not a new concept; it has been in use since the Vedic times, the proof of which can be found in various Upanishads. The first treatise that talked about the common use of arbitration in the Vedic era was Brhadaranayaka Upanishad, which was written by sage Yajnavalkya. It also mentioned three distinct arbitral bodies, namely:

a) A group of person, who belonged to different tribes and sects but they used to live together in the same locality, this group of persons were called The Puga.

b) A council of artisans and tradesman who belonged to different tribes and sects but were connected to each by being in the same profession, this group of persons were called the Sreni.

c) A group of people who are members of one family and are bound by family ties, this group is called The Kula Collectively, these bodies were known as "panchayats" and the members of these panchayats were called as the "Panchas". These panchayats conducted proceedings which were informal in nature and didn't have any complex technicalities like a municipal court. The orders and decisions given by these panchayats were final and binding on both the parties. However, a party aggrieved with the decision of the kula can appeal to the sreni and it can appeal to the puga where the party is aggrieved with the decision of the sreni. Where the party is not satisfied even by the decision of the puga, it can put an appeal to the Pradvivaca. Even though these panchayats were non-governmental, the municipal courts were capable to review their decisions. These panchayats used to deal with various kinds of disputes, such as matrimonial and contractual disputes and sometimes even disputes of criminal nature. The King used to act as the ultimate arbiter of all the disputes. However, with the changing times, the social, cultural and economic environment of the country also changed which made the functioning of such arbitral bodies outmoded and inadequate in some form or the other, but in spite of this these arbitral bodies are still prevalent in rural India.

2) Muslim Law

Imam Abu Hanifa along with his disciples Abu Yusuf and Imam Mohammad systematically compiled the Muslim law in the commentary, which came be known as the Hedaya. At that time all the Muslims in India were governed by the Islamic laws contained in the Hedaya. [2]The Hedaya among other things also laid down the provision for arbitration. In Arabic language the word used for arbitration is "Tahkeem" and the word "Hakam" is used to describe an arbitrator. In Muslim law an arbitrator was required to have the essential qualities of a Kazee- an official judge presiding over a court of law. Where both the parties to the dispute are Muslim, the entire arbitral process is governed by shariah law both substantively and procedurally.

However, where only one party is Muslim, the non-Muslim party can decide whether or not to follow the shariah laws in settling the dispute. As per shariah law, an award made under any other law will be considered as a foreign award, even if it fulfils most of the conditions of the shariah law. Such awards

1. International Journal of Law Management & Humanities Vol 4 issue 2

2. O.P. Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexis Nexis-ButterworthsPublication: New Delhi 2002) p- 5- 7

would be enforceable by the courts, although the courts don't have the powers to review the reasoning of the arbitrator or the merits of the dispute. However, the court does have the power to examine the formal conditions such as the validity and the existence of the arbitration agreement, whether the award deals with all the merits of the case and whether the award has been made by all the arbitrators.

3) Laws During British Rule

The East India Company between the years 1772 and 1827 gave a legislative structure to the law of arbitration in India, by enacting new rules and regulations in the three presidency towns namely Bombay, Calcutta and Madras. These rules and regulations did lacked uniformity and clarity in details; however they brought a significant change in the prevailing panchayat system. The Bengal Regulations of 1787, 1793, and 1795 brought significant changes in the procedure by enabling the courts to refer cases, with the consent of both parties to arbitration and they further empowered the courts refer cases whose value was less than ₹ 200 to arbitration and also disputes relating to debts, disputed bargains, partnership account and breach of contract. These provisions laid down the procedure for conducting arbitration.

The Bengal Regulation of 1802, 1814 and 1883 extended the limits of jurisdiction of arbitration by making procedural changes. Furthermore, the Regulation of 1816 authorised the district munsifs in the Presidency town of Madras, to hold Panchayats for sale disputes in connection with real estate and personal property. The Regulation VII of 1827 provided for settlement of civil disputes in the Presidency town of Bombay. These provisions remained in force until 1862 that is until the Civil Procedure Code 1859, was extended to the Presidency towns as well.

The Code of Civil Procedure Act 1859:

After the legislative council was established for India in 1834, it enacted the Code of Civil Procedure Act 1859. The aim for enacting such act was to codify the procedures that the civil courts would follow. Arbitration in suits was given under sections 312 to 325 of the code and sections 326 and 327 talked about arbitration without court intervention. However at that time this code was not in force in the presidency towns like Calcutta, Bombay and Madras. Therefore the aforementioned provisions were not in force in presidency towns until the code came into force in these towns in 1862. The Code of Civil Procedure Act 1859 was repealed by the Code of Civil Procedure Act 1877, which itself was later revised in 1882. However, the provisions relating to arbitration were reproduced in sections 506 to 526 of the new Act.

Indian Arbitration Act 1899:

The Indian Arbitration Act was enacted by the legislative council in the year 1899. This act was the first substantive piece of legislation which talked about arbitration in India. However, it was only applicable in the presidency towns like Calcutta, Bombay and Madras. This act broadened the scope of arbitration, as it defined the term 'submission' to mean 'a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not'. Before this, the term 'submission' was only limited to 'subsisting disputes'.

Therefore, before enactment of this act, a contract to refer disputed matters to arbitration came under 3 statutes, namely,

(a) the Code of Civil Procedure;

(b) the Indian Contract Act; and

(c) the Specific Relief Act.

Furthermore, under the Contract Act and the Specific Relief Act, a contract about referring existing or future disputes to arbitration, could not be specifically enforced.

Therefore, the law of arbitration was not satisfactory. In the case of *Dinkarrai vs. Yeshwantrai*[3], the Bombay High Court observed that the Indian Arbitration Act was unnecessarily complex, and the legislature must bring in reforms to restore its relevance.

The Schedules to the Code of Civil Procedure, 1908

The Code of Civil Procedure 1882 was repealed by the new Code of Civil Procedure 1908. In this new code the provisions relating to arbitration were included in the second schedule. The provisions relating to the law of arbitration which extended to other parts of the country was contained in the first schedule of the code, on the other hand the second schedule talked about arbitration outside the scope and operation of the 1899 Act. The second schedule mostly related to arbitration in suits while briefly providing arbitration without intervention of a court.

Arbitration (Protocol and Convention) Act, 1937

The main aim of the Arbitration (Protocol and Convention) Act, 1937 was to give effect to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 and Geneva Protocol on Arbitration Clauses 1923 and. Only those matters that were considered 'commercial' under the law in force in India came under the purview of this Act [4]. This act was mainly concerned with the procedure for filing 'foreign awards', enforcement of such foreign awards and the conditions that needed to be fulfilled for such enforcement and the operation of this act was based on reciprocal arrangements. The provisions of this act were later amended and consolidated in the Arbitration and Conciliation Act of 1996.

The Arbitration Act of 1940

The judicial rebuke and the hue and cry made by of the commercial community led to the enactment of a consolidating and amending legislation i.e. The Arbitration Act of 1940. This Act appeared to be a comprehensive and self-contained Code. Its provisions are summed up as follows:

1) The act made provisions for
   (a) arbitration with court-intervention, in cases where no suit was pending before the court;
   (b) arbitration without court-intervention; and
   (c) arbitration in suits i.e., arbitration with court-intervention in pending suits.

   Further provisions were made for all 3 types of arbitration.
2) The act interpreted the term 'written agreement' as a written agreement to send the present and future disputes to arbitration, whether or not an arbitrator is present or not.
3) The act also introduced deeming provisions in order to include the provisions under the First Schedule.
4) This act came up with the provision to protect the arbitration agreement from being vitiated because of the presence of some lacuna.
5) The courts were empowered by the act to remove an arbitrator and the umpire and to get a substitute for them in order to ensure that arbitration should not fail by reason of misconduct or want of diligence.
6) The act empowered the courts to deal with the awards judicially after they had been filed before it. This enabled the courts to pass judgments, with the discretion to modify, remit or set aside the award.
7) General provisions were made by the act that the courts should approve the arbitral awards by a judgement as to the validity, existence and effect of the awards or of 'arbitration agreement' between

3. AIR 1930 Bom 98

4. O.P.Malhotra, 'The law and practice of Arbitration and Conciliation', 1st edn, (Lexis Nexis-Butterworths Publication: New Delhi 2002) p-10

the parties. The legislature's intention behind enacting these provisions, was to make only one court where all matters connected with the "arbitration-agreement" or "award" can be filed.

Drawbacks of the Arbitration Act of 1940 After the country got its independence in 1947, the trade and industry received a great boost and industrial and commercial community started to favour settlements of disputes through arbitration. This increased the emphasis on proceedings of arbitration which exposed the shortcomings and infirmities in the Arbitration Act, 1940. These shortcomings were as follows:

The provisions regarding the power and duties of the arbitrators were inadequate. The act didn't say anything about the shortcomings in private contracts between individuals. The rules and procedure for filings awards was different for every High Court. There was a lack of provisions that prohibited an arbitrator or umpire from resigning at any time in the course of the proceedings, which resulted in parties incurring heavy losses in situations where the arbitrators or umpire acted mala fide. The act also failed to make distinction between the 'agreement' made in advance to submit future differences and a 'submission' made after a dispute had arisen[5]. In the case of *Guru Nanak Foundation v Rattan Singh and Sons*[6], the Supreme Court held that under the Arbitration Act of 1940, the proceedings have become highly technical, also because of its unending prolixity at every step; it can lead to a legal trap to the unwary.

The Foreign Awards (Recognition and Enforcement) Act, 1961

Many considered the New York Convention of 1958 as one of the most effective instance of International legislation in the entire history of commercial law'. India was a signatory of the said convention and the main aim of the Foreign Awards (Recognition and Enforcement) Act, 1961, was to give effect to the New York convention. The Supreme Court of India in the landmark case of *Renusagar Power Co Ltd v General Electric*[7] held that the main object of the aforementioned act was to promote and encourage international trade by making speedy settlement of disputes arising in trade possible through arbitration.

The United Nations Commission on International Trade Law (UNCITRAL); Model Law In 1966, the United Nations General Assembly established United Nations Commission on International Trade Law with the aim to promote the International trade law in order to promote the International trade. The UNCITRAL is regarded as the core legal body in the UN, which helps in avoiding duplication of efforts and to promote consistency, efficiency and coherence in the harmonisation of trade law. Travaux Preparatories – The UNCITRAL, in the year 1982 adopted a set of guidelines which helped in assisting institutions with regard to arbitration under the UNCITRAL Arbitration Rules 1976, with the aim of assisting the countries who had adopted these Rules or a modified version of them.

MODEL LAW

The Model Law on International Commercial Arbitration was a result of the guidelines provided in the Travaux Preparatories. It was designed for the use in all legal and geographical regions. The United Nations Commission International Trade Law (UNCITRAL), on 21 June 1985, adopted the full context of this Model Law on International Commercial Arbitration. The United Nation General Assembly recommended to all the countries across the globe to enact modern arbitration legislation based on the Model Law. This had a major influence on the Indian law and therefore these guidelines were codified in the Arbitration and Conciliation Act 1996.

5. Tractor export v Tarapore Co AIR 1971 SC 1,11

6. 1 AIR 1981 SC 2075- 76

7. AIR 1985 SC 1156.

Adoption of Model Law in India

The Model law, with the exception of a few provisions, was adopted in its entirety in India, in the form of the Arbitration and Conciliation Act 1996.

The following provisions were adopted by the act:

a) The form and definition of arbitration agreement

b) The duty of the courts to refer the parties to arbitration where a suit is brought before the court in breach of the arbitration agreement

c) The power of courts and tribunals to provide interim measures of protection in support of an arbitration agreement

d) The composition of the arbitral tribunal

e) Appointing arbitrators

f) Grounds to challenge an arbitrator

g) The termination of the mandate of an arbitrator because of his failure to act

h) Provisions for substitution of an arbitration when his mandate is terminated

i) The procedure for arbitration

j) The Enforceability of arbitral awards and appeal against them.

ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act contained the laws relating to Arbitration in India. The act is not exhaustive and is of consolidating and amending nature. The Arbitration and Conciliation Act, provides rules and regulations for both Domestic and International commercial arbitration and also enforcement of foreign arbitral awards. It also provides new rules and regulations regarding conciliation. This act proceeds on the basis of the UN Model Law, so as to make laws relating to arbitration in India accord with the laws adopted by the United Nations Commission on International Trade Law (UNCITRAL).

STRUCTURE OF ARBITRATION & CONCILIATION ACT (A&C ACT)

Globalization and liberalisation of the Indian economy had created the ecosystem for foreign investments to come into India after the year 1991. The investors, however, before investing in India were looking for a vibrant and steady alternate dispute resolution mechanism to be available to get disputes relating to their investments in India adjudicated quickly and at a lesser cost.

However, the then prevalent alternate dispute resolution mechanism being the provisions of the Arbitration Act, 1940 was not commensurate to the expectations of the investors, who wanted a more settled and vibrant alternate dispute resolution statute in India. India, based on the UNCITRAL Model Law on International Commercial Arbitration 1985 thereafter passed the Arbitration and Conciliation Act, 1996 to make its law contemporaneous to the worldwide existent position as far as arbitration is concerned.

The Arbitration and Conciliation Act, 1996 accordingly came in force on 22.08.1996. The said Act of 1996 was based on the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Conciliation Rules, 1980.

The key objectives of the Arbitration and Conciliation Act, 1996 were:

a. Minimisation of supervisory role of courts

b. Providing speedy disposal of the disputes.

c. Amicable, swift and cost-efficient settlement of disputes.

d. Resolving the dispute by a formal award.

e. Ensuring that arbitration proceedings are just, fair and effective.

f. Comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation.

g. Permit an arbitrator to use mediation, conciliation or other procedure during the arbitral proceedings to encourage settlement of disputes.

h. Provide that every arbitral award is enforced in the same manner as if it were a decree of the court.

Arbitration is a quasi-judicial proceeding, wherein the parties in dispute appoint an arbitrator by agreement to adjudicate the said dispute and to that extent differs from court proceedings. The power and functions of arbitral tribunal are statutorily regulated. Arbitration is accordingly essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal.

The Arbitration and Conciliation Act, 1996 is divided into four parts:

a) Part I which is titled “Arbitration”;

b) Part II which is titled “Enforcement of Certain Foreign Awards”;

c) Part III which is titled “Conciliation”; and

d) Part IV being “Supplementary Provisions”.

Apart from these Parts, there are Seven Schedules provided to the Act of 1996.

AMENDMENTS MADE TO ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996 was first amended in the year 2003. Later in the year 2014-15, the 246th Law Commission Report recommended further changes to the act and thus the act was again amended in the year 2015.

The 2015 Amendment was a boon for the parties who had succeeded in their dispute before the arbitral tribunal, as in the un-amended version of the act if an arbitral award was challenged before the court, even on issuance of notice by the court it would as good as a stay, but because of the amendment a specific stay has to be granted. This amendment also sought to narrow down the interpretation of the term “Public Policy of India” and the intent behind this was to give importance to the award of the arbitral tribunal and grant finality to the same. This amendment also tried to make the whole process speedier by setting a period of 90 days within which the arbitration proceedings have to be started by the party obtaining any interim order from the court. Interference of courts in arbitration proceedings were also restricted by this amendment. Also it prohibited the courts from entertaining any application in a matter where arbitration proceedings had already commenced. It was also confirmed by this amendment that when an arbitral tribunal passes any interim orders, they are to be enforced effectively, as prior to this amendment these interim orders were not enforced effectively as the provisions of Civil Procedure Code were not made specifically applicable to them.

In 2017, a committee was formed; the chairman of this committee was justice Srikrishna. This committee

recommended further changes to the act and to give impetus to institutional arbitration, this resulted in the Arbitration and Conciliation Act (Amendment), Act, 2019.

Following amendments were made by the 2019 amendment act:

1) Section 2(ca) was added in the act which gives a definition of an 'arbitral institution' i.e. an institution designated by the Supreme Court or a High Court under the Act.

2) The amendment empowered the Supreme Court and the High Court to designate arbitral institutions for the purpose of appointment of arbitrators. Also these institutions would be graded by the Arbitration Council of India. In cases where such graded institutions are not available, the chief justice of High Court will maintain a panel of arbitrators for the purpose of performing the functions of such institutions.

3) This amendment has also introduced the Arbitration Council of India, which will be set up by the central government and will have a Chairperson who is a judge of the Supreme Court or Chief Justice of The High Court or an eminent person who has specialised knowledge about arbitration proceedings. The main purpose of the council is to encourage and promote Alternative dispute resolution mechanisms by framing policies and guidelines for the operations and maintenance of professional standards in matters relating to arbitration

4) The act was also amended to state that the process of pleadings (statement of claims and defence) must be completed within a period of 6 months from the date of appointment of the arbitrator. Also awards must be made by the tribunals within a period of 12 months from the date of completion of pleadings.

5) The amendment also provided some qualifications and pre-requisites which a person must have in order to qualify as an arbitrator. Further, the amendment also prescribed some general norms which are to be followed by the arbitrator.

After analysing all the facts and circumstances, it can certainly be stated that in India the law of arbitration is still in development stage. The law of arbitration in India is still growing and the summit is yet to be touched by this branch of law. No doubt that Indian Government has taken various significant steps to make the law for arbitration more efficient. Slowly but steadily India is establishing itself as an arbitration friendly country. There have been several amendments in the law for arbitration, which intends to make the law better and more efficient so that it becomes most preferred platform for quick resolution of disputes.

RECENT AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996 has been amended in the years 2015 and 2019, to enable making arbitration proceedings in India to be time bound, efficacious and amenable to further litigation only on limited grounds.

The significant amendments include: –

- Grounds for challenge to arbitrators have been detailed out and specified as per prevalent international standards to uphold independence and impartiality of arbitrators.
- Statutory framework provided for time bound completion of arbitration proceedings.
- Interim orders that can be passed by the courts or arbitral tribunals, as the case may be, relating to arbitral proceedings have been detailed out to enable protection of the value of the subject matter of dispute during the pendency of the arbitration proceedings.
- The grounds for challenge to arbitral awards clarified to convey that the scope of challenge is intended to be limited. This would enable finality to arbitral awards.

- The provision of automatic stay on the enforcement of arbitral awards, as soon an application for setting aside an arbitral award is filed has been done away with and a provision included that a stay on the enforcement of an arbitral award may be granted upon imposition of conditions including deposit in case of monetary awards.
- Proposed notification of the establishment of Arbitration Council of India (ACI) for grading of arbitral institutes in the country.

THE ARBITRATION AND CONCILIATION (AMENDMENT ACT), 2021 ("2021 AMENDMENT")

The Arbitration and Conciliation (Amendment Act), 2021 ("2021 Amendment") is the most recent amendment. The 2021 Amendment, which was passed into law on 10th March 2021 follows the Arbitration and Conciliation (Amendment) Ordinance, 2020 promulgated by the President of India in November 2020.[8]

It should be noted that the changes brought about by the 2021 Amendment to Section 36 of the 1996 Act dealing with the "enforcement" of an arbitral award is widely discussed. The authors contend that the 2021 Amendment represents a retrogression in the pro-arbitration regime sought to be fostered in India.

Firstly, the 2021 Amendment alters the scheme of the 1996 Act by creating new hurdles to the enforcement of arbitral awards. Secondly, by limiting the discretion of courts to tailor relief to the attendant circumstances, the 2021 Amendment has undone the enforcement-friendly changes to the 1996 Act. Lastly, the introduction of ill-defined standards for enforcing arbitral awards (a) throws a spanner in the wheel of enforcement and (b) creates grounds to resist enforcement which are divorced from the grounds that are available to challenge an award. Viewed in this light, the 2021 Amendment has the potential to distort the arbitration framework in India, negatively impacting the rights of award-holders.

Nullifies the 2015 Amendment

Even within the realm of Section 36 proceedings, the 2021 Amendment could cause substantial mischief.

One of the major reasons for bringing in the 2015 Amendment was the observation of the Supreme Court in National Aluminium Company, that the automatic stay jurisprudence left "no discretion in the court to put the parties on terms" which defeated "the very objective of the alternate dispute resolution system". This grievance found succour with the 246th Law Commission Report as well, which recognised the paralytic effect of the same and recommended changing the law.

The legislative antidote to allay such concerns was to confer upon the Court powers to deal with enforcement claims akin to those conferred upon civil courts under Order 41 Rule 5 of the Civil Procedure Code, 1908 ("CPC") (See Proviso to Section 36 of the 1996 Act inserted by the 2015 Amendment). The exercise of such powers to stay enforcement of an award under the CPC is well-established and requires illustration that "substantial loss may result to the party applying for stay of execution unless the order is made" (See Order 41, Rule 5(3)(a), CPC).

With the 2021 Amendment Act, the illustration of a *prima facie* case would entitle the party to procure an "unconditional" stay, thereby obliterating any discretion to balance the competing equities which would doubtless vary from case to case in staying the enforcement of an arbitral award. In this respect, the 2021 Amendment re-introduces the stultification of judicial discretion resulting in 'paper awards', which led to the 2015 Amendment in the first place.

Further, the 2021 Amendment includes grounds such as 'fraud' and 'corruption' which are not explicitly contemplated under the CPC for staying a decree. These additional grounds now relate exclusively to arbitral proceedings, suggesting a fundamental distrust in the arbitral process, thereby creating inexplicable

8. Kluwer Arbitration Blog- Ashish Dholakia and Ketan Gaur, Kaustub Narendran /May 23, 2021

discrimination between civil proceedings and arbitral proceedings. Such discrimination has already by decried by the Supreme Court in the HCC Case where the Court observed:

"[...] The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full-blown appeals, and not being applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of arbitral awards, is itself a circumstance which militates against the enactment of Section 87 [...]." (Para 50).

AMENDMENT ON THE QUALIFICATIONS OF ARBITRATORS

Arbitration and Conciliation Amendment Act 2019, inserted Part 1A under the Act, which stipulated for the constitution of Arbitration Council of India (ACI). Section 43J thereunder introduced the Eighth Schedule into the Act. The Schedule became subject to wide criticism on the grounds of departure from the principles of party autonomy. It enlisted the qualifications and experience for being appointed as an arbitrator. The prescribed qualifications were not only restrictive but also unjustly prohibitive of the appointment of foreign arbitrators. It was argued that this untoward approach towards foreign arbitrators goes against the very spirit of arbitration and earns a bad reputation for India as the seat of international arbitration. Notably, these amendments have not been notified as the Arbitration Council of India (ACI) is yet to be established.

The 2021 Amendment has addressed this concern by effectively doing away with the Eighth Schedule in one full sweep. The Eighth Schedule now stands omitted and Section 43J states that the qualifications, experience, and norms for accreditation of arbitrators shall be such as may be specified by the regulations. The position of the section indicates that the "Regulations" will be framed by the ACI. The Statement of Object and Reasons under the amendment states that this step is being taken "to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country." Therefore, the regulations framed by the ACI are expected to be drafted in the interests of party autonomy and in consonance with international standards.

This is a welcome step in the development of arbitration. and is likely to attract more attention to India as an international seat for arbitration because the foreign investors will no more be deprived of their right to choose an arbitrator (even foreign). Having foreign arbitrators would not only bring confidence to the foreign parties, but would help shed-off the perception of India as an inward-looking arbitration regime. Furthermore, the delegation of framing legislation to the ACI could also be the cue that we may soon see the establishment of the ACI, and with that, a new dawn for the arbitration practice in India.

MODES OF DISPUTE RESOLUTIONS

We are all familiar with the most traditional dispute-resolution process of our civil justice system: litigation and trial with a judge or jury deciding who is right or wrong – where someone wins and someone loses. However, there are many other options available[9]. Negotiation, mediation and arbitration, often called ADR or alternative dispute resolution, are the most well known.

Whether you are involved in a family or neighborhood dispute or a lawsuit involving thousands of dollars, these processes should be considered. They are often the more appropriate methods of dispute resolution and can result in a fair, just, reasonable outcome for both you and the other party involved. Settlement and compromise have long been favored in the legal system. In fact, most cases that are filed in a court are settled and never go to trial. Only 5% of all cases filed go to trial. ADR procedures are excellent options for you in dealing with controversy, allowing you to reach resolution earlier with less expense than traditional litigation and allow you to maintain control of your legal matter. In fact, many courts require parties to consider some form of ADR before going to trial. The following processes describe ways to resolve disputes.

9. Oklahoma Bar Association - Methods-for-Resolving-Conflicts-and-Disputes

Negotiation

Definition: Negotiation is the most basic means of settling differences. It is back-and-forth communication between the parties of the conflict with the goal of trying to find a solution.

The Process: You may negotiate directly with the other person. You may hire an attorney to negotiate directly with the other side on your behalf. There are no specific procedures to follow – you can determine your own – but it works best if all parties agree to remain calm and not talk at the same time. Depending on your situation, you can negotiate in the board room of a big company, in an office or even in your own living room.

Negotiation allows you to participate directly in decisions that affect you. In the most successful negotiations, the needs of both parties are considered. A negotiated agreement can become a contract and be enforceable.

When and How Negotiation is Used: Most people negotiate every day. In some circumstances, you may want a lawyer to help you negotiate a fair deal. Negotiation is the first method of choice for problem solving and trying to reach a mutually acceptable agreement. If no agreement is reached, you may pursue any of the other options suggested here. This process can be appropriately used at any stage of the conflict – before a lawsuit is filed, while a lawsuit is in progress, at the conclusion of a trial, even before or after an appeal is filed.

Characteristics of Negotiation:

- Voluntary
- Private and confidential
- Quick and inexpensive
- Informal and unstructured
- Parties control the process, make their own decisions and reach their own agreements (there is no third-party decision maker)
- Negotiated agreements can be enforceable in court
- Can result in a win-win solution.

Mediation

Definition: Mediation is also a voluntary process in which an impartial person (the mediator) helps with communication between the parties and promotes reconciliation, which will allow them to reach a mutually acceptable agreement. Mediation is often the next step if negotiation proves unsuccessful.

The Process: The mediator manages the process and helps facilitate negotiation between the parties. A mediator does not make a decision nor force the parties to reach an agreement. The parties directly participate and negotiate their own settlement or agreement.

At the beginning of the mediation session, the mediator will describe the process and ground rules. The parties, or their attorneys, have an opportunity to explain their view of the dispute. Mediation helps each side better understand the other's point of view. Sometimes the mediator will meet separately with each side. Separate "caucusing" can help address emotional and factual issues as well as allow time for receiving legal advice from your attorney. Mediations are generally held in the office of the mediator or another agreed neutral location.

Agreements can be creative and tailored to your specific needs. You could reach a solution that might not be available from a court of law. For example, if you owe someone money but don't have the cash, rather than be sued and get a judgment against you, settlement options could include trading something you have for something the other party wants. If an agreement is reached, it will generally be put in writing. Most people

uphold a mediated agreement because they were a part of making it. If a lawsuit has been filed, the agreement is typically presented to the court as an enforceable order. If no lawsuit has been filed, the mediation agreement can become an enforceable contract. If no agreement is reached, you have not lost any of your rights, and you can pursue other options such as arbitration or going to trial.

When and How Mediation is Used: When you and the other person are unable to negotiate a resolution to your dispute by yourselves, you may seek the assistance of a mediator who will help you and the other party explore ways of resolving your differences. You may choose to go to mediation with or without a lawyer depending upon the type of problem you have. You may always consult with an attorney prior to finalizing an agreement to be sure you have made fully informed decisions and all your rights are protected. Sometimes mediators will suggest you do this. Mediation can be used in most conflicts, ranging from disputes between consumers and merchants, landlords and tenants, employers and employees, family members in such areas as divorce, child custody and visitation rights, eldercare and probate, as well as simple or complex business disputes or personal injury matters. Mediation can also be used at any stage of the conflict, such as facilitating settlements of a pending lawsuit.

Who Provides this Service: Professionals provide private mediation for a fee. If you have an attorney, you can work together to select a mediator of your choice. You may want a mediator who is knowledgeable about the subject matter of your dispute. You may wish to use a for-fee mediator in the first instance or if early settlement mediation has not resulted in a resolution of your dispute.

Public mediation services are available through court annexed Mediation centres countrywide.

Characteristics of Mediation:

- Promotes communication and cooperation.
- Provides a basis for you to resolve disputes on your own.
- Voluntary, informal and flexible.
- Private and confidential, avoiding public disclosure of personal or business problems.
- Can reduce hostility and preserve ongoing relationships.
- Allows you to avoid the uncertainty, time, cost and stress of going to trial.
- Allows you to make mutually acceptable agreements tailored to meet your needs.
- Can result in a win-win solution.

Advantages of Mediation:

- Parties have complete control over the settlement.
- Less stress as compared to litigation and arbitration.
- The relationship between the parties isn't overly damaged.
- Mediation proceedings are confidential.
- The process resolves the dispute quickly.

Disadvantages of Mediation:

- Since the decision is at the discretion of the parties, there is the possibility that a settlement between the parties may not arise.

- It lacks the support of any judicial authority in its conduct.
- The absence of formality- Mediation proceedings are lacking in any procedural formality since they are not based on any legal principle.
- The truth of an issue may not be revealed.

Arbitration

Definition: Arbitration is the submission of a disputed matter to an impartial person (the arbitrator) for decision.

The Process: Arbitration is typically an out-of-court method for resolving a dispute. The arbitrator controls the process, listens to both sides and makes a decision. Like a trial, only one side will prevail. Unlike a trial, appeal rights are limited.

In a more formal setting, the arbitrator will conduct a hearing where all parties present evidence through documents, exhibits and testimony. The parties may agree to, in some instances, establish their own procedure, or an administrating organization may provide procedures. There can be either one arbitrator or a panel of three arbitrators. An arbitration hearing is usually held in offices or other meeting rooms.

The result can be binding if all parties have previously agreed to be bound by the decision. In that case, the right to appeal the arbitrator's decision is very limited. An arbitrator's award can be reduced to judgment in a court and thus be enforceable. In nonbinding arbitration, a decision may become final if all parties agree to accept it, or it may serve to help you evaluate the case and be a starting point for settlement talks.

Advantages of Arbitration:

- Flexibility- Arbitration proceedings are flexible and more economically feasible compared to litigation.
- Time-Consuming- Arbitration proceedings occur at an expeditious rate as compared to Litigation; therefore, it saves time for both parties.
- Confidentiality- The disputes which are subject to arbitration are treated with privacy, and are not released to the public.
- Arbitrator- The parties have the liberty to choose an arbitrator to handle their dispute.
- Enforceability- Arbitration awards are generally easier to enforce as compared to court verdicts.

Disadvantages of Arbitration:

- If arbitration is mandatory as per the contract between the parties, then their right to approach the court is waived.
- There is a very limited avenue for appeals.
- Arbitration does not provide for the grant of interlocutory applications.
- Arbitration awards are not directly enforceable; they are executable subject to judicial sanction.

Conciliation

Conciliation is a method of dispute resolution wherein the parties to a dispute come to a settlement with the help of a conciliator. The conciliator meets with the parties both together and separately to enter into an amicable agreement. Here, the final decision may be taken by reducing tensions, improving communications, and adopting other methods. It is a flexible process, therefore allowing the parties to define the content and purpose of the proceeding. It is risk-free and is not binding upon the parties unless they sign it.

Advantages of Conciliation:

- Flexibility: Since the conciliation process is informal, it is flexible.
- The conciliator is often an expert in the disputed field.
- Conciliation proceedings, like any other form of ADR, is economical as compared to litigation.
- The parties to the dispute have the liberty to approach the court of law, if unsatisfied with the proceeding.

Disadvantages of Conciliation:

- The process is not binding upon the parties to the dispute.
- There is no avenue for appeal.
- The parties may not achieve a settlement to their conflict.

SELECTING THE APPROPRIATE METHOD

The method you use to resolve your dispute will depend upon your personal needs and the nature of your particular dispute. You may want to consult with an attorney to help diagnose which process best serves your particular situation.

Considerations:

- Private and confidential or in a public court setting
- Informal setting and a more flexible process or one that is more formal and has specific rules to follow
- Personal control or decision made by a judge or arbitrator
- Time
- Costs
- Maintaining relationships
- Dispute decided on questions of law, resolved with business principles or a solution found through other fair, yet practical means
- Binding and easily enforceable.

There will always be times when a courtroom trial is the best option. Often, however, you are better served by one of the other alternative dispute resolution processes. With a better understanding of the considerations that can help you choose the most appropriate method, your conflicts can be more successfully managed and your disputes more satisfactorily resolved.

HOW IS ARBITRATION DIFFERENT FROM OTHER MODES OF DISPUTE RESOLUTIONS

Difference between different types of Alternative Dispute Resolution (ADR) systems:[10]

ADR Methods-Basis	Arbitration	Mediation	Conciliation	Negotiation
Neutral Third Party	Adjudicator	Facilitator	Facilitator, Evaluator	Facilitator

10. Mondaq–issue 2021

Nature of the Proceeding	Legally Binding	Not legally binding	Not legally binding	Not legally binding
Level of Formality	Formal	Informal	Informal	Informal
Level of Confidentiality	Confidentiality as determined by law	Confidentiality based on trust	Confidentiality as determined by law	Confidentiality based on trust

Formality

Mediation is an informal process; the parties may agree to certain mediation rules but they are at liberty to amend any rules. There is no requirement to produce specified information before the mediation can commence, neither is there a requirement to spend resources filing and serving documents. Mediation is informal and uncomplicated.

Arbitration has been criticised for mimicking litigation; many steps have been taken to redress this and arbitrations are less formal, nevertheless arbitration may be considered formal and complicated when compared with mediation.

Litigation is, properly, a highly formalised process with specialised rules; non-compliance may prevent litigation proceeding. Resources have to be committed in filing and serving documents. Litigation is a highly formal and complicated process.

Speed

In mediation the timing is within the control of the parties. Subject to the availability of suitable and acceptable mediators, mediation may take place as quickly as the parties desire. The length of the mediation is similarly in the control of the parties; they can agree to stay as long, or as briefly, as required. The great majority of mediations are restricted to one working day or less.

Speed is often claimed as a feature of arbitration; however the reality is that the availability of all the parties involved, not least the arbitrators, dictate that the process is often protracted.

Litigation is often an infuriatingly slow process. In many jurisdictions advisers talk in terms of years rather than months as the timescale for trial dates.

Flexibility

Mediation is a flexible process; all arrangements can be changed if it becomes apparent that this is necessary.

Arbitration can share much of this flexibility and the Arbitration and Conciliation Act 1996 has given arbitrators wide-ranging powers to achieve flexibility.

Litigation is an inflexible process, specific steps must be taken to initiate and progress matters.

Cost

Mediation is an inexpensive process; this is achieved and facilitated by the informality and speed of the process. The amount of lawyer involvement can be reduced if the parties agree and in many cases the cost of preparing for mediation is marginal to the other preparation.

The parties can share the mediator's costs and the cost of the venue in an agreed fashion. Arbitration can certainly help in reducing costs and dealing with a dispute in a proportionate manner.

In comparison to litigation, it must be remembered that while the state pays for the judge, and rooms in many cases, in arbitration the parties must pay the arbitrator's costs.

FEATURES AND ADVANTAGES OF ARBITRATION

1. **Fast Settlement:** The main reason to opt for arbitration especially in domestic disputes is the speed at which the matter can be decided. According to Section 29A[11] the award is to be passed within a period of 12 months of referring the dispute to arbitration.
2. **Flexibility:** In arbitration the parties have the freedom to select or enact the procedure to conduct the proceedings. This gives them the flexibility to tailor it to suit their needs.
3. **Confidentiality:** Disputes may involve certain details which parties would not want to come into the public domain or want to keep confidential. As arbitration unlike courts happen privately i.e. no outsider is allowed to witness the proceedings it enables such details to remain confidential.
4. **Continuity of Role:** Unlike national courts where judges are frequently transferred the same arbitrator or arbitrators would decide the matter unless removed or leaves in exceptional circumstances allegations of bias or he/she quits because of personal reasons like ill health etc. This enables the decision makers to have a better grasp over the dispute and improves the quality of the outcome.
5. **Decision by Experts:** Since in arbitration parties have the freedom to choose decision makers of their choice, they will choose those who are experts in the required field. This enhances the chances of a better decision.

ARBITRATION AND LITIGATION

Several issues may arise when determining whether to agree on a forum selection or arbitration clause in negotiating international contracts. This section examines some of the most important issues. Competence and Expertise of the Decision Maker In litigation, parties generally do not have any influence over the selection of the judge assigned to hear their dispute and are therefore not in a position to assess how technically competent he or she is. In an arbitration, however, the parties are able to select the arbitrators (or the entity which will select for them in the event of disagreement) and can select individuals with the relevant technical expertise to decide their dispute. Privacy/Confidentiality Litigation is generally open to the public, with the documents filed and judgment of the court available for public inspection. Arbitration proceedings, documents and awards, however, are typically private between the parties and arbitral tribunal (and arbitral institution, if used). However, privacy is not the same thing as confidentiality.

An arbitral award can enter the public domain when an enforcement proceeding is commenced, or where a party has a legal obligation to disclose. Some courts have ruled that arbitral documents and proceedings are not protected by confidentiality, so the local law may be an important factor in choosing the seat for the arbitration.

ENFORCEABILITY COURT

Judgments are enforced through the powers of the state. Arbitration awards do not have any such automatic powers of enforcement, meaning that the award must be voluntarily complied with by the losing party. Where this does not happen, the winning party can seek enforcement before a national court. Court judgments have a territorial limitation, however, and there are no multilateral conventions for their enforcement except within the European Union. Nevertheless, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), an award made in one Convention state can be enforced in any of the other Convention states upon the production of the arbitration agreement, the award, and translations, if necessary.

11. Arbitration and Conciliation Act, 1996

PROCEDURE

The procedure adopted before national courts is laid down in rules applicable before such courts. These rules are not necessarily tailored to individual cases. Parties involved in an international arbitration can tailor their procedural rules to their particular dispute, even where the arbitration is conducted under specified arbitration rules.

ARBITRATION AGREEMENT

Arbitration agreement is the very foundation of arbitration. It is the very source of the powers of arbitrators. It determines the scope of their authority. As arbitration is a voluntary process there cannot be arbitration without there being an arbitration agreement.

According to Section 7(1)[12] – *arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Thus an agreement whereby parties express their consent or intention to settle the dispute through arbitration is termed as an arbitration agreement.*

Arbitration being a voluntary/ consensual process the consent must be very clear if there is any doubt about the said consent/ intent the matter cannot be referred to arbitration. For example if the agreement provides the parties – may refer the dispute to arbitration that would not be a competent arbitration agreement as the intention to opt for arbitration is ambiguous.

On the other hand if parties say that the matter – shall be referred to arbitration that would be a valid agreement. Therefore, one must be very careful while drafting the arbitration agreement. Also there must be no ambiguity about the identity of the parties to the arbitration agreement. If some of the parties to a dispute are not a party to the arbitration agreement they cannot be referred to arbitration. Only those who are a party to the arbitration agreement can be referred to arbitration.

The primary source of the tribunal's powers is the parties' arbitration agreement. Consensual arbitration is contractual in nature as between the parties, arbitrators and arbitral institutions. The arbitration agreement is supplemented by provisions of the arbitration rules incorporated into it. These rules also contain specific powers and rights exercisable by the arbitrators. According to the doctrine of severability (or separability for some), the arbitration agreement contained in a contract can survive the invalidity or termination of the main contract so that the jurisdiction it confers on the tribunal allows it to decide on the consequences of that invalidity. If this were not the case, all a reluctant respondent would need to do is allege invalidity, in order to take the proceedings before a state court – thus putting the parties back into the very place they sought to avoid by going to arbitration.

Types of Arbitration Agreement

According to Section 7(2) of the Arbitration and Conciliation Act, arbitration agreement can be in the form of a clause in the main contract or it can be in the form of a separate agreement. The latter is called submission agreement. Generally, arbitration agreements are in the form of a clause in the main contract.

Form of Arbitration Agreement

The Act does not prescribe any form for an arbitration agreement apart from that it must be in writing. If it is not in writing it cannot be enforced. An oral agreement to refer a dispute to arbitration is not appropriate. Section 7(4) of the Act mentions the above-mentioned agreement is considered to be in writing if it is contained in:

a) a document signed by the parties;

12. Arbitration and Conciliation Act, 1996

b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

The Supreme Court has held that the – statement of claim and defence mentioned in Section 7 (4) (c) need not be the statement of claim and defence filed before the arbitrator and could be a statement of claim and defence in any suit, petition or application filed before any court.

An arbitration agreement can be entered into by incorporating it from some other contract. According to Clause (5) of Section 7 the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

As per section 7 of the Act, the parties have the freedom to form the agreement in several ways as below:

By an arbitration clause- most often in commercial arbitration in India, a contract consists of an arbitration clause as a protectionist clause which states the party's intent to settle any disputes arising out of the contract to be resolved by the arbitration mechanism.

By incorporating a clause- By the virtue of the Doctrine of *Kompetenz- Kompetenz*, an arbitration clause which is a part of a separate contract can also be considered an arbitration agreement. Section 7(5) of the Act, it provides that when an agreement refers to any agreement containing an arbitration clause, it will be considered as an arbitration agreement providing the same is in writing and when it is drafted with the intent of incorporating it as a clause in the contract.

By communication- In precedence set by invoking provisions 7(b) and (c) in cases like Galaxy Infra an engineering [13], Murarji Savla[14] and S.N Prasad[15] communication by letters or telecommunication also signifies the intention of parties to refer to arbitration as a form of the arbitration agreement.

HOW TO DRAFT AN EFFECTIVE ARBITRATION AGREEMENT?

By virtue of the judgements of *Jagdish Chander v. Ramesh Chander*[16] and *K.K. Modi v. K.N. Modi*[17], the Supreme Court of India has laid down the validity and principles of an arbitration agreement.

The principle laid down in the judgment regarding the arbitration agreement are:

- It must be in writing,
- The agreement to settle the dispute in a private tribunal is mutual,
- The private tribunal has the power to adjudicate disputes without bias and by following the principles of natural justice,
- The parties agree to be bound by the arbitral tribunal's decision,
- The parties must refer the dispute to a private tribunal with no prior reservations,
- The parties must have mutual agreement reflecting from the maxim "*consensus ad idem*",

13. Pravin Electricals Pvt. Ltd vs Galaxy Infra And Engineering Pvt. ... on 8 March, 2021

14. (1998) 1 GLR 778

15. S.N. Prasad vs The Executive Engineer on 7 October, 2015

16 Jagdish Chander v. Ramesh Chander

17. K.K. Modi vs K.N. Modi &Ors on 4 February, 1998

- The clauses of the agreement must raise an obligation of performance,
- The clauses of the agreement do not exclude the essentials of separability, severability, autonomy or any other essentials of the agreement.

GENERAL PRINCIPLES IN AN ARBITRATION AGREEMENT[18]

Scott v. Avery clause: in contracts involving parties of different countries such as export transactions, foreign element and plant installation contracts, the arbitration clause should provide a machinery suitable to the international character of the transaction for facilitating the execution of award that may be made. This clause provides that no action shall be brought until an award has been made and such provision is very common in commercial contracts. This type of a clause is named after the case *Scott v. Avery*[19]. This clause is a condition precedent to the determination of liability of a party to a contract. Repudiation of contract does not affect this clause. A party successfully pleading *Svott v. Avery* clause as a defence in the suit cannot subsequently challenge the jurisdiction of an arbitrator when the matter in the suit is remitted to arbitration. There are two exceptions in which this clause may not be pleaded as a defence to a suit. First, where the conduct of the defendant is such that it disentitles him from relying on such clause. Secondly, where the agreement to arbitrate has ceased to exist.

In *Viney v. Bignold* [20] under an insurance policy there was a clause which provided that any dispute arising in the adjustment of a loss should be submitted to arbitration and the award should be conclusive evidence of the amount of the loss. It was further provided that the insured should not be entitled to commence any proceeding until the amount of the loss is determined by an arbitration award. In an action by the insured the arbitration clause was held to be good defence to the action.

Equity clause: *amiable composition.* It is settled law that an arbitrator shall act in accordance with law to decide a dispute. If the arbitration agreement is silent as to the matter in which decision of the arbitrator is sought, it is the duty of the arbitrator to decide the dispute according to equity and good conscience. He may not in such case follow the strict rule of law. It is often provided in arbitration clause that "the arbitrator shall be entitled to act as *amiable compositeur".* Provision of such term in arbitration agreement is called "equity clause" or 'amiable composition clause'[21]. This type of clause poses certain questions before the court. First, what does this clause mean? Secondly, what does this clause require the arbitrator to do?

The Arbitration agreement effectively incorporate the following :

1. **NUMBER OF ARBITRATORS**- Section 10 of the Act provides for the appointment of arbitrators at the discretion of the parties. However, the number of arbitrators must be odd and it is also necessary to select arbitrators who would not show any sort of bias. The number of arbitrators determines the cost of the arbitral proceeding.
2. **LANGUAGE OF PROCEEDING-** In cases of international commercial arbitration in India, the agreement usually deems smartest to have a prescribed language in which the proceeding takes place in order to avoid any future issues in the proceeding.

18. Apurva Agarwal - Universal Legal

19. (1856) 5 HL Cas 811

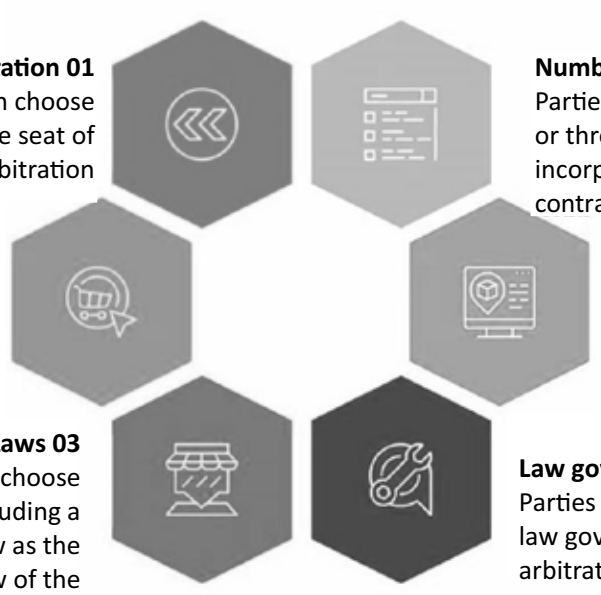
20. (1887) 20 QBD 172

21. Article 33 of the UNCITRAL Arbitration Rules

3. **SEAT AND VENUE OF THE ARBITRATION**- Arbitration law in India has evolved over the years and through precedents set by cases like the BALCO[22] and the BGS Soma [23], the importance of the differentiation and specific mention of the seat and venue have been highlighted. The venue signifies the place where the proceeding is held, whereas the seat is where the cause of action rises. The mechanism of commercial arbitration in India also lays down certain principles and doctrines regarding the seat and venue.

4. **INSTITUTIONAL ARBITRATION**- The procedures and clauses are set and agreed to in a specialized institution which appoints the arbitrator by themselves. This is a pre-defined means of carrying out arbitral proceedings.

ESSENTIAL ELEMENTS OF AN ARBITRATION AGREEMENT



Seat of Arbitration 01
The Parties can choose any place as the seat of Arbitration

Number of Arbitrators 06
Parties may choose one or three arbitrators and incorporate in the contract

Arbitration Institution 02
It is advisable to specify the Arbitral Institution to administer the arbitration

Language of Arbitration 05
Parties should specify the language of arbitration to avoid the application of default language

Substantive Laws 03
The Parties can choose any law including a neutral law as the substantive law of the arbitration

Law governing Arbitration Agreement 04
Parties may choose the law governing the arbitration agreement

ARB-MED-ARB CLAUSE : CONNECTING THE DOTS BETWEEN ARBITRATION AND MEDIATION

In the recent years, the "Arb-Med-Arb" process has gained traction as a dispute resolution mechanism. The process of "Arb-Med-Arb" entails exactly what its name suggests: the commencement of arbitration proceedings, followed by mediation to attempt an amicable resolution, followed by continuation of arbitration proceedings irrespective of the outcome.

The Singapore International Arbitration Centre ("SIAC") and the Singapore International Mediation Centre ("SIMC") have formalised their very own SIAC-SIMC Arb-Med-Arb Protocol ("AMA Protocol") for an "Arb-Med-Arb" clause.

The key aspects of the AMA Protocol are as given below:

a) Pursuant to the "Arb-Med-Arb" clause or as otherwise agreed by parties, the arbitration is commenced in accordance with the applicable arbitration rules.

b) After exchanging the Notice of Arbitration and Response to the Notice of Arbitration ("arbitration pleadings"), the arbitration is stayed.

22. Bharat Aluminium Co vs Kaiser Aluminium Technical ... on 6 September, 2012

23. (2020) 4 SCC 234.

c) Under the AMA Protocol, the case file with all documents lodged by parties will then be sent by the SIAC to the SIMC where the mediation will be conducted.

d) If the dispute is not been settled by mediation (whether partially or entirely), the arbitration proceeding will resume in respect of the remaining part of the dispute.

In India, if the mediation renders settlement agreement under the Arb-Med-Arb clause, it will be incorporated as consent award pursuant to Section 30 & Section 31 of the A&C Act.

Arb-Med-Arb is very ideal for construction disputes wherein multiple disputes exist within an arbitration case.

SAMPLE ARB-MED-ARB CLAUSE

The SIAC and SIMC have provided a sample "Arb-Med-Arb" clause, which we reproduce below and in italics the portions which are subject to change depending on the agreement of parties

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the [Singapore International Arbitration Centre ("SIAC")] in accordance with the [Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules")] for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be _____.

The Tribunal shall consist of [Three] arbitrator(s).

The language of the arbitration shall be _____.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the [Singapore International Mediation Centre ("SIMC")], in accordance with the [SIAC-SIMC Arb-Med-Arb Protocol] for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by [SIAC] and may be made a consent award on agreed terms.

KEY ELEMENTS OF AN ARBITRATION PROCEEDING

Following are the key element of an arbitration proceedings both domestic and internationally.

a) the agreement to arbitrate;

b) the need for a dispute;

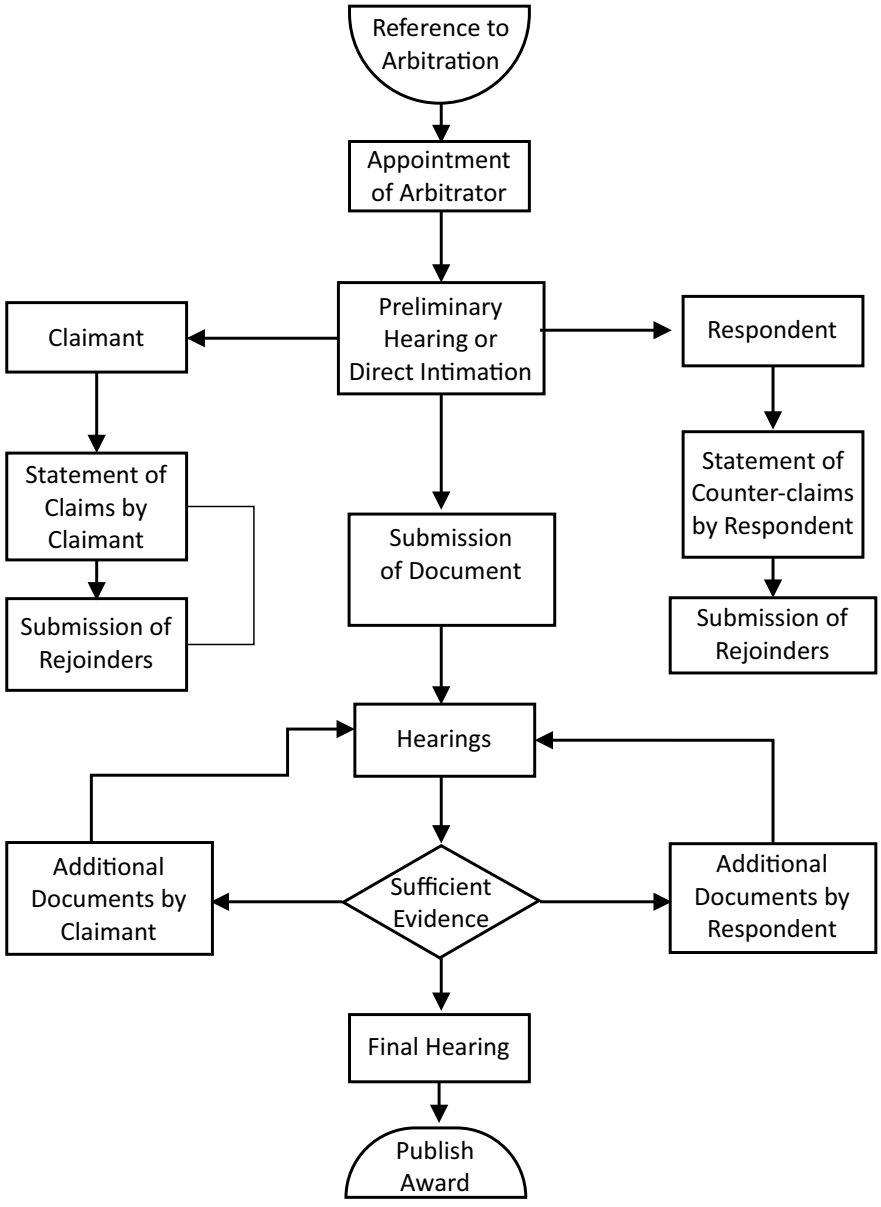
c) the commencement of an arbitration;

d) the arbitral proceedings;

e) the decision of the tribunal; and

f) the enforcement of the award.

Following flow diagram illustrates the Arbitration proceedings.



TYPES OF ARBITRATION

Types of Arbitration			
Institutional Arbitration	**Ad-hoc Arbitration**	**Statutory Arbitration**	**Contractual Arbitration**

Ad hoc Arbitration

Ad hoc arbitration is an arbitration procedure agreed and arranged by the parties themselves. If they fail to do so then it becomes the responsibility of the arbitration tribunal. This enables the parties to tailor the procedure to its needs. That is its main attraction. This flexibility is an advantage but one must not lose sight of the fact

that it is not an easy thing to create the procedure. It requires a lot of expertise. However the trouble of creating the said procedure can be escaped by choosing the rules of an arbitral institution to govern the arbitration proceedings without submitting the arbitration to an institution.

The major disadvantage of ad hoc arbitration is that if the arbitration encounters some troubles especially because of non- cooperation of a party, the recourse to save arbitration is to be made to the national courts. This is problematic because parties had opted for arbitration as they did not want to go to courts. In India ad hoc arbitration is said be more prevalent than institutional arbitration.

Institutional Arbitration

When arbitration is conducted under the supervision of an institution in accordance with its rules of procedure it is termed as institutional arbitration.There are various institutions which administer arbitration proceedings. They have their ownset of rules to conduct the proceedings. Some of the institutions prominent internationally are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), American Association of Arbitration (AAA) etc. As far as India is concerned some of the well- known arbitration institutions are The Indian Council of Arbitration (ICA) and Federation of Indian Chamber of Commerce and Industry (FICCI).

The biggest advantage of institutional arbitration is that parties are saved the trouble of framing the procedure of arbitration, since it would be conducted under the rules of the selected institution. Another advantage is the administrative support provided by the highly trained staff which these institutions have. Also they have good infrastructure to conduct the proceedings and list of competent arbitrators to choose from. Most importantly if arbitration encounters any problem there will be effective support from the institution to save it as they have their own internal mechanism to save arbitration without making recourse to the national courts. For example in the event of non- cooperation by a party to appoint an arbitrator or if emergency measures are to be taken even prior to the establishment of the tribunal the institution has mechanisms and rules to deal with such situations.

Institutional arbitration may be more expensive than ad-hoc arbitration but it offers a lot more facilities than the latter. Institutional arbitrations are conducted pursuant to institutional arbitration rules, almost always overseen by an administrative authority with responsibility for various aspects relating to constituting the arbitral tribunal, fixing the arbitrators' compensation and similar matters. In contrast, ad hoc arbitrations are conducted without the benefit of an appointing and administrative authority or generally pre-existing arbitration rules, subject only to the parties' arbitration agreement and applicable national arbitration legislation.

Fast Track Arbitration

It is the remedy to the lengthy and tedious process of arbitration. Time is the main essence of fast-track arbitration. In this process, all the methods which consume time in an arbitration process have been removed and the process is made much simpler. The arbitration process is also called a private process as it is not similar to the court proceedings it takes place privately.

PERTINENT STATUTES TO THE ARBITRATION PROCESS

Limitation Act

LIMITATION PERIOD FOR APPOINTMENT OF ARBITRATOR

The limitation period for a reference of a dispute to arbitration or to appoint an arbitrator under Section 11 of Act,

1996 is three years from the date on which the cause of action or the claim which is required to be arbitrated first arise. Further, mere interaction between the parties in the form of letters or reminders will not extend the statute of limitations.

TIME LIMIT FOR PRONOUNCEMNT OF ARBITRAL AWARD

The arbitrator is bound to complete the arbitral proceeding within 12 months as enunciated in the proviso 29A of Arbitration and Conciliation Act, 1996. The parties may, by consent, extend the period specified not exceeding six month.

CORRECTION AND INTERPRETATION OF AWARD

Within 30 days of receipt of arbitral award, a party, may request the arbitral tribunal to[24] correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award as well as request for interpretation of a specific point or part of the award.

The arbitrator shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

SET ASIDE APPLICATION

Upon receipt of arbitral award, the aggrieved party shall file an application to [25]set aside the arbitral award not later than 3 months and the time period shall be extended up to 30 days only if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months and not thereafter.

Civil Procedure Code

ENFORCEMENT OF ARBITRAL AWARD

[26]Upon receipt of arbitral and completion of limitation period to set aside an arbitral award, the awardee shall approach the court under the provisions of Civil Procedure Code, 1908 to execute the award within a period of 12 year.

Interest Act

The arbitrator has the discretion to award post-award interest on a part of the 'sum', which includes principal and pre-award interest. Unless the award otherwise directs under Section 31(7)(b) of the Act only qualify the rate of interest, not additional components of interest (such as pre-award interest). Section 31(7)(b) of the Arbitration Act only provides that if the arbitrator does not grant post-award interest, then the award-holder is entitled to post award interest at 18%, unless the award otherwise directs another rate of interest.

The Supreme Court in *U.H.L Power Company Ltd. v. State of Himachal Pradesh*[27] pronounced that the arbitral tribunal is empowered to grant compound interest or interest on interest. The legal position has been reiterated by the Supreme Court in *Indian Oil Corporation v. U.B. Engineering Ltd. and Anr*[28].

24. Section 33 of Arbitration and Conciliation Act, 1996

25. Section 34 of Arbitration and Conciliation Act, 1996

26. Section 34 of Arbitration and Conciliation Act, 1996

27. (2022) 4 SCC 116

28. Civil Appeal Nos. 2921-2922 of 2022

LAWS APPLICABLE IN AN ARBITRATION

An arbitration proceeding may involve the application of multiple sets of laws – law governing the substantive issues in dispute (the law of the contract), law governing the arbitration agreement, law governing the arbitration proceedings (usually the same as the law of the seat), the law governing the parties' capacity to arbitrate, and the law of the place where enforcement is sought.

These laws govern various aspects of arbitration and challenge to the award rendered, and its eventual enforcement.

Supreme Court in *Government of India v. Vedanta Limited* [29] pronounced the various laws applicable to an international commercial arbitration:

1. **The governing law of the contract**: This law determines the substantive rights and obligations of the parties under the contract. Where parties have chosen the governing law of the contract, the dispute is decided in accordance with such law. In the absence of express choice of the parties, the governing law of the contract is determined by the arbitral tribunal in accordance with applicable conflict of law rules.
2. **The law governing the arbitration agreement**: This law is determined separately from the governing law of the contract, and deals with issues such as the validity and scope of the arbitration agreement, extent of party autonomy, the jurisdiction of the arbitral tribunal etc.
3. **The curial law of the arbitration:** The law of the seat of arbitration is the curial law of the arbitration. The curial law governs the procedure of the arbitration, including its commencement, appointment of arbitrators in a default scenario, grant of interim measures, collection of evidence, hearings and challenge to the award.

Institutional rules for arbitration, such as the ICC Rules of Arbitration or the SIAC Rules (if chosen) apply along with the curial law to govern the procedure for the arbitration. The law governing enforcement – this law governs the proceedings for recognition and enforcement of the award in other jurisdictions.

The law governing enforcement is the *lex fori* (law of the forum where enforcement is sought). The *lex fori* determines the court which is competent and has the jurisdiction to decide the issue of recognition and enforcement of the foreign award, and the available legal remedies for enforcement of the award.

SEAT OF ARBITRATION

The seat of arbitration is a juridical concept, which refers to the legal home of the arbitration. It determines the procedural law applicable to the arbitration. Courts of the seat have exclusive jurisdiction over the conduct of arbitration except in relation to certain ancillary matters such as stay of court proceedings in favour of arbitration, grant of interim relief, and enforcement of the arbitral award.

As a result, the seat of arbitration has primary jurisdiction over the arbitration, with the jurisdiction of all other states being secondary. Thus, the seat is the "centre of gravity" of the arbitration, or the anchor for the arbitration. The venue of arbitration on the other hand is merely a geographical location where parties and/or the arbitral tribunal may meet or hold hearings. It has no legal significance for the arbitration. The place of arbitration may refer to either seat or venue. The Arbitration and Conciliation Act, 1996 ("Act") notably does not use the terms "seat" or "venue", but instead uses the term "place of arbitration" in Section 20. The term "place of arbitration" itself carries two distinct meanings – the use of such term in Section 20(1) and 20(2) signifies the seat of the arbitration whereas in Section 20(3), it signifies the geographical location where hearings may be conducted[30].

29. (2020) 10 SCC

30. Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited, (2017) 7 SCC 678.

The Hon'ble Supreme Court in BALCO Judgment[31] held that for the purpose of Section 2(1) (e) of the 1996 Act, the courts at the seat of the arbitration do not have exclusive jurisdiction. Instead, two courts have concurrent jurisdiction:

(1) the court which is amenable to the seat of the arbitration; and

(2) the court within whose jurisdiction the cause of action arises.

BALCO judgment further clarified that the rule regarding prospective effect was applicable. Only to the finding that Part I of the Arbitration Act, 1996, is applicable only to all the arbitrations which take place within the territory of India, and not to other ratio laid down in.

The Hon'ble Supreme Court, in the case, *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc* (Supra), has provided a detailed clarification in terms of "place", "seat", "situs", "venue". The place agreed between the parties to conduct the arbitration proceedings under the arbitration agreement shall be the seat of arbitration. Similarly, seat of arbitration shall be decided by the arbitrator in the absence of the contract between the parties in relation to the same.

However, when the arbitral tribunal meets at any place for consultation among its members, hearing witnesses, expert or parties or for inspection of documents, goods or other property, that shall be deemed to be venue of arbitration.

In the case, *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd*.[32], one of the parties to the arbitration submitted that the matter should be referred to arbitration either in London or Singapore where other arbitrations were already in progress concerning the same parties but the arbitration agreement provided Delhi as the place for arbitration. Hence, the court disallowed the request as Delhi was pre-decided by the parties as the venue and the part of the agreement was enforceable.

When the arbitral tribunal decides the venue of arbitration, the same cannot be construed as an award by the arbitrator and neither an interim award and therefore it cannot be appealed in the court.

The Closest-Connection Test to Ascertain the Seat of Arbitration

A question may arise as to what happens if the parties mention the venue to arbitration in the agreement but fail to mention the seat of arbitration. In such cases, can the venue of arbitration be deemed to be the seat of arbitration as well?

In *Dozco India Pvt Ltd. v. Doosan Infracore Co. Ltd [33](2011)*, the Supreme Court held that if the parties fail to mention the seat of arbitration in the agreement, the presumption is that the parties have intended the laws of the venue of the arbitration to be the laws governing the arbitration as well unless an intention to the contrary has been shown. This is called the closest-connection test as the country/place that is most closely connected with the arbitral proceedings is used to determine the seat of arbitration.

In *BGS SGS Soma JV v. NHPC Ltd [34](2020)*, the Supreme Court held that in the absence of an express mention of the seat of arbitration, the venue of the arbitration would be deemed to be the juridical seat since the venue of arbitration is most closely connected with the arbitral proceedings.

In *Inox Renewables Ltd. v. Jayesh Electricals Ltd [35](2021)*, the parties to the arbitration had mutually agreed to shift the venue of arbitration from Jaipur to Ahmedabad. It was contended by the Respondent that in the

31. Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc (2012) 9 SCC 552

32. (2006) 2 Scc 628

33. Civil Original Jurisdiction Arbitration Petition No. 5 Of 2008

34. Civil Appeal No. 9307 Of 2019 (Arising Out Of Slp (Civil) No.25618 Of 2018)

35. Civil Appeal No. 1556 Of 2021 (Arising Out Of Slp (C) No.29161 Of 2019)

absence of a written agreement, the shift in the venue of arbitration does not result in the shift in the seat of the arbitration. It was also contended that the courts in Rajasthan will have exclusive jurisdiction to hear the disputes arising out of the arbitration.

The Supreme Court held that the parties to an arbitration can shift the venue of the arbitration without a written agreement. By changing the venue of the arbitration, the seat of the arbitration also changes, and thus the courts in Gujarat will have exclusive jurisdiction to deal with the issues arising out of the arbitration.

Seat of Arbitration determines the following:

LANGUAGE OF ARBITRATION PROCEEDINGS

The language of the proceedings is to be indicated by the parties under their agreement. If the parties fail to define the language of the arbitration proceedings in the agreement, the arbitral tribunal has the authority to define the language of the arbitration proceedings. The language decided for the conduct of arbitration proceedings, either mutually through the agreement or by the arbitral tribunal, shall be applicable to any written statement of either party, any hearing, arbitral award, decision and any communications by the arbitral tribunal.

The arbitral tribunal may, at its discretion, order the documents filed it in any other language to be translated in the language decided for the conduct of arbitration proceedings. The relevant section of the Arbitration and Conciliation Act, 1996 is reproduced below:

Section 22 - Language

(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing an agreement referred to in sub-section (1), the Arbitral Tribunal shall determine the language or languages to be used in arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the Arbitral Tribunal.

(4) The Arbitral Tribunal may order that any documentary evidence shall be accompanied by a translation into the language agreed upon by the parties or determined by the Arbitral Tribunal.

QUALIFICATIONS OF THE ARBITRATORS

The arbitrators play important role in accomplishing the aim of arbitration (Resolving dispute). An eminent arbitrator should act fair in deciding the case and granting justice to the parties. He must comply with the Principles of Natural Justice. Section 11 of the Arbitration and Conciliation Act, 1996 defines the appointment of arbitrators.

It also mentions who can be an arbitrator?

Who is an Arbitrator?

In arbitration, an arbitrator is the presiding officer. The Cambridge dictionary defines an arbitrator as a person who has been officially chosen to make a decision between two people or groups who do not agree.

Cambridge Dictionary

In an arbitration proceeding, he plays an important role in deciding the case. An arbitrator is an independent third-party entity. They hear the pieces of evidence, apply the law and decide the result of the arbitration proceedings.

Who can be an Arbitrator?

A person who is of sound mind can be appointed as an arbitrator. The nationality of an arbitrator is not specifically restricted. Hence, the arbitrator may be of any nationality. This is as per Section 11 of the Arbitration and Conciliation Act, 1996 ("The Act"). Furthermore, the parties are free to choose the arbitrator and determine the arbitrator's qualifications.

A person to become an arbitrator must qualify the following conditions:

i. He can be a judge;

ii. He can be an advocate; or

iii. He can be a Company Secretary; or

iv. He can be a Chartered Accountant; or

v. He can be a CMA;

vi. He can be a maritime expert;

vii. He can be an executive; or

viii. He can be an engineer; or

ix. He can be a businessman;

x. He can be other Professional.

Some arbitral institutions which conducts international arbitration, have included foreigners for being arbitrators. This was to enable the foreign parties to appoint arbitrators of other nationalities whom they consider more appropriate.

What norms should an Arbitrator abide by?

There are various norms that an arbitrator must abide by. They include:

- A person who is of the general reputation of accountability, integrity. He shall be capable of applying objectivity in arriving at a settlement of disputes.

- An arbitrator should be impartial and neutral. He must avoid entering into any associations which has a tendency to affect the impartiality. The arbitrator must avoid circumstances which might create a reasonable appearance of partiality or bias among the parties.
- The arbitrator must not incorporate himself in any legal proceedings. He should refrain from any potential conflict related to the disputes which he shall arbitrate.
- He must not engage in any private discussions or conversations with the parties related to the dispute.
- The arbitrator must not accept any illegal gratifications.
- For any disputes which come before him, he must be capable of suggesting, recommending or writing a reasonable and enforceable arbitral award.

How is an Arbitrator appointed?

- The number of arbitrators to be appointed is stated in Section 10 of the Arbitration and Conciliation Act, 1996. It states that the parties are free to decide the number of arbitrators, however, the number should not be even. For the appointment of an arbitrator, the parties are free to decide the procedure. In case the parties fail to decide or agree on the appointment of arbitrators, they must refer to the agreement.
- If the agreement states that three arbitrators are to be appointed for arbitration, each party must choose one. Among the two appointed arbitrators must jointly appoint an arbitrator for the proceeding, who shall act as a presiding arbitrator.
- It might so happen that only one arbitrator is present. There might not be an arbitration agreement. In that case, this is the procedure of the appointment of the arbitrator. The parties must decide the arbitrator within 30 days from the day of receipt by one party's request from the other party for his decision. Else the Chief Justice or his designate appoints the same, as mentioned under section 11(2) and 11(5).
- While considering the application for the appointment of an arbitrator, the Court should confine to the examination of the arbitration agreement.

What are the powers of an Arbitrator?

According to the Arbitration and Conciliation (Amendment) Act, 2021 ("2021 Act", the arbitrator has the power to take interim measures under section 17 of the Arbitration and Conciliation Act, 1996. Section 31 (6) [36] with 31(6) empowers the arbitrator to make an interim arbitral award at any time. He may do so during the arbitration proceedings in any dispute. With regards to it the arbitrator can make a final award.

The Arbitration and Conciliation (Amendment) Act, 2021 has removed the Schedule VIII of the Arbitration and Conciliation Act, 2019. It was replaced with Section 43J. It states that "The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations ".

ARBITRATION INSTITUTIONS

Some of the prominent institutions which conduct institutional arbitration in India are:

1. Nani Palkhiwala Arbitration centre – Chennai and New Delhi
2. Delhi International Arbitration Centre (DIAC) – New Delhi

36. Section 31. Form and contents of arbitral award.... (6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

3. Mumbai Centre for International Arbitration
4. International Arbitration and Mediation Centre – Hyderabad
5. Indian Council of Arbitration (ICA) – New Delhi
6. Construction Industry Arbitration Council (CIAC)- New Delhi
7. LCIA India – New Delhi
8. International Centre for Alternative Dispute Resolution (ICDAR) – New Delhi
9. ICC Council of Arbitration – Kolkata.

- *Mumbai Centre for International Arbitration:* This is the most popular arbitration institution based in India for large commercial disputes. It was set up in 2016 and is led by a very competent and internationally renowned board of arbitration practitioners from across the globe, has received significant traction, but does not yet have a notable list of administered matters.
- *Nani Palkhivala Arbitration Centre:* This is another institution that has seen significant growth in recent years. It has been formally recognised by the Madras High Court to render assistance in arbitration matters by its Order dated 21 September 2005. The Centre has a panel of arbitrators comprising retired judges, lawyers, and civil servants, among others.

Some High Courts in India have also set up arbitration centres affiliated with such High Courts, such as the:

- *Delhi International Arbitration Centre*.
- *Madras High Court Arbitration Centre.*
- *Arbitration & Conciliation Centre - Bengaluru (Domestic and International),* an initiative of the High Court of Karnataka.
- *Jammu and Kashmir International Arbitration Centre,* an initiative of the Jammu and Kashmir High Court.

Despite these developments, most arbitrations in India are still conducted on an ad hoc basis. Recent legislative amendments to the Arbitration Act, including, in particular, the amendments in 2019, have encouraged institutional arbitration with the aim of changing this position.

ARBITRATION CENTRES – INTERNATIONAL

The following is a non-exhaustive list of arbitration centres which have institutional rules based on, or inspired by, the UNCITRAL Arbitration Rules[37] :

AUSTRALIA

Australian Centre for International Commercial Arbitration (ACICA)

Institute of Arbitrators & Mediators Australia (IAMA)

AUSTRIA

Vienna International Arbitration Centre (VIAC)

BAHRAIN

Bahrain Chamber for Dispute Resolution (BCDR-AAA)

37. https://uncitral.un.org/

BELARUS

Chamber of Arbitrators at the Union of Lawyers

BELGIUM

Belgian Centre for Arbitration and Mediation (CEPANI)

BRAZIL

Centro de Arbitragem e Mediação, Câmara de ComércioBrasil-Canadá (CCBC)

CANADA

British Columbia International Commercial Arbitration Centre (BCICAC)

CHINA

China International Economic and Trade Arbitration Commission (CIETAC)

Shenzhen Court of International Arbitration (SCIA)

Hong Kong, China

Hong Kong International Arbitration Centre (HKIAC)

CIETAC HONG KONG ARBITRATION CENTRE

DENMARK

Danish Institute of Arbitration

EGYPT

Cairo Regional Centre for International Commercial Arbitration (CRCICA)

FINLAND

Arbitration Institute of the Finland Chamber of Commerce (FAI)

FRANCE

International Chamber of Commerce, International Court of Arbitration (ICC)

GERMANY

German Institution of Arbitration (DIS)

INDONESIA

Indonesian National Board of Arbitration (BANI)

IRAN

Tehran Regional Arbitration Centre (TRAC)

ITALY

Chamber of Arbitration of Milan (Camera Arbitrale Milano) of the Chamber of Commerce of Milan

JAPAN

Japan Commercial Arbitration Association (JCAA)

MALAYSIA

Kuala Lumpur Regional Centre for Arbitration (KLRCA)

MAURITIUS

Mauritius International Arbitration Centre (MIAC)

MEXICO

Centro de Mediación y Arbitraje (CANACO)

MEXICO

Centro de Arbitraje de México (CAM)

MONGOLIA

Mongolian International National Arbitration Centre (MINAC)

MONTENEGRO

Arbitration Court at the Chamber of Economy of Montenegro (ACCEMN)

NETHERLANDS

Permanent Court of Arbitration at The Hague (PCA)

NIGERIA

Regional Centre for International Commercial Arbitration-Lagos

NORWAY

Arbitration Institute of the Oslo Chamber of Commerce

QATAR

Qatar International Center for Conciliation and Arbitration (QICCA)

REPUBLIC OF KOREA

Korean Commercial Arbitration Board (KCAB)

RUSSIAN FEDERATION

International Commercial Arbitration Court (ICAC) at the Russian Federation Chamber of Commerce and Industry

SAUDI ARABIA

Saudi Centre for Commercial Arbitration (SCCA)

SINGAPORE

Singapore International Arbitration Centre (SIAC)

SLOVENIA

Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC)

SOUTH AFRICA

Arbitration Foundation of South Africa (AFSA)

SPAIN

Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid

SWEDEN

Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

SWITZERLAND

Swiss Chambers' Arbitration Institution (SCAI)

Swiss Arbitration Association

THAILAND

Thailand Arbitration Center (THAC)

UNITED ARAB EMIRATES

Dubai International Arbitration Centre (DIAC)

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

London Court of International Arbitration (LCIA)

UNITED STATES OF AMERICA

International Institute for Conflict Prevention & Resolution (CPR)
International Centre for Settlement of Investment Disputes (ICSID)
International Centre for Dispute Resolution (AAA-ICDR)

BYE LAWS/RULES OF THE INSTITUTIONS

According to the Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India under the Chairmanship of Justice B. N. Srikrishna Retired Judge, Supreme Court of India, Institutional arbitration refers to the administration of arbitration by an institution in accordance with its rules of procedure. There are over 35 arbitral institutions in India. These include, in addition to domestic and international arbitral institutions, arbitration facilities provided by various public-sector undertakings ("PSUs"), trade and merchant associations, and city-specific chambers of commerce and industry. A large number of these arbitral institutions administer arbitrations under their own rules or under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules").

These Rules/Bye Laws provide the detailed procedure for conduct of Arbitral Proceedings. It includes the following:

1. **Notice of request:** The requirement for issuing a notice of request for arbitration is covered under this clause of the rules.
2. **Number of Arbitrators:** The rules relating to the number of arbitrators for a panel are mentioned under this rule. For example: There can be a sole arbitrator or arbitrators with odd number and if the parties had agreed for even number of arbitrators, the Institution can include a rule for appointment of presiding arbitrator.
3. **Appointment of arbitrators:** The procedure for appointment of arbitrators may be mentioned under this rule. The requirements with respect to nationality, qualification, procedure etc. can be mentioned under this rule.
4. **Grounds of Challenge and its procedure:** The grounds of challenge of the appointment of the arbitrator can be mentioned under this clause. For example: A person who is a relative of any of the party is not eligible to be an arbitrator in the matter. The procedure of the challenge is also to be mentioned under this clause.
5. **Rules relating to Statement of Claim and Defence:** The rule of pleadings should be clearly specified in the rules/bye laws of the Institution in order to make the process transparent.

6. **Others rules:** Other rules such as powers of taking interim measures, place of arbitration, appointment of experts, time limit for making an award, fees and costs, forms and contents of Arbitral Award, Costs, Corrections of Award, Deposits etc. are also essential requirements for the Arbitral Proceedings.

Incorporation/ Establishment of Arbitration Centre

An arbitration centre can be established in accordance with the law in force at the time of establishment. We can understand it with the aid of the below examples:

(i) Indian International Arbitration Centre

New Delhi International Arbitration Centre Act, 2019 was passed to provide for the establishment and incorporation of the New Delhi International Arbitration Centre for the purpose of creating an independent and autonomous regime for institutionalised arbitration and for acquisition and transfer of the undertakings of the International Centre for Alternative Dispute Resolution and to vest such undertakings in the New Delhi International Arbitration Centre for the better management of arbitration so as to make it a hub for institutional arbitration and to declare the New Delhi International Arbitration Centre to be an institution of national importance and for matters connected therewith or incidental thereto. The name of the centre was changed to Indian International Arbitration Centre in year 2023.

(ii) [38]Mumbai Centre for International Arbitration

The Mumbai Centre for International Arbitration (MCIA) established in a joint initiative between the domestic and international business and legal communities.

The MCIA aims to be India's premier forum for commercial dispute resolution by providing:

- arbitral rules which draw on the latest innovations in international arbitration best practice and are also attuned to the Indian market;
- a dedicated secretariat which facilitates the efficient, flexible, cost-effective and impartial administration of arbitration proceedings.

Fees

According to section 11(14) of the Arbitration and Conciliation Act, 1996, for the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule to the Act.

THE FOURTH SCHEDULE

Sum in dispute	Model fee
Up to Rs. 5,00,000	Rs. 45,000
Above Rs. 5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and up to Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent. of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000	Rs. 3,37,500 plus 1 per cent. of the claim amount over and above Rs. 1,00,00,000

38. https://mcia.org.in/about/

Above Rs. 10,00,00,000 and up to Rs. 20,00,00,000	Rs. 12,37,500 plus 0.75 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent on the fee payable as per the table set out above.

LESSON ROUND-UP

- Fundamentally arbitration is a dispute resolution mechanism through which the parties to the dispute sort out their dispute through a third person called the arbitrator.
- After the legislative council was established for India in 1834, it enacted the Code of Civil Procedure Act 1859. The aim for enacting such act was to codify the procedures that the civil courts would follow.
- Globalization and liberalisation of the Indian economy had created the ecosystem for foreign investments to come into India after the year 1991. The investors, however, before investing in India were looking for a vibrant and steady alternate dispute resolution mechanism to be available to get disputes relating to their investments in India adjudicated quickly and at a lesser cost.
- The Arbitration and Conciliation Act, 1996 was first amended in the year 2003. Later in the year 2014-15, the 246th Law Commission Report recommended further changes to the act and thus the act was again amended in the year 2015.
- Arbitration and Conciliation Amendment Act 2019, inserted Part 1A under the Act, which stipulated for the constitution of Arbitration Council of India (ACI). Section 43J thereunder introduced the Eighth Schedule into the Act. The Schedule became subject to wide criticism on the grounds of departure from the principles of party autonomy.
- We are all familiar with the most traditional dispute-resolution process of our civil justice system: litigation and trial with a judge or jury deciding who is right or wrong – where someone wins and someone loses.
- Conciliation is a method of dispute resolution wherein the parties to a dispute come to a settlement with the help of a conciliator. The conciliator meets with the parties both together and separately to enter into an amicable agreement.
- Arbitration agreement is the very foundation of arbitration. It is the very source of the powers of arbitrators. It determines the scope of their authority. As arbitration is a voluntary process there cannot be arbitration without there being an arbitration agreement.
- The SIAC and SIMC have provided a sample “Arb-Med-Arb” clause, which we reproduce below and in italics the portions which are subject to change depending on the agreement of parties.
- Ad hoc arbitration is an arbitration procedure agreed and arranged by the parties themselves. If they fail to do so then it becomes the responsibility of the arbitration tribunal. This enables the parties to tailor the procedure to its needs. That is its main attraction.
- The limitation period for a reference of a dispute to arbitration or to appoint an arbitrator under Section 11 of Act, 1996 is three years from the date on which the cause of action or the claim which is required to be arbitrated first arise.

- The language of the proceedings is to be indicated by the parties under their agreement. If the parties fail to define the language of the arbitration proceedings in the agreement, the arbitral tribunal has the authority to define the language of the arbitration proceedings.
- According to section 11(14) of the Arbitration and Conciliation Act, 1996, for the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule to the Act.

GLOSSARY

Arbitration: means any arbitration whether or not administered by permanent arbitral institution.

Arbitration Agreement: means an agreement referred to in section 7 of the Arbitration and Conciliation Act, 1996

Arbitral Award: It includes an interim award;

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. Write a short note on genesis of Alternate Dispute Resolution (ADR) in India.
2. Explain the recent Amendments to the Arbitration and Conciliation Act, 1996.
3. What are the different modes of Alternate Dispute Resolution Modes?
4. Explain the difference between various modes of Alternate Dispute Resolution.
5. What are advantages of Arbitration?
6. Whether Arbitration Clause and Arbitration Agreement be used interchangeably. Comment.

LIST OF FURTHER READINGS

Handbook on Arbitration: A Practical Guide for Professionals

- **ICSI Publication**

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/A1996-26.pdf
- https://www.indiacode.nic.in/bitstream/123456789/11413/1/a2019-17.pdf

Commercial Transactions

Lesson 2

KEY CONCEPTS

■ Commercial Transactions ■ Contract Law on Transactions ■ Negotiation vis-à-vis Conciliation ■ Discharge of Contracts

Learning Objectives

To understand:

- The role of commercial transaction in under Alternate Dispute Resolutions (ADRs)
- The types of contracts where Negotiation and Conciliation is beneficial
- How contracts are discharged and remedies of ADRs can be advantageous
- Provisions relating to Breach of Contract
- Damage provisions under Contract Law
- How to draft Commercial Contracts

Lesson Outline

- Introduction
- Practical aspects of Contract Law
- Types of Contracts and concepts relating to Negotiation and Conciliation
- Discharge of Contract
  - Discharge by Performance
  - Discharge be Tender of Performance
  - Discharge by mutual agreement or consent
  - Discharge by Lapse of time
  - Discharge by Operation of Law
  - Discharge by Impossibility or Frustration
  - Discharge by Supervening Impossibility
  - Discharge by Supervening Illegality
  - Discharge by Breach
- Critical Clauses
- Breach of Contract: Related Provisions
- Damages under Contract Law
- Drafting of Commercial Contract and other documents
- Role of Company Secretary & Arbitration
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/ Video Links)

REGULATORY FRAMEWORK

- Indian Contract Act, 1872
- Arbitration and Conciliations Act, 1996

INTRODUCTION

A transaction is a commercial transaction if it is connected with the industry, trade or business of the party incurring the liability. Commercial transactions is generally defined as some sort of payment for a good or service. There are many forms of commercial transactions, including those that occur between two separate businesses, consumers and businesses, businesses and government entities and between internal divisions of a company to name a few. Commercial transactions can happen on a large scale or small scale. In short, commercial transactions are at the heart of doing business. Following transactions are some of the example of commercial transactions that may refer for arbitration in case of disputes arising out of-

- ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;
- export or import of merchandise or services;
- issues relating to admiralty and maritime law;
- transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;
- carriage of goods;
- construction and infrastructure contracts, including tenders;
- agreements relating to immovable property used exclusively in trade or commerce;
- franchising agreements;
- distribution and licensing agreements;
- management and consultancy agreements;
- joint venture agreements;
- shareholders agreements;
- subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;
- mercantile agency and mercantile usage;
- partnership agreements;
- technology development agreements;
- intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;
- agreements for sale of goods or provision of services;
- exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;
- insurance and re-insurance;
- contracts of agency relating to any of the above

PRACTICAL ASPECTS OF CONTRACT LAW

"Arbitration Agreement" means an agreement referred to in section 7 of the Arbitration and Conciliation Act, 1996. The essentials of section 7 are as under:

(a) an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(b) That agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(c) That agreement shall be in writing.

(d) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. For example: A document on the website of a company containing terms and conditions relating to an arbitration may be referred to in by the written Contract.

Section 7(4) further clarifies when an agreement can be treated as "in writing".

According to section 7, an arbitration agreement is in writing if it is contained in –

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

In view of this, one of the most important conditions for initiating Arbitration Proceedings is an Agreement. Therefore, the necessary provisions of the Contract Law is also to be complied with. The effect of contract law cannot be understood by understanding the ratio of the cases hereinafter follows:

CASE LAWS

Tata Capital Finance Limited v. Shri Chand Construction and Apartment Pvt. Ltd. (Judgment dated 24.11.2021 in FAO(OS) 40/2020)

In this case, the validity of the below mentioned arbitration clause which lacked mutuality, was decided by Delhi High Court:

"12.18....Notwithstanding anything contained hereinabove, in the event due to any change in the legal status of TCHFL or due to any change or amendment in law or notification being issued by the Central Government or otherwise, TCHFL comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. ("SARFAESI Act") or the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (the DRT Act), which enables TCHFL to enforce the security under the SARFAESCI Act or proceed to recover dues from the Borrower under the SARFAESCI Act and/ or the DRT Act, the Arbitration provision hereinbefore contained shall, at the option of TCHFL , cease to have any effect and if arbitration proceedings are commenced but no award is made, then at the option of TCHFL such proceedings shall stand terminated and the mandate of the arbitrator shall come to an end from the date when such law or its change/ amendment or the notification, becomes effective or the date when TCHFL exercises its option of terminating the mandate or arbitrator, as the case may be....."

The court reasoned that the wording of the above clause allows the appellant the option to enforce the security under the SARFAESI Act. The moment the Appellant exercises the option, the arbitration agreement ceases to have any effect i.e., the option of arbitration can be abandoned at the will of Appellant only. The above clause nowhere mentions that the respondent has the same right. Thus, the option to give a go-bye to the Arbitration agreement is only available to the Appellant and not to the Respondent. Such a clause destroys the essential feature of an Arbitration agreement i.e. of mutuality.

The clause negates the essential element of an arbitration agreement, which is, mutual promise to submit differences to arbitration i.e. mutuality. Mutuality does not permit reservation of the right of reference to arbitration to only one party. For a valid Arbitration agreement, it is essential that either of the parties have the right to ask for a reference.

DLF Home Developers Limited v. Rajapura Homes Private Limited [Judgment dated 22.09.2021 in ARBITRATION PETITION (CIVIL) NO. 16 OF 2020]

In this case, Supreme Court analysed the law pertaining to courts' powers to determine whether the arbitration agreement correlate with the dispute.

The court anlysed, there is no gainsaying that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, by which Section 11 (6-A) was introduced, the earlier position of law as to the scope of interference by this Court at the stage of referral has been substantially restricted. It is also no more *res integra* that despite the subsequent omission of Section 11(6-A) by the Arbitration and Conciliation (Amendment) Act, 2019, the legislative intent behind thereto continues to be a guiding force for the Courts while examining an application under Section 11 of the Act.

The jurisdiction of Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a *prima facie* arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-judge bench in Vidya Drolia (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct '*prima facie* review' at the stage of reference to weed out any frivolous or vexatious claims.

To say it differently, this Court(Supreme Court) or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.

Union of India v. Manraj Enterprises (Judgment dated 18.11.2021 in CIVIL APPEAL NO. 6592 OF 2021)

It was contended that in this case, that the contract between the parties specifically bars payment of interest, not only on the earnest money or security deposit, but also upon any amounts payable to the contractor under the contract. It is urged that since the parties are governed by the contract and the arbitrator and the arbitration proceedings are creatures of the contract, they cannot traverse beyond what has been contemplated in the contract between the parties.

The question in issue was whether the contractor is entitled to any interest *pendente lite* on the amounts payable to the contractor other than upon the earnest money or the security deposit.

The supreme court held that it is clear from the above provision that if the contract prohibits pre- reference and *pendente lite* interest, the arbitrator cannot award interest for the said period. In the present case, clause barring interest is very clear and categorical. It uses the expression "any moneys due to the contractor" by the employer which includes the amount awarded by the arbitrator.

The court also held that the learned Arbitrator in the instant case has erred in awarding *pendente lite* and future interest on the amount due and payable to the contractor under the contract in question and the same has been erroneously confirmed by the High Court.

PSA Sical Terminals Pvt. Ltd v. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin (Judgment dated 28.07.2021 in CIVIL APPEAL NOS. 3699-3700 OF 2018)

In this case, whether the court can exercise its powers in accordance with the requirement of justice i.e *ex debito justitiae.*

The Supreme Court held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers *ex debito justitiae*. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subjectmatter of reference.

L&T Finance Limited v. Dm South India Hospitality Private Limited (Judgment dated 08.11.2021 in ARB. A. (COMM.) 14/2020)

In this case, the Delhi High Court observed that an arbitral tribunal, while adjudicating an application for interim protection under Section 17, does not determine the *lis* between the parties.

It is not required, or even expected, to embark on a detailed analysis of the clauses of the contract, or their true construction and import. It acts, essentially, on equity. While doing so, of course, the arbitral tribunal – as in the case of a Court exercising Section 9 jurisdiction – would not pass directions inimical to the contractual covenants, or which would hinder their compliance or enforcement at a later stage. If, however, while protecting the rights and claims of the parties as urged on the basis of the terms of the contract, the arbitral tribunal, in order to balance the equities, ensure placement of the parties before it on an even ground, and preserve the sanctity of the arbitral process, grants interim protection, the sustainability of the grant cannot be tested on a strict construction of the covenants of the contract.

Welspun Specialty Solutions Ltd. v. Oil and Natural Gas Corporation Ltd. (Judgment dated 13.11.2021 in CIVIL APPEAL NO. 6834 OF 2021)

In this case, the Supreme Court made the law clear on the point that when the time is essence of the Contract. It stated:

It is now settled that 'whether time is of the essence in a contract', has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the

contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same.

Tata Capital Housing Finance Ltd. vs. Shri Chand Construction and Apartment Private Limited and Ors. (24.11.2021 - DELHC)

Whether a valid arbitration clause providing for arbitration of claims of one party and providing for the remedy of the Court or any other fora for the claim of the other party is allowed? No

A bare perusal of the section clearly shows that while "some or all disputes" can be referred to the arbitration, the parties are not at the liberty to split the claims which arise out of the same defined legal relationship i.e. there cannot be a valid arbitration clause providing for arbitration of claims of one party and providing for the remedy of the Court or any other fora for the claim of the other party.

In the present case, the appellant is within the purview of the SARFAESI Act even though it was not on the date of entering into the agreement containing the arbitration clause. The moment the appellant comes within the purview of the SARFAESI Act and DRT Act, the appellant has the option to enforce the security under the SARFAESI Act and to proceed to recover dues under the SARFAESI Act or the DRT Act and then the Arbitration provisions, at the option of the appellant, will cease to have effect. However, the appellant asserts that loss of security in the form of original title deeds will not come with the purview of SARFAESI Act. Hence in the case of loss of documents, resort to arbitration is the only option available to the respondent, meaning thereby, that in respect of the claim of the appellant i.e. recovery of dues from the respondent, the arbitration will cease and the SARFAESI will be enforced but since there are no dues recoverable and only recovery of loss documents remains, the arbitration will continue to have the effect (the claims of Respondent against the appellant).

In our opinion, this cannot be allowed. Since the claims arise in respect of the same legal relationship, the same cannot be split to be adjudicated by arbitration - in respect of claims of one party and, simultaneously, the claim of the other party arising in respect of the same legal relationship to be adjudicated/determined by the SARFAESI/DRT Act. If this is permitted, it may very well be possible that the respondent/plaintiff in the present suit in respect of the same injury would pursue his claims under the Arbitration and Conciliation Act, while the appellant - relying on the aforesaid clause, pursues his claim under SARFAESI/DRT Act. This would not only be permitting splitting up of claims and causes of action, but also result in multiplicity of proceedings and a possibility of conflicting judgments on the same issues.

Inter Ads Exhibition Pvt. Ltd. vs. Busworld International Cooperative (13.01.2020 - DELHC)

In this case, the main and substantive relief claimed in the petition, as extracted in the earlier part of the judgment is for setting aside the termination notice dated 15.03.2019. Learned counsel for the respondent in my view is right in her contention that the said relief cannot be granted in a petition under Section 9 of the Act (i.e. Arbitration and Conciliation Act). The contract between the parties is clearly determinable in nature. Article 7.3 of JVA-I enables either one of the parties to terminate the agreement, if the other party is in default or is in breach of any material obligation under the JVA and has failed to correct the default within 30 days of the receipt of the notice.

The Court held that Once a contract is determinable in nature and has been terminated by one party to the contract, the same cannot be revived or restored by a Court and specific performance of the same cannot be sought by the defaulting party. This has been clearly held by the Court in the case of *RPS Educational Society (Regd.) vs. DDA,* OMP 538/2008, decided on 02.09.2009.

Analysis of above decisions

The contract law supports the Law relating to Arbitration as the Arbitral Process is mainly gets effective due to the agreement of the parties.

Arbitration agreement not to be discharged by the death of any party

Further, according to section 40 of the Act, an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event been forceable by or against the legal representative of the deceased. The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

Also, nothing in section 40, shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

TYPES OF CONTRACTS AND CONCEPTS RELATING TO NEGOTIATION AND CONCILIATION

Negotiation

Negotiation is the way in which individuals communicate with one another in order to arrange their affairs in commerce and everyday life, establishing areas of agreement and reconciling areas of disagreement. Negotiation has been defined as "the process we use to satisfy our needs when someone else controls what we want." Most disagreements are dealt with in one way or the other by negotiation between the principals themselves; relatively few involve legal intercession. Negotiation tends often to be a practical skill learnt pragmatically by personal experience. There are, however, various theories of negotiation, as well as many different individual styles and approaches. Negotiation in details will be studied in Lesson 14.

Conciliation

The settlement of disputes through conciliation covers a wide range of issues. Among others they include commercial and civil disputes and claims for breach of obligations. These may be factual, legal or technical disputes that can range from simple disagreement to complex and substantial technical or commercial disputes. They may arise in relation to virtually any kind of disputes e.g. issues arising under contracts; commercial or corporate disputes; torts and breach of duty including negligence allegation and insurance claims; consumer disputes; disagreements in business or professional relationships such as partnership, principal and agent, franchiser/franchisee and many others. Industrial and Labour disputes, family disputes including issues arising on separation and divorce, Community and Neighbourhood issues, Public Policy issues and social conflicts may also be taken up under conciliation. There are many other fields in which conciliation is being used for settlement of disputes for example, mediation in academia, hospitals and health care systems for consumer disputes, to deal with farmer/lender debt issues and for many other purposes.

The conciliation process and negotiations can be used by an arbitrator for effective resolution of disputes.

Types of Contracts/Agreements in which Arbitrations, negotiation and conciliation are advantageous

Arbitration as mode of dispute resolution has proven to be beneficial in the contracts of Commercial Nature. The Arbitration as dispute resolution system can prove to be advantageous in every type of contract or agreements where the rights and liabilities are of civil nature. However, it can be more favorable for following types of contacts/agreements:

1. **Outsourcing Agreements:** Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. It differs from contracting in that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best - its core competencies. Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing (BPO). BPO includes outsourcing related to accounting, human resources, benefits, payroll, and finance functions and activities. Knowledge Process outsourcing (KPO) includes outsourcing related to legal, paralegal, and other highly skilled activities. However, many a times people neglect to pay attention while drafting an outsourcing agreement.

   An outsourcing agreement though carefully been drafted can lead to a dispute. Therefore, an arbitration clause, negotiation and conciliation can prove to be beneficial.

2. **Business Collaboration:** When two parties join hands for exchange of technical know-how, technical designs and drawings; training of technical personnel of one of the parties in the manufacturing and/or research and development divisions of the other party; continuous provision of technical, administrative and/or managerial services, they are said to be collaborating in a desired venture. The agreements

drawn and executed between such collaborating parties are known as "foreign collaboration agreements". A large number of Indian industrialists have already entered into long and short-term collaboration arrangements with foreign companies, firms etc.

These agreements also can sometimes lead to a dispute and Arbitration, negotiation and conciliation may prove to supportive for the situation.

3. **Assignment Deeds:** There can be various types of assignments. For example: Assignment of Business Debts, Assignment of Goodwill, Assignment of Intellectual Property. In such type of assignment, the situations may arise in which resolution of dispute becomes imperative and Arbitration clause, negotiation and conciliation can prove to be helpful.

4. **Partnership Agreements:** Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits. However, in any business enterprise the possibility of its incurring loss cannot be ruled out. Therefore, all partners of a firm mutually agree to share all profits and losses of the business amongst them according to their predetermined shares/proportions fixed by them in the partnership agreement.

   In case of partnership agreements, Arbitration, negotiation and conciliation process may prove to be beneficial for the parties.

5. **Employment Contracts:** These contracts are entered into by and between the Employers and Employees. Service contracts are drafted in the same way as other agreements. The terms of employment are fixed and clearly expressed and nothing should be left to presumptions. They are required to be both affirmative (describing the acts and duties to be performed) as well as negative (putting restrictions on the acts of the employee during and/or after the term of employment). As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man, Unlike other agreements and legal documents which need not contain matters presumed or implied by law, it is better in such an agreement to specify even such matters and all other matters so as to make it a complete code, embodying the rights and duties of each party.

   An agreement howsoever carefully been drafted always has scope that a dispute may arise. Therefore, an arbitration, negotiation and conciliation can prove to be prolific in these contracts.

DISCHARGE OF CONTRACT

Discharge by Performance

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of Contract Act, 1872 or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Examples

A promises to deliver 50 cars on 07th April, 2023 on payment of 5 Crore Rupees to Z. A dies on 2nd April, 2023. B is the legal representative who is also Son of A. B should deliver the goods and Z should pay 5 crore rupees.

A promises to prepare a report for increase of growth for ZMAKL Limited by 07th April, 2023 on a payment of 10 Lakh Rupees. A dies on 2nd April, 2023. This contract cannot be enforced either by A's representatives or by Z.

Discharge by Tender of Performance

Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

It means one party is ready to perform his part but the other party is not performing. In this case the person offering to perform is not responsible for non-performance, nor does he lose his rights under the contract.

Conditions of such Offer

Every such offer must fulfil the following conditions:

(1) **Unconditional Offer:** The offer of performance must be unconditional.

(2) **Reasonableness:** The offer of performance must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

(3) **Certainty of the thing promised:** if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

(4) **Offer to Joint Promisees:** An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Example

A contracts to deliver to Z at his godown, on the 1st April, 2023, 100 cars of a brand. In order to make an offer of a performance with the effect stated in this section, A must bring the cars to Z's godown, 1st April, 2023, under such circumstances that Z may have a reasonable opportunity of satisfying himself that the thing offered is cars of that brand contracted for, and that there are 100 cars.

Effect of refusal of party to perform promise wholly

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Example

A, a poet, enters into a contract with Z, the manager of a restaurant, to do poetry at his restaurant one nights every week during the next twelve months, and Z engages to pay him 10,000 rupees for each performance. On the tenth night, A willfully absents himself from the theatre. B is at liberty to put an end to the contract.

With the assent of Z, A performs on the eleventh night. Z has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the tenth night.

In the above situation, If the parties to an agreement has Arbitration clause or agree to refer the matter for Arbitration. Arbitration can be useful for the parties.

Discharge by Mutual Agreement or Consent

The parties can modify the terms of the original contract by novation, rescission, and alteration of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.

Example

A has taken a loan from ABXFZR Finance Limited(A NBFC) under a Contract. It is agreed between A, ABXFZR Finance Limited and CDSLKM LLP Co that A shall accept CDSLKM LLP Co. as his debtor, instead of ABXFZR Finance Limited. The old debt is at an end, and a new debt has been contracted.

Every promisee may dispense with or remit, wholly or in part, the performance of the promisee made to him, or may extend the time for such performance,or may accept instead of it any satisfaction which he thinks fit.

Example

A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise

A owes B, under. a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

Discharge by Lapse of time

The Limitation Act, in certain circumstance, affords a good defence to suits for breach of contract, and in fact terminates the contract by depriving the party of his remedy to law. For example, where a debtor has failed to repay the loan on the stipulated date, the creditor must file the suit against him within three years of the default. If the limitation period of three years expires and he takes no action he will be barred from his remedy and the other party is discharged of his liability to perform.

Discharge by Operation of the Law

Discharge under this head may take place as follows:

(a) **By merger:** When the parties embody the inferior contract in a superior contract.

(b) **By the unauthorised alteration of items of a written document:** Where a party to a written contract makes any material alteration without knowledge and consent of the other, the contract can be avoided by the other party.

(c) **By insolvency:** The Insolvency Act provides for discharge of contracts under particular circumstances. For example, where the Court passes an order discharging the insolvent, this order exonerates or discharges him from liabilities on all debts incurred previous to his adjudication.

Discharge by Impossibility or Frustration

An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful. – A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful. – Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise.

Discharge by Supervening Impossibility

A contract will be discharged by subsequent or supervening impossibility in any of the following ways:

(a) Where the subject-matter of the contract is destroyed without the fault of the parties, the contract is discharged.

(b) When a contract is entered into on the basis of the continued existence of a certain state of affairs, the contract is discharged if the state of things changes or ceases to exist.

(c) Where the personal qualifications of a party is the basis of the contract, the contract is discharged by the death or physical disablement of that party.

Discharge by Supervening Illegality

A contract which is contrary to law at the time of its formation is void. But if, after the making of the contract, owing to alteration of the law or the act of some person armed with statutory authority the performance of the contract becomes impossible, the contract is discharged. This is so because the performance of the promise is prevented or prohibited by a subsequent change in the law.

Example

A enters into contract with B for cutting trees. By a statutory provision cutting of trees is prohibited except under a licence and the same is refused to A. The contract is discharged.

Cases in which there is no supervening impossibility

In the following cases contracts are not discharged on the ground of supervening impossibility–

(a) Difficulty of performance: The mere fact that performance is more difficult or expensive than the parties anticipated does not discharge the duty to perform.

(b) Commercial impossibilities do not discharge the contract: A contract is not discharged merely because expectation of higher profits is not realised.

(c) Strikes Lockouts etc.: Strikes, lockouts and civil disturbance like riots do not terminate contracts unless there is a clause in the contract providing for non-performance in such cases.

Supervening impossibility or illegality is known as frustration under English Law.

Discharge by Breach

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract. The breach of contract may be (i) actual; or (ii) anticipatory. The actual breach may take place either at the time the performance is due, or when actually performing the contract. Anticipatory breach means a breach before the time for the performance has arrived. This may also take place in two ways – by the promisor doing an act which makes the performance of his promise impossible or by the promisor in some other way showing his intention not to perform it.

CRITICAL CLAUSES

Any contract should be drafted carefully. But in case of Commercial Contracts, more diligence is required as the value at stake are comparably more in case if commercial. Though, all the clauses require enough time and due attention but few important clauses requires more diligence. These clauses *inter alia* are as under:

1. **Operating Clauses:** An agreement can be split into parts as any other document viz. Title, Date, Parties, Recitals, Testatum, Operating Clause, Schedule (if necessary), Exceptions and Reservations (if any),

Habendum, Covenants (if any) and Testimonium. Operating clauses are one the most important clauses of an agreement as they can be said to be the purpose and essence of a contract. They are required to be drafted very carefully. Otherwise the purpose of an contract may not succeed.

2. **Confidentiality Clause:** In modern business transactions, it is sometimes necessary for the seller to supply detailed specifications, literature, etc. relating to the goods particularly if the goods are of scientific or technical nature. In such cases, it is usual to provide in the contract as to whether the technical documentation supplied by the seller will become the property of the buyer or it has to be returned to the seller after a stipulated time. It is also desirable to provide that the technical and confidential information contained in the documentation should be kept confidential by the buyer and that it will not be transmitted by him to a third-party without the permission of the seller.

3. **Force Majeure:** Another very important provision witnessed in modern commercial contracts relates to force majeure or excuses for non-performance. This provision defines as to what particular circumstances or events beyond the control of the seller would entitle him to delay or refuse the performance of the contract, without incurring liability for damage. It is usual to list the exact circumstances or events, like strike, lockout, riot, civil commotion, Government prohibition, etc. which would provide an excuse to the seller to delay or refuse the performance. It may be further provided that events of a similar nature, which are beyond the control of the seller and which could not have been avoided with due diligence would also furnish the above relief.

4. **IPR Protection Clauses:** As the size of the Businesses are growing, the importance and value of IPR is increasing. Therefore, it is essential that the IPR Protection clause are always included in commercial contracts.

5. **Dispute Resolution:** The last, but not the least, important is the provision regarding settlement of disputes under the contract by arbitration or otherwise. It is usual to provide for an arbitration clause in the contract, particularly under the auspices of an arbitral institution. A suitable arbitration clause may be provided by the parties by mutual agreement. It is also desirable to provide for the mode of appointment of arbitrator and also for the venue of the arbitration in the arbitration clause.

BREACH OF CONTRACT: RELATED PROVISIONS

Section 73 provides the provisions relating to the Compensation for loss or damage caused by breach of contract. It states:

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Further this section also provides for the provisions for compensation for failure to discharge obligation resembling those created by contract. It states:

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation. – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations and Examples relating to Breach of Contract

(a) A contracts to sell and deliver 50 machines to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 machines of like quality at the time when the machines ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo, which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that

he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day, B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise.

In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being in consequence detained in Calcutta for some time and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to

which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Section 74 provides the provisions for Compensation for breach of contract where penalty stipulated for. Section 74 states:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation. – A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception. – When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation. – A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations and Examples

(a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

Section 75, provides for the Party's right of rescinding contract and entitlement to compensation. It states:

A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

DAMAGES UNDER CONTRACT LAW

The damages can be differentiated as Liquidated damages and Unliquidated damages.

Liquidated Damages: Where the contracting parties agree in advance the amount payable in the event of breach, the sum payable is called liquidated damages.

Unliquidated Damages: Where the amount of compensation claimed for a breach of contract is left to be assessed by the Court, damages claimed are called unliquidated damages.

Further, unliquidated damages can be divided into the following types:

(a) **general or ordinary damages:** These are restricted to pecuniary compensation to put the injured party in the position he would have been had the contract been performed. It is the estimated amount of loss actually incurred. Thus, it applies only to the proximate consequences of the breach of the contract and the remote consequences are not generally regarded.

(b) **Special damages:** Special damages are those resulting from a breach of contract under some peculiar circumstances. If at the time of entering into the contract, the party has notice of special circumstances which makes special loss the likely result of the breach in the ordinary course of things, then upon his-breaking the contract and the special loss following this breach, he will be required to make good the special loss.

(c) **Exemplary or punitive damages:** These damages are awarded to punish the defendant and are not, as a rule, granted in case of breach of contract. In two cases, however, the court may award such damages, viz.,

(i) breach of promise to marry; and

(ii) wrongful dishonour of a customer scheque by the banker

(d) **Nominal damages:** Nominal damages consist of a small token award, e.g., a rupee of even 25 paise, where there has been an infringement of contractual rights, but no actual loss has been suffered. These damages are awarded to establish the right to decree for breach of contract.

Liquidated Damages and Penalty

Where the contracting parties fix at the time of contract the amount of damages that would be payable in case of breach. This may be in the nature of liquidated damages or penalty. The test of the two is that where the amount fixed is a genuine pre-estimate of the loss in case of breach, it is liquidated damages and will be allowed. If the amount fixed is without any regard to probable loss, but is intended to frighten the party and to prevent him from committing breach, it is a penalty and will not be allowed. In Indian law, there is no such difference between liquidated damages and penalty. Section 74 provides for "reasonable compensation" upto the stipulated amount whether it is by way of liquidated damages or penalty.

Other remedies Specific Performance and Injunction

It means the actual carrying out by the parties of their contract, and in proper cases the Court will insist upon the parties carrying out this agreement. Where a party fails to perform the contract, the Court may, at its discretion, order the defendant to carry out his undertaking according to the terms of the contract. A decree for specific performance may be granted in addition to or instead of damages.

An injunction, is an order of a Court restraining a person from doing a particular act. It is a mode of securing the specific performance of a negative term of the contract, (i.e., where he is doing something which he promises not to do), the Court may in its discretion issue an order to the defendant restraining him from doing what he promised not to do. Injunction may be prohibitory or mandatory. In prohibitory, the Court restrains the commission of a wrongful act whereas in mandatory, it restrains continuance of a wrongful commission.

DRAFTING OF COMMERCIAL CONTRACT AND OTHER DOCUMENTS

Contracts are essential element of all business relationships and it is necessary to execute proper commercial contracts with parties to avoid future disputes. With the growing business activities, the quantum of contracts has increased proportionately, which demands more conscious approach from the parties to the contract.

When two companies wish to do business with each other, a contract specifies the activities entered into by both organizations and the terms through which they will each fulfill their parts of the agreement. Contracts affect business profitability in a very large way due to the emphasis on revenue and expenses.

When a contract is phrased poorly, one organization might lose countless money over a simple technicality that lack the resources to identify. Effective contract drafting can ultimately create a powerful business relationship and pave the road to greater profitability over the long term, but only when managed correctly.

You should start by drafting an agreement; either from scratch or by using a contract template. The advantage of using a contract template is that it is more efficient and it can help you ensure that the contract is compliant and consistent with your standards. A good contract management software should offer the opportunity to work in templates; either your own, some delivered by lawyers or more generic documents. You should also be able to capture and collect all your existing contracts with an upload function so that all your legal documents can be stored and analysed together.

GENERAL CONDITIONS OF CONTRACTS (GCC)

It is essential to understand the general conditions of the Contract. Owing to its name it contains standard terms and conditions which are generally applicable for all contracts irrespective of the nature of work, supplier type and other factors. Normally, the terms and conditions are about the rights and obligations of the contracting parties. Lay the framework for the entire relationship between the parties on the project. Understand what to look for and what the language means.

General Conditions are an inherent part of the Contract. It governs the entire contract. Contain contractual principles applicable to most projects with supplements for a particular project. Contains broad aspects relating to the roles, rights and duties and responsibilities of the parties to the contract. Generally, contains the Constants. Format forms the basis for modification.

It establishes the general risks, liabilities and obligations of the contracting parties and the administrative procedures for the administration of the contract i.e. the general conditions of contract. It is framed around the processes and procedures which commence with the signing of the Form of Offer and Acceptance and conclude with the Employer making a final payment to the Contractor.

General Condition Clause[1]

(a) DEFINITION AND INTERPRETATION

(b) EXECUTION, CORRELATION, AND INTENT

The Contract Documents shall be signed by the Owner and Contractor as provided in the Agreement. If either the Owner or Contractor or both do not sign all the Contract Documents, the Designer shall identify such unsigned Documents and ensure that they are properly signed by the necessary parties.

Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed, correlated personal observations with requirements of the Contract Documents, has checked and verified all site conditions, and hereby waives any and all claims, present or future, for misrepresentation on the part of the Owner or Designer.

The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all

(c) OWNERSHIP AND USE OF DESIGNER'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

(d) INTERPRETATION: In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

(e) CONFIDENTIAL NATURE OF DOCUMENTS AND INFORMATION

(f) PROHIBITION ON ASSIGNMENT, MODIFICATIONS

(g) INDEMNIFICATION

(h) ENCUMBRANCES AND LIENS

(i) FORCE MAJEURE; OTHER CHANGES IN CONDITIONS

(j) TERMINATION

SPECIAL CONDITIONS OF CONTRACT (SCC)

Special conditions of contract (SCC) shall be read in conjunction with the general conditions of contract (GCC) also referred to as General Terms and conditions of works contract, Schedule of Quantities, Specifications of work, drawings and any other document forming part of this contract wherever the context so requires.

Where any portion of GCC is contradicting any provisions of the SCC, then unless a different intention appears, the provision(s) of the SCC of contract will override the provision(s) of GCC.

Special conditions

- Extends anything not included or modified in the Supplementary Conditions, thus are an inherent part of the Contract for Construction.
- Extend the Conditions for a specific region, or project, or owner/ organization.

1. This list of Sample Clauses is for reference and not exhaustive, there can more general conditions clauses that can be included in the contract.

- Is likely a standard document issued by the owner (usually a public agency) to be attached to the general and supplementary conditions.
- Are new items, and do not follow the format of General Conditions.

Sample Clauses

a. **Lowest price syndrome:** It is always a guiding principle nowadays that the work should be awarded to Lowest bidder only. Proper evaluation of Lowest bidder has to happen in terms of his credentials in jobs execution, financial, safety statistics, technical capability etc before the price bid is considered.

b. **Dispute Resolution-Arbitration:** Most of the times, it is one sided favouring the customer, not the vendor. Time lines for arbitration also are not mentioned in the tender documents. Also, If there are several disputes in one job, payments should be released to vendor as soon as particular dispute is resolved, rather than waiting for resolution of all disputes.

c. **Engagement of screened & credible vendors:** A committee has to thoroughly study the technical bid of the vendors and then come to a conclusion on their capability to execute the project in terms of financial & technical parameters and also the track record of the vendors in executing similar works. CIDC is having approved vendors list and that list should be given preference while choosing the vendors.

d. **Cash flows and payments to be released:** Abnormal delays are happening in payments to vendors. Time lines to be defined strictly for payments and interest to be paid to vendors if there is delay in payments.

e. **Pre-engineered and pre-fabricated technologies:** In many government departments, even now, obsolete construction technologies are being used. A committee has to be formed to study new technologies in construction to save time & cost, and adopt them in construction. CIDC has list of approved vendors who adopt such technologies and vendors should be short-listed accordingly.

f. **Penalties and Bonuses:** Mostly the penalties are levied one sided only, and as a result, vendors are suffering. A rational and logical approach is required in this regard. Also bonus clause should be incorporated in the tender document to reward the vendors in case of early completion of work.

Difference Between General & Special Conditions of Contract

General Conditions of Contract	***Special Conditions of Contract***
Contains standard terms and conditions which are generally applicable for all contracts irrespective of the nature of work, supplier type and other factors	Relates to the specific contract. It includes terms and conditions which are applicable for that particular contract only and will vary for each contract depending upon the nature of work, supplier type and other factors
It would not be advisable to change or adjust GCC as these terms and conditions might have a long term legal implication and therefore need to be veted by the legal team	Although it is important to get the SCC veted by legal also but since it is generally specific to one contract and more of tactical (operational) nature, it's implications may not be as deep as the GCC
It is more of strategic in nature	It is more technical in nature
it is like if you want to change the look of your home for a particular event or function, you generally do not tamper with the foundation of the building but may change the interior decoration for different events.	

Drafting of Commercial Contracts in details has been covered in the paper Drafting, Pleadings & Appearances.

ROLE OF COMPANY SECRETARY & ADR

Company secretaries are not only corporate legal experts but due to the very nature of profession, their knowledge is far superior in respect of commercial understanding. They have an edge in the sense that they understand the underlying commercial transaction or the legal framework in a more effective manner. Since they are exposed to various facets of law and the management, they can formulate a better strategy in arbitral proceedings while advising to the client. Thus company secretaries in practice can act as strategist and authorized representative in arbitral proceedings. Presently company secretaries in practice render Arbitration and Conciliation Services such as advising on arbitration, negotiation and conciliation in commercial disputes between the parties, acting as arbitration/conciliator in domestic and international commercial disputes and drafting Arbitration/Conciliation Agreement/Clause.

LESSON ROUND-UP

- A transaction is a commercial transaction if it is connected with the industry, trade or business of the party incurring the liability. Commercial transactions is generally defined as some sort of payment for a good or service.
- The court anlysed, there is no gainsaying that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, by which Section 11 (6-A) was introduced, the earlier position of law as to the scope of interference by this Court at the stage of referral has been substantially restricted. It is also no more res integra that despite the subsequent omission of Section 11(6-A) by the Arbitration and Conciliation (Amendment) Act, 2019, the legislative intent behind thereto continues to be a guiding force for the Courts while examining an application under Section 11 of the Act.
- Arbitration as mode of dispute resolution has proven to be beneficial in the contracts of Commercial Nature. The Arbitration as dispute resolution system can prove to be advantageous in every type of contract or agreements where the rights and liabilities are of civil nature.
- The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of Contract Act, 1872 or of any other law.
- The Limitation Act, in certain circumstance, affords a good defence to suits for breach of contract, and in fact terminates the contract by depriving the party of his remedy to law. For example, where a debtor has failed to repay the loan on the stipulated date, the creditor must file the suit against him within three years of the default.
- Contracts are essential element of all business relationships and it is necessary to execute proper commercial contracts with parties to avoid future disputes. With the growing business activities, the quantum of contracts has increased proportionately, which demands more conscious approach from the parties to the contract.
- General Conditions are an inherent part of the Contract. It governs the entire contract. Contain contractual principles applicable to most projects with supplements for a particular project. Contains broad aspects relating to the roles, rights and duties and responsibilities of the parties to the contract. Generally, contains the Constants. Format forms the basis for modification.
- Company secretaries are not only corporate legal experts but due to the very nature of profession, their knowledge is far superior in respect of commercial understanding. They have an edge in the sense that they understand the underlying commercial transaction or the legal framework in a more effective manner.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain the relation between Alternate Dispute Resolutions and Contract Law?
2. How Alternate Dispute Resolution methods can prove to be beneficial for Commercial Transactions? Explain.
3. What is the status of an "arbitration clause which lacked mutuality" legally? Cite relevant case law.
4. Can courts determine whether the arbitration agreement correlate with the dispute? Comment with the help of a Case Law.
5. Explain various mode of discharge of contracts.
6. What can be the role of a Company Secretary in ADR Proceedings?

LIST OF FURTHER READINGS

Handbook on Arbitration: a Practical guide for Professionals

– **ICSI Publication**

Course Material of ICSI PMQ Course on Arbitration

– **ICSI Publication**

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf
- https://www.indiacode.nic.in/bitstream/123456789/2187/2/A187209.pdf

Arbitration Procedure, Appointment of an Arbitrator and Other Aspects

Lesson 3

KEY CONCEPTS

■ Pre arbitral process ■ Arbitral process ■ Notice to arbitration ■ Fillings of pleads ■ Appointment, power and duties of arbitrator ■ Arbitral awards ■ Pre and Post Amendment ■ Waiver of the Rights ■ Jurisdiction issue ■ The competence-competence ■ Principle

Learning Objectives

To understand:

- Arbitral process with and without court intervention
- What a notice to arbitration should contain; What is the objective of sending a notice
- Kinds of replies to notice to arbitrational proceeding
- The importance and procedures involved in exchanging written pleadings in arbitration proceedings
- The appointment process, the importance of mutual agreement between the parties in the selection of arbitrators, the guidelines for the appointment of arbitrators, and the role of courts in the appointment process
- Interim measures provided under the Arbitration and Conciliation Act, 1996
- Importance for defining the scope of the dispute and streamlining the proceedings
- Importance of an effective closing argument
- The provisions related to challenging an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996, and to provide a definition of an arbitral award
- information on the grounds and limitations for setting aside an arbitral ruling under the Indian Arbitration and Conciliation Act of 1996
- Powers, Duties and functions of arbitrator
- The grounds for potential conflicts in the arbitration process under the Act
- Major amendments brought about by the 2015 Amendment Act
- Section 4 of the Indian Arbitration and Conciliation Act, 1996, which deals with the deemed waiver of a party's right to object in certain circumstances
- Jurisdiction issues in the arbitral tribunal, the principles of party autonomy and competence-competence, and the remedies provided by the Arbitration and Conciliation Act, 1996, against an arbitration award

Lesson Outline

- Arbitral Process
- Invoking Arbitration and Notice to Parties
- Number of Arbitrators
- Reply to Arbitration Proceeding
- Service of Notice to Arbitrate
- Fillings of Pleadings
- Appointment of Arbitrator
- Appointment in Case of Institutional Arbitration and Ad Hoc Arbitration
- Witnesses and Evidence
- Interim Measures under Arbitration and Conciliation Act
- Prayers for Temporary Protective Measures
- Fixation of Issues
- Awards
- Modification of Arbitral Award
- Reliability of Arbitral Awards
- Grounds for Challenging the Appointment of an Arbitrator.
- Powers of Arbitrator
- Duties or Functions of Arbitrator
- Grounds for Conflict
- Pre Amendment
- Post 2015 Amendment
- Waiver of the Right to Object under the Arbitration and Conciliation Act, 1996
- Arbitration Tribunal and Jurisdiction issues
- Understanding the Competence-Competence Principle
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/ Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Indian Evidence Act, 1872
- Code of Civil Procedure, 1908

ARBITRAL PROCESS

Arbitral process refers to the procedures and steps involved in resolving a dispute through arbitration. Arbitration is a form of alternative dispute resolution where parties agree to have their dispute heard and resolved by an impartial third-party arbitrator or a panel of arbitrators, instead of going through traditional court litigation.

Steps in arbitration without court intervention

Steps in arbitration with court intervention

- Notice to Arbitrate
- Reply – Denies existence of arbitration agreement or affirms existence of arbitration agreement but no consensus on appointment of arbitrator
- Intervention of court under section 8 or section 11
- Interim Relief from court under section 9 where urgent relief is required from court and there is no provision for emergency arbitration
- Appointment of arbitrator: The parties will select an arbitrator or panel of arbitrators or in absence of consensus, court will appoint the arbitrator
- Challenge to jurisdiction – where arbitrator states that he doesn't have jurisdiction or he exceeded his jurisdiction under section 16(2) or 16(3), respectively, such decision of arbitrator can be challenged before court under section 37(2) of the Act
- Case Management Conference
- Statement of Claim
- Statement of Defense
- The party's u/s 27 may engage in limited discovery to obtain information and evidence to support their case.
- Arbitration hearing
- Arbitration award
- Award can be challenged under section 34
- If the parties do not voluntarily comply with award, court's intervention with enforcement may be sought under section 36 of the Act.

Pre-Arbitral Process

Pre-arbitral process refers to the preliminary procedures that parties engage in before initiating formal arbitration proceedings. This phase is crucial in resolving disputes outside of the court system, as it provides an opportunity for parties to come to a mutual agreement before committing to the time and expense of arbitration. The process is as follows:

- Notice to Arbitrate
- Appointment of an arbitrator (S. 11)
- Challenge/Termination of an arbitrator
- Interim Measures (S. 9)
- Case Management Conference
- Terms of Reference for Arbitrator

INVOKING ARBITRATION AND NOTICE TO PARTIES

According to the general rule, arbitration is assumed to have started when one party gives notice to arbitrate to the other stating his intention to invoke the arbitration agreement and requests that they both take action to start the arbitration process.

It cannot be expected of the other party to be aware of the party invoking the arbitration agreement's desire to have the issues arbitrated until a notice requesting their appointment of an arbitrator according to the arbitration agreement is served on them. The notice of invocation of arbitration also acts as a record to show the date it was sent, which is important for limitation purposes.

Any step that must be carried out as a prerequisite to using the arbitration agreement must be done so before using the arbitration agreement. The opponent may object about non-compliance with the mandatory procedure specified in the agreement before invoking arbitration agreement if such a mandatory method is not followed before invoking arbitration agreement. If the party seeking to invoke the arbitration agreement does not follow this mandatory procedure and the opposing party does not object before the arbitral tribunal, this amounts to waiver under Section 4 of the Arbitration and Conciliation Act, 1996.

While preparing the notice invoking the arbitration agreement, the party seeking to invoke the arbitration agreement must be meticulous.

In India, a notice to arbitration should generally contain the following information:

1. The names and contact information of the parties involved in the dispute.
2. A statement indicating that the dispute will be resolved through arbitration, rather than through litigation in a court of law.
3. A brief summary of the dispute, including the relevant facts and any legal or contractual provisions that are relevant to the dispute.
4. A request for a specific form of relief or remedy, such as monetary damages, injunctive relief, or specific performance.
5. The rules and procedures that will govern the arbitration, including any designated arbitration organization, the location of the arbitration, and the number of arbitrators who will be appointed.
6. A copy of the arbitration agreement, if any, that the parties have previously entered into.
7. A deadline for responding to the notice and for selecting an arbitrator or arbitrators if necessary.

8. A statement indicating that the parties agree to abide by the decision of the arbitrator or arbitration panel and to waive any right to appeal the decision.
9. A statement requesting the other party to nominate an arbitrator, in case of a two-arbitrator panel or to agree on the appointment of a presiding arbitrator in case of a three-arbitrator panel.
10. A statement indicating that if the other party does not respond to the notice within a specified time period, the initiating party may proceed with the appointment of an arbitrator or arbitrators on its own.
11. It is important to note that the specific requirements for a notice to arbitration in India may vary depending on the arbitration agreement, the applicable law, and the rules or procedures that apply to the arbitration. It is recommended to consult an attorney or a legal expert in India for guidance on the specific requirements for a notice to arbitration.

NUMBER OF ARBITRATORS

The arbitral tribunal will only consist of one arbitrator if the arbitration agreement specifies the appointment of a single arbitrator or if the arbitration agreement is silent about the number of arbitrators.

The party that requests arbitration under the arbitration agreement may suggest the names of a few arbitrators and may request that the other party accept one of those names or suggest another name if the first suggestion is rejected by the other party within thirty days of the date of receipt of the notice.

REPLY TO ARBITRATION PROCEEDING

When a party receives a claim in an arbitration proceeding, they may choose to reply in several ways. One common way to reply is to admit, deny, or admit but deny liability, as follows:

1. **Admit the claim:** The party may agree that the claim is valid and accept the liability for the damages or losses claimed by the other party. In this case, the parties may proceed to discuss the amount and terms of the settlement or award.
2. **Deny the claim:** The party may dispute the validity or merits of the claim, arguing that it is not supported by the facts or the law, or that the damages or losses are exaggerated or unfounded. In this case, the parties will need to present evidence and arguments to support their positions.
3. **Admit but deny liability:** The party may acknowledge that the claim is valid and the damages or losses have occurred, but deny that they are responsible for them, based on various grounds such as limitation periods, force majeure, or third-party liability. In this case, the parties will need to present evidence and arguments to support their positions, and the arbitral tribunal will need to determine the liability and the amount of damages or losses, if any.

COUNTER CLAIM

A counterclaim is a claim made by the respondent against the claimant in response to the original claim, seeking relief for damages or losses caused by the claimant's actions or omissions related to the same dispute. The following are the ingredients for a good counter claim:

1. **Scope**: The counterclaim must be related to the same transaction or occurrence that is the subject of the claim, or arise out of the same contract or relationship. It cannot be a separate or unrelated claim.
2. **Timing**: The counterclaim can be made in the initial response to the notice of arbitration, or later in the arbitration proceedings, subject to the time limits and procedures set forth in the arbitration rules or the agreement of the parties.
3. **Procedure**: The counterclaim must be asserted with sufficient detail and supporting evidence to enable

the arbitral tribunal to consider and decide on its merits. The parties may have the right to present evidence and arguments in support of their respective claims and defenses.

4. **Relief**: The counterclaim may seek various types of relief, such as damages, injunctions, specific performance, or declaratory relief, subject to the applicable law and the jurisdiction of the arbitral tribunal.
5. **Impact on the original claim:** The counterclaim may affect the original claim and the amount of damages or losses claimed by the claimant, as it may reduce or offset the claimant's entitlement to relief.
6. **Decision**: The arbitral tribunal will decide on the merits of the counterclaim, based on the evidence and arguments presented by the parties, and will include the decision in the final award. The decision may be enforceable against the claimant, subject to the applicable law and the jurisdiction of the courts.

SERVICE OF NOTICE TO ARBITRATE

Section 3 of the Arbitration and Conciliation Act, 1996 addresses the circumstances under which the respondent is presumed to have received a notification. Any written communication is deemed to have been received if it is personally delivered to the addressee or left at his place of business, habitual residence, or mailing address.

If none of the locations mentioned above can be located after making a reasonable search, a written communication is deemed to have been received if it is sent by registered letter or by any other method which provides a record of the attempt to deliver it.

Objectives for sending this notice for arbitration

The parties to the arbitration agreement who are the targets of a claim ought to be aware of those claims. It's possible that in response to the notice, the recipient may accept some of the claims in full or in part, which would help to focus on the areas of disagreement.

Such a notification gives the recipient the chance to determine whether the claims are legally or chronologically barred, estopped, or unsustainable in light of the factual circumstances surrounding the parties' disagreement.

This notification specifies the procedure to be used for the arbitration procedures and arbitrator appointment. It will not be feasible to determine whether the processes for the appointment of an arbitrator and other procedures as envisioned in the arbitration provision have been followed unless a notice invoking the arbitration clause has been given. Arbitration agreements almost often prohibit the unilateral appointment of an arbitrator by one of the parties; the choice of the arbitrator must be agreed upon by both parties. An important function of the notification provided under Section 21 is to facilitate agreement on the choice of an arbitrator.

Even if the notice required by Section 21 of the act allows one of the parties to select the arbitrator, the party making such an appointment must nonetheless notify the other party in advance of the person it intends to nominate. Such a person could very well be "disqualified" from serving as an arbitrator for a variety of reasons. After obtaining such notice, the recipient may be able to draw attention to this flaw and convince the claimant to designate a qualified individual.

FILING OF PLEADINGS

Statements of claim and statement of defence are typically exchanged in written procedures. They are the primary fillings of the arbitration proceeding. The quantity, order, and deadlines for submitting written pleadings may all be agreed upon by the parties. Unless specifically stated differently, the respondent may also submit a counterclaim. The Claimant presents the evidence supporting his claims, the points of contention, and the requested reliefs through the "Statement of Claim" (SOC). The Respondent, on the other hand, supplies the arbitral tribunal with a "Statement of Defence" (SoD), which outlines his defence and other details to refute

the claim made by the Claimant. The Arbitration and Conciliation Act of 1996's Section 23 mandates that the Statement of Claim and Defense include all relevant facts, remedy requests, and documentary evidence.

Section 25 of the Arbitration and Conciliation Act of 1996 emphasises the significance of the Statement of Claim and Defense. According to the Section, the arbitral tribunal may end the entire arbitration process if the claimant fails to submit his Statement of Claim. Nonetheless, Section 25(2) gives the arbitral tribunals the power to continue hearing arguments if the respondent does not provide a statement of defence. The arbitral tribunal may also decide to treat the respondent's failure to submit the Statement of Defence as a forfeiture or waiver of their claim under this Section. Hence, failing to submit a statement of claim or statement of defence would negatively affect any party's standing before the arbitral tribunal.

The statements made by each party serve as the foundation for their respective arguments. As a result, the parties must appropriately construct their statements. The High Court of Delhi in the case of of *M/s. Cinevistaas Ltd. V. M/s. Prasar Bharti, O.M.P. (COMM) 31/2017* held that claims that have already been raised in the notice of arbitration are not time-barred by limitation, even if they are not included in the statement of claim, in a case involving a petition brought under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenging an arbitrator's decision. The analysis of the law regarding arbitral orders that are subject to challenge under Section 34 of the Act, which deals with requests to vacate arbitral judgements, makes the ruling noteworthy as well.

It is also established that if the respondent wished to make changes in the statement of defense , they are permitted to do so *via* section Section 23(3) of the Arbitration and Conciliation Act, the Respondent may be permitted to amend the statements, but only under certain conditions, such as: The parties have not set any constraints on themselves regarding the amendment of the statements; The amendment may be permitted by the arbitral tribunal if the request for such amendment/ supplementing has been made without any unreasonable delay; the amendment may be rejected if they fall under the ambit of the arbitration agreement and can be made without manifest and grave justice to the party seeking the amendment; and the amendment will be allowed if the arbitral proceedings are still ongoing.

APPOINTMENT OF ARBITRATOR

The appointment of arbitrators is an essential element of the arbitration process, as it involves the selection of a neutral third party who is responsible for resolving disputes between the parties. Section 11 of the Arbitration and Conciliation Act, 1996, deals with the appointment of arbitrators and has undergone certain amendments in 2015 and 2019 to address issues that have arisen in the appointment process.

These amendments introduced significant changes in the appointment process. It established the Arbitration Council of India (ACI), which is responsible for maintaining a panel of arbitrators and promoting the development of arbitration in the country. Another notable development is that the designation of any person or institution by the Courts, shall not be regarded as a delegation of judicial power.

The Arbitration and Conciliation Act, 1996, provides for the finalisation of the name of arbitrators through mutual agreement between the parties. Section 11(1) of the Act states that the parties are free to agree on the procedure for appointing the arbitrator(s). This includes the selection of an arbitrator or a panel of arbitrators who are mutually agreed upon by the parties. The Act encourages the parties to agree on the selection of arbitrators as it promotes a more efficient and cost-effective arbitration process.

If the parties cannot come to a mutual agreement on the procedure for appointment, Section 11(3) provides the following guidelines for the appointment of three arbitrators: each party selects an arbitrator, and the two arbitrators then jointly select the third arbitrator who acts as the presiding arbitrator.

Further, under Section 11(4), there are two prerequisites when the procedure described in clause (3) is utilized. Firstly, both parties must nominate an arbitrator within thirty days of receiving a request from the other party

to do so. Secondly, within thirty days from the appointment of both arbitrators, they must arrive at a consensus regarding the appointment of the third arbitrator.

Mutual agreement on the selection of arbitrators remains the preferred method for finalizing the name of arbitrators, which provides that the courts shall not intervene in the selection of arbitrators made by the parties, except as provided in Section 11(6) which deals with a situation where the appointment process breaks down or a party fails to act in the appointment process.

When the parties do not agree on the appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996, either party may request the Supreme Court or the High Court, or any person or institution designated by such court, as the case may be, to appoint the arbitrator.

The Supreme Court or the High Court, as the case may be, will then examine the request and may seek further information or clarification from the parties, as it deems fit. Once satisfied, the Court will appoint the arbitrator or arbitrators, as the case may be.

In making the appointment, the Court or Designated Institution will take into consideration the qualifications required of the arbitrator as agreed upon by the parties, as well as any other relevant factors, such as the nationality of the arbitrator or his or her ability to communicate in a particular language. The designated institution or court shall then appoint a sole arbitrator or a panel of arbitrators, depending on the agreement between the parties. The appointment made by the Court is final and cannot be appealed against.

Efficiency is a key factor in arbitral proceedings and the same is safeguarded by Article 11(7) which enumerates that the decision by the designated authority under Sub-Section (4), (5) and (6) is final. The Supreme Court, or High Court, or the person or institution designated by such Court, has far reaching powers and may require an arbitrator to disclose in writing his/her qualifications or any and other considerations as are likely to secure the appointment of an independent and impartial arbitrator, with due consideration to Section 12(1).

Further, when parties in international arbitration belong to different nationalities and there is a requirement for the appointment of a sole arbitrator or a third arbitrator, the designated arbitral institution by the Supreme Court or a high court can appoint an arbitrator who does not share the nationalities of the parties involved.

APPOINTMENT IN CASE OF INSTITUTIONAL ARBITRATION AND AD HOC ARBITRATION

Ad-hoc arbitration involves parties designing their own arbitration process and appointing arbitrators directly. The parties may agree on the rules governing the arbitration process, including the appointment of arbitrators and the procedures for the conduct of the proceedings.

Institutional arbitration is a form of arbitration where the parties agree to have their dispute resolved by an arbitration institution rather than through an ad-hoc arbitration process. The Arbitration and Conciliation Act, 1996, provides for the appointment of arbitrators in case of institutional arbitration.

The appointment of arbitrators for institutional arbitration shall be made by the institution designated by the Supreme Court or High Court, as the case may be. This means that the institution appointed by the court shall appoint a sole arbitrator or a panel of arbitrators, depending on the agreement between the parties.

The designated institution is also responsible for maintaining a panel of arbitrators and promoting the development of arbitration in the country. Arbitration Council of India (ACI) is the designated institution for institutional arbitrations in the country.

Types of Ad Hoc Arbitration

Ad hoc arbitration is a type of arbitration that is not administered by an established arbitration institution.

Instead, the parties agree to the procedures and rules that will govern the arbitration, including the selection of arbitrators. Some examples of ad hoc arbitral bodies:

1. **Single-arbitrator ad hoc arbitration:** In this type of ad hoc arbitration, the parties agree to appoint a single arbitrator to resolve their dispute. The arbitrator is usually agreed upon by the parties or appointed by a mutually agreed third party.
2. **Panel-arbitrator ad hoc arbitration:** In this type of ad hoc arbitration, the parties agree to appoint a panel of arbitrators to resolve their dispute. The arbitrators are usually agreed upon by the parties or appointed by a mutually agreed third party.
3. **Special ad hoc arbitration:** In this type of ad hoc arbitration, the parties agree to specific procedures and rules that are tailored to their particular dispute. This could include the selection of arbitrators with specific expertise in the subject matter of the dispute, or the use of specific procedural rules.
4. **Industry-specific ad hoc arbitration**: Some industries have developed their own ad hoc arbitral bodies to deal with disputes within the industry. For example, the Construction Industry Model Arbitration Rules (CIMAR) are often used in construction disputes, and the Sport Dispute Resolution Centre of Canada provides ad hoc arbitration for disputes in the Canadian sport industry.

Appointment of Arbitrators in an ad hoc Arbitration

In an ad hoc arbitration, the appointment of arbitrators is typically done by the parties themselves, rather than by an arbitral institution. The following are the general steps involved in the appointment of arbitrators in an *ad hoc* arbitration:

1. **Drafting of the arbitration agreement:** The parties should first agree to submit their dispute to ad hoc arbitration and include an arbitration clause in their contract or agreement. The arbitration clause should specify the number of arbitrators and the procedure for their appointment.
2. **Initiation of the arbitration:** Once a dispute arises, one party will typically send a notice of arbitration to the other party, invoking the arbitration clause and stating their intention to proceed with ad hoc arbitration.
3. **Selection of arbitrators:** The parties will then need to agree on the appointment of arbitrators. If the arbitration agreement specifies the number of arbitrators, the parties will need to agree on the appointment of a sole arbitrator or each party's appointed arbitrator, who will then choose the presiding arbitrator. If the parties cannot agree on the appointment of arbitrators, the dispute resolution mechanism specified in the arbitration agreement may need to be followed.
4. **Appointment of arbitrators:** Once the parties have agreed on the arbitrators, they should appoint them by written notice. The appointment should include the name, address, and contact information of the arbitrator and a statement that the arbitrator accepts the appointment.
5. **Confirmation of the arbitral tribunal:** After the appointment of arbitrators, the arbitral tribunal should confirm its appointment in writing to the parties.
6. **Commencement of the arbitration:** Once the arbitral tribunal is confirmed, the parties can begin the arbitration process, including the exchange of written submissions, evidence, and oral hearings, according to the agreed-upon procedure.

Appointment of Arbitrators in Institution Arbitration

In case of institutional arbitration, the general steps slightly differ. The Singapore International Arbitration

Centre (SIAC) is an example of an institutional arbitration. The following are the general steps involved in the appointment of arbitrators in SIAC arbitration:

1. **Submission of the notice of arbitration:** The party initiating the arbitration will typically submit a notice of arbitration to the SIAC, along with any necessary fees and supporting documents.
2. **Appointment of the arbitral tribunal:** The SIAC will then appoint the arbitral tribunal in accordance with its rules and procedures. The tribunal may consist of a single arbitrator or a panel of arbitrators, depending on the agreement of the parties.
3. **Notification to the parties:** Once the arbitral tribunal is appointed, the SIAC will notify the parties of the appointment and provide them with the names, addresses, and qualifications of the arbitrators.
4. **Confirmation of the appointment:** The appointed arbitrators will need to confirm their appointment in writing to the SIAC and the parties. The confirmation should include a statement that the arbitrator accepts the appointment, any disclosures required by the SIAC rules, and a declaration of independence and impartiality.
5. **Challenge of arbitrators:** If a party has concerns about the independence or impartiality of an appointed arbitrator, they may challenge the appointment. The challenge will be reviewed by the SIAC, which will decide whether to accept or reject the challenge.
6. **Replacement of arbitrators:** If an arbitrator resigns or is otherwise unable to act, the SIAC will appoint a replacement arbitrator in accordance with its rules and procedures.
7. **Commencement of the arbitration:** Once the arbitral tribunal is confirmed, the parties can begin the arbitration process, including the exchange of written submissions, evidence, and oral hearings, According to the rules and procedures specified by the SIAC.

WITNESSES AND EVIDENCE

The parties are allowed to choose any arbitrator(s) they want for any arbitration procedure.

The arbitrators, however, cannot represent the parties as this would raise legitimate concerns about their independence or impartiality. The Madras High Court ruled in *Soceite Aninmina Lucchesse Oil v. Gorakhram Gokalchand* that the arbitrators were required to convene and act in accordance with natural justice principles. They must not only exercise good judgement but also refrain from acting as the party's agents or advocates.

The Arbitrators are in charge of their own procedure and are free to run the arbitration in any way they see fit. It is established by law that arbitrators are not constrained by the formal standards of proof upheld by courts.

The Arbitral Tribunal shall not be governed by the Indian Evidence Act, 1872, or the Code of Civil Procedure, 1908, according to Section 19 of the Act. Unless the parties expressly provide in the agreement, admissibility, relevance, and materiality of evidence are within the exclusive jurisdiction of the Tribunal.

The arbitral tribunal must adhere to the statutory procedure when the parties have not stipulated a different process. The Act's Section 19(4) requires the arbitral tribunal to adhere to the procedure.

The power of Arbitral Tribunal to conduct arbitral proceedings includes the power to decide the admissibility, relevance, substance and weight of any evidence. Thus, the Arbitral Tribunal shall assess whether a particular fact is relevant or admissible in accordance with its own good judgement without regard to the statutory provisions.

This does not, however, entail that the arbitrators are free from the requirements of natural justice and the norms of proof.

The Andhra Pradesh High Court has expressly said that parties are free to agree on the process to be followed by the Arbitral Tribunal in *Hindustan Shipyard Limited vs. Essar Oil Limited and Ors.*

Where such a procedure is not predetermined, the Arbitral Tribunal must follow the statutory procedure, which requires it to fairly assess all of the evidence in the record and reach a decision that is consistent with the terms of the dispute.

It has been ruled that the principles of natural justice, fair play, equal opportunity for both parties, and to pass an order, interim or final, based upon the material or evidence placed by the parties on the record and after due analysis and/or appreciation of the same by giving the terms of the contract a proper and correct interpretation, subject to the laws, simply cannot be overlooked. Furthermore, it has been ruled that parties may choose their own arbitration process if they agree to it.

There are few sections in the act itself that states certain procedures with respect to evidence. The arbitrators lack the authority to compel witnesses who refuse to come before the panel.

Nonetheless, Section 27 gives the tribunal the authority to ask the court for help gather evidence in accordance with the Model Law. Such a witness shall be subject to the same penalties and punishment as he may receive for comparable offences in cases heard before the court if he fails to appear in accordance with any order of the court, makes any other default, refuses to provide testimony, or is found guilty of any contempt of the arbitral tribunal. The court has two options for gathering evidence: either appointing a commissioner or mandating that the evidence be sent directly to the arbitral tribunal.

Section 26 allows the arbitral tribunal to designate experts for any particular subject, and parties must supply the experts with any pertinent material.

It will be possible for a party to request the expert to appear in an oral hearing following the delivery of his report so that the parties may ask him questions. Also, Any individual delivering testimony before a person authorised to administer an oath "will be bound to declare the truth on such issue," according to Section 8 of The Indian Oath's Act, 1969. As a result, the tribunal can legally swear that the witnesses are testifying before an arbitral tribunal and that if they lie under oath, they will have violated the Criminal Laws.

A court is not an arbitral tribunal. Any procedural flaw does not invalidate the Award unless it violates the principles of natural justice, equity, or fair play for the parties who were wronged.

The parties are free to present whatever evidence to support the facts required to establish their cases in the context of international arbitration. The rules of evidence in arbitration aren't prescriptive; they provide the parties the freedom to select the rules that are most practical and pertinent. This supports the purpose of arbitration, which is to lessen the parties' court contact and provide a more convenient dispute resolution option.

INTERIM MEASURES UNDER ARBITRATION AND CONCILIATION ACT

The 1996 Arbitration and Conciliation Act abolished the previous arbitration legislation in India and incorporated local arbitration, international commercial arbitration, and conciliation law. The new Act was created to ensure a just and speedy resolution of disputes in an international commercial contract, following the model set forth by the United Nations commission on international trade law (UNCITRAL).

In accordance with the Arbitration Act of 1940, a party could open court proceedings by submitting an application for the appointment of an arbitrator under Section 20 and, concurrently, a request for temporary relief under the Second Schedule read in conjunction with Section 41(b) of the previous Act. The New Act of 1996's Section 9 gives the court the authority to require a party to take temporary measures or protection in response to an application. Moreover, Section 17 grants the Arbitral Tribunal authority to issue interim orders unless the agreement expressly forbids such authority.

In the matter of *M D Army WHO vs. Sumangal services (p) Ltd*, which was heard by the Indian Supreme Court and published in *AIR 2004 SC 1344*, the court noted that even under Section 17 of the 1996 Act, the arbitrator's authority is restricted. It is not allowed to give any instructions that go beyond the arbitration agreement or

the reference. Even under Section 17 of the 1996 Act, an interim order may only be addressed to a party to the arbitration and must be related to the topic of the dispute. It can't be directed at different people. Even under S. 17 of the 1996 Act, the Arbitral Tribunal lacks the authority to implement its order, and the provision for judicial enforcement is absent.

According to a plain interpretation of section 9, a party may apply to the court for an interim measure of protection before, during, or after the arbitral procedures, as well as at any time after the arbitral award is made but before it is enforced in line with section 36.

PRAYERS FOR TEMPORARY PROTECTIVE MEASURES MAY INCLUDE THE FOLLOWING

- Appointment of a guardian for a minor or person not of sound mind
- Preserving or temporary custody of, or selling, perishable goods
- Securing the amount of claims
- Allowing inspection or temporary injunction or appointment of receiver
- Any other relief the court, in its discretion, may deem appropriate in light of the circumstances of the case

The Supreme Court was asked to consider whether, pursuant to Section 9 of the Arbitration and Conciliation Act, 1996, the Court has the authority to issue interim orders even before arbitral proceedings begin and before an arbitrator is appointed in the case of *M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd., AIR 1999 SC 565*. The SC ruled that it is not required for arbitration proceedings to be ongoing or at least for a notice to have been issued before a Section 9 application is submitted.

If the arbitration agreement does not prevent it, the Arbitral Tribunal may, upon a party's request, require the other party to adopt any temporary protective measures that the Arbitral Tribunal may judge necessary with respect to the subject matter of the dispute. As part of the procedure, it has the authority to order the provision of adequate security.

Additionally, this authority must be used in accordance with the arbitration agreement or terms of reference. It is extremely odd that Section 17 allows the arbitral tribunal to issue interim orders yet gives the panel no authority to enforce those orders. Additionally, the new Arbitration Act does not contain a provision that guarantees the execution of interim decisions issued by the Tribunal or that treats interim orders as enforceable decrees similar to final awards. In other words, the tribunal's authority is constrained, and any interim award must unavoidably blend with the final award in order to be enforceable.

Similar authority is granted to the arbitral tribunal in UNCITRAL model law under Articles 16 and 21 of the Arbitration Rules.

The following conclusions would result from a close examination of Sections 9 and 17: - The new arbitration Act grants the arbitral tribunal the authority to issue orders granting temporary relief, whereas the Old Act did not do so.

Only once the arbitral tribunal has been established and is operating can Section 17 powers be used. The terms "before, during, or after" make clear how broad the court's powers are under section 9. Even before the arbitration begins, a party may apply to the court for temporary safeguards. The court has extensive authority and is supreme in awarding temporary relief. Yet, the court's involvement in the tribunal's formation is minimal.

The Supreme Court noted in *Firm Asok Trading Vs. Gurumukhdas Saluja AIR2004 SC 1433* that Section 17 would only be in effect while the Arbitral Tribunal was in place. The powers granted to the arbitral tribunal under Section 17 and the court's powers under Section 9 may partially overlap at that time, but for the purposes of the pre- and post-arbitral processes, the party seeking an interim measure of protection must only turn to the court.

FIXATION OF ISSUES

Fixation of issues is an important step in the arbitration process, as it helps to define the scope of the dispute and streamline the proceedings. Section 23 of the Arbitration and Conciliation Act, 1996 provides for the fixation of issues by the arbitral tribunal after consulting with the parties.

The tribunal can also allow the parties to make written submissions on the issues to be framed. Once the issues have been framed, the tribunal can proceed with the hearing of the dispute.

Fixation of issues is an important aspect of the arbitration process, as it helps to ensure a fair and efficient resolution of the disputes.

Closing arguments

An opportunity to make closing arguments is given after each party has finished making their case. The information cited in closing argument should be summarised for it to be convincing and which impugn the opponent's argument.

The closing address typically outlines the burden of proof with relation to the topics in dispute, defines the issues, and refreshes the arbitrator's memory as to which facts are in dispute and which are common cause. It provides justifications for rejecting the opposing party's evidence.

An effective closing argument can be said to contain the following:

1. The facts that will be contested and those that were initially agreed upon have been decided by the parties.
2. Any discrepancies or questions that the other party's witnesses were unable to resolve, as well as any witnesses that the opposing party failed to call, should be brought to the commissioner's attention.
3. It is important to draw attention to the flaws in the other side's arguments' reasoning.
4. It is a good idea to have evidence from the law to back up your claims. The arbitrator should have easy access to a complete copy of the judgement.

While the value of a strong closing argument cannot be understated, a party must still invest a lot of time and effort in preparation to successfully prove the facts that the closing argument is based on.

AWARDS

Section 34 of the 1996 Act makes reference to both Article 34 of the UNCITRAL (United Nations Commission on International Trade Law) Model Law and Section 30 of the Arbitration Act 1940, which both deal with annulling an arbitral ruling.

The grounds for contesting an arbitral award issued under Section 31 are outlined in Section 34 of the Arbitration and Conciliation Act of 1996.

Yet there are restrictions for challenging an award under Section 34, such as the fact that it can only be done within three months of receiving the award, which can be extended for an additional 30 days.

The court determined in *Municipal Corp. of Greater Mumbai v. Prestress Products (India) (2003)* that the new Act (1996) was passed with the explicit parliamentary goal of limiting judicial participation and that Section 34's restriction on the potential scope of a challenge to an award was a key component of this legislation.

Definition

An arbitration tribunal's decision in an arbitration action is known as an arbitral award, and it is thought to have the same legal standing as a court's ruling in some cases.

The award may grant the parties a range of relief, including monetary compensation, consent, injunctions, and other types of relief. The type of the award—interim, partial, or final—depends on the dispute. Additionally, unless the parties have agreed that no justification should be provided or the judgement is an arbitral award on predetermined terms under Section 30 of the Arbitration and Conciliation Act of 1996, the arbitral award must provide the reasons behind its conclusion.

Grounds to set aside an arbitral ruling

The Arbitration and Conciliation Act of 1996 provides few grounds under Sections 34(2)(a) and (b) for the Court to set aside an arbitral ruling, including the following:

Incapacity of the parties	Any party who is a minor or under the age of majority is not required to abide by any agreements made. The agreement is therefore null and unlawful, and any award rendered in such a circumstance may be vacated by the court. For instance, a lady who has schizophrenia, a mental disease, may request that an award be withheld through the help of her agent.
Agreement itself was invalid	A contract must satisfy each of its key requirements in order to be enforceable. The arbitration agreement will be deemed invalid if the contract is unenforceable, and the arbitral ruling may be set aside as a result.
Other party must be notified	If the party making the application did not receive advance notice of the arbitrator's appointment or the arbitral processes or was otherwise unable to present his case, the arbitral award will be revoked.
Subject matter is beyond arbitration	If the arbitral award addresses a matter that is not covered by the arbitration agreement or contains rulings on topics that are not covered by the arbitration agreement, the arbitral award will be called into question. Additionally, only that portion of the arbitral award, including decisions on subjects not submitted to arbitration, may be set aside if judgements on items submitted to arbitration can be distinguished from those not so submitted.
Composition of the arbitral tribunal not as per contract	The aggrieved party may seek to have the award annulled in court if the arbitrator is not chosen in accordance with the terms of the agreement or by the parties, or if any other administrative requirement of the agreement that was decided earlier by the parties has not been completely executed.

In addition to the reasons listed above, the court may set aside an arbitral award as specified in Section 34(2)(b) of the Arbitration and Conciliation Act, 1996 due to the following reasons as well:

Subject matter of any other act or law	An arbitral award may be contested if it relates to another act or law rather than the Arbitration Act.
Not adhering to India's Public Policy	If the arbitral award conflicts with India's Public Policy, the court may annul it.

An arbitral ruling cannot be overturned under the following circumstances:

- **Application submitted three months after receiving the award:** According to Section 34, if an application to set aside an award is submitted more than three months after the applicant received the arbitral award, the Court will not take the application into consideration. The caveat to this section further provides that the Court may hear the application for an extra 30 days, but not longer, if the Court is persuaded that the applicant was prohibited from filing the application within the required timeframe for appropriate reasons.
- **Incorrectly interpreting the law or valuing the evidence:** an arbitral award cannot be overturned merely because the law was applied incorrectly or the evidence was not properly weighed.
- **Reason for the award:** The award must be supported by reasons, according to Section 31(3) of the Arbitration Act, unless the parties explicitly indicated otherwise in their agreement or if the decision was rendered subject to predetermined circumstances as described in Section 30 of the Act.

Vacation the arbitral award

According to Section 34(3) of the Arbitration Act, the aggrieved party shall submit a request to vacate the arbitral award within three months of the date of the award. The three-month deadline could be extended by another 30 days if the applicant can convince the court that there was a good reason he wasn't able to file the application. The time limit set forth in Section 34(3) expires after "three months". It is best practise to design this time as a calendar month rather than a 90-day period. The period would therefore conclude in the third month, on the day that corresponds to the start date.

In addition, the Arbitration Act's Section 34(6) establishes a one-year deadline for handling the application from the notification period. Given the numerous cases that come up in commercial arbitration, the goal of enacting this article is to encourage the prompt resolution of disputes. However, based on a number of prior decisions, the Supreme Court determined in *the State of Bihar & Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti, (2018)* that the altered parts are advisory rather than mandatory. By examining these samples, it was possible to discern the nature of the changed clauses.

MODIFICATION OF ARBITRAL AWARD

The findings in the arbitral decision cannot be altered or modified, and Section 34 is the only provision that can annul the arbitral award.

A division bench of the Supreme Court of India ruled in favour of minimal judicial intervention in the case of *Project Director, National Highway Authority of India v. M. Hakeem & Anr., (2021)*, holding that courts cannot amend, revise, or alter an arbitral judgement under Section 34 of the Arbitration Act.

However, the Court has permitted modifications to awards under Article 142 of the Indian Constitution in the interest of thorough justice, which clearly states that the Court hasn't backtracked on the modification of the award but is instead respecting Section 34 by indicating minimal judicial involvement.

It is crucial to keep in mind that disagreements and problems with award change are not exclusive to India. The English Arbitration Act, 1996 gives courts the authority to overturn a decision if a challenge is brought on a substantive issue or an appeal is made on a legal problem. On the other hand, there is no provision for partial annulment of arbitral verdicts in the Arbitration Act. The arbitral award should therefore be altered or changed in part by being partially set aside.

RELIABILITY OF ARBITRAL AWARDS

An arbitration award is analogous to a court decision in that it is legally binding on the parties and is important in that it helps the parties resolve their disagreement. Whether or not the arbitration decision is binding is the most crucial consideration when considering whether or not to appeal a judgement. Any party or parties may challenge the judgement without a good reason if the arbitration is ineffective and non-binding. To challenge the decision in court, as they would in a jury trial, the party or parties must, however, have a strong reason to do so if the arbitration is binding.

No one should be permitted to question the arbitrators' capacity to resolve a dispute. The parties shall abide by the arbitrator's award, whether it is in their best interests or not. It was determined in *Eastern and North East Frontier Railway Cooperative Bank Ltd. v. B. Guha and Co., (1986)*, that the court could not reconsider the evidence even if the arbitrator had made a mistake. As long as the arbitrator follows the correct procedures, parties to an arbitration agreement agree to accept the arbitrator's decision even if it is erroneous. As a result, as determined in *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprise*, courts cannot impede the enforcement of an award based on a legal or factual error (1999).

The problem of the burden of cases on courts, for which the arbitration tribunal was initially founded and as a key goal, would resurface if the courts are granted the authority to review based on a legal or factual error. However, if the court is convinced that the applicant party does not have a copy of the arbitration agreement and will not be able to obtain one during the normal course of the arbitration procedure, the Arbitration Act permits the court to hear any such applications for intervention in arbitration cases.

GROUNDS FOR CHALLENGING THE APPOINTMENT OF AN ARBITRATOR

A prospective arbitrator is required to provide a written disclosure of certain circumstances that could raise questions about his independence or impartiality under the 2015 amendment to Section 12(1) of the Act.

According to Section 12(1)(a), the arbitrator must reveal any direct, indirect, previous, or current relationships with the parties as well as any financial, business, professional, or other interests in the dispute's subject matter that might influence his objectivity. Similar to this, Section 12(1)(b) refers to any situations that would make it difficult for an arbitrator to dedicate enough time to complete the arbitration within a year.

In the sub-section, there are two explanations. The Fifth Schedule should be consulted in order to determine if the conditions outlined in Section 12(1)(a) are present, according to the first. According to the second, such a disclosure must follow the format specified in the sixth schedule.

The fifth schedule deals with following types of relations which might give rise to reasonable doubts:

1. Arbitrator's relationship with parties or counsel
2. Arbitrator's relationship to the dispute
3. Arbitrator's interest in the dispute
4. Arbitrator's past involvement with the dispute
5. Relationship of co-arbitrator's

6. Relationship of the arbitrator with parties and others in the dispute
7. Other Circumstances.

The arbitrator may be contested if the factual situation of a case fits under any of the aforementioned categories. For optimal objectivity, these broad terms cover a variety of situations. However, this schedule's "Explanation 3" notes that if it's a specialised arbitration involving a narrow field and it's customary to select the same arbitrators from a small pool of specialists, then this should be taken into account while implementing these criteria. None of these titles make the appointment of an arbitrator immediately prohibited.

Subsection 1 is reinforced by Section 12(2), which mandates that an arbitrator should disclose any conflict of interest as soon as practicable, unless a written disclosure has already been made.

OTHER GROUNDS FOR CHALLENGE

Section 12 provides an illustration of the actual grounds for challenging this section (3). An arbitrator may be challenged if his independence and impartiality are questioned as a result of the events described in Section 12(1), or if he doesn't meet the agreed-upon requirements.

A party to the dispute who names the arbitrator may object for grounds of which he learns only after the appointment. Any prospective arbitrator who fits into any of the categories listed in the Act's Seventh Schedule is automatically disqualified, according to section 12(5), which was added by the 2015 amendment.

The majority of the headings in the Fifth Schedule are also covered by the Seventh Schedule. Although not as comprehensive as the Fifth Schedule, the list just serves as a barrier to appointment as an arbitrator, as was already established. The parties may, however, agree in writing to waive this restriction.

- Schedule includes:
    1. Arbitrator's relationship with the parties or counsel
    2. Relation of Arbitrator to the dispute
    3. Arbitrator's interest in the dispute.

POWERS OF ARBITRATOR

The powers of Arbitrators include:

1. Power to administer an oath to the parties.
2. Power to take interim measures: According to Section 17 of this Act, any party may ask the arbitral tribunal for an intermediate measure at any point during the arbitration proceeding or after the arbitral decision has been made.
3. The arbitrator has the power to proceed *ex-parte*, or in favour of one party, in any arbitration proceeding if another party violates any provision of this Act.
4. In accordance with Section 26 of the Act, the arbitrator may, in any event, select one or more experts to provide him with a report on a particular subject. The arbitrator also has the authority to provide the expert with any pertinent data, papers, or items for his scrutiny. If required, the arbitrator may also name the expert as a witness at a hearing, but in order for the expert to be chosen, he must first persuade the parties that he is knowledgeable about the issues at hand.
5. The most significant authority granted to arbitrators by The Arbitration and Conciliation Act, 1996, is the authority to make awards.
6. In cases involving international commercial arbitration, the arbitral dispute must be resolved in

accordance with the rules of procedure determined by the parties; however, if they are unable to agree, the arbitrator will determine the rules that will apply.

DUTIES OR FUNCTIONS OF ARBITRATOR

The duties and functions of arbitrators *inter alia* include the following:

1. **Choose the arbitration's date, time, and location:** The arbitrator shall fix the time and place of the arbitration in accordance with Section 20 of the Arbitration and Conciliation Act if the parties cannot agree on such dates and places.
2. **To be Independent and Impartial:** The Arbitration and Conciliation Act, 1996's Sections 12 and 18 established a significant obligation on the arbitrator, requiring him to act independently and impartially during any arbitration hearing. Being impartial means that the arbitrator should treat both parties equally and should not have any personal or professional ties to either party that could influence the outcome of the arbitration. Being independent means that the arbitrator will not have any relationships with either party that could influence the outcome of the arbitration.
3. **Duty to disclosure:** According to Section 12 of Arbitration and Conciliation Act, an arbitrator has a duty to reveal any material information that both parties are required to be aware of at the time of his initial meeting with them.
4. **Effective resolution:** The arbitrator should be required to render decisions that are both valid and impartial. Should not be part of any misconduct like granting prizes that go against the law to be compromised or bribed; or violate the natural fairness principle.
5. **Duty to determine the rule of procedure:** Section 19 states that no procedural rules apply to the arbitration process. The arbitration tribunal may follow any procedure that the parties have previously agreed upon; however, if there has been no prior agreement on this matter, the arbitrator shall have complete discretion to determine the appropriate course of action.
6. **Duty to interpret or correct the award:** Section 33 of the Arbitration and Conciliation Act states that it is the responsibility of the arbitrator to rectify or elucidate the award that he has passed within 30 days from the date of receiving it. If a party notifies the other party, they may request the arbitration tribunal to correct any errors in the award, such as typographical, computational, clerical, or any other similar errors.

GROUNDS FOR CONFLICT

The grounds of conflicts under the Arbitration Proceedings *inter alia* includes the following:

1. **Appointment of arbitrator:** The following conditions must be satisfied for an individual to serve as an arbitrator: the parties' confidence, impartiality, lack of interest in the litigation and absence of conflicts of interest, and technical and legal qualifications. Section 12(1) of the Arbitration and Conciliation Act, 1996 provides grounds for challenging the appointed arbitrator. These include the arbitrator's relationship with any of the parties, the arbitrator's relationship to the dispute, the arbitrator's interest in the dispute, the relationship between the arbitrators, and any other relevant situations.
2. **Seat and Venue of arbitration:** Section 20 of the Arbitration and Conciliation Act, 1996 governs the selection of the Venue of Arbitration. The parties may choose the venue if it is specified in the agreement, and the Seat cannot be changed. It is important to note that there is a distinction between the Seat and Venue. The Seat refers to the place where the arbitration is conducted, while the Venue is the location of the proceedings. However, in institutional arbitration, the Venue cannot be changed, and the parties must be present at the institution during the proceedings. In *ad hoc* arbitration, the parties

have the flexibility to decide on the Venue where the arbitration will take place. The Seat and Venue of Arbitration can be challenged on two grounds. Firstly, if either party is absent during the proceedings, and secondly, if the arbitrator accepts the choice of Venue of one of the parties.

3. **Choice of language:** Section 22 of the Arbitration and Conciliation Act provides the parties with the freedom to choose the language to be used in the proceedings. However, in certain situations, such as when one party is from Russia, another from Japan, and the arbitrator is from England, it may be difficult to understand the chosen languages. In such cases, the arbitrator and parties must agree on a common language to be used in the proceedings. The choice of language in arbitration can be challenged if any party fails to follow the agreed-upon language or uses a language that is not understandable to the other party or the arbitrator.

4. **Arbitrability of Disputes:** There are certain matters that cannot be resolved through arbitration, including matrimonial problems such as divorce, guardianship of a minor, testamentary matters, insolvency matters, criminal proceedings, and disputes related to charities. The arbitrability of a dispute can be challenged on the basis of whether the dispute is capable of being resolved through arbitration and whether it falls within the scope of arbitration.

5. If a party is dissatisfied with the arbitral award, they must deliver a notice to the other party. Under Section 34 of the Arbitration and Conciliation Act, 1996, the parties may file an application if they are not satisfied with the decision. However, there are certain grounds on which an arbitral award can be challenged, such as if the agreement is void or if the parties are under some incapacity. Additionally, the decision given by the arbitrator can be suspended by a competent authority of the country, or if the dispute cannot be resolved by the arbitration law. The application of the decision may also be contrary to Indian public made by fraud or corruption or is in contravention with basic notions of morality, it can also be suspended.

PRE AMENDMENT

The Arbitration and Conciliation Act, 1996 (the "Act") was enacted to provide a legal framework for the arbitration of commercial disputes in India. However, over time, it was found that there were certain shortcomings in the Act that needed to be addressed. As a result, the Indian Parliament passed the Arbitration and Conciliation (Amendment) Act, 2015 (the "2015 Amendment"), which brought about significant changes to the Act.

- Before the Amendment, the Act had several shortcomings that had an adverse impact on the arbitration process.'
- One of the main issues was the delay in the disposal of arbitration cases.
- Moreover, the enforcement of arbitral awards was also problematic, as the Indian courts were reluctant to enforce foreign arbitral awards. This created a negative impression of the Indian legal system among foreign investors and affected India's international reputation.

POST 2015 AMENDMENT

The 2015 Amendment aimed to address the shortcomings of the Act by introducing several important changes. Some of the key changes are as follows:

a. **Interim relief from court:** Following the BALCO case judgment by the Supreme Court, Indian courts lacked the jurisdiction to intervene in arbitrations outside India. Consequently, in situations where the assets of a party were located in India, and the likelihood of asset dissipation existed, the other party could not seek interim orders from the Indian courts. This caused significant problems for parties who chose to arbitrate outside India since interim orders made by tribunals outside India were not

enforceable in India. The Amendment Act aimed to remedy this by adding Section 2(2), which provides for interim relief in cases where the place of arbitration is outside India, subject to agreement. However, the amendment only applies to international commercial arbitration and excludes two Indian parties arbitrating outside India.

b. **Interim relief from the arbitral tribunal:** The modifications made to Section 17 have empowered the arbitral tribunal with the same authority as that of a court under Section 9. To minimise court intervention and encourage parties to approach the arbitral tribunal, the Amendment Act specifies that once the tribunal has been established, courts cannot entertain applications for interim measures, except under circumstances where such remedy would not be efficacious. Furthermore, the Amendment Act clarifies that interim measures granted by the arbitral tribunal would have the same effect as an order of a civil court under the Civil Procedure Code, 1908. This is a crucial development as the previous arbitration regime did not allow for the statutory enforcement of interim orders by the arbitral tribunal, rendering them virtually meaningless.

   Another provision in the Amendment Act requires arbitration proceedings to commence within 90 days of the court passing an interim order, or within a period as prescribed by the court. This change aims to prevent parties from misusing the provision to obtain *ex parte* or *ad interim* orders and subsequently not proceeding with arbitration

c. **Limited scope to refuse arbitration:** The modified Section 8 authorizes the judicial authority to refer the parties to arbitration if there is an arbitration agreement, unless it appears prima facie that there is no valid arbitration agreement. Although Section 8(1) mentions “judicial authority”, in Section 8(2) the term “Court” is used instead of “judicial authority,” which seems to be an oversight.

d. **No automatic stay of arbitral award:** Before the Amendment Act, simply filing a challenge petition against an arbitral award would result in an immediate stay of the award. This process could take several years for the court to decide, making arbitration a lengthy and ineffective process. The Amendment Act has made a positive change by requiring a separate application to be filed in order to seek a stay of the arbitral award, and there will be no automatic stay granted. The court must now provide reasons for granting a stay, and the provisions of the CPC for granting a stay of a money decree will be applicable. As a result, the losing party will need to deposit a portion or the entire sum awarded in the arbitral award or furnish security, as determined by the court.

e. **Time Bound proceedings:** The Amended Act aims to expedite the arbitration process by implementing faster timelines. A proviso has been added to Section 24 that requires the arbitral tribunal to conduct oral hearings on a day-to-day basis, without granting adjournments unless sufficient cause is demonstrated. Heavy costs may be imposed by the tribunal for adjournments without sufficient cause. Arbitral awards must be made within 12 months of the arbitrator(s) receiving written notice of their appointment, with a possible extension of 6 months if mutually agreed upon by the parties. If the award is not made within 18 months, the mandate of the arbitrator(s) will terminate, unless extended by the court upon an application filed by any party.

f. **Fast track procedure:** The Amendment Act introduces Section 29B which provides the parties with the option to agree to a fast track mechanism wherein the arbitrator(s) must render the award within six months from the date of receiving written notice of appointment. The dispute will be resolved solely based on written pleadings, documents, and submissions submitted by the parties, without any oral hearing, except when deemed necessary by the arbitral tribunal or upon request by all parties to clarify specific issues. However, it may not be a common occurrence for parties in a dispute to agree to such a fast track procedure.

g. **A new expansive cost regime introduced**: Section 31A has recently been introduced, which grants broad powers to the arbitral tribunal to award costs. The arbitral tribunal may determine whether costs are payable, the amount of costs to be paid, and the timing of payment. The provision specifies that generally, the losing party will be required to pay costs to the winning party.

h. **Disclosure requirements of arbitrator:** The Amendment Act has adopted the disclosure requirements of the IBA Guidelines on Conflict of Interest in International Arbitration by including the Fifth and Seventh Schedule. These schedules serve as a reference for identifying situations that render an arbitrator ineligible.

i. **Cap on fees of arbitrator**: To prevent arbitration from becoming too costly, the Amendment Act has introduced the Fourth Schedule, which provides a fee model for arbitrations other than international commercial arbitrations and for cases where parties have agreed to the rules of an arbitral institution. Additionally, Section 11A (2) specifies the process for the Central Government to amend the Fourth Schedule. However, as the rates mentioned in the Fourth Schedule are to be considered by each state's High Court when framing rules, this could lead to a lack of consistency in fee structures across the country.

Other changes

1. The Arbitration and Conciliation Act 1996 was amended by the Arbitration and Conciliation (Amendment) Act 2015 to make the process of arbitration in India more user-friendly, cost-effective, and efficient. However, there are certain areas where the Amendment Act has fallen short of expectations, and there are some issues that remain unresolved.
2. One such issue is whether Indian parties can choose foreign law to resolve disputes through arbitration. Another is the lack of statutory recognition for the "emergency arbitrator" as provided under some institutional rules.
3. The Amendment Act does not address the issue of confidentiality in arbitrations, nor does it provide a time limit for the enforcement of foreign arbitral awards.
4. The Law Commission Report had recommended changes to Section 16 of the Arbitration Act to empower the arbitral tribunal to decide disputes involving serious questions of law, complicated questions of fact, or allegations of fraud, corruption, etc. Still, these recommendations have not been accepted.
5. Section 44(b) requires the reciprocating territory to be notified by the Central Government in Official Gazette, which reduces the scope of enforcing foreign arbitral awards significantly.
6. Finally, there is confusion regarding whether the amendments will have a retrospective or prospective effect for court actions concerning arbitration and the arbitration proceedings.

WAIVER OF THE RIGHT TO OBJECT UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Article 8 of the UNCITRAL Model Law on International Commercial Arbitration is based on the principle of estoppel, was introduced with the aim of ensuring efficiency in the arbitration process. However, during negotiations leading up to the introduction of this article, concerns were raised that its strict application could lead to unfair treatment of a party. This concern continues to be relevant, particularly in countries like India where ad hoc arbitration is prevalent.

Section 4 of the Indian Arbitration and Conciliation Act, 1996 is equivalent to Article 8 of the Model Law, which deals with the deemed waiver of a party's right to object in certain circumstances. Indian courts frequently refer to the *travaux preparatoires*, or official record of negotiations, to understand the context and objective of a particular provision.

The idea of a general principle of waiver was first discussed in the Fifth Session of the Working Group on International Contract Practices, United Nations Commission on International Trade Law. Most parties believed that a general waiver rule was necessary, albeit in a less rigid form that would apply only in cases of fundamental violations of procedural provisions. Parties suggested softening the language by replacing the word "promptly" with less strict terms like "without delay" and limiting the provision's application to non-mandatory provisions rather than all provisions. They also discussed introducing a provision that specified which provisions of the Model Law would be mandatory. The session also discussed the provision's scope, with one faction advocating for its effect to be limited to the arbitration proceedings, while the majority believed it should extend to the post-award stage, i.e., recognition and enforcement of the award.

Section 4 of the Arbitration and conciliation Act makes it clear that for the provision to apply, a party must have knowledge of the derogation or violation. The principle of waiver has always required knowledge of the party as a prerequisite for its general application. The term "waiver" is not defined under the Act, but Indian courts have defined it as the intentional or voluntary relinquishment of a legal right or advantage. However, courts have differentiated between "waiver" and "estoppel" based on intent. The phrase "know that" in Section 4 of the Arbitration & Conciliation Act has been interpreted to mean "actual knowledge," and it does not contain the phrase "knows or ought to know."

The conduct of the party during the arbitration is also closely related to their knowledge, such as whether they participated in the proceedings despite knowing of the defect and without stating an objection in time. According to Russel on Arbitration, a party who takes part in the proceeding is in a different position from one who does not. The Arbitration & Conciliation Act uses the phrase "yet proceeds with arbitration" to refer to this. The *travaux* preparatoires regarding Article of the Model Law state that "proceeding" includes appearing at a hearing or communicating with the arbitral tribunal or the other party. Therefore, a party would not be deemed to have waived their right if they were prevented from sending any communication due to a postal strike or similar impediment for an extended period. Thus, the timing of the objection raised by a party is a crucial factor in determining whether they have proceeded with the arbitration. The provision regarding time limits must be included in the arbitration agreement or the relevant arbitration rules, or may be determined by the tribunal itself. If there is no specified time limit, the objection must be raised "without undue delay."

Another essential precondition for invoking Section 4 of the Arbitration and Conciliation Act is the phrase "any provision of this part from which parties may derogate."

In the case of *Narayan Prasad Lohia v. Nikunj Kumar Lohia*, the Supreme Court addressed the issue of whether a mandatory provision of the Act could be waived by the parties. The court ruled that Section 10 of the Arbitration and Conciliation Act was derogable, as a party had the right to object to the composition of the Arbitral Tribunal under Section 16(2) of the Arbitration and Conciliation Act. The court also held that if a party did not raise the objection regarding the composition of the Arbitral Tribunal under Sections 12 and 13, it was barred from raising the same at a later stage. The court's observation that Section 34 of the Arbitration and Conciliation Act did not permit a challenge to the award on the grounds of a violation of Part I of the Act if the composition of the Arbitral Tribunal was in compliance with the arbitration agreement further supported the view that Section 4 was derogable. In Lohia Case, the Hon'ble Supreme Court addressed whether mandatory provisions can be waived, but the scope of its findings was limited to Section 10 of the Arbitration and Conciliation Act. The Court did not extend its test of opportunity to object under Section 16 of the Arbitration and Conciliation Act to other provisions such as Sections 12 and 13 of the Arbitration and Conciliation Act, and did not comment on the nature of provisions that could be derogated from.

In *Adani Enterprises Ltd. v. Antikeros Shipping Corpn*., the Hon'ble Bombay High Court held that Section 11 of the Arbitration and Conciliation Act could not be derogated from, as it confers powers on the High Court and the Supreme Court, and that a party cannot be deemed to have waived its right to recourse under the provision.

These cases demonstrate the preconditions that govern the application of Section 4 of the Arbitration and Conciliation Act, and an understanding of these conditions and key provisions of the Act can provide insight into how the provision applies to arbitration and related proceedings.

The right to refer a disagreement to arbitration is provided under Section 8(1) of the Arbitration and Conciliation Act, subject to the requirement that it be done within the timeframe specified therein, i.e. before submitting the first statement on the substance of the issue.

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, the Hon'ble Supreme Court ruled that even though Section 8 of the Arbitration and Conciliation Act does not specify a deadline, an application under Section 8 of the Arbitration and Conciliation Act must be submitted as soon as possible, and a party who voluntarily participates in the litigation and submits to the court's jurisdiction cannot later argue that the parties should be sent to arbitration because there is an arbitration agreement.

It has been made clear that Section 8 of the Arbitration and Conciliation Act has been interpreted to permit the simultaneous filing of an arbitration reference and written statement.

Nonetheless, if a party filed a written declaration prior to asking for an arbitration reference, even though it said "without prejudice to the arbitration agreement," the same was deemed insufficient to counteract the effect of an arbitration waiver.

Hence, when establishing whether a party has waived a right, the party's actions must be taken into account. Any action done to terminate an interim order has been ruled not to constitute a waiver in the context of interim orders.

Contrary to Section 8 of the Arbitration and Conciliation Act, Section makes no clear mention of the court's authority to decide whether an arbitration agreement is genuine. Nonetheless, it has been determined that the phrase "presence of arbitration agreement," as it appears in Section 11 of the Arbitration and Conciliation Act, also refers to the agreement's legality, and that the scope of the court's judicial review under the two provisions is the same. The Arbitration and Conciliation Act's Section 11 does not, however, set a deadline by which any challenge to the existence of the arbitration agreement must be made. In the absence of such a limit, a party may be required to raise an objection without undue delay in accordance with Section 4(b) of the Arbitration and Conciliation Act. Delay has been taken into account in petitions filed under Section 11 of the Arbitration and Conciliation Act where a party has been barred from raising concerns regarding the arbitrability of the dispute after having failed to do so earlier.

It can be claimed that in the absence of a set period of time, the proper deadline for raising an objection will depend on the specific facts and circumstances of the case.

The reasons for contesting the appointment of an arbitrator are outlined in Section 12 of the Arbitration and Conciliation Act, while Section 13 outlines how to do so. According to the aforementioned requirements, a party who wants to contest the appointment must do so within the following time frames:

(a) as specified in the agreement; or,

(b) within fifteen days after the day the tribunal is established or the party learns of the conflicting circumstances.

However, if a party who participated in the appointment of an arbitrator learns of the circumstances after the appointment, he is not prohibited from making an objection under Section 12 of the Arbitration and Conciliation Act. Depending on the circumstances surrounding the ineligibility, a party's right to object to the establishment of Section 12 of the Arbitration and Conciliation Act may need to be waived.

While waiver under Section 4 of the Arbitration and Conciliation Act includes circumstances of deemed waiver by behaviour, the Hon'ble Supreme Court has made it clear in *Bharat Broadband Network Ltd. v. United Telecoms*

Ltd. that the waiver under Section 12(5) of the Arbitration and Conciliation Act requires an express written agreement between the parties. The Hon'ble Court also ruled that Section 4 of the Arbitration and Conciliation Act would not be applicable due to the clear language in Section 12(5) of the Arbitration and Conciliation Act. Hence, a party cannot be regarded to have forfeited its right to object under Section 12(5) of the Arbitration and Conciliation Act because it is an obligatory provision by simply taking part in an arbitration case or by declining to object.

The Supreme Court held that the principle of waiver would not be applicable even in the case where a party did not raise the objection before the Arbitral Tribunal under Section 16(2) of the Arbitration and Conciliation Act but did so in the earlier proceedings under Section 11 of the Arbitration and Conciliation Act that were still pending appeal. As a result, it would seem that a party who was made aware of the arbitration procedures but elected not to participate in them and has not brought up the issue at any point before the petition under Section 34 of the Arbitration and Conciliation Act is presumed to have relinquished its right to object.

The subject of waiver often leads to disputes, particularly when one party seeks to capitalize on the other party's delay during arbitration proceedings. This problem is more prevalent in India, where *ad hoc* arbitration is common and institutional arbitration is just starting to gain traction. To address this issue, one solution could be to transition to institutional arbitration, as it provides a more defined process and institutions have mechanisms in place to handle waiver-related issues.

Determining the appropriate level of stringency for waiver rules is not a straightforward matter. On one hand, a waiver can extinguish a party's right, but on the other hand, it should not reward or fail to penalize a party for their lack of diligence. To strike a balance between the two and promote efficiency, a more rigorous system of costs could be introduced, as provided for in the Act but not yet fully implemented. If a party wishes to dispute a waiver, they should bear appropriate costs. Ultimately, the law must ensure justice is served, and arbitration proceedings cannot ignore this principle. Indian courts should strive for a pro-arbitration stance by minimizing their interventions. However, when a party's lack of diligence requires court intervention to promote efficiency, the consequences of costs cannot be ignored. Implementing such a system should encourage parties to be more diligent and efficient, potentially rendering the issue of waiver moot over time. Ironically, this would be the most fitting tribute to the provision

ARBITRATION TRIBUNAL AND JURISDICTION ISSUES

Arbitral tribunal does not possesses statutory jurisdiction. Tribunal has the authority to adjust its jurisdiction based on the parties' requirements. The scope of the tribunal's jurisdiction is primarily determined by the arbitral agreement.

The principle of party autonomy emphasizes that when two parties have the ability to settle their disputes independently, they also have the right to demonstrate this ability to any third party in order to openly establish their disagreement. Therefore, it is crucial to consider a carefully crafted agreement as it empowers the tribunal to determine matters related to jurisdiction.

Section 17 of the Arbitration and Conciliation Act, 1996 specifically mentions the jurisdiction to decide specific matters. Some instances where the competence of the arbitral tribunal is dependent on resolving questions include appointing a guardian for someone who is of unsound mind or a minor during the arbitration process, ensuring the safety and security of the subject matter of the arbitration, and issuing provisional injunctions.

The arbitral tribunal has the authority to determine and regulate its own jurisdiction, including any challenges to the existence or validity of the arbitration agreement, for which purpose The arbitration clause, as a part of the contractual agreement, should be considered a separate and independent agreement from the other terms of the contract; and an arbitral tribunal's decision that the contract is void does not automatically invalidate the arbitration clause.

A party cannot raise a plea claiming that the arbitral tribunal lacks jurisdiction after submitting their defence statement. If a party alleges that the arbitral tribunal is exceeding its authority, they must raise the plea as soon as the matter in question arises during the arbitral proceedings. If a party is dissatisfied with the arbitral award, they can apply for the award to be set aside under Section 34.

The previous Arbitration Act did not allow the Arbitral Tribunal to determine its own jurisdiction However, now Section 16 empowers the Arbitral Tribunal to regulate its own jurisdiction. Section 16 of the Act also encompasses the principle of competence-competence, which has two aspects: first, it allows the tribunal to decide on its jurisdiction without seeking approval from the courts, and second, it emphasizes the court's reluctance to decide on the issue before the tribunal has ruled on it.

In some instances, an arbitration agreement may not be a standalone document, but instead may be included as a clause within a larger agreement or contract between the parties. If the larger contract is deemed illegal or void, the question arises as to whether the arbitration clause embedded within it also becomes void.

However, after the enactment of the Arbitration and Conciliation Act in 1996, Section 16(1) declared that the arbitration clause, even if embedded in a contract, is considered separate and independent from the rest of the contract. Thus, an invalidity determination of the larger contract by the Arbitral Tribunal does not necessarily invalidate the arbitration clause.

The law provides certain remedies to ensure proper and efficient conduct of arbitration proceedings. The repealed Arbitration and Conciliation Act, 1940 provided three remedies against an arbitration award-modification, remission, and setting aside. These remedies have been further amended by the Arbitration and Conciliation Act, 1996, and are now divided into two parts. The remedy for rectification of errors has been given to the Tribunal and the parties to decide. The remedy for setting aside the award has also been amended, and the award will now be returned to the tribunal for removal of defects.

Section 34 provides some grounds for setting aside an arbitral award, including an invalid agreement, incongruity, inefficiency on the part of one of the parties, incapacity in the subject of the arbitration process, opposing public policy, and discrepancies in the appointment of the arbitrators.

UNDERSTANDING THE COMPETENCE-COMPETENCE PRINCIPLE

At the core of the principle of Competence-competence is the power to determine jurisdiction. If there is no challenge to the arbitral tribunal's Competence-competence decision, it takes effect within the state of the seat, and the resulting award is recognized under the New York Convention in the same way as an award from an arbitral tribunal whose Competence-competence was challenged before the courts of the seat but upheld.

Any limitation of Competence-competence over a question for which jurisdiction may potentially be exercised will be used by respondents to delay and complicate the proceedings. Relying solely on the will of the parties is logically insufficient to encompass Competence-competence determinations on the operability of such will and to give effect to arbitral decisions denying jurisdiction due to the inoperability of party will.

Regarding the principle of Competence-competence in India, it is important to consider the extent of powers exercised by a judicial authority when appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. This scope has been subject to constant changes over time.

Before the Arbitration and Conciliation (Amendment) Act, 2015, the section's wording did not provide much clarity on the matters that could be reviewed when granting or denying an application under Section 11.

The scope of powers exercised by a judicial authority appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, which has been constantly evolving, is relevant in the context of the principle of competence-competence.

The scope of power exercised under Section 11 - case of *SBP & Co. v. Patel Engineering Ltd.*, as follows:

(a) determining whether there is a valid arbitration agreement between the parties;

(b) determining whether the party which has made the request under Section 11, is a party to the arbitration agreement; and

(c) whether the party making the motion had approached the appropriate High Court.

The court pointed out that the Competence-competence principle would only apply if the parties had gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. If jurisdictional issues are decided under these sections before a reference is made, Section 16 cannot be used by the Arbitral Tribunal to ignore the decision given by the judicial authority. The court held that the finality conferred on an order passed prior to the reference by the statute that creates it cannot be reopened by the arbitrator during the proceeding before the tribunal. Therefore, the case undermined the importance of the Competence-competence principle enshrined in Section 16 of the Act.

As a result of this case, the Law Commission in its 246th report recommended that the scope of judicial intervention under Section 11 should be restricted to only examining the existence of the arbitration agreement. This recommendation was incorporated through the insertion of Section 11(6A) by the 2015 amendment.

The purpose of this doctrine - minimize judicial interference in disputes submitted to the tribunal by parties. Case of *Duro Felguera S.A. v. Gangavaram Port Ltd.* also upheld the same.

When there is a jurisdictional issue and a determination of competence, the question of limitation often arises. Hon'ble Supreme Court held in *Pandurang Dhoni Chougule v. Maruti Hari Jadhav* that "a plea of limitation is a plea of law which concerns the jurisdiction of the court which tries the proceedings, as a finding on these pleas in favour of the party raising them would oust the jurisdiction of the concerned court."

The Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.* has ruled that if an application under Section 11 is rejected on the grounds of limitation, the issue should be left for determination by the arbitrator.

However, there are exceptions to this doctrine, such as when the arbitration agreement is procured by fraud or deception, or when parties have only entered into a draft agreement as a proposal to arbitrate.

LESSON ROUND-UP

- Arbitration is a form of alternative dispute resolution where parties agree to have their dispute heard and resolved by an impartial third-party arbitrator or a panel of arbitrators, instead of going through traditional court litigation.
- Pre-arbitral process refers to the preliminary procedures that parties engage in before initiating formal arbitration proceedings. This phase is crucial in resolving disputes outside of the court system, as it provides an opportunity for parties to come to a mutual agreement before committing to the time and expense of arbitration.
- A counterclaim is a claim made by the respondent against the claimant in response to the original claim, seeking relief for damages or losses caused by the claimant's actions or omissions related to the same dispute.
- The appointment of arbitrators is an essential element of the arbitration process, as it involves the selection of a neutral third party who is responsible for resolving disputes between the parties.

- The appointment of arbitrators is an essential element of the arbitration process, as it involves the selection of a neutral third party who is responsible for resolving disputes between the parties.
- The parties are allowed to choose any arbitrator(s) they want for any arbitration procedure. The arbitrators, however, cannot represent the parties as this would raise legitimate concerns about their independence or impartiality.
- Section 23 of the Arbitration and Conciliation Act, 1996 provides for the fixation of issues by the arbitral tribunal after consulting with the parties.
- An arbitration tribunal's decision in an arbitration action is known as an arbitral award. The award may grant the parties a range of relief, including monetary compensation, consent, injunctions, and other types of relief. The type of the award—interim, partial, or final—depends on the dispute.
- The arbitrator shall fix the time and place of the arbitration in accordance with Section 20 of this Act if the parties cannot agree on such dates and places.

GLOSSARY

Arbitral process - Procedures and steps involved in resolving a dispute through arbitration.

Case management conference - meeting held between the parties involved in an arbitration to discuss and establish a framework for the arbitration process.

Notice of Arbitration: A formal written notice sent by one party to another, invoking the arbitration clause in the agreement and requesting the commencement of arbitration proceedings.

Claim: A demand or request for relief, compensation, or damages made by one party against another in a dispute.

Respondent: The party against whom a claim is made in an arbitration proceeding.

Legal or Chronological Bar: A legal or procedural restriction that prevents a claim or defense from being pursued, either due to the passage of time or other legal requirements.

Appointment of Arbitrator: The process of selecting an arbitrator by the parties or a designated institution to hear and decide on a dispute in an arbitration proceeding.

Unilateral Appointment: The appointment of an arbitrator by one party without the agreement of the other party.

Disqualification of an Arbitrator: The removal or rejection of an arbitrator from serving on an arbitration panel, usually due to a conflict of interest, bias, or lack of qualifications.

Qualified Individual: An arbitrator who possesses the necessary knowledge, skills, and experience to hear and decide on a dispute in an arbitration proceeding.

Fillings of pleadings: Statements of claim and statement of defense are the primary fillings of the arbitration proceeding. These statements are typically exchanged in written procedures. The parties may agree upon the quantity, order, and deadlines for submitting written pleadings. Unless specifically stated differently, the respondent may also submit a counterclaim.

Single-arbitrator *ad hoc* arbitration: An ad-hoc arbitration process in which parties agree to appoint a single arbitrator to resolve their dispute.

Panel-arbitrator *ad hoc* arbitration: An ad-hoc arbitration process in which parties agree to appoint a panel of arbitrators to resolve their dispute.

Experts: Individuals designated by the arbitrator(s) to provide their expertise on a specific subject.

Oral Hearing: A hearing where witnesses and experts are questioned by the parties and the arbitrator(s).

Oath: A solemn promise to tell the truth.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the limitations of the arbitrator's authority in issuing interim orders under Section 17 of the Arbitration and Conciliation Act of 1996 in India?
2. What is the principle of party autonomy and how does it relate to the determination of jurisdiction in arbitration?
3. What is the difference between "waiver" and "estoppel" according to Indian courts, and what is the prerequisite for the general application of the principle of waiver under the Arbitration and Conciliation Act, 1996?
4. What are the grounds on which an arbitral award can be challenged according to the Arbitration and Conciliation Act, 1996?
5. What are the Powers and Duties of Arbitrator?

LIST OF FURTHER READINGS

- Commercial Arbitration - International Trends and Practices by Chirag Balyan & Yashraj Samant.
- International Arbitration Law and Practice by Gary. B. Born
- Avtar Singh's Law of Arbitration and Conciliation and Alternative Dispute Resolution (ADR) Systems by Saurabh Bindal
- Dr. P.C. Markanda Arbitration: Step by Step by Naresh Markanda, Rajesh Markanda and DR. P.C. Markanda
- Everything You Need To Know About Arbitration by Tariq Khan

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf

Arbitral Proceedings, Pleadings and Evidence

Lesson 4

KEY CONCEPTS

■ Written Submissions ■ Statement of Claim ■ Statement of Defence ■ Counterclaim ■ Rejoinders ■ Facts in Issue ■ Collateral Facts ■ Relevant Facts ■ Relevance ■ Witness Statements ■ Cross-Examination ■ Documentary Evidence

Learning Objectives

To understand:

- The rules relating to Written Submissions
- Preparation of the Statement of Claim
- Preparation of the Defence
- Preparation of Counter Claims
- Oral Hearings
- Rules of Evidence In Arbitration
- Obligations and Accountabilities of Expert Witnesses
- Court Aid in taking Evidence
- Filing of the Evidence through Affidavit
- Method of drafting an Affidavit

Lesson Outline

- Introduction
- Written Submissions
- Statement of Claim
- Statement of Defence
- Counterclaim
- Rejoinders
- Disclosure of Evidence
- Oral Hearings
- Evidence
- Assessing Evidence
- Weightage of Evidence
- Impeaching Credibility
- Proof of Statements contained in Documents
- Witnesses of Fact
- Witness Statements
- Cross-examination
- Re-examination
- Expert Witnesses

- Duties and Responsibilities
- The expert's Report
- Ascertaining the Facts
- Admissibility and Weight of Evidence
- Court assistance in Taking Evidence
- Relevance or Weight Hearsay Evidence
- Documentary Evidence
- Burden of Proof
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- Contract Terms
- Standard of Proof
- Evidence by Affidavit
- Relevant provisions of filing an Evidence on Affidavit
- Understanding the Practical approach for presenting Evidence on Affidavit
- Adducing Evidence under Section 34 of the Arbitration act
- Drafting an Affidavit
- Affidavit
- Statement of Claim & Defence
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Indian Evidence Act, 1872
- Arbitration and Conciliation Act, 1996
- Code of Civil Procedure, 1908
- MSMED Act 2006
- Indian Contract Act, 1872

INTRODUCTION

Fact-finding is an important task of the tribunal, and nowhere in the arbitral procedure is the cultural contrast more vivid than in the presentation of evidence. The civil law culture tends to prefer contemporaneous documents or, at least, written statements by witnesses. Professionals usually do not assist in the preparation of these statements. On the other hand, the common law tradition favours oral testimony, where the decision-maker can observe the demeanour of the witness.

The arbitration tribunals do not tend to follow strict rules of evidence found in common law countries. They also tend to favour documentary evidence. It is rare for a tribunal to exclude relevant evidence, although they may give it different weight, depending on its source. The burden of proof will generally be with the party alleging a particular fact.

The standard of proof is akin to the common law's civil standard of 'balance of probabilities' rather than the strict 'beyond reasonable doubt' used in criminal cases.

The Arbitrators are the masters of their own procedure and may conduct arbitral proceedings in a manner

they consider appropriate. It is a settled law that arbitrators are not bound by the technical rules of evidence as observed by the courts. Section 19[1] of the Act clearly states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872. The power of Arbitral Tribunal to conduct arbitral proceedings includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Thus, the relevancy or admissibility of a particular fact is to be decided by the Arbitral Tribunal as per its own good sense, and reference to the statutory provisions are not necessary.

However, this does not imply that the arbitrators are not bound by rules of evidence and fundamental principles of natural justice. In *Hindustan Shipyard Limited Vs. Essar Oil Limited and Ors*[2]., the Andhra Pradesh High Court has categorically stated that parties are free to agree on the procedure to be followed by the Arbitral Tribunal. When such procedure is not fixed, the Arbitral Tribunal has to follow the statutory procedure; it means it has to weigh the entire evidence on record properly and that it has to come to a just conclusion within the parameters of the dispute. It has been held that the principles of natural justice, fair play, equal opportunity to both the parties and to pass order, interim or final, based upon the material/ evidence placed by the parties on the record and after due analysis and/or appreciation of the same by giving proper and correct interpretation to the terms of the contract, subject to the provisions of law, just cannot be overlooked. It has been further held that parties, by consent, may adopt their own procedure for conducting arbitration. An Arbitral Tribunal is not a Court. Any lacuna in procedure does not vitiate the Award, unless it is in breach of principle of natural justice, equity or fair play for the aggrieved parties. It has been reiterated by the Bombay High Court in *Vinayak Vishnu Sahasrabudhe v. B.G. Gadre*[3] *and Ors.* that though the Arbitration Act does not provide for the procedure to be followed by the arbitrators, even so, the Arbitrators are bound to apply the principles of natural justice.

The power to decide the relevancy and admissibility of evidence is the sole jurisdiction of the Arbitrator. The Arbitrator is the judge of the quality and quantity of evidence that is produced by the parties. By virtue of this power, an arbitrator can call for additional evidence too, if it will be helpful for him to decide upon the dispute. But the exercise of this power has to be circumscribed within the fundamental principles of natural justice. It must be exercised cautiously and for some legitimate cause and not as a matter of routine. As stated by the Delhi High Court[4], you cannot win battles by springing surprises. It means that the Arbitrator is free to call for additional evidence at a belated stage of the arbitral proceedings as long as it does not cause prejudice to the other party. It would be unfair if parties are permitted to plead and proof at variance. If permission to lead evidence is ordinarily allowed, it will be impossible to conclude the hearing of any arbitral proceedings.

This chapter explains in detail about the ARBITRAL PROCEEDINGS, PLEADINGS AND EVIDENCE and the best practices being followed in India.

PART A - SUBMISSIONS DURING THE ARBITRATION

WRITTEN SUBMISSIONS

Written submissions are often referred to as pleadings. There is no required form and different legal traditions may treat the submissions differently. Whatever their format, their purpose is the same: they allow each side to know what the other party's contentions are in order to address them in their own written submissions and at the evidentiary hearing.

1. 19. Determination of rules of procedure.—(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

2. 2005 (1) ALD 421, 2005 (1) ALT 264, 2005 (1) ARBLR 454 AP

3. AIR 1959 Bom 39, ILR 1959 Bom 87

4. Delhi Development Authority Vs. Krishna Construction Co. 183 (2011) DLT 331 (DB) at para 19

The old term 'pleading' referred to a traditional court style pleading that set out the case of the claimant to be answered by the respondent. It was written in typical litigation-style language and was written as a persuasive document rather than having the primary purpose of defining the issues which the arbitrator is to determine.

It is for the arbitrator to decide when and how these pleadings are to be 'filed' or 'served' (sent simultaneously to the tribunal and to the other parties). The tribunal will usually do this at the procedural hearing after hearing the parties' comments, and then notify the procedural calendar to everyone.

Written pleadings are usually exchanged sequentially, so that the claimant fires the first shot, the statement of claim, and the respondent answers with the statement of defence (and counterclaim, if any). Exceptionally, however, the arbitral tribunal may direct that the parties should submit their written pleadings simultaneously, so that each party delivers a written submission of its claims against the other on a set date, and then, on a subsequent date, the parties exchange their written answers and so forth.

The order in which the statements are filed is very important. Firstly the claim is filed simultaneously with the arbitrator and the respondent. Then the defence with any counterclaim is filed simultaneously with the arbitrator and the claimant; and then the reply to the defence and the defence to the counterclaim is simultaneously filed with the arbitrator and the respondent; and finally any reply to the defence to the counterclaim is simultaneously filed with the arbitrator and the claimant. Although this sounds confusing it is quite a simple progression and enables each party to consider the claims, defences and arguments of the other party.

Whilst simultaneous exchanges can reduce the overall duration of the written phase, they are more likely to lead to the arbitral equivalent of 'ships passing in the night'. For this reason, simultaneous exchange remains less common than sequential exchange for pre-hearing submissions.

The Arbitration and Conciliation Act stipulates the submission requirements as follows:

23. Statements of claim and defence.—

(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

[(2A) [5]The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.]

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

(4) [6]The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment.

The delivery of the claim, the defence (and counterclaim, if any) and any reply to the defence (and defence to the counterclaim, if any and reply to the defence to the counterclaim, if any) completes the pleadings stage of a reference.

5. Ins. by Act 3 of 2016, s. 11 (w.e.f. 23-10-2015)

6. Ins. by Act 33 of 2019, s. 5 (w.e.f. 30-8-2019).

STATEMENT OF CLAIM

A statement of case, also called a statement of claim, will set out the duty owed (either in tort or in contract), the alleged breach of that duty, and the consequent damage. The arbitral tribunal may require that the claimant file, either simultaneously with the statement of case or shortly thereafter the documents relied upon by the claimants, the evidence of witnesses, and a statement of the law relied upon.

The statement of claim must contain all the factual matters relied upon and refer to the evidence in support of those factual claims linked with any contention of law relied upon, together with an itemisation of the relief claimed including interest and costs.

Though the sequence of events appears that statement of claim as a precedent act, in case of interim relief it is not mandatory; Statement of Claim not *sine qua non* to Filing an Application under Section 17 of the Arbitration Act.

It should be noted that post the 2015 Amendment, the powers of the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996 ("Act"), are at par with and akin to the powers of the Court under Section 9 of the Act. Whilst the non-filing of the Statement of Claim did not serve as an impediment to the Courts granting interim reliefs under Section 9, the question on whether an Arbitral Tribunal is empowered to grant interim reliefs under Section 17 in the absence of a Statement of Claim remained unclear.

The Hon'ble Delhi High Court has in the matter of *Sanjay Arora and Anr. v/s. Rajan Chadha & Ors.*[7], put the above controversy to rest and opined that an Application for interim reliefs preferred under Section 17 of the Act need not mandatorily be preceded by filing of the Statement of Claim.

Interestingly, the view taken by the Delhi High Court deviates from the one taken by the Hon'ble Bombay High Court in as much as the latter has held that filing of the Statement of Claim is *sine qua non* to preferring an Application under Section 17.

Pertinently, after the 2015 amendment, the phrase "during the arbitral proceedings" was incorporated in Section 17. Section 21 of the Act stipulates that arbitral proceedings deem to commence on the date when a notice, requesting for reference of the dispute to arbitration is issued by one party to another, thereby implying that arbitral proceedings commence even before the Arbitral Tribunal is constituted as the notice invoking arbitration would necessarily be prior in point of time.

On perusing the above referred provisions in unison, the Hon'ble Court observed that they empower the Arbitral Tribunal to pass orders in terms of Section 17 at any point of time and that post the 2015 amendment, filing of the Statement of Claim, prior to moving the Arbitral Tribunal under Section 17, can no longer be regarded as a mandatory requirement.

The amendment to the Statement of Claim:

Any party may seek to amend their claim after the commencement of an arbitration reference. There may be consequences in terms of wasted costs for the other party in the dispute in dealing with any revision at an advanced stage of the reference.

The arbitrator should consider whether the application to revise the claim is reasonable and timely. The arbitrator does have a discretion to award costs against the party applying to amend their claim so that the other party is restored (in terms of costs expended) to the position they would have been in had a party altering their claim got it right first time.

Permission to amend should be granted when:

(a) relevant facts arise during the course of disclosure.

7. (2021 SCC Online Del 4619)

(b) the amendment is to correct a mistake in the original submission;

(c) the amendment is to deal with a request for clarification or the provision of further and better particulars;

(d) to put a different legal argument on alleged facts;

(e) to raise new issues which have an impact on the issues already referred to the arbitrator.

It is a contentious issue whether to allow such amendments can be allowed after the initial submission before the Arbitral tribunal. Delhi High court clarified this in the following case:

Rejection of additional claims by impugned order have all trappings of an arbitral award

Cinevistaas Ltd. vs. Prasar Bharti [8]

Facts : The Petitioner, Cinevistaas Ltd., had undertaken production of a game show the telecast of which was approved by Prasar Bharti, which is the public service broadcaster established under a statute. When Prasar Bharti informed Cinevistaas that the show would not be aired, the latter triggered arbitration and a sole arbitrator was also appointed by the High Court of Delhi upon an application made by Cinevistaas.

During the pendency of the arbitration, Cinevistaas moved an application before the arbitrator seeking permission to correct two claims in its statement of claims. Through the correction, Cinevistaas sought to increase the claims regarding losses incurred on account of concept development, research scripting and appointing technicians. This application was dismissed by the arbitrator on 08.08.2009 on the ground of limitation. The arbitrator held that the changes sought to be made by the application constituted additional claims and that the application for incorporating such additional claims, was barred by limitation. It was this order of the arbitrator that was challenged before the High Court.

Sequitur by the Court:

35. Arbitral proceedings are not meant to be dealt with in a straitjacket manner. Arbitral proceedings cannot also be conducted in a blinkered manner. There could be various situations wherein, due to inadvertent or other errors, applications for amendments/corrections may have to be moved. So long as the disputes fall broadly within the reference, correction and amendments ought to be permitted and a narrow approach cannot be adopted.

36. In the facts of this case, it is clear that the quantification of claims was done correctly in the notice invoking arbitration, in the application under Section 11 as also in the writ petition filed by the Petitioner. The rejection of the additional claims has in fact resulted in greater delay rather than expeditious disposal. The bona fides of the Petitioner are not in question. Rejection of additional claims by the impugned order have all the trappings of an award and hence the Section 34 petition is clearly maintainable.

37. It is, accordingly, held that the present petition is maintainable. Additional claims having been raised in the first place in the notice invoking arbitration, the claims are not time barred by limitation as the commencement of arbitral proceedings is governed by Section 21 of the Act which stipulates that the notice invoking arbitration constitutes commencement. Amended claim petition is, therefore, directed to be taken on record.

STATEMENT OF DEFENCE

The respondent's defence will admit or deny each matter set out in the statement of case. If there is a denial, the respondent must state what the correct position is alleged to be. The arbitrator may require the respondent's evidence and legal submissions to be set out in the same way as was required of the claimant.

The statement of defence prepared in answer must contain all factual matters and any contentious law upon which the respondent intends to rely. It must also deal with each item in the statement of claim which the

8. (12.02.2019 - DELHC).

respondent may admit or deny and the grounds of fact and denial together with any other factual matters, evidence or contentions of law on which the defence of the respondent is to be based.

COUNTERCLAIM

If the respondent brings a counterclaim, it will add to its Defence its own statement of case. The claimant must then submit a Defence to the Counterclaim. The tribunal must ensure that the counterclaim arises out of the same contract to which the arbitration agreement applies, and that it falls within the ambit of the arbitration clause. The Model Law does not deal specifically with the issue of counterclaims arising out of a different contract. In contrast, the English Arbitration Act has set out specific situations where an arbitral tribunal can address these types of counterclaims. The tribunal can consider a counterclaim arising out of another contract only if:

a. that other contract possesses a compatible arbitration agreement;

b. the arbitrator has also been appointed as arbitrator for the determination of the counterclaim from the other contract; and

c. the 'claim arbitration' and the 'counterclaim arbitration' have been consolidated by the agreement of the parties.

These criteria are typical of the considerations most courts and arbitral tribunals will weigh in deciding whether the counterclaim is indeed a true counterclaim or, in fact, needs to go elsewhere for resolution.

When there is a delay in filing counter claim in an Arbitration – What is the remedy?

Delhi High Court, single judge, in the case of *Airone Charters Private Limited v. Jetsetgo Aviation Services Private Limited* decided by High Court of Delhi on 12.10.2021 that the Petitioner's counterclaims were struck off before the Arbitral Tribunal (AT) on the ground of being filed at an extremely belated stage.

Thereafter, after attempting several different courses of actions to agitate its counterclaims, the Petitioner finally filed the present Petition under Section 11 of the Arbitration & Conciliation Act, 1996, for referring its counterclaims to arbitration by the already constituted AT (presumably because they already knew the disputes very well).

The Court observed as follows:

1. The Claims of the Petitioner were *prima facie* appearing to be within limitation. In any case issues of limitation and *res-judicata* which were raised by the Respondent would be looked into by the Arbitrator once it was in seisin of the dispute.

2. The right to legal redress is a fundamental right and cannot be obliterated altogether. Therefore the right of the Petitioner to raise its counterclaim could not be destroyed altogether, even though initially it had been dismissed by AT being delayed, and as the time period of the arbitration was almost about to expire.

3. The Petitioner has the choice of either raising its disputes as a counterclaim or by serving fresh notice of dispute (*State of Goa v. Praveen Enterprises* [9]).

4. Simply because the counterclaims were alive at the inception of the first arbitral proceedings and were required to be raised then, it cannot be said that they could not be permitted to be raised later, unless the arbitration clause was specifically worded in that manner.

9. (2012) 12 SCC 581

(Distinguished *Dolphin Drilling v. O.N.G.C.* [10], and explained *Gammon India Ltd. v. N.H.A.I*[11]). Based on the above, although the Court did not refer the disputes to the same AT, the Court appointed one of the arbitrator's as the Petitioner's nominee, directed the Respondent to appoint its nominee and thereafter the two learned arbitrators to proceed to appoint the presiding arbitrator.

The Court disposed off the petition with an observation that needless to say, if the parties would be agreeable to the claims being decided by the existing AT, that would be the eminently advisable course to pursue, which would aid in expeditious disposal of arbitral proceedings.

REJOINDERS

If the parties so desire and the tribunal considers it appropriate, there may be a Reply to the Defence (on both claim and counterclaim), and perhaps a second, and even third round of written submissions. Good practice demands that before ordering a second round of written submissions, the tribunal consider the cost of this further step in relation to the importance and amount of the claim.

Further and better Particulars

It is frequently the position once the 'statement of case' has been served on a party that they wishes to receive clarification on some of the matters covered. A request may be made by an application for 'further and better particulars' and it is often the case that after further information is disclosed that some of the issues referred to the arbitrator may be settled.

If the parties are unable to agree among themselves as to what additional information should be provided in reply to the request then the matter will be referred to the arbitrator and this is usually done in an interlocutory hearing or by a written application.

NO PLEADINGS?

In some instances, the parties may have been arguing by letter for several months. It may, in a simple case, be possible to let these letters stand as the pleadings of the parties in order not to waste time reiterating what the parties have already stated probably more than once. In some commercial arbitrations concerning, for example, the quality of grain, there will be no written submissions (and possibly no oral evidence or hearing). The arbitrator, an expert in the grain market, examines the grain by smelling, tasting, touching, and handling. These 'look and sniff' arbitrations are still used to some extent but it is rare to dispense with the written submissions.

DISCLOSURE OF EVIDENCE

Whatever form of procedure is adopted, it is for the arbitrator to rule on whether any documents or classes of documents should be disclosed and produced by the parties, and when. The disclosure of evidence may highlight the differing legal cultures of the parties, which, in turn, shape their expectations about what they must disclose. In common law jurisdictions, the rule is that a party must disclose material evidence (and relevant law), even if it is unfavourable to that party. In civil law jurisdictions, this obligation is not only unknown, it may even be forbidden. Lawyers from some civil law jurisdictions can be disbarred for divulging information unfavourable to their client. Finding the path between these conflicting obligations and expectations can be one of the tribunal's most delicate tasks.

It is a general rule in allowing any application for disclosure that a party may only see such particulars as ought to have been in the original statement in the first place. Parties must be prevented from prolonging the

10. 2010 (3) SCC 267

11. AIR 2020 DELHI 132

arbitration procedure and deliberately increasing costs by embarking on 'fishing expeditions' to discover facts that are not central or relevant to the issues referred to the arbitrator.

Vital evidence may include hospital reports, a site agent's diary, the general manager's reports to head office, emails between the parties, plans, graphs, working models, or the minutes of meetings. If a party is relying on a document, it may be attached to the written submissions. If a party would rather the document never come to light, it may try to avoid disclosure. If any important document or other evidence has not been disclosed, the party wishing to see it may apply to the arbitrator for an order for its production.

Having heard submissions from the other side, the arbitrator may order that the document be made available for inspection or that copies be delivered to the requesting party within a certain time limit. It is important to realize that it may take some time to assemble the documents when establishing the timing of subsequent procedural steps.

In practice, the usual format for dealing with requests for disclosure is the Redfern Schedule.

This is in the form of a chart with 4 columns:

Column (1): documents requested.

Column (2): reasons for request.

Column (3): objections to production.

Column (4): left blank for the decision of the tribunal on each request.

ORAL HEARINGS

Although the Arbitration and Conciliation Act, 1996 ('the Act') affords a non-absolute right to an oral hearing, it follows from the wordings of Section 24 of the Act that the parties may agree to conduct the arbitration without holding a hearing. It also follows that as a matter of public policy, that in any case, the requirement of due process may not be waived. The presence of 'due process' is a fundamental characteristic to any arbitral proceeding and documents-only arbitration is no exception.

It should be noted that there may arise allegations of due process violations when the right under Section 24[12] is waived through the application of Section 29B. Let us consider a scenario where written arguments and counter-arguments are duly submitted by Companies A and B respectively. A argues that B has over-valued its losses, on three grounds. But the arbitrators base their calculation of damages payable on B's arguments. Here, A can contest the award in Court on the ground that the right to be heard and consequently due process, was violated because the arbitrators failed to address A's grounds against over-valuation. It is to be noted that there are no rules of minimum duty prescribed for arbitrators and no other auxiliary rules of procedure. This might prove sufficient for a court to annul the award but there is also scope for the alternative.

There may be other allegations of violation as well. For instance, in the *Sukhbir Singh* case the petitioner had challenged the award of the tribunal on grounds of violation of natural justice. It was alleged that the petitioner was not given a reasonable opportunity to cross-examine the witnesses on account of fabrication of documents. The Court upon inspection found that the tribunal had not maintained the minimum standard

12. Section 24 of the A&C Act - Hearings and written proceedings. —(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held:

[Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.]

of rules of natural justice and hence the award was set aside. Possibilities of such instances of fabrication of documents in documents-only arbitration, would not be favoured by the proviso under Section 24(1), leading to a blatant violation of due process.

Though a mere possibility of abuse might be insufficient grounds for amendment, in order to avoid unconstitutional stances by tribunals and inconsistent decision-making by courts, we believe that the question that needs an answer through amendment of Section 24 is, *what is due process in an arbitral proceeding*?

Any procedure which indorses the 'right to be heard' of all concerned parties, may be termed as due process. The scrutiny on processual matters must be placed *only* on whether the parties were afforded proper procedural opportunities to present their case, and *not* on whether there *was* an oral hearing [The violation of a party's right to present its case is a ground for challenge under Sections 34(2)(a)(iii)[13] and 48(b) of the Act].

Therefore, excluding the blanket application of Sections 34(2)(a)(iii) and 48(b), a clause similar to that prescribed by Swiss law is imperative in the Indian context. The clause must read, *"if in a proceeding under Section 29B, the arbitral tribunal, does not take into account some statements of facts, arguments, evidence and offers of evidence submitted by one of the parties which ought to be considerations in the decision to be issued it would amount to the violation of due process"*.

This amendment is needed to ensure unnecessary due process violation claims in documents-only arbitration, such that, even in waiving the "oral hearing right", the parties' fundamental right to be heard, is in no manner violated.

Oral evidence (testimony) and hearsay Testimony is an oral statement of a witness made on oath in a hearing. This evidence is offered as evidence of the truth of what is said. This is normally direct evidence of matters of which the witness has first-hand knowledge – what he experienced with one of his five senses: what he saw, heard, said, did or smelt. This should be distinguished from hearsay evidence and circumstantial evidence. Circumstantial evidence was discussed under relevant facts above. Hearsay evidence is discussed in more detail below.

In Keane's 'The Modern Law of Evidence', hearsay is defined as: "any statement, other than one made by a witness in the course of giving evidence in the proceedings in question, by any person, whether it is made on oath or un-sworn and whether it was made orally, in writing or by signs and gestures, which is offered as evidence of the truth of its contents." Of course, if the statement is to be introduced merely to prove that it was made, rather than to prove that the contents are true, the statement will not be hearsay but 'original' evidence. If the original evidence is relevant to a fact in issue, then it will be admissible.

EVIDENCE

Introduction

The arbitrator has a duty to properly consider the evidence presented by the parties in support of their claim, defence or counterclaim. The arbitrator therefore needs a full understanding of the legal principles governing the admissibility, reliability and weight that should be attached to any oral or documentary evidence presented by the parties.

In the absence of an express agreement by the parties, the arbitral tribunal can, subject to Part I of the Arbitration and Conciliation Act[14], conduct the proceedings in the manner it considers appropriate. There is nothing in Part I of the Arbitration and Conciliation Act prohibiting or limiting the arbitral tribunal's power to order disclosure of documents and attendance of witnesses. On the other hand, the courts have recognised that the arbitral

13. Section 34. Application for setting aside arbitral award. (2) An arbitral award may be set aside by the Court only if— (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

14. Section 19(3), of the A&C Act- Determination of rules of procedure.

tribunal has the same powers as the courts with respect to discovery, inspection, and production of documents, and summoning of witnesses.

If a direction issued by the arbitral tribunal directing production of documents by a party is not complied with, the tribunal can draw an adverse inference from the conduct of the parties, or it can apply to the court under section 27 of the Arbitration and Conciliation Act for assistance in taking evidence.

As per section 1 of the Indian Evidence Act, 1872 the said Act does not apply to proceedings before the Arbitrator. Further, section 19(1) of the 1996 provides that Arbitral Tribunal shall not be bound by the Indian Evidence Act. Thus the inapplicability of technical rules of evidence is statutorily recognized.

While provisions of the Evidence Act, 1872 do not in terms apply to arbitration proceeding, the principles of Law of Evidence generally apply to arbitration proceeding. Section 18 of the 1996 Act insists that the parties shall be, treated with equality and each party shall be given a full opportunity to present his case.

Under section 24 the parties are entitled to sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property. Further, all statements, documents etc. supplied to, or applications made to, the arbitral tribunal by one party is required to be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision ought to be communicated to the parties.

Thus, the Arbitral Tribunal is bound to see that there is no violation of principles of natural justice and no evidence is taken behind the back of any party or that no evidence is taken without allowing the other party to scrutinize the same[15]. Similarly, if there is no evidence before an arbitrator or award is based on no evidence, the Court can set aside such an award.[16]

The arbitrator can appoint one or more experts to report to it on specific issues and require a party to give the expert(s) any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for their inspection[17]. The tribunal can also order the expert(s) to participate in the oral hearings where the parties have been given the opportunity to cross examine the expert(s) on their testimony.

The 'Rules of Evidence' is an important concept in the decision-making process in any tribunal, including courts, arbitrations and adjudications. In court, the 'rules' are prescribed by the rules of court and in common law jurisdictions the precedent decisions from the courts themselves are important. In arbitration, in some jurisdictions, the 'rules' may be binding on the arbitrator as he sieves through the evidence in preparation of the award. Although not always binding, the 'Rules of Evidence' provide an arbitrator with a valuable source of guidance when reviewing the evidence offered in support of the parties' various submissions; and assist him in arriving at findings of fact (and law) and thereby reaching a decision on the issues. To properly appreciate the 'Rules of Evidence', it is essential to understand some of the basic concepts that underlie the law of evidence.

Therefore, this lesson explores evidence, as follows:

- The purpose of evidence.
- Basic concepts: facts, and types of evidence.
- The rules of evidence and their application.

The Purpose of Evidence

The word 'evidence' originates from the Latin term 'evidentia' which means 'to show clearly, to discover clearly and certainly, to ascertain or to prove'. Thus, evidence is something which serves to prove or disprove the

15. Union of India v. D. Bose AIR 1981 Cal 95

16. Delhi Development Authority v. Alkaram, AIR 1982 Del 365

17. Section 26 of the A&C Act- Expert appointed by arbitral tribunal

existence or non-existence of an alleged fact. The party who alleges the existence of a certain fact has to prove its existence, and the party who denies it has to disprove its existence, or prove its non-existence.

All facts traditionally considered as evidence may not, however, be evidence in the eyes of the law. Rather, evidence is something presented before the court for the purpose of proving or disproving the issue in question. In other words, evidence is the means by which a party satisfies the court of the truth of a disputed fact between the parties.

Evidence is defined in Keane: The Modern Law of Evidence as: "Information by which facts tend to be proved, and the law of evidence is that body of legal rules regulating the means by which facts may be proved in courts of law and tribunals and arbitrations in which the strict rules of evidence apply."

The purpose of presenting evidence is to assist a tribunal in determining disputed areas of fact and disputed issues of opinion (expert evidence). The law of evidence is the body of legal rules developed, and in some jurisdictions enacted, to govern:

a. Facts that may be considered in court. This is the issue of relevant evidence that may be adduced before the court to support an allegation:
    i. Facts in issue; and
    ii. Facts relevant to the facts in issue;
b. The methods of securing the consideration of these facts:
    i. By proof through real evidence or documentary evidence;
c. Facts which need not be proved:
    i. Judicial notice of facts which are so notorious in public knowledge or are capable of being verified by authoritative texts;
    ii. Judicial admission – facts admitted in pleadings, in open court, in examination of witnesses, in testimony etc.
d. The party that must secure the consideration of which facts, the burden of proof and the degree of proof required to win the case. The function of controlling the flow of evidence is, from the arbitrator's perspective, one of procedure and good management. It is vital to ensure that the time is used efficiently, and party representatives bear a heavy burden to ensure the evidence is placed before the arbitrator in a relevant, understandable, logical and effective manner. It greatly assists the arbitrator if the parties ensure that only evidence referred to in the submissions themselves is included, and it obviously helps if documentary evidence is provided in chronological order, paginated and annotated in the submission that it supports.

Basic Concepts - Facts

There are three types of facts, discussed below, that may be proved or disproved by evidence:

Facts in issue

Facts in issue are also referred to as the 'principal' facts. These are facts that the referring party must prove to succeed. So, where for example the responding party denies a contractual relationship, the principal facts the referring party must prove are those that establish the formation of the contract between the parties, a breach and the loss suffered.

In an allegation of negligence where the responding party denies the breach of duty, the facts in issue are those that would establish a breach and the resulting causal link to the damages claimed. In an arbitration, the facts in

issue should be capable of being identified in the referral notice, one purpose of which (in a well-ordered claim) is to set out the terms of the dispute and what aspects the parties do not dispute.

Relevant facts

Relevant facts are the facts which are to prove that the 'fact in issue' exists. This type of evidence is additionally referred to as 'circumstantial evidence'. This can best be explained by the use of a criminal law example. If the fact in issue is whether A shot X, an eyewitness would be the best way to prove the facts in issue. However, if such evidence is unavailable, the fact that after the incident, a policeman found the gun in A's car would be a relevant fact that assists in proving the fact in issue. In an arbitration case, a fact in issue might be that a cargo delivery was delayed. Useful evidence would be a document showing the arrival date, but if that was not available, then a witness statement from the harbourmaster confirming the date of arrival would be relevant.

Collateral facts

There are three types of collateral facts, discussed below:

- Facts regarding the competence of witnesses. For example, evidence to prove that a potential witness is suffering from a mental illness and so would not be able to provide competent evidence.
- Facts regarding the credibility of a witness. A good example of this is the case of *Thomas* v. *David [1836]*. In this case, a witness denied in cross-examination that she was the mistress of a man in whose favour she was giving evidence. Collateral evidence was allowed in order to contradict her testimony.
- Preliminary facts. These are normally facts relating to the admissibility of evidence. A good criminal law example would be the rule that confessions must not be obtained through the use of oppression.

So, if a defendant claims to have been tortured, the court will hear evidence of this before deciding if the confession is admissible. Types of Evidence There are four forms of evidence: real, demonstrative, documentary and testimonial evidence. This section is concerned with the way these forms of evidence can be presented. Real evidence As the name indicates, this type of evidence is usually a material object produced for inspection.

Sometimes, it is the characteristics of the thing that are relevant and may be of significant importance. For example, in a case where the quality of the work is in issue, the defective work or materials will be 'real evidence'. Demonstrative evidence Demonstrative evidence can be used to supplement the evidence of a witness, such as the use of e-maps or hand-drawn diagrams or photographs (regularly used in construction cases to capture a moment in time in the process) to illustrate the scene of an occurrence. It is brought into evidence through the testimony of the witness producing that evidence. The question that arises in dealing with demonstrative evidence is whether the photograph, for example, is evidence of fact or merely adds weight to the testimony of the witness who is giving the evidence of fact. The evidence that the witness is giving is that he saw the defect and the photograph illustrates, or demonstrates what he saw.

THE RULES OF EVIDENCE IN ARBITRATION

An arbitral tribunal is independent of restrictions imposed by the adjective law, however, it is bound to follow the fundamental principles of natural justice and in that event, must not disregard the rules of evidence which are based on such principles. It was held by the Apex Court, in *Mallikarjun v Gulbarga University*[18] that for the purposes of constituting a valid arbitration agreement. Certain principles which are based on natural justice are not necessary to be expressed in arbitration agreement as violation of such principles would result in unjust and unfair procedure adopted by the arbitration tribunal.

18. [2003 (3) ARBLR 579 SC],

Now, if the arbitral tribunal is bound by fundamental principles of natural justice, Section 91 and 92 of IEA shall apply to the arbitral proceedings. In *Bengal Jute Mills Co. Ltd. vs Lal chand Dugar*[19], the Calcutta High Court has held that the principles embodied under sections 91 and 92 of IEA lay down the principles of natural justice and an arbitral tribunal is bound to follow such principles even though it is not bound by the IEA. These rules of evidence are sometimes thought to be based on the 'best evidence' principle.

The rule of evidence contained under section 91 of IEA[20] is regarded as the cardinal rule of evidence, not one of technicality but of substance. It stipulates the rule that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. The reason behind this rule is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. Further, section 92 of IEA debars, from working into oral evidence, once the contract is executed in writing except as provided in the provisos thereof.

In a court, the rules of evidence typically cover a number of topics including: the relevance and admissibility of evidence; the burden of proof; the weight to be attached to different types of evidence; the order in which evidence is given; privilege; hearsay evidence; written evidence and disclosure of documents; witness evidence (of fact) and expert evidence (opinion). Whilst these 'rules' are not binding on an arbitrator, a proper understanding of evidence and the concepts that underpin the 'rules' are essential for anyone intending to make decisions as an arbitrator.

To illustrate the evidential concepts in an arbitration, consider the questions an arbitrator must ask in the analytical process by which he decides the facts of the dispute:

- What facts are alleged by the referring party?
- Which of these facts are disputed by the responding party?
- Of each disputed fact, which party has the burden of proof?
- In respect of each fact that is disputed, what evidence is adduced by the party who has the burden of proof?
- Is the evidence in respect of any of the disputed facts incontrovertible?
- For those alleged facts not supported by incontrovertible evidence, what evidence does the party not having the burden of proof have to rebut the allegation?
- Which party's evidence does the arbitrator prefer?

The arbitrator has then made his decision as to the facts.

ASSESSING EVIDENCE

Circumstantial evidence

Circumstantial evidence can be oral, documentary or real. Pollock CB in *R v. Exall [1866]*, compared circumstantial evidence to a rope made up of several cords: "One strand of the cord may be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction of more than a mere suspicion; but the three taken together may create a conclusion of guilt which as much certainty as human affairs can require or admit of."

19. [AIR 1963 Cal 405]

20. S. 91 of IEA - When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Relevance

There are several concepts that are fundamental to understanding evidence. One of these is relevance. The rule is that all evidence that is sufficiently relevant to prove or disprove a fact in issue, which is not excluded by any other rule of evidence, is admissible.

Though relevance is named as the first criterion for admission, in practice it is not easy to separate the wheat from the chaff. Arbitrators are reluctant to limit the evidence that can be submitted and normally err toward permitting parties to present evidence, including the introduction of materials of questionable relevance. Arbitrators are mindful of the fact that their award can be set aside if a party was 'unable to present the case'. It should be emphasised that parties must only be afforded a fair opportunity for presenting their cases; this does not mean that arbitrators are required to wait until a party actually avails itself of the right to be heard.

Thus, a party cannot insist on the admission of evidence that the tribunal considers irrelevant. However, it would be unrealistic to rely fully on that way of thinking. National arbitration laws usually do not counterbalance that basic principle of arbitral proceedings which protects the party's right to be heard, so do not help arbitrators with any special rules concerning relevance; therefore, unless the evidence is manifestly irrelevant, any irrelevancy-based refusal to admit evidence submitted by a party is associated with significant risk. In essence, where a piece of evidence does not prove or disprove an issue, it will be inadmissible. If the purpose of introducing evidence to court is to try to prove facts, it stands to reason that only relevant evidence is allowed. If introduced, irrelevant evidence would simply have the effect of adding confusion, rather than assisting with the resolution of the matter between the parties.

Admissibility

When evidence is said to be admissible, it means that as a matter of law, the evidence is properly admitted to the court. Of course, the first condition is that the evidence must be relevant. However, relevant evidence is not always admissible, and it is necessary to appreciate that relevant evidence may be excluded. For example, highly relevant evidence may be withheld as a matter of public policy on the grounds that disclosure would jeopardise national security.

The main categories of inadmissible evidence are opinion evidence and privileged communications.

- When dealing with opinion evidence, we are not concerned with expert evidence but non-expert evidence. There are special rules on the evidence of experts.
- Privilege rules can affect the admissibility of evidence. Privileged communications are confidential conversations and documents passing between parties and their legal advisers (normally). Other than questions of relevance, the major issues relating to admissibility of evidence in arbitration arise from the application of the exclusionary rules, by which evidence that is relevant may be excluded. An arbitrator has discretion as to the application of the law of evidence and this includes the possibility of ignoring the exclusionary rules. However, an arbitrator should at the very least be cognisant of those rules and of the prejudice that might be caused to one of the parties if they are not applied.

The concept of the general admissibility of relevant evidence is recognised in international arbitration. It was largely taken from the common law tradition (eg. the USA evidence law with respect to admissibility establishes one seemingly simple rule: all relevant evidence is generally admissible, evidence which is not relevant is not admissible). Thus, generally speaking all relevant evidence is admissible in arbitration, except as otherwise provided by mandatory rules, or by agreement of the parties. The concept of deciding to 'admit' or 'exclude' evidence gives a broad meaning to the term 'admissibility', that includes the evaluation and assessment of evidence in deciding the case. Arbitrators admit evidence; that is why admissibility is the most general condition for evidence to be admitted.

Once a piece of evidence has been rendered inadmissible, that determination may serve as a ground for it to be refused in admission, or excluded from evidence if already admitted. It is necessary to distinguish between refusal or exclusion on purely procedural grounds (eg. non-compliance with the terms established by the tribunal for submissions) and exclusion on the grounds of inadmissibility. The parties can agree, or the tribunal can determine, that evidence must be submitted in a timely fashion; in that respect, the tribunal can set a specific deadline for submission and can refuse any evidence submitted after that deadline.

Non-compliance with the deadline by the submitting party does not directly affect the properties of the evidence and shall be dealt with as if it were a procedural issue, that is, evidence may be admitted if procedural fairness is not prejudiced. A similar approach can be taken if a party requests leave to exclude documents which were not exchanged. The arbitrators should not consider those documents to be automatically inadmissible. Where documents were not exchanged in accordance with the rules of procedure, the arbitrators may adjourn the hearing to afford the disadvantaged party a fair opportunity to examine and comment on the documents.

WEIGHTAGE OF EVIDENCE

Another basic concept that should be considered at this stage is the weight of evidence. In civil litigation, it is for the judge to consider relevance, admissibility and what weight ought to be given to the evidence. Unlike admissibility, which is a question of law, weight is a question of fact. When we speak of weight here, it means the cogency or probative worth of the evidence. This may be assessed by the judge applying common sense and, of course, experience.

The following factors may assist:

- the extent to which the evidence is supported or contradicted by other evidence;
- in direct testimony, the demeanour, plausibility and credibility of the witness and all the circumstances in which he claims to have perceived the facts in issue;
- in the case of hearsay, in England and Wales, the Civil Evidence Act 1995 gives guidance on specific issues to be taken into account regarding weight. In essence, the judge must look at the evidence before him and consider if it is both credible and reliable.

A witness may be credible, but his evidence may not be reliable. Honest witnesses may give evidence that is inaccurate or mistaken. Weight, like relevance, is a question of degree. The evidence may be so weak that it could not possibly justify finding in favour of the party introducing it, in which case it will be insufficient evidence. On the other hand, the evidence may be so weighty that it could justify finding in favour of the party introducing it, in which case there is sufficient evidence on the face of the matter. Finally, the weightiest possible evidence will be regarded as conclusive evidence.

The practical issues regarding the weight to be attached to conflicting evidence are important to a practising arbitrator. Where the evidence is in conflict, the arbitrator may wish to call those making the conflicting statements before him in a meeting to help him make up his mind as to which one he believes. It is not always possible, however, to decide from the demeanour of a witness whether he is telling the truth or not. In fact, sometimes the most nervous of witnesses can be shown to have been telling the truth where the bare-faced liar appears to be very convincing. What the arbitrator has to do in the circumstances is the same function as anyone who has to consider evidence: he has to assess and test it for consistency and probability.

The basic approach is to have a framework of incontrovertible facts. This should always be done at the outset of any consideration of evidence.

IMPEACHING CREDIBILITY

Most pieces of legislation dealing with evidence permit evidence to be admitted for the purpose of attacking or supporting the credibility of hearsay statements. This applies where the maker of the statement is not being called to give evidence. Rules permit evidence that the maker of the statement has been convicted of a crime, evidence of bias on the part of the maker in favour of the party adducing his statement and evidence that the maker has made a previous inconsistent statement.

PROOF OF STATEMENTS CONTAINED IN DOCUMENTS

Some legislation, such as the Evidence Act Singapore, differentiates between documents, generally those documents that form part of the records of a business or public authority. As to general documents, they allow the production of the documents as evidence (always so long as it is otherwise admissible) and if the original is not in existence, a copy, which the court may require to be authenticated.

WITNESSES OF FACT

When an arbitration is concerned with what actually happened, witnesses of fact can help to establish this. The arbitrator has to determine whether these witnesses should attend the hearing and give evidence, or if written statements will suffice. If a witness attends, the usual procedure is for the advocate presenting the witness to elicit 'direct evidence' or 'evidence in chief', after which the counsel for the opposing party and the tribunal will ask questions.

WITNESS STATEMENTS

If, as is often the case, witness statements are exchanged in advance of the hearing, the tribunal may decide to use this in lieu of direct evidence. A copy of a party's witness statement is supplied to the other side several weeks or months before the hearing. With witness statements, the other side knows in advance the evidence that it is required to accept, explain, or rebut and the hearing may be shorter if the witness statement is used in lieu of direct evidence. What is usually to be avoided is the worst of both worlds - the duplication of procedures, with both witness statements and direct evidence. A disadvantage of using witness statements is that they are often prepared by lawyers so may not represent the unprompted view of the witness. Also, if a witness wants to alter the statement after it has been filed, this may attract undue attention to the alterations. Generally, witnesses will have a copy of the statement in front of them while testifying. Problems may arise when the advocate calling a witness wants to ask questions to amplify points made in the witness statement or to add new details. Opposing counsel may complain of ambush or surprise, and demand the opportunity to meet this new evidence. It will be for the tribunal to decide how to deal with this.

CROSS-EXAMINATION

In common law jurisdictions, once a witness has given direct evidence either orally or by the witness statement, the opposing side can pose questions. The object of these questions is to test how much weight is to be given to the witness's evidence. Cross examination is a technique which is virtually unknown in civil law jurisdictions where it is simply not necessary since the court procedures are, for the most part, based on written evidence. With the increased use of international arbitration, more civil law advocates have exposure to some form of cross examination, but in a case where parties are from both traditions, the result is often a compromise.

RE-EXAMINATION

After a cross-examination, the party calling the witness can ask questions, but usually only relating to the matters raised in the cross-examinations.

It is important to understand that these rules and techniques of examining witnesses evolved in the common law tradition when trial by jury was the norm, and when many jurors did not read or write. One purpose for testing the witness was to protect unsophisticated jurors who might otherwise take unreliable testimony at face value. In contrast, civil law judges are trained jurists, accustomed to weighing and evaluating evidence. The international arbitral tribunal has more in common with the civil law judge than with the unsophisticated jury of old. As a result, the rules of evidence used in common law courts are usually relaxed in the international arbitration setting.

EXPERT WITNESSES

Section 26[21] of The A&C Act empowers the arbitral tribunal to appoint one or more experts and take their reports on certain issues. In *Girdhari Lal v Kameshwar Prasad*[22], it was stated by the court that even though the provisions of Sec. 45 of the Evidence Act may not be applicable in the literal sense in an arbitral proceeding, but the pith and substance of the principles contained therein about obtaining the opinion of the persons especially skilled in science or art are the relevant factors. Normally the expert has to give his opinion before the arbitrator, or the court and he must be allowed to be examined and cross-examined by the respective parties.

When an arbitrator, in addition to having to determine what happened, must also decide why it happened, expert evidence is required. Such evidence will be needed to determine technical matters such as why a certain operation went wrong; why the brakes on a vehicle failed; which of several possibilities was the primary cause of a delay; why a building collapsed. This evidence, called the 'expert's report', is always in writing and always exchanged between the parties in advance. An expert's report in reply is also produced and exchanged. A copy of each of these reports is, of course, supplied to the arbitrator. Because the reports will be taken 'as read', the experts go straight into their cross-examination. It is therefore vital for the arbitrator to have mastered these reports before the experts are called. Although a tribunal may need this evidence, they cannot order either party to engage an expert. If neither party wishes an expert, the tribunal can appoint its own expert.

'Unless otherwise agreed by the parties, the arbitral tribunal (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal'. At first sight, this appears an ideal solution. However, the disadvantage is that a tribunal-appointed expert may cause both parties to hire their own experts to advise them about testing the tribunal's expert, thereby increasing the expense.

Views differ about the rules that control admissibility of expert evidence. The following have been put forward as possible guidelines for assessing the admissibility of expert evidence:

- "field of expertise: the claimed knowledge or expertise should be recognised as credible by others who are capable of evaluating its theoretical and experiential foundations;
- expertise: the witness should have sufficient knowledge and experience to entitle him or her to be held out as an expert who can assist the court;

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21. 26. Expert appointment by arbitral tribunal.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

22. [AIR 1989 All 210]

- common knowledge: the information sought to be elicited from the expert should be something upon which the court needs the help of a third party, as opposed to relying upon its own general knowledge and common sense;
- ultimate issue: the expert's contribution should not have the effect of supplanting the function of the court in deciding the issue before it; and
- basis: the admissibility of expert opinion evidence depends on proof of the factual basis of the opinion."

DUTIES AND RESPONSIBILITIES

The duties and responsibilities of expert witnesses in a civil case had a number of duties and responsibilities to the court, including the following:

- the expert evidence presented to the court should be the independent product of the expert and should not be influenced as to form or content by the exigencies of the current litigation;
- the expert witness should act as an independent assistant to the court and his duty was to furnish an objective and unbiased opinion concerning the matter within his area of expertise;
- an expert witness in the High Court should never assume the role of an advocate;
- facts or assumptions upon which the expert's opinion was founded should be stated along with material facts which could detract from the opinion advanced;
- an expert witness ought to make it clear when a matter (for example, a question or issue) falls outside his area of expertise;
- if insufficient data was available to enable the expert to properly research his opinion or part thereof, then that deficiency had to be stated, together with an indication that the opinion was provisional;
- if when following an exchange of reports, the expert witness changed his mind on a material matter, then that change of view should be communicated to the other side without delay through legal representatives and, when appropriate, to the court; and
- all the documents and exhibits referred to in the expert evidence should be provided to the other side at the same time as the exchange of reports.

THE EXPERT'S REPORT

From an expert's report, an arbitrator wants to learn what facts have led that expert to come to this opinion as to causation, amount of damages etc.; whether any books or articles support the expert's opinion; and why and to what extent this expert rejects the opinion of the opposing expert. When a court gives leave for parties to call an expert, a court will often order the experts to meet before they produce their reports. The purpose of this meeting is to give the experts an opportunity to discuss the case and to discover in broad terms the contentions of the other expert. Arbitrators may wish to make a similar arrangement.

A modern practice is for the tribunal (after consulting with the parties' counsel) to establish a briefing note to the experts. This brief contains a list of issues to be addressed by both parties' experts, in the same order. The tribunal is then sure to have input from both sides on the same questions, and can then judge which is more acceptable. The Chartered Institute of Arbitrators has prepared a guidance document on the use of experts. This is included as Appendix 5. Arbitrators and advocates can look to the protocol for assistance in briefing the experts, presenting, and evaluating their evidence. The arbitral tribunal can decide instead of, or in addition to, relying upon the evidence of witnesses, whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.

Contents of the Expert's Report

Article 5.2 of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration states that the expert report should contain:

i. the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

ii. a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

iii. a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

iv. a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

v. his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

vi. if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

vii. an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

viii. the signature of the Party-Appointed Expert and its date and place;

ix. if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author."

ASCERTAINING THE FACTS

In a common law trial, all matters of proof and evidence are left to one party to produce and the other to challenge. The judge plays little part – sitting rather passively and giving judgment based only upon what the parties have presented. In contrast, a civil law judge takes an active role and will not hesitate to pose questions during the hearing. The arbitrator may choose between these approaches or, as is more often the case, combine them, probably allowing counsel to present questions first and then posing any questions that the arbitrator wants clarified. Different tribunals will have different styles, and may adapt their own styles depending on the legal and cultural background of the parties before them. Arbitrators should keep in mind that the parties and their counsel are almost certainly more informed about the details of the case than the tribunal can possibly be.

ADMISSIBILITY AND WEIGHT OF EVIDENCE

If the parties haven't made any agreement on the matter, the tribunal has to determine whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material tendered on any matters of fact or opinion, and the time, manner, and form in which that material should be exchanged and presented. Two matters are dealt with in this provision—admissibility and relevance, and weight.

Admissibility: It is for the arbitrator to determine whether to apply any rules of evidence in deciding whether to admit:

a. hearsay evidence – any statement by a person other than the witness, whether made orally, in writing, or by signs and gestures.

An example: "I heard the garage foreman tell George not to worry about the leak - there wasn't time"; and

b. documentary evidence – includes maps, plans, graphs, drawings, photographs, discs, tapes, videotapes, films, and negatives. The practical answer is for the arbitrator to always admit any statement or document. If evidence is excluded, the party concerned may feel that it has not been able to present its case, and consider challenging the resulting award. The relevance or weight that an arbitrator gives to that document is another matter.

COURT ASSISTANCE IN TAKING EVIDENCE

The arbitral tribunal has the power to direct a party before it to produce a document or provide evidence. [23]However, the arbitral tribunal does not have jurisdiction over third parties. Section 27 provides assistance to the arbitral tribunal or parties in respect of third parties who may be required to be summoned as witnesses or in possession of documents which may be required to be produced in the arbitration.

The arbitral tribunal, or a party with approval of the tribunal, is empowered to apply to the courts for assistance in taking evidence[24]. The court, may in its discretion, execute the request by ordering any person to provide evidence to the arbitral tribunal directly or issue summons to the such person to appear before the tribunal[25]. The ambit of Section 27 has been held to include not just persons who are parties to the arbitral proceedings, but also third parties[26]. If any person fails to appear or adduce evidence or is guilty of any contempt before the arbitral tribunal, then such person shall be subject to such disadvantages, punishments or penalties, as they would incur for like offences in suits tried before courts.[27]

RELEVANCE OR WEIGHT HEARSAY EVIDENCE

The concept of hearsay evidence is unknown in many jurisdictions. Strict rules developed in the common law tradition were to protect jurors from accepting information from unreliable sources. In civil law courts, where the decision-makers are judges, this protection is less important.

Following are the criteria that any arbitrator can consider in deciding how much weight to give hearsay evidence:

a. whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

b. whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

c. whether the evidence involves multiple hearsay ("He told me that she had said it was raining hard when she drove home.");

d. whether any person involved had any motive to conceal or misrepresent matters;

e. whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

23. Bharat Heavy Electricals Ltd. v. Silor Associates S.A., 2014 SCC OnLine Del 4442

24. Section 27(1) of the Act.

25. Sections 27 (3) and 27(4) of the Act

26. Delta Distilleries Ltd. v. United Spirits Ltd. & Anr., (2014) 1 SCC 113.

27. Section 27(5) of the Act.

f. whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper valuation of its weight.'

Another consideration might be whether the hearsay evidence is corroborated by other evidence.

DOCUMENTARY EVIDENCE

Unlike the usual common law procedure for "proving" documents, these may usually be submitted directly to the tribunal by the party wishing to rely on them. Usually, parties will agree that a copy of a document will be accepted as authentic unless one party objects to it, in which case the tribunal will rule on the admissibility and the weight to be given to that document. If a witness testifies, for example, "The foreman stated in his report that a drain had been inspected"; that hearsay could be proved by producing the report itself, or an authenticated copy of that report, or by a copy of the authenticated copy. This, of course, only proves that in the report the foreman had stated that the drain had been inspected.

The truth of that statement - whether the drain had in fact been inspected - is another matter. In a territorial dispute before the International Court of Justice (which deals with arbitrations between states), the claimant submitted historical documents to prove the ownership of some islands situated between the two states. When respondent's counsel showed the documents to be falsified, the claimant retracted them.

Documentary evidence is evidence in written form whether handwritten, printed or computer-generated. This group of evidence can include all printed or printable materials, such as maps and photos. Like demonstrative evidence, the admissibility and ultimate weight of this type of evidence will depend on its authentication by the witness through whom it is introduced into evidence. A document may be introduced as evidence of the truth of its contents or to show that it exists or to prove its condition, in which case it may be regarded as real evidence. However, because documents contain human language, and because of the historical development of the common law, documents present special problems not presented by other forms of real evidence, such as when they contain hearsay. If a document is used as evidence of the truth of its contents (or the representations made within it), then it cannot be hearsay.

So, for instance, a contract may be produced to show that it is the contract between the parties and that it exists in that particular form, containing those particular terms. In this sense it is both real evidence and documentary evidence. What a party cannot rely on in producing the contract is that, in order to understand the terms of the contract, other extrinsic evidence should be taken into account. This latter issue is known as the 'parol evidence rule'. In common law, the parol evidence rule excludes the admission of evidence not included in the contract itself in order to interpret the words used in the contract, such as minutes of a meeting where the term was negotiated. Thus, a written instrument is seen as a complete expression of the contracting parties' mutual understanding, and it cannot be challenged by past or contemporary evidence contradicting it or modifying its content, unless the will of one of the parties has been affected by a recognised vice of consent. No equivalent rule exists in the civil law legal tradition.

BURDEN OF PROOF

The burden of proof is the obligation to prove facts in issue. There are two main types of burden, the legal burden and the evidential burden. It is not always easy to identify the burdens and judges do not always specify which burden they are dealing with. This section attempts to clarify the area far as is possible.

The Legal Burden

The legal burden of proof is the obligation on a party to prove a fact in issue. If the party who bears this burden cannot prove the facts in issue, then they do not succeed. Whether or not the burden is discharged will only be

decided at the end of the case. Most cases involve more than one issue and the legal burden of proof in relation to these issues may be distributed between the parties to an action. For example, in a claim in negligence, where the respondent alleges contributory negligence, the referring party bears the legal burden on the issue of negligence and the responding party bears it on the contributory negligence.

The incidence of the Legal Burden

The general rule in civil as opposed to criminal cases is that 'he who asserts must prove'. For example, in a claim in negligence, the referring party bears the legal burden of proving duty, breach and causation. The legal burden of proving a defence (one that goes beyond the simple denial of the referring party's assertions such as consent or contributory negligence), lies with the responding party.

Statute

The incidence of the legal burden may also be fixed by legislation. A good example is a case of misrepresentation that affects the validity of a contract: the French Civil Code provides that the innocent party must prove that it would not have entered into the contract had it not been for the deception.

Contract terms

In written contract and insurance disputes, the legal burden may be fixed by the terms of the contract. However, if there is no express agreement by the parties, the issue is a question of construction for the court. In *Munro Brice* v. *War Risks Association [1918]*, an insurance policy covered the ship subject to an exception in respect of loss or capture in consequence of war hostilities. The ship in question disappeared for reasons unknown and the claim was made. The question to be decided was whether the plaintiffs had to prove that the ship was not lost by reason of enemy action. The court found for the plaintiff, saying that the defendants bore the burden of proving that the facts fell within the exception and they had failed to do so.

However, where a claimant relies on a proviso, the burden of proving that the facts fall within the proviso may fall on him, as in The Glendarroch [1894]. In this case, the plaintiff brought an action in negligence for the non-delivery of goods. The goods were lost when the boat carrying them sank. Under the bills of lading, there was a clause exempting the defendants from liability in respect of loss or damage caused by the perils of the sea, provided the defendants were not negligent. The court held that the plaintiffs bore the burden of proving the contract and the non-delivery and if the defendants relied on an exception clause, it would be for them to prove that the facts fell within it. However, if the plaintiffs sought to rely on the proviso (the negligence of the defendant), it would be up to them to prove.

The Evidential Burden

This is also referred to as the burden of adducing evidence. The obligation here is to adduce enough evidence to raise an issue for the court's consideration. It is worth noting that a party may have an evidential burden in relation to one issue without having the legal burden. One of the main differences between the two burdens is when the evidence is considered. In order to determine if the legal burden has been discharged, the judge will look at all the evidence presented, whereas when dealing with the evidential burden, the judge will consider only the particular evidence relevant to the issue.

STANDARD OF PROOF

While the burden of proof determines which party should prove the relevant facts and law underlying an assertion, the standard of proof sets the level of proof required and thus goes to the heart of the case. There is

no unanimously recognised standard of proof in international arbitration as there is with the burden of proof – national laws vary. Yet, the standard of proof is often considered to be a 'balance of probability', 'preponderance of the evidence' or 'more likely than not' standard – that is, a standard that does not rise to the 'beyond all reasonable doubt' standard that applies, for instance, in criminal matters in common law jurisdictions.

Arbitral tribunals usually refer, cumulatively or exclusively, to the applicable substantive national law to determine the applicable standard of proof. Although the standard of proof varies from one legal system to another, the standard is often similar or leads to a similar analysis. In common law jurisdictions, the party making the claim for damages must meet the standard of proof for civil cases – that is, the 'balance of probabilities' test.

CONCLUSION

The Arbitration and Conciliation Act does not prescribe detailed default rules regulating procedure. However, it does provide some useful guidance to the parties and the arbitrators on the manner in which arbitrations should be conducted. Parties can deviate from these default rules by specific agreement, subject to the limitation that any procedure devised by the parties or the tribunal must meet the basic tenets of an adjudicatory process.

The Arbitration and Conciliation Act provides, among other things, that:

- The claimant must usually state the facts supporting their claim, the points at issue, and the relief or remedy sought, and the respondent must state their defence in respect of these particulars, and any counterclaim or set-off they seeks to claim, while filing their statement of claim and defence, respectively.
- Parties can submit with their statements all documents they consider to be relevant or add a reference to the documents or other evidence they will submit.
- Either party can amend or supplement their claim or defence during the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.
- The arbitral tribunal must, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on a day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and can impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.
- The parties must be given sufficient notice in advance of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods, or other property.
- All statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party must be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal relies on in making its decision must be communicated to the parties.
- If, without showing sufficient cause, the claimant fails to communicate his/her statement of claim, the arbitral tribunal must terminate the proceedings.
- If, without showing sufficient cause, the respondent fails to communicate their statement of defence, the arbitral tribunal must continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and must have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.
- If, without showing sufficient cause, a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal can continue the proceedings and make the arbitral award on the evidence before it.

After perusal of the rules of evidence under the Indian Evidence Act and laws stipulated in The Act, it is essential to analyse the setting aside of an arbitral award on the ground of insufficiency of evidence. In this context, the extract of judgment of Calcutta High Court in *West Bengal Industrial InfraStrictire Development Corp.vs Star Engineering Co*.[28] has been produced below:

> "Arbitrator is the sole Judge of the law and of the facts. If he had taken the decision on the basis of whatever evidence was on record and had allowed the claim, his award cannot be challenged on the basis of inadequacy or inadmissibility or impropriety of evidence, particularly when both the parties had the full opportunity to argue their respective cases and adduce evidence.
>
> Total absence of evidence or arbitrator's failure to take into consideration a very material document on record or admission of the parties in arriving at the finding are however good grounds for challenging the proceeding for legal misconduct of the arbitrator."

Also, it has been held by the Bombay High Court in *Rasiklal Rathilal vs Fancy Corporation*[29] that once the Court comes to a conclusion that documents are required for adjudication of the issues, it may issue direction or pass such an order to produce the original documents before the Arbitral Tribunal. An arbitral award is often challenged on the ground of insufficiency of evidence.

The insufficiency of evidence to reach the finality of award must be distinguished with complete absence of evidence in reasoning of the award. As section 19 of The Act mandates the inapplicability of IEA and CPC, the arbitral award must be valid until and unless it violates the fundamental principles of natural justice. No applicability of technical rules of evidence is one of the fundamental reasons behind invoking arbitration by the parties to the dispute.

An arbitral award should not be set aside on the ground of insufficiency or inadequacy of evidence as in ordinary parlance, the appraisal of evidence in an arbitral proceeding is not the matter which a court looks into while setting aside an award.

PART B : AFFIDAVITS IN ARBITRATION

EVIDENCE BY AFFIDAVIT

Introduction

Under Commercial matters, considering the heavy reliance upon documents for establishing its case, it becomes incumbent for the parties to prove the veracity of such documents. The stage at which the parties need to prove such documents and facts are followed immediately after completion of the pleadings i.e., with the filing of the evidence by way of affidavit. Though, neither the Civil Procedure Code, 1908 (**"CPC"**) nor the Indian Evidence Act, 1872 (**"Evidence Act"**) are *per se* applicable to arbitration, the arbitral proceedings are largely *pari materia* to the civil trial conducted under the CPC and as a rule of general practice, principles laid down in the CPC, as well as Evidence Act, are followed in arbitration and the provisions of CPC can be applied if they are not inconsistent with the provisions of Arbitration and Conciliation Act, 1996 (**"Arbitration and Conciliation Act"**).[1] Hence, production of evidence by way of affidavit forms an inevitable part of the arbitration.

Since the subject matter of arbitration involves a commercial dispute, the parties tend to rely on voluminous documentary evidence, and it becomes essential to prove such documents by way of producing witnesses on affidavit. In addition, the evidentiary stage i.e., filing of the witness statement also assumes importance since it provides the last opportunity as a matter of right to produce any document that the parties seek to rely upon to strengthen their case.

28. [AIR 1987 Cal 126]

29. [2007 (3) Bom CR 603]

Relevant Provisions of Filing an Evidence on Affidavit

Since neither the CPC nor the Evidence Act are *per se* applicable to arbitration, the said witness statement is filed under Section 19 of the Arbitration and Conciliation Act. Section 19(4) of the Arbitration and Conciliation Act empowers the arbitral tribunal *"to determine the admissibility, relevance, materiality and weight of any evidence"*.

Nevertheless, while presenting the witness affidavit, as a rule of general practice, principles laid down in the CPC as well as Evidence Act are followed. In the CPC, the stage of evidence is dealt with under Section 30 of the CPC read with Order 18 Rule 4 of the CPC which mandates the examination-in-chief of a witness on affidavit. Furthermore, Order 19 of the CPC lays down the procedure required for admission of an affidavit before the court. Order 19 of the CPC *inter alia* provides for the following conditions for an affidavit to be admissible before a court -

a. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove;

b. Affidavits should follow a chronological sequence of the relevant dates and events;

c. Affidavits should not be the reproduction of the pleadings;

d. Each para of the Affidavit so far as possible, be supported by a document.

Since evidence adduced by way of affidavits cannot be relied upon until the witness is available for cross-examination[30], the Evidence Act also attains equal importance in an arbitration proceeding.

UNDERSTANDING THE PRACTICAL APPROACH FOR PRESENTING EVIDENCE ON AFFIDAVIT

It is a settled principle of law that the burden of proof lies upon a party only to the extent that its submissions (be it factual or documentary) are disputed by the other party. No proof is required for the admitted facts or documents. It is therefore the presentation of evidence is immediately preceded by the admission/denial of documents of opposite parties. Order 11 Rule 4 of the CPC mandates the parties to set out explicitly whether such party is admitting or denying the -

a. correctness of contents of a document.

b. existence of a document.

c. execution of a document.

d. issuance or receipt of a document.

e. custody of a document.

It is only based on the statement of admission/denial of the documents, the other party can prepare and present the evidence of the witness on affidavit. The party filing such evidence thereafter prepares a table of such denied documents and segregates it on the basis of its denial.

For instance, if the existence of any document is denied, the same can be proved by any facts which suggest that the other party themselves has referred to such documents in its pleadings or correspondences. Similarly, in order to strengthen one's case and to proof the veracity of such denied documents, it is important to proof the existence of the document and the contents of the document that proves one's case which has been denied by the other in the admission/denial of the documents.

30. Ayaaubkhan Noorkhan Pathan vs. the State of Maharashtra, (2013) 4 SCC 465.

Moreover, sub-rule 3 of Rule 4 Order 11 of CPC states that there cannot be a mere denial of the documents. Parties must provide a reason for the denial of a specific document. Especially, when the party denies a receipt but admits the content, it is a settled law that the party must provide for the reasoning of the same. However, if such documents are public documents or any other documents the party adducing the evidence by way of the affidavit should proof to the best of their knowledge as to the authenticity of those documents along with the sources where it was procured from.

Similarly, for proving the disputed facts, the practical approach is to separate the facts which have been disputed by the opposite party from those which have been admitted. It becomes important for the party preparing the evidence to distinguish the admitted facts from the disputed facts and keep its focus upon corroborating those facts by way of affidavits that have been disputed by the other party.

Furthermore, as stated above, as per the requirements of Order 19 Rule 6 of the CPC, the evidence should state the facts in the chronological order bringing together the list of dates following the events subsequently pointing out the claims and the documents that have been relied upon by the parties to establish their case.

Similarly, in technical and complicated arbitrations, the statement of an expert witness is also provided by way of affidavit. The affidavit normally contains the facts associated to the specific issue that the witness is proving, coupled with their scholarly expert opinion on the same. The arbitrators also have a right to question the expert witnesses and clarify their technical doubts on the subject of the dispute. In such cases, the expert report affidavit comes in handy because the Tribunal can refer to it in order to gain clarity on the subject, in consequence to the dispute.

In certain arbitrations, the Tribunal comes across as very rigid when they expect the Parties to submit every declaration, application, statement etc. in the form of affidavit. If they are overused, since these procedures come from the application of court procedure into arbitration, they make arbitration highly time consuming and unwieldy.

It is not necessary to submit evidence by affidavit in all circumstances. Arbitrators may accept evidence without affidavit as well. It is for the parties' counsel to sense whether certain facts need to be asserted through affidavit. Depending on the situation and gaging the Tribunal's conduct, it would be advisable to submit evidence along with an affidavit/verification that the submitted information is true to the best of one's knowledge. As a legal strategy, neither of the parties want to rub the Tribunal the wrong way. It is also important to gain the Tribunal's trust and confidence. Hence submitting all the evidence by affidavit can be considered one of the options to instill confidence to the Tribunal.

If the documentary evidence is not submitted by affidavit, then only the document including a cover page describing and summarising it is submitted. It is advisable to substantiate the issue at hand for which the particular document is going to be referred, when additional documents are submitted as evidence.

Conclusion

Thus, it can be safely concluded that in the case of arbitration even though there is no statutory requirement for the parties to follow the rules of the Evidence Act or Civil Procedure Code, Section 19 of the Arbitration and Conciliation Act empowers the Arbitral Tribunal to call for evidence by way of affidavit. Also, the rules to produce evidence by affidavit laid down in the CPC i.e., under Order 18, Rule 4 , and Order 19 of the CPC are not inconsistency with any of the provisions of the Arbitration and Conciliation Act and therefore is applicable even for evidence produced before the Arbitral Tribunal.

ADDUCING EVIDENCE UNDER SECTION 34 OF THE ARBITRATION ACT

It has been well established that proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") are summary in nature. The scope of enquiry in any proceedings under Section 34 of the Act has been restricted to consider whether any of the grounds mentioned in Section 34(2) or Section 13(5) or Section 16(6) are made out to set aside the award, the grounds for which are specific. In a recent decision passed by the Supreme Court in *Canara Nidhi Limited vs. M. Shashikala*[31], it was held that under Section 34 of the Act, cases should be decided only with reference to the pleadings and the evidence placed before the arbitral tribunal and the grounds specified under Section 34(2) of the Act and only in exceptional circumstances should additional evidence be adduced. However, this position of law has not always been the case. With there being a change after the 2015 Amendment, we witnessed two new sub-sections being inserted to Section 34 of the Act, which has played a role in the change in understanding of the law with regards to adducing evidence under Section 34 of the Act. Through this article we aim to trace the development of law on adducing evidence under Section 34 of the Act.

Pre 2015 Amendment

Under Section 34 (2) (a), it has been stated that a *"party making the application furnishes proof"*, which could lead to a natural conclusion that a party will have to plead and prove the grounds mentioned in Section 34(2) of the Act. The High Courts in India all have their separate rules on arbitration. The rules on arbitration by some High Courts do allow for all provisions of the Civil Procedure Code, 1908 ("CPC") to be applicable, in fact Rule 4(b) of the Karnataka High Court Arbitration Rules[32] provides that all provisions of the CPC shall be applicable to an application under Section 34 of the Act insofar as they could be made applicable.

The Supreme Court in *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and Anr.*[33] ("Fiza Developers Decision") was considering the issue of whether issues as contemplated under Order XIV Rule 1 of the CPC should be framed in an application under Section 34 of the Act and held that framing of issues is not required as the proceedings are summary in nature. However, the Court further went on to add that an opportunity to the aggrieved party has to be afforded to prove existence of any of the grounds under Section 34(2) of the Act, and as a result the Court allowed the applicant in the case to file affidavits of the applicant's witnesses as *"proof"* and granted the respondent-defendant an opportunity to place their evidence by affidavit. With regards to cross-examination of the witnesses the Court held that *"... Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules*[34]*."*

The 2015 Amendment

Section 34 of the Act was amended by Act 3 of 2016 by which sub-sections (5) and (6) of Section 34 were added to the with effect from 23.10.2015. Sub-section (5) directed parties to ensure a notice is given to the other party before initiating any proceeding under Section 34 of the Act.[35] Whereas, sub-section (6) requires Courts to

31. Civil Appeal Nos. 7544-7545 of 2019 (Arising out of SLP (C) Nos. 35673-74 of 2014)

32. Application under Section 14 or Section 34 shall be registered as an arbitration suit, the applicant being treated as the plaintiff and the parties to the award other than the applicant being treated as defendants and the proceedings thereafter shall be continued as in the case of a suit and all the provisions of the Civil Procedure Code, 1908, shall apply to such proceeding insofar as they could be made applicable.

33. (2009) 17 SCC 796

34. (2009) 17 SCC 796

35. (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

dispose of an application under Section 34 of the Act within a year from the date the notice under sub-section (5) was filed. Thus, after the 2015 amendment there was now a definite time period within which the courts were to decide an application under Section 34 of the Act.

Clarification to the Fiza Developers Decision

While it was widely recognized that the Fiza Developers Decision was correct in holding that proceedings under Section 34 of the Act are summary in nature, there was a need to clarify the correct position in law after the 2015 Amendment especially with the insertion of sub-section (5) and sub-section (6). After the 2015 Amendment there were conflicting judgments arising out different High Courts of the country and there was a need for a clarification with regards to the correct position of law. The Supreme Court in *Emkay Global Financial Services Limited v. Girdhar Sondhi*[36] ("Emkay Decision") clarified that the Fiza Developers Decision must be read in light with sub-sections (5) and (6) of the Act and stated that an application for setting aside an arbitral award would not ordinarily require anything beyond the record that was before the arbitrator. The Court further clarified that only if there were matters not contained in the record before the arbitrator and would be relevant for determining issues arising under Section 34(2)(a), only then they maybe brought to the notice of the Court by way of affidavits filed by both parties. With regards to cross-examination of the witnesses swearing the affidavits the Court held that cross-examination of persons swearing to the affidavits should not be allowed unless necessary**.**

Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India

The High Level Committee chaired by Justice B.N. Srikrishna had also commented on the inconsistencies that had been brought about with the phrase *"party making the application furnishes proof".* The High Level Committee noted that opportunity to furnish proof in proceedings under Section 34 of the Act had led to inconsistent practices by various High Courts who had begun insisting on proceedings under Section 34 of the Act to be conducted in the manner of that of a regular civil suit despite the Fiza Developers Decision wherein it was held that proceedings under Section 34 of the Act should not be conducted in the same manner as civil suits, with regards to framing of issues under Rule 1 of Order 14 of the CPC[37]. To ensure that proceedings under Section 34 of the Act were decided expeditiously the High Level Committee proposed that Section 34 of the Act be amended and the phrase *"party making the application furnishes proof"* should be substituted with the words *"establishes on the basis of the Arbitral Tribunal's record that."* This change has been accepted by the legislature and therefore as a result in the 2019 Arbitration Act, Section 34 (2)(a) of the Act now reads as

"(2) An arbitral award may be set aside by the Court only if —

(a) "establishes on the basis of the Arbitral Tribunal's record that...."

Present Position in Law

In light of the 2019 amendment and 2015 amendment to the Act, it is evident that the intention of the legislature is to ensure proceedings under Section 34 of the Act are resolved expeditiously and any application under Section 34 of the Act must be read in light of the decisions set forth in Fiza Developers Decision and the Emkay Decision. In this context the recent judgment of the Supreme Court in *Canara Nidhi Limited vs. M. Shashikala*[38] becomes even more relevant for it has been clarified that only in exceptional circumstances should evidence in the form of affidavits and cross-examination of those witnesses be permitted. If there does exist any exceptional

36. (2018) 9 SCC 49

37. Report of Justice B.N. Srikrishna Committee quoted in Emkay Global Financial Services Ltd. v. Girdhar Sondhi (2018) 9 SCC 49]

38. Civil Appeal Nos. 7544-7545 of 2019 (Arising out of SLP (C) Nos. 35673-74 of 2014)

circumstance wherein parties are required to adduce evidence in the form of an affidavit, then it must be indicated as to what point a party intends to adduce evidence for and should disclose specific documents or evidence that would be required to be produced.

Thus if an exceptional circumstance does arise, then there must be specific averments in the affidavit as to the necessity and relevance of the additional evidence sought to be adduced which would be beyond the record that was before the arbitrator.

DRAFTING AN AFFIDAVIT

Introduction

An affidavit is a statement made by a person before the court or an appropriate adjudicating authority, wherein the deponent (the person who makes the statement) states the facts and information related to the matter in dispute, in his knowledge and swears it to be true. There are various provisions in Indian law, which explain what an affidavit is and the proper procedure that must be followed while submitting it before the court.

Indian Civil Procedure Code 1908 : Order XIX (19)

As per Rule 1: A court can at any time, for which reasons can be recorded, order that an affidavit shall be submitted to prove any facts or circumstances as the court may wish and find reasonable.

Rule 3(1) describes the situation or circumstances which can be explained through an affidavit. It says that affidavits will be confined to such facts that the deponent is able to prove through his own knowledge. However interlocutory applications are excluded from the ambit of this rule and therefore in interlocutory applications, statements of his belief may also be admitted provided proper reasoning and explanation is given for the same.

Essential elements of an affidavit

Certain aspects of an affidavit are of vital importance to be included, so as to validity to the said affidavit. They are as under:

- The declaration should be made by a legal person,
- Contents of the affidavit should relate and connect with the said facts of the case,
- The declaration must be in writing,
- The language of the said declaration must be in the first person,
- The affidavit must be signed or affirmed, before a Magistrate or other authorised and appropriate officer.

Process of drafting an affidavit

- At the top, write the name of the court, tribunal in which the affidavit is to be submitted, along with the allotted case/suit no.
- Mention the names of parties in brief.
- As a heading/title of the document, mention 'AFFIDAVIT' in the bold and underlined font.
- Thereafter give the details of the deponent (the person who is testifying as to the truth of submissions made by him, in the main petition) such as the name of the deponent and his father, age of deponent and his residential address, followed by 'Do solemnly affirm and declare as under.'
- In the first paragraph after the introduction, the deponent has to mention that he/she is the plaintiff or

the defendant (as the case may be) in the suit for which the affidavit is being submitted and he has to make a declaration that he is fully aware and conversant with the facts of the case and can testify for the same.

- In the second paragraph, mention that the petition or submission made in the petition has been drafted by the counsel of the deponent and that the contents have been read over in vernacular language, with detailed explanation made to the deponent, along with consequences of the same, been explained to him.
- Mention in brief the circumstances of the suit or the submission made by the deponent. In case the main petition already contains the details, the same need not be repeated in the affidavit and one can mention that 'contents of the petition are not being repeated here for sake of brevity and therefore one shall consider the same as a part of this affidavit.'
- Lastly, state that it is the deponent's true and correct statement, followed by a paragraph about verification, which will state that contents of the affidavit are true and correct to the deponent's knowledge and that nothing material has been concealed.

AFFIDAVIT – SAMPLE

THE COURT OF REGIONAL MICRO & SMALL ENTERPRISES FACILITATION COUNCIL, COIMBATORE REGION

Address: _____

E-mail: _____

In the Matter of:

_____ *(Hereinafter Claimant)*

_____ (Address)

Mobile _____

Email: _____

AND

_____ *(Hereinafter Respondent)*

_____ (Address)

Mob : _____

Email:_____

SUBJECT: CLAIMANT'S RESPONSE TO THE RESPONDENT'S LETTER OF DEFENCE.

References:

1. Hearing notice dated 26.10.2022 from MSEFC- region.
2. Respondent's reply (dated 29/07/2022) to Claimant's petition via Samadhan portal

On behalf of our client, (Claimant) we herewith submit the following for the MSEFC's perusal and appropriate remedy under the MSMED Act 2006.

- _____ *(Respondent)* awarded two Contracts to our client.
- First Contract is for the Fabrication and Supply of Pre-fabricated E house for their end client

_____.

- As per the Purchase Order, Time for Completion was 13 weeks for the E house Engineering and Fabrication works. Though the work was started in a timely manner, due to the Respondent's lack of preparedness and coordination, the work was completed with 10 weeks delay.
- Subsequently PO 2037046009/18.12.2020 was issued for the transportation and delivery of the above E house, at the _____.
- Delivery acceptance was issued by the end client on 30th August 2021. The claimant further records that the delays during this period were not attributable to them but to force majeure reasons stipulated in the Contract.
- The Claimant performed both the two Contracts satisfactorily and the delivery acceptance was made for both the Contracts. In spite of that, there is a payment delay of INR _____ (INR _____) by the respondent.
- We have already submitted the payment schedules and Invoice copies for MSEFC's perusal.
- The Claimant, as part of the amicable settlement process, submitted a claim request on 14th of June 2022 for which the respondent is yet to send a formal reply. Therefore, my client approached MSEFC for the recovery of overdue payment via petition dated 15th July 2022.
- After the submission of petition via Samadhan, respondent sent a written reply dated 29/07/2022 stating that the amount INR _____ (INR _____ only) is withheld towards LIQUIDATED DAMAGES for the delays in both the Contracts.

Our submission is that,

1. THE CLAIMANT NEVER COMMITTED ANY DELAYS / BREACH OF CONTRACT; ON THE CONTRARY THE DELAYS WERE SOLELY ATTRIBUTABLE TO THE RESPONDENT
2. It is well settled legal principle that the defaulting promisor cannot retain the money of promise.
3. The principles embodied in Section 37 of the Indian Contract Act has been reiterated by the judiciary that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation.
4. We wish to highlight that the Claimant incurred substantial damages due to the respondent's breaches and already pertinent claim was submitted to the respondent dated 14th June 2022.
5. It is evident from the above that even if there is an alleged breach of Contract, the resultant damages should be adjudicated by the Court and no pecuniary liability arises until such adjudication.
6. On the Contrary, the respondent withheld INR _____ (INR _____), unilaterally which is against the Law.

We again emphasize here that there are no delays / breach attributable to the Claimant; despite that the respondent withheld/ delayed substantial amount resultant of huge financial burden to the MSME supplier's cashflow which is the lifeline of their business.

OUR PRAYER IS:

THE CLAIMANT THUS RESPECTFULLY PRAYS BEFORE THE MSEFC COUNCIL THAT NECESSARY ORDERS ARE PASSED PURSUANT TO THE MSMED ACT 2006, AS FOLLOWS:

I. DIRECT THE RESPONDENT TO SETTLE THE OUTSTANDING PRINCIPAL PAYMENT AS INCLUDED IN THIS PETITION WHICH IS INR _____ (INR _____).

II. DIRECT THE RESPONDENT TO PAY OTHER RECOVERABLE MONIES DUE TO THE DELAYS CAUSED BY THEM IN PAYMENT AND WORKS AS FOLLOWS:

LOSSES INCURRED BY WAY OF ADDITIONAL RESOURCES DUE TO DELAY BY _____ DURING E HOUSE WORKS. INR _____

STORAGE CHARGES DUE TO DELAYS CAUSED BY _____ INR _____

LOSSES INCURRED DUE TO DELAY DURING TRANSPORTATION AND DELIVERY AT LOCATION. _____

III. DIRECT THE RESPONDENT TO PAY THE PENAL INTEREST (3 TIMES PREVAILING INTEREST RATE AS PER THE PRIVATE COMMERCIAL LENDING) FROM THE APPOINTED DATE TILL THE DATE OF REALISATION.

IV. FURTHER DIRECT THE RESPONDENT TO PAY ALL REASONABLE COSTS ASSOCIATED WITH THIS RECOVERY OF DELAYED PAYMENTS, SUCH AS LEGAL COSTS, RENEWAL OF BONDS/GUARANTEES, UNRECOVERED MONIES, ETC.,

V. AND PASS ANY OTHER ORDER OR ORDER(S) AS THE MSFC COUNCIL DEEMS FIT AND APPROPRIATE GIVEN THE CIRCUMSTANCES OF THE CASE, EQUITY, AND JUSTICE

Date : Counsel for the Claimant.

Place: _____

STATEMENT OF CLAIM – SAMPLE

Ref No:_____

BEFORE THE SOLE ARBITRATOR

CLAIM PETITION NO: OF 2021

STATEMENT OF CLAIM

PART A: Compulsory Information

I. DETAILS OF CLAIMANTS:

(1) M/s. ABC Pvt Ltd

through its Managing Director vide Power of Attorney

Shri._____

residing at _____

having office at _____

(2) M/s. XYZ Limited

through its authorized person

Shri. _____

residing at _____

having office at _____

II. DETAILS OF RESPONDENTS:

(1) _____

through its Vice Chairman

III. STATEMENT OF FACTS:

Annexed.

IV. THE POINTS FOR CONSIDERATION:

Annexed.

V. THE GROUNDS OF CLAIMS

Annexed.

VI. DELAY ANALYSIS

Annexed

VII. THE DAMAGES ACCRUED / QUANTUM ANALYSIS

Annexed.

VII. THE RELIEFS/REMEDIES / PRAYER:

PART B: Documents Annexed

The Statement of claim is accompanied by the following documents:

I. Detailed Chronological List of Dates

Annexed.

II. Copy of the following documents:

1. Copy of the tender
2. Copy of the bid
3. Copy of the Joint Venture
4. Copy of the Agreement
5. Copy of the General Terms of the Contract
6. Copy of the Work Order

.....

III. Copies of all communication between the parties are annexed with index

Annexed.

PART C: Other Evidence

I. Other Evidences

Labour / Staff / Machinery deployment records

Proof of Payments made to various stakeholders

Insurances for the resources

Guarantee / Bonds renewal details

Any other submission / approvals

PART D: Service of the Statement of Claim

It is submitted that the statement of claim along with all the documents and annexure have been served on the respondent's counsel on _____ at AM/PM by _____. The counsel has counter signed the claim for proof of the same.

PART E: Additional Information

Signature of the Claimant Date: _____

PART F: For office use only

Date of filing: Filed by: _____

STATEMENT OF DEFENCE - SAMPLE

BEFORE THE SOLE ARBITRATOR

DEFENSE PETITION NO: ___OF 2022

STATEMENT OF DEFENCE

I. DETAILS OF CLAIMANTS:

(1) M/s. ABC Pvt Ltd

through its Managing Director vide Power of Attorney

Shri._____

residing at _____

having office at _____

II. DETAILS OF RESPONDENTS:

(1) M/s. XYZ Pvt Ltd

through its Whole time Director vide Power of Attorney

Shri._____

residing at _____

having office at _____

III. STATEMENT OF FACTS

1. We are [_____] Company, the Respondent in arbitration case No. [_____] at the India International Arbitration Centre (IIAC) whose information is as follows:

Address	:
Legal representative	:
Tax Code	:
Telephone	:
Fax	:
Email	:

2. The Respondent in this arbitration is represented by [_____] in accordance with the Power of Attorney No [_____] dated [_____].

3. On [_____], the Respondent received the IIAC's Notice No. [_____] dated [_____] with respect to the dispute with the Claimant – [_____] Company. In response to the request in the Notice, by this Statement of Defense, the Respondent would like to submit its opinion as below.

I. Factual background

4. On [_____], the Claimant and the Respondent signed the Contract/Agreement/ No[_____] regarding the sale of goods/provision of service/_____. According to the Contract/Agreement/_____, the Respondent is obliged to [_____], the Claimant is obliged to [_____].

5. In fact, the Respondent performed/ failed to perform the Contract/Agreement _____ *(specify how the Respondent performed/ failed to perform)*. The Claimant performed/ failed to perform the Contract/Agreement _____ *(specify how the Claimant performed/ failed to perform).*

6. Additional matters (if any): [_____].

II. Legal basis for the Respondent's defense

7. In the Arbitration Agreement No [_____] dated [_____]/Article [_____] on dispute settlement of the Contract/Agreement, the Parties agreed as follows: ["_____"]*(specify the content of the arbitration agreement).*

8. Opinion/arguments of the Respondent against the Claimant's requests stated in the Request for Arbitration [_____]*(specify whether the Respondent agrees or disagrees with the Claimant's requests and/or other opinion, attached documents, evidences (if any)).*

9. On the basis of the aforementioned submissions, the Respondent respectfully requests the Arbitral Tribunal as follow(s):

   (i) [_____];

   (ii) [_____];

   (iii) [_____]

10. The Respondent selects Mr./Ms. [_____] to act as an Arbitrator/The Respondent request the IIAC to appoint an Arbitrator to resolve the dispute between the Claimant and the Respondent. Mr./Ms. [_____] is an Arbitrator listed in the IIAC's Arbitrator List.

11. Please contact Mr./Ms. [_____]via the followings details:

    Address :

    Telephone :

    Email :

12. Regarding the place of arbitration, Article_____ of the contract/agreement provides that _____/ the respondent proposes that _____ is the place of Arbitration.

On behalf of the Respondent

(sign, stamp)

CASE STUDY

Topware Limited is a listed company having Paid up share capital of Rs. 100 crore engaged in the business of manufacturing of fans and coolers. It is the one of the biggest manufacturer of air cooler, Fans etc. It is well-known for making residential Air Coolers, Fans and Industrial Air Coolers, as well as for its ability to cool enormous spaces. In addition to a wide choice of air coolers and other household appliances, they offer an all-India sales and servicing network with more than 10,000 retail touch points. XYZ, LLP founded in 1996 is a condenser manufacturing firm. Topware issues a tender for supply of Condenser / Capacities.

The tender has been awarded to XYZ, LLP. While drafting the agreement, the parties included the clause that if in case any dispute arises during the tenure of Agreement, the same will be resolved by the common arbitrator namely Mr. S.

A dispute arose between company and LLP in which the company claimed that the condenser provided by the firm is of poor quality and does not meet the required standards norms. In consequence, the company stopped making the payment to the firm. XYZ, LLP intends to refer the matter for arbitration.

In this regard, prepare a Statement of Claim on behalf of XYZ, LLP. Assume necessary facts.

LESSON ROUND-UP

- Fact-finding is an important task of the tribunal, and nowhere in the arbitral procedure is the cultural contrast more vivid than in the presentation of evidence. The civil law culture tends to prefer contemporaneous documents or, at least, written statements by witnesses.
- Written pleadings are usually exchanged sequentially, so that the claimant fires the first shot, the statement of claim, and the respondent answers with the statement of defence (and counterclaim, if any). Exceptionally, however, the arbitral tribunal may direct that the parties should submit their written pleadings simultaneously, so that each party delivers a written submission of its claims against the other on a set date, and then, on a subsequent date, the parties exchange their written answers and so forth.
- Any party may seek to amend their claim after the commencement of an arbitration reference. There may be consequences in terms of wasted costs for the other party in the dispute in dealing with any revision at an advanced stage of the reference.
- Whatever form of procedure is adopted, it is for the arbitrator to rule on whether any documents or classes of documents should be disclosed and produced by the parties, and when. The disclosure of evidence may highlight the differing legal cultures of the parties, which, in turn, shape their expectations about what they must disclose.
- Oral evidence (testimony) and hearsay Testimony is an oral statement of a witness made on oath in a hearing. This evidence is offered as evidence of the truth of what is said. This is normally direct evidence of matters of which the witness has first-hand knowledge – what he experienced with one of his five senses: what he saw, heard, said, did or smelt.
- The 'Rules of Evidence' is an important concept in the decision-making process in any tribunal, including courts, arbitrations and adjudications. In court, the 'rules' are prescribed by the rules of court and in common law jurisdictions the precedent decisions from the courts themselves are important. In arbitration, in some jurisdictions, the 'rules' may be binding on the arbitrator as he sieves through the evidence in preparation of the award.

- When an arbitration is concerned with what actually happened, witnesses of fact can help to establish this. The arbitrator has to determine whether these witnesses should attend the hearing and give evidence, or if written statements will suffice.
- The arbitral tribunal has the power to direct a party before it to produce a document or provide evidence. However, the arbitral tribunal does not have jurisdiction over third parties. Section 27 provides assistance to the arbitral tribunal or parties in respect of third parties who may be required to be summoned as witnesses or in possession of documents which may be required to be produced in the arbitration.
- In a recent decision passed by the Supreme Court in *Canara Nidhi Limited vs. M. Shashikala,* it was held that under Section 34 of the Act, cases should be decided only with reference to the pleadings and the evidence placed before the arbitral tribunal and the grounds specified under Section 34(2) of the Act and only in exceptional circumstances should additional evidence be adduced.
- An affidavit is a statement made by a person before the court or an appropriate adjudicating authority, wherein the deponent (the person who makes the statement) states the facts and information related to the matter in dispute, in his knowledge and swears it to be true.

GLOSSARY

Written Submissions: Written submissions are often referred to as pleadings. There is no required form and different legal traditions may treat the submissions differently. Whatever their format, their purpose is the same: they allow each side to know what the other party's contentions are in order to address them in their own written submissions and at the evidentiary hearing.

Statement of Claim: A Statement of Case, also called a statement of claim, will set out the duty owed (either in tort or in contract), the alleged breach of that duty, and the consequent damage. The arbitral tribunal may require that the claimant file, either simultaneously with the statement of case or shortly thereafter the documents relied upon by the claimants, the evidence of witnesses, and a statement of the law relied upon.

Statement of Defence: The Respondent's defence will admit or deny each matter set out in the statement of case. If there is a denial, the respondent must state what the correct position is alleged to be. The arbitrator may require the respondent's evidence and legal submissions to be set out in the same way as was required of the claimant.

Rejoinders: If the parties so desire and the tribunal considers it appropriate, there may be a Reply to the Defence (on both claim and counterclaim), and perhaps a second, and even third round of written submissions. Good practice demands that before ordering a second round of written submissions, the tribunal consider the cost of this further step in relation to the importance and amount of the claim.

Admissibility: When evidence is said to be admissible, it means that as a matter of law, the evidence is properly admitted to the court. Of course, the first condition is that the evidence must be relevant. However, relevant evidence is not always admissible, and it is necessary to appreciate that relevant evidence may be excluded.

Witness Statements: Witness Statements are exchanged in advance of the hearing, the tribunal may decide to use this in lieu of direct evidence. A copy of a party's witness statement is supplied to the other side several weeks or months before the hearing.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. In an arbitration, in what circumstances might it be appropriate to dispense with written submissions? Is this common?
2. At what point should witness statements be exchanged between the parties? When should the tribunal receive them?
3. What is the purpose of cross-examination?
4. Who can decide whether evidence is admissible and what weight it should be given? What factors should be considered in these decisions?
5. How does evidence assist the arbitrator?
6. How far do civil and common law approaches to evidence differ?
7. What guidance on use of evidence is available to an arbitrator?
8. What is a fact in issue?
9. Give a definition of hearsay.
10. How would you define 'relevance' in the context of the law of evidence?
11. What are the main types of inadmissible evidence?
12. In what context is 'weight' used in evidence?
13. When may hearsay evidence be excluded?
14. To what degree is hearsay evidence admissible to impeach the credibility of a witness?

LIST OF FURTHER READINGS

- Handbook on Arbitration: a Practical guide for Professionals

  ICSI Publication

- Course Material of ICSI PMQ Course on Arbitration

  ICSI Publication

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf

Preparation and Execution of Arbitral Award

Lesson 5

KEY CONCEPTS

■ Award ■ Domestic Award ■ Foreign Award ■ Two Tier Arbitration

Learning Objectives

To understand:

- Vital components of an Award
- Difference between Domestic Award and Foreign Award
- Drafting of Execution Petition
- Categories of Award
- Arbitration Award and Implementation of Arbitral Awards
- Court's power to modify award
- Drafting of an Award

Lesson Outline

- Introduction
- Essential Ingredients of an Award
- Domestic v. Foreign Award
- Drafting of Execution Petition
- Enforcement of Arbitration Award
- Application for Execution of part of an Award
- Enforceability of an Arbitral Award
- Pendency of Appeal
- Validity of an Arbitral Award
- Enforcement of Foreign Award
- Foreign Decree and the Code of Civil Procedure, 1908
- Enforcement of Foreign Arbitral Award
- The Public Policy doctrine and the Enforcement of Arbitral Award
- Types of Awards
- Enforcement of Arbitration Award
- Drafting of Arbitration Award
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Income Tax Act, 1961
- Foreign Awards Act, 1961
- Indian Contract Act, 1872
- Limitation Act 1963

INTRODUCTION

The key requirement of the contents of the award that are prescribed in the Arbitration and Conciliation Act, 1996 is that the award should be a well-reasoned and speaking award including reference to a Settlement if arrived at in terms of Section 30. However, if the parties have prior agreed that the award need not give the reasonings, while laying down the procedural aspects for conduct of proceedings, the Arbitral Tribunal is obligated to adopt such guidelines in its award as specified in Sec 19(2) of the Arbitration and Conciliation Act, 1996. This exception to a speaking and well-reasoned order has been carved out in Section 31(3). There is no benefit of an award if it remains unexecuted. Therefore, Execution of Award is one of the key step after passing of award in an Arbitration Proceedings.

ESSENTIAL INGREDIENTS OF AN AWARD

Ingredients of an Award

An award shall consist of the following:

- An award shall be made in writing and be signed by all the members of the Arbitral Tribunal.
- In a situation where there is more than one arbitrator, the award shall be signed by majority of the arbitrators with reasons for the omitted signature.
- The award shall state the reasons on which it is based.
- The award shall state the date and the place of arbitration.
- Signed copy of the arbitral award must be delivered to each of the parties.

Interest on Arbitral Award

In commercial contracts, where a huge amount of capital investment is at stake, it is righteous that in a situation where any party defaults in their obligations, the defaulting party is made to undo the losses suffered by their actions. Such contracts have commercial risks and greater exposure, therefore it is just and equitable that the opposite party be compensated not only for the capital but also for the time value of money for non-performance by the other party or breach of the contract. It is with this intention that award of interests becomes a key factor in ensuring that investments and investors do not have to pay for the cost of funds for which they are not responsible.

The object of providing for interest on an award is to compensate the damage resulting from the fact that on default by one party, the opposite party is not deprived of the deployment of the money and the returns that could have been earned from the invested sum. It is with this objective the arbitration laws of various nations and the Indian Arbitration and Conciliation Act, 1996 provides for payment of interest.

An arbitrator while determining the question on the interest on award, has to take into consideration several factors which enable him to determine the nature of the loss incurred and determine an appropriate interest

on the award made. The first document which enables the arbitrator to decide if the interest is to be awarded, is the commercial contract which has given rise to the dispute. Since arbitration laws provide an autonomy to the parties, unless parties themselves agree that the arbitrator shall have the power to award interest on the award, the same power cannot be exercised by the arbitrator. Given that the Arbitral Tribunal is the creation of the contract itself, the Arbitral Tribunal is bound to honour the terms of agreement between the parties.

The Arbitration and Conciliation Act, 1996 provides for a pre as well as post award interest. The pre-award interest is to ensure that the arbitral proceedings are concluded without any unnecessary delay. The post award interest is to ensure speedy trial and compliance of payment of amount awarded against the defaulting party. Till date of payment of decretal (awarded) amount, the party who has been awarded the claim, is entitled to claim interest.

CASE LAWS

The Supreme Court of India has observed on the payment of interest in the following matter:

Hyder Consulting (UK) Ltd. v. Governor, State of Orissa,[1]

Brief Facts

Civil Appeal arose from an order of Orissa High Court dtd 28-7-2010 in a writ petition quashing the order of the Trial Court (Dist. Court) in an execution petition filed by the Appellant where post award interest payment consisting of principal sum and *pendente lite* interest aggregating to Rs 8.92 crores was granted in favour of the appellant. The award dated 26-4-2000 was upheld by the Division Bench where a principal sum of Rs 2.30 crores was granted in favour of Appellant. Directions were given to the Trial Court to recalculate the total amount payable under the award following the principles as laid down in *State of Haryana and Ors v. S.L. Arora and Co*[2]. The Supreme Court special bench remanded the appeal to an appropriate two judge bench of this Court to adjudicate the matter.

Rulings of Supreme Court

A. Meaning of "sum" for award of interest

1) The Court dealt with Section 31(7) and emphasised on the word "sum" directed to be paid under award along with pre-award interest and post-award interest, as the case may be. The word sum would include pre-award interest and post award interest, along with / without principal sum as the award determines. The pre-award interest loses its character and becomes subsumed as part of the sum. Thus, where the post award interest is granted under Section 31(7)(b), the sum would be inclusive of pre award interest and principal, if allowed by the arbitrator. The Supreme Court analysed the distinction between the power to award interest by the Civil Court under Section 34 of Code of Civil Procedure, 1908 "on the principal sum adjudged" *vis a vis* the inclusive definition of word sum used in Section 31(7) which means the aggregate sum of principal and interest. The word interest is distinct from principal which is a payment for compensation for deferment or withholding of the principal sum during this period.

2) Grant of pre-award interest is discretionary powers of the arbitrator and has to be applied depending on the facts of each case. However, as provided in Section 31(7)(a) if there is a prior agreement between the parties for grant of pre-award interest, that would prevail and the arbitrator has to recognise it in the award. Pre-award interest ensures that arbitral proceedings are concluded without delays with a speedy disposal.

1. (2015) 2 SCC 189.

2. (2010) 3 SCC 690

3) Post-award is not mandatory but is at the discretion of the Arbitral Tribunal. If award does not specify post-award interest, then the concerned party will receive statutory interest of 18% pa under Section 37(1)(b). The non obstante clause "unless the award otherwise directs" amplify the discretion of the arbitrator. Only if the award is silent on the payment of post award interest, then Section 31(7)(b) comes into play to grant the statutory interest of 18% pa to the party entitled.

B. Interpretation of statutes

Under general rules of interpretation of statutes, the word appearing in the same Section of a statute, must be given the same meaning, unless there is anything to the contrary to indicate otherwise. In such a case, different meanings may be given to the word as contextual.

The Supreme Court held as follows:

Para 82. Section 31(7)(a) of the Act deals with grant of pre-award interest while sub-clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance of the award. Pre-award interest is at the discretion of the Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of statute – the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act,i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.

Section 31(7) of the Arbitration and Conciliation Act, 1996 provides that it is not mandatory for the arbitrator to discuss in detail the reasons over awarding interest but the grant of interest and the rate shall be based on the doctrine of reasonability. Only, in a situation where the arbitrator awards a different rate of interest as agreed by the parties, it is obligatory upon the arbitrator to give cogent reasons for the variation. Further, in the situation with the arbitrator while granting the claims of any party, fails to deal with the issue of interest on the award, the Court can modify the award only to the extent of granting award of interest on the amount of claim or monies awarded to the claimant. However, the Courts do not have unbridled powers to grant interest in such instances.

The Supreme Court of India gave an important ruling[3] with reference to the power of the arbitrator to award interest upon the sum during the arbitral proceedings. While deliberating upon Section 31 (7)(a), the Supreme Court made the following observations:

1. Section 31 (7)(a) of the Arbitration and Conciliation Act, 1996 provides that the term 'sum' shall also include any interest on the pre award. Only in a situation where no interest is awarded by the Arbitral Tribunal the word 'sum' comprises only the principal.
2. On the comparison of the provisions and Section 34 of the Code of Civil Procedure, the Court observed that Section 34 of the Code of Civil Procedure empowered the Courts to avoid interest on the principle/principal sum and not merely the sum. Section 31(7) of the Arbitration and Conciliation Act, 1996 provides that the pre award interest awarded along with the principal sum shall also be included under Section 31(7).
3. At the post award stage, the sum that is directed to be paid by the Arbitral Tribunal shall include the interest. Therefore, a post award interest which is granted by the Tribunal is only on the sum that is directed to be paid by the Tribunal and not on any other amount referred to as interest. The Court

3. Hyder Consulting (UK) Limited vs. Governor, State of Orissa, (2015) 2 SCC 189.

therefore ruled that the term 'interest on interest' is inaccurate.

4. While deliberating upon Section 31(7), the Court ruled that the provision was enacted to encourage only payment of the award sum, therefore the sum could be interpreted to include interest in line with the purpose which the provision is to serve.

Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd[4]

The Supreme Court held that the Courts while hearing a challenge on the rate of interest awarded by the Arbitral Tribunal, shall take into consideration several external factors as well while commenting upon the validity of the award passed by the Arbitrator. The Court observed that the interest rate shall take economic conditions into account and shall not be too harsh or exorbitant upon the Debtor.

Brief Facts

On 22-5-2008 Appellant an Indian company and Respondent a Chinese company, entered into interlinked four EPC Contracts (offshore and onshore) for construction of 210 MW co-generation powerplant. All the contracts provide for amicable settlement of disputes failing which parties will refer them to arbitration under Arbitration and Conciliation Act, 1996 with one arbitrator to be appointed by each party, with two arbitrators to appoint a presiding arbitrator. Place of arbitration will be Mumbai, language of proceedings in English, with governing laws of India and the arbitration award shall be final and binding on the parties. It was agreed that during pendency of the dispute the supplier shall be mandated to carry on its obligations under the contracts. On 25-2-2011 due to dispute between parties the EPC contracts were terminated. Respondent invoked arbitration vide a notice dated 18-4-2012 and referred disputes to three member Arbitral Tribunal. On 17-10-2012 in the 1st sitting the parties changed venue from Mumbai to New Delhi. Claimant/Respondent raised claims in multiple currencies viz INR-EURO-USD with *pendente lite* and future interest @18% to be decided by the Arbitral Tribunal. On 9-11-2017 a detailed award passed granting Rs 50 lakhs consolidated amount to claimant / respondent with pre-award interest @ 9% PA to be scaled upto 18% PA if the decretal amount is not realised in initial 120 days. Appellant moved application under Section 34 with Delhi High Court which was rejected on 12-2-2018. An appeal under Section 37 was filed which was quashed on 30-8-2018. Thus, the Civil Appeal was filed in Supreme Court.

Rulings of Supreme Court

The key takeaways from the judgment are :

1) In international commercial agreement, in absence of an agreement between parties on payment of interest the rate of interest shall be governed by the law of the seat of arbitration; the currency of the award; in conformity with the prevailing laws (*lex fori*); the party held as debtor in the award shall not be liable to pay *pendente lite* interest during the appeal period to which he is entitled.

2) Challenges of multi currencies when parties are geographically dispersed shall be considered having a bearing on the interest rate.

3) The Courts are empowered to reduce interest rate awarded by Arbitral Tribunal when such rates are not reflective of the system of that country.

4) The doctrine of reasonability will be a strong factor.

The Court decided that the flat rate of 9% PA be applicable to the claim in INR and for Euro claims Libor plus 3 basis points will be allowed. The Court disallowed the higher rate of 15% PA applicable after initial 120 days.

"On the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature".

"Courts may reduce the interest rate awarded by an arbitral tribunal where such interest rate does not reflect the prevailing economic conditions (Indian Oil Corpn. v. Lloyds Steel Industries Ltd.[(2007) 4 Arb LR 84 at

4. (2019) 11 SCC 465.

p.103] to or where it is not found reasonable [Manalal Prabhudayal v. Oriental Insurance Co. Ltd., [(2009) 17 SCC 296], or promotes the interests of justice [Food Corporation of India v. A.M. Ahmed and Co and ors. [(2006) 13 SCC 779: AIR 2007 SC 829]".

DOMESTIC V. FOREIGN AWARD

According to section 2(1) (c) of the Arbitration and Conciliation Act, 1996, "arbitral award" includes an interim award. Further, section 2(7) of the Act provides that an arbitral award made under Part I shall be considered as a domestic award and Chapter I and Chapter II of Part II are relating to enforcement of Foreign Award. The below mentioned cases provides a more clear picture of the difference between Domestic and Foreign Award.

The Bombay High Court in the case of (*Jindal Drugs Limited Mumbai. v. Noy Vallesina Engineering SPA,Italy and Ors*[5]) observed as follows:

"It appears from the reading of the Act that in so far as the challenge and enforceability is concerned, there are different schemes for a domestic Award and a foreign Award".

The Act provides for a direct challenge to a domestic Award under Section 34. A domestic Award is enforceable as a decree passed by a Civil Court, after the period provided for challenging the same expire, and in case it is challenged, after the challenge fails under Section 34. Foreign Awards cannot be challenged in India. It is, therefore, quite clear that an application under Section 34 is not at all contemplated insofar as a foreign award is concerned.

In terms of Challenging Foreign Arbitral Award in Indian Courts is concerned there have been different views of the Supreme Court of India.(*Bhatia International v. Bulk Trading S.A. and Ors*[6]).

The Supreme Court in this decision observed that, unless the parties expressly or impliedly agreed to the contrary, the Indian Courts have jurisdiction with respect to foreign seated arbitration akin to decisions in India under Part I of the Arbitration and Conciliation Act, 1996. This decision was unequivocally overruled by the Supreme Court of India. (*Bharat Aluminium Company. v. Kaiser Aluminium Technical Services Inc*[7]). Part I of the Arbitration and Conciliation Act, 1996 does not apply to foreign seated arbitrations.

CASE LAWS

***Bharat Aluminium Company. v. Kaiser Aluminum Technical Services Inc*[8].**

Facts:

The Appellants had entered into an agreement with the respondents whereby the respondents were required to supply and install computer-based system at one of the appellant premises. The agreement was governed by the prevailing law of India but it contained an arbitration clause that stated that any dispute that may arise in future shall be governed by the English Arbitration Law and the venue shall be London.

When the dispute arose between appellants and the respondents with respect to performance of the agreement and then the matter was referred to arbitration, the proceeding was held in England and two awards were passed. Aggrieved by the decision of the Arbitral Tribunal, the appellants filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, which was refused by the District Court and the High Court of Chhattisgarh and finally the appellants approached the Supreme Court of India.

5. 2002 (2) Arb. LR 323 (Bombay)

6. (2002) 4 SCC 105

7. Civ App 3678 of 2007

8. (Supra).

Held: The Supreme Court of India decided as follows:

(i) Part I and Part II are applicable to different fields. Part I of the Act of 1996 is applicable to all domestic awards, including to awards where both the parties to the dispute are Foreign Parties but the proceedings are held in India, or International Commercial Arbitration held in India.

(ii) Part II of the Act of 1996 applies to enforcement of Foreign Awards in India.

(iii) The principle of territoriality in Model Law is adopted in Act of 1996 *Mutatis Mutandis*.

(iv) Section 48 of Part II does not confer jurisdiction on two courts to annul the award and is provided only to provide alternative to parties to challenge the award in case, Law of the country where seat of arbitration is located has no provision for challenge of the award.

(v) Interim Relief u/s.9 can be awarded in case seat of arbitration in International commercial arbitration in India and thus intervention u/s.9 can be sought only with respect to domestic awards. Part II has no provision that grants interim relief leading to the logical inference that Indian Court cannot pass interim orders against award delivered outside India.

(vi) The Arbitral Awards awarded in International Commercial Arbitration with seat of Arbitration outside India shall be subject to the Jurisdiction of Indian Courts only when they are sought to be enforced in India in accordance with Part II of the Act.

(vii) Part I of the Act shall not be applicable to non-convention arbitral awards. The definition of Foreign Award is limited to New York Convention and Geneva Convention and hence the Act does not provide for enforcement of non-convention Arbitral awards.

Principle: It would be against the Provisions of the Arbitration and Conciliation Act, 1996, to interfere with the Foreign Arbitral Award as the Act of 1996 provides for challenging only Domestic Arbitral Awards under Section.34. The above decision makes it clear that Foreign Arbitral Awards cannot be challenged in Indian Courts as Section 34 of the Arbitration and Conciliation Act, 1996 provides for setting aside of Domestic Arbitral Awards only.

DRAFTING OF EXECUTION PETITION

Where the time for making an application to set aside the arbitral award under section 34 has expired, , such award can be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court. However, when an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award.

Further, where the Court is satisfied that a Prima facie case is made out that, –

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption,

it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Specimen Format for Plaint under CPC for enforcement of Award

IN THE COURT OF _____

A.B. (add description and residence) _____ Plaintiff

against

C.D. (add description and residence) _____ Defendant

A. B., the above-named plaintiff, states as follows: –

1. On the ___day of_____20___, the plaintiff and defendant, having a difference between them concerning a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay; agreed in writing to submit the difference to the arbitration of E. F and G. H. and the original document is annexed hereto.
2. On the ___day of_____20____ the arbitrators awarded that the defendant should pay the plaintiff rupees.
3. The defendant has not paid the money
4. Facts showing when the cause of action arose and that the Court has jurisdiction.
5. The Value of the subject-matter of the suit for the purpose of jurisdiction is .....rupees and for the purpose of court-fees is.....rupees.
6. The Plaintiff Prays:
   (i) _____
   (ii) _____

Verification:-

I, _____S/o_____ R/o_____ do hereby verify that the contents of this application are true to my knowledge and belief.

Place:

Dated:

(Signatures)

Through

(Signature)

Advocates

TYPES OF AWARDS

The awards can be classified in four categories i.e. Interim Award, Additional Award, Settlement Award and Final Award.

1. **Interim award** – Section 2(1)(c) of Arbitration and Conciliation Act, 1996 defines Arbitral Award. According to the definition, "arbitral award" includes an interim award. It is an award made by a tribunal during the pendency of the matter. The jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal. The Interim Award does not end the proceedings and Arbitration Proceedings comes to end after passing of Final Award.

2. **Additional award** – Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request to be justified, it can make the additional arbitral award within sixty days from the receipt of such request.

   Corrections and Interpretation of the Award

   Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties –

   (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

   (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

   If the arbitral tribunal considers the request to be justified, it can make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

   The arbitral tribunal may also correct any error of the type mentioned above, on its own initiative, within thirty days from the date of the arbitral award.

3. **Settlement awards** – 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. An award. If 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. .

4. **Final award** – An award which finally determines all the issues in a dispute is called Final Award. The Final Award is the decision on the points that were identified by or submitted to the Arbitral Tribunal. It is the final outcome of the Arbitral Process. If the final award is not appealed or recourse has not been taken against the award, it leads to conclusion of the Arbitral Proceedings.

ENFORCEMENT OF ARBITRATION AWARD

Enforcement of Award can be classified into two categories i.e. Enforcement of Domestic Award and Enforcement of Foreign Award. The enforcement for both these type of awards is discussed hereinafter.

Enforcement of Domestic Awards

The purpose of Sections 35 and 36 of Arbitration and Conciliation Act is to ensure that once an award is given by the Arbitral Tribunal, the award is binding on the parties and any person claiming under the award. The main point to be noted is that any person, though not a party to the arbitration but claiming under the award is bound by the award and the award shall be enforced upon the person as per Section 36 of the Arbitration and Conciliation Act, 1996.

Section 35 provides the provides the provisions relating to Finality of Arbitral Awards. It provides that subject to part I an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

In India, arbitration proceedings are dealt and regulated as per the Arbitration and Conciliation Act, 1996 and its amendments thereof. This Act provides that when the time for making an application to set aside the arbitral award has expired, or when such application has been made and rejected in accordance with Section 34, the

award would be considered as final and binding on the parties under it, in accordance with Section 35, and shall be enforced under the Code of Civil Procedure, 1908 as if it were a decree of the Civil Court in accordance with Section 36. Section 35 and 36 of Arbitration and Conciliation Act, 1996, fall under Chapter VIII of the Act. These Sections majorly deal with the finality, recognition and enforcement of an arbitral award. Any award, which is not challengeable or rejected as an objection under Section 34, is deemed to be final and binding on the parties to the arbitration. However, to implement Sections 35 and 36, the prevailing party may face a challenge against the award under Section 34, wherein there is a period of three (3) months for the other party to challenge the award. If the non-prevailing party forgoes or its application challenging the award is unqualified then the award is deemed to be considered as final and binding on all the parties under Section 35. Once the period of three months has lapsed without any application to challenge the award, then the prevailing party may approach the Court for enforcing the award under Section 36.

For considering the grounds to challenge the award, Section 34 shall be analyzed in detail which furnish that no application can be made after the expiry of 3 months from the date of receipt of award by the party, subject to a 30 day relief period that may be granted by the Court at its sole discretion. This Arbitration and Conciliation Act, 1996 also provides that the application may be made by a party only if it establishes on the basis of the record of the Arbitral Tribunal of the grounds specified in Section 34 of the Arbitration and Conciliation Act, 1996.

Reaching to this stage, it is important to examine how the Courts interpret the rights and the powers, the Section has granted them, in order to realize if the Courts have taken a different or anti-arbitration position or have engaged in unnecessary interference which renders the enforcement of such awards as difficult.

For the purpose of binding the award as final, Section 35 deals with:

When an arbitration is called between the parties and respondent do not appear or object upon notices for the reason of non-accepting the venue as feasible, then the party seeking arbitration will have the right to go ahead with the proceedings and the arbitrator can pass the award in absence of the respondent, the same award can be enforced by the appellant in accordance with Section 36 of Arbitration and Conciliation Act, 1996. Later the respondent can challenge the award under Section 34, reasoning the non-appearance to the arbitration proceedings.

In the case of *Quippo Construction Equipment Limited v. Janardan Nirman Pvt. Limited*[9] Hon'ble Supreme Court held that:

"(i) the arbitration in question was a domestic and an institutional arbitration where CIAA was empowered to and did nominate the arbitrator. It was not as if there were completely different mechanisms for appointment of arbitrator in each of the agreements. The only distinction was that according to one of the agreements the venue was to be at Kolkata. The specification of place of arbitration may have special significance in an International Commercial Arbitration, where the place of arbitration may determine which curial law would apply. However, in the present case, the applicable substantive as well as curial law would be the same.

(ii) It was possible for the Respondent to raise submissions that arbitration pertaining to each of the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted accordingly. Considering the facts that the Respondent failed to participate in the proceedings before the arbitrator and did not raise any submission that the arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the Respondent must be deemed to have waived all such objections,

(iii) In the circumstances, the Respondent was now precluded from raising any submission or objection as

9. CA NO.2378 OF 2020 - 29.04.2020-SC.

to the venue of arbitration, the conclusion drawn by the Court while dismissing Miscellaneous Case was quite correct and did not call for any interference. In any case, the fact that the cause title showed that the present Appellant was otherwise amenable to the jurisdiction of the selected Court, could not be the decisive or determining criteria. Hence the award is held as final and binding on both the parties in accordance with Section 35, of the Arbitration and Conciliation Act, 1996".

Another issue related to Section 35 of the Arbitration and Conciliation Act, 1996 faced by many parties is: *whether an arbitral award is binding on a third party, who is not a signatory to the arbitration agreement*? To resolve this issue and provide the clarity on the Section 35, Supreme Court in the case of *Cheran Properties Limited v. Kasturi and Sons Limited and Ors.*[10] held that Section 35 of the Arbitration and Conciliation Act, 1996 states that an arbitral award is *"binding on the parties and persons claiming under them".* The expression "persons claiming under them" is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person (party not a signatory to the arbitration agreement) whose capacity or position is derived from and is the same as a party to the proceedings. This expression was held to widen the net to include those who claim under the award, irrespective of whether such person was a party to the arbitration agreement or the arbitral proceedings.

After an award has been made, either it is challenged under Section 34 of the Arbitration and Conciliation Act,1996 or is enforced under Section 36 of the Arbitration and Conciliation Act,1996. In the light of Section 35 of the Arbitration and Conciliation Act, 1996 the crucial question is as to whether the award of the first-tier Arbitral Tribunal will be considered a "final award". If it is so, then that would leave open the option to file a petition under Section 34 to both parties. This would create a legal conundrum as one party may file a petition to the Court for setting aside of the arbitral award, while the other party may file an appeal against the award to the second tier/Appellate tribunal. In such a scenario, or even otherwise, it becomes important to have a clear set of rules and regulations that would govern two tier arbitrations and the enforceability of such awards in order to provide legal certainty regarding the same.

Two Tier Arbitration

Two Tier Arbitration means in case an award given by a sole arbitrator it would be appealed to an Arbitral Tribunal consisting of a panel of three arbitrators or a higher odd number. This concept is permissible subject to having a clause to the effect in the arbitration agreement. In that event, the award given by the sole arbitrator cannot be enforced and after exhausting the appeal before the panel of arbitrators, the award so rendered by the said panel will be enforceable subject to the application of provisions under Section 35 and 36 of the Arbitration and Conciliation Act, 1996. A three Judges bench of the Hon'ble Supreme Court of India delivered a judgment in *M/s Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd*[11] upholding the validity of such constitution of appellate Arbitral Tribunals.

PROVISIONS RELATED TO ENFORCEMENT OF ARBITRATION AWARD

Section 36 of the Arbitration and Conciliation Act, 1996 provides the provisions relating to Enforcement. It mentions that:

(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court.

(2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants

10. CA Nos.10025-10026/2017 – 24.04.2018 SC.

11. Civil Appeal No 2562 of 2006 dated 15-12-2016.

an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

Provided further that where the Court is satisfied that a *Prima facie* case is made out that, –

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation. – For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

The main purpose of this Section is to enforce an award given by the Arbitral Tribunal as equivalent to the decree of the Court and enforced in accordance to the provisions of the Code of Civil Procedure, 1908 and as per the Arbitration and Conciliation (Amendment) Act, 2019 the filing of an application before the Court under Section 34 shall not make the award unenforceable unless the Court grants an order of stay. It shall be applied retrospectively.

Thus the amended Section 36 of the Arbitration and Conciliation Act, 1996 provides for:

(a) after expiry of making an application to set aside the arbitral award (i.e. 90 days from the award) the award shall be enforced as if it was a decree of the Court;

(b) filing of an application under Section 34 shall not by itself render the award unenforceable;

(c) upon an application for grant of stay of the award, the Court has the discretion to grant stay, which may be subject to such conditions as it may deem fit;

(d) while passing any stay order the Court is to "have due regard" to the provisions of Code of Civil Procedure, 1908 for grant of stay of money decree.

Provision under Arbitration and Conciliation (Amendment) Act, 2021[12]

As a further development to Section 36, The latest Arbitration and Conciliation (Amendment) Act, 2021 has been enacted to address the concerns raised by stakeholders after the enactment of the Arbitration and Conciliation (Amendment) Act, 2019 and to ensure that all the stakeholder parties get an opportunity to seek unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement or contract or making of the arbitral award are induced by fraud or corruption.

1. In Section 36(3) of the Arbitration and Conciliation Act, 1996, after the proviso, the following shall be inserted and shall be deemed to have been inserted with effect from 23rd day of October 2015, namely:-

   "Provided further that where the Court is satisfied that a prima facie case is made out,-

   (a) That the arbitration agreement or contract which is the basis of the award; or

12. Enactment dated 4th Nov 2020

(b) The making of the award, was induced or effected by fraud or corruption, it shall stay he award unconditionally pending disposal of the challenge under Section 34 to the award".

Explanation,- For the removal of doubts, it is hereby clarified that the above proviso shall apply to all Court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or Court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Duty of an Arbitrator to render an enforceable award

Some rules of arbitration contain an express provision that the arbitrator shall 'make every effort' to ensure that the award is enforceable. Even the most successful and promising arbitrator in the world cannot guarantee that the Arbitral Tribunal's award will be enforceable in whatever country enforcement may be sought. The maximum that can be expected is that the Arbitral Tribunal will do its best to ensure that the appropriate procedure is followed and that each party is given an impartial and a fair hearing.

APPLICATION FOR EXECUTION OF PART OF AN AWARD

During pendency of Section 34 application, wherein the non-prevailing party has challenged the award, the present execution application is not maintainable. Under the Arbitration and Conciliation Act, 1996, once a Section 34 application is filed to challenge the validity of an arbitral award, the award becomes non-executable and no part of the award can be executed.

The Supreme Court in the case of *National Aluminium Co. Ltd. v. Pressteel and Fabrications (P) Ltd and Ors***.** has stated that the arbitral award given becomes non-executable once a Section 34 proceeding is filed to set aside the award by the non-prevailing party and the Court states that:

"Para 11: However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act, leaving no discretion in the Court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend Section 34 with a proposal to empower the civil Court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."

In the above case law, before enactment of the Arbitration and Conciliation (Amendment) Act, 2015 the automatic stay of the award is applicable once Section 34 is filed in the Court. This defeats the very objective of the alternative dispute resolution system, and thus the Section was amended in the Arbitration and Conciliation (Amendment) Act, 2015. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness in the provision before the execution of Arbitration and Conciliation (Amendment) Act, 2015 which granted an automatic stay to execution of an award before the enforcement process under Section 36 takes place (the stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended by the Arbitration and Conciliation (Amendment) Act, 2015, should apply to Section 34 applications filed before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 to avoid the automatic stay.

ENFORCEABILITY OF AN ARBITRAL AWARD

It is well settled that preferring of an appeal does not operate as stay on the decree or order appealed against or on the proceedings in the Court. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. The only guiding factor is the existence of sufficient cause in favour of the appellant on the availability of which the Appellate Court would be inclined to pass an order of stay.

In *Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd.*[13] experience shows that the principal consideration which prevails with the Appellate Court is that Inspite of the appeal having been entertained for hearing by the Appellate Court; the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the Court be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the Court dealing with a prayer for the grant of stay asks itself is why the *status quo* prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should not be granted.

PENDENCY OF APPEAL

Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order challenged and it is only if the application is allowed and leave granted that the finality of the decree or order under challenge is jeopardized. The proposition that an appeal is a continuation of the original proceedings in the sense that within the scope of appellate power conferred by the statute which could be as wide as those of the trial Court the Appellate Court can review the decision of the authority whose order is challenged does not imply that the order of the authority or Court of first instance cannot be executed.

In the case of *Kerala State Electricity Board through its special officer (revenue) and Ors. v. MRF Ltd. and Ors*[14] it was held that the pendency of appeal before the Supreme Court only ensured that the proceedings had not been concluded and the ultimatum has not been met. But in the absence of any interim order of the Supreme Court granting stay of operation of the judgment, the judgment given by the Arbitral Tribunal shall be binding between the parties.

Mere filing of appeal does not operate as a stay of the order challenged. Mere pendency of the appeal does not have the effect of suspending the operation of the award of the Arbitral Tribunal.

The provisions of the Code of Civil Procedure, 1908 would be applicable to proceedings under the Arbitration and Conciliation Act, 1996 before the Courts'. The effect of the application of the Code of Civil Procedure, 1908 would be that the Appellate Court would possess the power of grant of stay. The petitioner therefore is not remedy less. Stay can be granted in the appeal before the Supreme Court under Article 136 and no ground for applying the principle that the High Court has power to do substantial justice *Ex debito justitiae* is made out when leave has been granted and the case is pending before the Apex Court.

VALIDITY OF AN ARBITRAL AWARD

The question that arises for determination in this matter is when would the period of limitation for execution of a decree passed in a suit for partition commence. In other words, question is when such a decree becomes enforceable from the date when the decree is made or when the decree is engrossed on the stamp paper which, out of these two would be the starting point of limitation. The Supreme Court in the case of *Chiranji Lal (D) by Lrs., v. Hari Das (D) by Lrs*[15] held that the question as to whether the award is required to be stamped or registered is relevant only when the parties would file the award for its enforcement under Section 36 of the Arbitration and Conciliation Act, 1996. On the strength of this authority, it was contended that the parties can object to admissibility of such a decree arising out of an award on account of non-registration and non-stamping at that stage.

In the case of *Anusuya Devi v. M. Nanik Reddy*[16]**,** the appellants and the respondents are the members of the

13. (2005) 1 SCC 705.

14. (1996) 1 SCC 597.

15. AIR 2005 SC 2564: 2005 (10) SCC 746: 2005 (6) SRJ 450.

16. AIR (2003) 8 SCC 565.

joint family. It appears that certain disputes arose and as a result of which they entered into an agreement to refer the dispute to the Arbitral Tribunal for deciding the partition of the Joint Hindu properties. Although the agreement postulated the Arbitral Tribunal of five persons, it is not disputed that there were only four persons who comprised the Arbitral Tribunal. The Arbitral Tribunal gave an award on 31stMay, 1998 which was subsequently corrected on 10th June, 1998 by a clarification order. The respondents herein, who appears to have not satisfied with the award, filed two petitions under Section 34(1) of the Arbitration and Conciliation Act, 1996 for setting aside the award.

The Supreme Court held that non-stamping of the arbitral award is not a ground for challenge under Section 34 of the Arbitration and Conciliation Act, 1996 but can be considered as a ground to object at the stage of enforcing the award under Section 36 of the Arbitration and Conciliation Act 1996.

CASE LAWS

Case Law 1

Brief Facts

In *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors,* a notice was sent by the Respondent invoking arbitration under franchise agreement. The sole arbitrator was appointed, who delivered two arbitral awards against Appellant and in favour of Respondents. Appellants filed application under Section 34 of Arbitration and Conciliation Act, 1996 challenging aforesaid arbitral awards. Respondents filed two execution applications for payment of amounts awarded under two awards, pending enforcement of such awards.

Decision

These were resisted by the 2 Chamber Summons filed by the Appellants dated 3rd December, 2015, praying for dismissal of aforesaid execution applications stating that old Section 36 would be applicable, and that therefore there would be automatic stay of awards until the Section 34 proceedings had been decided.

The Judge gave a judgment which dismissed the aforesaid Chamber Summons and found that amended Section 36 would be applicable in facts of present case. Hence, the present appeal was filed by the Appellant.

The judge further said that it is well settled that execution proceedings are procedural in nature and retrospective and therefore, the substituted Section 36 would apply even in cases where the Section 34 application is made before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Case Law 2

Brief Facts

In *Pam Developments Private Ltd. v. State of West Bengal***,** the respondent filed stay application under amended Section 36(2) of the Arbitration and Conciliation Act, 1996 in the pending proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 before High Court. The stay application of the Respondent was dismissed in default. The executing Court passed an order attaching the sum of Rs.2.75 Crores lying to the credit of the Respondent-State of West Bengal with the Reserve Bank of India. It was further clarified that, in the event there was no stay of operation of the award by the adjourned date (04.12.2018), it would be open to the Appellant (award holder) to pray for release of the said amount. Relying on an order of a co-ordinate bench of the High Court wherein an unconditional stay of award had been granted to the State Government, the Executing Court dismissed the execution petition filed by the Appellant. Without filing the application for recall of the order, whereby the stay application of the Respondent had been dismissed in default,

the Respondent filed a fresh application for stay of the award, in which the impugned order of unconditional stay was passed after relying on the provisions of Order XXVII Rule 8A of Code of Civil Procedure, 1908. Challenging the said order, the present Appeal has been filed. The submission of Appellant is two-fold. Firstly, that the provision of Order XXVII Rule 8A of Code of Civil Procedure, 1908 would not be applicable to the present case, and as such the Court ought not to have considered the same while deciding the application for stay of the award under Section 36 of the Arbitration and Conciliation Act, 1996. Secondly, it has been submitted that even if the provision of Order XXVII Rule 8A are to be taken into account, then too the Courts should not pass an order of unconditional stay of award.

Decision

Section 36 of the Arbitration and Conciliation Act 1996 also does not provide for any special treatment to the Government while dealing with grant of stay in an application under proceedings of Section 34 of the Arbitration and Conciliation Act 1996. In view of consideration and also the provisions of Section 18 providing for equal treatment of parties, it would make it clear that, there is no exceptional treatment to be given to the Government while considering the application for stay under Section 36 filed by the Government in proceedings under Section 34 of the Act.

Also, in Sub-Section (3) of Section 36 of the Arbitration and Conciliation Act 1996 mandates that, while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration and Conciliation Act 1996, if stay is to be granted then, it shall be subject to such conditions as may be deemed fit. The said Sub-Section clearly mandates that, the grant of stay of the operation of the award is to be for reasons to be recorded in writing "subject to such conditions as it may deem fit". The proviso makes it clear that, the Court has to "have due regard to the provisions for grant of stay of a money decree under the provisions of the CPC".

The phrase "have due regard to" would only mean that the provisions of Code of Civil Procedure, 1908 are to be taken into consideration, and that they are not mandatory. While considering the phrase "having regard to", this Court in the case of *Shri Sitaram Sugar Company Limited. v. Union of India* has held that,

the words 'having regard to' in Sub-Section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory.

ENFORCEMENT OF FOREIGN AWARDS

The world today has become economically interdependent. Business now has no boundaries and global market players are emerging on. In this era of interdependence, the importance of an improved and an efficient legal system for the facilitation of international business, trade and investment has become the need of the hour. With the advent of the economic reforms of 1991, it was important for India as well to revamp its commercial laws and provide for an easy and a more friendly method for the investors for the resolution of disputes as big international business houses were eyeing the Indian markets to make investment after the liberalisation of the policies. The United Nations Commission on International Trade Law, established by the United Nations General Assembly, played an important role in harmonising the law related to international business and trade. The UNCITRAL Model Law, 1985 was prepared by a consortium of many countries who participated in the discussions as 'member states', therefore ensuring global acceptance. This UNCITRAL Model Law was designed keeping in mind the need to unify and modernise the law related to arbitration in various jurisdictions to promote international trade and primarily was aimed to create a uniform law related to arbitration in terms of the composition of the Arbitral Tribunal, the jurisdiction of the Arbitral Tribunal and cover aspects of recognition and enforcement of foreign arbitral award.

India signed the *New York Convention* on 10th June 1958 and ratified the convention on 13th July 1960. India also

is a signatory to the *Geneva Protocol on Arbitration Clauses, 1923* and the *Geneva Convention on the Execution of Foreign Arbitral Awards, 1927*. Prior to the execution of Arbitration and Conciliation Act, 1996 the law on the enforcement of foreign arbitral award was governed by the Foreign Award (Recognition and Enforcement) Act, 1961.

Sections 44-52 of the Arbitration and Conciliation Act, 1996 deals with the execution of foreign award passed under the New York Convention and Section 53-60 of the Arbitration and Conciliation Act, 1996 provides for the process of enforcement of award as per the Geneva Convention.

FOREIGN DECREE AND THE CODE OF CIVIL PROCEDURE, 1908

With the expanding cross border transactions and businesses, it becomes important that cross border decrees and judicial decisions are given universal applicability and particularly by the Courts in the country where the decision is to be executed. The mechanism of executing a foreign award in India is governed by the Code of Civil Procedure, 1908. Section 2(6)[17] of the Code of Civil Procedure, 1908 defines a 'Foreign Judgment' as the judgment passed by a foreign Court. The term 'Foreign Court' is defined by Section 2(5)[18]of the Code of Civil Procedure, 1908 as a Court situated outside India and one which is not established or continued by the authority of the Central Government. The specific provision under the Code of Civil Procedure, 1908 governing the enforcement of foreign award in India is Section 44A. The provision lays down certain qualifications which must be required for a foreign judgment to be enforceable in India by the Indian Courts. These necessary pre-conditions required for a foreign judgment to be executed in India include are as follows:

- An application shall be made to the District Court where the decree may be executed along with the certified copy of the decree of the Foreign Superior Court and a certificate from such Superior Court, stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate by itself shall be a conclusive proof to the extent of such satisfaction.
- The said decree which is to be executed in India by the Indian Courts should have been passed by a Superior Court of a reciprocating[19] territory.

Section 13 of the Code of Civil Procedure, 1908 provides for the test of conclusiveness of the Foreign Judgment or Decree and provides that a Foreign Judgment or Decree shall be conclusive unless it has been pronounced by a Court of competent jurisdiction, has not been given on the merits of the case, appears on the face of the proceedings to be on an incorrect view of international law or a refusal to recognise the laws of India in a situation where such laws are applicable, proceedings in which the judgment has been obtained in violation of the principles of natural justice, or has been obtained by fraud and sustains a claim founded on a breach of any law in force in India. A party before approaching the Court for the enforcement of the foreign award shall ensure that the favoured Judgment or Decree passes the tests as laid down above to be enforceable in India. Section 14 of the Code of Civil Procedure, 1908 provides that the Indian Court shall presume upon the production of any document purporting to be a certified copy of a Foreign Judgment that such Judgment/Decree has been pronounced by a Court of competent jurisdiction. Sec 44 A of the Code of Civil Procedure, 1908 permits a judgment passed by a Court of the notified reciprocating territory to be directly made enforceable in India as if it were a decree passed by a Court in India by filing the certified copy of the superior Court of the reciprocating territory.

In a situation where the award is passed in one country and needs to be executed in the other, it really would be a challenge to persuade the Courts to recognise a foreign Decree/Judgment. In 1971, desiring to establish

17. S.2(6) "foreign judgment" means the judgment of a foreign Court.

18. S.2(5) "foreign Court" means a Court situated outside India and not established or continued by the authority of the Central Government.

19. Reciprocating Territory means any country or territory outside India which the Central Government may by notification declare as a reciprocating territory.

common provisions on mutual recognition and enforcement of judicial decisions, rendered in several respective countries, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971[20] (hereinafter the Convention) was signed at the Hague, which is a multilateral treaty governing the enforcement of judgments entered by one nation's legal authorities in other signatory nations. It is one of the many progressive conventions in the area of private international law. The convention mandates and promotes the realm of Public International Law and co-operation between the signatories of this convention. However, India had its reservation with respect to Article 10, 15 and 16 of the Convention and therefore never became a party to the Convention.

In a situation where the Judgment/Decree is not of a reciprocating jurisdiction, the Bombay High Court[21] ruled that in such a situation the decree holder should file in the domestic Court of competent jurisdiction, a suit on that foreign decree or on the original, underlying cause of action, or both. To obtain that decree, he must show that the foreign decree, if he sues on it, satisfies the tests of Section 13 Code of Civil Procedure, 1908.

Domestic Arbitration v/s. International Commercial Arbitration

The Arbitration and Conciliation Act, 1996 defines an International Commercial Arbitration under Section 2(f) as follows:

"international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

i. *an individual who is a national of, or habitually resident in, any country other than India or,*
ii. *a body corporate which is incorporated in any country other than India; or*
iii. *an association or a body of individuals whose central management and control is exercised in any country other than India, or*
iv. *the Government of a foreign country"*

Upon a perusal of the definition provided above, in a simple language, an international commercial arbitration means the disputes settled through arbitration which involves parties that transcend the national boundaries. On the other hand, a domestic arbitration is one where the arbitration takes place in India, the subject matter of the contract is in India, the merits on which the dispute exists between the parties and the procedure that is to be applicable for the arbitral proceedings is governed by the local laws of India. For example, Switzerland determines the nature of the arbitration being international or domestic on the basis whether at the time when the arbitration agreement was concluded between the parties, at least any of the parties was not domiciled or habitually resident in Switzerland.

Article 1(3) of the UNCITRAL Model Law, 1985 summarises under what circumstance can an award be considered to be an international award and provides that; *(i)* an arbitration shall be an international commercial arbitration when at the time of conclusion of that agreement, the parties had their places of businesses in different States *(ii)* the place of the arbitration as defined under the agreement is situated outside the State in which the parties have their businesses, *(iii)* the place where the substantial part of the obligations of the contract is situated outside the place in which parties have their businesses, or *(iv)* in a situation where the parties have themselves agreed that the subject matter of the arbitration agreement relates to more than one country.

Redfern and Hunter[22], defines an international commercial arbitration as follows:

20. Text of the Convention available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=78.

21. Marine Geotechnics LLC v. Coastal Marine Construction and Engineering Ltd. 2014 (2) BOM CR 769

22. Blackaby, Nigel. Redfern And Hunter on International Arbitration. Oxford; New York:Oxford University Press, 2009.

"An arbitration is considered to be 'international' if (in the sense of the Model Law) it involves parties of different nationalities, or it takes place in a country that is 'foreign' to the parties, or it involves an international dispute. Nonetheless, a caveat must be entered to the effect that such arbitrations will not necessarily be universally regarded as international. If a question arises as to whether or not a particular arbitration is 'international', the answer will depend upon the provisions of the relevant national law."

The Supreme Court of India in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*[23], while determining whether an arbitration is a domestic or a foreign arbitration ruled that a company which is incorporated in India, has the Indian nationality for the purpose of Arbitration and Conciliation Act, 1996. It therefore cannot be said that where both the parties who get into an arbitration agreement and are companies registered in India, the arbitration agreement between them be referred to as International Commercial Arbitration under Section 2(1) (f).

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Part-II of the Arbitration and Conciliation Act, 1996 deals with enforcement of Foreign awards. Chapter I of Part II of the Act deals with Sections 44 to 52 for any award passed under *New York Convention*.

Section 44. Definition. *– In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 –*

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification[24] *in the Official Gazette, declare to be territories to which the said Convention applies.*

International commercial arbitration awards delivered out of India related to disputes contractual or not arising out of a prior agreement in writing between the parties for submitting such disputes to arbitration as per the Convention stated in First Schedule to the Arbitration and Conciliation Act, 1996 which refers to New York Convention. India is a signatory to such Convention.

Section 45. Power of judicial authority to refer parties to arbitration. *– Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration,* [25]*[unless it prima facie finds] that the said agreement is null and void, inoperative or incapable of being performed.*

Judicial authority while dealing with a dispute where parties have agreed in writing under Section 44 shall at request of any party refer matter to arbitration unless the commercial arrangement is prima facie void.

Section 46. When foreign award binding. *– Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.*

Foreign award shall be binding inter se parties and any one party may rely upon it as a defence, set off in, legal proceedings initiated in India.

23. (2008) 14 SCC 271.

24. Subs. By the Arbitration and Conciliation (Amendment) Act, 2021 (3 of 2021), dt. 11-03-2021 w.e.f 4-11-2020.

25. Subs. For the words "unless it finds" by Act No. (33 of 2019), dt. 09-08-2019. w.e.f. 30-8-2019 vide SO 3154 (E), dt. 30-8-2019.

Section 47. Evidence. *– (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court –*

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-Section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

[Explanation. – In this Section and in the Sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.]

Any party seeking enforcement of a foreign arbitral award shall have to produce original or authenticated copies of the award, the arbitration agreement and a translated copy of the award, if not in English, by the diplomatic or consular agent in India. All foreign arbitral awards will be dealt by the High Court having original civil jurisdiction or with the appellate jurisdiction to hear decrees from lower or subordinate Court.

Section 48. Conditions for enforcement of foreign awards. *– (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that –*

(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that –

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1. – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, –

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-Section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Any party aggrieved by the foreign award or the Court *suo motu* may move the Court to challenge the enforcement of the said award. The aggrieved party can challenge the order before it becomes enforceable or has been suspended or set aside by competent authority on grounds of incapacity of parties, inadequate notice for appointment of arbitrator and commencement of proceedings, subject matter was not in terms of adjudication, improper composition of Arbitral Tribunal. The Court can also refuse to enforce the order if found to be inconsistent with Indian laws or opposed to public policy or on grounds of fraud, corruption, morality or injustice.

Section 49. Enforcement of foreign awards. *– Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.*

Unless the Court intervene under Section 48 the Court shall enforce the award as it were a decree of the Court.

Section 50. Appealable orders. *– (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the order refusing to –*

(a) refer the parties to arbitration under Section 45;

(b) enforce a foreign award under Section 48;

to the Court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

The appeal shall lie from refusal to refer to arbitration under Section 45 and not enforcing the foreign award invoking provisions of Section 48. No second intra Court appeal will lie against the Court in appeal. However, appeal to Supreme Court shall remain unimpaired.

Section 51. Saving. *– Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.*

There shall not be any prejudice to the rights of any person of enforcing foreign awards in India even if this Chapter was not enacted.

Section 52. Chapter II not to apply. – Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

Chapter II relating to Geneva Convention shall not apply to this Chapter.

Chapter II deals with *Geneva Convention* Awards as contained in Sections 53 to 60 read with Second and Third Schedule to the Arbitration and Conciliation Act, 1996.

Section 53. Interpretation. *– In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924, –*

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, andof whom the other is subject to the jurisdiction of some other of the powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Foreign awards refer to commercial disputes which have been submitted for adjudication under arbitration in terms of a written agreement made under Second Schedule. The foreign award will not be treated as final if there is a challenge or a contest pending before the appropriate forum in the country of origin.

Section 54. Power of judicial authority to refer parties to arbitration. *– Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom Section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that Section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.*

A judicial authority to whom a commercial dispute has been referred, shall refer the matter to arbitration based on a prior written agreement made under Second Schedule. However, this will not impair the discretion to act otherwise if the agreement lacks legal infirmities.

Section 55. Foreign awards when binding. *– Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.*

This Section is a replica of Section 46 of the New York Convention Awards and reiterates that a foreign award shall be binding inter se parties and any one party may rely upon it as a defence, set off in, legal proceedings initiated in India.

Section 56. Evidence. *– (1) The party applying for the enforcement of a foreign award shall, at the time of application produce before the Court –*

(a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-Section (1) of Section 57 are satisfied.

(2) Where any document requiring to be produced under sub-Section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or

consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

[1][Explanation 1. – In this Section and in the Sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.]

Section 47 provisions of New York Convention Awards shall also apply to Geneva Convention Awards mutatis mutandis

Section 57. Conditions for enforcement of foreign awards. *– (1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that –*

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) the enforcement of the award is not contrary to the public policy or the law of India.

[*Explanation 1*. – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, –

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

(2) Even if the conditions laid down in sub-Section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that –

(a) the award has been annulled in the country in which it was made;

(b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-Section (1) and clauses (b) and (c) of sub-Section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Section 48 provisions of New York Convention Awards shall also apply to Geneva Convention Awards mutatis mutandis.

Section 58. Enforcement of foreign awards. *– Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.*

On enforcement of the award by the Court it will be deemed as a decree of that Court.

Section 59. Appealable orders. *– (1) An appeal shall lie from the order refusing –*

(a) to refer the parties to arbitration under Section 54; and

(b) to enforce a foreign award under Section 57,

to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

Appeal provisions of Section 50 of New York Convention Awards shall also apply replica to Geneva Convention Awards.

Section 60. Saving. *– Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.*

THE PUBLIC POLICY DOCTRINE AND THE ENFORCEMENT OF ARBITRAL AWARD

Since the decisions rendered by Arbitral Tribunals are not subjected to appeal before any Courts, it becomes important that these quasi-judicial bodies do not digress from the pious task of imparting justice. Broadly speaking, it may also be noted that the role of the judicial body is to ensure that the realm of *public policy* is not set aside as public order is equally important as individual freedom. Therefore, the Arbitral Tribunals must ensure that in the process they do not abandon the *public policy* element while passing any award. The awards passed by the Arbitral Tribunals which are contrary or opposed to the *public policy* therefore can be challenged before the Judicial Courts and thereby also set aside.

The earliest of the laws on Arbitration in India was the Indian Arbitration Act, 1899 (hereinafter 1899 Act). The 1899 Act provided '***misconduct and improper procurement of award'*** as the only ground when the Court could interfere with the award and set it aside. The 1899 Act was repealed and replaced by the Arbitration Act, 1940. The Arbitration Act, 1940 in addition to the grounds mention in the 1899 Act, added an award being '***otherwise invalid***' as an additional ground to set aside the award by the Courts, thus giving a scope for the expansion of judicial review. The challenges faced by the Arbitration Act, 1940and the need to boost the alternate dispute resolution process was realised and addressed by the lawmakers who repealed the Arbitration Act, 1940 and introduced the Arbitration and Conciliation Act, 1996.

The UNCITRAL Model Law, 1985 introduced an award being opposed to '***public policy'*** as a valid ground for setting aside the arbitral award. This concept was adopted by India in the Arbitration and Conciliation Act, 1996 under Section.34 (relating to the domestic awards) and under Section.48 (relating to the foreign award).

In arbitration, the autonomy of the parties is kept at the highest pedestal. Therefore, any Court adjudicating upon the validity of an arbitral award is not to function as an appellate Court, but merely is to decide upon

the legality of the validity of the arbitral award. But the jurisprudence related to what constitutes *public policy* has been a matter of debate and discussions until the Arbitration and Conciliation (Amendment) Act, 2015 was brought into force which amended Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation (Amendment) Act, 2015 expressly laid down the features of *public policy* whose violation would be considered as being opposed to the *public policy*.

CASE STUDY

Case Law: Prior to implementation of Arbitration and Conciliation Act, 1996.

Renusagar Power Co. Ltd. v. General Electric Co.[26]

One of the earlier instances where the Supreme Court was to determine the legality of the foreign arbitral award on ground of it being opposed to the public policy of India was in *Renusagar Power Co. Ltd. v. General Electric Co.*

Renusagar Power Co. Ltd. (*hereinafter* Renusagar) was an electricity generating and distributing company established under the Companies Act, 1956; and wanted to set up a unit in Mirzapur District of Uttar Pradesh. General Electric Co. was a company based out of the United States and was primarily involved in the manufacture of, selling and repairing of several electrical products and ancillary activities. Renusagar wanted to enter into an agreement with General Electric for supplies of certain products that could be used for setting up the proposed plant in the Mirzapur District. After attaining permission from the Government authorities, Renusagar and General Electric (collectively referred to as parties) entered into an agreement on August 24, 1964. The agreement between the parties provided for an arbitration clause which mentioned that in case of any dispute between the parties, the said dispute shall be referred to International Chamber of Commerce (hereinafter ICC) for arbitration. The agreement provided for a constitution of three-member Arbitral Tribunal, out of which one were to be nominated by each party and the third shall be appointed by the ICC. The subject matter of the dispute was a provision in the contract between the parties which provided that if General Electric received an exemption from the Government of India with respect to the payment of income tax on the interest amount paid by Renusagar, General Electric shall exempt and reduce the interest rate upon Renusagar from 6.5% per annum to 6% per annum commencing from the date of such exemption. The Government of India gave its approval under the Income Tax Act, 1961 to the loan obtained by Renusagar from General Electric and thereby exempted the interest. However, the same was withdrawn on September 11, 1969 retrospectively and General Electric was held liable to pay income tax on the interest payable at 6.5% per annum. The said order of September 11, 1969 was set aside by the Delhi High Court. Subsequently some issue related to the payment of interests arose between the parties and the parties pursuant to the arbitration agreement decided to arbitrate at the ICC.

A suit was filed by Renusagar at the original side of the Bombay High Court with a prayer restraining the Arbitral Tribunal at the ICC from progressing further with the arbitration and also restraining the Arbitral Tribunal from passing any orders requiring Renusagar to make any deposit for any sum. Renusagar got an award in its favour ex-parte. On the contrary, an application was filed by the General Electric before the Bombay High Court. Both the applications were heard together, and a common order was passed which allowed the application of General Electric and imposed a stay on all previous orders. In the meanwhile, the arbitration proceedings begun at the ICC and Renusagar appeared under protest. Subsequently, an award was passed against Renusagar for an amount of US $ 12,215,622.14.

General Electric filed an execution petition under Section 5 of the Foreign Awards Act, 1961 in the Bombay High Court. The Bombay High Court accepted the application for the enforcement of arbitral award. The said order for execution was challenged through an LPA to the Division Bench of the High Court. The Division

26. 1994 AIR 860, 1994 SCC Supl. (1) 644

Bench of the High Court dismissed the application but granted a certificate of appeal to the Supreme Court. The objections raised by Renusgaar before the Supreme Court were that the award was against the public policy of India under Section 7(1)(b)(ii) of the Foreign Awards Act.

The Supreme Court on the ambit of Public Policy held as follows:

"IV. *Meaning of 'public policy' in Section 7(1)(b)(ii) of the Act*

Para 46. *While observing that "from the very nature of things, the expressions 'public policy', 'opposed to public policy' or 'contrary to public policy' are incapable of precise definition" this Court has laid down:*

Public policy ... connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See : *Central Inland Water Transport Corpn. Ltd. and Anr* v. *Brojo Nath Ganguly and Anr.)*

The Supreme Court allowing the enforcement of the award, held that "public policy" shall be used in a narrower sense to be attracted. Further It was held that an enforcement of an foreign award could be refused if it is proved that such award is contrary to:

i. Fundamental Policy of Indian Law; or

ii. The interests of India; or

iii. Justice or morality.

Case Law: Post Arbitration and Conciliation Act, 1996

Bhatia International v. Bulk Trading S.A. and anr.[27]

After the discussion of the realm of the public policy in the enforcement of foreign arbitral award in India, the three judge bench of the Supreme Court was again called upon to determine the scope of public policy as under the Arbitration and Conciliation Act, 1996. The arbitration clause between the parties provided that in an instance of a dispute, the dispute shall be referred to adjudication by the ICC. An application under Section 9 of the Arbitration and Conciliation Act, 1996 was filed before the Additional District Judge, Indore seeking an injunction restraining the parties from alienating, transferring and/or creating third-party rights. The major contention that was raised was on the applicability of Part I of Arbitration and Conciliation Act, 1996 to the foreign arbitral proceedings. Answering the question in positive, the Supreme Court held that Part I of the Arbitration and Conciliation Act, 1996 shall also be applicable to international commercial arbitrations. It was held by the Supreme Court as below:

Para 16. *A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(1)(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called "the convention country"). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part II only applies to arbitrations which take place in a convention country. Mr Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept the submission that the said Act makes no provision for international commercial arbitrations which take place in a non-convention country.*

27. (2002) 4 SCC 105.

Oil and Natural Gas Corporation Ltd. v. Saw Pipes[28]

A wider interpretation was given to the term of public policy by the Supreme Court. Herein, the Supreme Court while adopting the grounds for setting aside the foreign award as laid down in the *Renusgar case,* also added 'patent illegality' as one of the facets for setting aside an arbiral award. The Supreme Court held as below:

"Para 22. *The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-Sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required* ***to be set aside on the ground of "patent illegality****".*"

Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.[29]

The scope of the realm of 'public policy' which has often been referred to as an *unruly horse* had made many international awards liable to be set aside by the Indian Courts. The contours of perils of public policy was finally curtailed by the constitutional bench of the Supreme Court of India in the *BALCO* judgment. The BALCO judgment categorically overruled *Bhatia International case*[30]and held that Part I of the Arbitration and Conciliation Act, 1996 shall not be applicable to the proceedings under Part II. This meant that the grounds of "public policy" as it existed under Section 34 of the Arbitration and Conciliation Act, 1996 shall not be applicable under the grounds of public policy as applicable under Section 48. Overruling *Bhatia International (Supra),* the Supreme Court held as follows:

28. (2003) 5 SCC 705.

29. (2012) 9 SCC 552.

30. (2002) 4 SCC 105.

Para 195. *With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.*

Para 196. *We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.*

Para 197. *The judgment in Bhatia International [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International [(2002) 4 SCC 105] . Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.*

Judicial non-interference in International Commercial Arbitration

This is the central pillar and fundamental principle of contemporary international commercial arbitration based on the consensus approach of international convention countries i.e. England, France, Germany, Belgium, Austria, Japan who have adopted the right of procedural neutrality and dispensing with procedural protections designed for domestic litigation. Granting basic equality to parties lies at the core of this subject to an extent that the mandatory provisions of the national law are ordinarily limited in their scope even in the most developed arbitration statues, in absence of specific agreement between the parties. ICC rules will apply in exclusion of all other laws. The NY Convention and various international arbitration conventions, for example the Geneva Protocol, supported by national arbitration legislation have adopted this principle. Article II of the Geneva Convention cast an obligation on contracting states to recognise all material terms of the arbitration agreement relating to arbitral seat, number of arbitrators, institutional rules, arbitration procedures etc.

UNCITRAL Notes on Organising Arbitral Proceedings deals extensively on this aspect. Article 5 states that no Court shall intervene in the proceedings except so provided in this law. Further, Article 19 provides that unless explicitly excluded by the parties,the arbitrators shall have no discretion to apply procedural laws. According to Article 24(1) – in absence of contrary agreement between the parties, the Arbitral Tribunal shall decide to hold any oral hearings. The UNCITRAL Model Law, 1985 permits limited circumstances including judicial support to resolve objections on jurisdiction, assist in constitution of Arbitral Tribunal, granting provisional relief, consider applications to vacate awards, but does not permit judicial supervision of procedural decisions through interlocutory appeals. The local national Courts can deny recognition to arbitral awards that are fundamentally unfair, arbitrary, unbalanced procedures, failure to apply international standards or local procedural public policies and procedural protections guaranteed by national law. English and US Courts have adopted the principle of judicial non- interference in arbitral proceedings.

Enforcement of arbitral award and the approach of the Supreme Court in recent cases

A few recent cases deserve merit for understanding the mind of judiciary in dealing with enforcement of foreign arbitral awards.

1) National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta SA[31]

The Supreme Court on the subject of enforcement of a foreign award dealt with contractual obligations and breach, coupled with the larger question of the award being opposed to public policy of India. NAFED was

31. Civil Appeal No. 667 of 2012, decided on 22.04.2020.

constrained not to export under the contract as it was Government's refusal to allow the export in interest of the country, in variance of export policy norms. Thus, the impossibility of performance did not amount to commitment of a breach. The parties thus agreed to cancel the contract as performing the contract against the policies of the Government would be construed as against the public policy of India. The Court also considered the Foreign Awards (Recognition and Enforcement) Act, 1961 which also address the public policy aspect as ground for setting aside the award. Section 23 of Indian Contract Act, 1872 deals with consideration and objects that are unlawful. The Court opines that if the contract is opposed to public policy then the consideration will be unlawful rendering the agreement as void. The Court has stated that Section 7(1)(b)(ii) of the Foreign Awards Act, 1961 must apply equally to Section 48(2)(b) of Arbitration and Conciliation Act, 1996. In proceedings for enforcement of foreign award under Foreign Awards Act, 1961, the grounds specified in Section 7(1)(b)(ii) are to be evaluated narrowly in defence of public policy.

On this analogy the Court recommends that principles of Renusagar case should also be tested in appeal under Section 48(2)(b) of Arbitration and Conciliation Act, 1996. While judging enforceability of foreign awards the national Court does not exercise appellate jurisdiction nor entitled to enquire whether some error has been committed in rendering foreign award. The grounds of challenge or refusal of enforcement under Section 34 and Section 48 of the Arbitration and Conciliation Act, 1996 are identical.

Sukanya Holdings Pvt. Ltd., v. Jayesh H. Pandya and Ors.[32]

The Supreme Court held that Section 89 of Code of Civil Procedure, 1908 cannot be resorted to for interpreting Section 8 of the Arbitration and Conciliation Act, 1996 as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement. The Court has to apply its mind to the condition contemplated under Section 89, of Code of Civil Procedure, 1908 and even if an application under Section 8 of the Arbitration and Conciliation Act,1996 is rejected, the Court is required to follow the procedure prescribed under the said Section.

GOI. v. Vedanta Ltd and Ors.[33]

The Apex Court has dealt with certain key areas like limitation for filing an application under Section 47 of the Arbitration and Conciliation Act, 1996 for enforcement of New York convention awards covered in First Schedule, the applicability of yardsticks of public policy by the Malaysian Courts in deciding challenge to the award and if the foreign award fails the public policy tests in India.

The key takeaways from this order could be summarised as:

- A foreign award reaches its finality for being enforced in India after it passes musterthrough the gateways and rigours of sec 47 and 48, if invoked by an aggrieved party. The grounds of challenge that a party may raise are stipulated in sec 48. There are five grounds which an aggrieved party may raise before the court. The court can also suo moto refuse to enforce the foreign award under sec 48, if it finds that the subject matter of settlement is not arbitrable under the Indian laws or the enforcement of the foreign arbitral award would be opposed to the public policy of India. The enforcement court however will not have extra territorial power to review the order to correct the errors or undertake review on merits but has limited powers either to enforce the order or otherwise if valid grounds as cited above under sec 48 is made out.
- The Enforcement Court (Execution Court) cannot set aside the award as that power is vested only with the supervisory Court located at the seat of arbitration. The enforcement of foreign arbitral awards is not covered by Arbitration and Conciliation Act, 1996 but falls under Code of Civil Procedure, 1908 under Sec 44 A read with Sec 13. Sec 44 A is the core Section that allows an Indian court pertaining to a reciprocating territory, to execute the order as if it were passed by this court. Sec 13 of CODE OF

32. AIR 2003 SC 2252.

33. Civil Appeal No 3185 of 2020.

CIVIL PROCEDURE, 1908 states that the judgment of a foreign court must be conclusive and pass the tests of this Section. The High Court will adhere to the Order XXI of CODE OF CIVIL PROCEDURE, 1908.

- The question of applicability of law of limitation, to enforcement of Foreign Arbitral Awards have been initially tested in the backdrop of two judgments, where the courts have taken a conflicting and contrary view. The Madras High Court in Compania Naviera '*SODNOC*' v. *Bharat Refineries Ltd. and Ors*. passed by single judge allowed a period of 12 years under Article 136 of the Limitation Act 1963 to the holder of award for seeking enforcement of foreign arbitral award. However, the Bombay High Court in Noy Vallesina Engineering Spa vs. Jindal Drugs Limited [34], the learned single judge decided that enforcement of foreign arbitral award will be governed by Article 137 of Limitation Act 1963 providing for a three year period for limitation.

  The Delhi High Court in *Cairn India Ltd and Ors.* v. *Government of India* held in its judgement passed on 19-2-2020 reiterated that Article 136 of Limitation Act would apply for execution of foreign arbitral award on the lines ofthe decision in Compania Naviera (supra). However, the Apex Court appears to have settled this controversy of limitation in its recent judgement on 16-9-2020 in GOI vs Vedanta& Others [CA no 3185 of 2020] has held that Article 136 will not be applicable for enforcement or execution of foreign arbitral awards, since they cannot be construed to be a decree of a civil court in India. A foreign arbitral award will be covered by Article 137 which provides for a timeline of three (3) years from when the right to apply accrues. A party seeking enforcement of foreign arbitral award may file an application for condonation of the delay under sec 5 of the Limitation Act 1963 and provisions of Order XXI of CPC would be applicable to a substantive petition under 1996 Act.

- The Court further deals with the provisions to be followed by the holder of award for enforcement of New York convention awards. The noticeable observation is that there is no requirement to obtain a decree from the seat court to entitle the award to be enforceable as a foreign decree. Neither is the applicant require to obtain leave of the seat court or under the laws of which the award was made.

- The next important question came up was if the Malaysian court which was trying a challenge to the award ought to have applied the substantive law of contract, viz., Indian law to determine the conflict with public policy. The court held that the Malaysian court was justified in applying the local Malaysian law in dealing with the challenge raised by GOI, being the curative court having principal jurisdiction. The GOI challenged the award on grounds of lack of jurisdiction to try the dispute as subject matter beyond the scope of arbitral tribunal and also opposed to public policy. However, the enforcement court shall not be guided by the decision of Malaysian court in trying an application of challenge of enforcement under Section 48 of the Act. While arriving its findings the court dealt with four laws. The governing laws guiding the commercial contract between parties; the governing law of arbitration which is distinct from the law governing law, the curial law of arbitration hinged to the seat of arbitration and lastly the lex fori which determines the issue of enforcement by the national court. Article III of New York Convention acknowledge that national courts shall apply lex fori including limitation period one of the issues before the court.

- The last issue decided by the court was determining public policy if a challenge is made under sec 48 of the Act. The court reiterated the principles laid down in Renusagar judgment (Supra), elucidated in *Shri Lal Mahal Ltd.* vs. *Progetto Grano SPA* [(2014) 2 SCC 433]. The enforceability of the foreign award will be laid down by the national court following the parameters laid down in Renusagar if it is contrary to the public policy of India, interests of India and justice or morality. The recent amendment of Sec 48 vide Act 3 of 2016 where the earlier meaning of public policy the words "in the interest of India" has been deleted and narrowed down significantly. The supreme court had expounded the meaning of

34. 2006 (3)ArbLR510(Bom);

public policy in Renusagar judgment. The apex court has in its findings cited two important judgments of foreign courts, US Court of Appeals in Parsons case [508 F.2d 969(2nd Cir 1974) have held that the Convention's public policy doctrine should be viewed narrowly and the court can only intervene in a foreign arbitral award only when enforcement would violate the forum state's most basic notions of morality and justice. The Singapore Court of Appeal in PT Asuransi *Jasa Indonesia* vs. *Dexia Bank SA* [2006] SGCA 41elaborated that the public policy is not the political stand or international policies of a state but entails the fundamental notions of principles of justice. Thus, instances of corruption, fraud, bribery would constitute a valid ground of setting aside an award. It is interesting to note that International Council for Commercial Arbitration (ICCA) in its Guide to the interpretation of the 1958 NY Convention : A handbook of judges (pub in 2011) in refusing enforcement of foreign awards the court must be guided by the following principles : a) no review on merits b) narrow interpretation of grounds for refusal c) limited discretionary powers.

Enforcement under the UK and Singapore Law- A comparative Study

It would be interesting to see the reforms in UK and Singapore regarding enforcement of foreign arbitral awards.

UK Courts

Recognition and Enforcement of Arbitral Awards made at an English seat and Foreign Arbitral Awards in England are guided by UK Arbitration Act, 1996. Upon widespread adoption of New York Convention, it shall be noted that most foreign awards are enforced in England in accordance with the UK Arbitration Act, 1996. Section 66 deals with enforcement of awards both domestic and international. Sections 101-103 deals specifically with Recognition and Enforcement of New York Convention. English Court of Appeal upheld a first instance decision to refuse enforcement of US $ 200 mn New York Convention Award in *Dallah Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Govt of Pakistan*[35]. On the basis that the arbitration agreement was invalid for the purposes of Section 103(2)(b) of UK Arbitration Act, 1996 which reflects Article V.1(a) of New York Convention. Dallah a Saudi Co invoked ICC for a claim against the Govt of Pakistan. Govt of Pakistan refused to participate in proceedings refuting the arbitration agreement. ICC passed awards after confirming validity of arbitration agreement and final award passed in favour of Dallah for US$ 18 mn as damages for breach of contract by Govt. of Pakistan. Dallah filed application in the UK High Court for enforcement of the award. The UK High Court in enquiry under Section 103(2)(b) of UK Act, 1996 hinged on the procedural steps to be followed in the hearing.

The UK High Court re-opened the award and finally held invalidity of the arbitration agreement and thus refused to enforce the award. Court of Appeal upheld the High Court's order and reiterated a full hearing on the validity of the arbitration agreement was necessary, by rejecting the suggestion that Section 103(2)(b) permitted the Court to re-hear the matter only in the case when the award was prima facie wrong.

Dallah finally appealed to the Supreme Court. The appeal was dismissed on the ground that the Government was not a party to the arbitration agreement.

The Supreme Court in its judgment reviewed the core issue of jurisdiction of the Tribunal on the premise that the Government is a necessary part to the proceedings.

The Apex Court observed that:

While the Tribunal has inherent jurisdiction to arbitrate on disputes referred to it, the courts of the country where the hearings were held and as well as the courts of a foreign country should examine the proper jurisdiction of the court before enforcement of the award. The Tribunal can exercise jurisdiction only by the consent of both the parties and cannot confer jurisdiction on its own. Moreover, the New York (NY)

35. [2009] EWCA (Civ) 755.

Convention also secures the rights of a party to dissent on the jurisdiction of the Tribunal. Thus, in line with the provisions of the NY Convention read with Section 103(2)(b) of the UK Act 1996 it was incumbent on English courts to determine the validity of jurisdiction, on the challenge by the respondent that it was never a party to the arbitral proceedings. The Government could establish to the satisfaction of the court that there was no common intent and agreement between it and Dallah for pursuing the arbitration for resolution of the dispute. Thus, the appeal was dismissed lacking merits.

These decisions raise a concern and a larger question on the disregard to the golden principles of judicial non-interference in arbitral proceedings.

Singapore Courts

Given Singapore's long standing, pro-arbitration legislation and judicial stance, the scope of opposition to a foreign award on grounds of public policy available to a party is very narrow. By and large the national Courts have not refused to enforce foreign arbitral awards on grounds of public policy.

Singapore is a party to New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The exceptions to the recognition of such awards are triggered challenging invalid arbitration agreement and if the award breaches natural justice or conflict with public policy. There are two recognised paths for enforcement of foreign awards viz. a) Under Reciprocal Enforcement Act b) Common law action. The law related to the jurisdiction of courts with respect to enforcement of foreign award in Singapore is governed by the RECJA (Recognition and Enforcement of Commonwealth Judgments Act) and REFJA (Recognition and Enforcement of Foreign Judgments Act). Foreign judgments extend to Courts of UK, New Zealand, Sri Lanka, Malaysia, Pakistan, Brunei, India, Australia, Hong Kong, Windward Islands. Foreign judgments should be final and conclusive, relating to monetary claims or damages.

The challenge to foreign awards can be made on grounds of *(i)* lack of jurisdiction of foreign Courts *(ii)* pending appeal against the award *(iii)* judgment obtained by fraud.

Common law principles for enforcement of foreign awards should be based on *(i)* judgment of foreign Court having international jurisdiction *(ii)* judgment is final and conclusive *(iii)* award for payment of definite sum of money. Enforcement of foreign award can be denied if it is proved *(i)* breach of natural justice principles *(ii)* award obtained by fraud *(iii)* enforcement of award would be against the public policy. Singapore International Commercial Court (SICC)formed in 2015 is gaining importance, and maturity for hearing international matters of commercial disputes. The orders of SICC carry weight both in domestic and international commercial arbitration.

DRAFTING OF ARBITRATION AWARD

An award can be divided in three parts.

(1) General Procedure and Decision

(2) Award of Interest

(3) Award of Costs

According to section 31 of Arbitration and Conciliation Act, 1996, an award should,

(i) be in writing;

(ii) contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award;

(iii) state the date and the place of arbitration; and

(iv) be signed by all of the arbitrators or contain an explanation for any missing signature. The Act provides that after passing the award, a signed copy of the award shall be delivered to each party.

General guidelines for drafting of Arbitral Award

1. An Award should be logically sequenced.
2. The Arbitrator should ensure that the Award should be legally enforceable.
3. An award should be made timely.
4. Award should be communicated to the Parties.
5. An award should be titled property. For example: Interim Award, Final Award etc.
6. An award should be properly paragraph and numbered to the possible extent.
7. In case of Arbitration by a panel of more than one arbitrator, the voting of individual arbitrator should be mentioned.
8. An arbitration agreement is required to be in writing.
9. The award is to be signed by the members of the arbitral tribunal.
10. The making of an award is a rational process which is accentuated by recording the reasons. Generally, the award should contain reasons.
11. The award should be dated.
12. The arbitral tribunal is under obligation to state the place of arbitration.
13. The arbitral tribunal may include in the sum for which award is made, interest up to the date of award and also a direction regarding future interest.
14. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.

Specimen of Arbitration Award

MODEL ARBITRAL AWARD

STAMP DUTY OF RS. ____ PAID AS PER THE LAW IN THE STATE OF A.P.

BEFORE THE ARBITRAL TRIBUNAL

PANEL OF ARBITRATORS

CONSISTING OF

_____ PRESIDING ARBITRATOR

_____ ARBITRATOR

AND

_____, ARBITRATOR

IN THE MATTER OF ARBITRATION OF DISPUTES AND DIFFERENCES ARISING OUT OF THE INSURANCE POLICIES:

(1) No._____;

(2) No._____; and

(3) No._____

BETWEEN:

M/s. _____,
a registered Partnership Firm,
Regd. Office at _____,
Rep.by its Managing Partner, _____. **CLAIMANT**

AND

_____ Insurance Co., Ltd.
Rep. by its Divisional Manager, Gudivada,

Krishna District, A.P. **RESPONDENT**

AWARD

UNDER THE ARBITRATION AND CONCILIATION ACT, 1996.

APPEARANCE: (1) _____,
Managing Partner of
the Claimant.

(2) _____,
Advocate for the Claimant.

AND

(1) _____ Manager,
Respondent _____ Insurance Co., Ltd.

(2) _____ Asst. Manager of the
Respondent Insurance Company.

(3) _____, Advocate for the Respondent.

Brief facts of the claim:

1. The claimant is a registered Partnership Firm doing business in the purchase of paddy in bulk quantities, converts the same into raw rice in its Mill and sells the same in the market along with by-products of broken rice, bran etc., at _____. The claimant insured its goods to cover all conceivable risks. The claimant purchased large quantities of paddy during April and May, 1997 and stocked the same in the open area besides in the Mill Hall and Godown and insured its building, machinery, paddy stocks, kept in open area as well as in Godown with the respondent insurance company under three insurance policies. The claimant paid the premiums as required by the respondent Insurance Company. On _____(date) there was a devastating sudden and localized storm associated with heavy rain and strong gales for Hr.0-45 minutes to one hour. Heavy loss and damage were caused to the insured goods of the claimant. This was brought to the notice of the respondent on _____ itself. At about _____on the same day the Asst. Divisional Manager of the respondent Insurance Company came along with Development Officer and witnessed the extent of loss.

2. _____, Surveyor, deputed by the respondent Insurance Company, visited and assessed the loss caused. Part of the Godown got damaged. 15000 quintals of paddy kept in the Godown Hall and in the open and 1000 quintals of rice, 300 quintals of broken rice and 150 quintals of bran as well as gunnies were extensively damaged. The paddy became unfit for human consumption. The insured took all precautions to safeguard the insured property. The respondent insurance company is under

the obligation to settle the claims of the insured claimant, within reasonable time. But, the respondent Insurance Company, after one year, offered to pay a meagre amount of Rs.3,00,000/- The claimant suffered a net loss to the tune of Rs.20,00,000/- after deducting salvage. The respondent Insurance Company is liable to compensate the actual loss with interest at 24% P.A. The claimant prays the Arbitrators to direct the respondent Insurance Company to pay the same with interest and costs.

3. Disputes and differences have arisen between the parties and the claim has cropped up. The claimant contends that it is entitled for the entire amount with interest as claimed. The respondent Insurance Company refuted all the contentions and claim made by the claimant. According to the respondent, the claim is not tenable and that the claimant is entitled to only Rs. 3,00,000/-.

4. The claim made in the claim statement are in respect of disputes and differences arising out of Exs.A-1, A-1(a) and A.-(b) Insurance Policies. The said Insurance Policies provide for settlement of all disputes by arbitration. As the claim of the claimant has not been honoured, the claimant was forced to invoke the arbitration clause of the Insurance Policies.

5. We, the panel of Arbitrators, entered into reference on _____, held preliminary sittings on _____, _____ and _____ and proceeded further with enquiry and held sittings on _____, _____, _____, and finally on _____.

6. The sittings were held at: - _____ in the office premises of _____, the Presiding Arbitrator to suit the convenience of both the parties herein.

7. The claimant examined one witness P.W.1 and got marked ExhibitsA-1 to A-11 (Particulars are given in the Appendix of Evidence at the end of the Award). The respondent Insurance Company examined two witnesses R.Ws. 1 & 2 and got marked Exs.B-1 to B-13 (Particulars are given in the Appendix of Evidence at the end of the Award).

8. Both parties stated that there are no other witnesses to be examined and no other documents to be filed and marked and that there is no further evidence to be adduced and further material to be placed. **Hence, evidence concluded.**

9. Heard arguments in full, advanced by both the parties. Both the parties herein stated that there were no further arguments.

10. Both the parties herein expressed satisfaction and stated that there was no further evidence to be adduced or further arguments to be advanced and that they were given full opportunity in all matters. As both the parties stated that there was no further material to be placed or further arguments to be advanced, **the enquiry also concluded.**

11. The Arbitrators, after conducting enquiry and after fully hearing both the parties and after carefully and judiciously considering the said arguments and pleadings and all documents and also after carefully and judiciously assessing the value of the entire evidence and all material placed and after bestowing full thought to all matters in dispute and after carefully and judiciously considering the merits and demerits of all contentions of both parties on the claim,

MADE THE FOLLOWING

AWARD

12. **The following point is formulated for consideration: -**

To what amount is the claimant entitled from the respondent Insurance Company towards damage and loss caused to the insured properties?

13. The entire pleadings, documents, oral evidence and material placed have to be carefully and judiciously

considered to assess the merits and demerits of the claim and to come to correct conclusion in giving finding on the above point.

14. The claimant is a Firm represented by its Managing Partner. The business is purchase of paddy in bulk quantities and converting the same into raw rice in its mill and selling the same in the market. In view of high magnitude of business operations involving huge quantities of paddy and rice, the claimant insured its goods to cover all conceivable risks. The mill and other properties are insured by the claimant with the respondent Insurance Company under Ex. A-1, A-1(a) and A-1(b) Insurance Policies. It is not in dispute that the properties in respect of which the claim is made are insured with the respondent Insurance Company and that the policies are subsisting by and beyond the date of the incident i.e., _____.The insured took all precautions to safeguard the insured properties under normal conditions. The Surveyor engaged by the respondent Company stated in Ex. B-2, Survey Report, that the insured complied with all the warranties.

15. Before assessing and evaluating the damage and loss caused to the insured property it is necessary to know the stock position. The stock position as on _____ is not in dispute.

16. We will next consider the evidence regarding the assessment and evaluation of loss and damage to the insured property. The claimant in the claim statement claimed Rs.20,00,000/- towards the total loss sustained. In Ex. B-1 claim form submitted to the respondent Insurance Company, the claimant claimed as the total, Rs._____. The Surveyor engaged by the respondent Insurance Company assessed the total loss at Rs. _____/-. As against this, the Surveyor engaged by the claimant assessed the total loss at Rs._____.

17. The dispute and differences between the parties is the quantum of loss and damage caused to the insured properties by the storm and inundation and the amount payable by the respondent Insurance Company to the claimant. Here, the quantum of damage and loss is directly proportionate to the intensity of the storm. Extent of damage as stated by the claimant can only be caused, if there was a devastating storm. It is established in evidence that there was a devastating and severe storm on _____for about 45 minutes to one hour at _____ where the insured Rice Mill and the properties are located, causing damage and loss not only to the insured property but also to the properties and products surrounding the Mill. The huts have collapsed, the trees were uprooted and the electric poles were bent and uprooted. The claimant reported to the respondent Insurance Company on _____ evening itself about the devastating storm and the consequential loss and damage caused to the insured property. The Assistant Divisional Manager, who is an employee of the respondent insurance company, visited the Mill on the date of occurrence itself and saw the loss caused to the claimant. Ex. B-3 is his report. In Ex. B-3, the Assistant Divisional Manager furnished the details of the damage which occurred due to the sudden, violent, localized gale and storm that hit the place. His report Ex. B-3 fully supports the claim of the claimant. The Assistant Divisional Manager, being the employee of the respondent, we consider his report as impartial and credit-worthy and we accept the same. The Revenue Officer also visited and made assessment and evaluation of the loss caused to the claimant. The Revenue Officer is a respectable Officer of the Government and his report has to be given weightage and hence hereby accepted. This report is marked as Ex. A-11. Besides this, the respondent Insurance Company as well as the claimant engaged their surveyors to assess and evaluate the loss and damage caused to the insured properties due to storm and inundation.

18. Shri _____ (R.W.1) is the Surveyor engaged by the respondent Insurance Company. Ex. B-2 is his report. He gave evidence as R.W.1.Taking an overall view of his evidence and report we are constrained to observe that his report and evidence are devoid of fairness and impartiality. Mr. _____ is the Surveyor engaged by the claimant. There is absolutely no bar for the claimant engaging its own Surveyor to protect its own interest and establish the truth before this Arbitral Tribunal. His report and

evidence will be relied upon and accepted wherever necessary.

19. We will next take up item-wise assessment and evaluation of loss caused to the insured properties of the claimant. The claim pertains to the properties covered by Insurance Policies Nos._____, _____ and _____. The loss relates to the damage and destruction caused to the Godown Building, the stocks in Godown, _____ quintals of paddy packed in _____ Gunny Bags, _____ quintals of rice, _____ quintals of broken rice and _____ quintals of bran and as well as the stocks kept in the open i.e., 2 heaps of paddy and loose paddy in the Kundi amounting to _____ quintals besides Gunnies. We reject the findings of Mr. _____ engaged by the respondent Insurance Company as its Surveyor, as his survey and assessment are unreliable, unrealistic and unacceptable. His evaluation of salvages is high and perverse. **We arrive at the correct salvages even if we rely on the material in his report Ex. B-2.** The assessment and evaluation of Mr. _____ the Surveyor engaged by the claimant, in his Ex. A-2 report is realistic and nearer to the truth. We will accept his findings wherever required.

Stock in Godown:

Paddy:

Total quantity of paddy stocked in the Godown is _____ quintals. Out of this the bottom, top and sides were damaged.

The Surveyor Mr. _____ claims to have milled 10 quintals of paddy which yielded rice, broken rice and bran.

The cost of normal rice is Rs. _____/- per quintal even according to Ex. B2, while calculating the value of damaged paddy, the Surveyor Mr. _____ has given the salvage value of rice after milling at Rs. _____, which is unrealistic, unacceptable and unreasonable. Hence, we reject the same because the salvage value comes to 85.47% which is unrealistic and we rely on Ex. B-2 of the Surveyor Mr. _____ while calculating the loss of raw rice lying damaged in the Godown. He has arrived the salvage value of Rs. _____ vide page No.11 of Ex. B2. This can be safely adopted for the discoloured rice got from the damaged paddy, after milling.

Hence salvage value per quintal comes to Rs. _____, according to _____ Surveyor, the rice that we realized after milling _____ quintals is _____ Kgs. We find accordingly.

Broken Rice: -

_____

_____

_____

Rice: -

_____

_____

Raw Rice: -

_____

_____

Broken Rice: -

_____

_____

Bran: -

_____

_____

Gunnies: -

_____

_____

Paddy stocks kept in open: -

_____

_____

Heap No.II:-

_____

_____

Gunnies: -

_____

_____

Kundi: -

_____

_____

Now, we arrive at the grand total of loss sustained by the claimant and payable by the respondent Insurance Company as follows:

(1)	Loss and damage to the Godown	..	Rs. _____
(2)	The net loss for the stocks in Godown	..	Rs. _____
(3)	Net loss for open stocks	..	Rs. _____

	Total		**Rs._____**

We have already taken into consideration the under-insurance factor. **Policy excess is Rs. _____. This has to be deducted from the above amount and the net amount of loss comes to Rs. _____.**

We have scrutinized and taken into consideration all the documents filed by both sides and also considered the evidentiary value, if any, of each and every document. In our award we have specifically referred to such of those documents which are necessary to adjudicate the dispute referred to us. We have also taken into consideration the merits and demerits of the entire oral evidence adduced by the parties.

For the reasons stated above we find that the claimant is entitled to get from the respondent insurance company an amount of Rs. _____under the claim.

In the result, we allow Rs._____.

We award accordingly.

Interest: -

According to Section 31 of the Arbitration and Conciliation Act, 1996, we have power to grant interest from the date on which the cause of action arose till the date of payment. The cause of action arose on the date of incident i.e., on _____. The claimant has submitted his claim form on _____. Hence, we award interest from _____ till the date of payment at 18% per annum.

Costs:

Each party is directed to pay its own costs.

For the reasons stated above we find on the above point that the claimant is entitled from the respondent insurance company a sum of Rs. _____ with interest at the rate of 18% p.a. from _____ till the date of payment.

In the result, we hereby declare and award and direct that the respondent Insurance Company shall pay to the claimant an amount of Rs._____ (_____) with interest at the rate of 18% per annum with effect from _____ till the date of payment.

Award passed accordingly.

The other Arbitrator, _____ has expressed that he will be passing a separate award and declined to sign on this award. So far, no communication is received from him. Hence, we are passing this award by majority. This Award is concurred by the Presiding Arbitrator and the Arbitrator _____, which is an Award of the majority of the Panel.

This AWARD is made and signed on this the _____th day of _____, 20____ at _____.

1. Sd/-

   _____

   Presiding Arbitrator

2. Sd/-

   _____

   Arbitrator

Place: _____

Dated: _____

APPENDIX OF EVIDENCE

Witnesses examined for the Claimant: -

(1) Mr. _____. Surveyor.

Witnesses examined for the Respondent: -

(1) Mr. _____ Surveyor.

(2) Ms. _____., Manager of the respondent,

DOCUMENTS MARKED

For Claimant:

Exhibits A-1 to A-11 annexed with description to this Award.

For Respondent:

Exhibits B-1 to B-13 annexed with description to this Award.

1.

Presiding Arbitrator

2.

Arbitrator

Place:_____

Dated: _____

LESSON ROUND-UP

- The key requirement of the contents of the award that are prescribed in the Arbitration and Conciliation Act, 1996 is that the award should be a well-reasoned and speaking award including reference to a Settlement if arrived at in terms of Section 30.
- The object of providing for interest on an award is to compensate the damage resulting from the fact that on default by one party, the opposite party is not deprived of the deployment of the money and the returns that could have been earned from the invested sum.
- A domestic Award is enforceable as a decree passed by a Civil Court, after the period provided for challenging the same expire, and in case it is challenged, after the challenge fails under Section 34. Foreign Awards cannot be challenged in India. It is, therefore, quite clear that an application under Section 34 is not at all contemplated insofar as a foreign award is concerned.
- Enforcement of Award can be classified into two categories i.e. Enforcement of Domestic Award and Enforcement of Foreign Award.
- It is well settled that preferring of an appeal does not operate as stay on the decree or order appealed against or on the proceedings in the Court. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same.
- The Supreme Court in the case of Chiranji Lal (D) by Lrs., v. Hari Das (D) by Lr held that the question as to whether the award is required to be stamped or registered is relevant only when the parties would file the award for its enforcement under Section 36 of the Arbitration and Conciliation Act,1996
- The mechanism of executing a foreign award in India is governed by the Code of Civil Procedure, 1908. Section 2(6)1 of the Code of Civil Procedure, 1908 defines a 'Foreign Judgment' as the judgment passed by a foreign Court.
- According to section 31 of Arbitration and Conciliation Act, 1996, an award should, be in writing, contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award, state the date and the place of arbitration; and be signed by all of the arbitrators or contain an explanation for any missing signature. The Act provides that after passing the award, a signed copy of the award shall be delivered to each party.
- Part-II of the Arbitration and Conciliation Act, 1996 deals with enforcement of Foreign awards. Chapter I of Part II of the Act deals with Sections 44 to 52 for any award passed under New York Convention.
- Since the decisions rendered by Arbitral Tribunals are not subjected to appeal before any Courts, it becomes important that these quasi-judicial bodies do not digress from the pious task of imparting justice.

GLOSSARY

Two Tier Arbitration: It means in case an award given by a sole arbitrator it would be appealed to an Arbitral Tribunal consisting of a panel of three arbitrators or a higher odd number.

Interim award –It is an award made by a tribunal during the pendency of the matter. The jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal. The Interim Award does not end the proceedings and Arbitration Proceedings comes to end after passing of Final Award.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Define Award. What are the essential ingredients of an award?
2. Explain Domestic Award and Foreign Award.
3. Draft Specimen format for Plaint under CPC.
4. Briefly explain the different Types of award.
5. Explain the Validity of an Arbitral award.
6. Explain the relevance of Judicial non-interference in International Commercial Arbitration as per Indian Laws.
8. Draft a Specimen of Arbitration Award. Assume necessary facts.

LIST OF FURTHER READINGS

Handbook on Arbitration: A Practical guide for Professionals

– **ICSI Publication**

OTHER REFERENCES (Including Websites/Video Links)

- https://www.ciarb.org/media/4206/drafting-arbitral-awards-part-i-_-general-2021.pdf

Challenge to Award and Appeals

Lesson 6

KEY CONCEPTS

■ Arbitral Award ■ Public Policy ■ Period of Challenge ■ Recourse against Arbitral Award ■ Appeals including Second Appeal

Learning Objectives

To understand:

- Time Period of Challenge
- Grounds of Challenge of Award
- Court's power to modify award
- Drafting of petition for setting aside an Arbitral Award.
- Appealable Orders
- Appeal against the Interim order of the court and tribunal
- Appeal against refusal to set aside Arbitral Awards

Lesson Outline

- Introduction
- Grounds of Challenge and Powers of Court to Modify the Award
- Arbitral Award in Conflict with Public Policy of India
- Time Period of Challenge
- Challenge of an Arbitral Award
- Essential Elements of an Arbitral Award
- Recourse against Arbitral Award-Analysis
- Differentiation of Appeal under CPC and Application under the Arbitration
- Pre Conditions for Invoking Section 34(4) of the Arbitration and Conciliation Act, 1996
- Indian Stamp Act, 1899
- Challenge of Foreign Awards in India
- Difference between Challenge of Domestic Award and Foreign Award
- Drafting of Petition for Setting Aside an Arbitral Award
- Appeals (Section 37)
- Whether a Second Appeal lies from an order passed in Appeal under Section 37?
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Indian Contract Act, 1872
- Limitation Act 1963
- General Clauses Act, 1897
- Indian Stamp Act, 1899

PART A: RECOURSE AGAINST ARBITRAL AWARD (SECTION 34)

INTRODUCTION

An arbitral award is an adjudication of a dispute of the case by an Arbitral Tribunal. Once the disputing parties are heard, the Arbitral Tribunal may arrive at a decision which is known as an award and is analogous to a judgment in a Court of Law and that award has to be enforced under the Code of Civil Procedure,1908 in the manner as if it was a Decree of Court. In *Leela Hotels Limited v. Housing and Urban Development Corporation Limited*[1], the Supreme Court held that an award would tantamount[2] to a decree. Once the award is given, the proceedings are terminated and the award becomes binding upon parties. After issuing the arbitral award, if any corrections are required to the award it should be brought to the notice of the Arbitral Tribunal as prescribed under Section 33 of the Arbitration and Conciliation Act, 1996 which provides a specific procedure for correction of clerical, or typographical errors in the award by the Arbitral Tribunal and requires parties to apply for correction of such error within 30 days from the receipt of the award (*State of Arunachal Pradesh v. Damani Construction*[3]). Once the proceedings are terminated, if either of the party is aggrieved by such an award, they can approach the Courts as mandated by Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award. Section 34 provides the basis on which an arbitral award can be set aside and if an award is declared to be void then the whole purpose and object of the Act gets nullified.

The arbitral awards cannot be interfered with unlike the first appeals. On the merits of the award the Court has no power to interfere. The Court either can uphold or reject the award or the Court can remand the award to the arbitrator for the reconsideration. Section 34 provides limited grounds to challenge an arbitral award which are narrated in the succeeding paragraphs.

GROUNDS OF CHALLENGE AND POWERS OF COURT TO MODIFY THE AWARD

Section 34: Application for setting aside arbitral award – (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that-

(i) a party was under some incapacity, or

1. 2012 (1) SCC 302.

2. Tantamount comes from the Anglo-French phrase tant amunter, meaning 'to amount to as much'.

This phrase comes from the Old French tant, meaning 'so much 'or 'as much' and amounter, meaning 'to ascend'.

3. (2007) 10 SCC 742.

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1 – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) It is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2– For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

Furnishing of Proof

While setting aside award in accordance with sub-section (2) and sub-section (3) the party making the application must furnish proof that:

(i) A party was under some incapacity. Sections 10, 11, and 12 of the Indian Contract Act, 1872 are relevant here. One of the most essential elements of a valid contract is the competence of the parties to make a contract. Section 11 of the Indian Contract Act, 1872 defines the capacity to contract of a person on three aspects i.e attaining the age of majority, being of sound mind, and not disqualified from entering into a contract by any law. Incapacity includes insolvency (*K. Kishan v. Vijay Nirman Company Pvt. Ltd*). The Hon'ble Supreme Court further expanded the scope of the word 'Dispute' and held that the pendency of a petition under Section 34 of the Arbitration and Conciliation Act, 1996 constitutes a 'Dispute' under the IBC[4]. Therefore, the IBC cannot be invoked to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of an operational debt where an arbitral award has been passed against the debtor, though it has not yet been finally adjudicated upon due to a challenge under Section 34 of the Arbitration and Conciliation Act, 1996. The filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award, at least till the final adjudicatory process under Sections 34 and 37 has been completed.

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force.

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; Principles of Natural Justice are identified with the two constituents of a fair hearing, which are the rule against bias (*nemo judex in causa sua[5]),* and (*audi alteram partem[6]).*

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(v) The composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part.

(vi) Court finds that, the subject-matter of the dispute is not capable of settlement by arbitration under the Law for the time being in force. Well recognized example is non-arbitrable disputes.

Public Policy under Section 34

The Public Policy

The arbitral award is in conflict with the public policy of India. Public policy implies the violation of confidentiality under Section 75 of the Arbitration and Conciliation Act, 1996. Confidentiality shall extend also to the settlement

4. Insolvency and Bankruptcy Code,2016

5. no man can be a judge in his own cause.

6. the right to a fair hearing.

agreement, except where its disclosures are necessary for the purposes of implementation and enforcement, and also violation of admissibility of evidence under Section 81 of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court held that the Public Policy of India refers to the Law in force in India whether State Law or Central Law. (*M/S Lion Engineering Consultants v. State of M.P and Ors*)[7].

The Supreme Court in *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd*, interpreted the term Public Policy. However, the Supreme Court giving a broader meaning to the term '*Public Policy*' in *ONGC Ltd v. Saw Pipes Ltd* explaining the concept of "Public Policy of India" said that it has not been defined in the Arbitration and Conciliation Act, 1996, is vague and is likely to be interpreted widely or narrowly depending on the context in which it is being used.

Public Policy means:

- Fundamental policy of Indian law,
- The interest of India,
- Justice or Morality,
- and that the award is patently illegal.

In the Saw Pipes case (Supra), the scope of public policy was widened to include challenge of award when such an award is patently illegal. Some arbitrators have viewed the judgment in the Saw Pipes case with concern. The main concern on the judgment is that it sets the clock back to the same position that existed before the Arbitration and Conciliation Act, 1996, and it increases the scope of judicial intervention in challenging arbitral awards[8]. It was also criticized on the grounds that giving a wider meaning to the term 'Public Policy' was wrong, when the trend in international commercial arbitration is to reduce the scope and extent of 'public policy'[9]. Jurists and experts have opined that unless the Courts themselves decide not to interfere, the Arbitration and Conciliation Act, 1996, would meet the same fate as the Arbitration Act, 1940[10]. The Parliament, when enacting the Arbitration and Conciliation Act, 1996 and following the UNCITRAL Model Law, did not introduce 'patent illegality' as a ground for setting aside an award. The Supreme Court cannot introduce the same through the concept of 'public policy of India'[11]. However whatever is the law laid by the Supreme Court is binding on the people of India. The above analysis is only a presentation of a constructive criticism. There are other views also which in fact support this judgment as the arbitral awards must be in proper frame and form.

ARBITRAL AWARD IN CONFLICT WITH PUBLIC POLICY OF INDIA – SECTION 34(2)(B)(II)

The term public policy is not defined in the Arbitration and Conciliation Act, 1996, but the expression 'public policy' can be referred to as the principles and standards constituting the general policy of the State established by the Constitution and the existing laws of the country and also principles of justice and morality. Further if the award is obtained by fraud or corruption, or when the award is unfair, unreasonable and shocks the conscience of the Court such an award can be designated as an award which is against public policy. In *Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd*, the Supreme Court observed that the phrase 'Public Policy of India' used in Section 34 should be given wider meaning like the phrase connotes that the matter which concerns public good and public interest or injurious or harmful to public good, which may vary from time to time. In *Union of India v. G.S. Atwal and Co*, by an express agreement between the parties, arbitrability of the claim for refund

7. (2018) 16 SCC 758.

8. Ashok H Desai, 'Challenges to an award – use and abuse', ICA's Arbitration Quarterly, ICA, 2006, vol. XLI/No.2, p 4. Ashok H Desai is a Senior Advocate of the Supreme Court of India.

9. Pravin H Parekh, 'Public Policy as a ground for setting aside the award', ICA's Arbitration Quarterly, ICA, 2005, vol. XL/No.2, p 19.

10. Inaugural address by Justice Santosh N Hedge, Judge, Supreme Court of India, on Indian Council of Arbitration's National Conference on 'Arbitrating Commercial and Construction Contracts' held at Hotel Inter-Continental, New Delhi, December 6, 2003.

11. Supra, note 41 at page19

of hire charges of equipment loaned was referred to arbitration. After the arbitrator entered into the reference, the claim was made that he enlarged the dispute unilaterally without any agreement by the appellant. This enlargement of the scope of the arbitration was objected by the parties. Nevertheless, the arbitrator continued the proceedings and parties had no choice but to participate in the proceedings. The Supreme Court held that just because the parties went on participating in the proceedings inspite of raising concerns does not amount to acquiescence and hence the award was set aside as the arbitrator has misdirected himself and committed legal misconduct which vitiated the entire award.

The Arbitration and Conciliation (Amendment) Act, 2021 which has come into force w.e.f 4/11/2020 relating to Section 36 widens the scope of public policy and the arbitrators are expected to maintain high rate of efficiency and impeccable integrity. The ordinance empowers the Courts to grant unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement or contract or making of the arbitral award are induced by fraud or corruption. As a justice process is in the private hands and the arbitrators are *de-facto* judges, this judgment is very necessary in the present day scenario. Section 34(2)(3) provides that the application for setting aside the award should approach the Courts within 3 months from the date of receipt of Arbitral Award. Further, 30 days of condonation of the delay may be allowed by the Courts, if the parties show sufficient cause which prevented them from approaching the Court within the prescribed time.

TIME PERIOD OF CHALLENGE

The Limitation period to challenge Arbitral Award

The time limit prescribed under Section 34 to challenge an arbitration award is absolute and unextendable by the Court under Section 5 of the Limitation Act, 1963. *Simplex Infrastructure Limited v. Union of India*.The Arbitration and Conciliation Act 1996 provides for 3 months time to file application under Section 34 and also provides for delay condonation procedure and the use of phrase 'but not thereafter' makes it clear that extension cannot be beyond thirty days and therefore there can be no application of Section 5 of Limitation Act, 1963 in condoning the delay to file the application under Section 34 of the Arbitration and Conciliation Act, 1996.

The time period for challenging an award commences only upon its proper receipt *(The State of Maharashtra and Ors. v. ARK Builders Pvt. Ltd)*. Period of Limitation prescribed under Section 34(3) would start running only from the date of signed copy of award is delivered to/ received by the party making an application for setting aside the award u/s 34(1).

An award would be regarded as properly received only if it is delivered in the manner prescribed under Section 31 (5) which means when a "signed copy" has been delivered to the party. [*Anil Kumar Jinabhai Patel (D) thr. L.Rs. v. Pravinchandra Jinabhai Patel and Ors*]. The delivery of an award constitutes an important stage in the arbitral proceedings. The Supreme Court has held that "delivery of an arbitral award" is not a matter of formality but of substance; as it confers certain rights on the party. (*Union of India v. Tecco Trichy Engineers and Contractors*). The wording within three months from, indicates that, there is an ordinary rule that where statutes, while prescribing time period, uses the expression 'from', it is an indication that while computing the period so prescribed the rule would be to exclude the first and include the last day[12]. In this context Section 14 of the Limitation Act, 1963 is relevant to refer which contains the provisions pertaining to exclusion of time proceedings bona fide in Court without jurisdiction (*Oriental Insurance Co. Ltd. v. M/s Tejparas Associates and Exports Pvt. Ltd*). In this case the party filed an application under Section 34 at Jaipur but the same has been returned for the want of proper jurisdiction, then it is filed in the Court having proper jurisdiction. The Hon'ble Supreme Court held that Section 14 of Limitation Act, 1963 would be applicable to the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, subject to the condition that the application under Section 34 for first time was filed within time as stipulated under Section 34(3).

12. Section 9 of the General Clauses Act, 1897.

Continuous running of time. – Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues.

- In the case of *State of Himachal Pradesh and Ors. v. Himachal Techno Engineers and Ors*, the Supreme Court extended this principle to Section 34(3). Thus, the time period for filing an application under Section 34 would commence "a day after the receipt of the award by the party".
- The time in between, once the time has begun to run, no subsequent disability or inability to institute a suit or make an application would "stop it". This is a fundamental rule[13].
- Period of Limitation prescribed under Section 34(3) would start running only from the date of signed copy of award is delivered to/ received by the party making an application for setting aside the award u/s 34(1). (*The State of Maharashtra and Ors. v. ARK Builders Pvt. Ltd*[14]). So, after proper receipt of award, the time period for a challenge 'begins to run'. Apart from the exception of Section 33, it cannot be stopped[15].
- The last day, the time period under Section 34(3) expires after 'three months'. The rule of construction of this period would be to not treat this period as 90 days, but actual period of calendar month. Thus, the period would expire in the third month on the date corresponding to the date upon which the period starts. In days it may mean '90 days or 91 days or 92 days or 89 days'.
- A rule for computation is that in case the last day of the time period expired on a day when the Court is closed the proceedings will be instituted 'on the day when the court reopens' (Section 4 of the Limitation Act, 1963). However, the Supreme Court has held that the benefit of this rule cannot be taken to prefer an application under Section 34 after the expiry of the time period. (*Assam Urban Water supply and sew board. v. Subhash Projects and Marketing*).
- The proviso to Section 34(3): Additional 30 days, Section 34(3) provision enables the party to make an application after the expiry of three months upon demonstrating that the applicant was 'prevented by sufficient cause' from doing so. In *NTPC Ltd. v. Voith Hydro Joint Venture,*[16] the Apex Court held that, the affidavit merely indicates that the file was sent from one department to another, and does not provide any valid explanation for the delay. As such, not inclined to exercise discretion under Article 136 (SLP) of the Constitution of India in favour of the petitioner to interfere with the order passed by the High Court or the award passed by the Arbitral Tribunal.

  In such cases, the statute has conferred upon the Court discretion to entertain the application within a period of 30 days 'but not thereafter'. (*K. Kishan. v. Vijay Nirman Company Pvt. Ltd)*.
- To "prevent" means to thwart; to hinder or to stop. Thus, while 'time period' would never stop under any circumstances but certain circumstances may stop an applicant from making the application. If the Court found those circumstances constituted 'sufficient cause' it would permit the party to make the application (*Simplex Infrastructure Ltd. v. Union of India*) In this case the Supreme Court held that the statutory time limit to challenge an Arbitral Award has to be strictly adhered. Application under Section 37 of the Arbitration and Conciliation Act, 1996 was barred by limitation by following two judgments., (*Union of India v. Varindera Constructions Ltd*, and *N.V. International v. State of Assam and Ors*).The observation of the Supreme Court in these two judgments is that no appeal under the said Section can

13. Section 9 of the Limitation Act, 1963.

14. (2011) 4 SCC 616

15. Section 34(3)

16. Supreme Court of India, Petition(s) for Special Leave to Appeal (C) No(s).7312/2020 dated 22 September, 2020

be entertained by the Court beyond a maximum period of 120 days. As the Petitioner's appeal was filed after 128 days, the High Court was constrained to dismiss the same as barred by limitation.

CHALLENGE OF AN ARBITRAL AWARD

The grounds on which an award may be set aside are limited and pertain primarily to the procedure of the arbitration and principles of natural justice. A crucial amendment was the inclusion of specific wording in relation to the scope of the public policy challenge- perhaps the most abused provision in the Arbitration and Conciliation Act, 1996. The amendments clarify that an award will be in conflict with the public policy of India only if: (i) the making of the award was induced or affected by fraud or corruption or was in violation of confidentiality provisions or admissibility of evidence provisions in the Act; (ii) it is in conflict with the most basic notions of morality or justice; or (iii) it is in contravention with the fundamental policy of Indian Law. Specifically, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute. In case of challenge of an arbitral award, if the arbitrator has applied his mind to the matter before him, the Court cannot re-appraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (The Supreme Court of India in *Navodaya Mass Entertainment Ltd. v. J.M.Combines*).

In the cases of the *Bharat Coking Coal Ltd. v. L.K. Ahuja*, *Ravindra and Associates v. Union of India*, *Madnani Construction Corporation Private Limited v. Union of India and Ors*, *Associated Construction v. Pawanhans Helicopters Pvt. Limited*, and *Satna Stone and Lime Company Ltd MP and Ors. v. Union of India and Ors,* it was held by the Supreme Court that once the arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail.

ESSENTIAL ELEMENTS OF ARBITRAL AWARD

The following are the essential requirements of an arbitration award as per Section 31 of the Arbitration Conciliation Act 1996:

An award should,

(i) be in writing;

(ii) contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award;

(iii) state the date and the place of arbitration; and

(iv) be signed by all of the arbitrators or contain an explanation for any missing signature. The Act provides that after passing the award, a signed copy of the award shall be delivered to each party.

When one of the parties challenge the award under Section 34 of the Act, now the question arises whether Arbitrator must have Knowledge about Section 34 of the Act-The Answer will be '*Yes'.*

When the Arbitrator had found to have not travelled outside his jurisdiction, the Supreme Court held that, there was no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. (*Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*[17]).

When the arbitrator has knowledge about Section 34 since the inception of arbitration proceedings, will deal with the issues with due care and caution so that the award will not attract and give scope for Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of arbitration award, and as such the arbitrator should be well versed with the provisions of Section 34 of Arbitration and Conciliation Act, 1996. It saves the Court time and pending cases before Courts.

17. AIR 2012 SC 2829

RECOURSE AGAINST ARBITRAL AWARD- ANALYSIS

There is no appellate system in Alternate Dispute Resolution mechanisms because in most of the mechanisms parties settle the disputes by themselves. In case of arbitration if the parties settle the issue under Section 30, there is no mechanism as to revert the same or change the same, but if the award is delivered by the Arbitral Tribunal, such an Award can be set aside under Section 34. This relief is available only to the domestic awards (*Pandey and Co. Builders Pvt. Ltd. v. State Bank of Bihar and Ors*[18]). Apart from exercising the jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 (Setting aside of the award), the District Court can entertain appeals against the decision of Arbitral Tribunal made under Section 16(2) or (3) on jurisdiction under Section 17 on granting of interim measures. Against these orders of the Court no second appeal lies. Under Section 17 of the Arbitration and Conciliation Act, 1996 the power of the arbitrator is a limited one. It cannot issue any direction which would go beyond the arbitration agreement. The award of the arbitrator is not required to be made a 'Rule of Court' and is enforceable on its own force. An interim order must relate to the protection of subject matter of the dispute and the order may be addressed only to a party to the arbitration and not to other parties, *(M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt Ltd).*While proceedings are pending before him the arbitrator can pass interim orders under Section 17. (*Gail India Limited v. Bal Kishan Agarwal Glass Industries Limited*[19]*).* Applications under Section 34 of the Arbitration and Conciliation Act are summary proceedings with provision for objections by the respondent- defendant, followed by an opportunity to the applicant to "prove" the existence of any ground under Section 34(2).The applicant is permitted to file affidavits of his witnesses in proof.

A corresponding opportunity is given to the respondent-defendant to place his evidence by affidavit. Where the case so warrants, the Court permits cross-examination of the persons swearing to the affidavit. Thereafter, the Court hears arguments and/or receives written submissions and decides the matter. The Apex Court of India in the case of *Fiza Developers and Inter-Trade P. Ltd. v. AMCI (I) Pvt. Ltd and Ors*[20]*,* while discussing all the whims of Section 34 of the Arbitration and Conciliation Act, 1996 held that, '*It is difficult to envisage proceedings u/s34 of the Act as full- fledged regular civil suits under the Code of Civil Procedure. Application u/s 34 of the Act are summary proceedings'.* The object of Section 34(5) and (6) is the requirement that an application under Section 34 be disposed of expeditiously within a period of one year from the date of service of notice. *(The State of Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti*[21]*).*

This is of course the routine procedure. The Court may vary the said procedure, depending upon the facts of any particular case or the local rules. The levels of Appealable Orders are given as follows:

(i) Refusal to refer the parties to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996;

(ii) A grant or refusal to grant an interim measure under Section 9 of the Arbitration and Conciliation Act, 1996;

(iii) Setting aside or refusing to set aside an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996;

(iv) A grant of the plea of a party by the Arbitral Tribunal that it does not have jurisdiction;

(v) A grant of the plea of a party by the Arbitral Tribunal that it is exceeding the scope of its authority; and

(vi) A grant or refusal to grant an interim measure by the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996.

18. AIR 2007 SC 465.

19. 2008 (8) SCC 161.

20. (2009) 17 SCC 796.

21. (2018) 9 SCC 472 .

No second appeal shall automatically lie against an order passed in appeal under Section 37 of the Act. However, it is clarified that nothing in Section 37 shall affect or take away a right to seek special leave to appeal to the Supreme Court under Article 136 of the Constitution of India against an order passed in appeal under Section 37.

DIFFERENTIATION OF APPEAL UNDER CPC AND APPLICATION UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Appeal as per Section 96 of the Code of Civil Procedure, 1908 provides that an aggrieved party to any decree, which was passed by a Court while exercising its original jurisdiction, is conferred with at least one right to appeal to a higher authority designated for this purpose. The Section further provides that an appeal shall lie from a decree passed by any Court exercising original jurisdiction to the authorised appellate Courts, except where expressly prohibited. A combined reading of Sections 2(2), 2(9), & 96 of the CPC indicates that a regular first appeal may/may not be maintainable against certain adjudications.

PRE-CONDITIONS FOR INVOKING SECTION 34(4) OF THE ARBITRATION AND CONCILIATION ACT, 1996

(i) Under Section 34(4), the application is mandatory before the award is set aside by the Court. Once the main proceedings under Section 34 are disposed of, the Court becomes functus officio. *(Kinnari Mullik and Ors.v Ghanshyam Das Damani[22]).*

(ii) If the party fails to request the Court to defer the Section 34 proceedings before the award is formally set aside, then the party is precluded from moving an application under Section 34(4).

(iii) The application under Section 34(4) must be in writing, by a party to the arbitration proceedings.

(iv) The power under Section 34(4) cannot be exercised by the Court *suo motu*. (*Radha Chemicals v. Union of India* and *Kinnari Mullick and Ors v. Ghanshyam Das Damani*[23]).The Supreme Court held that the Court while deciding a Section 34 petition has no jurisdiction to remand the matter to the arbitrator for a fresh decision. Further, it was held that the discretion of the Court under Section 34(4) to defer the proceedings for specific purpose is limited and can be invoked only upon request by the party prior to setting side of the award.

(v) On receipt of an application under Section 34 (4) (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. An arbitral tribunal cannot be allowed to review the award (or the reasoning there under) on merits or rewrite the award under the guise of being granted with an opportunity to eliminate the grounds for setting aside the award under Section 34(4) of the Arbitration and Conciliation Act, 1996.

(vi) That the power under Section 34(4) of the Arbitration and Conciliation Act, 1996 could be exercised where the Arbitral Tribunal overlooked a particular claim on which the parties led evidence and addressed arguments (*Kritika Nagpal v Geojit Financial Services Ltd.).*

The Supreme Court recently threw some light on this issue in (*Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd)*, while dealing with an award which it found to be unintelligible and inadequately reasoned. The Court may give an opportunity to the arbitral tribunal to eliminate the grounds under Section 34(4) of the Arbitration and Conciliation Act 1996.

22. (2018) 11 SCC 328

23. Supra

INDIAN STAMP ACT, 1899

Validity of an Unstamped/Insufficiently Stamped Agreement under the Arbitration and Conciliation Act, 1996.

As per Section 34 and 36, the question is whether the award requiring stamping and registration falls within the ambit of Section 47 of Code of Civil Procedure and is not covered by Section 34 of Arbitration and Conciliation Act 1996. (*M. Anasuya Devi and Ors. v. M.Manik Reddy and Ors*[24].)

(i) The Court should before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

(ii) If the document is found to be not duly stamped, Section 35 of Stamp Act, 1899 bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The Court should then proceed to impound the document under Section 33 of the Stamp Act, 1899 and follow the procedure under Section 35 and 38 of the Stamp Act, 1899. (*Jayaraj Devidas v. Nilesh Shantilal Tank*). The Supreme Court in (*SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd*[25]) held that in regard to Section 35 of the Stamp Act, 1899 unless the stamp duty and penalty due in respect of the instrument is paid, the Court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act, 1899), and the defect with reference to deficit stamp is cured, the Court may treat the document as duly stamped and valid.

(iv) Once the document is found to be duly stamped, the Court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the Court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, the Court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property.

In *N. N. Global Mercantile Private Limited v. M/s Indo Unique Flame Ltd. Ors*. the court observed that exercise of power coupled with duty under Section 33 of the Stamp Act cannot be accused of judicial interference in contravention to Section 5 of the Arbitration and Conciliation Act (the Act) and further that it shall not be confused with examination whether an arbitration agreement or arbitration clause in the said instrument, exists so as to appoint arbitrator in invocation of the power under Section 11(6) of the Act. In that view of the matter, the provisions under Section 11(6A) or 16 of the Act cannot act as a rider for the exercise of the said power under Section 33 of the Stamp Act.

The Bar under Section 35 of the Stamp Act on admission of instruments not duly stamped in evidence, as is evident from proviso (a) to it, is not permanent and is curable by following procedures provided thereunder and making an endorsement as provided under Section 42(1) of the Stamp Act.

In the above matter, it can therefore be said that Arbitration Agreement may be taken as valid by the courts after Payment of appropriate duty and that should not be taken as Judicial Intervention.

24. 2003 (8) SCC 565.

25. 2011 (4) Arb.L.R.265(S.C.)

CHALLENGE OF FOREIGN AWARDS IN INDIA

The question that arises is whether a foreign award can be challenged under Section 34 of the Act. Part II of the Act of 1996 deals with the enforcement of Certain Foreign Awards. It has two Chapters. Under Chapter I, Sections 44 to 50, deal with New York Convention Awards and under Chapter II, Sections 53 to 60, deal with Geneva Convention Awards. The provisions of Part II of the Act give effect to both the New York Convention and the Geneva Convention. It is clear that part II is different from Part I of the Act. Part I relates to arbitration in general and to domestic awards. Part II pertains to 'enforcement of certain foreign Awards'.

The Act provides for a direct challenge of a domestic Award under Section 34. A domestic Award is enforceable as a decree passed by a Civil Court, after the cooling period provided for challenging the same expires and in case it is challenged, after the challenge fails under Section 34. The Act, provides different remedies to persons, against whom domestic award is made and person against whom foreign award is made. A person against whom a domestic Award is made, has to immediately approach the Court for challenging the same by making an application under Section 34 of the Act. Otherwise the person in whose favour the Award has been made can execute the same as a decree. On the other hand, a person against whom a foreign Award has been made cannot be challenged in India.

DIFFERENCE BETWEEN CHALLENGE OF DOMESTIC AWARD AND FOREIGN AWARD

The Bombay High Court in the case of (*Jindal Drugs Limited Mumbay. v. Noy Vallesina Engineering SPA, Italy and Ors*[26]) observed as follows:

"It appears from the reading of the Act that in so far as the challenge and enforceability is concerned, there are different schemes for a domestic Award and a foreign Award".

The Act provides for a direct challenge to a domestic Award under Section 34. A domestic Award is enforceable as a decree passed by a Civil Court, after the period provided for challenging the same expire, and in case it is challenged, after the challenge fails under Section 34. Foreign Awards cannot be challenged in India. It is, therefore, quite clear that an application under Section 34 is not at all contemplated insofar as a foreign award is concerned.

CASE LAWS

In terms of Challenging Foreign Arbitral Award in Indian Courts is concerned there have been different views of the Supreme Court of India. (*Bhatia International v. Bulk Trading S.A. and Ors*).

The Supreme Court in this decision observed that, unless the parties expressly or impliedly agreed to the contrary, the Indian Courts have jurisdiction with respect to foreign seated arbitration akin to decisions in India under Part I of the Arbitration and Conciliation Act, 1996. This decision was unequivocally overruled by the Supreme Court of India. (*Bharat Aluminium Company. v. Kaiser Aluminium Technical Services Inc*). Part I of the Arbitration and Conciliation Act, 1996 does not apply to foreign seated arbitrations.

Bharat Aluminium Company. v. Kaiser Aluminum Technical Services Inc.

Facts:

The Appellants had entered into an agreement with the respondents whereby the respondents were required to supply and install computer-based system at one of the appellant premises. The agreement was governed by the prevailing law of India but it contained an arbitration clause that stated that any dispute that may arise in future shall be governed by the English Arbitration Law and the venue shall be London.

26. 2002 (2) Arb. LR 323 (Bombay)

When the dispute arose between appellants and the respondents with respect to performance of the agreement and then the matter was referred to arbitration, the proceeding was held in England and two awards were passed. Aggrieved by the decision of the Arbitral Tribunal, the appellants filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, which was refused by the District Court and the High Court of Chhattisgarh and finally the appellants approached the Supreme Court of India.

Held: The Supreme Court of India decided as follows:

(i) Part I and Part II are applicable to different fields. Part I of the Act of 1996 is applicable to all domestic awards, including to awards where both the parties to the dispute are Foreign Parties but the proceedings are held in India, or International Commercial Arbitration held in India.

(ii) Part II of the Act of 1996 applies to enforcement of Foreign Awards in India.

(iii) The principle of territoriality in Model Law is adopted in Act of 1996 *Mutatis Mutandis*.

(iv) Section 48 of Part II does not confer jurisdiction on two courts to annul the award and is provided only to provide alternative to parties to challenge the award in case, Law of the country where seat of arbitration is located has no provision for challenge of the award.

(v) Interim Relief u/s.9 can be awarded in case seat of arbitration in International commercial arbitration in India and thus intervention u/s.9 can be sought only with respect to domestic awards. Part II has no provision that grants interim relief leading to the logical inference that Indian Court cannot pass interim orders against award delivered outside India.

(vi) The Arbitral Awards awarded in International Commercial Arbitration with seat of Arbitration outside India shall be subject to the Jurisdiction of Indian Courts only when they are sought to be enforced in India in accordance with Part II of the Act.

(vii) Part I of the Act shall not be applicable to non-convention arbitral awards. The definition of Foreign Award is limited to New York Convention and Geneva Convention and hence the Act does not provide for enforcement of non-convention Arbitral awards.

Principle: It would be against the Provisions of the Arbitration and Conciliation Act, 1996, to interfere with the Foreign Arbitral Award as the Act of 1996 provides for challenging only Domestic Arbitral Awards under Section 34. The above decision makes it clear that Foreign Arbitral Awards cannot be challenged in Indian Courts as Section 34 of the Arbitration and Conciliation Act, 1996 provides for setting aside of Domestic Arbitral Awards only.

DRAFTING OF PETITION FOR SETTING ASIDE AN ARBITRAL AWARD

IN THE COURT OF DISTRICT JUDGE, COIMBATORE

Regular Suit No. _____of 2023

XYZ .....

Petitioner/Applicant;

vs.

ABC .....

Respondent/Opposite Party.

MOST RESPECTFULLY SHOWETH:

1. The Petitioner is a builder/developer and the original Claimant in the arbitration proceedings, which are the subject matter of the present Petition.
2. The Respondent society is an allottee and a lessee of a non-agricultural land admeasuring _____ sq. metres. situated on _____ (hereinafter "the said property"). The said allotted land is a Class II land owned by the Collector, Mumbai for the use of residential purposes and any development of the same was to be undertaken with the permission of the Collector. The said property of the Respondent Society comprises of two Buildings viz. Building 'A' occupied by its _____ members and Building 'B' occupied by its _____ members.
3. The present Petition challenges the Arbitral Award dated _____ ("the Impugned Award"), whereby the Learned Arbitrator has not only rejected the Petitioner's claim for specific performance but has also refused to consider the Petitioner's claim for damages. The Petitioner has challenged the Impugned Award interalia on the ground that the same is contrary to settled law and thus, in violation of the fundamental policy of Indian law. The Learned Arbitrator, by passing the Impugned Award, has in effect held that all development agreements entered into by societies are per se construction contracts and therefore, incapable of specific performance.

The petition/application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of the award dated: — — —, served on—, passed by [Sole Arbitrator/Arbitral Tribunal Comprising .....] in the case of *XYZ* vs. *ABC*, etc.

Valuation:

Court Fee:

The petitioner/applicant above named begs to state as under:—

1. That.... [Brief facts of the case inclusive of grounds of challenge in paragraph wise form]
2. That.....
3. That this Hon'ble Court has jurisdiction to hear this suit as the cause of action has accrued within the territorial jurisdiction of this Court. The valuation of the petition is Rs..... Upon which a court Fee of Rs..... is being paid herewith.

PRAYER

Wherefore, the petitioner/applicant prays for the following reliefs:

The award dated _____ passed by the learned tribunal may be set aside for the facts and Circumstances stated to in the present application/petition.

OR

Remit the matter to the arbitrator for reconsideration and adjudication in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

This Court may be further pleased to grant such other relief as it may deem just and proper in the facts and circumstances of this case. Award the cost of these proceedings.

Place:

Dated:

Applicant.

Through Advocate

VERIFICATION

I, _____ , the petitioner/applicant above named do hereby verify that the contents of paragraphs .... to. .... are true to my personal knowledge, while those of paragraphs. .... to ..... are based on legal advice and records.

Place:

Dated:

Applicant

CASE STUDIES

CASE STUDY ON CHALLENGING AWARD

Adarsh Kumar Khera (Petitioner) vs Kewal Kishan Khera And Ors. (Respondents) on 16 January, 2019

Facts

A petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('The Act') was filed challenging the arbitral Awards dated 13th July, 2007, 12th May, 2007 and 28th May, 2007. There is also a fourth Award dated 8th June, 2007 which was also passed by the learned Sole Arbitrator.

Disputes have arisen between three brothers namely. The three brothers were engaged in joint business in three partnership firms. The shares of the brothers vary in each of the firms. They have entered into an arbitration agreement on 28th February, 2007.

The Arbitrator entered reference and passed four Awards, Award No.1 dated 12th May, 2007, Award No.2 dated 28th May, 2007, Award No.3 dated 8th June, 2007 and Award No. 4 dated 13th July, 2007. Some other documents including a draft MOU were also drawn up by the Arbitrator but the said documents are not admitted by some of the parties.

The pleader Appearing for the Petitioner submitted that the third Award was not in the knowledge of the Petitioner at the time of filing of the present petition. It is submitted that the shares of the parties have also been wrongly determined.

Learned counsel for Respondent No.2 submitted that his client also has objections to all the Awards which have been passed and thus seeks that the entire dispute between the parties may be decided afresh.

Decision

The Court has heard the submissions on behalf of the parties. A perusal of the various Awards passed by the learned Arbitrator shows that the Arbitrator has decided the matter simply on the basis of the statement of claims made by all the parties. Though the Arbitrator is not bound by the strict provisions of the CPC, each of the parties ought to have been given an opportunity to respond to the case set up by the other, which is a basic feature in any arbitration proceedings. The Respondents submit that even though some properties may be in the name of the Petitioner, or his family members, the same have been purchased from the profits earned by the common businesses. This contention is disputed by learned counsel for the Petitioner, who has objected to the inclusion of the properties which belong to either him and his wife/son.

The question as to which of the properties need to be considered as properties of the firms. On this issue, the learned Arbitrator, after hearing the parties, would have to adjudicate the shares of each of the partners. This has clearly not been done by the learned Arbitrator.

All parties agree that the four Awards dated 13th July, 2007, 12th May, 2007, 28th May, 2007 and 8th June, 2007 be set aside. The said Awards are accordingly set aside.

The learned Arbitrator would be free to determine as to which of the properties is to be included in the common pool for being divided, the valuation of all movable/immovable assets of the firms, liabilities of the firms and adjustments to the given, the share of each of the parties, the manner of sale of any of the properties including the market rates thereof, the manner of disbursement of the various amounts due to the respective parties and all other issues which may arise during the course of the arbitration proceedings.

Owing to the age of all the brothers and considering the fact that this petition has remained pending before this Court since 2007, it is directed that the learned Arbitrator would endeavour to conclude the proceedings within a period of 6 months from the date of filing of claims by all the parties.

The arbitral award was set aside since it was made without giving the parties a chance to be heard, it was deemed void, and both parties wanted it overturned.

PART B: APPEALS (SECTION 37)

APPEALS UNDER SECTION 37

Arbitration is a legitimate strategy, which happens outside the Courts, and at the same time results in a last and lawfully binding decision like a Court judgment. Arbitration is a strategy for addressing dispute areas, which can give a speedy, cost effective, confidential, reasonable and best solution for a dispute. It includes the adjudication of the dispute by at least one free outsider instead of Court adjudication. The outsiders, called arbitrators, are named by or for the benefit of the parties in dispute.

The purpose of this part is to discuss and analyse the provisions related to appeal under the Arbitration and Conciliation Act, 1996 and amendments thereto. The relevance and importance of Arbitration and Conciliation in the Indian legal scenario in the past two decades is undisputed, an ever-evolving field, arbitration even after decades remain a riveting subject to discuss and deliberate upon. However the arbitral award may not be palatable to both the parties equally as it is not a win-win situation. Hence appeals are provided in the Arbitration and Conciliation Act, 1996 to redress the grievances of the parties as the judicial process of adjudication is shifted from the Courts into the hands of agreed third and private parties.

Section 37. Appealable orders – (1) Not withstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An Appeal shall also lie to a Court from an order of the Arbitral Tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

WHETHER A SECOND APPEAL LIES FROM AN ORDER PASSED IN APPEAL UNDER SECTION 37?

Sub-section 3 provides that no further appeal can be made to any Courts having same jurisdictions, larger benches of the Courts having same jurisdiction, or with the Courts having superior jurisdiction, against the order passed in an appeal under this Section. However, an appeal can be made to the Supreme Court only if a certificate under Article 133 of the Constitution of India is granted by the Appellate High Court. But if the Hon'ble

High Court refuses to grant such a certificate, an appeal can be preferred to the Hon'ble Supreme Court, under Article 136 of the Constitution of India, as a special leave to appeal.

It is to be noted that the expression 'Second Appeal' used in this Section means a further appeal from an order passed in an appeal under this Section and not an appeal under Section 100 of the Code of Civil Procedure, 1908.

CASE STUDY

In Nirma Ltd. v. Lurgi Lentjes Energietechnik GMBH and Ors, following the decision in *Shyam Sunder Agarwal and Co. v. Union of India*[27], a two-judge Bench of the Supreme Court held that merely because a second appeal against the appellate order is barred by the provisions of Section 37(3) of Arbitration and Conciliation Act, 1996 the remedy of revision under Section 115 of the Code of Civil Procedure, 1908 does not cease to be available to the petitioner.

In *I.T.I. Ltd. v. Siemens Public Communications Network Ltd*[28], it was held that although no second appeal lies against an appellate order passed by a Court under Section 37, a revision of such an order lies under Section 115 of the Code of Civil Procedure, 1908. An appeal can be preferred to the Supreme Court against an appellate order passed under Section 37 of the Arbitration and Conciliation Act, 1996. If the Appellate Court is a High Court, an application can be made for a certificate under Article 133 of the Constitution of India and if the certificate is granted by the High Court, an appeal can be preferred to the Supreme Court. But if the High Court refuses to grant such a certificate, an appeal can be preferred to Supreme Court, under Article 136 of the Constitution of India, as a special leave to appeal. No writ petition lies against an arbitral award.

In M. Moideen Kutty v. Divisional Forest Officer Nilambur and Ors, it was held in the High Court of Kerala at Ernakulam that as an arbitrator being a private forum agreed upon by the parties, no writ lies against him or his award. The only remedy is what has been provided in the Arbitration and Conciliation Act, 1996.

What is the period of limitation for preferring an appeal under Section 37 of the Arbitration and Conciliation Act, 1996?

Hon'ble High Courts Perspective on Limitation Period for Section 37 Appeal:

The Bombay High Court in the matter of *ONGC Limited v. Jagson International Limited*[29], (hereinafter *Jagson*) had an opportunity to determine the period of limitation for filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. After perusing the said provision, the Court refused to import the period of limitation provided under Section 34 to the appeals filed under Section 37.

As per the Court, the Legislature was well aware of the importance of providing a limitation period for the provisions of the Act and that it had chosen not to provide a specific period of limitation for filing an appeal under Section 37. Further, the Court also went through the Articles of the Second Division of the Schedule to Limitation Act, 1963 which deals with appeals. After analysing the Articles from 114 to 119, the Court reiterated that the absence of any provision on Section 37 shows the intention of the legislature not to provide for any limitation period for filing an appeal under Section 37.

Moreover, the Bombay High Court clearly ignored Section 29(2) of the Limitation Act, 1963 when it held that if a special law does not provide a limitation period for a remedy, then the general law of limitation cannot be made applicable to provide a limitation period. The said judgment is clearly bad in law and stands

27. AIR 1996 SC 1321.

28. (2002) 5 SCC 510.

29. AIR 2005 Bom 335: 2005 (3) ARBLR 167 Bom: I (2006) BC37: 2005 (5) BomCR 58: 2005 (3) MhLJ 1141.

overruled by the Hon'ble Supreme Court in the case of *Consolidated Engineering Enterprises and Ors. v. Principal Secretary Irrigation Department and Ors.*

On the other hand, it is equally important to look at the decisions of the Bombay High Court and Meghalaya High Court in *ONGC Limited v. M/s Dinamic Corporation (Hereinafter Corporation)* and *North Eastern Electric Power Corporation Ltd. v. Patel Unity Joint Venture (Hereinafter Patel Unity)* respectively.

In the Corporation case referred afore, the Division Bench of the Hon'ble Bombay High Court revisited its judgment in Jagson. It held that the decision of the Single Bench in Jagson was incorrect because of the flawed premise of the Court as per which if the Legislature had not specifically provided a limitation period for a provision, then no limitation would be applicable in those proceedings. The Court pointed out that the judgment had clearly overlooked Section 29 of the Limitation Act, 1963 and Section 43 of the Arbitration and Conciliation Act, 1996 when it reached the incorrect conclusion that there was no limitation period for filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. Further, in the Corporation case, the appeal was filed against the order of the Single Bench of the High Court allowing a petition under Section 34 of the Arbitration and Conciliation Act, 1996 which thereby meant that the Single Bench had set aside the arbitral award. So, the Division Bench of the High Court applied Article 117 of the Limitation Act, 1963 to govern the appeal filed under Section 37 and held that the limitation period was 30 days. In this case, Article 117 was attracted as the appeal was directed "from an order of the High Court to the same Court".

In the case of Patel Unity referred afore, the appeal was filed against the order of the Additional Deputy Commissioner (Judicial), who refused to set aside the arbitral award. The Meghalaya High Court after going through various judgments of the Supreme Court and High Courts held that the limitation period for filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is governed by Article 116(a) of the Schedule to the Limitation Act, 1963 which stipulates a period of 90 days. The High Court found Article 116(a) applicable to the appeal filed under Section 37 as the appeal was directed "to the High Court from any order".

Also, it is interesting to note that the Hon'ble Meghalaya High Court in Patel Unity case, condoned the delay of 32 days in filing the appeal while observing that the delay was not significant in nature. The appellants had submitted that the delay was because of the time they consumed in examining files and obtaining opinions and that it was not deliberate on their part. The Court accepted the submission of the appellant and allowed their appeal to be examined on its merits.

The Hon'ble Supreme Court's Perspective on Limitation Period For An Appeal under Section 37

The Meghalaya High Court in the case of Corporation and Patel Unity interpreted the law to hold that the provisions of the Limitation Act, 1963 are applicable to proceedings under the Arbitration and Conciliation Act, 1996 and accordingly determined the limitation period for an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 as 30 days (from an order of the High Court to the same Court) and 90 days (to the High Court from any order), depending on the nature of appeal.

On December 06, 2019, in the case of *State of Assam and Ors. v. N V International and Ors*, *(hereinafter N.V. International)* the question of computing the limitation period for filing an appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 had arisen before the Hon'ble Supreme Court. In this case, the arbitral award was rendered by a former Judge of the Hon'ble Supreme Court, Justice K.N. Saikia. As per Section 34 of the Arbitration and Conciliation Act, 1996, the said award was challenged, however, was rejected by the District Judge, Gauhati. Subsequently, the petitioner availed the recourse available under Section 37 of the Arbitration and Conciliation Act, 1996, Act and appealed against the District Judge's order which refused to set aside the award. But, the appeal was filed after a delay of 189 days as opposed to the prescribed limit of 90 days under Article 116 of the Limitation Act 1963 and since the petitioner failed to furnish a sufficient cause for the delay, the appeal was consequently dismissed.

The ruling in N.V. International case is based on the decision of a two-judge bench in the matter of *Union of India v. Varindera Constructions Limited*[30]. In this case the Hon'ble Supreme Court had attempted to draw an analogy in order to compute the limitation period for filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. The Court stated that since an application under Section 34 has to be filed within a maximum period of 120 days, an appeal from the exact same proceedings (under Section 37) should also be filed within the same period i.e. 120 days. The 120 days period for an application under Section 34 was arrived at by adding a 30 days grace period if sufficient cause for delay is shown in addition to the statutory limitation of 90 days provided under Article 116 of the Limitation Act, 1963. The Court also held that if the party filing the appeal fails to make an application within 120 days from the day its petition was either allowed or dismissed under Section 34, the delay shall not be condoned as it would be opposed to the objective of the Arbitration and Conciliation Act, 1996 which is to promote speedy resolution of disputes.

Interpretation

It was concluded by the Hon'ble Supreme Court in N.V. International case that a similar extension can be granted to the party appealing under Section 37. It was held that a maximum period of 120 days is available to the applicant for appealing under Section 37 against an order passed by the Court under Section 34.

It is imperative to highlight that the legislature has not mentioned the period of limitation for appealing under Section 37, let alone an extension for the same. The High Courts in Corporation and Patel Unity cases had only examined the applicability of the limitation law to the Arbitration and Conciliation Act, 1996 and accordingly determined the period of limitation for filing an appeal under Section 37. The High Courts in the above-mentioned cases did not equate the limitation period provided under Section 34 with Section 37 but rather simply interpreted the law as it is, to hold different limitation periods for inter and intra-Court appeals as stipulated by Articles 116 and 117 of the Schedule to the Limitation Act, 1963.

Similarly, the Supreme Court was well within its powers to hold that the limitation period for Section 37 application in an inter-Court appeal is 90 days as per the Limitation Act, 1963 but it went further to hold that an extension of 30 days is also available if a sufficient cause is furnished by the party.

Table 5: Some Important Judicial decisions in respect of Limitation

Sr. No	***Case Name***	***Case Note/Extract of Judgment***
(a)	*Deep Industries Limited* vs. *Oil and Natural Gas Corporation Limited and Ors.* (28.11.2019 - SC)	*1) The present appeal raises important questions relating to the High Court's exercise of jurisdiction under Article 227 of the Constitution of India when it comes to matters that are decided under the Arbitration and Conciliation Act, 1996 ("the Act" for short).* *2) This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first*

30. (2020)2SCC111.

		appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction. 3) *We reiterate that the policy of the Act is speedy disposal of arbitration cases. The Arbitration Act is a special act and a self-contained code dealing with arbitration.* 4) *The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal."* 5) *It was finally concluded that the appeal stands allowed. Accordingly, the arbitration proceedings may now be disposed of as expeditiously as possible, in accordance with the mandate contained in the Act.*
(b)	*The State of Jharkhand and Ors.* vs. *HSS Integrated SDN and Ors.* (18.10.2019-SC)	1) Aggrieved by the impugned judgment and order dated 30.01.2019 passed by the High Court of Jharkhand at Ranchi in Commercial Appeal No. 01 of 2018, by which the High Court has dismissed the said appeal preferred by the petitioners herein under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') and has confirmed the award declared by the learned Arbitral Tribunal, confirmed by the First Appellate Court, the original appellants have preferred the present special leave petition. 2) This special leave petition arises out of the contractual dispute between the petitioners-State and the respondents in relation to a consultancy agreement over construction of six-lane Divided Carriage Way of certain parts of Ranchi Ring Road. Respondent Nos. 1 and 2 acted as a consortium for providing such consultancy and supervisory services. An agreement was entered into between the parties on 28.08.2007. The original work period under the said agreement was for 36 months, i.e. from 01.10.2007 to 30.09.2010. There was a dispute with respect to the non-performance and unsatisfactory work done by the respondents. However, the respondents were granted extension of contract twice. Thereafter, a letter dated 25.11.2011 was issued by the Executive Engineer to the respondents and other contractors entrusted with the task of

		construction, granting a second extension of time of contract for construction work. The respondents were called upon to make compliances with the issues pointed out, at the earliest. In the said communication dated 25.11.2011, it was stated that if the deficiencies are not removed and/or complied with, in that case, there shall be suspension of payment under Clause 2.8 of the General Conditions of Contract (for short 'the GCC'). On 05.12.2011, a review meeting was held between the parties, followed by a letter dated 07.12.2011 issued by the respondents- original claimants in reply/compliance of the aforesaid letter dated 25.11.2011. It was the case on behalf of the respondents-original claimants that without properly considering the said letter of the respondents-original claimants dated 07.12.2011, petitioners herein issued letter dated 12.12.2011 invoking Clause 2.8 of the GCC for suspension of payment, alleging certain deficiencies. It was the case on behalf of the respondents-original claimants that by letter dated 27.12.2011, they replied to the suspension notice and complied with the deficiencies. In reply to the aforesaid letters, the petitioners issued letters dated 23.12.2011 and 28.12.2011 asking the claimants to ensure compliance of the pending issues. That by letter/communication dated 09.02.2012, the petitioners served a notice upon the respondents terminating the contract with effect from 12.03.2012. The said termination notice was issued under Clause 2.9.1(a) and (d) of the GCC. The respondents-original claimants replied to the said termination notice by letters dated 16.02.2012 and 24.02.2012 and requested the petitioners to re-consider the matter. However, the dispute between the parties was not resolved. The respondents-original claimants served a legal notice dated 10.03.2012 and invoked the arbitration clause 2.9.1(a). Pursuant to the order passed by the High Court, the Arbitral Tribunal was constituted. 2.1 The Arbitral Tribunal comprised of nominees of the rival parties and a retired Judge of the Jharkhand High Court as the Presiding Arbitrator. The respondents-original claimants claimed a total sum of Rs.5,17,88,418/- under 13 different heads, excluding interest. The petitioners also filed a counter-claim for Rs.6,00,78,736/- under five heads. 3) In view of the finding arrived at by the learned Arbitral Tribunal that the termination of the contract was illegal and without following due procedure as required under the contract and in view of allowing the claims of the claimants partly, the Arbitral Tribunal dismissed the counter claims submitted by the petitioners. 2.4 The award declared by the learned Arbitral Tribunal has been confirmed by the First Appellate Court in a proceeding under Section 34 of the Arbitration Act. The same has been further confirmed by the High Court by the impugned judgment and order in an appeal under Section 37 of the Arbitration Act. 2.5 Feeling

		aggrieved and dissatisfied with the impugned judgment and order passed by the High Court dismissing the appeal under Section 37 of the Arbitration Act and consequently confirming the award passed by the learned Arbitral Tribunal, the original respondents-State and others have preferred the present special leave petition. 4) The main controversy is with respect to the termination of the contract vide letter/communication dated 09.2.2012 terminating the contract with effect from 12.03.2012 invoking Clause 2.9.1(1) and (d) of the GCC. That, on appreciation of evidence and considering the various clauses of the contract, the learned Arbitral Tribunal has observed and held by giving cogent reasons that the termination of the contract was illegal and contrary to the terms of the contract and without following due procedure as required under the relevant clauses of the contract. The said finding of fact recorded by the learned Arbitral Tribunal is on appreciation of evidence. The said finding of fact has been confirmed in the proceedings under Sections 34 and 37 of the Arbitration Act. Thus, there are concurrent findings of fact recorded by the learned Arbitral Tribunal, First Appellate Court and the High Court that the termination of the contract was illegal and without following due procedure as required under the relevant provisions of the contract. 6.1 In the case of Progressive-MVR (supra), after considering the catena of decisions of this Court on the scope and ambit of the proceedings under Section 34 of the Arbitration Act, this Court has observed and held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not be interfered with in a proceeding under Section 34 of the Arbitration Act. 5) Once the finding recorded by the learned Arbitral Tribunal that the termination of the contract was illegal is upheld and the claims made by the claimants have been allowed or allowed partly, in that case, the counter-claim submitted by the petitioners was liable to be rejected and the same is rightly rejected. No interference of this Court is called for. 6) In view of the above and for the reasons stated above, the present special leave petition deserves to be dismissed and is accordingly dismissed.
(c)	*MMTC Ltd.* vs. *Vedanta Ltd.* (18.02.2019 - SC)	1) In the matter concerned the Appellant MMTC Ltd. (Consignment agent as appointed by respondent) who provide services regarding storage, handling and marketing of copper rods produced by Respondent Vedanta Ltd.

(c)		2) The dispute arose when Appellant supplied copper rods produced by Respondent to a company which did not pay the amount due to Appellant. The Appellant (agent of respondent) further failed to pay the amount due to Respondent entity which violated the principal-agent relationship. 3) The Respondent by invoking arbitration clause referred the dispute to Arbitral Tribunal. 4) Conclusion: Appellant to pay to Respondent sum with interest. 5) Matter further referred to High Court- Decision unchanged. 6) Matter finally referred to Supreme Court (Apex Court)- Concluded that dispute is governed by Arbitration clause and they find no reason to disturb the Majority Award on ground that subject matter of dispute was not arbitrable. Thus, Appeal got dismissed.

CASE STUDY

In case where the Arbitral Tribunal rules that it has no jurisdiction, an appeal against that order would lie under Section 37 of Arbitration and Conciliation Act, 1996.

The Hon'ble High Court of Delhi held that in a *Indeen Bio Power Limited v. EFS Facilities Service (India) Pvt. Ltd* where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, the remedy lies in Section 34 of the Arbitration and Conciliation Act 1996. However, where the Arbitral Tribunal declines to pass an award for reasons of not having jurisdiction the remedy shall lie under Section 37 of the Arbitration and Conciliation Act, 1996.

Challenge

The only point for consideration before the Hon'ble Court was that in a case when the Arbitral Tribunal ruled that it has no jurisdiction, would an appeal under Section 37 of the Arbitration and Conciliation Act 1996, lie against the said order or would it be liable to be challenged under Section 34 of the Act as an award.

Held

The Hon'ble High Court of Delhi after relying upon *National Thermal Power Corporation Ltd. v. Siemens Atiengesellschaft, r*ejected the objections raised by the Respondent. It was held that in case the Arbitral Tribunal, by its order, has ruled that it has no jurisdiction, an appeal would lie under Section 37 of the Arbitration and Conciliation Act, 1996, against the said order. It was further held that in the context of Section 16 and the specific wording of Section 37(2)(a) of the Arbitration and Conciliation Act, 1996, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Arbitration and Conciliation Act, 1996, is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

LESSON ROUND-UP

- Section 34 provides the basis on which an arbitral award can be set aside and if an award is declared to be void then the whole purpose and object of the Act gets nullified.
- The arbitral award is in conflict with the public policy of India.
- The time period for challenging an award commences only upon its proper receipt (*The State of Maharashtra and Ors*. v. *ARK Builders Pvt. Ltd*). Period of Limitation prescribed under Section 34(3) would start running only from the date of signed copy of award is delivered to/ received by the party making an application for setting aside the award u/s 34(1).
- The grounds on which an award may be set aside are limited and pertain primarily to the procedure of the arbitration and principles of natural justice.
- In case of arbitration if the parties settle the issue under Section 30, there is no mechanism as to revert the same or change the same, but if the award is delivered by the Arbitral Tribunal, such an Award can be set aside under Section 34.
- A person against whom a domestic Award is made, has to immediately approach the Court for challenging the same by making an application under Section 34 of the Act. Otherwise the person in whose favour the Award has been made can execute the same as a decree. On the other hand, a person against whom a foreign Award has been made cannot be challenged in India.
- Section 37(3) provides that no further appeal can be made to any Courts having same jurisdictions, larger benches of the Courts having same jurisdiction, or with the Courts having superior jurisdiction, against the order passed in an appeal under this Section.
- The Hon'ble High Court of Delhi after relying upon *National Thermal Power Corporation Ltd.* v. *Siemens Atiengesellschaft*, rejected the objections raised by the Respondent. It was held that in case the Arbitral Tribunal, by its order, has ruled that it has no jurisdiction, an appeal would lie under Section 37 of the Arbitration and Conciliation Act, 1996, against the said order.
- The Hon'ble High Court of Delhi held that in a *Indeen Bio Power Limited* v. *EFS Facilities Service (India) Pvt. Ltd*. where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, the remedy lies in Section 34 of the Arbitration and Conciliation Act 1996. However, where the Arbitral Tribunal declines to pass an award for reasons of not having jurisdiction the remedy shall lie under Section 37 of the Arbitration and Conciliation. Act, 1996.

GLOSSARY

Public Policy: It can be referred to as the principles and standards constituting the general policy of the State established by the Constitution and the existing laws of the country and also principles of justice and morality.

Recourse: According to Cambrdige dictionary, using something or someone as a way of getting help, especially in a difficult or dangerous situation.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the grounds of challenge and powers of court to modify the award?
2. Explain Public policy with the aid of relevant case law.
3. Describe the time limit prescribed under Section 34 to challenge an arbitration award.
4. What are the Essential elements of Arbitral Award?
5. Explain the Pre-conditions for Invoking Section 34(4) of the Arbitration and Conciliation Act, 1996.
6. Can a foreign award be challenged in India? Explain.
7. Draft a Petition for setting aside an Arbitral Award. Assume Necessary facts.

LIST OF FURTHER READINGS

Handbook on Arbitration: A Practical guide for Professionals

– **ICSI Publication**

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf
- https://www.ciarb.org/media/4206/drafting-arbitral-awards-part-i-_-general-2021.pdf

Emerging Aspects: Fast Track and Virtual Arbitration

Lesson 7

KEY CONCEPTS

■ Track Arbitration ■ Online Dispute Resolution ■ Effect of Arbitration on Insolvency ■ Virtual Arbitration

Learning Objectives

To understand:

- Fast Track Arbitration
- Drafting under Fast Track Arbitration
- Virtual Arbitration
- Role of CS in Arbitration Proceedings
- *Arbitration* vs. *Insolvency*
- Prospects of Arbitration in India
- Online Dispute Resolution system

Lesson Outline

- Fast Track Arbitration
- Difference between Fast Track Arbitration and Ordinary Arbitration
- Law Relating to Fast Track Procedure
- Required Documents and Drafting
- Procedure and Steps in Virtual Arbitration
- Important aspects for Conduct of Virtual Arbitration
- Steps under Virtual Arbitration
- Role of Company Secretaries and Related Provision
- *Arbitration* vs. *Insolvency and Bankruptcy Code 2016: A Comparative Study*
- Future of Indian Arbitration: Prospects and Challenges
- Recent Amendments
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Indian Stamp Act, 1899
- Indian Evidence Act, 1872

FAST TRACK ARBITRATION

Arbitration is a method of dispute resolution that is rising popularly in India. The Indian legislature has made many amendments to the Arbitration and Conciliation Act, 1996, to make arbitration the preferred method of dispute resolution at both domestic and international levels. One of the main tasks in pursuing dispute resolution through any method is the lengthy process and time it takes to reach a decision or award. Arbitration is an resourceful and flexible method that can reduce the time it takes to resolve disputes. Compared to Civil Courts, which are overloaded with a massive number of cases, arbitration is a more effective and streamlined way to resolve disputes. Further, fast track arbitration is a productive method of dispute resolution that is time-bound, so it can't be overdue for any cause. It's a sub-system of regular arbitration, wherein a sole arbitral tribunal is finalised after obtaining the permission of parties, with fixed time limits. In Fast Track Arbitration, limited procedures are to be followed to speed up the process of dispute resolution.

Fast Track Arbitration has become a popular option in Indian law recently because it allows parties to resolve disputes quickly. The amendment to the Arbitration & Conciliation (Amendment) Act, 2015 makes this process more effective. This new law makes it easier for parties to come to an agreement and get an award resolved within six months. Time is important in this type of arbitration, so this change is a big help.

Nevertheless, it is not governed by ordinary rules and regulations. In Fast Track Arbitration Oral proceedings are avoided and reliance is to be placed on written pleadings. Under fast track arbitration, the arbitrators have to decide the matter within the time frame on written submission without oral hearings. This will inspire confidence in the foreign investors also who want to dispose of the matter in a time bound manner which ultimately reduces the cost.

Essential Features of Fast Track Arbitration

The essential feature of a fast track arbitration are as follow:

1. Arbitral proceedings under Fast Track Arbitration are largely governed by time limits to be followed by arbitrators as well as the parties under the Arbitration. The objective is to speed up Arbitral process and attain the resolution within the shortest possible span of time.
2. In case the arbitral process is not completed within the time frame provided under the Arbitration and Conciliation Act, the parties also may extend the time limits. If the award is made within six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive additional fees as the parties may agree. The Court is also empowered either prior to or after the expiry of the period so specified, extended the period. However, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.
3. Fast Track Arbitration permits the activities that facilitates the resolution of disputes in an expeditious manner. However, this does not allow the arbitrator to avoid the necessary requirements to arrive at the decision.
4. In Fast Track Arbitration, the emphasis are on written proceedings and not on the Oral Hearings.
5. The selection of the Arbitrator is made by parties.

DIFFERENCE BETWEEN FAST TRACK ARBITRATION AND ORDINARY ARBITRATION

Basis	*Fast Track Arbitration*	*Ordinary Arbitration*
Non-obstante Clause	The provisions related to Fast Track Procedure in Arbitration and Conciliation Act is non-obstante.	Regular provisions are applicable.
Agreement to resolve through Fast Track Mode	A provision has been specifically provided to the effect that the parties may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure.	If no such agreement between the parties, ordinary arbitration procedure has to be followed.
Number of Arbitrator	Specific provision has been given that parties may agree that the arbitral tribunal shall consist of a sole arbitraton. Courts have no active role to decide on appointment of Arbitrator.	In ordinary arbitration, courts are specifically empowered to appoint Arbitrators under section 11 of the Arbitration and Conciliation Act.
Oral Hearing	The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing. However, An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues.	Oral Hearing may be conducted by the Arbitrator.
Time Limit for making an award	The award shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.	The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings.

LAW RELATING TO FAST TRACK PROCEDURE

Section 29B of the Arbitration and Conciliation Act provides the provisions relating to Fast track procedure. Which is reproduced below:

Notwithstanding anything contained in Arbitration and Conciliation Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified below.

The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings:

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

The award under section 29B shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

If the award is not made within the period specified above, the provisions of section 29A(3) to 29A(9) shall apply to the proceedings.

The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

REQUIRED DOCUMENTS AND DRAFTING

As per section 29B(1) of the Arbitration and Conciliation Act, 1996, notwithstanding anything contained in Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure.

According to above, the first document required is the Agreement to settle the dispute by Fast Track Procedure. Further, the parties may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing. Therefore, the documents such as Statement of Claims, Defence, Agreements of Procedure, Evidences etc. are required for the Arbitration under Fast Track Procedure.

The drafting of the all the documents for the purpose of arbitration should be done in such a manner that it should be complete and explanatory in all respects. The purpose of drafting of documents in such a manner is to facilitate the Arbitral Tribunal for early resolution of dispute.

PROCEDURE AND STEPS IN VIRTUAL ARBITRATION

The arbitration process is often praised for its tractability and time-effective process. With physical hearings of Adjudicatory authorities becoming increasingly rare, the Covid-19 pandemic made virtual hearings the fresh norm. Due to the fact that the legal fraternity has become more reliant on technology in order to appear before courts or various tribunals, everyone had to resort to remote hearings as a way of avoiding overburdening the judiciary. This has caused some problems, as it has taken away the opportunity for people to see and interact with their lawyers in person. However it has its own advantages such as cost effectiveness, convenience etc.

It is often said that “Justice delayed is Justice Denied. With a purpose to address the preceding issue, the Indian judiciary came up with effective solutions to move forward with their work and manage the upward push of cases as they come, as justice by no means sleeps. To keep up with the competition with other countries, we need to take significant steps in improve the situation.

IMPORTANT ASPECTS FOR CONDUCT OF VIRTUAL ARBITRATION

1. All participants should be ready for videoconference well before the start time of the proceedings.
2. The Presiding officer should preferable act as the host of the session.

3. The audio visual availability of all the participants has to be ensured.
4. The tribunal should take note of the attendance of the parties.
5. The tribunal may also adjourn the proceedings in case of need.
6. The parties should try to sit in position that is visible to everyone.
7. The parties and their authorized representative should try to attend the proceedings from the same location.
8. The person speaking during the proceedings should be visible.
9. The administrative arrangements for the video conferencing for the sessions should be made in advance.

STEPS UNDER VIRTUAL ARBITRATION

Step 1: Appointment of Arbitrator	The parties should agree on the name of Arbitrators arbitral tribunal.
Step 2: Agreement on procedure for Arbitration	The parties should agree on the procedure of Arbitration. The agreement may *inter alia* include, the notice to other parties, the mode in which proceedings to be conducted.
Step 3: Submission of Claims and Defences	The parties submit the claims to the tribunal and copy has to be provided to the other party. On the basis of the claim, the other party submits its defence on the claim.
Step 4: Submission of Evidences and Witnesses	If required, the arbitrator may ask for evidences and examine the witnesses.
Step 5: Conduct of Proceedings	The proceedings should be conducted on the basis of agreement by the parties.
Step 6: Preparation and Communication of Award	The arbitrator prepares the award and communicate award to both the parties.

CASE STUDIES

1. In one instance, a XYZ Ltd. (FMCG Company) and subcontractor had made an agreement for supply of materials to the company. XYZ Ltd. with over 30 brands across 08 distinct categories including Household Care, Purifiers, Personal Wash, Skin Care, Hair Care, Colour Cosmetics, Oral Care and Deodorants, the Company is part of the daily life of millions of consumers. In addition, the company has been granted the franchise for the Kite brand of SepiCo products in Sri Lanka. It has 25 manufacturing plants in India. The company has a sales of Rs 17.98 Cr.

   But they were involved in a clash over quality of the material supplied. Fast track arbitration was in initiated by the FMCG Company in order to resolve the conflict quickly and affordably. They both mutually appointed an arbitrator for the settling the dispute promptly and efficiently. The parties had agreed on a simplified hearing procedure that would include little discovery and a brief hearing period.

   The fast track arbitration resulted in the issue being settled in a few of months for a fraction of the price of regular arbitration. Both sides were pleased with the result and the procedures' effectiveness.

Prepare necessary documents for submission of claims and defence and Award passed by Arbitrator. Assume necessary facts.

2. Mr. X was working in a Cables Manufacturing Company as Marketing Manager. Company has 8 units at Pimpri (Pune), Urse (Pune), Verna (Goa) and Roorkee (Uttarakhand). The company has vide range of products including 1100 V PVC insulated cables – electrification of industrial establishments, electrical panel wiring and consumer electrical goods, Motor winding PVC insulated cables and 3 core flat cables – submersible pumps and electrical motors, Automotive/battery cables – wiring harness for automobile industry and battery cables for various applications, Heavy duty, underground, high voltage, power cables – Intra-city power distribution network etc.

   However, company terminated Mr. X without giving him any reason or explanation thereof. The employee disputed the firing and said they were fired unfairly. The employer had a different take on the situation and thought the dismissal was legal. The matter was taken before an arbitrator, who used fast track arbitration to settle it. The arbitrator rendered a judgement in favour of the employee after rapidly going over the evidence offered by both parties. The employee and the company both saved time and money because the decision was rendered in a short span of time.

   Prepare necessary documents for submission of claims and defence and Award passed by Arbitrator. Assume necessary facts.

[1]ROLE OF COMPANY SECRETARIES AND RELATED PROVISION

As we aware that Arbitration is cost effective, less formal and convenient method of resolving the disputes. In arbitration, the parties has to choose the arbitrator on mutual agreement in most of the cases except the Arbitrator appointed by courts under a particular law such as under Section 11 of the Arbitration and Conciliation Act, 1996. Therefore, the parties approach the subject matter expert who are able to understand and resolve their disputes amicably. A company secretary is a competent professional to deal with Arbitration matter in the areas such as financial or contractual commercial disputes, international or cross-border commercial disputes, in research and development agreements and many more areas. A Company Secretary also specialise in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, Commercial disputes, rights of properties, Lease transactions, etc. and represent their clients in Arbitration Proceedings.

Further, according to the India International Arbitration Centre (Criteria for Admission to the panel of arbitrators) Regulations, 2023, a Company Secretary qualification is added as a Criteria for empanelment of arbitrator.

Regulation 6(1) of the above said regulations provides the criteria for empanelment of Arbitrator, which is as under :

The Chamber of Arbitration shall empanel the arbitrators on the basis of following criteria, namely:-

(i) the applicant shall not be less than thirty five years and not more than seventy five years of age;

(ii) the educational qualifications and experience of the applicant shall be largely relevant to the applicant's field of expertise or of conduct of arbitration proceedings either as a sole arbitrator or as a memberof any Arbitral Tribunal, within the last five years or otherwise related to the field of arbitration;

(iii) the applicant shall furnish a statement that he has not been found guilty by a Court for any criminal offence, or for misconduct after conduct of disciplinary proceedings and that no criminal case or any departmental proceeding is pending against him:

1. Source from the Presentation of V. Inbavijayan, B.A.B.L., PAP (KFCRI), FCIArb (UK) on the topic Opportunities for CS in Arbitration and Mediation and can be accessed from: https://www.icsi.edu/media/filer_public/27/9c/279c9c39-a885-4f28-9114-b785a9712e78/opportunities_for_cs_in_arbitration_and_mediation_mr_inbavijayan.pdf

Provided that the Chamber of Arbitration may even otherwise invite eminent persons having specialised knowledge and substantial relevant experience in the field of arbitration for being empaneled on the panel of arbitrators. A Company Secretary is eligible for empanelment as arbitrator in accordance with the above.

Section 26 of the Arbitration and Conciliation Act, 1996 provides the provisions relating to expert to be appointed by arbitral tribunal.

It provides that unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal.

Further, unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

A Company Secretary being an expert of Corporate Laws can act as experts in accordance with section 26 of Arbitration and Conciliation Act, 1996.

ARBITRATION VS INSOLVENCY AND BANKRUPTCY CODE 2016: A COMPARATIVE STUDY

The Insolvency and Bankruptcy Code (IBC) was enatcted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. The purpose of IBC was maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.

IBC deals with the matter relating to Insolvency and bankruptcy and Arbitration and Conciliation Act deals with the resolution of diputes outside the court.

There are no provisions in IBC that requires that a matter to be referred for Arbitration. Conflict between Arbitration and IBC Process can have detrimental effect over the Corporates due to the delay in both the processes. Parties resorting to both arbitration and IBC processes face a many problems. However, there is a scope of Arbitration can prove to be helpful wherever there is a scope of settlement. Few judicial decisions have shown a positive signs of Involvement of Arbitration in the Insolvency Matters. The topic can more be understood with the help of below mentioned cases.

***Indus Biotech Private Limited vs. Respondent: Kotak India Venture (Offshore) Fund and Ors* (26.03.2021 - SC)**

The Arbitration Petition is filed by 'Indus Biotech Private Limited' Under Section 11(3) read with Sections 11(4)(a) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 seeking the appointment of an Arbitrator on behalf of the Respondents. The petition filed before Supreme Court was due to the fact that *Kotak India Venture (Offshore) Fund and Ors* is a Mauritius based Company and the dispute qualifies as international arbitration. The other Respondents though are Indian entities, they are the sister ventures of *Kotak India Venture (Offshore) Fund and Ors*. Further, according to the Petitioner the subject matter involved is the same, though under different agreements, the arbitration could be conducted as a single process, by a single Arbitral Tribunal. Hence a common petition is filed before the (Supreme Court), instead of bifurcating the causes of action and availing their remedy before the High Court in respect of similar disputes with other Respondents.

The dispute in question, according to the Petitioner company is with regard to the appropriate formula to be adopted and to arrive at the actual percentage of the paid-up share capital which would be converted into equity shares and the refund if any thereafter. Until an amicable decision is taken there is no liability to repay the amount. Therefore, there is no 'debt' or 'default', nor is the Petitioner company unable to pay.

On the said issue, the Respondents contended that the fact of the Respondents having subscribed to the OCRPS

is not in dispute. In such event, on redemption of the same, the amount is required to be paid by the Petitioner company. The Respondents contend that on redemption of OCRPS, a sum of Rs. 367,08,56,503/- (Rupees Three Hundred Sixty-Seven Crore Eight Lakh Fifty-Six Thousand Five Hundred Three) became due and payable. The Respondents having demanded the said amount and since the same had not been paid by the Petitioner company, it is contended that the same had constituted default. It is contended that as the debt had not been paid by the company it had given a cause of action for the Respondents No. to invoke the jurisdiction of the Adjudicating Authority, NCLT by initiating the Corporate Insolvency Resolution Process ('CIRP') provided under the Insolvency and Bankruptcy Code, 2016.

Supreme Court decided point relating to the appointment of the Arbitral Tribunal as sought in the petition. Essentially the main contention that has been urged is with regard to the proceedings before the NCLT and, therefore, the dispute not being arbitrable. However, in the present position the parties would be left with no remedy if the process of arbitration is not initiated and the dispute between the parties are not resolved in that manner as the proceedings before the NCLT has terminated. Learned Senior Counsel for Indus Biotech Private Limited has contended that the transaction between the parties is a common one and as such it would be efficient if the dispute is resolved by a single Arbitral Tribunal. Further in view of the objection raised on behalf of the Respondent No. 4 (Kotak India Venture) that the arbitration Clause has not been invoked in accordance with the requirement therein, since the promoters have to suggest one arbitrator and not the Company, learned Senior Counsel representing the promoters who are arrayed as Respondent Nos. 5 to 11 in the arbitration petition has pointed out that the affidavit has been filed supporting the petition seeking arbitration and, therefore, the Tribunal be constituted. Though learned Senior Counsels had in their argument opposed the reference to arbitration by pointing out lacunae in the manner the Clause was invoked and the name of the arbitrator was suggested, in the circumstance the only remedy for the parties being resolution of their dispute through arbitration as indicated above, we consider it appropriate to take note of the substance of the arbitration Clause and constitute an appropriate Tribunal.

[2]FUTURE OF INDIAN ARBITRATION: PROSPECTS AND CHALLENGES

There are many arbitral institutions in India. These include, in addition to domestic and international arbitral institutions, arbitration facilities provided by various public-sector undertakings ("PSUs"), trade and merchant associations, and city-specific chambers of commerce and industry. A large number of these arbitral institutions administer arbitrations under their own rules or under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules").

Despite the existence of numerous arbitral institutions in India, parties in India prefer *ad hoc* arbitration and regularly approach courts to appoint arbitral tribunals under the relevant provisions of the Arbitration and Conciliation Act, 1996. A 2013 survey showed that there was a strong preference for *ad hoc* arbitration amongst both Indian companies that had experienced arbitration and Indian.

Measures that promote access to the jurisdiction (i.e., whether foreign lawyers can represent clients in international arbitrations held in the country) and promote the jurisdiction as a venue by easing restrictions related to immigration, tax, etc. have been instrumental in the growth of institutional arbitration in many countries.

The Indian legal position with respect to permitting foreign lawyers to represent clients in arbitrations in India is not very clear. In *A.K. Balaji v. Government of India*, the Madras High Court held that foreign lawyers are permitted to visit India temporarily on a fly in and fly out basis to advise clients regarding foreign law and international legal issues and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

At the other end of the spectrum are countries such as Singapore and Hong Kong. In both jurisdictions, a mechanism is provided which allows foreign lawyers to get them registered and practice foreign law in the

2. Source: Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, Chairman Justice B. N. Srikrishna Retired Judge, Supreme Court of India. The report may be accessed at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

respective jurisdiction. Singapore goes a step ahead and allows foreign lawyers to practice permitted areas of Singapore law as well. Singapore does not impose a visa requirement for non-resident arbitrators.

A study of successful arbitral institutions across the world shows how the governments and the legislatures in the jurisdictions they are located in have played a significant role in helping them flourish. This has been through governmental and legislative efforts in promoting such jurisdictions as arbitration hubs. The Committee opined that the government and the legislature can play a similar role in promoting institutional arbitration in India, and more generally, promoting India as an arbitration hub.

For this purpose, the Committee has identified certain areas where the government and / or the legislature can play a more proactive role in creating a conducive environment for institutional arbitration to flourish. The Committee proposes that a permanent standing committee be constituted under the aegis of the APCI that can help liaise with the government to ensure a healthy ecosystem for the development of arbitration in India. As can be seen from the successes of Singapore and Hong Kong as arbitration hubs, this is vital to ensure the competitive edge and the success of arbitration in any jurisdiction.

The Committee also opined that the National Litigation Policy ("NLP") and state litigation policies must promote arbitration in government contracts. Arbitration must be encouraged as a dispute resolution mechanism in disputes involving government departments or PSUs and private parties.

However, ADR is thought of as a substitute to litigation, with the latter being deemed as the conventional and default format for resolving disputes. While the growing use of ADR mechanisms has precipitated some change to notion, in most cases, they continue to play second-fiddle to litigation.

Further, Arbitration faces the below difficulties in India:

- lack of awareness of arbitral processes
- Lack of guidelines for arbitral awards
- Arbitral Award can be enforced as a decree. Therefore, a party has to approach courts for enforcement of Award.

As Justice Sundaresh Menon (the Chief Justice of Singapore) had pointed out in an address, ADR must be transformed into 'Appropriate Dispute Resolution'. This paradigm shift is necessary to create a parity between ADR mechanisms and litigation, and instil faith in them as equally (or more) efficient and comprehensive dispute resolution frameworks.

ONLINE DISPUTE RESOLUTION

Online Dispute Resolution (ODR) is the use of technology to resolve the disputes outside of the court system. ODR is the use of technology to 'resolve' disputes. ODR can use technology tools that are powered by AI/ML in the form of automated dispute resolution, script-based solution and curated platforms that cater to specific categories of disputes.

This topic in detail has been covered in Lesson 9 of this Study Material.

CASE LAWS

N.N. Global Mercantile Private Limited vs. M/s. Indo Unique Flame Ltd. & Ors. (April 25, 2023)

Fact

The first respondent, who was awarded the Work Order, entered into a sub-contract with the appellant. Clause 10 of the Work Order, constituting the subcontract, provided for an Arbitration Clause. The appellant had furnished a bank guarantee in terms of Clause 9. The invocation of the said guarantee led to a Suit by the appellant against

the encashment of the bank guarantee. The first respondent applied under Section 8 of the Arbitration and Conciliation Act, 1996 ('the Act) seeking Reference. A Writ Petition was filed by the first respondent challenging the Order of the Commercial Court rejecting the Application under Section 8 of the Act. One of the contentions raised was that the Arbitration Agreement became unenforceable as the Work Order was unstamped. The High Court, however, allowed the Writ Petition filed by the first respondent. The issue relevant to this Bench was, whether the Arbitration Agreement would be enforceable and acted upon, even if the Work Order is unstamped and unenforceable under the Indian Stamp Act, 1899 ('the Stamp Act').

Decision

It said, Learned brother Justice K. M. Joseph, after explaining as to how the expression 'certified copy' must be understood, held that the Court exercising the power under Section 11 (6) has to exercise the power under Section 33 of the Indian Stamp Act when the original is produced before the Court. In other words, according to me, it is rightfully held that when the original document carrying the arbitration clause is produced and if it is found that it is unstamped or insufficiently stamped, the Court acting under Section 11 is duty bound to act under Section 33 of the Indian Stamp Act as held in the draft judgment.

I am also concurring with the view that what is permissible to be produced as secondary evidence i.e., other than the original document in terms of Section 2(a) of the scheme framed under Section 11(10) of the Act, is nothing but certified copy as mentioned earlier. But such a certified copy, would not be available to be proceeded with under Section 33 of the Stamp Act if it is unstamped or insufficiently stamped. In such circumstances, such certified copy shall not be acted upon.

It cannot be presumed that despite the conspicuous difference in the said expressions, under paragraph 2 (a) 'certified copy' alone was permitted to be appended along with the application under Section 11 of the Act, unintentionally. I am of the considered view that it was so prescribed, fully understanding the nature of exercise of power under Section 11 (6) of the Act and also the presumption of genuineness and correctness of 'certified copy' available by virtue of Section 79 of the Evidence Act.

It can be said that unstamped/insufficiently stamped document does not affect the enforceability of a document nor does it render a document invalid. A plain reading of the provisions would also make it clear that a document can be "acted upon" at a later stage. It is therefore a curable defect.

RECENT AMENDMENTS

Amendment Act 2021

In the Arbitration and Conciliation Act, 1996, in section 36 (3), after the proviso, the following has been inserted and shall be deemed to have been inserted with effect from the 23rd day of October, 2015, namely:

"Provided further that where the Court is satisfied that a *prima facie* case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or (b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.– For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.".

For section 43J of the principal Act, the following section shall be substituted, namely:—– "43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations."

The Eighth Schedule to the principal Act has been omitted.

LESSON ROUND-UP

- One of the main tasks in pursuing dispute resolution through any method is the lengthy process and time it takes to reach a decision or award. Arbitration is an resourceful and flexible method that can reduce the time it takes to resolve disputes.
- The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
- As per section 29B(1) of the Arbitration and Conciliation Act, 1996, notwithstanding anything contained in Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure.
- A company secretary is a competent professional to deal with Arbitration matter in the areas such as financial or contractual commercial disputes, international or cross-border commercial disputes, in research and development agreements and many more areas.
- A study of successful arbitral institutions across the world shows how the governments and the legislatures in the jurisdictions they are located in have played a significant role in helping them flourish. This has been through governmental and legislative efforts in promoting such jurisdictions as arbitration hubs.

GLOSSARY

Fast Track Arbitration: It is a productive method of dispute resolution that is time-bound, so it can't be overdue for any cause. It's a sub-system of regular arbitration, wherein a sole arbitral tribunal is finalised after obtaining the permission of parties, with fixed time limits.

Online dispute resolution: ODR is the use of technology to 'resolve' disputes. ODR can use technology tools that are powered by AI/ML in the form of automated dispute resolution, script-based solution and curated platforms that cater to specific categories of disputes.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Define Fast Track arbitration. What are the Essential Features of Fast Track Arbitration?
2. Differentiate between Fast Track Arbitration and Ordinary Arbitration.
3. What are the important aspects and steps for conduct of virtual arbitration?
4. What is Future of Arbitration in India.
5. Can Arbitration complement Insolvency Proceedings? Comment.

LIST OF FURTHER READINGS

Handbook on Arbitration: A Practical Guide for Professionals

– ICSI Publication

OTHER REFERENCES (Including websites/video links)
• https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf • https://amlegals.com/fast-track-arbitration-in-india/# • https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/

Arbitration under Investor's Grievances Redressal Mechanism of Stock Exchanges

Lesson 8

KEY CONCEPTS

■ Investors grievances redressal mechanism (IGRM) ■ Arbitration proceedings ■ Regulatory and Surveillance actions ■ Procedure for Arbitration under Investor's Grievances redressed mechanism of stock exchange ■ Case studies on Arbitration

Learning Objectives

To understand:

- System of Investors grievances redressal mechanism (IGRM)
- Arbitration proceedings under the mechanism
- Procedure under the mechanism
- Regulatory actions
- Surveillance actions

Lesson Outline

- Introduction
- Investor's Grievance Redressal Mechanism (IGRM)
- Benefits of IGRM
- Threshold limit for interim relief paid out of IPF in Exchanges
- Investor Service Centre (ISC)
- Investor Grievances Redressal Committee (IGRC)
- Investor Grievance Redressal facility at Stock Exchanges/Depositories
- Arbitration Process at Stock Exchanges
- Resolution of complaints by Stock Exchange
- Disciplinary Action Committee, Defaulters' Committee, Investors Service Committee, Arbitration Committee
- National Commodity Derivatives Exchanges
- Place of arbitration / appellate arbitration
- Speeding up grievance redressal mechanism
- Automatic Process and Common Pool of arbitrators
- Regulatory actions
- Surveillance actions
- Case studies on Arbitration under Stock Exchange Grievance Redressal Mechanism
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings & Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Finance Act, 2015
- Forward Contracts (Regulation) Act, 1952
- Securities Contracts (Regulation) Act, 1956
- SEBI Act, 1992
- Limitation Act, 1963

INTRODUCTION

Arbitration is an alternative dispute resolution mechanism that has gained significant importance in the field of investor grievance redressal. It is a process by which parties can resolve their disputes outside of court in a private and confidential manner.

The Investor's Grievances Redressal Mechanism of stock exchanges provides investors with a platform to resolve their complaints against brokers and listed companies through arbitration. In this mechanism, a neutral third-party arbitrator is appointed to hear and resolve the dispute between the parties. This process is considered faster, cost-effective, and less formal than traditional court litigation. In this topic, we will explore the various aspects of arbitration under the Investor's Grievances Redressal Mechanism of stock exchanges and its significance in protecting the interests of investors.

INVESTOR GRIEVANCE RESOLUTION PANEL (IGRP)/ ARBITRATION MECHANISM

The Investor's Grievance Redressal Mechanism is a vital tool for protecting the interests of investors in the securities market. It is a process by which investors can file complaints against brokers and listed companies and seek redressal for their grievances. The Arbitration and Conciliation Act, 1996 provides for the establishment of an effective and efficient grievance redressal mechanism for investors.

Under this Act, investors can opt for arbitration as a means of resolving their disputes with brokers and listed companies. The mechanism is administered by the stock exchange, which appoints an arbitrator to hear and decide the dispute. The arbitrator is a neutral third party who is appointed based on his or her expertise and experience in the field of securities.

The process of arbitration under the Investor's Grievance Redressal Mechanism is relatively faster, cost-effective, and less formal than traditional court litigation. The parties involved can present their cases before the arbitrator, who will then issue an award. This award is binding on both parties and is enforceable under the law.

Investors can file complaints under various categories, including non-settlement of trades, failure to deliver securities, fraudulent and unfair trade practices, and violations of stock exchange regulations. The mechanism also provides for the appointment of an ombudsman, who acts as an independent authority to review the decisions of the arbitrator.

Overall, the Investor's Grievance Redressal Mechanism under the Arbitration and Conciliation Act, 1996, is an essential tool for protecting the interests of investors and ensuring the integrity and fairness of the securities market.

For any dispute between the member and the client relating to or arising out of the transactions in Stock Exchange, which is of civil nature, the complainant/ member shall first refer the complaint to the IGRC and/ or to arbitration mechanism provided by the Stock Exchange before resorting to other remedies available under any other law. For the removal of doubts, it is clarified that the sole arbitrator or the panel of arbitrators, as the

case may be, appointed under the Stock Exchange arbitration mechanism shall always be deemed to have the competence to rule on its jurisdiction. A complainant/member, who is not satisfied with the recommendation of the IGRC, shall avail the arbitration mechanism of the Stock Exchange for settlement of complaints within six months from the date of IGRC recommendation.

In order to further enhance the effectiveness of grievance redressal mechanism at Market Infrastructure Institutions (MIIs), based on the internal deliberations, discussions and feedback as received from MIIs, it was decided to add/modify certain provisions in the SEBI circular number CIR/CDMRD/DEICE/CIR/P/2017/77 dated July 11, 2017, which are as follows:

i. **Public dissemination of profiles of arbitrators**

In order to enhance transparency and also to provide choice to parties, Exchanges shall disseminate information w.r.t. brief profile, qualification, areas of experience/ expertise, number of arbitration matters handled, pre-arbitration experience, etc. of the arbitrators on their website.

ii. **Submission of documents in soft copies**

In order to assist the arbitrators in pronouncing comprehensive and speedy awards, Exchanges shall make necessary arrangements in terms of hardware viz., computer, scanner, printer, etc. and required software's at exchange offices/ Investor Service Centers (ISCs) to facilitate the clients to type/ convert their documents into electronic format/ soft copy. Such electronic format/ soft copies shall be provided to the arbitrators along with original submissions in physical copies.

iii. **Review and Training of arbitrators**

Investor Service Committee of the Exchanges shall review the performance of the arbitrators annually and submit the review report to the Board of the Exchange. Training need of the arbitrators will be catered by National Institute of Securities Markets (NISM). Cost of training of arbitrators may be incurred from ISF of the exchange.

iv. **Mechanism for implementation of award**

Exchanges shall create a common database of defaulting clients accessible to members across the Exchanges.

For this purpose, a client may be identified as defaulter if the client does not pay the award amount to the member as directed in the IGRP/ arbitration/ appellate arbitration order and also does not appeal at the next level of redressal mechanism within the timelines prescribed by SEBI or file an application to court to set aside such order in accordance with Section 34 of the Arbitration and Conciliation Act, 1996 (in case of aggrieved by arbitration/ appellate award).

v. **Empanelment of arbitrators and segregation of arbitration and appellate arbitration panel**

There shall be separate panels for arbitration and appellate arbitration. Further, for appellate arbitration, at least one member of the panel shall be a Retired Judge. Exchanges shall obtain prior approval of SEBI before empanelment of arbitrators/ appellate arbitrators.

vi. **Empanelment of IGRP members**

Exchanges shall empanel IGRP members, however, no arbitrator/ appellate arbitrator shall be empaneled as IGRP member.

vii. **Revision in professional fee of arbitrators**

The arbitrator fee shall be upwardly revised to Rs.18,000/- (Rs. Eighteen thousand) per case. Consequent to this upward revision, the additional expenses attributable to a client over and above the fee structure

as specified in point x, shall be borne by the client (wherever applicable) and Exchange equally. The total expense attributable to the member has to be borne by the concerned member.

viii. Place of Arbitration/ Appellate Arbitration

In case award amount is more than Rs. 50 lakh (Rs. Fifty lakh), the next level of proceedings (arbitration or appellate arbitration) may take place at the nearest metro city, if desired by any of the party involved. The additional cost for arbitration, if any, to be borne by the appealing party.

ix. Arbitration / Appellate Arbitration award

In order to safeguard the interest of the parties involved in arbitration and to ensure speedy implementation of the arbitration award, the rate of interest on the award passed by arbitrators shall be in compliance with Arbitration and Conciliation (Amendment) Act, 2015.

x. Speeding up grievance redressal mechanism

a. In order to have faster implementation of award and to discourage delayed filling of arbitrations by members, the fee structure (exclusive of statutory dues - stamp duty, service tax, etc.) for filing arbitration reference shall be as follows:-

b.

Amount of Claim/ Counter Claim, whichever is higher (in Rs.)	***If claim is filed within six months from the date of dispute***	***If claim is filed after six months from the date of dispute or after one month from the date of IGRP order, whichever is later***	***If the claim is filed beyond the timeline prescribed in column 3, (only for member)***
≤ 10,00,000	1.3% subject to a minimum of Rs.10,000	3.9% subject to a minimum of Rs.30,000	Additional fee of Rs. 3,000/- per month over and above fee prescribed in column 3
> 10,00,000 - 25,00,000 <	Rs. 13,000 plus 0.3% amount above Rs. 10 lakh	Rs. 39,000 plus 0.9% amount above Rs. 10 llakh	Additional fee of Rs. 6,000/- per month over and above fee prescribed in column 3
> 25,00,000	Rs. 17,500 plus 0.2 % amount above Rs. 25 lakh subject to maximum of Rs. 30,000	Rs. 52,500 plus 0.6 % amount above Rs. 25 lakh subject to maximum of Rs.90,000	Additional fee of Rs. 12,000/- per month over and above fee prescribed in column 3

c. The filing fee will be utilized to meet the fee payable to the arbitrators. Excess of filing fee over fee payable to the arbitrator, if any, to be deposited in the IPF of the respective exchange.

d. A client, who has a claim / counter claim upto Rs. 10 lakh and files arbitration reference, will be exempted from filing the deposit.

e. In all cases, on issue of the arbitral award the exchange shall refund the deposit to the party in whose favour the award has been passed.

For the purpose of ensuring efficient redressal of investors grievances:

- SEBI has mandated all stock exchanges to constitute an Investor Grievance Redressal Committee ("IGRC"). The IGRC functions as an administrative / meditation body and tries to mediate the complaint between two parties.

- If unsatisfied, a party may file a claim for arbitration whereby, on the basis of the pecuniary jurisdiction, a sole arbitrator or a panel of three arbitrators would be appointed to settle the dispute.
- If still not satisfied by the order of the arbitrator, a party can appeal against the order for appellate arbitration.
- Subsequent to the decision of the appellate arbitrators, the party would still have a limited scope of appeal that would lie to the jurisdictional High Court under the Arbitration and Conciliation Act, 1996.

BENEFITS OF INVESTORS GRIEVANCES REDRESSAL MECHANISM

An Investor Grievances Redressal Mechanism (IGRM) is a process established by companies or organizations to address and resolve complaints and grievances raised by investors. When it comes to arbitration proceedings, an effective IGRM can bring several benefits, including:

Facilitating communication: An IGRM helps establish clear communication channels between investors and companies. It enables investors to report their grievances and receive responses from the company or the designated authority. This can help prevent misunderstandings and conflicts that could otherwise escalate into formal arbitration proceedings.

Faster resolution: An IGRM can resolve investor grievances quickly and efficiently. This can help prevent delays in arbitration proceedings that could otherwise be costly and time-consuming.

Cost-effective: An IGRM can help resolve disputes at a lower cost than traditional arbitration proceedings. By addressing complaints and grievances before they become formal legal disputes, companies can save on legal fees and other costs associated with arbitration.

Improved investor confidence: An effective IGRM can help improve investor confidence in the company. By providing a reliable mechanism for resolving grievances, companies can demonstrate their commitment to transparency, accountability, and investor protection.

Compliance with regulations: Several regulatory bodies, such as SEBI in India and the SEC in the US, require companies to establish an IGRM. By complying with these regulations, companies can avoid penalties and legal action and maintain their reputation in the market.

THRESHOLD LIMIT FOR INTERIM RELIEF PAID OUT OF IPF IN EXCHANGES

SEBI vide its circular no CIR/CDMRD/DIECE dated November 16, 2015 has made applicable Circular No. CIR/MRD/ICC/30/2013 dated September 26, 2013 to Exchanges. In partial modification to Circular No. CIR/MRD/ICC/30/2013 dated September 26, 2013 on "Investor Grievance Redressal Mechanism" the following changes are prescribed:

(i) Exchanges, in consultation with the IPF Trust and SEBI, shall review and progressively increase the amount of interim relief available against a single claim for an investor, at least every three years.

(ii) The Exchanges shall disseminate the interim relief limit fixed by them and any change thereof, to the public through a Press Release and also through its website.

(iii) In case, award is in favour of client and the member opts for arbitration wherein the claim value admissible to the client is not more than Rs. 20 lakhs (Rs. Twenty lakhs), the following steps shall be undertaken by the Exchange:

a) In case the IGRP award is in favour of the client then 50% of the admissible claim value or Rs. 2.00 lakhs (Rs. Two lakhs), whichever is less, shall be released to the client from IPF of the Exchange.

b) In case the arbitration award is in favour of the client and the member opts for appellate arbitration then 50% of the amount mentioned in the arbitration award or Rs. 3.00 lakhs (Rs. Three lakhs), whichever is less, shall be released to the client from IPF of the Exchanges. The amount released shall exclude the amount already released to the client at clause (a) above.

c) In case the appellate arbitration award is in favour of the client and the member opts for making an application under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the appellate arbitration award, then 75% of the amount determined in the appellate arbitration award or Rs. 5.00 lakhs (Rs. Five Lakhs), whichever is less, shall be released to the client from IPF of the Exchanges. The amount released shall exclude the amount already released to the client at clause (a) and (b) above.

INVESTOR SERVICE CENTRE (ISC) AND INVESTOR GRIEVANCES REDRESSAL COMMITTEE (IGRC)

Investor Services Cell (ISC) of the Exchange caters to the needs of investors by resolving the queries of investors, resolution of investor complaints and by providing Arbitration Mechanism for quasi-judicial settlement of disputes. At each of the above ISC Centre, Exchange has constituted Grievance Redressal Committee (GRC). All complaints which do not get resolved within fifteen working days from the date of registration of complaint by Exchange or cases where parties are aggrieved by the resolution worked out would be referred to GRC.

Presently, Investor Service Centre (ISC) is located at the following cities:

Ahmedabad, Bangalore, Bhubaneshwar, Chandigarh, Chennai, Dehradun, Delhi, Guwahati, Hyderabad, Indore, Jaipur, Jammu, Kanpur, Kochi, Kolkata, Lucknow, Mumbai, Panjim, Patna, Pune, Raipur, Ranchi, Shimla and Vadodara.

Arbitration and appellate arbitration shall be conducted at the centre nearest to the address provided by Client in the KYC form.

Source: https://www.nseindia.com/invest/grievance-redressal-committee

INVESTOR GRIEVANCE REDRESSAL FACILITY AT STOCK EXCHANGES/DEPOSITORIES

Investors who are not satisfied with the response to their grievances received from the brokers/Depository Participants/listed companies, can lodge their grievances with the Stock Exchanges or Depositories. The grievance can be lodged at any of the offices of the BSE/NSE located at Chennai, Mumbai, Kolkata and New Delhi. In case of unsatisfactory redressal, the exchanges have designated Investor Grievance Redressal Committees (IGRCs), or Regional Investor Complaints Resolution Committees (RICRC), This forum acts as a mediator to resolve the claims, disputes and differences between entities and complainants. Stock Exchanges provide a standard format to the complainant for referring the matter to IGRC. The committee calls for the parties and acts as a nodal point to resolve the grievances. For any detailed information please visit the website of the respective stock exchange. In case the investor is not satisfied with the conciliation done by IGRC, he/ she can go for arbitration and file arbitration under the Rules, Bye – laws and Regulations of the respective Stock Exchange/Depository.

ARBITRATION PROCESS AT STOCK EXCHANGES

The arbitration process at Stock Exchanges is given below:

- Applicant submits arbitration application to Exchange
- Application is verified and sent to Respondent
- Arbitrator appointed and documents forwarded to arbitrator
- Hearings held by arbitrator
- Arbitrator passes award
- Award debited if in favor of constituent
- Appeal filed by aggrieved party

- Hearings held and appeal award passed
- Petition filed u/s 34 of the Indian Arbitration Act in Court.

If the applicant is not satisfied with award passed by arbitration panel, he can go for appeal against the award to Appellate mechanism in the exchange itself.

RESOLUTION OF COMPLAINTS BY STOCK EXCHANGE

i. Timeline

Stock Exchange shall ensure that the investor complaints shall be resolved within 15 working days from the date of receipt of the complaint. Additional information, if any, required from the complainant, shall be sought within 7 working days from the date of receipt of the complaint. The period of 15 working days shall be counted from the date of receipt of additional information sought.

Stock Exchange shall maintain a record of all the complaints addressed/redressed within 15 working days from the date of receipt of the complaint/additional information. If complaint is not resolved within stipulated time frame, then the reason for non-redressal in given time frame shall also be recorded.

ii. Service-related complaints

Stock Exchange shall resolve service related complaints at its end. However, in case the complainant is not satisfied with the resolution, the same may be referred to the Investor Grievance Redressal Committee ("IGRC"), after recording the reasons in writing by the Chief Regulatory Officer of the Stock Exchange or any other officer of the Stock Exchange authorized in this behalf by the Managing Director. Service related complaints shall include non-receipt/ delay of Account statement, non-receipt/ delay of bills, closure of account/ branch, technological issues, shifting/closure of branch without intimation, improper service by staff, freezing of account, alleged debit in trading account, contact person not available in Trading member's office, demat account transferred without permission etc.

iii. Complaints to be referred to IGRC

For Complaints related to trade, settlement and 'deficiency in services', resulting into any financial loss, the stock exchange shall resolve the complaint on its own as per the time lines prescribed. However, if complaint is not resolved amicably, the same shall be referred to the IGRC, after recording the reasons in writing by the Chief Regulatory Officer of the Stock Exchange or any other officer of the Stock Exchange authorized in this behalf by the Managing Director.

HANDLING OF COMPLAINTS BY IGRC

i. IGRC shall have a time of 15 working days to amicably resolve the investor complaint through conciliation process. If IGRC needs additional information, then IGRC may request the Stock Exchange to provide the same before the initiation of the conciliation process. In such case, where additional information is sought, the timeline for resolution of the complaint by IGRC shall not exceed 30 working days.

ii. IGRC shall not dispose the complaint citing "Lack of Information and complexity of the case". The IGRC shall give its recommendation to Stock Exchange.

iii. IGRC shall decide claim value admissible to the complainant, upon conclusion of the proceedings of IGRC. In case claim is admissible to the complainant, Stock Exchanges shall block the admissible claim value from the deposit of the member as specified in this regard.

iv. Expenses of IGRC shall be borne by the respective Stock Exchange and no fees shall be charged to the complainant/member.

v. The Stock Exchange shall organize regular training program for IGRC members in consultation with National Institute of Securities Markets ("NISM"). The cost of such program shall be borne by Investor Service Fund ("ISF") of the Stock Exchange.

ARBITRATION

For any dispute between the member and the client relating to or arising out of the transactions in Stock Exchange, which is of civil nature, the complainant/ member shall first refer the complaint to the IGRC and/ or to arbitration mechanism provided by the Stock Exchange before resorting to other remedies available under any other law. For the removal of doubts, it is clarified that the sole arbitrator or the panel of arbitrators, as the case may be, appointed under the Stock Exchange arbitration mechanism shall always be deemed to have the competence to rule on its jurisdiction. A complainant/member, who is not satisfied with the recommendation of the IGRC, shall avail the arbitration mechanism of the Stock Exchange for settlement of complaints within six months from the date of IGRC recommendation.

ADVICES TO STOCK EXCHANGES

The stock exchanges are advised to: –

a) make necessary amendments to the relevant bye-laws, rules and regulations for the implementation of the above decision immediately;

b) bring the provisions of this circular to the notice of the members of the stock exchange and also to disseminate the same through their website; and

c) communicate to SEBI, the status of implementation of the provisions of this circular in the Monthly Development Reports to SEBI.

Source: SEBI CIRCULAR No.SEBI/HO/MIRSD/DOC/CIR/P/2020/226 dated November 06, 2020

DISCIPLINARY ACTION COMMITTEE, DEFAULTERS' COMMITTEE, INVESTORS SERVICE COMMITTEE, ARBITRATION COMMITTEE

SEBI vide its circular no CIR/CDMRD/DEA/03/2015 dated November 26, 2015 has made applicable circular No. CIR/MRD/DSA/33/2012 dated December 13,2012 to Exchanges. In partial modification to circular no. CIR/MRD/DSA/33/2012 dated December 13,2012, the composition and functions of the Disciplinary Action Committee, Defaulter's Committee and Investors Service Committee will be as follows:

Sr. No.	***Name of Committee***	***Functions handled***	***Composition***
1	Disciplinary Action Committee	i. The Committee shall formulate the policy for regulatory actions including warning, monetary fine, suspension, withdrawal of trading terminal, expulsion, to be taken for various violations by the members of the exchange. ii. Based on the laid down policy, the Committee shall consider the cases of violations observed during inspection, etc and impose appropriate regulatory action on the members of the exchange.	(i) The Committee shall have a minimum of 3 members and a maximum of 5 members. (ii) The Public Interest Directors shall form a majority of the Committee. (iii) A maximum of two key management personnel of the exchange can be on the Committee and one of which shall necessarily be the Managing Director of the exchange.

Sr. No.	Name of Committee	Functions handled	Composition
		iii. While imposing the regulatory measure, the Committee shall adopt a laid down process, based on the 'Principles of natural justice'.	(iv) The Committee may also include independent external persons such as retired judge, etc. (v) SEBI may nominate members in the Committee, if felt necessary in the interest of commodities market.
2	Defaulters' Committee	i. To realize all the assets/ deposits of the defaulter/expelled member and appropriate the same amongst various dues and claims against the defaulter/expelled member in accordance with Rules, Byelaws and Regulations of the exchange. ii. In the event both the clearing member and his constituent trading member are declared defaulter, then the Defaulters' Committee of the clearing corporation shall work together to realise the assets of both the clearing member and the trading member. iii. Admission or rejection of claims of client/ trading members/ clearing members over the assets of the defaulter/ expelled member. iv. Advise in respect of the claims to the Trustees of the IPF on whether the claim is to be paid out of IPF or otherwise.	i. The Committee shall have a minimum of 3 members and a maximum of 5 members. ii. The Public Interest Directors shall form a majority of the Committee. iii. A maximum of two key management personnel of the exchange can be on the Committee. iv. The Committee may also include independent external persons such as retired judge, etc. v. SEBI may nominate members in the Committee, if felt necessary in the interest of commodities market.
3	Investor Services Committee	i. Supervising the functioning of Investor's Services Cell of the Exchange which includes review of complaint resolution process, review of complaints remaining unsolved over long period of time, estimate the adequacy of resources dedicated to investor services, etc.; (i) Supervision of utilization of ISF; (ii) To have annual review of the arbitrators and arbitration/awards (both quantum and quality of the awards).	i. The Committee shall have a minimum of 3 members and a maximum of 5 members. ii. The Public Interest Directors shall form a majority of the Committee. iii. A maximum of two key management personnel of the exchange can be on the Committee. iv. The Committee may also include independent external persons. v. SEBI may nominate members in the Committee, if felt necessary in the interest of commodities market.

The Commodity Derivatives Exchanges are advised to:-

- make necessary amendments to relevant bye-laws, rules and regulations for the implementation of this circular;
- bring the provisions of this circular to the notice of the members of the Commodity Derivatives Exchanges and also to disseminate the same through their website;
- communicate SEBI, the status of implementation of the provisions of this circular.

NATIONAL COMMODITY DERIVATIVES EXCHANGES

Pursuant to Section 131 of the Finance Act, 2015 and Central Government notification F.No. 1/9/SM/2015 dated August 28, 2015, all recognized associations under the Forward Contracts (Regulation) Act, 1952 are deemed to be recognized stock exchanges under the Securities Contracts (Regulation) Act, 1956 with effect from September 28, 2015. This circular applies to National Commodity Derivatives Exchanges as defined in the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) (Amendment) Regulations, 2015.

The circular no. CIR/CDMRD/DIECE/02/2015 dated November 16, 2015 is issued with an objective to streamline and strengthen the framework of investor redressal and arbitration mechanism at commodity derivatives exchanges in line with the securities market. The provisions of this circulars are as under

A. Investor Service Centre (ISC)/ Investor Grievances Redressal Committee (IGRC) :

i. The national commodity derivative exchanges shall set up investor service centers (ISC) for the benefit of the public/ investors in accordance with the circular CIR/MRD/DSA/03/2012 dated January 20, 2012.

ii. The national commodity derivatives exchanges shall constitute IGRC in accordance with the SEBI circular no CIR/MRD/DSA/03/2012 dated January 20, 2012 and shall perform all such functions and responsibilities as stated in the SEBI circular no CIR/MRD/ICC/30/2013 dated September 26, 2013.

B. Arbitration Committee / Panel and Appellate Arbitration:

i. The national commodity derivatives exchanges shall maintain panel of arbitrators, code of conduct for arbitrators, arbitration process, appellate arbitration, place of arbitration (nearest address provided by the client in the KYC form), implementation of arbitration award in favour of clients, records and disclosures as per the provisions of SEBI Circulars no CIR/MRD/DSA/24/2010 dated August 11, 2010, CIR/MRD/DSA/04/2012 date January 20, 2012 and CIR/MRD/ICC/20/2013 dated July 05, 2013.

ii . The national commodity derivatives exchanges shall make applicable the arbitration fees to each parties to the arbitration in accordance with the SEBI Circular No CIR/MRD/DSA/29/2010 dated August 31, 2010 read with CIR/MRD/ICC/29/2012 dated November 07, 2012 and CIR/MRD/ICC/29/2013 dated September 26, 2013.

C. Automatic Process and Common Pool of arbitrators:

i. The national commodity derivatives exchanges shall pool all arbitrators of their exchange in the common pool across all national commodity derivatives exchanges, facilitate automatic selection of arbitrators from the common pool and shall also follow all other provisions mentioned in the SEBI Circular CIR/MRD/ICC/8/2013 dated March 18, 2013.

The implementation w.r.t above should be reported by the national commodity derivatives exchange to SEBI on monthly basis.

The national commodity derivatives exchanges are advised to:-

- make necessary amendments to relevant bye-laws for the implementation of this circular;
- bring the provisions of this circular to the notice of the members of the commodity derivatives exchanges and also to disseminate the same through their website;
- take necessary steps to make investors aware of the grievances redressal mechanism and arbitration process;
- communicate SEBI, the status of implementation of the provisions of this circular.

ARBITRATION MECHANISM MADE SIMPLER

Based on inputs received from investors regarding functioning of the arbitration mechanism at the Stock Exchanges, the following changes have been made to the arbitration mechanism by SEBI.

Sl. No.	*Features*	*Earlier policy*	*Present Policy*
1.	Composition of Arbitration Panel	40% of the members of the exchange on the Arbitration Committee and the balance 60% shall be nominated from the persons other than members of the stock exchanges with the prior approval of the Stock Exchange Board.	• Arbitration Committees/councils/panels shall consist of persons other than members of the stock exchange who shall be nominated with prior approval of the Stock Exchange Board.
2.	Selection of arbitration	Selection of Arbitrators by Stock Exchanges.	• List of Arbitrators on the panel of all stock exchanges having nation- wide trading terminals shall be pooled and will be called a 'Common Pool'. This list shall be made publicly available including by way of display on websites of the stock exchanges. • 'Common pool' of Arbitrators will consist of Arbitrators listed on the panels of all stock exchanges having nation-wide trading terminals. The pooling of arbitrators will be done centre-wise. To illustrate, the list of arbitrators on the panel of all stock. • exchanges for the region covered by the Delhi centre will be pooled. This would enable an applicant from the region to choose any arbitrator from the 'Common Pool' for Delhi.

Sl. No.	Features	Earlier policy	Present Policy
			• If the client and member (stock broker, trading member or clearing member) fail to choose the Arbitrator(s) from the Common Pool, the Arbitrator(s) will be chosen by an 'Automatic Process' wherein neither the parties to arbitration (i.e. client or member) nor the concerned Stock Exchanges will be directly involved. • The 'Automatic Process' will entail a randomized, computer generated selection of Arbitrator, from the list of Arbitrator, from the list of Arbitrators in the 'Common Pool'. • The selection process shall be in chronological order of the receipt of arbitration reference i.e. only after selecting an arbitrator for the former arbitration reference received, selection for the latter shall be taken up. • The 'Automatic Process' will send a system generated, real time alert sms, email etc.) to all entities involved in the particular case. Further, the communication for the appointment of the Arbitrator will be sent immediately and in any case not later than the next working day from the day of picking of the Arbitrator. This communication will be sent by the stock exchange on which the dispute had taken place, to all concerned entities including clients, arbitrators, members, stock exchanges etc. • The selection of Arbitrators by Stock Exchanges as done currently, shall henceforth be replaced by the 'Automatic Process'. • In case of any probable conflict of interest in an arbitration reference being assigned to any Arbitrator the Arbitrator will have to upfront decline the arbitration reference. • After the said arbitrator declines, the 'automatic process' will pick the name of another Arbitrator. This will continue till the time there is no conflict of interest, by

Sl. No.	Features	Earlier policy	Present Policy
			the selected arbitrator. In this regard, the timelines of 30 days might get extended. However, SEs shall put on record the reasons of such extension. ● In case of conflict of interest by the arbitrator, the information for the same may reach the stock exchange on which the dispute has taken place within 15 days of receipt of communication from the SE above. The said information may be sent by any method which ensures proof of delivery.
3.	Investor Service Centres	Delhi, Mumbai, Kolkata and Chennai.	● Additionally made available at Ahmedabad, Hyderabad, Kanpur and Indore. ● Being made available at Bangalore, Pune, Jaipur and Ghaziabad by December 31, 2023. ● Being made available at Lucknow, Gurgaon, Patna and Vadodara by June 30, 2014. ● Arbitration and appellate arbitration shall be conducted at the centre nearest to the address provided by Client in the KYC form.
4.	Fees for filling arbitration	A client who has a claim/ counter claim upto Rs. 10 lakh and files arbitration reference for the same within six months, shall be exempt from the deposit.	● A client, who has claim/ counter claim upto Rs 10 lakh and files arbitration reference, shall be exempt from the deposit. Expenses thus arising with regard to such applications shall be borne by the Stock Exchanges."
5.	Fees for filling appeal.	A party filing an appeal before the appellate panel shall pay a fee not exceeding Rs. 30,000, as may be prescribed by the stock exchange, in addition to statutory dues (stamp duty, service tax, etc) along with the appeal."	● A party filing an appeal before the appellate panel shall pay a fee not exceeding Rs. 30,000, as may be prescribed by the stock exchange, in addition to statutory dues (stamp duty, service tax, etc) along with the appeal." ● In case the party filing the appeal is a client having claim/counterclaim of upto Rs. 10 lakh, then the party shall pay a fee not exceeding Rs. 10,000/- Further expenses thus arising shall be borne by the Stock Exchanges and the Investor Protection Fund of Stock Exchanges equally.

Sl. No.	*Features*	*Earlier policy*	*Present Policy*
6.	Timelines for arbitration and reconciliation and Credit of claims pending appeal	No set timelines.	• Stock Exchanges shall ensure that all complaints are resolved at their end within 15 days as mentioned in the circular no. CIR/MRD/ICC/16/2012 dated June 15, 2012. The correspondence with the Member & investor (who is client of a Member) may be done on email if the email id of the investor is available in the UCC database. The Member (Stock Broker, Trading Member and Clearing Member) shall provide a dedicated email id to the stock exchange for this purpose. • In case the matter does not get resolved, conciliation process of the exchange would start immediately after the time lines stated above. • Investor Grievance Redressal Committee (IGRC) shall be allowed a time of 15 days to amicably resolve the investor complaint. • IGRC shall adopt a two-fold approach i.e. for proceedings leading to direction to the Member to render required service in case of service related complaints and proceedings leading to an order concluding admissibility of the complaint or otherwise in case of trade related complaints. • In case the matter is not resolved through the conciliation process IGRC would ascertain the claim value admissible to the investor. • Upon conclusion of the proceedings of IGRC, i.e in case claim is admissible to the investor, Stock Exchanges shall block the admissible claim value from the deposit of the Member. • The Stock Exchange shall give a time of 7 days to the Member from the date signing of IGRC directions as mentioned under sub-para (d) above to inform the Stock Exchange whether the Member intends to pursue the next level of resolution i.e. Arbitration.

Sl. No.	Features	Earlier policy	Present Policy
			• In case, the Member does not opt for arbitration, the Stock Exchange shall, release the blocked amount to the investor after the aforementioned 7 days. • In case, the Member opts for arbitration and the claim value admissible to the investor is not more than Rs. 10 lac, the following shall be undertaken by the Stock Exchange i) 50% of the admissible claim value or Rs. 0.75 lac, whichever is less, shall be released to the investor from IPF of the Stock Exchange. ii) In case the arbitration award is in favour of the investor and the Member opts for appellate arbitration then a positive difference of 50% of the amount mentioned in the arbitration award or Rs. 1.5 lac, whichever is less and the amount already released to the investor at clause (i) above, shall be released to the investor from IPF of the Stock Exchange. iii) In case the appellate arbitration award is in favour of the investor and the Member opts for making an application under section 34 of the Arbitration and Conciliation Act 1996 to set aside the appellate arbitration award then a positive difference of 75% of the amount determined in the appellate arbitration award or Rs 2 lac whichever is less and the amount already released to the investor at clause (i) and (ii) above, shall be released to the investor from IPF of the Stock Exchange. iv) Before release of the said amounts from the IPF to the investor, the Stock Exchange shall obtain appropriate undertaking indemnity from the investor against the release of the

Sl. No.	Features	Earlier policy	Present Policy
			amount from IPF to ensure return of the amount so released to the investor, in case the proceedings are decided against the investor. v) If it is observed that there is an attempt by investor/client either individually or through collusion with Member(s) or with any other stakeholders, to misuse the provisions then appropriate action in this regard shall be taken against any such person, by the Stock Exchange, including disqualification of the person so involved. vi) In case the complaint is decided in favour of the investor after conclusion of the proceedings, then amount released to the investor shall be returned to IPF from the blocked amount of the Member by the Stock Exchange and the rest shall be paid to the investor. vii) Total amount released to the investor through the facility of monetary relief from IPF in terms of this Circular shall not exceed Rs. 5 lac in one financial year. viii) Stock Exchanges may devise a detailed procedure with regard to release of funds from IPF and recovery thereof and necessary formats of documentation. ix) In case the investor loses at any stage of the proceedings and decides not to pursue further, then the investor shall refund the amount released from IPF, back to the IPF. In case the investor fails to make good the amount released out of IPF then investor (based on PAN of the investor) shall not

Sl. No.	Features	Earlier policy	Present Policy
			be allowed to trade on any of the Stock Exchanges till such time the investor refunds the amount to IPF. Further, the securities lying in the demat account(s) of the investor shall be frozen till such time as the investor refunds the amount to the IPF. x) The Stock Exchanges may also resort to displaying the names of such investors on their websites if considered necessary,
7.	Provision to Appeal in Courts of law.	Appeal against the decision of appellate panel can be filed in the court at the centre of arbitration only.	• Appeal against the decision of the appellate panel shall be filed in the competent Court nearest to the address provided by Client in the KYC form.
8.	Facilitation desks would inter-alia also assist investors in obtaining documents/ details from Stock Exchanges wherever So required for making application to IGRC and filing arbitration.	Not available.	• Mandated at all Stock Exchanges having nation wide terminals.

WHEN CAN SEBI TAKE ACTION FOR NON RESOLUTION OF THE COMPLAINT?

SEBI follows up with companies who do not redress investor's grievances by sending reminders to them, having meetings with them and issuing pre-enforcement letters for pending complaints. While the entity is directly responsible for redressal of the complaint, SEBI initiates action against recalcitrant entities on the grounds of their unsatisfactory redressal of large number of investor complaints as a whole.

Enforcement actions as provided under the Securities laws (including launch of Adjudication, Prosecution proceedings, Directions u/s 11B of SEBI Act, 1992) are initiated against the companies and/or its directors whose progress in redressal of investors' grievances is not satisfactory.

SITUATION/S WHERE SEBI HAS CLOSED A COMPLAINT AFTER DUE CONSIDERATION BUT COMPLAINANT KEEPS REPEATING IT

Sometimes a complaint is addressed and disposed off by SEBI advising the complainants to adopt appropriate course of action but the complainants have been writing to SEBI repeatedly without choosing to avail of the appropriate legal remedy from the competent forum.

Example: A complainant raises the issue of incorrect information provided by broker regarding his exposure limits and squaring off positions without his consent. The broker replies that as there was a debit in client's account and due to unavailability of funds, his positions were squared up. The complainant is advised to approach Stock Exchanges' Investor Grievance Resolution Panel/Committee as the matter is that of a dispute. The complainant refuses to approach/attend meetings and continues to send frequent mails to various levels in SEBI. In such cases, SEBI may not respond to any such mail/letter etc.

PLACE OF ARBITRATION / APPELLATE ARBITRATION

In case, the award amount is more than Rs. 50 lakhs (Rs. Fifty lakhs), the next level of proceedings (arbitration or appellate arbitration) may take place at the nearest metro city, if so desired by any of the parties involved. The additional statutory cost for arbitration, if any, shall be borne by the party desirous of shifting the place of arbitration.

THRESHOLD LIMIT FOR INTERIM RELIEF PAID OUT OF IPF IN STOCK EXCHANGES

In case, the order is in favour of client and the member opts for arbitration wherein the claim value admissible to the client is not more than Rs. 20 lakhs (Rs. Twenty lakhs), the following steps shall be undertaken by the Stock Exchange:

a) In case the GRC order is in favour of the client, then 50% of the admissible claim value or Rs. 2.00 lakhs (Rs. Two lakhs), whichever is less, shall be released to the client from IPF of the Stock Exchange.

b) In case the arbitration award is in favour of the client and the member opts for appellate arbitration, then a positive difference of, 50% of the amount mentioned in the arbitration award or Rs. 3.00 lakhs (Rs. Three lakhs), whichever is less, and the amount already released to the client at clause (a) above, shall be released to the client from IPF of the Stock Exchange.

c) In case the appellate arbitration award is in favour of the client and the member opts for making an application under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the appellate arbitration award, then a positive difference of, 75% of the amount mentioned in the appellate arbitration award or Rs. 5.00 lakhs (Rs. Five Lakhs), whichever is less, and the amount already released to the client at clause (a) and (b) above, shall be released to the client from IPF of the Stock Exchange.

d) Total amount released to the client through the facility of interim relief from IPF in terms of this Circular shall not exceed Rs. 10.00 lakhs (Ten lakhs) in a financial year."

SPEEDING UP GRIEVANCE REDRESSAL MECHANISM

The additional fees charged from the trading members, if the claim is filed beyond the prescribed timeline, if any, to be deposited in the IPF of the respective Stock Exchange.

REGULATORY ACTIONS

The Securities and Exchange Board of India (SEBI) was established on April 12, 1992 in accordance with the provisions of the Securities and Exchange Board of India Act, 1992. The Regulatory body i.e. SEBI will take actions for the complaints received on its SCORES portal.

SEBI Complaints Redress System (SCORES) Portal

There will be occasions when you have a complaint against a listed company/ intermediary registered with SEBI. In the event of such complaint, you should first approach the concerned company/ intermediary against whom you have a complaint. However, you may not be satisfied with their response. Therefore, you should know whom you should turn to, to get your complaint redressed.

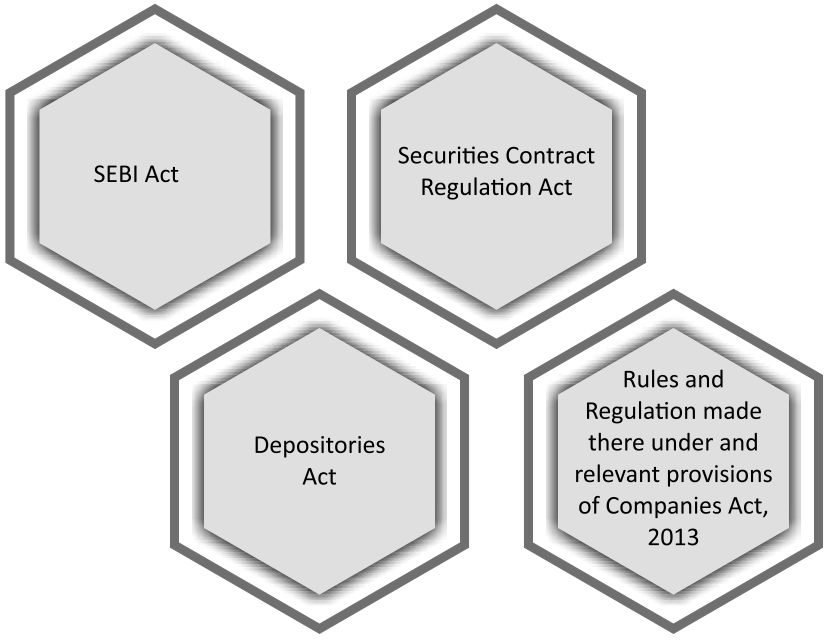
SEBI takes up complaints related to issue and transfer of securities and non-payment of dividend with listed companies. In addition, SEBI also takes up complaints against the various intermediaries registered with it and related issues.

SCORES facilitates you to lodge your complaint online with SEBI and subsequently view its status.

It is an online platform for investors to lodge their complaints related to securities market. The Status of every complaint can be viewed online in the SCORES website or can be obtained from toll free helpline.

Entity/Investor can seek/provide clarification on complaint online. It provides unique complaint registration number for future reference and tracking.

Complaints coming under the purview of SEBI



Complaints NOT coming under the purview of SEBI

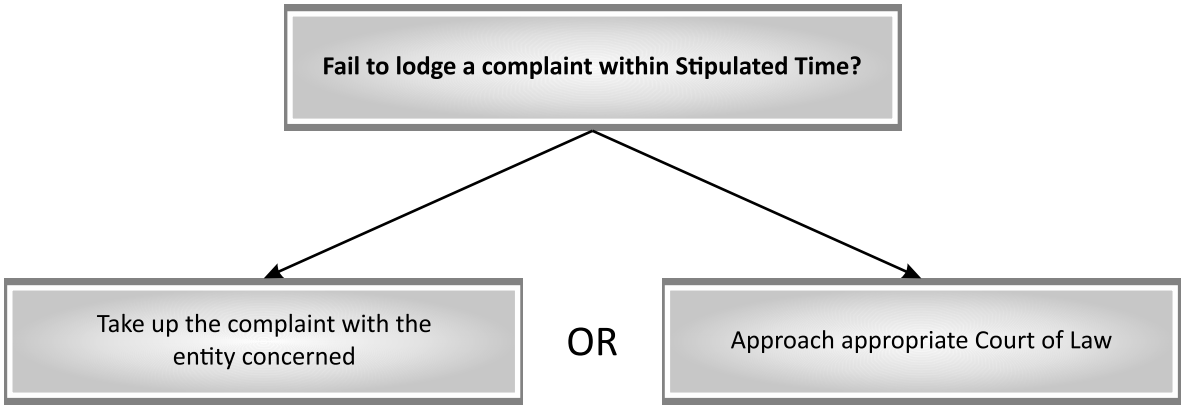
- Complaint not pertaining to investment in securities market
- Anonymous Complaints (except whistle blower complaints)
- Incomplete or un-specific complaints
- Allegations without supporting documents
- Suggestions or seeking guidance /explanation
- Not satisfied with trading price of the shares of the companies
- Non-listing of shares of private offer

- Disputes arising out of private agreement with companies/intermediaries
- Matter involving fake/forged documents
- Complaints on matters not in SEBI purview
- Complaints about any unregistered/un-regulated activity.

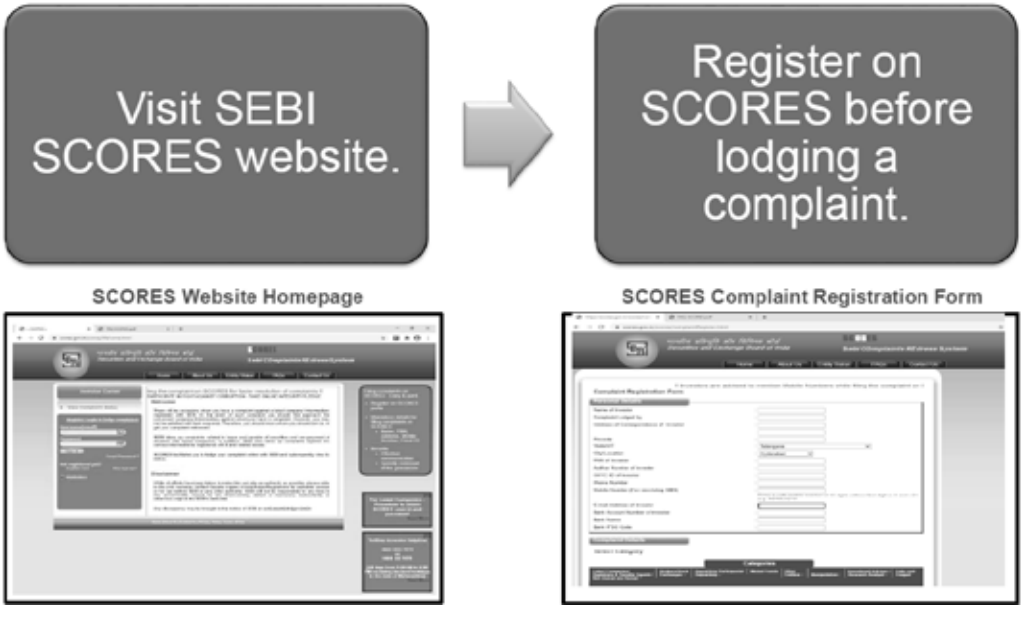
Time period for Lodging of a complaint on SCORES

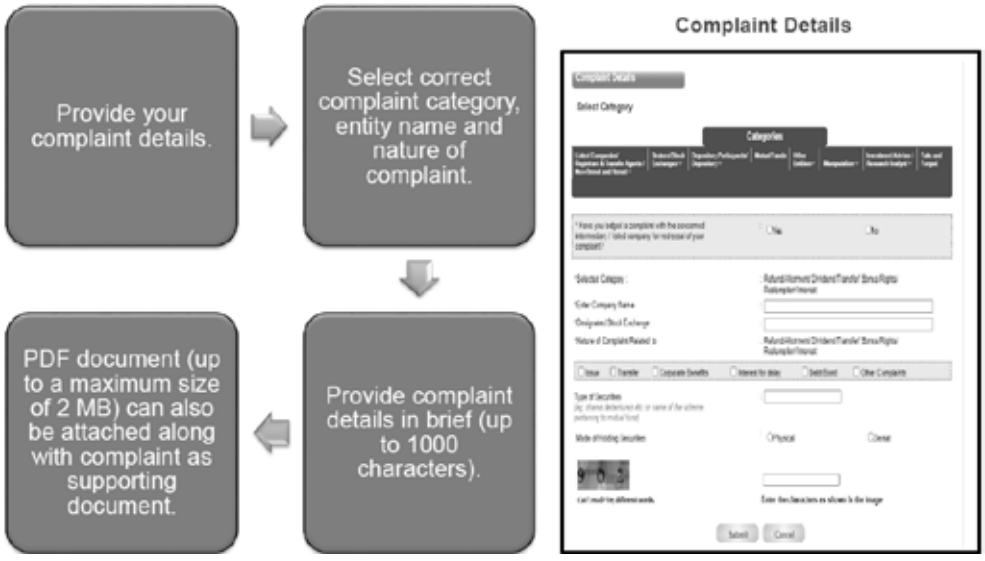
Complainant needs to lodge a complaint on SCORES within **three(03)** years from the date of cause of complaint. Where:

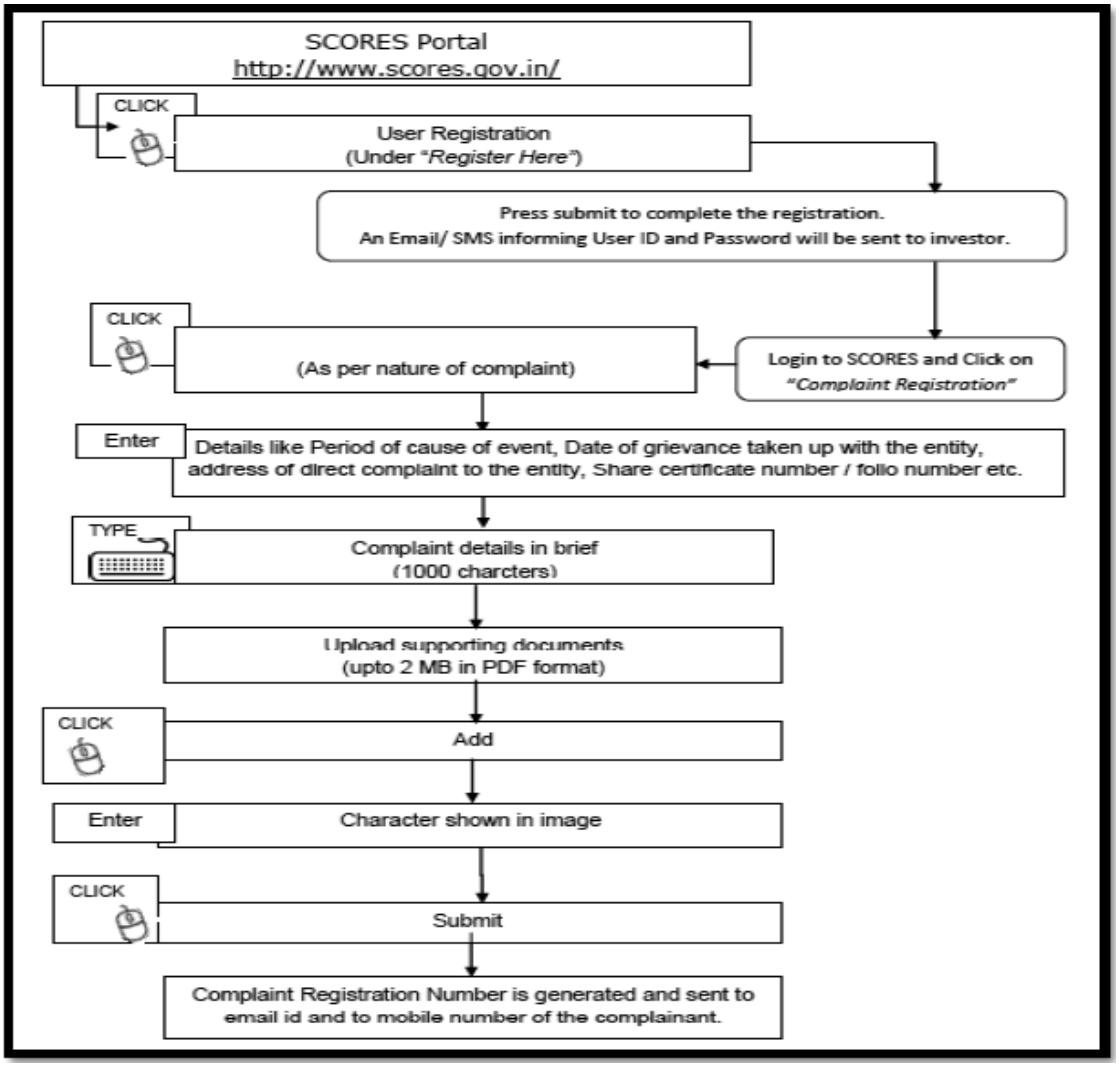
- Investor has approached listed company or registered intermediary for redressal of complaint and,
- Concerned listed company or registered intermediary rejected the complaint or,
- Complainant hasn't received any communication from listed company or intermediary concerned or,
- Complainant is not satisfied with reply given to him or redressal action taken by the listed company or an intermediary.



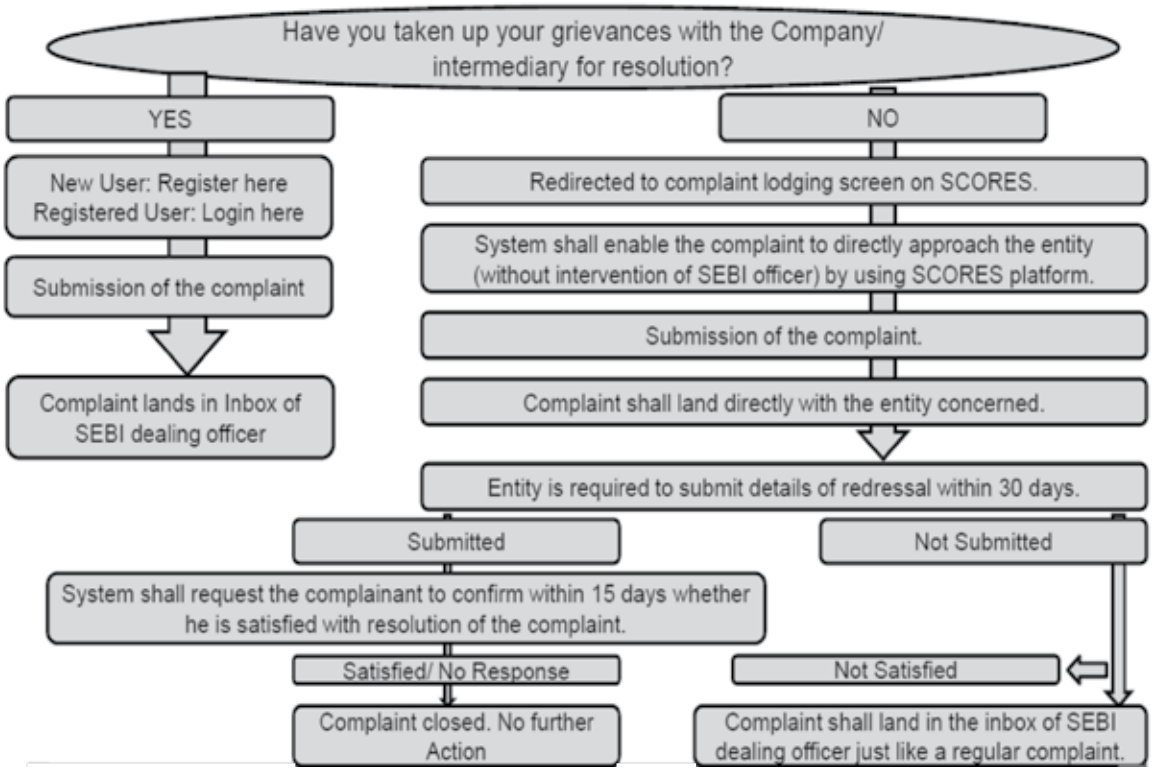
Procedure to lodge complaint online in SCORES



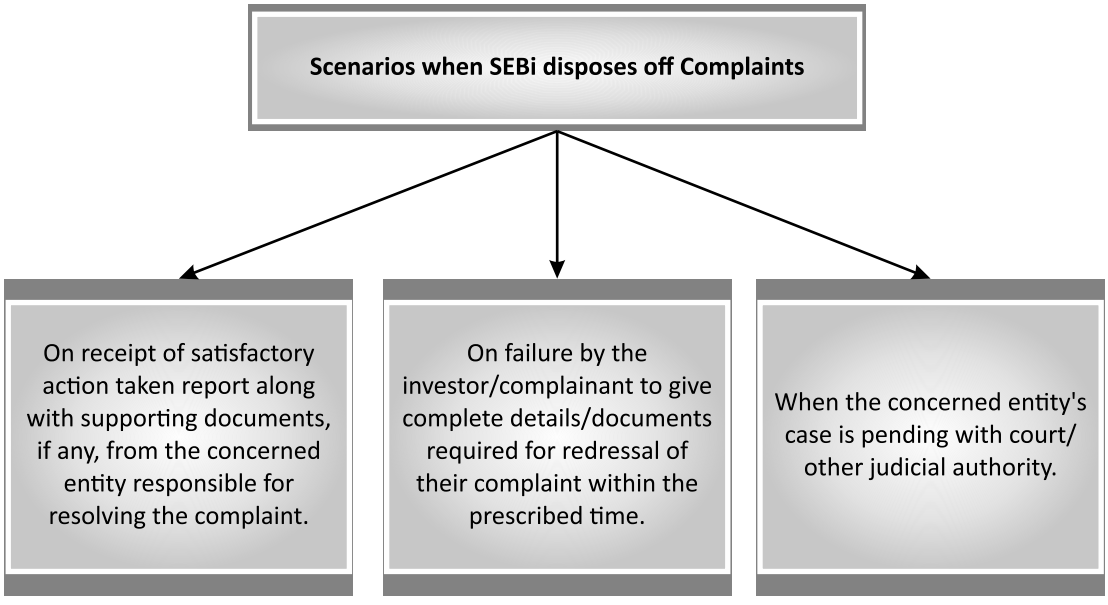

Provide your complaint details.
Select correct complaint category, entity name and nature of complaint.
Provide complaint details in brief (up to 1000 characters).
PDF document (up to a maximum size of 2 MB) can also be attached along with complaint as supporting document.
Complaint Details


SCORES Portal
http://www.scores.gov.in/
CLICK
User Registration
(Under "Register Here")
Press submit to complete the registration.
An Email/ SMS informing User ID and Password will be sent to investor.
CLICK
(As per nature of complaint)
Login to SCORES and Click on
"Complaint Registration"
Enter
Details like Period of cause of event, Date of grievance taken up with the entity, address of direct complaint to the entity, Share certificate number / folio number etc.
TYPE
Complaint details in brief
(1000 charcters)
Upload supporting documents
(upto 2 MB in PDF format)
CLICK
Add
Enter
Character shown in image
CLICK
Submit
Complaint Registration Number is generated and sent to email id and to mobile number of the complainant.

How are investor complaints handled?



Disposing of Investor Complaints



NICE PLUS: NSE'S INVESTOR CENTRE

Arbitration is a quasi-judicial process of settlement of disputes between Trading Member, Investor, Clearing Member, Authorised Person, Listed Company etc. Arbitration aims at quicker legal resolution for the disputes.

When one of the parties feels that the complaint has not been resolved satisfactorily either by the other party or through the complaint resolution process of the Exchange, the parties may choose the route of arbitration.

Role of Arbitration Mechanism for dispute resolution

Standard Operating Procedures (SOP) for dispute resolution under the Stock Exchange arbitration mechanism for disputes between a Listed Company and/or Registrars to an Issue and Share Transfer Agents (RTAs) and its Shareholder(s)/Investor(s)

1 Applicability

1.1. The provisions of SOP shall be applicable to Listed Companies / RTAs offering services on behalf of listed companies. In case of claims or disputes arising between the shareholder(s)/ investor(s) of listed companies and the RTAs, the RTAs shall be subjected to the stock exchange arbitration mechanism. In all such instances, the listed company shall necessarily be added as a party.

1.2. The Arbitration Mechanism shall be initiated post exhausting all actions for resolution of complaints including those received through SCORES Portal. The Arbitration reference shall be filed with the Stock Exchange where the initial complaint has been addressed.

2. Maintenance of a Panel of Arbitrators and Code of Conduct for Arbitrators

2.1. The maintenance of Panel of Arbitrators and the Code of Conduct for Arbitrators shall be in line with the current norms being followed by the Stock Exchanges for arbitration mechanism.

3. Arbitration

3.1. The limitation period for filing an arbitration application shall be as prescribed under the law of limitation, i.e., The Limitation Act, 1963.

3.2. In case of arbitration matters involving a claim of up to Rs. 25 lakhs, a sole arbitrator shall be appointed and, if the value of the claim is more than Rs. 25 lakhs, a panel of three arbitrators shall be appointed.

3.3. The process of appointment of arbitrator(s) shall be completed by the stock exchange within 30 days from the date of receipt of complete application from the applicant.

3.4. Disputes pertaining to or emanating from investor service requests such as transfer/transmission of shares, demat/remat, issue of duplicate shares, transposition of holders, investor entitlements like corporate benefits, dividend, bonus shares, rights entitlements, credit of securities in public issue, interest /coupon payments on securities and delay in processing/wrongful rejection of aforesaid investor service requests may be considered for arbitration.

4. Appellate Arbitration

4.1. Any party aggrieved by an arbitral award may file an appeal before the appellate panel of arbitrators of the stock exchange against such award within one month from the date of receipt of arbitral award by the aggrieved party.

4.2. The appellate panel shall consist of three arbitrators who shall be different from the one(s) who passed the arbitral award appealed against.

4.3. The process of appointment of appellate panel of arbitrator(s) shall be completed by the stock exchange within 30 days from the date of receipt of complete application for appellate arbitration.

5. Arbitration Fees

5.1. The fees per arbitrator shall be Rs. 18,000/- plus stamp duty, service charge etc. as applicable per

case. The fees plus stamp duty, service charge etc. as applicable shall be collected from RTAs/ Listed companies and shareholder(s)/ investor(s) separately by the Exchange, for defraying the cost of arbitration.

5.2. If the value of claim is less than or equal to Rs.10 lakhs, then the cost of arbitration with respect to the shareholder(s)/investor(s) shall be borne by the Exchange.

5.3. Further on passing of the arbitral award, the fees and stamp charges paid by the party in whose favour the award has been passed would be refunded and the fees and stamp charges of the party against whom the award has been passed would be utilized towards payment of the arbitrator fees.

5.4. For appellate arbitration, fees of Rs. 54,000/- plus stamp duty, service charge etc. as applicable shall be paid by the appellant only. The Appellate fees shall be non-refundable.

5.5. In case, an appellant filing an appeal is a shareholder/an investor having a claim of more than Rs. 10 lakhs, the appellant shall pay a fee not exceeding Rs. 30,000/- plus stamp duty, service charge etc. as applicable and in case of a claim upto Rs. 10 lakhs, the appellant shall pay a fee not exceeding Rs. 10,000/- plus stamp duty, service charge etc. as applicable. Further expenses thus arising shall be borne by the Stock Exchanges and the Investor Protection Fund of Stock Exchanges equally.

6. Place of Arbitration

6.1. The arbitration and appellate arbitration shall be conducted at the regional centre of the stock exchange nearest to the shareholder(s)/investor(s). The application under Section 34 of the Arbitration and Conciliation Act, 1996, if any, against the decision of the appellate panel of arbitrators shall be filed in the competent Court nearest to such regional centre.

7. Hearings

7.1. No hearing shall be required to be given to the parties involved in the dispute if the value of the claim or dispute is upto Rs. 25,000/-. In such a case, the arbitrator(s) shall proceed to decide the matter on the basis of documents submitted by the parties concerned.

7.2. If the value of claim or dispute is more than Rs. 25,000/-, the arbitrator(s) shall offer to hear the parties to the dispute unless parties concerned waive their right for such hearing in writing.

7.3. After appointment of the arbitrator(s) in the matter, the Exchange in consultation with the arbitrator(s) shall determine the date and time of the hearing and a notice of the same shall be given by the Exchange to the parties concerned at least ten days in advance. The parties concerned may opt for physical hearings which are conducted in the Stock Exchange Premises or hearing through Video Conference. The hearings through Video Conference may be conducted by the Stock Exchanges after taking consent from the parties concerned.

7.4. The arbitrator(s) may conduct one or more hearings, with a view to complete the case within the prescribed timelines.

8. Passing of Award

8.1. Arbitral Award

8.1.1. The arbitration proceedings shall be concluded by way of issue of an arbitral award within four months from the date of appointment of arbitrator(s).

8.1.2. The stock exchanges may extend the time for issue of arbitral award by not more than two

months on a case to case basis after recording the reasons for the same. 8.2. Appeal against Arbitral Award.

8.2.1. The appeal against an arbitral award shall be disposed of by way of issue of an appellate arbitral award within three months from the date of appointment of appellate panel.

8.2.2. The stock exchanges may extend the time for issue of appellate arbitral award by not more than two months on a case to case basis after recording the reasons for the same.

8.2.3. A party aggrieved by the appellate arbitral award may file an application to the court of competent jurisdiction in accordance with Section 34 of the Arbitration and Conciliation Act, 1996.

8.3. In case the parties wish to settle/withdraw the dispute, the arbitrator(s)/ appellate panel may pass an award on consent terms.

8.4. Where the award is against the Listed Company/RTA, the Listed Company/RTA shall update the status of compliance with the arbitration award promptly to the exchange.

9. Record and Disclosures

9.1. The stock exchanges shall preserve the documents related to arbitration for five years from the date of arbitral award, appellate arbitral award or Order of the Court, as the case may be; and register of destruction of records relating to above, permanently.

9.2. The stock exchanges shall disclose on its website, details of disposal of arbitration proceedings and details of arbitrator-wise disposal of arbitration proceedings as per the formats prescribed by SEBI for already available arbitration mechanism.

10. The provisions of this SOP shall come into force with effect from June 01, 2022.

Source: *https://static.nseindia.com//s3fs-public/inline-files/Arbitration_mechanism_for_disputes_between_Listed_Company_and_its_Investor.pdf*

Source*: https://www.cdslindia.com › Investors › IAP PPTs*

SURVEILLANCE ACTIONS

In order to facilitate effective surveillance mechanism at the Member level, the Exchange has introduced the Surveillance Dashboard. It aims to provide information about alerts on orders and trades which are abnormal in nature. Information on Dashboard Surveillance dashboard is mainly divided into 4 parts:

1. Information Dashboard
2. Alert / Monitoring Dashboard
3. Exchange communication
4. Transactional escalation from TM to the Exchange.

Securities and Exchange Board of India (SEBI) and Exchanges in order to enhance market integrity and safeguard interest of investors, have been introducing various enhanced pre-emptive surveillance measures such as reduction in price band, periodic call auction and transfer of securities to Trade for Trade segment from time to time.

In continuation to various surveillance measures already implemented, SEBI and Exchanges, pursuant to discussions in joint surveillance meetings, have decided that along with the aforesaid measures there shall be Additional Surveillance Measures (ASM) on securities with surveillance concerns based on objective parameters viz. Price / Volume variation, Volatility etc.

The shortlisting of securities for placing in ASM is based on an objective criterion as jointly decided by SEBI and Exchanges covering the following parameters:

- High Low Variation
- Client Concentration
- Close to Close Price Variation
- Market Capitalization
- Volume Variation
- Delivery Percentage
- No. of Unique PANs
- PE.

Daily review of Price Bands

Price bands determine the range in which a security can move. To illustrate, a 10% price band implies that the security can move +/- 10% of its previous day close price on a given day. The downward revision is a daily process whereas upward revision is a bi-monthly process, subject to satisfaction of certain objective criteria's.

No price band is applicable to securities on which derivative products are available. However, Exchange shall set a dynamic price band at 10% of the previous closing price and shall be flexed based on pre-determined criteria.

Deep Out-of The Money (OTM) contracts

This has reference to Exchange circular NSE/SURV/42382 dated October 11, 2019 on Surveillance measures for Deep Out-of The Money (OTM) contracts.

Graded Surveillance Measure (GSM)

Securities and Exchange Board of India (SEBI) and Exchanges in order to enhance market integrity and safeguard interest of investors, have been introducing various enhanced pre-emptive surveillance measures such as reduction in price band, periodic call auction and transfer of securities to Trade for Trade segment from time to time.

The main objective of these measures is to:

- Alert and advice investors to be extra cautious while dealing in these securities; and
- Advice market participants to carry out necessary due diligence while dealing in these securities.

In continuation to various surveillance measures already implemented, SEBI and Exchanges, pursuant to discussions in joint surveillance meetings, have decided that along with the aforesaid measures there shall be additional Graded Surveillance Measures on securities with price not commensurate with financial health and fundamentals like Earnings, Book value, Fixed assets, Net-worth, P/E multiple, Market Capitalisation etc.

The list of such securities identified under GSM shall be informed to the market participants from time to time and shall be available on the exchange's website.

1. All market participants dealing in identified securities have to be extra cautious and diligent as, Exchanges and SEBI may at an appropriate time subject to satisfaction of certain criteria lay additional restrictions such as:
    - Placing / continuing securities in Trade for Trade category;

- Requirement of depositing additional amount as Surveillance Deposit, which shall be retained for an extended period;
- Once in a week trading; and
- Freezing of price on upper side of trading in securities, as may be required;
- Any other surveillance measure as deemed fit in the interest of maintaining the market integrity.

2. All the aforesaid actions shall be triggered based on certain criteria and shall be made effective with a very short notice.
3. The above surveillance actions are without prejudice to the right of Exchanges and SEBI to take any other surveillance measures, in any manner, on a case to case basis or holistically depending upon the situation and circumstances as may be warranted.
4. The members trading in the identified securities either on their own account or on behalf of clients shall be kept under close scrutiny by the exchange and any misconduct shall be viewed seriously.

Defaulting clients

As per SEBI Circular No. SEBI/HO/DMS/CIR/P/2017/15 dated February 23, 2017, the Stock Exchanges are directed to create a common database of defaulting clients accessible to Members across the Stock Exchanges.

Defaulting Clients as defined by SEBI is:

A client may be identified as defaulter if the client does not pay the award amount to the member/depository participant as directed in the IGRP/Arbitration /Appellate arbitration order and also does not appeal at the next level of redressal mechanism within the timelines prescribed by SEBI or file an application to court to set aside such order in accordance with Section 34 of the Arbitration and Conciliation Act, 1996 (in case of aggrieved by arbitration/ appellate award).

Accordingly, the Exchange had issued circular dated September 14, 2017, seeking information of defaulting clients as defined above from its Trading Members. Based on the information provided by the trading members of National Stock Exchange of India Ltd. and other Exchanges regarding the defaulting clients as defined above a common database across Exchanges have been made available.

Investor's Beware: Report Un-solicited messages/videos/any other reference

- Investors beware while dealing based on unsolicited Stock Tip/ Recommendation circulated by unauthorized/ unregistered entities, received through Whatsapp, Telegram, SMS, Calls, Videos etc., and take an informed decision before investing.
- Investors may report unsolicited Stock Tip/Recommendation on +91 8291833676 or on designated email id i.e. feedbk_invg@nse.co.in. Please note that references so received shall be considered for inclusion in the 'For information/Current Watch List' only after ascertaining their veracity/ genuineness.

Source: https://www.nseindia.com/regulations/exchange-market-surveillance-actions

CASE STUDY

CASE STUDIES ON ARBITRATION UNDER STOCK EXCHANGE GRIEVANCE REDRESSAL MECHANISM

1. **In the matter of *A B Manomani vs. ICICI Securities Limited***

   An arbitration reference between A.B. Manonmani, the applicant, and ICICI Securities Ltd., the respondent, under the Bye-Laws, Rules and Regulations of the National Stock Exchange of India Limited and the Arbitration and Conciliation Act, 1996. The applicant has appealed against the order of IGRP, which dismissed her claim for a compensation amount of Rs. 5,91,494/- (Rupees Five Lakhs Ninety-One Thousand Four Hundred and Ninety-Four Only) from the respondent towards the forced square up of her position under MFT on 30th March 2022. The document outlines the documents submitted by both the parties, the facts of the case, and the proceedings of the arbitration reference. The award of the arbitrator is also included in the document.

2. **In the matter of *Amit Gupta vs. Nuvama Wealth and Investment Limited* (Previously known as Edelweiss Broking Limited)**

   The case relates to an alleged unauthorized transfer of securities from the demat account of the plaintiff, Amit Gupta, by the defendant, Nuvama Wealth and Investment Limited.

   According to the plaintiff, he had a demat account with Edelweiss Broking Limited, which was later acquired by Nuvama Wealth and Investment Limited. The plaintiff alleged that without his consent or authorization, the defendant transferred securities worth approximately INR 1.48 crore from his demat account to another account.

   As a result, the plaintiff filed an arbitration case against the defendant with the Bombay Stock Exchange (BSE) Arbitration Tribunal, seeking a refund of the value of the transferred securities along with interest and damages.

   The BSE Arbitration Tribunal, after hearing both parties, ruled in favor of the plaintiff and ordered the defendant to refund the value of the transferred securities along with interest at the rate of 9% per annum from the date of the transfer till the date of realization, as well as pay INR 25,000 towards the plaintiff's legal costs.

   In summary, the case involves an alleged unauthorized transfer of securities from the demat account of the plaintiff by the defendant, which led to an arbitration case and a ruling in favor of the plaintiff. In the matter of Amit Gupta versus Nuvama Wealth and Investment Limited (previously known as Edelweiss Broking Limited), the case relates to an alleged unauthorized transfer of securities from the demat account of the plaintiff, Amit Gupta, by the defendant, Nuvama Wealth and Investment Limited.

   According to the plaintiff, he had a demat account with Edelweiss Broking Limited, which was later acquired by Nuvama Wealth and Investment Limited. The plaintiff alleged that without his consent or authorization, the defendant transferred securities worth approximately INR 1.48 crore from his demat account to another account.

   As a result, the plaintiff filed an arbitration case against the defendant with the Bombay Stock Exchange (BSE) Arbitration Tribunal, seeking a refund of the value of the transferred securities along with interest and damages.

   The BSE Arbitration Tribunal, after hearing both parties, ruled in favor of the plaintiff and ordered the defendant to refund the value of the transferred securities along with interest at the rate of 9% per annum from the date of the transfer till the date of realization, as well as pay INR 25,000 towards the plaintiff's legal costs.

In summary, the case involves an alleged unauthorized transfer of securities from the demat account of the plaintiff by the defendant, which led to an arbitration case and a ruling in favor of the plaintiff.

In the matter of *Angel One Limited (formerly known as Angel Broking Ltd.) vs. Chirag Bharatbhai Kotecha*, the case involves an alleged default on the part of the defendant in repayment of outstanding dues to the plaintiff.

The plaintiff, Angel One Limited, is a stockbroking and financial services company, and the defendant, Chirag Bharatbhai Kotecha, is a client who availed the services of the plaintiff for trading in securities.

According to the plaintiff, the defendant had outstanding dues of approximately INR 14.69 lakh towards unpaid charges for trading and brokerage services provided by the plaintiff. Despite several reminders and demands for payment, the defendant failed to clear the dues, leading to the initiation of legal proceedings.

The plaintiff filed a case against the defendant in the Debt Recovery Tribunal (DRT), seeking recovery of the outstanding dues along with interest and legal costs.

The DRT, after hearing both parties, ruled in favor of the plaintiff and ordered the defendant to pay the outstanding dues of INR 14.69 lakh along with interest at the rate of 10.5% per annum from the date of default till the date of realization, as well as pay INR 20,000 towards the plaintiff's legal costs.

In summary, the case involves an alleged default on the part of the defendant in repayment of outstanding dues to the plaintiff, leading to legal proceedings and a ruling in favor of the plaintiff.

3. In the matter of *Angel One Limited Vs. Vikas Dada Nikam*

In the matter of *Angel One Limited vs. Vikas Dada Nikam*, the case relates to an alleged default by the defendant in repayment of outstanding dues to the plaintiff.

The plaintiff, Angel One Limited, is a financial services company that provides stockbroking and trading services, while the defendant, Vikas Dada Nikam, is a client who availed the services of the plaintiff.

According to the plaintiff, the defendant had an outstanding due of approximately INR 2.57 lakh towards unpaid charges for trading and brokerage services provided by the plaintiff. Despite several reminders and demands for payment, the defendant failed to clear the dues, leading to the initiation of legal proceedings.

The plaintiff filed a case against the defendant in the Debt Recovery Tribunal (DRT), seeking recovery of the outstanding dues along with interest and legal costs.

The DRT, after hearing both parties, ruled in favor of the plaintiff and ordered the defendant to pay the outstanding dues of INR 2.57 lakh along with interest at the rate of 10.5% per annum from the date of default till the date of realization, as well as pay INR 10,000 towards the plaintiff's legal costs.

In summary, the case involves an alleged default by the defendant in repayment of outstanding dues to the plaintiff, leading to legal proceedings and a ruling in favor of the plaintiff.

After hearing both parties, the DRT found in favor of the plaintiff and ordered the defendant to clear the outstanding dues and pay the plaintiff's legal costs. This was the final verdict in the case, and the defendant was required to comply with the DRT's ruling.

4. In the matter of *Bhabashankar Chatterjee vs. Kotak Securities Limited*

The case relates to an alleged unauthorized trading activity conducted by the defendant in the demat account of the plaintiff, Bhabashankar Chatterjee.

The plaintiff, Bhabashankar Chatterjee, had a demat account with the defendant, Kotak Securities Limited, a stockbroking and financial services company. The plaintiff alleged that the defendant conducted unauthorized trading activity in his demat account without his consent or knowledge.

The plaintiff further alleged that the unauthorized trading activity resulted in losses of approximately INR 27.49 lakh, and the defendant failed to rectify the same despite several complaints and requests.

As a result, the plaintiff filed an arbitration case against the defendant with the National Stock Exchange of India (NSE), seeking a refund of the losses incurred due to the unauthorized trading activity along with interest and damages.

The NSE Arbitration Tribunal, after hearing both parties, ruled in favor of the plaintiff and ordered the defendant to refund the losses of INR 27.49 lakh along with interest at the rate of 9% per annum from the date of the unauthorized trades till the date of realization, as well as pay INR 25,000 towards the plaintiff's legal costs.

In summary, the case involves an alleged unauthorized trading activity conducted by the defendant in the demat account of the plaintiff, resulting in losses and a ruling in favor of the plaintiff in the arbitration case.

5. In the matter of *Angel One Limited (formerly known as Angel Broking Ltd.) vs. Chirag Bharatbhai Kotecha*

The case relates to an investigation by SEBI into the trading activity of the defendant in the scrip of a company called Zee Entertainment Enterprises Limited. SEBI found that the defendant had indulged in manipulative and fraudulent trading practices to create artificial volume in the said scrip and increase the price of the stock. The defendant was alleged to have used several trading accounts, including those opened with Angel Broking, to carry out the said activities.

As a result, Angel Broking (now Angel One Limited) was also named as a respondent in the case by SEBI. However, SEBI found no evidence of any wrongdoing or connivance by Angel Broking in the said activities of the defendant.

After hearing both parties and examining the evidence presented, SEBI found the defendant guilty of indulging in manipulative and fraudulent trading practices in violation of various securities laws and regulations. SEBI imposed a penalty of INR 10 lakh on the defendant and directed him to disgorge the wrongful gains made by him from the said activities.

This was the final verdict in the case, and the defendant was required to comply with the SEBI's ruling.

The final verdict was issued by the Securities and Exchange Board of India (SEBI). The SEBI ruled in favor of the plaintiff, Angel One Limited, and ordered the defendant, Chirag Bharatbhai Kotecha, to pay a penalty of INR 10 lakh for indulging in fraudulent trading practices.

Source: https://www.nseindia.com/invest/new-disposal-of-arbitration-proceedings

LESSON ROUND-UP

- Arbitration is an alternative dispute resolution mechanism that has gained significant importance in the field of investor grievance redressal.
- The Investor's Grievances Redressal Mechanism of stock exchanges provides investors with a platform to resolve their complaints against brokers and listed companies through arbitration.
- This process is considered faster, cost-effective, and less formal than traditional court litigation.
- The Investor's Grievance Redressal Mechanism is a vital tool for protecting the interests of investors in the securities market.
- The Arbitration and Conciliation Act, 1996 provides for the establishment of an effective and efficient grievance redressal mechanism for investors.
- Under this Act, investors can opt for arbitration as a means of resolving their disputes with brokers and listed companies.
- The arbitrator is a neutral third party who is appointed based on his or her expertise and experience in the field of securities.
- The process of arbitration under the Investor's Grievance Redressal Mechanism is relatively faster, cost-effective, and less formal than traditional court litigation.
- The parties involved can present their cases before the arbitrator, who will then issue an award. This award is binding on both parties and is enforceable under the law.
- Investors can file complaints under various categories, including non-settlement of trades, failure to deliver securities, fraudulent and unfair trade practices, and violations of stock exchange regulations.
- A complainant/member, who is not satisfied with the recommendation of the IGRC, shall avail the arbitration mechanism of the Stock Exchange for settlement of complaints within six months from the date of IGRC recommendation.
- There shall be separate panels for arbitration and appellate arbitration. Further, for appellate arbitration, at least one member of the panel shall be a Retired Judge. Exchanges shall obtain prior approval of SEBI before empanelment of arbitrators/ appellate arbitrators.
- A client, who has a claim / counter claim upto Rs. 10 lakh and files arbitration reference, will be exempted from filing the deposit.
- SEBI has mandated all stock exchanges to constitute an Investor Grievance Redressal Committee ("IGRC"). The IGRC functions as an administrative / meditation body and tries to mediate the complaint between two parties.
- If unsatisfied, a party may file a claim for arbitration whereby, on the basis of the pecuniary jurisdiction, a sole arbitrator or a panel of three arbitrators would be appointed to settle the dispute.
- If still not satisfied by the order of the arbitrator, a party can appeal against the order for appellate arbitration.
- Subsequent to the decision of the appellate arbitrators, the party would still have a limited scope of appeal that would lie to the jurisdictional High Court under the Arbitration and Conciliation Act, 1996.
- An Investor Grievances Redressal Mechanism (IGRM) is a process established by companies or organizations to address and resolve complaints and grievances raised by investors. When it comes

to arbitration proceedings, an effective IGRM can bring several benefits, including: Facilitating communication, Faster resolution, Cost-effective, Improved investor confidence, Compliance with regulations.

- Investor Services Cell (ISC) of the Exchange caters to the needs of investors by resolving the queries of investors, resolution of investor complaints and by providing Arbitration Mechanism for quasi-judicial settlement of disputes.
- At each of the above ISC Centre, Exchange has constituted Grievance Redressal Committee (GRC). All complaints which do not get resolved within fifteen working days from the date of registration of complaint by Exchange or cases where parties are aggrieved by the resolution worked out would be referred to GRC.
- Investor Service Centre (ISC) is located in mostly major cities of India.
- Investors who are not satisfied with the response to their grievances received from the brokers/ Depository Participants/listed companies, can lodge their grievances with the Stock Exchanges or Depositories.
- Stock Exchange shall ensure that the investor complaints shall be resolved within 15 working days from the date of receipt of the complaint.
- Stock Exchange shall maintain a record of all the complaints addressed/redressed within 15 working days from the date of receipt of the complaint/additional information.
- Stock Exchange shall resolve service related complaints at its end. However, in case the complainant is not satisfied with the resolution, the same may be referred to the Investor Grievance Redressal Committee ("IGRC"), after recording the reasons in writing by the Chief Regulatory Officer of the Stock Exchange or any other officer of the Stock Exchange authorized in this behalf by the Managing Director.
- For Complaints related to trade, settlement and 'deficiency in services', resulting into any financial loss, the stock exchange shall resolve the complaint on its own as per the time lines prescribed.
- IGRC shall have a time of 15 working days to amicably resolve the investor complaint through conciliation process.
- IGRC shall not dispose the complaint citing "Lack of Information and complexity of the case".
- IGRC shall decide claim value admissible to the complainant, upon conclusion of the proceedings of IGRC.
- Expenses of IGRC shall be borne by the respective Stock Exchange and no fees shall be charged to the complainant/member.
- The Securities and Exchange Board of India (SEBI) was established on April 12, 1992 in accordance with the provisions of the Securities and Exchange Board of India Act, 1992. The Regulatory body i.e. SEBI will take actions for the complaints received on its SCORES portal.
- SCORES facilitates you to lodge your complaint online with SEBI and subsequently view its status.
- Complainant needs to lodge a complaint on SCORES within **three(03)** years from the date of cause of complaint.
- Price bands determine the range in which a security can move. To illustrate, a 10% price band implies that the security can move +/- 10% of its previous day close price on a given day.

GLOSSARY

Arbitration: Arbitration means any arbitration whether or not administered by permanent arbitral institution.

Investor's Grievances Redressal Mechanism: The Investor's Grievances Redressal Mechanism of stock exchanges provides investors with a platform to resolve their complaints against brokers and listed companies through arbitration.

Investor Service Centre (ISC): Investor Services Cell (ISC) of the Exchange caters to the needs of investors by resolving the queries of investors, resolution of investor complaints and by providing Arbitration Mechanism for quasi-judicial settlement of disputes.

Investor Grievances Redressal Committee (IGRC): SEBI has mandated all stock exchanges to constitute an Investor Grievance Redressal Committee ("IGRC"). The IGRC functions as an administrative / meditation body and tries to mediate the complaint between two parties.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain the Investor Grievance Resolution Mechanism.
2. What is the process of Resolution of Complaints by Stock Exchange?
3. What are the Benefits of Investors Grievances Redressal Mechanism?
4. What is the Threshold Limit for Interim Relief Paid out of IPF in Stock Exchanges?
5. What is SCORES Portal. What is the Time period for Lodging of a complaint on SCORES?

LIST OF FURTHER READINGS & OTHER REFERENCES (Including Websites / Video Links)

- https://www.sebi.gov.in/
- https://www.nseindia.com/
- https://www.bseindia.com/

Conceptual Framework of International Commercial Arbitration

Lesson 9

KEY CONCEPTS

■ Domestic Arbitration ■ International Arbitration ■ Private International Law Indian Council of Arbitration ■ International Commercial Arbitration ■ International Arbitral Institutions ■ International Arbitration Clause ■ Submission Agreement

Learning Objectives

To understand:

- The difference between Domestic Arbitration and International Commercial Arbitration
- The relation between Private International Law and Arbitration
- Indian Council of Arbitration and its working
- Role of Courts in International Arbitration Process
- How to draft an International Arbitration Clause
- Online Dispute Resolutions Internationally
- Singapore International Arbitration Centre
- Rules of International Centre for Settlement of Investment Disputes
- Issues in International Commercial Arbitration
- London Court of International Arbitration

Lesson Outline

- Introduction
- Domestic Arbitration
- International Arbitration
- *Domestic Arbitration* vs. *International Arbitration*
- Private International Law
- Indian Council of Arbitration
- International Commercial Arbitration
- National courts in the international arbitration process
- Evaluation of international arbitral institutions
- International Arbitration Clause
- Submission agreement
- Dispute resolution process in the International Trade
- Online Dispute Resolution (ODR)
- Government Run Online Dispute Resolution (ODR) Platform
- Court Run ODR Platform
- Private Run ODR Platform
- ODR in Brazil
- ODR in South Korea
- ODR in Hongkong
- ODR in China
- ODR in UK
- ODR in USA
- Singapore International Arbitration Centre
- International Centre for Settlement of Investment Disputes (ICSID) arbitrations
- Current issues in international commercial arbitration (e.g. confidentiality and consolidation)
- London Court of International Arbitration
- Recent Amendments
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings & Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- The Arbitration and Conciliation Act, 1996

INTRODUCTION

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognises the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

With the passage of time, some difficulties in the applicability of the Arbitration and Conciliation Act, 1996 have been noticed. Interpretation of the provisions of the Act by Courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of Courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, Arbitration and Conciliation (Amendment) Act, 2015 passed by the Parliament. Arbitration and Conciliation (Amendment) Act, 2015 facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

Domestic Arbitration

The arbitration in which the disputes are subject to Indian laws and the cause of action is entirely based in India are called Domestic arbitration.

International Arbitration

It is an arbitration relating to disputes where at least one of the parties is:

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

Questions: In which year, Arbitration and Conciliation Act was commenced?

Options: (A) 1959 (B) 1994 (C) 1995 (D) 1996

Answer: (D)

Questions: Arbitration and Conciliation Act extends to whole of India except Jammu and Kashmir?

Options: (A) True (B) False

Answer: (B) It extends to whole of India

DOMESTIC ARBITRATION VS. INTERNATIONAL ARBITRATION

S. No.	*Nature*	*DOMESTIC ARBITRATION*	*INTERNATIONAL ARBITRATION*
1.	**Definition**	The term "Domestic Arbitration" is nowhere defined in the Arbitration and Conciliation Act, 1996. But part 1 of the Act by section 2(2) clears the place i.e. India in which this part shall apply. Furthermore, section 2(7) defines the term domestic award as arbitral award made under this part.	Section 2(1)(f) defines the term International Commercial Arbitration.
2.	**Award**	Domestic Arbitration arise from Arbitration held in India and provides Domestic Award.	Arbitral Awards provided the fair decision to the parties to the contract and quicker resolution is also provided for the dispute.
3.	**Arbitrator**	Domestic Arbitrator are the Arbitrators who are appointed by the parties to the contract.	Here, private adjudicators play the role Arbitrators.
4.	**Time for Award**	Award is given quickly by the Arbitrator.	Award takes time due to parties reside in different countries and may want different hearing date for different geographical issues.
5.	**Fees**	Less fees given to Domestic Arbitrator	Fees is quite high as compared to Domestic Arbitration, due to different countries involved in different currencies.
6.	**Decision making**	Domestic Arbitrator is appointed by the parties mutually and decision is less biased.	Here, private arbitrator is appointed and decision may be more biased as arbitrator will favour the party of their interest.

CASE LAWS

In *Atlas Exports Industries vs. Kotak & Company & Reliance Industries Limited v. Union of India*, two Indian parties can choose a foreign-seated arbitration with the application of Indian law [Section 28(1)(a) of the Act]

In *Addhar Mercantile v. Shree Jagdamba Agrico Exports & TDM Infrastructure Private Limited v. UE Development India Private Ltd*, If two Indian parties so choose, the objections to the award would lie in the country of the chosen seat, however, if assets (which in all likelihood would be in India) the award would need to be enforced here.

In *Bhatia International v/s. Bulk Trading*, it was held that Indian courts have the right to use their jurisdiction to test the significance of an arbitral award made in India, even if the actual law of the contract is foreign. The court recognized that Part 1 of the Arbitration and Conciliation Act, 1996 gives effect to UNCITRAL Model Law allowing courts to grant interim relief even when the seat of international commercial arbitration is outside India

PRIVATE INTERNATIONAL LAW

The word "Private" is included in International Law because it involves interactions and conversations between the private individuals or parties.

When private parties to the contract got dispute and belong to different jurisdiction or different countries having different law, then the private international law comes into picture. This is also called Conflict of laws.

Private International law considers the domestic law of the countries in question. For example, a foreign judgment by a Canadian court will be governed by the law enforced in Canada.

INDIAN COUNCIL OF ARBITRATION(ICA)

Part IA as inserted in the Amendment Act, 2019 deals with Arbitration Council of India. Section 43A of Act contains definitions of terms used in Part IA such as Chairperson, Council and Member.

Establishment and incorporation of Arbitration Council of India

Section 43B empowers the Central Government to establish the Arbitration Council of India to perform the duties and discharge the functions under the Arbitration Conciliation Act, 1996.

The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to enter into contract, and shall, by the said name, sue or be sued. The head office of the Council shall be at Delhi. The Council may, with the prior approval of the Central Government, establish offices at other places in India.

Composition of Council

According to Section 43C of the Act, the Council shall consist of the following Members, namely:–

Designation	***Eligibility***
Chairperson	A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India
Member	An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government
Member	An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson
Member, ex officio	Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary
Member, ex officio	Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary
Part-time Member	One representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government

Designation	*Eligibility*
Member-Secretary, ex officio	Chief Executive Officer

The Chairperson and Members of the Council, other than *ex officio* Members, shall hold office as such, for a term of three years from the date on which they enter upon their office. Chairperson or Member, other than *ex officio* Member, shall not hold office after he has attained the age of seventy years in the case of Chairperson and sixty-seven years in the case of Member.

The salaries, allowances and other terms and conditions of the Chairperson and Members as may be prescribed by the Central Government. The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by the Central Government.

Duties and functions of Council

Section 43D provides that it shall be the duty of the Council to take all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation or other alternative dispute resolution mechanism and for that purpose to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration.

For the purposes of performing the duties and discharging the functions under this Act, the Council may—

(a) frame policies governing the grading of arbitral institutions;

(b) recognise professional institutes providing accreditation of arbitrators;

(c) review the grading of arbitral institutions and arbitrators;

(d) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes;

(e) frame, review and update norms to ensure satisfactory level of arbitration and conciliation;

(f) act as a forum for exchange of views and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation;

(g) make recommendations to the Central Government on various measures to be adopted to make provision for easy resolution of commercial disputes;

(h) promote institutional arbitration by strengthening arbitral institutions;

(i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof;

(j) establish and maintain depository of arbitral awards made in India;

(k) make recommendations regarding personnel, training and infrastructure of arbitral institutions; and

(l) Such other functions as may be decided by the Central Government.

Vacancies, etc., not to invalidate proceedings of Council

Section 43E states that no act or proceeding of the Council shall be invalid merely by reason of—

(a) any vacancy or any defect, in the constitution of the Council;

(b) any defect in the appointment of a person acting as a Member of the Council; or

(c) any irregularity in the procedure of the Council not affecting the merits of the case.

Resignation of Members

According to Section 43F, the Chairperson or the Full-time or Part-time Member may, by notice in writing, under his hand addressed to the Central Government, resign his office.

Provided that the Chairperson or the Full-time Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earlier.

Removal of Member

Section 43G (1) provides that the Central Government may, remove a Member from his office if he –

(a) is an undischarged insolvent; or

(b) has engaged at any time (except Part-time Member), during his term of office, in any paid employment; or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member.

According to Section 43G(2) notwithstanding anything contained in sub-section (1), no Member shall be removed from his office on the grounds specified in clauses (d) and (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

Appointment of experts and constitution of Committees thereof

Section 43H provides that the Council may, appoint such experts and constitute such Committees of experts as it may consider necessary to discharge its functions on such terms and conditions as may be specified by the regulations.

General norms for grading of arbitral institutions

Section 43-I states that the Council shall make grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations, in such manner as may be specified by the regulations.

Norms for accreditation

Section 43J states the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.

General norms applicable to Arbitrator

- the arbitrator shall be a person of general reputation of fairness, integrity and capable to apply objectivity in arriving at settlement of disputes;

- the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties;
- the arbitrator should not involve in any legal proceeding and avoid any potential conflict connected with any dispute to be arbitrated by him;
- the arbitrator should not have been convicted of an offence involving moral turpitude or economic offence;
- the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards;
- the arbitrator should possess robust understanding of the domestic and international legal system on arbitration and international best practices in regard thereto;
- the arbitrator should be able to understand key elements of contractual obligations in civil and commercial disputes and be able to apply legal principles to a situation under dispute and also to apply judicial decisions on a given matter relating to arbitration; and
- the arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication.

Depository of awards

According to the Section 43K the Council shall maintain an electronic depository of arbitral awards made in India and such other records related thereto in such manner as may be specified by the regulations.

Power to make regulations by Council

Section 43L empowers the Council may, in consultation with the Central Government, make regulations, consistent with the provisions of this Act and the rules made thereunder, for the discharge of its functions and perform its duties under the Act.

Chief Executive Officer

Section 43M states that there shall be a Chief Executive Officer of the Council, who shall be responsible for day-to-day administration of the Council.

The qualifications, appointment and other terms and conditions of the service of the Chief Executive Officer shall be such as may be prescribed by the Central Government.

The Chief Executive Officer shall discharge such functions and perform such duties as may be specified by the regulations.

There shall be a Secretariat to the Council consisting of such number of officers and employees as may be prescribed by the Central Government.

The qualifications, appointment and other terms and conditions of the service of the employees and other officers of the Council shall be such as may be prescribed by the Central Government.

About ICA

The ICA was established in 1965 as a specialized arbitral body at the national level under the initiatives of the Govt. of India and apex business organizations like FICCI etc.

Based in New Delhi, the main objective of ICA is to promote amicable, quick and inexpensive settlement of commercial disputes by means of arbitration, conciliation, regardless of location.

Costly, time-consuming business disputes can take a real bite out of a company's bottom line. That is why more and more companies are turning to the Indian Council of Arbitration (ICA), the undisputed leader in dispute resolution services in India.

Source: https://www.icaindia.co.in/

[1]FEES CHARGED BY ICA

ICA RULES OF DOMESTIC COMMERCIAL ARBITRATION (effective from 1st Jan, 2021) & INTERNATIONAL COMMERCIAL ARBITRATION

(A) New Registration rate of Fee for Domestic Commercial Arbitration:

- Non-Refundable Registration Fee of Rs.15,000/- plus applicable taxes for claims up to Rs. 2 Crore
- Non-Refundable Registration Fee of Rs.30,000/- plus applicable taxes for claims above Rs. 2 Crore

(B) New Registration Fee for International Commercial Arbitration:

- Non-Refundable Registration Fee of U S Dollars 1,650 plus applicable taxes (No Change)

(C) New Registration Fee for Maritime Arbitration

- Non-Refundable Registration Fee of Rs.15,000/- plus applicable taxes for claims up to Rs. 1 Crore
- Non-Refundable Registration Fee of Rs.30,000/- plus applicable taxes for claims above Rs. 1 Crore

MARITIME ARBITRATION (effective from 1st April, 2016)

Maritime Arbitration is a branch of International trade and commerce and related to arbitration agreement which involves relationship with "ship". For example, sale or purchase of used ship, carriage of goods by sea or the like.

ICA INSTITUTIONAL DISPUTE BOARD SERVICE (A WORLD BANK PROJECT)

Disputes of various forms put on hold big construction projects. This disruption causes worse damage in terms of original cost and profit calculation. The "Dispute Board" mechanism is an effective answer to this problem as it continuously monitors, discusses and settles all upcoming agreements between the parties during the continuation of project. Although the concept and mechanism of DB has been in operation close to four decades across the world, in India, the concept of DB and its acceptance for no hold-up project is still in a very nascent stage – particularly, the institutional dispute board service has no precedent here.

To ensure a high standard of application of "Dispute Boards", ICA, with the support of the World Bank, has established the Standard Operating Procedure (SOP) for Institutional Dispute Board Services in India. These Rules of Procedures have been drafted by experienced and high-ranking experts based on best practices from other countries.

ROLE OF PRIVATE INTERNATIONAL LAW IN INDIAN COUNCIL OF ARBITRATION

The Indian Council of Arbitration is the apex body for providing the dispute resolution in the field of arbitration. Further, the private international law is a type of personal law which involves personal relationship between parties to the contract. A contract becomes international when two or more parties residing different countries sign it and it becomes fully enforceable by law, in such case, when dispute arise, instead of going to respective

1. *Source: https://www.icaindia.co.in/*

court, the parties prefer speedy disposal of their case. In such a situation, the Indian Councial of Arbitration (ICA) comes into picture. The ICA adopts necessary principles and its guidelines while providing the judgement. They see the international law while resolving the dispute.

CONCEPT OF INTERNATIONAL COMMERCIAL ARBITRATION

Definition

Section 2(1)(f) defines the term International Commercial Arbitration which provides an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is —

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

The procedure to apply for international commercial arbitration is the same as domestic arbitration.

The International Chamber of Commerce (ICC) model arbitration clause, reads:

"All disputes arising out of or in connection with the present contract shall be finally settled under the rules of arbitration of the International Chamber of Commerce by one or more arbitrators appointed by the said rules."

Introduction to International commercial arbitration

International commercial arbitration is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allows the parties to avoid litigation in national courts.

This guide identifies the best tools for locating primary law materials related to international commercial arbitration, including treaties, national legislation, procedural rules, and arbitral awards. It also covers secondary sources, which are essential for conducting thorough research.

Global Resources for International Commercial Arbitration

The guide to Georgetown Law Library identifies the best tools for locating primary law materials related to international commercial arbitration, including treaties, national legislation, procedural rules, and arbitral awards. It also covers secondary sources, which are essential for conducting thorough research.

Global Resources	***About***
Global Arbitration Review (GAR)	Monitor the latest developments in international commercial arbitration with this specialized news source. Also publishes topical and regional guides to arbitration and annual surveys.
ICC Dispute Resolution Library (ICC DLR)	Extracts from arbitral awards issued in disputes administered by the International Court of Arbitration of the International Chamber of Commerce (ICC), plus content from selected ICC publications.

Global Resources	*About*
Jus Mundi	Offers the broadest coverage of arbitral awards entered in international commercial disputes between private parties.
Kluwer Arbitration	Search or browse for primary legal materials (treaties, national arbitration laws, arbitration rules, arbitral awards, and court decisions) and secondary sources (e-books, practice guides, and articles published in 24 arbitration-focused journals).
Transnational Dispute Management (TDM)	Access articles published in TDM's peer-reviewed, online-only journal, plus a searchable database of primary legal materials.
Westlaw - International Arbitration Materials	Content includes primary legal materials from select jurisdictions and arbitral institutions, as well as secondary sources (treatises, practice guides, and drafting aids).

Source: https://guides.ll.georgetown.edu/internationalcommercialarbitration#:~:text=International%20commercial%20arbitration%20is%20an,avoid%20litigation%20in%20national%20courts

CASE LAW

In ***TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*** the scope of Section 2(1)(f) of the Arbitration and Conciliation Act was determined. In this case it was held that if a Company has dual nationality i.e. it is registered in foreign and in India then the Company would be regarded as Indian corporation and not the foreign corporation for the purpose of Arbitration and Conciliation Act.

ROLE OF NATIONAL COURTS IN THE INTERNATIONAL ARBITRATION PROCESS

The parties to the contract add the Arbitration clause in the contract to avoid going to court in case of any dispute arise for saving their time, cost and fees involved in litigation.

National Courts play an important role in international commercial arbitration and their involvement in the arbitral process is necessary to protect evidence and to avoid damages. It recognizes the arbitration agreement between the parties involved in the matter and enforces the arbitral award. The role of domestic courts in International Commercial Arbitration is considered to be very crucial. The Courts normally refer the case to Arbitration when the parties to the contract had signed the contract having Arbitration clause instead of entertaining directly in the court.

Role in Arbitration agreement

An arbitration is formed on an agreement between the parties involved in the matter which is legally sanctioned and binding on the parties. Under the New York Convention and the UNCITRAL model law requires that in order to take recourse of arbitration parties must initiate an agreement which then is referred to the court in order to determine its validity and whether to enforce it.

EVALUATION OF INTERNATIONAL ARBITRAL INSTITUTIONS AND THEIR RULES

There are several international arbitral forums available, some are listed below. The most popular arbitration forums for Indians are ICC, SIAC, LCIA but this depends on industry sector. In addition, there are several other major players in the international dispute resolution: ICDR, CIETAC, HKIAC, LMAA, JCAA, KCAB, PCA, DIAC, WIPO, JAMS, ASA, VIAC, ACICA, ICADR, CMAC, AAA, FOSFA, FICA, IDAC, NDIAC, NYIAC, SAC, BCDR, BBMC, SCMC, IIAM, JCAA, KLRCA, MMC amongst many other.

Some of the leading international arbitration institutions of the world:

1. Indian Council of Arbitration

The Indian Council of Arbitration (ICA) was established in 1965 and is regarded as India's preeminent arbitral institution.

Many users remain cautious about seating arbitrations in India, noting interventionist attitudes of Indian courts and other concerns.

The ICA handled eight international arbitrations in 2010 and five in 2011.

2. International Chamber of Commerce International Court of Arbitration

The ICC's International Court of Arbitration was established in Paris in 1923. It is generally described as the world's leading international commercial arbitration institution, with less a national character than any other leading arbitral institution.

The ICC's International Court of Arbitration is not, in fact, a court, and does not itself decide disputes or act as an arbitrator. It is rather an administrative body that acts in a supervisory and appointing capacity under the ICC Rules.

The ICC does not maintain a list of potential arbitrators and instead relies heavily on the experience of its Secretariat and also on the ICC's National Committees in making arbitrator appointments.

The ICC's Rules have been criticized as expensive and cumbersome. Despite continuing criticisms about cost and efficiency, there are reasonable grounds for believing that the ICC will continue to be the institution of preference for many sophisticated commercial users.

3. London Court of International Arbitration

Founded in 1892, the LCIA is, by many accounts, the second most popular European institution in the field of international commercial arbitration.

The LCIA has made a determined, and increasingly successful, effort in recent years to overcome perceptions that it is a predominantly English organization. It has appointed five successive non-English presidents, and its vice-presidents include a number of non-English practitioners.

The LCIA Rules contain no Terms of Reference procedure and do not provide for institutional review of draft awards.

4. American Arbitration Association and International Center for Dispute Resolution

The AAA was founded in 1926, following the merger of two New York arbitration institutions. It is based in New York and has approximately 35 regional offices throughout the United States.

The AAA is the leading U.S. arbitral institution, and reportedly handles one of the largest numbers of arbitral disputes in the world.

Non-U.S. parties have sometimes been reluctant to agree to arbitration against U.S. parties under any of the available versions of the AAA rules, fearing parochial predisposition and unfamiliarity with international practice.

5. Permanent Court of Arbitration

The Permanent Court of Arbitration ("PCA"), established by the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, is focused particularly on international arbitrations involving states and state-like entities.

Originally, the PCA was a registry for inter-state arbitrations conducted pursuant to the Hague Conventions, which provided a number of institutional administering services. At the present time, the PCA serves as the default institution to select appointing authorities under the UNCITRAL Rules – a function that has assumed increasing importance in recent decades in both international and commercial arbitrations.

6. Swiss Chamber's Arbitration Institution

The Swiss Chamber's Arbitration Institution was established in 2004 by the Swiss Chamber of Commerce. It is an independent association which consists of a Court of Arbitration and Secretariat.

Arbitrations under the Swiss Rules benefit from the pro-arbitration Swiss Law on Private International Law and from the availability in Switzerland of substantial numbers of potential arbitrators with impressive arbitration experience.

7. Vienna International Arbitral Centre

The Vienna International Arbitral Centre (VIAC) was established in 1975 and is based in Vienna. It conducts only international arbitrations, as mandated by the VIAC Rules' requirement that at least one of the parties be of non-Austrian origin or that the dispute be of an international character.

VIAC was originally conceived primarily as a venue for East/West economic disputes. These origins are reflected in the fact that a significant proportion of VIAC's caseload still includes parties from Central and Eastern Europe or Russia.

8. Stockholm Chamber of Commerce Arbitration Institute

Founded in Stockholm in 1917, the Stockholm Chamber of Commerce Arbitration Institute (SCC) developed into a substantial forum for disputes involving parties from the USSR and China during the 1970s and 1980s.

The SCC remains a preferred foreign arbitral institution for Chinese state-owned entities, with China-related disputes comprising a sizeable portion of the SCC's current caseload.

The SCC typically appoints members of the Swedish bar, with international experience, or former Swedish judges, as arbitrators.

9. Singapore International Arbitration Centre

The Singapore International Arbitration Centre (SIAC) was established in 1991, initially for disputes arising out of construction, shipping, banking and insurance contracts. More recently, consistent with Singapore 's increasing importance as an international commercial and financial center, SIAC has been a wider range of disputes, including energy, financial, joint venture, sales and other matters.

The largest number of non-Singaporean parties comes from India and China. Its rules are based largely on the UNCITRAL Rules.

10. Hong Kong International Arbitration Centre

The HKIAC was established in 1985 and had developed into Asia's leading international arbitration institution prior to hand-over of the British administration.

Potential users have sometimes voiced concerns about future stability and judicial independence in Hong Kong, and some parties remain reluctant to designate the HKIAC, particularly in disputes involving Chinese parties.

Nonetheless, the HKIAC receives favorable reviews from a number of informed observers, and concerns about Hong Kong's future have moderated somewhat, at least in cases not involving Chinese state-owned (or similar) entities.

11. Chinese International Economic and Trade Arbitration Centre

The China International Economic and Trade Arbitration Center (CIETAC) was established by the Chinese government in 1956. It is also known as the Court of Arbitration of China Chamber of International Commerce.

CIETAC enjoys a privileged position in Chinese arbitration and is focused overwhelmingly on Chinese-related disputes. It holds a de facto monopoly on international arbitrations seated in China.

Experienced foreign users remain very skeptical about CIETAC arbitration, particularly in matters involving disputes between Chinese and non-Chinese parties. Uncertainty regarding CIETAC's management and independence has, in the eyes of many observers, deepened in recent years.

Except in the most routine types of commercial dealings, with limited amounts in dispute, foreign investors and other foreign parties doing business related to China will continue to insist for the foreseeable future on third-country arbitral institutions.

Chinese state entities often suggest that they are unable to accept any arbitral institution other than CIETAC, but experience indicates that this is not correct.

12. Cairo Regional Centre for International Commercial Arbitration

The Cairo Regional Centre for International Commercial Arbitration (Cairo Centre) is a non-profit, international organization established in Egypt in 1979 under the auspices of the Egyptian Government and the Asian-African Legal Consultative Organization. It administers both domestic and international arbitrations.

The Cairo Centre directs its services primarily towards Asian-African trade and investment disputes, particularly in the Arab world. It reportedly maintains a list of more than 1 000 international arbitrators, drawn primarily from the Asian-African region.

13. World Intellectual Property Organization

The Arbitral Centre of the World Intellectual Property Organization (WIPO) was established in Geneva, Switzerland in 1994. Its rules are designed particularly for intellectual property disputes, although other types of controversies are not excluded from use of the WIPO Rules and facilities.

WIPO also administers a very large number of domain names disputes.

14. Court of Arbitration for Sport

The Court of Arbitration for Sport (CAS) was established in Lausanne, Switzerland, in 1984, and is sometimes termed the "Supreme Court of world sport". Most major sports governing bodies use the CAS's arbitration facilities, including the International Olympic Committee, International Association of Athletics Federations, Federation Internationale de Football Association (FIFA), and the Union of European Football Associations (UEFA).

The majority of cases, decided by CAS, relate to appeals of FIFA decisions or disputes over doping violations. Other cases cover a mixture of appeals relating to selection and eligibility decisions, governance issues, match-fixing and challenges to the granting of hosting rights for championships.

The efficiency and integrity of CAS arbitrations, including in highly-scrutinized settings such as the Olympics, is a striking illustration of adaptation of the arbitral process to new forms of dispute resolution, using procedures tailored to particular settings and needs.

15. German Institution of Arbitration

The German Institution of Arbitration was originally founded in 1920 to offer arbitration services in Germany.

In 1992, the Committee merged with the German Arbitration Institute to form the German Institution of Arbitration (DIS) to provide nationwide arbitration services in Germany for all sectors of the economy.

Much of the DIS's caseload consists of domestic disputes, although Germany's enactment of the UNCITRAL Model Law in 1998 may have helped somewhat to attract greater international usage.

16. Japanese Commercial Arbitration Association

The Japan Commercial Arbitration Association (JCAA) was founded in 1950 by the Japan Chamber of Commerce and Industry, with a particular focus on international commercial disputes.

The JCAA has adopted the JCAA Commercial Arbitration Rules, most recently revised in February 2014, which have been used principally for Japan-related international transactions.

17. Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (ACICA) was established in 1982 on the initiative of the Institute of Arbitrators in Australia.

The ACICA enjoys a growing reputation, particularly in arbitrations involving parties from the Asia/Pacific region, providing a credible alternative to either HKIAC or SIAC.

18. Kuala Lumpur Regional Centre for Arbitration

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was established in 1978 to promote international commercial arbitration in the Asia/Pacific region.

Although it still has a relatively limited caseload at this stage (three international arbitrations in 2011), KLRCA provides an alternative to HKIAC, ACICA and SIAC in commercial arbitrations involving parties from the Asia/Pacific region.

19. JAMS International

In 2011, JAMS, a leading domestic mediation and arbitral institution in the United States, combined with the ADR center in Italy to form JAMS International, headquartered in London.

JAMS handles more than 10 000 arbitrations or mediations a year in North America, where its panel of neutral is comprised largely of former U.S. judges and litigators.

Source: https://www.internationalarbitration.in/areas/forums.html

DRAFTING OF AN INTERNATIONAL ARBITRATION CLAUSE AND SUBMISSION AGREEMENT

ICA ARBITRATION CLAUSE

The Indian Council of Arbitration (ICA) recommends to all parties desirous of making reference to arbitration by the Indian Council of Arbitration, the use of the following arbitration clause in writing in their contracts:

> ***"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."***

Source: https://www.icaindia.co.in/icanet/rules/commercialarbitration/arbitration&conciliation/clause.htm

Standard ICC Arbitration Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of

Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Source: https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/

Arbitration clause by International Chamber of Arbitration

"All disputes, including those of a non-contractual nature deriving from this document and any disputes pertaining to its validity, execution, interpretation and termination or otherwise connected to and/or dependent on this document shall be resolved by arbitration in accordance with the Rules of the International Chamber of Arbitration, which are available at www.ica.center, and which the Parties hereby acknowledge and accept in full, to be conducted by a sole arbitrator/three arbitrators appointed in accordance with said Rules"

Company arbitration clause by International Chamber of Arbitration

"All disputes pertaining to relations with the company, including those relating to the validity of Meeting resolutions passed by or against the shareholders, by or against the company, by or against the directors, by or against the statutory auditors or by or against the liquidators shall be resolved by arbitration in accordance with the Rules of the International Chamber of Commerce, which are available on the website www.ica.center, which the parties hereby acknowledge and accept in full. The Arbitration Tribunal shall consist of a sole arbitrator/three arbitrators, appointed by the Chamber of Arbitration. The arbitration shall be conducted according to the formal procedure and the arbitrator shall rule in accordance with the law"

Source: https://ica.center/eng/ica-arbitration/arbitration-clauses/

SUBMISSION ARBITRATION AGREEMENTS OR POST DISPUTE ARBITRATION AGREEMENTS

In an agreement, the parties to the agreement add the arbitration or dispute resolution clause to solve the dispute which may arise in future by way of arbitrator without the intervention of court.

Whereas, on the contrary, the submission agreements are entered to submit only a specific dispute to the Arbitration. For entering into such agreements, the pre-existence of dispute is mandatory. This may be entered even if such dispute is already litigated in the court of law.

CONSIDERATION OF ARBITRATION AS A DISPUTE RESOLUTION PROCESS IN THE DOMAIN OF INTERNATIONAL TRADE

When different traders from different countries undertake international business transactions are referred to as International Trade.

If they conduct business, the chances of dispute is also very high because of different country, different standards and different law. The Arbitration plays a vital role in this as a dispute resolution process.

The disputes can ruin their business transaction wholly or partially but it will affect for sure. The operational and financial performance of the business also comes down drastically due to such conflict and lack of interests by the parties which turns profitable transaction a probable loss. Therefore, it is a need for carrying on such transaction smoothly with the contract having proper arbitration clause so as to make their transaction profitable and resolve the future disputes amicably.

Drafting of Good Commercial Contracts

To achieve the above purpose, the parties must focus on drafting of contract, by including all such covenants which are necessary for conducting the trade. The rights and duties of the parties to the international trade must be very clear and should not be having any ambiguity. Further, the contract must cover all important points and contingencies in clear and unambiguous terms. Lastly, it must contain an arbitration clause.

ONLINE DISPUTE RESOLUTION(ODR)

Online Dispute Resolution (ODR) is the use of internet technology to resolve the disputes between the parties outside of the public court system. In its most basic sense, ODR is the use of technology to 'resolve' disputes. It is not just any form of technology integration (such as electronically scheduling a session), but its active use to help resolve the dispute (such as video conferencing for hearings or electronic document sharing for filing). Though derived from ADR, ODR's benefit extends beyond just e-ADR or ADR that is enabled through technology. ODR can use technology tools that are powered by AI/ML in the form of automated dispute resolution, script-based solution and curated platforms that cater to specific categories of disputes.

Benefits of ODR

It is cost effective, convenient, efficient, allows for customizable processes to be developed and can limit unconscious bias that results from human interactions. In terms of layers of justice, ODR can help in dispute avoidance, dispute containment and dispute resolution. Its widespread use can improve the legal health of the society, ensure increased enforcement of contracts and thereby improve the Ease of Doing Business Ranking for India. Over time, the benefits of ODR and Digital Courts (technology in the public court system) together can transform the legal paradigm as a whole.

1. **Cost effective**

   The economic burden of dispute resolution often turns the process itself into a punishment and thereby hinders access to justice. In this light, ODR offers a cost-effective mode of dispute resolution for the disputants as well as the Neutrals.

   Further, ODR has the potential to reduce legal costs, by way of reduced time for resolution and by doing away with the need for legal advice in select categories of cases.

   Apart from these tangible costs, there are other indirect costs, often faced by enterprises, on account of lengthy litigation proceedings.

   For instance, enterprises see loss of productive time, loss in wellbeing of the individuals, loss in investor confidence, reduced investments and consequently slower economic growth. While all these impacts cannot be completely remedied by ODR, it can help in mitigating them and therefore prove to be cost effective.

2. **Convenient and quick**

   Issue: The pendency of cases in Courts across India has been one of the major challenges for the justice system. As per the India Justice Report, 2019, in 21 States and Union Territories, cases in District Courts remain pending for 5 years on average or more. Excessive adjournments, vacancy in judicial and administrative staff, and complex processes involving multiple participants are some of the major reasons for such pendency.

   How ODR is solving such issue: ODR can address such delays by providing a faster and more convenient process for resolution of disputes. In itself, ADR employs simpler procedures and a fixed timeline for

processes leading to efficient dispute resolution. To add to such benefits, ODR eliminates the need for travel and synchronisation of schedules. This reliance on asynchronous communication, allows parties to submit their arguments intermittently, or follow a 'documents-only' process. Not requiring the physical presence of parties also reduces the need for travel thereby especially benefitting parties involved in cross border disputes. Similarly, use of ODR within businesses such as e-commerce entities also provides consumers a one-stop avenue to resolve their disputes thereby making dispute resolution quicker and more convenient.

3. **Allows for customisable processes**

Over the past few years, ADR has seen a lot of variants emerge, that go beyond the traditional ADR processes such as arbitration and mediation. Some of the hybrid variants include med-arb, med-arb-med, arb-med-arb. ODR's integration with such non-traditional ODR processes and use of artificial intelligence can lead to limitless possibilities in terms of the types of models that can be developed. Thus, ODR can allow for multi-door dispute resolution through curated and customised process for certain classes of cases. This in turn, can make the dispute resolution process more cost effective and convenient for the user.

4. **Encourages dispute resolution**

ODR can contribute significantly to improve access to a variety of dispute resolution processes by addressing major concerns such as lack of access to physical courts or ADR centres, cost of dispute resolution as well as the barriers due to disabilities. Since ODR tools such as online negotiation and mediation are premised on mutually arriving at an agreement, they make the dispute resolution process less adversarial and complicated for the parties. Resolving disputes in the comfort of the user's own homes can make the dispute resolution process feel more accessible. This improvement in the overall experience can encourage more parties to opt to resolve their disputes through such formal means as opposed to not agitating their rights at all.

5. **Limits implicit bias caused by human judgment**

With the increased awareness regarding racial, caste and gender justice, there have been some concerns regarding the impact of biases, prejudice, and stereotype on decision-making processes and outcomes. Studies have identified that implicit bias and anxiety to communicate with members of different communities can influence the outcome of mediation. ODR processes can lessen the unconscious bias of the Neutral while resolving disputes. ODR Platforms, especially those based on texts and emails, detach audio-visual cues relating to the gender, social status, ethnicity, race, etc. and help in resolving disputes based on the claims and information submitted by the disputing parties, rather than who these parties are.

That said, while ODR could indeed limit biases arising from human interactions, ODR stands the risk of introducing new biases through the use of artificial intelligence.

The successful integration and co-option of ODR across the world, has ultimately led to the development of a few models of ODR all of which have been running in parallel across the globe. They are:

1. **In-house private ODR** Platforms run by individual businesses;
2. **Private ODR Platforms or service providers** catering to different categories of disputes and multiple modes of resolution;
3. **Government run** or state-sponsored ODR programs and platforms **and**
4. **Court-annexed ODR systems**

Source: https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf

INTERNATIONAL EXPERIENCE IN ONLINE DISPUTE RESOLUTION (ODR) AND PROCEDURE ADOPTED BY ODR IN FOREIGN COUNTRIES

A. Government-Run ODR Platforms

S. No.	*ODR Service*	*Nature of Disputes*	*Mechanism for dispute resolution*	*Partnership and Regulation*
1.	**Brazil:** Consumidor.gov	**Consumer disputes:** Consumer can use the ODR Platform to resolve disputes against companies registered with the Consumidor.gov.	**The process for dispute resolution through Consumidor.gov is provided below:** 1. The consumer can file their complaint against the company registered on the ODR Platform. 2. The company is given 10 days to analyse and respond to the complaint. 3. After the response from the company, the consumer is required to comment and classify the company's response, stating whether their complaint has been resolved or not resolved, within 20 days.	Consumidor.gov platform is integrated with State and Municipal consumer rights protection bodies, 'Procons' (an institution linked to the Secretariat of Justice and Defense of Citizenship, State of São Paulo), Courts of Justice, Office of Public Prosecutor, Public Defenders, Regulatory Agencies and the Ministry of National Consumer Secretariat. The guidelines for the platform provide data protection framework and prohibits activities such as defamation, harassment, etc. Further, ODR services under the platform are provided for free.
2.	**European Union:** The European Online Dispute Resolution Platform by the European Commission.	**Consumer disputes**	1. All online traders are mandated to provide a link to the ODR Platform on their website. 2. Once a consumer files a complaint on the ODR Platform the trader receives a notification. 3. The complainant may resolve the dispute directly on the platform or submit the complaint to an ODR service provider listed on the ODR Platform.	The European Union has partnered with more than 750 ODR service providers across Europe to provide ODR services to the consumers.67 The ODR service providers are recognised and accredited by the sector-specific regulators of the member countries of EU. The ODR service providers are also required to undergo yearly audits and publish annual reports.

S. No.	ODR Service	Nature of Disputes	Mechanism for dispute resolution	Partnership and Regulation
			4. Disputes can be resolved directly on the ODR Platform - if the trader is willing to talk, then direct messages can be exchanged on the dashboard along with photographs to resolve the dispute. 5. Resolution of dispute through ODR service provider - The ODR service provider, listed on the platform offers efficient dispute resolution. Both parties are provided 30 days to agree on an ODR service provider to handle their case. 6. If the parties cannot decide upon the ODR service provider, the consumer is advised by the ODR Platform to adopt other modes for dispute resolution.	
3.	**Hong Kong:** COVID-19 Online Dispute Resolution (ODR) Scheme	The scheme aims to resolve disputes that are, arising due to the COVID-19 pandemic where the amount claimed is HKD 500,000 (approximately INR 47 lakhs) or less, and where at least one of the parties is a Hong Kong resident.	**The scheme offers a multi-tiered dispute resolution process:** 1. initially parties try to negotiate the dispute, 2. if negotiation is unsuccessful, then mediation is attempted, 3. in case the mediation process is unsuccessful, parties proceed to arbitration for resolving their disputes. Parties are free to appoint their own mediator and arbitrator for the process.	eBRAM, an independent not-for- profit organisation established in 2018 under Hong Kong law, has been appointed as the service provider for this ODR scheme. The proceedings under the scheme are regulated by the rules framed by eBRAM.

S. No.	*ODR Service*	*Nature of Disputes*	*Mechanism for dispute resolution*	*Partnership and Regulation*
4.	**Mexico:** Concilianet by the Federal Consumer Prosecutor's Office (PROFECO).	**Consumer disputes:** Consumers can file complaints against manufacturers and service providers that have entered into a collaboration with the office of the Attorney General to resolve their disputes through Concilianet.	**The process for dispute resolution through Concilianet is provided below:** 1. The consumer is required to register an account with Concilianet with proper identification documents. 2. The consumer can submit their complaint along with relevant documents on the ODR Platform. 3. PROFECO analyses the complaint and determines its competence to resolve the dispute. After such analysis, it sends a reply to the complainant within 10 days. 4. Post such analysis, online conciliation hearing is arranged with the consumer, manufacturer, and a conciliator. 5. After the conciliation, the consumer can provide feedback on their level of satisfaction with the service received.	Concilianet provides a free ODR Platform for consumer dispute resolution. If a consumer files a complaint regarding a product or a service, the manufacturer or the service provider are mandated to appear for conciliation, failing which a fine may be imposed.
5.	**South Korea:** E-Commerce Mediation Committee (ECMC)	**E-commerce and E-transactions disputes.**	The ECMC offers dispute resolution through different modes of communication, including face- to-face, online, written, and phone call. 1. for face-to-face coordination, disputes are resolved with a mediator, the disputing parties, and an investigator present in one meeting place. It is considered more appropriate for complex disputes. 2. for online coordination, a party can access the online coordination centre (chatting. ecmc. or.kr) to resolve a dispute.	The mediation proceedings under ECMC are regulated by the Framework Act on Electronic Documents and Commerce. The Act includes provisions for the appointment of mediators and conducting mediation proceedings.

S. No.	ODR Service	Nature of Disputes	Mechanism for dispute resolution	Partnership and Regulation
			3. written coordination is another means available to disputing parties who are unable to engage in a face-to-face dispute resolution process. This process is considered more appropriate for cases involving specific details and evidences. 4. phone call coordination involves phone calls between a mediator, the disputing parties, and an investigator for resolution of a dispute.	
6.	**United Kingdom:** UK Financial Ombudsman	**Disputes between financial businesses and customers.**	The mechanism for dispute resolution 81 is provided below. 1. The consumer is required to give the business an opportunity to resolve the claim themselves. The business should address the issue within 8-weeks. If the business fails to resolve the issue, the consumer can file a complaint before UK Financial Ombudsman. 2. **Initial assessment –** Every complaint is assigned a case handler who reviews the complaint and shares their initial thoughts with both the sides. 3. **Review by ombudsman** – If the parties disagree with the initial assessment, they can ask ombudsman to conduct a formal review of the complaint. The ombudsman reviews all facts and evidences and decides the case. 4. **Binding nature of the decision** - The consumer has the option to withdraw from the process at any stage or decline the outcome of the process. However, if the consumer accepts the outcome, then it is legally binding on the businesses.	The Financial Ombudsman is regulated as per the rules published by Financial Conduct Authority. The rules provide the procedure for handling the disputes, fee for the ombudsman services and jurisdiction of the ombudsman office.

S. No.	ODR Service	Nature of Disputes	Mechanism for dispute resolution	Partnership and Regulation
7.	**United States:** Technology Assisted Group Solutions (TAGS) by Federal Mediation and Conciliation Service (FMCS)	**Labour Disputes**	FMCS has employed TAGS to help mediators resolve labour-management disputes efficiently. It uses technology tools for efficient group problem-solving, decision-making, improving the facilitation of meetings and conducting online surveys.	TAGS uses a combination of technology tools including e-Room, mimio, FacilitatePro and NetMeeting to enable online meeting, caucuses and provide efficient internet based dispute resolution.

B. COURT-ANNEXED ODR PLATFORMS

S. No.	Who is the service provider?	Nature of Disputes (eg: MSME, small value, e-commerce)	Mechanism for dispute resolution	Regulation of the ODR Platform	Additional information
1.	**Canada:** British Columbia Civil Resolution Tribunal (CRT)	1. Motor vehicle injury disputes up to Canadian $50,000 (or INR 30 lakhs approximately), 2. Small claim disputes up to Canadian $5,000 (or INR 3 lakhs approximately), 3. Strata property (condominium) disputes of any amount, and 4. Societies and cooperative associations disputes of any amount.87	The entire process of dispute resolution is conducted online. 1. **Negotiation**– Once an application is accepted, parties may use the CRT platform to negotiate and resolve some or all of the issues. 2. **Facilitation**– In this process a Neutral is appointed to clarify the claims of the parties and facilitate mediation to reach a settlement. 3. **Tribunal Decision Process**– If the parties are unsuccessful in resolving disputes, an independent CRT member adjudicates the dispute.	1. The Civil Resolution Tribunal or CRT has been established under the Civil Resolution Tribunal Act. 2. Agreements arrived at through negotiation and facilitation can be turned into a 'consent resolution order'. Consent Resolution Order is enforceable through courts like a court order.91	

S. No.	Who is the service provider?	Nature of Disputes (eg: MSME, small value, e-commerce)	Mechanism for dispute resolution	Regulation of the ODR Platform	Additional information
			The decisions of taken by the CRT members are binding and can be enforced like a court order.		
2.	**China:** Beijing Internet Court	Civil and administrative disputes stemming from e-commerce and internet.	The Beijing Internet Court provides comprehensive online mediation service. The parties select the mediation organisation, the mediator and initiate mediation online. If the mediation is successful, the judge confirms the result of the process and withdraws the suit after an agreement is drafted.	Beijing Internet Court's Court Hearing Rules has standardised dispute resolution process in the Internet Court.	In the first year, the Beijing Internet Court conducted online mediation for 29,728 cases. The court successfully mediated 23.9 percent of the disputes.
3.	**China:** Hangzhou Internet Courts	Civil and administrative disputes stemming from e-commerce and internet.	The Court offers online pre-litigation mediation service. The mediation process allows asynchronous exchange of questions and arguments and mediation. The platform also allows parties to upload video testimonies and evidence for efficient mediation process. Further, the Internet Court has built electronic evidence platform connected with ecommerce websites, financial institutions, notary institutions, etc.	Hangzhou Internet Court has promulgated a series of 15 rules to govern online dispute resolution process.	

S. No.	*Who is the service provider?*	*Nature of Disputes (eg: MSME, small value, e-commerce)*	*Mechanism for dispute resolution*	*Regulation of the ODR Platform*	*Additional information*
			The platform uses blockchain technology to store and authenticate evidence filed by the disputing parties.		
4.	**China:** Zhejiang Province's Online Dispute Diversification Resolution Platform (ODDRP)	E-commerce (sales, copyright, trademark, and small claims of internet financing), divorce and maintenance, road accident liabilities, contractual disputes.	The platform offers a tiered model of dispute resolution: 1. Legal Consultation provides intelligent online consultation through relevant laws and cases. Such consultations are then followed by manual consultations. 2. Online evaluation evaluates litigation risk by relying on data on judgments. 3. Online Mediation offers professional mediation service by combining both online and offline channels. 4. Online Arbitration is provided by 11 arbitration institutions in the province. The full process from application to conclusion of arbitration is conducted online.		As on January 2019, the success rate of mediation proceedings on the platform was 90.66 percent and the platform has successfully mediated 355,973 cases.

S. No.	Who is the service provider?	Nature of Disputes (eg: MSME, small value, e-commerce)	Mechanism for dispute resolution	Regulation of the ODR Platform	Additional information
			5. Online Litigation provides litigation services like filing, evidence, hearing and sentencing through High People's Court of Zhejiang Province Legal Service Official Website.		
5.	**Singapore:** Singapore State Courts e-negoti-ation and e-mediation platforms105	Disputes before the Small Claims Tribunal (SCT), Community Disputes Claims Tribunal (CDCT) and Employment Claims Tribunal (ECT)	1. **E-negotiation:** Each party can make multiple offers (three in case of small value claims and five rounds in case of employment claims) in the negotiation process. If no settlement is reached through such offers, the parties are directed to attend the consultation on the provided date and time.107 2. **E-mediation:** Parties may resolve their dispute online with the help of a court mediator. If both parties agree, then the respective tribunal schedules an online mediation session with parties and a court mediator.	1. The Practice Directions issued by the State Courts have a dedicated section on using ADR avenues for dispute redressal. No amendments have been made to these sections to include ODR. However, there is a presumption of ADR for all cases i.e. the court encourages parties to consider the appropriate Court of Dispute Resolution (CDR) or ADR processes as a 'first stop' for civil disputes. 2. The settlement agreement require consent of the respective tribunal where the case was first filed.	

S. No.	*Who is the service provider?*	*Nature of Disputes (eg: MSME, small value, e-commerce)*	*Mechanism for dispute resolution*	*Regulation of the ODR Platform*	*Additional information*
6.	**UAE:** Dubai International Finance Centre Courts (DIFC)	Commercial disputes, filings, wills etc.	1. The DIFC Courts are manned by judges who are appointed by the Government. 2. The courts function as courts of first instance and appeal. 3. The DIFC Courts also work as supervisory courts. 4. Hearings are being held through teleconferencing and filing is done through 'e-Registry'. The will service centre facilitates the drafting of wills online.	Arbitration is conducted based on DIFC Arbitration law based on the UNCITRAL model.	The first half of 2020 the courts saw a 96% year on year increase in the number of cases filed.
7.	**United Kingdom:** Money Claim Online	Money claims below £100,000 (or INR 90 lakhs approximately) and above £10,000 (or INR 9 lakhs approximately)	**The following procedure followed by Money Claim Online to resolve disputes:** 1. The claimant is required to register with the platform and issue claim against the defendant/s through Money Claim Online. 2. Defendant/s is/are provided 14 days from the date of service to file a response to the claim.	The procedure for Money Claim Online is governed through Practice Direction 7E.	

S. No.	Who is the service provider?	Nature of Disputes (eg: MSME, small value, e-commerce)	Mechanism for dispute resolution	Regulation of the ODR Platform	Additional information
			3. If the defendant/s admits the claim, the claimant can proceed to request judgment online. 4. If the defendant/s has defended the claim, the case is referred to mediation after the consent of the parties. Alternatively, the dispute is filed before a court for its resolution. 5. After a settlement is reached between parties, they can file request for online or manual judgment.		

C. PRIVATE ODR PLATFORMS

S. No.	Name of the platform and organisation introducing the platform	Industry and types of disputes	Mechanism for dispute resolution	No. of disputes resolved
1.	Australia: Australian Disputes Centre	The platform is a non-profit that caters to commercial entities, Government and individuals. It is not dedicated to a specific sector.	The centre offers efficient dispute resolution through mediation, arbitration, expert determination, and conciliation. It also provides access to custom designed virtual courtrooms for better dispute resolution experience. **Arbitration:** One can register and send an e-notification online to the other party. After the other party serves a notice of response, the parties try to resolve the dispute amongst themselves. If the same fails, then a Neutral is appointed by the parties based on a list provided by ADC. The final award is binding on the parties.	

S. No.	*Name of the platform and organisation introducing the platform*	*Industry and types of disputes*	*Mechanism for dispute resolution*	*No. of disputes resolved*
2.	**Canada:** Platform to Assist in the Resolution of Litigation Electronically (PARLe)	**Consumer disputes**	1. The platform encourages the consumer to settle their dispute with the merchant on their own through negotiation. If no settlement is reached within 20 days from the start of negotiation, then a mediator is automatically appointed to intervene in the dispute resolution process. The consumer and trader can request for a mediator soon after submission of proposal and counter-proposal as well. 2. Consumers are provided with resource tools such as case law summaries and explainers on statutes to help them through the process of dispute resolution.	Dispute settlement rate of 70% and user satisfaction rate of 90%.
3.	**China:** Alibaba Internal Online Dispute Settlement Mechanism	**Consumer Disputes**	Alibaba Group (including Taobao and Tmall that enables consumer-to-consumer and business-to-consumer transactions respectively) have adopted a 4-way process to resolve a consumer dispute online. Buyer can opt for any of these processes to attain efficient dispute settlement. The process adopted by Taobao platform is provided below. Tmall has also adopted a similar process. 1. **Negotiation between parties:** The consumer can choose to directly negotiate disputes with the seller. 2. **Taobao Consumer Service Intervening:** The Consumer Service acts as a neutral third party in the disputes. The parties share the evidence, chat and transaction details with the consumer service. The decision of the consumer service is non-binding, but Taobao may take actions against the seller and enforce the decision by private implementation methods. 3. **Public Review Service:** Taobao has created a public review system and Taobao Judgment Centre. The public review team is constituted of 31 volunteers who decides on the disputes. Parties should get at least 16 votes to win the dispute. 4. **Report to Taobao:** Taobao has established a Report platform to allow parties to report irregularities and violations on the platform. Such practice plays a regulatory role to prevent unfair competition and rights of the parties.	

S. No.	*Name of the platform and organisation introducing the platform*	*Industry and types of disputes*	*Mechanism for dispute resolution*	*No. of disputes resolved*
4.	**Europe:** YOUSTICE134	**Consumer disputes** The service has been expanded to include travel, gambling, and car-rental disputes.	The ODR Platform follows a two-level dispute resolution mechanism: i. Direct negotiations between traders and consumers ii. Submission to resolve: In case of failure of step (i), parties approach an ADR Platform that assigns the case to a neutral third party.	The platform has partnered with Nubelo, an online directory, and offers services to over 300,000 service providers.
5.	**UAE:** Dubai Chamber of Commerce and Industry136	Primarily includes disputes around non-payment and defects in goods	1. To initiate the dispute resolution process, one of the parties must be a member of Dubai Chamber of Commerce and Industry 2. Applicants can submit their mediation requests and relevant documents followed by payment 3. They also have the option to track new and previous applications electronically 4. The platform offers a smart mediation application, through which users can submit applications, upload documents and pay the prescribed fee. It also enables the user to keep track of their application.	
6.	**United Kingdom:** Resolver	**Consumer Disputes**	The platform offers free dispute resolution service to the consumers. After filing the complaint on the platform, the consumers can add evidence, reply to a communication, track the progress, and download all the documents on their devices. The platform also helps consumers to escalate complain with an ombudsman and regulator to achieve efficient dispute resolution.	Resolver provided their services to about 1.8 million consumers between April 2018 and March 2019.

S. No.	*Name of the platform and organisation introducing the platform*	*Industry and types of disputes*	*Mechanism for dispute resolution*	*No. of disputes resolved*
7.	**United States:** Cybersettle	**Monetary Claims**	The platform uses blind bidding to resolve monetary disputes between the parties. The online blind bidding service offered by the platform requires the disputants to submit the highest and lowest settlement figures acceptable to them. Based on this information, the platform provides optimal resolution for both parties.	In 2014, Cybersettle has facilitated settlement of $1.9 billion in claim-based transactions.
8.	**United States:** eBay	**E-commerce, consumer disputes**	The platform developed by eBay follows five steps for efficient dispute redressal: 1. The parties are required to file the dispute at the Resolution Centre (RC). 2. RC confirms whether — The dispute falls within eBay's coverage for a money- back guarantee — The buyer selected 'pay now' — Asserted the complaint within 30 days of estimated or actual date of delivery. 3. RC gathers the proposed resolution and encourages both parties to resolve the dispute via the messaging facility on eBay. 4. RC re-evaluates in case of failure to resolve within 3 days of step (3). 5. Resolution Services team contacts the seller and informs the buyer if they are eligible for a refund. Refunds are enforced through chargebacks.	In 2010, the platform resolved approxi-mately 60 million cases a year.
9.	**United States:** PayPal	**E-commerce, consumer disputes**	Follows a two-tiered dispute resolution system. i. **Dispute:** The buyer or the seller can institute the dispute. The time period offered for resolution of the dispute is 20 days. Until the dispute is resolved, PayPal puts a hold on the transaction funds.	

S. No.	Name of the platform and organisation introducing the platform	Industry and types of disputes	Mechanism for dispute resolution	No. of disputes resolved
			ii. **Claim:** In case the dispute has not been resolved within 20 days, either of the parties can escalate the dispute to a claim. PayPal will then intervene, investigate the case, and offer a solution. A limited appeals process follows where the seller is the only party allowed to appeal under three circumstances: (1) item is returned to seller, but not in the same condition as the buyer first received it; (2) no item was returned at all; or (3) wrong item was returned.	
10.	**United States:** Smartsettle	Family disputes, insurance disputes, real estate disputes, small claims disputes and disputes regarding domain names.	Smartsettle provide asynchronous communication facility to resolve disputes through negotiation. It involves three steps: 1. Modelling the problem, 2. Identifying preferences and trade-offs, and 3. Providing optimal solution through algorithm.	

Source: https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf

[2]SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

Since commencing operations in 1991 as an independent, not-for-profit organisation, SIAC has established a track record for providing best in class arbitration services to the global business community. SIAC arbitration awards have been enforced in many jurisdictions including Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA and Vietnam, amongst other New York Convention signatories. SIAC is a global arbitral institution providing cost-competitive and efficient case management services to parties from all over the world.

SIAC's Board of Directors and its Court of Arbitration consists of eminent lawyers and professionals from all over the world.

The Board is responsible for overseeing SIAC's operations, business strategy and development, as well as corporate governance matters.

The Court's main functions include the appointment of arbitrators, as well as overall supervision of case administration at SIAC. SIAC has an experienced international panel of over 500 expert arbitrators from over 40 jurisdictions. Appointments are made on the basis of our specialist knowledge of an arbitrator's expertise, experience, and track record. SIAC's panel has over 100 experienced arbitrators in the areas of Energy, Engineering, Procurement and Construction from more than 25 jurisdictions.

2. Source: https://siac.org.sg/about-us/why-siac

The SIAC Rules provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all sizes and complexities involving parties from diverse legal systems and cultures.

SIAC's full-time staff manage all the financial aspects of the arbitration, including:

- Regular rendering of accounts
- Collecting deposits towards the costs of arbitration
- Processing the Tribunal's fees and expenses

SIAC supervises and monitors the progress of the case. SIAC's scrutiny process enhances the enforceability of awards.

SIAC's administration fees are highly competitive.

SIAC, A Respected Neutral Arbitral Institution with a Record of Enforcement

It is established in 1991 as an independent, not-for-profit organisation. SIAC has a proven track record in providing neutral arbitration services to the global business community. SIAC arbitration awards have been enforced by the courts of Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA, and Vietnam, amongst other New York Convention signatories.

An International Organisation with a Global Outlook

- SIAC is ranked 2nd among the world's top 5 arbitral institutions, and is the most preferred arbitral institution in the Asia-Pacific.
- SIAC's case management services are supervised by the Court of Arbitration, which comprises internationally renowned arbitration practitioners.
- SIAC's Board of Directors consists of highly respected lawyers and professionals from all over the world.
- The Board is responsible for overseeing SIAC's operations, business strategy and development, as well as corporate governance matters.
- SIAC has an experienced international panel of over 500 expert arbitrators from over 40 jurisdictions.
- SIAC's panel has over 100 experienced arbitrators in the areas of Energy, Engineering, Procurement and Construction from more than 25 jurisdictions.
- SIAC's multinational Secretariat comprises experienced lawyers qualified in civil and common law jurisdictions.
- Over 90% of new cases filed at SIAC are international in nature.
- The SIAC Rules are efficient, cost-effective and flexible, and incorporate features from civil and common law legal systems.
- SIAC is registered as a Permanent Arbitral Institution under Russia's Federal Law on Arbitration and is authorised to administer international commercial arbitrations for Russia-seated arbitrations.

SIAC Facilitates the Efficient Resolution of Disputes

The SIAC Rules provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all sizes and complexities involving parties from diverse legal systems and cultures.

SIAC appoint arbitrators where the parties are unable to agree under the SIAC Rules, UNCITRAL Rules and ad hoc cases. Appointments are made on the basis of our specialist knowledge of the arbitrator's expertise, attributes and track record. Click here to view our panel of arbitrators.

There are strict standards of admission for the SIAC Panel of Arbitrators, thus minimising the risk of challenges and delay.

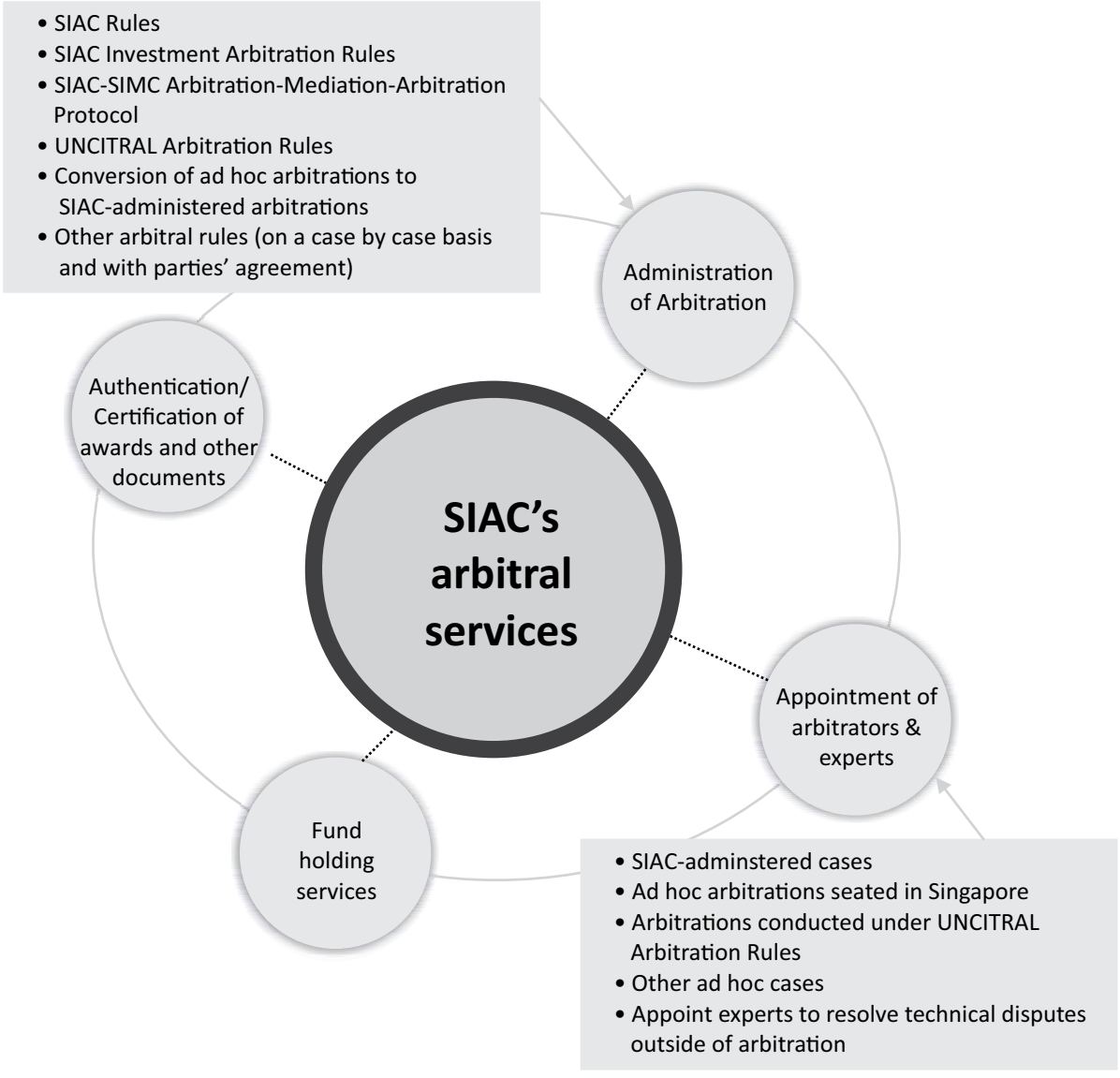
Our full time staff manage all the financial aspects of the arbitration, including:

Our transparent financial management of the case according to published guidelines allows legal representatives to provide their clients with accurate cost projections, timelines and costs for each stage of the arbitration process.

We supervise and monitor the progress of the case. We conduct scrutiny of the arbitral award, thus enforcement problems are less likely.

SIAC's administration fees are competitive in comparison with all the major international arbitral institutions. Click here to estimate your fees.

Arbitral Services Offered by SIAC



Current Fee Schedule

This Schedule of Fees is effective as of 1 August 2016 and is applicable to all arbitrations commenced on or after 1 August 2016.

Case Filing Fee+ (Non-Refundable)

Singapore Parties	S$2,140*
Overseas Parties	S$2,000

+ A filing fee is applicable to all arbitrations administered by the SIAC, and to each claim or counterclaim.

* Fee includes 7% GST.

Administration Fees

The administration fees calculated in accordance with the Schedule below apply to all arbitrations administered by SIAC and is the maximum amount payable to SIAC.

Sum in Dispute (S$)	***Administration Fees (S$)***
Up to 50,000	3,800
50,001 to 100,000	3,800 + 2.200% excess over 50,000
100,001 to 500,000	4,900 + 1.200% excess over 100,000
500,001 to 1,000,000	9,700 + 1.000% excess over 500,000
1,000,001 to 2,000,000	14,700 + 0.650% excess over 1,000,000
2,000,001 to 5,000,000	21,200 + 0.320% excess over 2,000,000
5,000,001 to 10,000,000	30,800 + 0.160% excess over 5,000,000
10,000,001 to 50,000,000	38,800 + 0.095% excess over 10,000,000
50,000,001 to 80,000,000	76,800 + 0.040% excess over 50,000,000
80,000,001 to 100,000,000	88,800 + 0.031% excess over 80,000,000
Above 100,000,000	95,000

The administration fees does not include the following:

- Fees and expenses of the Tribunal;
- Usage cost of facilities and support services for and in connection with any hearing (e.g. hearing rooms and equipment, transcription and interpretation services); and • SIAC's administrative expenses.
- 7% GST as may be applicable.

SIAC will charge a minimum administration fee of S$3,800, payable for all cases, unless the Registrar otherwise determines.

Arbitrator's Fees

For arbitrations conducted pursuant to and administered under these Rules, the fee calculated in accordance with the Schedule below is the maximum amount payable to each arbitrator, unless the parties have agreed to an alternative method of determining the Tribunal's fees pursuant to Rule 34.1.

Sum in Dispute	*Arbitrator's Fees*
Up to 50,000	6,250
50,001 to 100,000	6,250 + 13.800% excess over 50,000
100,001 to 500,000	13,150 + 6.500% excess over 100,000
500,001 to 1,000,000	39,150 + 4.850% excess over 500,000
1,000,001 to 2,000,000	63,400 + 2.750% excess over 1,000,000
2,000,001 to 5,000,000	90,900 + 1.200% excess over 2,000,000
5,000,001 to 10,000,000	126,900 + 0.700% excess over 5,000,000
10,000,001 to 50,000,000	161,900 + 0.300% excess over 10,000,000
50,000,001 to 80,000,000	281,900 + 0.160% excess over 50,000,000
80,000,001 to 100,000,000	329,900 + 0.075% excess over 80,000,000
100,000,001 to 500,000,000	344,900 + 0.065% excess over 100,000,000
Above 500,000,000	605,000 + 0.040% excess over 500,000,000 up to a maximum of 2,000,000

The above Arbitrator's Fees do not include 7% GST or its equivalent in the relevant jurisdiction, as may be applicable.

SIAC Model Clause

In drawing up international contracts, we recommend that parties include the following arbitration clause:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause."

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____** arbitrator(s).

The language of the arbitration shall be _____.

[In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court ("the SICC"); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC.]***

* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").

** State an odd number. Either state one, or state three.

*** The inclusion of this sentence is recommended if the arbitration commenced to resolve the dispute will be/is an international commercial arbitration, and Singapore is chosen as the seat of arbitration.

**** State the country or jurisdiction.

[3]INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) ARBITRATIONS

ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.

ICSID provides for settlement of disputes by conciliation, mediation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interests of investors and host States. Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process. More than 900 such cases have been administered by ICSID to date.

ICSID also promotes greater awareness of international law on foreign investment and the ICSID process. It has an extensive program of publications, including the leading ICSID Review-Foreign Investment Law Journal and it regularly publishes information about its activities and cases. ICSID staff organize events, give numerous presentations and participate in conferences on international investment dispute settlement worldwide.

Member States

There are significant advantages to becoming a member of ICSID. Member States and their nationals obtain access to investment dispute settlement under the ICSID Convention and the Additional Facility, as well as to the facilities and expert services of the Secretariat. As Members, States participate in ICSID through their representation on the Administrative Council. They may also nominate persons for the ICSID Panels of Arbitrators and of Conciliators and make designations and notifications for the purposes of the ICSID Convention.

ICSID maintains a comprehensive database of ICSID Member States, which includes the designations and notifications made by each of them under the ICSID Convention, and their nominations to the ICSID Panels of Arbitrators and of Conciliators.

The ICSID institutional affairs team supports Member States in all matters relating to membership and the general procedure. ICSID frequently gives presentations on the ICSID process and tours of its facilities to State delegations.

ICSID Secretariat

The ICSID Secretariat carries out the daily operations of ICSID. Its composition and principal functions are set out in the ICSID Convention (Articles 9 to 11 of ICSID Convention and the Administrative and Financial Regulations).

3. : https://icsid.worldbank.org/

Composition of the Secretariat

The Secretariat consists of approximately 70 staff of diverse backgrounds and nationalities. It is led by the Secretary-General, who is the legal representative of ICSID, the registrar of ICSID proceedings, and the principal officer of the Centre.

English, French and Spanish are the official languages of ICSID. The case management teams are chiefly organized by these languages, but the Secretariat has capacity to communicate in over 25 languages. Each case management team has experienced legal counsel acting as Secretaries to Tribunals, Commissions and ad hoc Committees under the ICSID Convention, ICSID Additional Facility and UNCITRAL Arbitration Rules. They are assisted by paralegals and legal assistants.

The general administration and financial management team oversees all financial aspects of case management and the ICSID budget. It also handles ICSID's archives, human resources and information technology.

Support in Dispute Settlement

ICSID Cases

The Secretariat's main role is to provide support in investor-State dispute settlement. It is involved in all aspects of the process, including:

- acting as registrar in proceedings (for example, receiving, reviewing and registering requests for arbitration and conciliation and authenticating awards);
- assisting in the constitution of Conciliation Commissions, Arbitral Tribunals and ad hoc Committees;
- assisting parties and Commissions, Tribunals and Committees with all aspects of case procedure;
- organizing and assisting at hearings;
- administering the finances of each case; and
- providing other administrative support as requested by Commissions, Tribunals and Committees.

Non-ICSID Cases

The Secretariat also supports dispute settlement in State-State or investor-State proceedings under rules other than the ICSID Rules. This includes cases under the UNCITRAL Arbitration Rules and other ad hoc dispute settlement provisions. The Secretariat's services in these proceedings range from support with the organization of hearings to full administrative services comparable to those provided in ICSID cases. Parties are free to elect the extent of the services desired in these cases.

ICSID also assists regularly with the organization of hearings in arbitration proceedings conducted under the auspices of the ICC, LCIA, PCA, and other institutions.

Appointing Authority/Deciding Challenges

The Secretary-General acts as appointing authority in proceedings not conducted under the ICSID Convention or the Additional Facility Rules, and decides proposals for disqualification of arbitrators, upon request.

Panels of Arbitrators and of Conciliators

The ICSID Convention entitles each Member State to designate up to four persons to the Panel of Arbitrators and up to four persons to the Panel of Conciliators (Article 12 to 16 of the ICSID Convention). In addition, the Chairman of the Administrative Council of ICSID may designate up to ten persons to each Panel.

The designees of a Member State may be of any nationality. They serve for a renewable term of six years and may serve on both Panels simultaneously.

The arbitrators and conciliators listed on the Panels are available for selection to ICSID Tribunals, Conciliation Commissions and ad hoc Committees. The Panel lists are used most often to appoint where the parties are unable to agree on a nominee. The Panel of Arbitrators is also used for appointment to ad hoc Committees.

Young ICSID

ICSID launched Young ICSID in November 2012. The purpose of Young ICSID is to encourage professional development for young lawyers, and to provide a forum for them to discuss ideas and meet other professionals.

Members under age 45 are welcome to enroll by completing a form. There is no registration fee to enrol. Membership benefits include information on upcoming events, training and conferences.

Services

ICSID offers services for the resolution of international disputes, primarily between investors and States, but also in State-to-State disputes. In addition, it offers fact-finding proceedings to examine and report on facts before a dispute arises.

CURRENT ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION (E.G. CONFIDENTIALITY AND CONSOLIDATION)

There are various issues in International Arbitration since it involves the privately appointed arbitrator. The entire decision to settle the dispute is hold in the hands of a private arbitrator which may not hold good sometimes. The parties to the arbitration may seek the court's advice.

On the other hand, the privately appointed arbitrator may play a bias role in favour of party of his choice while resolving the dispute. He may forget his ethical principles and guidelines for delivering his judgment as there is no uniform code which he needs to follow. In turn, it may result in questioning of his judgment.

The international arbitration process is too far from the domestic court and its supervision. The full procedure may take a lot of time due to the nature of dispute involved in the transaction. The dispute is normally of such a nature which makes the arbitration work so time taking and costly.

The redrafting of rules by major international arbitral bodies like ICC, ICSID, SCIA etc. makes the international arbitration procedure more complex and they impose their rules and no uniformity is there.

There may be some cultural differences between the parties to the dispute due to different geopolitical backgrounds which may affect the international arbitration proceedings.

CONFIDENTIALITY

Mostly, Confidentiality is mentioned one of the advantages of international commercial arbitration (ICA). This is an essential component of the ICA as it signifies the duty to the parties to not to disclose the information which affects the proceedings.

Global Case Laws

In *Esso and others* v. *Plowman* (1995), High Court of Australia held that confidentiality was not an essential attribute of arbitration.

In *U.S.* v. *Panhandle et al.* (1988), US Court held that there was no general principle of confidentiality.

In *Bulbank* v. *A.I. Trade Finance* (2000), The Supreme Court of Sweden held that an implied duty of confidentiality in ICA.

Confidentiality is not a part of most of the countries' ICA because they follow UNCITRAL Model Law in which there is no provision on confidentiality. And many arbitral institutions follow the provisions of confidentiality but they impose more duties and code of ethics on the Arbitrators rather than parties to the contract.

International Chamber of Commerce Rules, 2021

Further, Article 6 of Appendix I, and Article 1 of Appendix II of International Chamber of Commerce Rules, 2021, impose duties on arbitrators and the staff of the International Court of Arbitration only but not on the parties, although Article 22.3 authorizes the Arbitral Tribunal to make orders concerning confidentiality upon the request of any party.

Source: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_b1

International Centre for Dispute Resolution(ICDR) Rules, 2014

Similarly, Article 37.1 of the International Centre for Dispute Resolution(ICDR) Rules, 2014 of the American Arbitration Association(AAA) imposes duties of confidentiality on arbitrators and Administrator only not on parties and Article 37.2 provides that the tribunal may make orders concerning confidentiality.

Source: https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf

LCIA Arbitration Rules (2014)

Furthermore, on the contrary, the Article 30 of LCIA Arbitration Rules (2014) provides some obligation on the parties and Arbitral Tribunal and its members and says that the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceeding. Further, the deliberations of the Arbitral Tribunal shall remain confidential to its members.

Source: https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article%2030

CONSOLIDATION

The second major issue in ICA is consolidation of all laws applicable to a specific dispute applicable to parties belonging from different geopolitical background. The Arbitrator may have to consolidate such laws and may face hurdle in applying them.

CONCLUSION

Although majority of the International Arbitral Institutions provide the duties w.r.t. the confidentiality for Arbitrators and Administrator but not on parties to the ICA. That is the reason why parties insist on insertion of a provision related to confidentiality in an Arbitration agreement. It is always advisable to have a proper clause of confidentiality in Arbitration Agreement to provide clear understanding and way to resolve the dispute and have less or no doubt on each other w.r.t. to the leakage of material information related to the dispute.

[4]LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

Introduction

The LCIA is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law. The international nature of the LCIA's services is reflected in the fact that, typically, over 80% of parties in pending LCIA cases are not of English nationality.

The LCIA has access to the most eminent and experienced arbitrators, mediators and experts from many jurisdictions, and with the widest range of expertise. The LCIA's dispute resolution services are available to all contracting parties, without any membership requirements.

In order to ensure cost-effective services, the LCIA's administrative charges, and the fees charged by the tribunals it appoints, are not based on sums in issue. A registration fee is payable with the Request for Arbitration and, thereafter, hourly rates are applied by the arbitrators and by the LCIA.

The LCIA has the word "court" in its name because historically the LCIA wanted to let people know that it could help them to resolve disputes, just like a traditional court.

The LCIA is not really a court in the way most people think of a court – it is not tied to any country's legal system or government, and the arbitrators the LCIA appoints to decide disputes are not associated with the LCIA like a judge is associated with a court. Arbitrators are independent of the LCIA, appointed on a case-by-case basis, and paid by the parties rather than the LCIA.

The LCIA does, however, have a body it calls the "**LCIA Court**", made up of a distinguished group of arbitration lawyers. The LCIA Court is the part of the LCIA that officially carries out various functions under the LCIA Arbitration Rules (including appointing arbitrators) and also ensures that those rules are kept up to date.

Establishment of LCIA

The London Court of International Arbitration (the "LCIA") was established in 1892 to help people who wanted to use arbitration to resolve their commercial disputes.

The LCIA's role in an arbitration is to provide administrative support. When the LCIA "**administers**" a case, it will:

a. appoint arbitrators to decide the dispute;

b. monitor the progress of an arbitration. This involves things like reminding arbitrators if the parties have missed a deadline for submitting documents;

c. manage payments to arbitrators. Parties pay arbitrators for their help in resolving a dispute – the LCIA obtains the money from the parties and then organises these payments; and

d. help with any practical matters, like arranging for a venue for a hearing.

The LCIA can also help parties to use mediation similarly to how it helps parties with arbitration.

History

On 5 April 1883, the Court of Common Council of the City of London set up a committee to draw up proposals for the establishment of a tribunal for the arbitration of domestic and, in particular, of trans-national commercial disputes arising within the ambit of the City.

4. Sourced: https://lcia.org/

As The Law Quarterly Review ("LQR") was to report at the inauguration of the tribunal a few years later:

"This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife."*

Commercial interests were also seeking the adjudication of their disputes by their own; by a tribunal precisely familiar with the area of business in which the dispute had arisen, though this was not, of itself, a new idea. As the same LQR report commented:

"We have the germ of it .... in the old Court of Pied Poudre, in the aldermen arbitrators of the fifteenth century, in the committees of the Stock Exchange, Corn Exchange, Coal Exchange."

In 1884, the committee submitted its plan for a tribunal that would be administered by the City Corporation, with the co-operation of the London Chamber of Commerce. However, though the plan had arisen out of an identified and urgent need, it was to be put on ice pending the passing of the Arbitration Act of 1889.

In April 1891, the scheme was finally adopted and the new tribunal was named "The City of London Chamber of Arbitration". It was to sit at the Guildhall in the City, under the administrative charge of an arbitration committee made up of members of the London Chamber and of the City Corporation.

The Chamber was formally inaugurated on 23 November 1892, in the presence of a large and distinguished gathering, which included the then President of the Board of Trade. Considerable interest was also shown both by the press and in legal commercial circles.

In April 1903, the tribunal was re-named the "London Court of Arbitration" and, two years later, the Court moved from the Guildhall to the nearby premises of the London Chamber of Commerce. The Court's administrative structure remained largely unchanged for the next seventy years.

In 1975, the Institute of Arbitrators (later the Chartered Institute) joined the other two administering bodies and the earlier arbitration committee became the "Joint Management Committee", reduced in size from the original twenty four members to eighteen, six representatives from each of the three organisations. The Director of the Institute of Arbitrators became the Registrar of the London Court of Arbitration.

In 1981, the name of the Court was changed to "The London Court of International Arbitration", to reflect the nature of its work, which was, by that time, predominantly international. New and innovative rules were also adopted that year.

In 1985, not far short of its centenary, new and innovative rules were promulgated and the LCIA Arbitration Court was established, marking the coming of age of the LCIA as an international institution.

In 1986, the LCIA became a private not-for-profit company, limited by guarantee, and fully independent of the three founding bodies. It then set about consolidating its position in the international arena, under the guidance of Sir Michael Kerr, the first President of the LCIA Court, and Bertie Vigrass, the first Registrar of the independent LCIA.

Sir Michael Kerr's illustrious successors in the role of President of the LCIA Court have, to date, been Professor Dr Karl-Heinz Böckstiegel (1994 - 1998), The Honourable L Yves Fortier CC OQ QC (1998 - 2001), Professor Dr Gerold Herrmann (2001 - 2004), Jan Paulsson (2004 - 2010), Professor William W Park (2010 - 2016), Judith Gill QC (2016 - 2019), Paula Hodges QC (2019 - Present).

Organisation

The LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court and the Secretariat. The Director General of the LCIA fulfils the role of chief executive officer, with day-to-day responsibility of the conduct of the business of the LCIA, and is the principal point of contact between the institution and its Board and Court.

The Company

The LCIA is a not-for-profit company limited by guarantee. The LCIA Board, made up largely of prominent London-based arbitration practitioners, is principally concerned with the operation and development of the LCIA's business and with its compliance with applicable company law.

The Board does not have an active role in case administration, though it does maintain a close interest in the LCIA's administrative function, particularly through the Arbitration Court, whose members it appoints.

The Arbitration Court

The LCIA Court is made up of up to thirty five members, plus representatives of associated institutions, and former Presidents, selected to provide and maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world and of whom no more than six may be of UK nationality. In addition, former presidents are invited to become Honorary Vice Presidents, for so long as they may wish to remain in that role, and overseas bodies associated with the LCIA may be invited to nominate special delegates to the Court.

The LCIA Court is the final authority for the proper application of the LCIA rules. Its principal functions are appointing tribunals, determining challenges to arbitrators, and controlling costs. Although the Court meets regularly in plenary session, most of its functions under the LCIA Rules and Constitution are performed, on its behalf, by the President, or a Vice President, or an Honorary Vice President, or a former Vice President, or by a 3 or 5-member Division of the LCIA Court.

The Secretariat

Headed by the Registrar, the casework Secretariat is based at the International Dispute Resolution Centre in London and is responsible for the day-to-day administration of all disputes referred to the LCIA. LCIA case administration is highly flexible. All cases are allocated dedicated soft and hard copy files and account ledgers. Every case is monitored, but the level of administrative support adapts to the needs and wishes of the parties and the tribunal, and to the circumstances of each case.

The LCIA's administrative services are not confined to the conduct of arbitration and of a wide range of other ADR procedures under its own rules. It also acts as administrator in UNCITRAL-rules cases, and not merely as appointing authority, and provides a fundholding facility in otherwise ad hoc proceedings.

LCIA Arbitration Rules

The LCIA arbitration rules are universally applicable, being suitable for all types of arbitrable disputes. They offer a combination of the best features of the civil and common law systems, including in particular:

- Maximum flexibility for parties and tribunals to agree on procedural matters
- Speed and efficiency in the appointment of arbitrators, including expedited procedures
- Means of reducing delays and counteracting delaying tactics
- Emergency arbitrator provisions
- Tribunals' power to decide on their own jurisdiction
- A range of interim and conservatory measures
- Tribunals' power to order security for claims and for costs
- Special powers for joinder of third parties and consolidation

- Waiver of right of appeal
- Costs computed without regard to the amounts in dispute
- Staged deposits - parties are not required to pay for the whole arbitration in advance.

The LCIA Arbitration Rules are the rules which govern most arbitrations administered by the LCIA. They cover many different practical aspects of an arbitration, like how arbitrators are appointed, and the extent to which an arbitration must be kept confidential.

How Arbitrators Chosen

How arbitrators are chosen in a given arbitration depends on what the parties have agreed. There are three common ways in which arbitrators in LCIA arbitrations are chosen:

a. **By the LCIA**: If the parties haven't agreed anything different, the LCIA will choose an appropriate arbitrator to decide the dispute. Parties can also ask the LCIA to choose three arbitrators, who will work together to decide a dispute.

b. **By the parties**: The parties can agree to work together to choose a sole arbitrator or they can agree to each choose one arbitrator, with a third arbitrator to be chosen either by the LCIA or by the two arbitrators that the parties chose.

c. **By the arbitrators**: Where the parties have agreed to choose one arbitrator each, the parties may agree that these two arbitrators should decide on a third arbitrator to act as chair.

Recommended Clauses

Future disputes For contracting parties who wish to have future disputes referred to arbitration under the LCIA Rules, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause."

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ]."

Existing disputes

If a dispute has arisen, but there is no agreement between the parties to arbitrate, or if the parties wish to vary a dispute resolution clause to provide for LCIA arbitration, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate. "A dispute having arisen between the parties concerning [ ], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract [is/shall be] the substantive law of [ ]. "

Modifications to Recommended Clauses

The LCIA Secretariat will be pleased to discuss any modifications to these standard clauses. For example, to provide for party nomination of arbitrators or for expedited procedures.

Mediation and other forms of ADR

Recommended clauses and procedures for Mediation, for Expert Determination, for Adjudication, and for other forms of ADR, to be administered by the LCIA, or in which the LCIA is to act as appointing authority, are available on request from the LCIA Secretariat.

Mediation

Mediation is a negotiated settlement, conducted and concluded with the assistance of a neutral third-party. The process is voluntary and does not lead to a binding decision, enforceable in its own right.

Most commercial disputes, in which it is not imperative that there should be a binding and enforceable decision, are amenable to mediation. Mediation may be particularly suitable where the parties in dispute hope to preserve, or to renew, their commercial relationships.

As mediation is likely to be a shorter process than either litigation or arbitration, there may also be economic arguments for attempting a mediated settlement.

The LCIA mediation rules may be used both by parties who are already committed to mediate, by virtue of contractual dispute resolution provisions, and by parties who have not provided for mediation, but who wish to mediate their dispute, either in an attempt to avoid, or during the course of, litigation or arbitration.

The LCIA has access to a large number of experienced and highly-qualified mediators from many jurisdictions.

As with the arbitrations it administers, the LCIA aims to make its mediations cost-effective. To this end, mediation costs are also based on the hourly rates of the mediators and of the LCIA's administrative staff, without reference to the sums in issue.

LESSON ROUND-UP

- The purpose of Arbitration Act is to provide quick redressal to commercial disputes by private arbitration.
- The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters.
- The Act has been divided into four parts. Part one deals with Arbitration; Part two deals with enforcement of certain Foreign Awards; Part three deals with conciliation; and Part four contains supplementary provisions.
- The Present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.
- Domestic Arbitration is the arbitration in which the disputes are subject to Indian laws and the cause of action is entirely based in India.
- International Arbitration is an arbitration relating to disputes where at least one of the parties is Foreign individual or a body corporate which is incorporated in Foreign country or an association or a body of individuals whose central management and control is exercised in foreign country or the Government of a foreign country.

- The Indian Council of Arbitration is the apex body for providing the dispute resolution in the field of arbitration. Further, the private international law is a type of personal law which involves personal relationship between parties to the contract.
- International commercial arbitration is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allows the parties to avoid litigation in national courts.
- The submission agreements are entered to submit only a specific dispute to the Arbitration. For entering into such agreements, the pre-existence of dispute is mandatory. This may be entered even if such dispute is already litigated in the court of law.
- It is a need for carrying on business transaction smoothly with the contract having proper arbitration clause so as to make parties' transaction profitable and resolve the future disputes amicably.
- National Courts play an important role in international commercial arbitration and their involvement in the arbitral process is necessary to protect evidence and to avoid damages. It recognizes the arbitration agreement between the parties involved in the matter and enforces the arbitral award. The role of domestic courts in International Commercial Arbitration is considered to be very crucial.
- Online Dispute Resolution (ODR) is the use of internet technology to resolve the disputes between the parties outside of the public court system. In its most basic sense, ODR is the use of technology to 'resolve' disputes.
- In-house private ODR are the platforms that run by individual businesses.
- Private ODR Platforms are the service providers platforms that catering to different categories of disputes and multiple modes of resolution.
- Government run or state are sponsored ODR programs and platforms.
- ODR is cost effective, convenient, efficient, allows for customizable processes to be developed and can limit unconscious bias that results from human interactions. In terms of layers of justice, ODR can help in dispute avoidance, dispute containment and dispute resolution.
- Singapore International Arbitration Centre (SIAC) is an independent, not-for-profit organisation and has established a track record for providing best in class arbitration services to the global business community.
- SIAC supervises and monitors the progress of the case. SIAC's scrutiny process enhances the enforceability of awards. SIAC's administration fees are highly competitive.
- International Centre for Settlement of Investment Disputes (ICSID) Arbitrations is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases.
- ICSID also promotes greater awareness of international law on foreign investment and the ICSID process. It has an extensive program of publications, including the leading ICSID Review-Foreign Investment Law Journal and it regularly publishes information about its activities and cases.
- Confidentiality and Consolidation are two major issues in International Commercial Arbitration.
- London Court of International Arbitration (LCIA) is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law.
- The LCIA has access to the most eminent and experienced arbitrators, mediators and experts from many jurisdictions, and with the widest range of expertise.
- The LCIA has the word "court" in its name because historically the LCIA wanted to let people know that it could help them to resolve disputes, just like a traditional court.

GLOSSARY

International Commercial Arbitration: International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India.

International Arbitration: It is an arbitration relating to disputes where at least one of the parties is Foreign individual or a body corporate which is incorporated in Foreign country or an association or a body of individuals whose central management and control is exercised in foreign country or the Government of a foreign country.

Private International Law: Where private parties to the contract got dispute and belong to different jurisdiction or different countries having different law, then the private international law comes into picture. This is also called Conflict of laws.

Indian Council of Arbitration(ICA): Section 43B empowers the Central Government to establish the Arbitration Council of India to perform the duties and discharge the functions under the Arbitration Conciliation Act, 1996.

Online Dispute Resolution (ODR): ODR is the use of internet technology to resolve the disputes between the parties outside of the public court system. In its most basic sense, ODR is the use of technology to 'resolve' disputes.

Singapore International Arbitration Centre (SIAC): It is an independent, not-for-profit organisation and has established a track record for providing best in class arbitration services to the global business community.

International Centre for Settlement of Investment Disputes (ICSID) Arbitrations: It is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases.

London Court of International Arbitration (LCIA): It is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

A. Descriptive Questions

1. What is the distinction between Domestic Arbitration and International Arbitration?
2. What do you understand by an International arbitration agreement?
3. Explain the Role of Private International Law in International Commercial Arbitration.
4. International Centre for Settlement of Investment Disputes (ICSID) Arbitrations is the world's leading institution devoted to international investment dispute settlement. Elaborate.
5. Explain confidentiality clause in International Chamber of Commerce Rules, 2021.
6. Explain confidentiality clause International Centre for Dispute Resolution(ICDR) Rules, 2014.
7. ODR is the use of offline table to resolve the disputes between the parties in public court system
   A. True
   B. False

8. The submission agreements are entered to submit only a specific dispute to the Arbitration. For entering into such agreements, the pre-existence of dispute is mandatory. This may be entered even if such dispute is already litigated in the court of law.

    A. True

    B. False

9. SIAC is

    (A) SWITZERLAND INTERNATIONAL ARBITRATION CENTRE

    (B) SWEDEN INTERNATIONAL ARBITRATION CENTRE

    (C) SINGAPORE INTERNATIONAL ARBITRATION CENTRE

    (D) None of the Above.

LIST OF FURTHER READINGS & OTHER REFERENCES (Including Websites / Video Links)

- https://siac.org.sg/
- https://www.lcia.org/
- https://www.icaindia.co.in/
- https://guides.ll.georgetown.edu/internationalcommercialarbitration#:~:text=International%20commercial%20arbitration%20is%20an,avoid%20litigation%20in%20national%20courts
- https://blog.ipleaders.in/international-commercial-arbitration-2/
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International Law of Arbitration

Lesson 10

KEY CONCEPTS

■ International Commercial Arbitration ■ UNCITRAL Arbitration Act ■ CIArb-UK Model Rules ■ Model Laws on International Commercial Arbitration ■ APCAM Rules and Accreditation System ■ International Arbitration, (IBA) Rules on conflict of Interest ■ ICC Rules on International Commercial Arbitration ■ New York Convention ■ Geneva Convention

Learning Objectives

To understand:

- Law and practice of International Commercial Arbitration
- UNCITRAL Arbitration Act and Rules
- CIArb- UK Model rules on International Arbitration
- Model Laws on International Commercial Arbitration
- Asia Pacific Centre for Arbitration & mediation (APCAM) Rules and accreditation system and International Arbitration
- The International Bar Association (IBA) Rules on conflict of Interest
- International Chamber of Commerce (ICC) Rules on International Commercial Arbitration
- New York Convention
- UN Convention on Recognition and Enforcement of Foreign Arbitral Awards
- Case Study on International Commercial Arbitration

Lesson Outline

- Introduction
- Definition of International Commercial Arbitration
- Law and practice of International Commercial Arbitration
- UNCITRAL Arbitration Act and Rules
- CIArb- UK Model rules on International Arbitration
- Model Laws on International Commercial Arbitration
- Asia Pacific Centre for Arbitration & mediation (APCAM) Rules
- Accreditation system and International Arbitration under APCAM Rules
- The International Bar Association (IBA) Rules
- IBA Rules on conflict of Interest
- International Chamber of Commerce (ICC) Rules
- ICC Rules on International Commercial Arbitration
- New York Convention
- Foreign Arbitral Awards
- UN Convention on Recognition on Foreign Arbitral Awards
- UN Convention on Enforcement of Foreign Arbitral Awards
- Case Study on International Commercial Arbitration
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- The Arbitration and Conciliation Act, 1996
- CIArb- UK Model rules on International Arbitration
- Asia Pacific Centre for Arbitration & mediation (APCAM) Rules
- The International Bar Association (IBA) Rules
- International Chamber of Commerce (ICC) Rules

INTRODUCTION

The Indian law for Arbitration is "The Arbitration and Conciliation Act, 1996" which aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognises the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

Similarly, the need for international arbitration does arise when the parties to the business contract belong to different countries. The Arbitration is needed for all such disputes which arise between the international parties. The International law of Arbitration involves both civil and common law procedure which help parties to reconstruct their procedure of arbitration so that their dispute to the contract can be resolved.

DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION

Definition

Section 2(1)(f) of the Indian Arbitration Act defines the term International Commercial Arbitration which provides an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

The procedure to apply for international commercial arbitration is the same as domestic arbitration.

LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

The International Commercial Arbitration is gaining importance significantly with the days passed because of its role and functions. This is becoming the primary method of resolving the international commercial disputes with the increasing number of international commercial business transactions. The drafting of Arbitration Agreement has a key role in this. The Arbitrators need to be chosen meticulously for the satisfaction of all the parties to the international business contract. The process which is adapted by the arbitrator should be very transparent and based on the laws and practices which is followed mostly by other arbitrators. The national courts also got involved in whole arbitral process. We will study the following international model rules and laws in order to understand the procedural law and practices:

- UNCITRAL Arbitration Act and Rules

- CIArb- UK Model rules on International Arbitration
- Model Laws on International Commercial Arbitration
- Asia Pacific Centre for Arbitration & mediation (APCAM) Rules and accreditation system and International Arbitration
- The International Bar Association (IBA) Rules on conflict of Interest
- International Chamber of Commerce (ICC) Rules on International Commercial Arbitration
- New York Convention

[1]UNCITRAL ARBITRATION ACT AND RULES

The United Nations Commission On International Trade Law (UNCITRAL) Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.

Scope of Rules

The Rules cover all aspects of the:

- arbitral process,
- providing a model arbitration clause,
- setting out procedural rules regarding the appointment of arbitrators, and
- the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

Versions

At present, there exist three different versions of the Arbitration Rules:

(i) the 1976 version;

(ii) the 2010 revised version; and

(iii) the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration; and

(iv) the 2021 version which incorporates the UNCITRAL Expedited Arbitration Rules.

Adoption and Coverage

The UNCITRAL Arbitration Rules were initially adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions.

Revision in Rules

In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised in order to meet changes in arbitral practice over the last thirty years. The revision aimed at enhancing the efficiency of arbitration under the Rules without altering the original structure of the text, its spirit or drafting style.

1. Source: https://uncitral.un.org/en/texts/arbitration

The UNCITRAL Arbitration Rules (as revised in 2010) have been effective since 15 August 2010. They include provisions dealing with, amongst others, multiple-party arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a review mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures.

With the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") in 2013, a new article 1, paragraph 4 was added to the text of the Arbitration Rules (as revised in 2010) to incorporate the Rules on Transparency for arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014. The new paragraph provides for utmost clarity in relation to the application of the Rules on Transparency in Investor-State arbitration initiated under the UNCITRAL Arbitration Rules. In all other respects, the 2013 UNCITRAL Arbitration Rules remain unchanged from the 2010 revised version.

With the adoption of the UNCITRAL Expedited Arbitration Rules in 2021, a new article 1, paragraph 5 was added to the text of the Arbitration Rules to incorporate the Expedited Rules as an appendix to the UNCITRAL Arbitration Rules. The phrase "where the parties so agree" in that paragraph emphasizes the need for the parties' express consent for the Expedited Rules to apply to the arbitration.

UN CONVENTIONS

United Nations Convention on transparency in treaty-based Investor-state Arbitration (New York, 2014) (the "Mauritius Convention on Transparency")

Date of adoption: 10 December 2014

Entry into force: 18 October 2017

Purpose

The Convention is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency" or "Rules"). The Rules on Transparency, effective as of 1 April 2014, are a set of procedural rules for making publicly available information on Investor-State arbitrations arising under investment treaties. In relation to investment treaties concluded prior to 1 April 2014, the Rules apply, inter alia, when Parties to the relevant investment treaty agree to their application. The Convention is an efficient and flexible mechanism for recording such agreement.

Key Provisions

The Convention supplements existing investment treaties with respect to transparency-related obligations. Article 2, a key provision of the Convention, determines when and how the Rules on Transparency shall apply to Investor-State arbitration within the scope of the Convention. In contrast to the Rules on Transparency, whether the arbitration is initiated under the UNCITRAL Arbitration Rules or not does not have any impact on the application of the Convention. The general rule of application is stipulated in paragraph 1 (bilateral or multilateral application) and paragraph 2 refers to the application of the Rules on Transparency when only the respondent State (and not the State of the investor-claimant) is a party to the Convention (unilateral offer of application).

A Party to the Convention has the flexibility to formulate reservations, thereby excluding from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules (negative-list approach). A Party may also declare that it will not provide a unilateral offer of application. Lastly, in the event the Rules on Transparency are revised, a Party may also declare, within a limited period of time after such revision, that it will not apply that revised version. By defining specific timing for the formulation and withdrawal of reservations, the Convention provides the necessary level of flexibility, while ensuring that reservations cannot be used to defeat the purpose of the Convention.

The Convention and any reservation thereto apply prospectively, that is to arbitral proceedings commenced after the entry into force of the Convention for the Party concerned.

Together with the Rules on Transparency, the Convention takes into the account both the public interest in such arbitration and the interest of the parties to resolve disputes in a fair and efficient manner. The Convention foresees the Secretary-General of the United Nations as performing the repository function, through the UNCITRAL secretariat.

FOREIGN ARBITRAL AWARDS (NEW YORK CONVENTION AWARDS)

Part 2 Chapter I and Sections 44 to 52 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of Foreign Awards, particularly New York Convention Awards.

According to Section 2(1)(c) an "arbitral award" includes an interim award.

According to Section 44, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India:

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Power of judicial authority to refer parties to arbitration: Section 45 confers the power of judicial authority to refer parties to arbitration where parties have an agreement under section 44 and any party to such agreement requests the court for such referring.

Binding of foreign award: According to Section 46, any foreign award shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence: According to Section 47, the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

Further, if the award or agreement to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Conditions for enforcement of foreign awards: Section 48 imposes conditions for enforcement of foreign awards.

The Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further, if an application for the setting aside or suspension of the award has been made to a competent authority, the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

The Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Enforcement of foreign awards: According to Section 49, where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

Appealable orders: According to Section 50, an appeal shall lie from the order refusing to**:**

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48,

to the court authorised by law to hear appeals from such order.

Further, no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

FOREIGN ARBITRAL AWARDS (GENEVA CONVENTION AWARDS)

Part 2 Chapter II and Sections 53 to 60 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of certain Foreign Awards, particularly Geneva Convention Awards.

According to Section 53, “foreign award” means an arbitral award on differences related to matters considered as commercial under the law in force in India:

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Power of judicial authority to refer parties to arbitration: Section 54 confers the power of judicial authority to refer parties to arbitration where parties have an agreement under section 53 and any party to such agreement requests the court for such referring.

Binding of foreign award: According to Section 55, any foreign award shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence: According to Section 56, the party applying for the enforcement of a foreign award shall, at the time of application produce before the Court—

(a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

Further, where any document requiring to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Conditions for enforcement of foreign awards: Section 57 imposes conditions for enforcement of foreign awards.

Sub-section (1) states that in order that a foreign award may be enforceable under this Chapter, it shall be necessary that—

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) the enforcement of the award is not contrary to the public policy or the law of India.

Sub-section (2) states that even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that—

(a) the award has been annulled in the country in which it was made;

(b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

Further, if the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Enforcement of foreign awards: According to Section 58, where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

Appealable orders: According to Section 50, an appeal shall lie from the order refusing to**:**

(a) to refer the parties to arbitration under section 54; and

(b) to enforce a foreign award under section 57,

to the court authorised by law to hear appeals from such order.

Further, no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

[2]UN CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) (THE "NEW YORK CONVENTION")

Entry into force: The Convention entered into force on 7 June 1959 (Article XII).

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts

2. Source: https://uncitral.un.org/en/texts/arbitration

of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

How to become a Party?

The Convention is open to accession by any Member State of the United Nations, any other State which is a member of any specialized agency of the United Nations or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), better known as the New York Convention, is one of the most important United Nations treaties in the area of international trade law and the cornerstone of the international arbitration system. Under the New York Convention, States undertake to give effect to an agreement to arbitrate, and to recognize and enforce awards made in other States. In 2006, a Recommendation regarding the interpretation of articles II(2) and VII(1) was adopted and in 2016, the UNCITRAL Secretariat Guide on the New York Convention was published.

UNCITRAL adopted the first edition of the Notes on Organizing Arbitral Proceedings in 1996 and the second in 2016. The Notes list and describe matters relevant to the organization of arbitral proceedings, to be used in a general and universal manner. The UNCITRAL Arbitration Rules, which were initially adopted in 1976 and first revised in 2010, provide a comprehensive set of procedural rules for the conduct of arbitral proceedings and are widely used in both ad hoc and institutional arbitrations. On both occasions, Recommendations were made to assist arbitral institutions and other interested bodies that envisaged using the Rules with following the text and substance. In 2013, the Rules were further amended to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, application of which is promoted by United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) or the Mauritius Convention on Transparency. Article 8 of the Rules on Transparency creates the Repository of published information. In 2017, the Mauritius Convention on Transparency entered into force. The Convention has created a novel and efficient mechanism that supplements existing investment treaties (concluded prior to April 2014) with respect to transparency related obligations.

The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985 and amended in 2006. It constitutes a sound basis for the desired harmonization and improvement of national laws, covering all stages of the arbitral process.

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985), WITH AMENDMENTS AS ADOPTED IN 2006

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form required of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.

Source: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (EFFECTIVE DATE: 1 APRIL 2014)

The UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency"), which come into effect on 1 April 2014, comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration.

The Rules on Transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application. The Rules on Transparency apply in relation to disputes arising out of treaties concluded on or after 1 April 2014 ("future treaties"), when Investor-State arbitration is initiated under the UNCITRAL Arbitration Rules unless the parties otherwise agree. The Rules on Transparency are also available for use in Investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.

Given the link between the UNCITRAL Arbitration Rules and the application of the Rules on Transparency, a new version of the UNCITRAL Arbitration Rules (with new article 1, paragraph 4 as adopted in 2013) (the "UNCITRAL Arbitration Rules 2013"), will also come into effect on 1 April 2014. Such a revision (namely, the inclusion of a new paragraph 4 of article 1) ensures that the Rules on Transparency are clearly incorporated into the latest version of the UNCITRAL Arbitration Rules, to provide for utmost clarity in relation to the application of the Rules on Transparency in disputes arising under future treaties and initiated under the UNCITRAL Arbitration Rules. In all other respects, the UNCITRAL Arbitration Rules 2013 remain unchanged from the UNCITRAL Arbitration Rules (as revised in 2010).

Information to be made available to the public under the Rules on Transparency shall be published by a central repository, a function undertaken by the Secretary-General of the United Nations, through the UNCITRAL Secretariat. Information shall be published via the UNCITRAL website.

Source: https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency

EXPEDITED ARBITRATION RULES (2021)

Expedited arbitration is a streamlined and simplified procedure with a shortened time frame, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. The UNCITRAL Expedited Arbitration Rules provide a set of rules which parties may agree for expedited arbitration. The Expedited Rules balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and fair treatment.

Article 1(5) of the UNCITRAL Arbitration Rules incorporates the Expedited Rules, which are presented as an appendix to the UNCITRAL Arbitration Rules. The phrase "where the parties so agree" in that paragraph emphasizes the need for the parties' express consent for the Expedited Rules to apply to the arbitration.

Source: https://uncitral.un.org/en/content/expedited-arbitration-rules

CHARTERED INSTITUTE OF ARBITRATORS (CIARB)- UK MODEL RULES ON INTERNATIONAL ARBITRATION[3]

The Chartered Institute of Arbitrators ("CIArb") last revised its Arbitration Rules in 2000. When considering how to update its rules, the CIArb recognised that the 2010 version of the UNCITRAL Arbitration Rules ("UNCITRAL Rules") provide a comprehensive set of procedural rules which are widely used for ad hoc international arbitrations and which can be adopted by arbitral institutions who wish to act as appointing authority.

3. Source: https://www.ciarb.org/media/1552/ciarb-arbitration-rules.pdf

The CIArb has decided that, instead of drafting a completely new set of rules, it would adopt the UNCITRAL Rules with itself as the appointing authority. Additionally, the CIArb has adapted the UNCITRAL Rules to include waiver of the parties' right of appeal, provisions for emergency arbitrators and a checklist of suggested matters to be considered at the case management conference.

The emergency arbitrator provisions incorporated in the CIArb Arbitration Rules apply automatically to arbitrations where the arbitration agreement was entered into on or after 1 December 2015, unless the parties expressly opt out. Accordingly, where parties wish to avoid the application of the emergency arbitrator provisions, it is recommended that they specify in their arbitration agreement that "the emergency arbitrator rules shall not apply". The emergency arbitrator provisions apply to arbitration agreements entered into before 1 December 2015 only if the parties expressly opt in.

The CIArb Arbitration Rules may be adopted in an arbitration agreement entered into at any time before or after a dispute has arisen, which provides that any dispute between the parties shall be referred to arbitration in accordance with these Rules. These Rules are effective as of 1 December 2015. They supersede and replace the CIArb Arbitration Rules (2000 edition) and can be used in both domestic and international arbitral proceedings.

The CIArb Arbitration Rules stipulate that the CIArb will be the appointing authority and provide the following services:

a) appointment of arbitrators, including emergency arbitrators;

b) decisions on challenges to arbitrators;

c) replacement of arbitrators; and

d) fund-holding services.

Both applications for the appointment of an arbitrator and requests for a decision on challenges to arbitrators pursuant to the CIArb Arbitration Rules may be submitted by post, fax or email to:

Address- CIArb, 12 Bloomsbury Square, London, WC1A 2LP , Fax- +44 (0) 020 7900 2899, Email- *das@ciarb.org*

CIARB- UK MODEL RULES ON INTERNATIONAL ARBITRATION

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1	SCOPE OF APPLICATION
2	NOTICE AND CALCULATION OF PERIODS OF TIME
3	NOTICE OF ARBITRATION
4	RESPONSE TO THE NOTICE OF ARBITRATION
5	REPRESENTATION AND ASSISTANCE
6	APPOINTING AUTHORITY
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7	NUMBER OF ARBITRATORS
8 to 10	APPOINTMENT OF ARBITRATORS

Article No.	*Heading*
11 to 13	DISCLOSURES BY AND CHALLENGES TO ARBITRATORS
14	REPLACEMENT OF AN ARBITRATOR
15	REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR
16	EXCLUSION OF LIABILITY
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17	GENERAL PROVISIONS
18	PLACE OF ARBITRATION
19	LANGUAGE
20	STATEMENT OF CLAIM
17	STATEMENT OF DEFENCE
18	AMENDMENTS TO THE CLAIM OR DEFENCE
19	PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL
20	FURTHER WRITTEN STATEMENTS
21	PERIODS OF TIME
22	EMERGENCY RELIEF AND INTERIM MEASURES
23	EVIDENCE
24	HEARINGS
25	EXPERTS APPOINTED BY THE ARBITRAL TRIBUNAL
26	DEFAULT
27	CLOSURE OF HEARINGS
28	WAIVER OF RIGHT TO OBJECT
29	EXPERTS APPOINTED BY THE ARBITRAL TRIBUNAL
30	DEFAULT
31	CLOSURE OF HEARINGS
32	WAIVER OF RIGHT TO OBJECT
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33	DECISIONS
34	FORM AND EFFECT OF THE AWARD

Article No.	*Heading*
35	APPLICABLE LAW, AMIABLE COMPOSITEUR
36	SETTLEMENT OR OTHER GROUNDS FOR TERMINATION
37	INTERPRETATION OF THE AWARD
38	CORRECTION OF THE AWARD
39	ADDITIONAL AWARD
40	DEFINITION OF COSTS
41	FEES AND EXPENSES OF ARBITRATORS
42	ALLOCATION OF COSTS
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Section I. Introductory rules

Article 1 — Scope of application

Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the CIArb Arbitration Rules ("the Rules") then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree. These Rules shall come into force on 1 December 2015 and, unless the parties have agreed otherwise, shall apply to all arbitrations falling within article 1.1 in which the notice of arbitration is submitted on or after that date.

All communications with and applications to the CIArb under these Rules shall be in English. The CIArb may request from the parties a translation of any document written in a language other than English, where such document is required for the CIArb to fulfil its mandate under these Rules.

In these Rules:

a) "arbitral tribunal" or "tribunal" includes one or more arbitrators;

b) "award" includes, *inter alia*, an interim, partial, costs or final award;

c) "CIArb" means the "Chartered Institute of Arbitrators".

The functions of the CIArb under the arbitration agreement shall be performed in its name by the President or Deputy President of the CIArb;

d) "claim" or "claims" includes any claim, counterclaim, or claim for set-off by any party against any other party; e) "DAS" means "Dispute Appointment Service of the CIArb";

f) "party" or "parties" includes claimants, respondents and other persons subject to the jurisdiction of the tribunal; and

g) "place of arbitration" means the seat of arbitration.

Article 2 — Notice and calculation of periods of time

A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission. If an address has been designated by a party specifically for this purpose or authorised by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorised.

Article 3 — Notice of arbitration

The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called "the respondent") a notice of arbitration. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

Article 4 — Response to the notice of arbitration

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

   a) the name and contact details of each respondent; and

   b) a response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

Article 5 — Representation and assistance

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for the purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Article 6 — Appointing authority

Unless otherwise agreed by the parties, the CIArb shall perform the functions of the appointing authority and provide the services as set out in these Rules. The CIArb shall be entitled to charge administrative fees for its services as set out in Appendix III to these Rules as in force at the date of commencement of the arbitration and any amendment thereto or substitution thereof during the course of the arbitration.

Section II. Composition of the arbitral tribunal

Article 7 — Number of arbitrators

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

Appointment of arbitrators (articles 8 to 10)

Article 8

If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the CIArb.

Article 9

If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the CIArb to appoint the second arbitrator.

Article 10

For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

Disclosures by and challenges to arbitrators (articles 11 to 13)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

Article 13

A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

Article 14 — Replacement of an arbitrator

Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

Article 15 — Repetition of hearings in the event of the replacement of an arbitrator

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Article 16 — Exclusion of liability

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitral tribunal, any emergency arbitrator, the CIArb, including the President, the Deputy President and its employees, and any person appointed by the arbitral tribunal or the emergency arbitrator based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

Article 17 — General provisions

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Article 18 — Place of arbitration

If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

Article 19 — Language

Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

Article 20 — Statement of claim

The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

Article 21 — Statement of defence

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

Article 22 — Amendments to the claim or defence

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Article 23 — Pleas as to the jurisdiction of the arbitral tribunal

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part

of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

Article 24 — Further written statements

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Article 25 — Periods of time

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Article 26 — Emergency relief and interim measures

Any party in need of conservatory or urgent interim measures prior to the constitution of the arbitral tribunal may file an application with the CIArb seeking the appointment of an emergency arbitrator pursuant to the procedures set forth in Appendix I to these Rules.

Article 27 — Evidence

Each party shall have the burden of proving the facts relied on to support its claim or defence. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

Article 28 — Hearings

In the event of an oral hearing the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

Article 29 — Experts appointed by the arbitral tribunal

After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

Article 30 — Default

If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

a) the claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

b) the respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

Article 31 — Closure of hearings

The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

Article 32 — Waiver of right to object

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such a party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

Article 33 — Decisions

When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Article 34 — Form and effect of the award

The arbitral tribunal may make separate awards on different issues at different times. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay. By adopting these Rules, the parties waive their right to any form of appeal or recourse to a court or other judicial authority insofar as such waiver is valid under the applicable law.

Article 35 — Applicable law, *amiable compositeur*

The arbitral tribunal shall apply the rules of law designated by theparties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

Article 36 — Settlement or other grounds for termination

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 arbitral 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.

Article 37 — Interpretation of the award

Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

Article 38 — Correction of the award

Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.

Article 39 — Additional award

Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

Article 40 — Definition of costs

The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision. The term “costs” includes only:

a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

b) the reasonable travel and other expenses incurred by the arbitrators;

c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

d) the reasonable travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;

e) the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

f) any fees and expenses of the CIArb.

Article 41 — Fees and expenses of arbitrators

The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

Article 42 — Allocation of costs

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

Article 43 — Deposit of costs

The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).

MODEL ARBITRATION CLAUSES

The following model clauses may be adopted by the parties to a contract who wish to have any future disputes referred to arbitration under the CIArb Arbitration Rules:

Model arbitration clauses for contracts

1. **Model arbitration clause with emergency arbitrator rules**

   Any dispute, controversy, or claim arising out of or in connection with this contract, or the breach, termination or validity thereof, shall be submitted to the Chartered Institute of Arbitrators (CIArb) and settled by final and binding arbitration in accordance with the CIArb Arbitration Rules. Judgment on any award issued under this provision may be entered by any court of competent jurisdiction.

2. **Model arbitration clause excluding the emergency arbitrator rules**

   Any dispute, controversy, or claim arising out of or in connection with this contract, or the breach, termination or validity thereof, shall be submitted to the Chartered Institute of Arbitrators (CIArb) and settled by final and binding arbitration in accordance with the CIArb Arbitration Rules, except that the emergency arbitrator rules shall not apply. Judgment on any award issued under this provision may be entered by any court of competent jurisdiction.

Post-dispute arbitration submission agreement

We, the undersigned parties, hereby agree that the dispute concerning [insert a brief and accurate description of the dispute] shall be submitted to the Chartered Institute of Arbitrators (CIArb) and settled by final and binding arbitration in accordance with the CIArb Arbitration Rules. Judgment on any award issued under this provision may be entered by any court of competent jurisdiction.

[4]ASIA PACIFIC CENTRE FOR ARBITRATION & MEDIATION (APCAM) RULES

APCAM Mediation Rules [w.e.f. 06 August 2020]

Preamble

APCAM Mediation is based on the Mediation Rules published by the Asia-Pacific Centre for Arbitration & Mediation ("APCAM"), which is intended to help parties and mediators to take maximum advantage of the flexible procedures available in mediation for the resolution of disputes amicably, quickly and economically through international and cross-border mediation.

APCAM Mediation Rules are intended to provide effective mediation services through the use of administered mediation on global standards. Being an international ADR centre having mediation centres in various Asia-Pacific countries, the APCAM Mediation Rules helps the business community to resolve their international commercial and business disputes by mediation under a single set of Mediation Rules,governed by a uniform fee structure in all the constituent countries. The Rules reflect the best practices and latest developments in international mediation, which allow the procedure to be as short and provides a cost structure and management to keep the services cost-effective. The Rules also provide for many innovative concepts like transactional-mediation, deal-mediation or assisted deal-making, where parties use mediation to help them to conclude deals and for project mediation, which helps the parties to oversee the contract and avoid disputes. The costs and expenses of mediation will be governed by the Fee Schedule under the APCAM Mediation Rules.

APCAM Mediation Rules shall apply to mediation proceedings of present or future disputes where the parties seek an amicable settlement of such disputes. The Rules shall be applicable where, either by stipulation in their contract by way of a mediation clause or by an agreement to mediate, the parties have agreed that the mediation proceedings shall take place in accordance with APCAM Rules.In the absence of an APCAM mediation clause, if the parties have a mediation clause to mediate under the respective mediation clauses of the constituent institutional members of APCAM, these Rules shall apply, if so, prescribed under their mediation rules.

APCAM MEDIATION RULES

Rule No.	*Heading*
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SECTION 1 – MEDIATION	
2	INITIATION OF MEDIATION PROCESS
3	APPOINTMENT OF MEDIATOR
4	PLACE OF MEDIATION
5	MEDIATION PROCESS
6	TIME FRAME FOR MEDIATION
7	ROLE OF MEDIATOR

4. Source: https://apcam.asia/mediation-rules/

Rule No.	*Heading*
8	ROLE OF PARTIES
9	ROLE OF APCAM
10	REPRESENTATION
11	PRIVACY, CONFIDENTIALITY & VOLUNTARINESS
12	SETTLEMENT
13	TERMINATION OF MEDIATION
14	COSTS
15	FEEDBACK
16	MEDIATOR'S ROLE IN SUBSEQUENT PROCEEDINGS
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APCAM MEDIATION SCHEDULES

SCHEDULE	*HEADING*
1	Definitions
2	Mediators' Code of Professional Conduct
3	Mediators' Conduct Assessment Process
4	International Mediation Fee Schedule
5	Recommended Clauses

RULE 1 SCOPE AND APPLICATION

Where any agreement, submission or reference provides for mediation by the Asia-Pacific Centre for Arbitration and Mediation ("APCAM") or under the Mediation Rules of the Asia-Pacific Centre for Arbitration and Mediation ("APCAM Mediation Rules"), the parties shall be taken to have agreed that the mediation shall be conducted in accordance with the following Rules, or such amended Rules or affiliated Rules as APCAM may have adopted to take effect before the commencement of mediation.

Section 1: MEDIATION

RULE 2 INITIATION OF MEDIATION PROCESS

If a dispute arises, a party may seek the initiation of mediation ("initiating party") by delivering a written invitation for mediation to the other party ("opposite party"). Such invitation shall contain a brief self-explanatory statement of the nature of the dispute, the quantum of dispute, if any, the relief or remedy sought and nominating a mediator or mediators thought suitable. The opposite party who receives an invitation for mediation shall notify the initiating party and APCAM within fifteen days after receipt of the invitation whether (s)he is willing for mediation and whether any mediator nominated is acceptable. Failure by any party to reply within fifteen days shall be treated as a refusal to mediate. On receipt of reply, the initiating party shall file the Request for Mediation to APCAM.

RULE 3 APPOINTMENT OF MEDIATOR

When the initiating Party submits the Request for Mediation, (s)he can nominate a mediator from the panel of APCAM accredited mediators. If the initiating Party does not nominate a mediator or if the opposite party object to the nomination of the mediator or if the parties fail to agree on the appointment of a mediator, APCAM shall appoint a mediator who is prepared to serve.

RULE 4 PLACE OF MEDIATION

The parties are free to agree on the place of mediation.

RULE 5 MEDIATION PROCESS

Upon appointment of mediator, APCAMshall work with the parties to establish the time and location of each mediation session. The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

RULE 6 TIME FRAME FOR MEDIATION

The mediator shall use his/her best endeavours to conclude the mediation within 90 days of his/her appointment. The validity of the appointment shall not extend beyond a period of four months without the written consent of all parties.

RULE 7 ROLE OF MEDIATOR

The mediator may conduct the mediation in such manner, as (s)he considers appropriate, taking into account the circumstances of the case, the needs of the parties and the need for a speedy settlement of the dispute or for an effective deal making. The mediator is not bound by the law of procedure or of evidence.

RULE 8 ROLE OF PARTIES

The mediator may communicate with the parties together in general sessions or with parties separately in caucus or private sessions, and each party shall co-operate with the mediator. The parties shall give full assistance to enable the mediation to proceed and be concluded within the time stipulated.

Explanation — The term "Parties" may include their respective counsels/ consultants/ advisers.

RULE 9 ROLE OF APCAM

1. APCAM shall make the necessary arrangements for mediation, including —
    a. Appointing the Mediator;
    b. Organizing a venue and assigning a date for mediation;
    c. Organizing an exchange of the pre-mediation submission or any such submissions, if any; and
    d. Providing general administrative support, including giving online support.

RULE 10 REPRESENTATION

The parties may be represented or assisted by persons of their choice. Each party shall notify in advance the names and the role of such persons to the Mediator and the other party. Each party shall have full authority to settle the matter or make a deal, before the mediator. The parties shall confer upon their representatives the necessary authority to settle the dispute or to make the deal.

Explanation — In case there is a change of representative such information shall also be notified in advance as specified above.

RULE 11 PRIVACY, CONFIDENTIALITY & VOLUNTARINESS

Mediation is a private, confidential and voluntary process. The parties may withdraw from the mediation at any time by informing the Mediator and all other parties without being required to give any justification for doing so.

RULE 12 SETTLEMENT

When the mediator finds that there exist elements of settlement, (s)he shall formulate the terms of a possible settlement and submit to the parties for their observations. After receiving their observations, the terms may be reformulated by the mediator.

RULE 13 TERMINATION OF MEDIATION

1. The mediation process shall come to end—
    a. Upon the signing of MSA by the parties or;
    b. Upon the written advice of the mediator after consultation with the parties that in his/her opinion further attempts at mediation are no longer justified or;
    c. Upon written notification by any party at any time to the mediator and the other parties that the mediation is terminated.

    Provided, if a party does not respond to the invitation of the other party, mediator or APCAM or does not attend the mediation session without any information and does not respond to any clarifying query

raised by the other party, mediator or APCAM, it shall be deemed to be a notification by the party that the mediation is terminated.

RULE 14 COSTS

1. Unless otherwise agreed, each party shall bear its own costs regardless of the outcome of mediation or of any subsequent arbitral or judicial proceedings. All other costs and expenses shall be borne equally by the parties and the parties shall be jointly and severally liable to pay to the mediator such costs, including —
    a. The mediator's fees and expenses;
    b. Expenses for any expert advice or opinion requested by the mediator with the consent of the parties; and
    c. The APCAM administrative costs in support of mediation.
    d. Any other costs that the parties have consented to bear, such as the payment towards translators and interpreters

RULE 15 FEEDBACK

Unless inappropriate in the circumstances, Mediators shall, at the conclusion of mediation, invite the parties and advisers and any co-mediators or assistant mediators, to complete a Feedback Form and/or Mediator Evaluation Form and send the same to the Reviewer or APCAM. The feedback shall remain confidential and shall be used for preparing the Feedback Digest by the Reviewer as per guidelines given by APCAM, to be used in the Mediator's profile.

RULE 16 MEDIATOR'S ROLE IN SUBSEQUENT PROCEEDINGS

The parties undertake that the mediator shall not be appointed as adjudicator, arbitrator or representative, counsel, expert or witness of any party in any subsequent adjudication, investigation, arbitration or judicial proceedings whether arising out of dispute covered under mediation or any other dispute in connection with the same contract. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract.

RULE 17 NOT LEGAL COUNSEL OR EXPERT

1. All parties recognize that at the mediation session(s) and at every other point in the proceedings —
    a. Neither APCAM nor the mediator shall be acting as a legal adviser or legal representative for any of the parties.
    b. Neither APCAM nor the mediator has a duty to assert, analyse or protect any party's legal rights or obligations, including lien rights, statutes of limitation, or any other time limit or claim requirement.
    c. Neither APCAM nor the mediator has a duty to make an independent expert analysis of the situation, raise issues not raised by the parties or determine that additional necessary parties should participate in mediation.
    d. Neither APCAM nor any mediator can guarantee that a mediation session will result in a settlement or deal.

RULE 18 EXCLUSION OF LIABILITY

The parties jointly and severally release, discharge and indemnify the mediator and APCAM in respect of all liability whatsoever, whether involving negligence or not, from any act or omission in connection with or arising out of or relating in any way to any mediation conducted under these Rules, save for the consequences of fraud, dishonesty or violation of APCAM Mediators' Professional Code of Conduct.

RULE 19 ACTION AGAINST THE MEDIATOR

If any of the parties feels that the mediator is guilty of violation of the APCAM Mediators' Professional Code of Conduct, they shall within a period of one month, from the date of such apprehension, initiate the APCAM Mediators' Conduct Assessment Process.

RULE 20 GENERAL PROVISIONS

Under these Rules a decision to be taken by APCAM, shall be taken by the Administrator. The Administrator may, if required delegate such of its duties and functions to a Registrar and the Registrar may decide such issues so specifically authorized by the Administrator.

Section 2 : ONLINE MEDIATION

RULE 21 SCOPE

Where any agreement, submission or reference provides for mediation by APCAM or under APCAM Mediation Rules, a party can opt to conduct online mediation through digital platform, as agreed by the parties.

RULE 22 INITIATION OF ONLINE MEDIATION

The initiating party can commence online mediation by serving a Request for Mediation to the Digital Administrator, providing the details of the initiating party so as to confirm his/her identity and also the details of the opposite party, which shall include the mobile number and email address.

Explanation — The initiating party and the opposite party shall also provide the details of its representatives such as counsel/ consultant/ expert, which shall include their mobile numbers and email addresses.

RULE 23 ONLINE SECURITY AND PRESUMPTIONS

The digital platform used for online mediation should ensure the following features and safety measures —

a. Allow the parties to opt for textual communications – chat rooms, audio conferencing or video conferencing.

b. Allow the parties facilities for online waiting rooms, general discussion room and caucus rooms.

c. The entry to the rooms is restricted to registered parties only, with list of participants issued to all participating parties and password protected.

d. Ensure that communications are private and confidential and recording of any communication whatsoever, is not permitted.

Section 3 : MEDIATION UNDER ARB-MED-ARB PROCEDURE

RULE 24 SCOPE AND PROCEDURE

Once a party invokes an AMA Clause to initiate an Arb-Med-Arb Procedure as per the APCAM Arbitration Rules, the Emergency Arbitrator shall stay the arbitration and inform APCAM that the case be submitted for mediation. APCAM will initiate mediation and submit the case to mediation under these Rules.

Section 4: PROJECT MEDIATION

RULE 25 SCOPE AND PROCEDURE

APCAM Dispute Prevention & Management ("DPM") system provides for parties to opt for Dispute Management Clause ("DM clause") in their project contracts, wherein the parties to the contract can jointly appoint a "Project Mediator", whereby the parties would have the opportunity to work together, in a more collaborative and mutually beneficial environment and oversee that the contract proceeds smoothly.

RULE 26 INITIATION OF MEDIATION

Any party to a contract who would like to initiate the mediation process or the parties jointly, can submit the request for commencing mediation in the hotline hub, and notification and email will be issued to all parties and the project mediator.

RULE 27 EMERGENCY MEDIATION

Under the Project Mediation, a party or the parties jointly can also initiate emergency mediation, in case of exceptional urgency, to resolve a dispute.

RULE 28 STATUS-QUO DURING PROJECT MEDIATION

When the parties invoke Project Mediation under these Rules, it is agreed by the parties that they shall not disrupt the services or contractual obligations under the contract and shall continue with the terms of the contract.

SCHEDULE 1 : DEFINITIONS

In this Rules, unless the context otherwise requires –

1. "Administrator" means the APCAM official assigned under these Rules who shall perform all the functions to be done by APCAM as required under these Rules.
2. "Agreement to Mediate" means an agreement in writing executed by the parties and the mediator, to mediate any dispute or conduct assisted deal-making, specifying the appointment of mediator, role and obligation of parties and mediator and the mediation process.
3. "AMA Procedure" means a hybrid procedure of Arbitration-Mediation-Arbitration Procedure under the APCAM Arbitration Rules, where a party submits disputes for resolution for arbitration under the APCAM "Arb-Med-Arb Clause" or "AMA Clause".
4. "Code of Conduct" means the Code of Conduct for Professional Mediation Practice to be observed by a Mediator as under these Rules.
5. "Conduct Assessment" means the Mediator's Conduct Assessment based on a complaint received against a mediator, as described under these Rules.
6. "Deal-mediation", "Transactional-mediation" or "Assisted deal-making", means a process, whereby parties attempt to make or conclude deals with the assistance of a third person or persons ("the mediator") lacking the authority to impose any suggestion to the parties, but facilitates to conclude the deal.
7. "Digital Administrator" or "ODR Administrator" means the entity that carries out such administration and coordination of an online negotiation, mediation or ODR in an agreed digital platform.
8. "Hotline Hub" means a chat-platform consisting of the parties to the contract and the Project Mediator, when the parties choose Project mediation.
9. "International mediation" or "Cross-border mediation" means a mediation if —
    - The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or
    - The parties agree that the mediation is international; or

- The State in which the parties have their places of business is different from either:
- The State in which a substantial part of the obligations of the commercial relationship is to be performed; or
- The State with which the subject matter of the dispute is most closely connected.

Explanation — For the purposes of above —

- If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;
- If a party does not have a place of business, reference is to be made to the party's habitual residence.

10. "Mediated Settlement Agreement" or "MSA", in relation to a mediation, means an agreement in writing reached by some or all of the parties to mediation, settling the whole or part of the dispute, or finalising the terms of the deal and signed by the parties and the mediator.

    An MSA is "in writing" if its content is recorded in any form. The requirement that it should be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

11. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

12. "Mediation Communication" means anything said or done or any document or report prepared or any information provided, for the purposes of or in the course of mediation, and includes an agreement to mediate or a mediated settlement agreement.

13. "Mediation Session" means a meeting arranged as under these Rules, between the mediator and one or more of the parties to the dispute or parties to deal-making, and includes any activity undertaken to arrange or prepare for such a meeting, whether or not the meeting takes place; and includes any follow up on any matter or issue raised in such a meeting.

    Meeting includes a meeting conducted by electronic communication, video conferencing or other electronic means.

    Mediation session may include "General" session which shall include all the parties and the mediator and "Private" or "Caucus" session, which shall include the mediator and any one party or group of parties.

14. "Mediator" means an individual who is appointed to mediate and to assist the parties in dispute to reach a mutually acceptable agreement to resolve the dispute or for assisted deal-making.

    Where more than one mediator is appointed for a mediation, a reference to a mediator under these Rules is a reference to all the mediators for the mediation.

15. "Non-Party" means a person who participates in mediation, other than a party or mediator, and includes counsels/ consultants/ advisers for each party, experts in the subject matter of the dispute or deal, or any third party who attend mediation proceedings.

16. "Online Dispute Resolution" or "ODR" means a mechanism for resolving disputes through the use of electronic or digital platform and other information and communication technology, without the need for physical presence at a meeting or hearing and could also have hybrid processes comprising both online and offline elements, which could comprise of negotiation, mediation, arbitration.

17. "Online Mediation" means mediation initiated and/or conducted as an ODR mechanism, conducted using the electronic platform as agreed by the parties.

18. "Online meeting" or "Virtual meeting" means a meeting arranged as under these Rules, between the mediator and one or more of the parties for conducting mediation by audio-conference, video-conference, or other similar means of communication.

19. "Party to a Mediation" means any party to the whole or part of a dispute that is referred for mediation, or participate in deal-making, but does not include any mediator conducting the mediation.

    Party may include multiple parties, which includes initiating parties as well as opposite parties.

    "Initiating party" means the party who initiate the process of mediation under these Rules.

    "Opposite party" means the party against whom the initiating party initiates the process of mediation under these Rules.

20. "Project-mediation", means a dispute management process where the parties appoint a mediator in a contract, so as to resolve disputes during the pendency of the contract as more specifically described in section 4.

21. "Registrar" means the APCAM official assigned under these Rules who shall perform all the functions to be done by APCAM, as delegated by the Administrator.

SCHEDULE 2: APCAM MEDIATORS' CODE OF PROFESSIONAL CONDUCT

Trust underpins the mediation process. If the parties do not trust a mediator's integrity in terms of competence diligence, neutrality, independence, impartiality, fairness and the ability to respect confidences, mediation is unlikely to succeed.

The APCAM Mediators' Code of Professional Conduct ("the Code") provides users of mediation services with a concise statement of the ethical standards they can expect from Mediators who choose to adopt its terms and sets standards that they can be expected to meet.

Users who believe the standards established in this Code have not been met may prefer a complaint to APCAM on the Mediators' conduct Assessment.

The Mediators under the APCAM Panelare required to make known to users that the Code governs their professional mediation practice.

Source : *https://apcam.asia/mediation-rules/*

APCAM ACCREDITATION SYSTEM AND INTERNATIONAL ARBITRATION

APCAM maintains stringent accreditation norms for creating high standards of professionalism among its Neutrals, including arbitrators and mediators and for maintaining a common pool of Neutrals comprising of mediators and arbitrators from different jurisdictions, which will be available in all ADR institutions who are members of APCAM.

APCAM Accreditation is based on the respective Experience Qualification Path (EQP) or the Qualifying Assessment Programs (QAP). APCAM Neutrals are also bound by the APCAM Neutrals Code of Professional Conduct, which provides users of ADR services from APCAM with a concise statement of professional and ethical standards they can expect from APCAM Neutrals and sets standards that the Neutrals are expected to meet. Users who believe the standards established in this Code have not been met, may prefer a complaint to APCAM Accreditation & Disciplinary Committee as per the APCAM Neutrals Conduct Assessment Process.

APCAM ARBITRATOR ACCREDITATION RULES

The APCAM Arbitrator Accreditation Rules is a professional standards process developed by the Asia Pacific Centre for Arbitration & Mediation (APCAM) to certify professional arbitrators.

All the APCAM Centres maintain a panel of skilled and experienced arbitrators from diverse jurisdictions, based on domain knowledge and expertise in various sectors, trade and industry. Various reports and feedbacks obtained from experts and users have emphasized strong preference for accreditation and proper training for arbitrators and that the criteria for inclusion of arbitrators on panels must be made more stringent. Responses also suggested that arbitral institutions must keep records of the performance of all arbitrators appointed by them and review them annually. Different grades or categories of accreditation reflect different levels of skill and experience and are given on satisfaction of the criteria set for each grade or category. These rules have been made with stringent accreditation norms for creating high standard of excellence and proficiency among arbitrators for creating a common pool of arbitrators from different jurisdictions, which will be available in all APCAM institutions in the region, so as to guarantee quality and transparency, enabling credible, competent and professional outcome in dispute resolution.

The APCAM Accreditation system follows a multi-level approach by which arbitrators with diverse proficiency and experience are recognised, giving exposure and growth options for professional arbitrators and giving options for users to select different grades of arbitrators based on their requirement. This ladder-step approach helps young and new professionals to get more work through greater exposure and step-up their accreditation based on experience.

The accreditation is also based on the Feedback given by experts on the quality of the arbitrator, so that the quality and ethical transparency is made available to the user while selecting the arbitrator, which enhances the value propositions behind APCAM Accreditation process.

The APCAM Accreditation will be accessible on equal basis to all arbitrators regardless of their gender, race, ethnicity, age, religion, sexual orientation or other personal characterisation. The Arbitrator accreditation will be purely based on evaluation under the respective QAP's.

LEVELS OF ACCREDITATION

As per APCAM Accreditation System, there are three levels of Accreditation.

1. APCAM Accredited Arbitrator (AAA)
2. APCAM Certified Arbitrator (ACA)
3. APCAM International Certified Arbitrator (AICA)

APCAM Accreditation is given as per the Qualifying Assessment Programs (QAP) or under the Experience Qualification Path (EQP).

1. APCAM Accredited Arbitrator (AAA):

This is the entry level accreditation provided by APCAM to recognize junior arbitrators. The candidate should complete an APCAM certified Arbitrator Training Program or an APCAM approved Arbitrator Training Program along with an APCAM Top-up program within the two-year period immediately preceding the date of application. An Accredited Arbitrator shall not be entitled to act as a Sole-arbitrator or Presiding-Arbitrator and has a monetary limit of disputes not exceeding 1 million Euros. A candidate can apply for AAA under QAP-1.

2. APCAM Certified Arbitrator (ACA):

An Arbitrator, who has completed an APCAM certified Arbitrator Training Program or an APCAM approved

Arbitrator Training Program along with an APCAM Top-up program, after completing fifteen arbitrations as a co-arbitrator is eligible to apply for accreditation as APCAM Certified Arbitrator. Certified Arbitrator will be eligible to act as Sole-Arbitrator or Co-Arbitrator and has no monetary limit in dispute amount. A candidate can apply for ACA under QAP-2.

3. **APCAM International Certified Arbitrator (AICA):**

   An Arbitrator, who has completed an APCAM certified Arbitrator Training Program or an APCAM approved Arbitrator Training Program along with an APCAM Top-up program, after completing thirty-five arbitrations as a co-arbitrator or sole-arbitrator is eligible to apply for accreditation as APCAM International Certified Arbitrator. International Certified Arbitrator will be eligible to act as Presiding Arbitrator, Sole-Arbitrator or Co-Arbitrator and has no monetary limit in dispute amount. A candidate can apply for AICA under QAP-3.

BENEFITS OF BECOMING APCAM CERTIFIED ARBITRATOR

1. Only APCAM Certified Arbitrators will be empanelled as arbitrators with all APCAM centres in the Asia-Pacific region of approximately ten countries, and featured in the APCAM website, enabling visibility in all these countries.
2. Enlistment in APCAM website gives the arbitrators greater exposure and growth options as international professional arbitrators, helping them to enhance their knowledge, skills, multi-cultural awareness and networking opportunities.
3. Certified Arbitrators will have a unique profile page containing all details, brief profile, complete with a Feedback Digest, and are searchable by users.
4. All accredited and certified arbitrators will receive exclusive updates and news and priority subscription to events, seminars and conferences organised by APCAM or in collaboration with other APCAM Partners.
5. APCAM International Certified Arbitrators are also offered to become Reviewers of other Arbitrators who would prepare the Feedback Digest.
6. APCAM International Certified Arbitrators and Certified Arbitrators are also offered to become Assessors under the respective QAPs.

QUALIFYING ASSESSMENT PROGRAMS (QAP)

QAP-1 (For APCAM Accredited Arbitrators)

QAP-1 is applicable to a candidate who has successfully completed an APCAM certified Arbitrator Training Program or an APCAM approved Arbitrator Training Program along with an APCAM Top-up program, within the two-year period immediately preceding the date of application.

Evaluation of Arbitration Knowledge: The applicant shall provide the copy of the certificate of arbitration training and shall have to demonstrate arbitration knowledge either by submitting an assignment given to him/her which would cover topics on arbitration theory, arbitration rules, professional code and ethical standards or by attending an interview conducted by APCAM, as decided by the Accreditation Committee. On evaluation of the assignment or interview, the applicant should get a minimum of 55% score. On failure to get the minimum grade, the applicant will be able to apply again, only after a period of 3 months.

Assessor & Fee: The Assessor for QAP-1 would be a selected APCAM Certified Arbitrator or above. Fee for QAP-1: € 100.00

Annual Fees: The annual fees payable by an APCAM Accredited Arbitrator for listing in the APCAM website will be € 50.00. The annual fees received will go towards supporting APCAM's work and operations in maintaining high standards of professional arbitration in the region, promoting arbitration and research initiatives. For new Arbitrators, fee will be payable within eight weeks of being notified that their application has been successful. For existing Arbitrators, fees are payable by 15 April of each calendar year.

QAP-2 (For APCAM Certified Arbitrators)

QAP-2 is applicable to an Arbitrator who has successfully completed an APCAM certified Arbitrator Training Program or an APCAM approved Arbitrator Training Program along with an APCAM Top-up program and who has completed fifteen arbitrations as a co-arbitrator. Applicant shall provide documentary evidence to show the level of experience as an arbitrator.

The Applicant will be entitled to avail the benefit of attendance in recognized programs, like arbitration workshops, seminars, conferences, training programs, courses etc. Such programs can be taken in lieu of numbers of arbitration, provided only a maximum of three, will be accepted.

Evaluation of Arbitration Knowledge: The applicant shall provide the copy of the certificate of arbitration training and records of specific subject-knowledge. (S)he shall have to demonstrate arbitration knowledge either by submitting an assignment given to him/her which would cover topics on arbitration theory, arbitration rules, professional code and ethical standards or by attending an interview conducted by APCAM, as decided by the Accreditation Committee. The applicant shall also draft an arbitral award based on the assignment given by the Accreditation Committee. On evaluation of the assignment or interview and the arbitral award, the applicant should get a minimum of 60% score. On failure to get the minimum score, the applicant will be able to apply again, only after a period of three months.

Evaluation of Arbitration Experience: Eligible Arbitrator, who successfully completes the Arbitration Knowledge evaluation, will be evaluated for arbitration experience and proficiency. This shall be based on assessment of Feedback forms collected from at least five individuals who have witnessed the Applicant acting as a co-arbitrator (e.g. counsel, co-arbitrator or presiding-arbitrator)and through an interview between the Applicant and Assessors or by other means of assessing an applicant's competency in arbitration, as approved by Accreditation Committee. The applicant should have at least a minimum of 60% "3" rating or above in the Feedback forms and in the interview.

On successful evaluation, the Feedbacks could become a base for the Feedback Digest which would be included in the Arbitrator's Profile.

Once accredited and enlisted, the certified arbitrator shall update the Feedback digest regularly through their reviewers or at any rate once in two years, with Feedback forms of at least five individuals who have witnessed the arbitrator acting as a co-arbitrator or sole-arbitrator. If the Feedback Digest is not updated or if the annual fee is not paid APCAM reserves its right to de-list the arbitrator from the APCAM website.

Assessor & Fee: The Assessor for QAP-2 would be a selected APCAM International Certified Arbitrator. Fee for QAP-2: € 150.00

Annual Fees: The annual fees payable by an APCAM Certified Arbitrator for listing in the APCAM website will be € 75.00. The annual fees received will go towards supporting APCAM's work and operations in maintaining high standards of professional arbitration in the region, promoting arbitration and research initiatives. For new Arbitrators, fee will be payable within eight weeks of being notified that their application has been successful. For existing Arbitrators, fees are payable by 15 April of each calendar year.

QAP-3 (For APCAM International Certified Arbitrator)

QAP-3 is applicable to an Arbitrator who has successfully completed an APCAM certified Arbitrator Training Program or an APCAM approved Arbitrator Training Program along with an APCAM Top-up program and who

has completed thirty-five arbitrations as a co-arbitrator or sole-arbitrator. Applicant shall provide documentary evidence to show the level of experience as an arbitrator.

The Applicant will be entitled to avail the benefit of presentation or attendance in recognized programs, like arbitration workshops, seminars, conferences, training programs, courses etc. Such programs can be taken in lieu of numbers of arbitration, provided only a maximum of five, will be accepted.

Evaluation of Arbitration Knowledge: The applicant shall provide the copy of the certificate of arbitration training and records of specific subject-knowledge. (S)he shall have to demonstrate arbitration knowledge either by submitting an assignment given to them which would cover topics on arbitration theory, arbitration rules, professional code and ethical standards or by attending an interview conducted by APCAM, as decided by the Accreditation Committee. The applicant shall also draft an arbitral award based on the assignment given by the Accreditation Committee. On evaluation of the assignment or interview and the arbitral award, the applicant should get a minimum of 60% score. On failure to get the minimum score, the applicant will be able to apply again, only after a period of three months.

Evaluation of Arbitration Experience: Eligible Arbitrator, who successfully completes the Arbitration Knowledge evaluation, will be evaluated for arbitration experience and proficiency. This shall be based on assessment of Feedback forms collected from at least fifteen individuals who have witnessed the Applicant acting as a co-arbitrator or sole-arbitrator (e.g. counsel, co-arbitrator or presiding-arbitrator) and through an interview between the Applicant and Assessors or by other means of assessing an applicant's competency in arbitration, as approved by Accreditation Committee. The applicant should have at least a minimum of 60% "3" rating or above in the Feedback forms and in the interview.

On successful evaluation, the Feedbacks could become a base for the Feedback Digest which would be put into the Arbitrator's Profile.

Once accredited and enlisted, the international certified arbitrator shall update the Feedback digest regularly through their reviewers or at any rate once in two years, with Feedback forms of at least fifteen individuals who have witnessed the arbitrator acting as a co-arbitrator, sole arbitrator or presiding-arbitrator. If the Feedback Digest is not updated or if the annual fee is not paid APCAM reserves its right to de-list the arbitrator from the APCAM website.

Assessors & Fee: The Assessors for QAP-3 will comprise of two selected APCAM International Certified Arbitrators. Fee for QAP-3: € 225.00.

Annual Fees: The annual fees payable by an APCAM International Certified Arbitrator for listing in the APCAM website will be € 100.00. The annual fees received will go towards supporting APCAM's work and operations in maintaining high standards of professional arbitration in the region, promoting arbitration and research initiatives. For new Arbitrators, fee will be payable within eight weeks of being notified that their application has been successful. For existing Arbitrators, fees are payable by 15 April of each calendar year.

Records for Accreditation

1. The applicant shall submit proof of arbitration experience. This could be records of appointment as arbitrator, copy of awards (with names of parties scored off) or certificate from the institution endorsing the appointment of the applicant as arbitrator.
2. The applicant shall be entitled to avail the benefit of attendance in recognized CPD programs, like arbitration workshops, seminars, conferences, training programs, courses. The self-attested certificates of such programs shall be produced for availing this.

APCAM Experience Qualification Path (EQP)

The Experience Qualification Path (EQP) is an alternative path towards becoming an APCAM Certified or International Certified Arbitrator under the APCAM Arbitrator Accreditation system. Through this system, APCAM recognizes the experience that is corresponding to the knowledge and proficiency required under the QAP's. There are two limbs under the EQP:

1. Arbitrators endorsed by an APCAM constituent member; and
2. Certified Arbitrators endorsed by other mutually recognised international certifying organisations.

I. Endorsement by APCAM constituent members

Under this process, an arbitrator may apply to become:

1. An APCAM Certified Arbitrator if they provide the following:
   - an endorsement by an APCAM constituent member, stating that the applicant is an experienced practicing and active arbitrator under their panel of arbitrators and has a strong commitment to professionalism, esteemed values and integrity and has more than 5 years of experience;
   - appoint a Reviewer to write a Feedback Digest based on Feedback forms collected from at least five individuals who have witnessed the Applicant acting as an arbitrator (e.g. counsel, co-arbitrator or presiding-arbitrator); and
   - complete his/her Certified Arbitrator profile in accordance with APCAM Guidelines.
2. An APCAM International Certified Arbitrator if they provide the following:
   - an endorsement by an APCAM constituent member, stating that the applicant is an experienced practicing and active arbitrator under their panel of arbitrators and has reached a high standard of excellence and proficiency and further signifies that (s)he has a strong commitment to professionalism, esteemed values and integrity and has more than 10 years of experience;
   - appoint a Reviewer to write a Feedback Digest based on Feedback forms collected from at least fifteen individuals who have witnessed the Applicant acting as an arbitrator (e.g. counsel, co-arbitrator or presiding-arbitrator); and
   - complete his/her Certified International Arbitrator profile in accordance with APCAM Guidelines.

This path is only available for a period of six months from the date from which the institution has been accepted as a constituent member of APCAM.

The applicant may apply under QAP-2 or QAP-3, based on the certification required, but is not required to complete the arbitration knowledge and experience evaluation.

II. Certified Arbitrators from other international organisations

Certifications given by other international organisations may also follow the same procedure under clause-I, once such institutions are recognised by APCAM and mutual recognition of APCAM accreditation is given by such organisation.

APCAM Reviewer

APCAM Reviewers shall be the constituent members of APCAM, who shall make a list of International Certified Arbitrators who will act as Reviewers. Every APCAM certified and international certified Arbitrator empanelled with APCAM shall mandatorily select a Reviewer of his choice from the list of Reviewers available. The Reviewer selected by an arbitrator should not be a member of the family, or someone who is subordinate to the arbitrator

in a professional relationship. The Reviewer shall be responsible for preparing the Feedback Digest of the arbitrator as per the APCAM Guidelines. The identity of the Reviewer will be mentioned in the Arbitrator's Feedback Digest. The Reviewer will also receive future Feedbacks for updating the Arbitrator's Feedback Digest as required to maintain the Certification.

APCAM Assessor and Procedure for Consistent QAP Evaluation

APCAM Certified Arbitrator or International Certified Arbitrator or such other eminent and experienced person from the field of arbitration may be appointed as Assessor under the respective QAP for evaluating arbitrator accreditation process.

For evaluating the arbitrators under QAP, the Assessors will be given guidelines for evaluating arbitration knowledge and arbitration skills. This is to ensure that the QAP Assessors evaluate the applicants on a consistent application of high-quality standards. The adherence to the guidelines also confirms that the standard of evaluation and outcome is the same for all Assessors, in identical situations, thereby ensuring the consistency of appraisal ratings. Assessors will assess applicants based on the written documentation and interview, as per the Guidelines given to them.

APCAM will monitor that the Assessors evaluate the applicants based on the guidelines. APCAM Accreditation Committee shall also monitor the performance and practice of the Assessors based on their (i) responsiveness, (ii) timeliness, (iii) meticulousness, and (iv) impartiality. Assessors will be invited to assist APCAM to improve the QAP and to develop the high standards.

The Assessors are independent of the Institution and have no administrative connection with the Institution. Those Assessors who are members of the Governing Board or Committees of the Institution will be put in as Assessors along with another Assessor who is independent of such Board or Committee, for arbitrators who are connected with the administration of the Institution.

Guidelines to Assessors for QAP Evaluation

Arbitration Knowledge Evaluation:

Knowledge of arbitration / specific topic theory	25%
Knowledge of arbitration rules	15%
Knowledge of arbitrator ethics & code	15%
Drafting of Arbitral Award	20%
Fairly & accurately presenting the matter & assessment of the issue	15%
Conforming with time schedule and number of words	10%

Arbitration Skill Evaluation:

Ingenuity and ability to communicate and facilitate dialogues	20%
Style, Poise, Courtesy & Demeanour	10%
Understanding of arbitration theory & practice	10%
Covering the topics pertaining to the dispute	20%
Reflection of experience as an Arbitrator	10%

Time Management & Organization	10%
Structuring the arbitration process in a professional manner	20%

APCAM Accreditation Programs

APCAM EQPs or QAPs are formed to accredit Neutrals at high standards of professionalism and to control and maintain the dignity, decorum, ethics, rules and code of conduct of Arbitrators and Mediators, and for the purpose frame rules, regulations and bye-laws and to amend, vary or rescind any rule/ regulation/ bye-law from time to time.

The APCAM Accreditation and QAP's will be accessible on equal basis to all mediators and arbitrators regardless of their professional affiliations, gender, race, ethnicity, age, religion, sexual orientation or other personal characterization. The accreditation will be purely based on evaluation under the respective EQP or QAP.

APCAM Arbitration is based on the most effective Arbitration Rules published by the Asia Pacific Centre for Arbitration & Mediation, which helps parties and arbitrators to use the best available global practice for the resolution of international disputes quickly and economically by way of administered arbitration on global standards.

International Arbitration

APCAM Arbitration Rules have been developed to cater the requirements of all constituent member institutions to conduct administered international arbitration under their respective Institutional Arbitration Rules. APCAM Arbitration Rules attempts to balance institutionalisation with party autonomy, so that issues which deal with the legality and integrity of proceedings are integrated within the Rules and conducted in a systematic way with efficient administrative control.

The APCAM Arbitration Rules also provides facility for Arb-Med-Arb Procedure, which is an effective way by which the party can invoke arbitration and simultaneously try to resolve the dispute through mediation and if successful, make the outcome as an arbitral award or in case of failure of mediation, continue with arbitration. The AMA procedure helps to save time and also helps to make mediation settlement binding.

Emergency Arbitrator:

The APCAM Arbitration Rules provide the provision for the appointment of emergency arbitrators, which allows the party in need of an emergency interim relief to make such application and the said application can be made concurrently with or after the filing of the Arbitration Submission, but not after the constitution of the arbitral tribunal. Emergency interim relief order or award granted by an emergency arbitrator shall have a binding effect on the parties.

How it Works:

A party need not have a specific APCAM arbitration clause in their contract to invoke the APCAM Rules. A party who have opted for institutional ADR services under the Arbitration Rules of any of the constituent institutional members in any of the countries, can use those institutions to conduct arbitration of their international disputes under the APCAM Arbitration Rules. As per the Arbitration Rules of the respective institutions, in case of an international dispute, the process will be governed under the APCAM Arbitration Rules for resolving their international disputes. The APCAM Arbitration Rules provide an easy and comprehensive procedure for parties to adopt and conduct their proceedings in any of the countries without hurdles. The costs and expenses of arbitration will be governed by the Fee Schedule of the APCAM Arbitration Rules in all these jurisdictions.

Source: https://apcam.asia/

[5]THE INTERNATIONAL BAR ASSOCIATION (IBA) RULES ON CONFLICT OF INTEREST

The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, as updated in August 2015, are another a leading soft law instrument in providing guidance regarding the scope of arbitrators' disclosure obligations and conflict of interest issues, since they first launched in 2004.

The IBA Guidelines on Conflicts of Interest apply to both commercial and investment arbitration, as well as to both legal and non-legal professionals serving as arbitrators. The Introduction to these Guidelines further stipulates that they "*are based upon statutes and case law in a cross-section of jurisdictions, and upon the judgment and experience of practitioners involved in international arbitration*" (Introduction, para. 4).

Part I of the 2014 IBA Guidelines on Conflicts of Interest comprise "General Standards" regarding impartiality, independence and disclosure, as well as "Explanatory Notes" on those Standards.

Part II of those Guidelines, entitled Practical Application of the General Standards, is divided into three colored-lists, i.e.,

the Red List,

the Orange List, and

the Green List (together the "Application Lists"),

which contain specific, non-exhaustive, scenarios that are likely to occur in arbitration practice, aiming to assist users in determining whether the appointment of an arbitrator would violate conflict of interest rules.

Red List

The Red List is further divided into two parts, i.e., the Waivable Red List, which includes "*situations that are serious*", but could be waived "*only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator"* and the Non-Waivable Red List which contains "*situations deriving from the overriding principle that no person can be his or her own judge*", thus, "*acceptance of such a situation cannot cure the conflict*" (Part II, para. 2).

An example of a Waivable Red List situation is where an "*arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties*" (Part II, Waivable Red List, para. 2.3.1).

An example of a Non-Waivable Red List situation is where an "*arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*" (Part II, Non-Waivable Red List, para. 1.4).

Notably, the aforementioned paragraph 1.4 of the Non-Waivable Red List has been recently criticized in the *W Limited v. M SDN BHD* [2016] EWHC 422 case, where an English court was called to consider a challenge to two arbitration awards issued by a sole arbitrator. The sole arbitrator in question was a partner at a law firm that provided services to a company that had the same parent as the respondent. The English court took issue with the term "*affiliate*", which is broadly defined in the Guidelines (p. 21, fn. 4) as "*all companies in a group of companies, including the parent company*" and the fact that, under paragraph 1.4 of the Non-Waivable Red List, an arbitrator could be disqualified, even though he or she was neither aware of, nor involved with, the advising of an affiliate of a party (Decision, paras. 33-41). The court found it "*hard to understand why this situation should warrant inclusion in the Non-Waivable Red List. The situation is classically appropriate for a*

5. Source: https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918

https://www.acerislaw.com/iba-rules-and-guidelines-regarding-international-arbitration-an-overview/

case-specific judgment. And if the arbitrator had been aware and had made disclosure, why should the parties not, at least on occasion, be able to accept the situation by waiver?" (Decision, para. 36).

Orange List

The Orange List contains situations which "*may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence*", meaning that an arbitrator has a duty to disclose them (Part II, para. 3). This is, for example, when an "*arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties*" (Part II, Orange List, para. 3.1.3). However, no disclosure of such fact may be needed, in certain types of arbitration, such as "*maritime, sports or commodities arbitration*", where the pool of arbitrators is smaller, and thus "*it is the custom and practice for parties to frequently appoint the same arbitrator in different cases*" (Part II, Orange List, para. 3.1.3, fn. 5).

Green List

The Green List includes "*situations where no appearance and no actual conflict of interest exists from an objective point of view*" (Part II, para. 7), such as when an "*arbitrator and counsel for one of the parties have previously served together as arbitrators*" (Part II, Green List, para. 4.3.2). An arbitrator has no duty to disclose situations falling within the Green List.

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

ICC was founded in the aftermath of the First World War when no world system of rules governed trade, investment, finance or commercial relations.

In 1919, a handful of entrepreneurs decided to create an organisations that would represent business everywhere.

The group of industrialists, financiers, and traders were determined to bring hope to a world still devastasted by war. they resolved to replace fear and suspicion with a new spirit of cooperation.

They founded the International Chamber of Commerce and called themselves the Merchants of Peace.

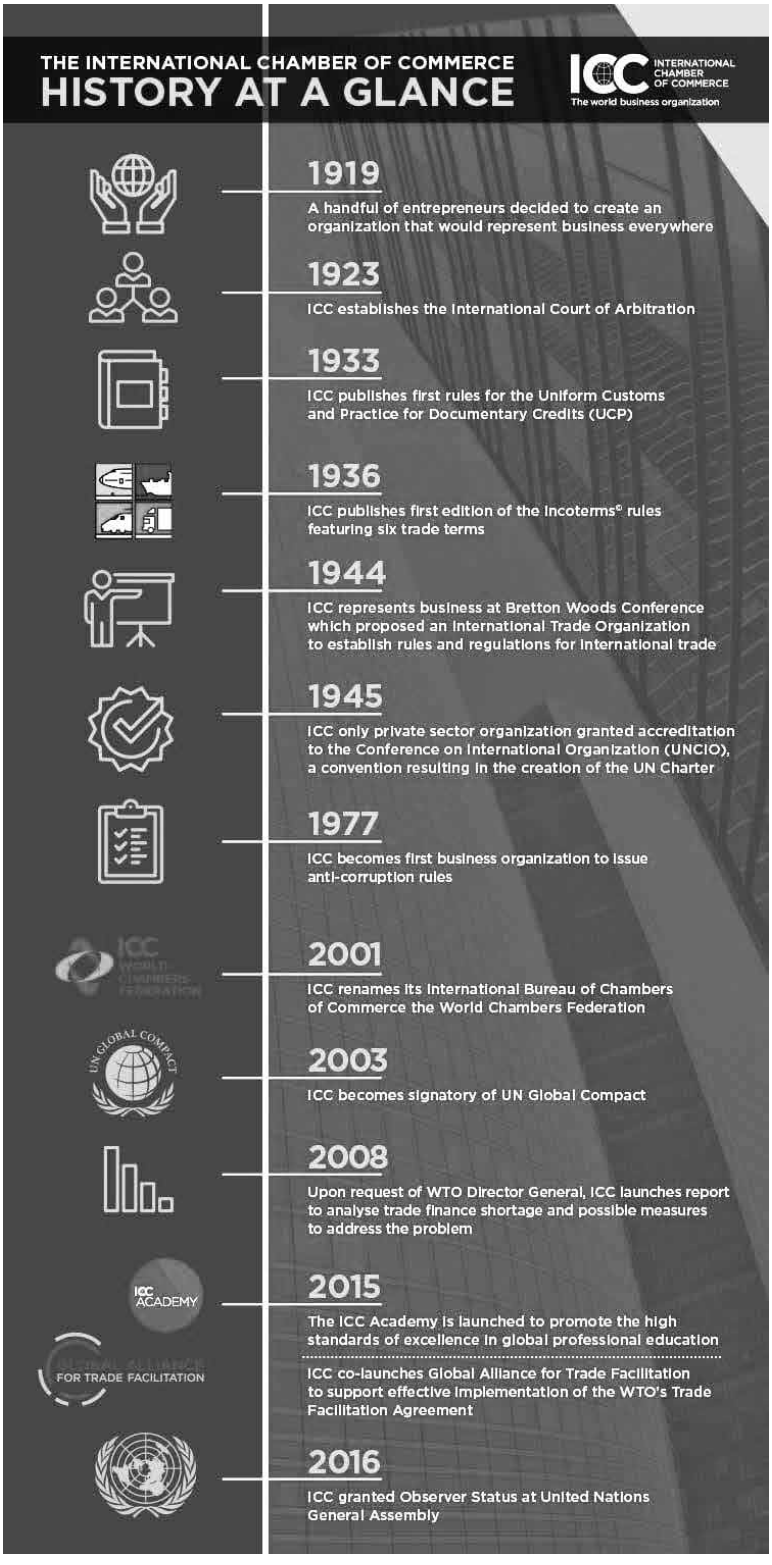
Without waiting for governments to fill the gap, ICC's founders acted on their conviction that the private sector is best qualified to set global standards for business. A century later, ICC issued its **Declaration on the Next Century of Global Business** setting out a vision to shape the future of global business for the next century, embracing ICC's renewed purpose to enable business worldwide to secure peace, prosperity and opportunity for all.

ICC is the world business organization, enabling business to secure peace, prosperity and opportunity for all. It is an institutional representative of more than 45 million companies in over 100 countries with a mission to make business work for everyone, every day, everywhere.

Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Its members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

ICC plays a vital role in scaling widespread action on Sustainable Development Goals and has a long history of formulating the voluntary rules by which business is conducted every day – from internationally recognised Incoterms rules to the UCP 600 Uniform Customs and Practice for Documentary Credit that are widely used in international finance.

The corporate culture at ICC is based on shared values – the foundation of the work we've done for more than 100 years.



Source: https://iccwbo.org/about-us/who-we-are/history/

[6]ICC RULES ON INTERNATIONAL COMMERCIAL ARBITRATION

The below ICC Rules of Arbitration entered into force on 1 January 2021. They define and regulate the management of cases received by the International Court of Arbitration from 1 January 2021 on. The ICC Arbitration Rules are used all around the world to resolve disputes. They assure parties of a neutral framework for the resolution of cross-border disputes.

Article No.	*Heading*
INTRODUCTORY PROVISIONS	
1	INTERNATIONAL COURT OF ARBITRATION
2	DEFINITIONS
3	WRITTEN NOTIFICATIONS OR COMMUNICATIONS; TIME LIMITS
COMMENCING THE ARBITRATION	
4	REQUEST FOR ARBITRATION
5	ANSWER TO THE REQUEST; COUNTERCLAIMS
6	EFFECT OF THE ARBITRATION AGREEMENT
MULTIPLE PARTIES, MULTIPLE CONTRACTS AND CONSOLIDATION	
7	JOINDER OF ADDITIONAL PARTIES
8	CLAIMS BETWEEN MULTIPLE PARTIES
9	MULTIPLE CONTRACTS
10	CONSOLIDATION OF ARBITRATIONS
THE ARBITRAL TRIBUNAL	
11	GENERAL PROVISIONS
12	CONSTITUTION OF THE ARBITRAL TRIBUNAL
13	APPOINTMENT AND CONFIRMATION OF THE ARBITRATORS
14	CHALLENGE OF ARBITRATORS
15	REPLACEMENT OF ARBITRATORS
THE ARBITRAL PROCEEDINGS	
16	TRANSMISSION OF THE FILE TO THE ARBITRAL TRIBUNAL
17	PARTY REPRESENTATION
18	PLACE OF THE ARBITRATION
19	RULES GOVERNING THE PROCEEDINGS
20	LANGUAGE OF THE ARBITRATION

6. Source: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

Article No.	*Heading*
21	APPLICABLE RULES OF LAW
22	CONDUCT OF THE ARBITRATION
23	TERMS OF REFERENCE
24	CASE MANAGEMENT CONFERENCE AND PROCEDURAL TIMETABLE
25	ESTABLISHING THE FACTS OF THE CASE
26	HEARINGS
27	CLOSING OF THE PROCEEDINGS AND DATE FOR SUBMISSION OF DRAFT AWARDS
28	CONSERVATORY AND INTERIM MEASURES
29	EMERGENCY ARBITRATOR
30	EXPEDITED PROCEDURE
AWARDS	
31	TIME LIMIT FOR THE FINAL AWARD
32	MAKING OF THE AWARD
33	AWARD BY CONSENT
34	SCRUTINY OF THE AWARD BY THE COURT
35	NOTIFICATION, DEPOSIT AND ENFORCEABILITY OF THE AWARD
36	CORRECTION AND INTERPRETATION OF THE AWARD; ADDITIONAL AWARD; REMISSION OF AWARDS
COSTS	
37	ADVANCE TO COVER THE COSTS OF THE ARBITRATION
38	DECISION AS TO THE COSTS OF THE ARBITRATION
39	MODIFIED TIME LIMITS
40	WAIVER
41	LIMITATION OF LIABILITY
42	GENERAL RULE
43	GOVERNING LAW AND SETTLEMENT OF DISPUTES

Article 1: International Court of Arbitration

The International Court of Arbitration (the "Court") of the International Chamber of Commerce ("ICC") is the independent arbitration body of ICC.

Article 2: Definitions

In the Rules:

(i) "arbitral tribunal" includes one or more arbitrators;

(ii) "claimant" includes one or more claimants, "respondent" includes one or more respondents, and "additional party" includes one or more additional parties;

(iii) "party" or "parties" include claimants, respondents or additional parties;

(iv) "claim" or "claims" include any claim by any party against any other party;

(v) "award" includes, *inter alia*, an interim, partial, final, or additional award.

Article 3: Written Notifications or Communications; Time Limits

All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be sent to each party, each arbitrator, and the Secretariat. Any notification or communication from the arbitral tribunal to the parties shall also be sent in copy to the Secretariat.

Article 4: Request for Arbitration

A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.

Article 5: Answer to the Request; Counterclaims

Within 30 days from receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information:

a) its name in full, description, address and other contact details;

b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;

c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;

d) its response to the relief sought;

e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

Article 6: Effect of the Arbitration Agreement

Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement. By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.

Article 7: Joinder of Additional Parties

A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder

is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party.

Article 8: Claims Between Multiple Parties

In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6 and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23.

Article 9: Multiple Contracts

Subject to the provisions of Articles 6 and 23, claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

Article 10: Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

a) the parties have agreed to consolidation; or

b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or

c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

Article 11: General Provisions

Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration. Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

Article 12: Constitution of the Arbitral Tribunal

Number of Arbitrators

The disputes shall be decided by a sole arbitrator or by three arbitrators.

Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.

Sole Arbitrator

Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party or parties, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

Article 13: Appointment and Confirmation of the Arbitrators

In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13.

Article 14: Challenge of Arbitrators

A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

Article 15: Replacement of Arbitrators

An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

Article 16: Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

Article 17: Party Representation

Each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation.

Article 18: Place of the Arbitration

The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. The arbitral tribunal may, after consulting the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. The arbitral tribunal may deliberate at any location it considers appropriate.

Article 19: Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

Article 20: Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

Article 21: Applicable Rules of Law

The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

Article 22: Conduct of the Arbitration

The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Article 23: Terms of Reference

As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

b) the addresses to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

e) the names in full, address and other contact details of each of the arbitrators;

f) the place of the arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono.

Article 24: Case Management Conference and Procedural Timetable

When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall hold a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22.

Article 25: Establishing the Facts of the Case

The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

Article 26: Hearings

A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.

Article 27: Closing of the Proceedings and Date for Submission of Draft Awards

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

a) declare the proceedings closed with respect to the matters to be decided in the award; and

b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 34.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

Article 28: Conservatory and Interim Measures

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

Article 29: Emergency Arbitrator

A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

Article 30: Expedited Procedure

By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement.

Article 31: Time Limit for the Final Award

The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2).

Article 32: Making of the Award

When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone. The award shall state the reasons upon which it is based.

The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

Article 33: Award by Consent

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

Article 34: Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

Article 35: Notification, Deposit and Enforceability of the Award

Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to ICC by the parties or by one of them.

Article 36: Correction and Interpretation of the Award; Additional Award; Remission of Awards

On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days from notification of the award by the Secretariat pursuant to Article 35.

Article 37: Advance to Cover the Costs of the Arbitration

After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration:

a) until the Terms of Reference have been drawn up; or

b) when the Expedited Procedure Provisions apply, until the case management conference.

Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 37.

Article 38: Decision as to the Costs of the Arbitration

The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

Article 39: Modified Time Limits

The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.

Article 40: Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

Article 41: Limitation of Liability

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

Article 42: General Rule

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.

Article 43: Governing Law and Settlement of Disputes

Any claims arising out of or in connection with the administration of the arbitration proceedings by the Court under the Rules shall be governed by French law and settled by the Paris Judicial Tribunal (Tribunal Judiciaire de Paris) in France, which shall have exclusive jurisdiction.

Standard ICC Arbitration Clause

If ICC Arbitration is chosen as the preferred dispute resolution method, it should be decided when negotiating contracts, treaties or separate arbitration agreements. However, if both parties consent, this can be included after a dispute has arisen as well.

It is recommended that parties wishing to make reference to ICC Arbitration in their contracts use the standard clause below:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

CASE STUDY

CASE STUDY ON INTERNATIONAL COMMERCIAL ARBITRATION

Waguih Elie George Siag and Clorinda Vecchi

vs.

The Arab republic of Egypt (ICSID Case No. ARB/05/15).

Summary of facts about case study related Investment Disputes:

This case involves an investment dispute between (Claimants), Waguih Elie George Siag and Clorinda Vecchi, and) Respondent), the Arab Republic of Egypt ("Egypt"), they filed with the International Centre for Settlement of Investment Disputes(ICSID) a Request for Arbitration directed against Egypt On 26th May, 2005.

According to the Request, in 1989 the Egyptian Ministry of Tourism sold a parcel of property on the Gulf of Aqaba to a Company called Siag Touristic Investments and Hotels Management Company ("Siag Touristic"), which is owned principally by the Claimants. Siag Touristic is an Egyptian joint stock Company. The purpose of the sale was to permit Siag Touristic to develop a tourist resort on the property. Development commenced on the property. However, in 1996 the property was confiscated by the Egyptian Government. Although the Claimants obtained relief from the Egyptian courts, this was ignored by the Egyptian Government[19].

The Claimant (Siag – Clorinda) according to the request seeks a declaration that the Respondent (Egypt) has violated the BIT, international law and Egyptian law, compensation for all damages suffered, costs and an award of compound interest.

Article 25(1) of the ICSID Convention and decide on the jurisdiction of the Centre:

Under Rule 41 of the ICSID Arbitration Rules the Tribunal is required to decide the Respondent's objection that the present dispute "is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal". The Claimants contend that the Tribunal's jurisdiction is established under two instruments referred to at the outset of this Decision: (a) the BIT and (b) the ICSID Convention.

Egypt's objection to jurisdiction of tribunal based on three reasons.

Siag's nationality

Egypt argued that Siag remained an Egyptian national and accordingly failed the negative nationality requirement of Article 25(2)(a) of the ICSID Convention. The Tribunal was therefore without jurisdiction.

Egypt noted that the Tribunal had found in its Decision on Jurisdiction that, pursuant to Article 10(3) of the Egyptian nationality law, Siag had been required to state his intention to retain his Egyptian nationality within one year of gaining permission from Egypt to obtain Lebanese nationality. As Siag did not state such an intention within the relevant time, the Tribunal held that he had lost his Egyptian nationality.

Egypt filed its Counter-Memorial on the merits on October 12, 2007 expert opinion of Professor Smit which accompanied it, also addressed Egypt's Lebanese nationality objection. Egypt submitted that Professor Smit's opinion made it clear that Siag had never properly shed his Egyptian nationality when he "supposedly took on Lebanese nationality.

Siag was born in Egypt on March 12, 1962 to Egyptian parents. He was, therefore, an Egyptian national from birth, On March 5, 1990 the Egyptian Minister of Interior issued his Decree No. 1353 of 1990 acknowledging Siag's prior acquisition of Lebanese nationality and granting him permission to maintain his Egyptian nationality, but he lost his Egyptian nationality because do not notify the Egyptian Interior Ministry within the period of one year of the desire to retain Egyptian nationality Siag acquired Italian nationality on May 3, 1993 on the basis of his marriage to an Italian citizen.

Siag's bankruptcy

Egypt filed a notification and application concerning objection to the center subject matter jurisdiction, Egypt discovered that Waguih Siag had been declared bankrupt on 16 January 1999 as a result of a debt of 23,545.16 Egyptian Pounds.

Egypt contended that, under Egyptian bankruptcy law Siag, from the date he became bankrupt in 1999, could no longer validly agree to arbitrate any dispute relating to any asset forming part of the bankruptcy estate. Egypt argued that at the time the Request for Arbitration was lodged in 2005 Siag therefore lacked the capacity to arbitrate the dispute. Siag also lacked capacity to maintain the present arbitration.

After long discussions, the Tribunal finds that Egypt has not demonstrated that Siag was bankrupt at times relevant to the jurisdiction of the Tribunal under the ICSID Convention.

Existence of an "investment"

On the subject of its objections to jurisdiction, Egypt submitted that although the term investment has a broad definition it is not without limitations and should be determined on a case-by-case basis, also the purpose of the ICSID Convention is to afford a higher level of protection to foreign investors.

At the date, Egypt and Italy concluded the BIT on 2 March 1989, and at the date of entering into the sale contract on 4 January 1989 the Claimants were Egyptian nationals. The two companies, Siag Touristic and Siag Taba were established under Egyptian laws. From their inception, the economic activities of the Claimants were devoid of any foreign element.

Word of tribunal about jurisdiction

The Claimants have succeeded on the merits and Egypt's objections to the jurisdiction of the Tribunal were rejected in their totality, both at the jurisdictional phase and during the Tribunal's consideration of the merits:

- finds and declares that at all relevant times Siag was not an Egyptian national;
- finds and declares that Egypt's objection to jurisdiction based on Siag's alleged Egyptian nationality and all of its related contentions about his alleged disqualifying dual nationality fail and are hereby dismissed;
- finds and declares that Egypt's objection to jurisdiction concerning Siag's alleged fraud or other misconduct in relation to his acquisition of Lebanese nationality fails and is hereby dismissed; and
- finds and declares that Egypt's objection to jurisdiction based on Siag's alleged bankruptcy fails and is hereby dismissed.

Applicable law

Second step after discussing the parties, the Tribunal decided that the applicable law is the bilateral agreement between Egypt and Italy.

The claimant's requests

The Tribunal finds that the evidence clearly establishes that Egypt has unlawfully expropriated Claimants' investment, in breach of Article 5(1)(ii) of the BIT; that Egypt failed to provide full protection to Claimants' investment, in breach of Article 4(1) of the BIT; that Egypt failed to ensure the fair and equitable treatment of Claimants' investment, in breach of Article 2(2) of the BIT; and that Egypt allowed Claimants' investment to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT[23].

Main point in the word of tribunal:

For the following reasons:

- All of Egypt's defenses on the merits have been dismissed.

- Egypt was responsible for greatly increasing the costs of these proceedings.
- Claimants should be compensated for their reasonable legal fees and related expenses in respect of both the original jurisdictional phase and subsequent phases.
- The Tribunal agrees that "it is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.
- Tribunal has also noted that Egypt has made a number of unsuccessful jurisdictional objections, some of which were filed late in the course of proceedings and which represented in modified form issues which had already been decided by the Tribunal.

The word of Tribunal:

- Egypt is liable to Claimants for unlawfully expropriating Claimants' investment, consisting of the Property and the Project, in breach of Article 5(1)(ii) of the BIT.
- Egypt is liable to Claimants for failing to provide full protection to Claimants' investment, consisting of the Property and the Project, in breach of Article 4(1) of the BIT.
- Egypt is liable to Claimants for failing to ensure the fair and equitable treatment of Claimants' investment, consisting of the Property and the Project, in breach of Article 2(2) of the BIT.
- Egypt is liable to Claimants for allowing Claimants' investment, consisting of the Property and the Project, to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT.
- The Claimants are entitled to recover from Egypt the total sum of USD 74,550,794.75 in compensation for its actions in breach of the BIT.

Source: https://www.emerald.com/insight/content/doi/10.1108/REPS-11-2018-0027/full/html

LESSON ROUND-UP

- The purpose of Arbitration Act is to provide quick redressal to commercial disputes by private arbitration.
- The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters.
- The Act has been divided into four parts. Part one deals with Arbitration; Part two deals with enforcement of certain Foreign Awards; Part three deals with conciliation; and Part four contains supplementary provisions.
- The Present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.
- United Nations Commission On International Trade Law (UNCITRAL) Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.
- The UNCITRAL Arbitration Rules were initially adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions.

- The UNCITRAL Arbitration Rules (as revised in 2010) have been effective since 15 August 2010. They include provisions dealing with, amongst others, multiple-party arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal.
- International commercial arbitration is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allows the parties to avoid litigation in national courts.
- With the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") in 2013, a new article 1, paragraph 4 was added to the text of the Arbitration Rules (as revised in 2010) to incorporate the Rules on Transparency for arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014.
- The Convention is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency" or "Rules").
- Part 2 Chapter I and Sections 44 to 52 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of Foreign Awards, particularly New York Convention Awards.
- Part 2 Chapter II and Sections 53 to 60 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of certain Foreign Awards, particularly Geneva Convention Awards.
- The UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency"), which come into effect on 1 April 2014, comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration.
- Expedited arbitration is a streamlined and simplified procedure with a shortened time frame, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. The UNCITRAL Expedited Arbitration Rules provide a set of rules which parties may agree for expedited arbitration. The Expedited Rules balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and fair treatment.
- The Chartered Institute of Arbitrators ("CIArb") last revised its Arbitration Rules in 2000. When considering how to update its rules, the CIArb recognised that the 2010 version of the UNCITRAL Arbitration Rules ("UNCITRAL Rules") provide a comprehensive set of procedural rules which are widely used for ad hoc international arbitrations and which can be adopted by arbitral institutions who wish to act as appointing authority.
- APCAM Mediation is based on the Mediation Rules published by the Asia-Pacific Centre for Arbitration & Mediation ("APCAM"), which is intended to help parties and mediators to take maximum advantage of the flexible procedures available in mediation for the resolution of disputes amicably, quickly and economically through international and cross-border mediation.
- APCAM maintains stringent accreditation norms for creating high standards of professionalism among its Neutrals, including arbitrators and mediators and for maintaining a common pool of Neutrals comprising of mediators and arbitrators from different jurisdictions, which will be available in all ADR institutions who are members of APCAM.
- The 2014 International Bar Association (IBA) Rules on Conflict of Interest in International Arbitration, as updated in August 2015, are another a leading soft law instrument in providing guidance regarding the scope of arbitrators' disclosure obligations and conflict of interest issues, since they first launched in 2004.International Centre for Settlement of Investment Disputes (ICSID) Arbitrations is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases.

- International Chamber of Commerce (ICC) was founded in the aftermath of the First World War when no world system of rules governed trade, investment, finance or commercial relations.
- ICSID also promotes greater awareness of international law on foreign investment and the ICSID process. It has an extensive program of publications, including the leading ICSID Review-Foreign Investment Law Journal and it regularly publishes information about its activities and cases.

GLOSSARY

International Centre for Settlement of Investment Disputes (ICSID) Arbitrations: It is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases.

United Nations Commission on International Trade Laws (UNCITRAL): The Present Act is based on model law drafted by UNCITRAL both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.

New York Convention: Part 2 Chapter I and Sections 44 to 52 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of Foreign Awards, particularly New York Convention Awards.

Geneva Convention: Part 2 Chapter II and Sections 53 to 60 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of certain Foreign Awards, particularly Geneva Convention Awards.

Expedited arbitration: It is a streamlined and simplified procedure with a shortened time frame, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. The UNCITRAL Expedited Arbitration Rules provide a set of rules which parties may agree for expedited arbitration. The Expedited Rules balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and fair treatment.

The Chartered Institute of Arbitrators ("CIArb"): The CIArb recognised that the 2010 version of the UNCITRAL Arbitration Rules ("UNCITRAL Rules") provide a comprehensive set of procedural rules which are widely used for ad hoc international arbitrations and which can be adopted by arbitral institutions who wish to act as appointing authority.

APCAM Mediation: It is based on the Mediation Rules published by the Asia-Pacific Centre for Arbitration & Mediation ("APCAM"), which is intended to help parties and mediators to take maximum advantage of the flexible procedures available in mediation for the resolution of disputes amicably, quickly and economically through international and cross-border mediation.

The 2014 International Bar Association (IBA) Rules on Conflict of Interest in International Arbitration, as updated in August 2015, are another a leading soft law instrument in providing guidance regarding the scope of arbitrators' disclosure obligations and conflict of interest issues, since they first launched in 2004.

International Chamber of Commerce (ICC) was founded in the aftermath of the First World War when no world system of rules governed trade, investment, finance or commercial relations.

London Court of International Arbitration (LCIA): It is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

A. Descriptive Questions

1. The International law of Arbitration involves both civil and common law procedure which help parties to reconstruct their procedure of arbitration so that their dispute to the contract can be resolved. Explain.
2. Define International Commercial Arbitration**.**
3. Explain some significant Arbitration Rules drafted by UNCITRAL.
4. Part 2 Chapter I and Sections 44 to 52 of the Indian Arbitration and Conciliation Act, 1996 deal with the provisions related to Enforcement of Foreign Awards, particularly New York Convention Awards Elaborate.
5. Enumerate model Laws on International Commercial Arbitration.
6. Explain some significant Arbitration Rules drafted by Asia Pacific Centre for Arbitration & mediation (APCAM) Rules.
7. Write a Brief note on New York Convention and Geneva Convention.

LIST OF FURTHER READINGS

- The Arbitration and Conciliation Act, 1996
- CIArb- UK Model rules on International Arbitration
- Asia Pacific Centre for Arbitration & Mediation (APCAM) Rules
- The International Bar Association (IBA) Rules
- International Chamber of Commerce (ICC) Rules

OTHER REFERENCES (Including Websites / Video Links)

- https://uncitral.un.org/en/texts/arbitration
- https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
- https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency
- https://uncitral.un.org/en/content/expedited-arbitration-rules
- https://www.ciarb.org/media/1552/ciarb-arbitration-rules.pdf
- https://apcam.asia/
- https://apcam.asia/mediation-rules/
- https://www.acerislaw.com/iba-rules-and-guidelines-regarding-international-arbitration-an-overview/
- https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/
- https://www.emerald.com/insight/content/doi/10.1108/REPS-11-2018-0027/full/html

Introduction to Conciliation and its Importance for MSMEs

Lesson 11

KEY CONCEPTS

■ Micro Enterprises ■ Small Enterprises ■ Medium Enterprises ■ Voluntary Conciliation ■ Involuntary Conciliation

Learning Objectives

To understand:

- Scope of conciliation in MSMEs
- Characteristics and Methods of Conciliation
- Process of Conciliation
- Legislation concerning Conciliation
- Significance of Conciliation for MSME
- The practical application of Conciliation under MSME through a Case Study

Lesson Outline

- Introduction
- Important definitions
- Nature & modes of Conciliation
- Importance of Conciliation for MSME
- Conciliation Proceedings
- Law relating to Conciliation
- Case Study on Conciliation under MSME
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- The Arbitration and Conciliation Act, 1996
- Micro, Small and Medium Enterprises Development Act, 2006

INTRODUCTION

Due to the increasing burden on the civil court, various legislations provide that the disputing parties must attempt to resolve their issues through conciliation and mediation before invoking arbitration or approaching the civil courts. This results in reducing the burden of the civil courts and is time effective at the same time. Such a provision can be found in the Micro, Small and Medium Enterprises Development Act, 2006 ("MSME Act") whereby any reference to a Micro and Small Enterprises Facilitation Council ("MSME Council") necessarily requires the MSME Council to initiate a mandatory conciliation process. The provision provides that, in the event conciliation fails, arbitration can be commenced. The Arbitration and Conciliation Act, of 1996 aims to consolidate and modify the existing laws on domestic and international arbitration, the enforcement of foreign arbitral awards, and the definition of the law relating to conciliation. The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985, and the United Nations General Assembly recommended that all countries consider adopting it for the sake of uniformity of arbitral procedures. Additionally, the UNCITRAL adopted the UNCITRAL Conciliation Rules in 1980, which the General Assembly of the United Nations recommended for use in disputes arising in the context of international commercial relations where parties seek amicable settlements. Both the Model Law and Rules are significant contributions towards the establishment of a unified legal framework for fair and efficient dispute resolution in international commercial relations.

History of Conciliation

India has a tradition of employing "Panchayat," or elder-led conciliation or mediation, to resolve disputes even if there is no formal law. Many of the choices made during this process were enforceable in order to show respect for the elders. Also utilized to resolve disputes in the past were the courts of Kula, Sreni, and Gana. Even ancient literature provides insightful information about the value of dispute resolution in society. Despite the emergence of a formal legal system, village-based mediation is still used to settle complex disputes, indicating its acceptance of maintaining relationships. The government has taken steps to reform and modernize this system. The laws pertaining to conciliation are found in the Arbitration and Conciliation Act of 1996. The system went into service on January 25, 1996. The Act is not exhaustive but acts to consolidate and amend. However, it goes far beyond the 1940 Act, which was its predecessor. Therefore, it is necessary to examine the previous Act. The 1940 Arbitration and Conciliation Act was claimed to be the law. The 29 Sections of the Act were broken down into 7 Chapters and 3 Schedules.There were no sections in the Act that dealt with foreign awards, conventions, or protocols. There were two distinct Acts for Foreign Awards as well as an arbitration convention and protocol. As a result, the Act needed to be amended, and the new Act—which included the Conventions and Protocols and Foreign Awards—became effective.

Arbitration and Conciliation Act, 1996

Even before courts were founded, individuals used to engage a third party to mediate disputes when they arose between two parties. Once courts were established, the appropriate procedures were followed to resolve the conflicts. Justice was ultimately done after several days of submitting a case because to a rise in population, a high number of cases that were still pending in court, and a backlog of cases. The people's ability to access justice was consequently hindered. Major industry development brought forth by population growth sparked an uptick in commercial disputes. To strike a balance with this, many techniques for resolving conflicts outside of

the courts have been devised. ADR stands for alternative dispute resolution. Alternate Dispute Resolution uses a variety of methods. As follows:

1. Arbitration
2. Mediation
3. Conciliation
4. Mediation-arbitration etc.

Some of these techniques significantly evolved as a result of the court's delay in delivering justice. Conciliation is one of the methods that gained popularity. Mutual Resolution of disputes for the parties is the primary goal of Conciliation.

The law governing conciliation is found in the Arbitration and Conciliation Act, 1996. On January 25th, 1996, this Act became operative. This law contains provisions for domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral rulings. It is based on the UN model law in order to be comparable to the legislation approved by UNCITRAL, the United Nations Commission on International Trade Law

It is a law-integrating and law-amending act pertaining to:

1. National mediation.
2. Arbitration in international business.
3. Foreign arbitral award enforcement.
4. Law pertaining to conciliation and the issues associated with it.

IMPORTANT DEFINITIONS

According to section 7 of the MSME Act:

Micro Enterprises

Micro Enterprises are enterprises with an investment of less than Rs. 1 crore and turnover less than Rs. 5 Crore.

Small Enterprises

Small Enterprises are enterprises with an investment of less than Rs. 10 crore and turnover less than Rs. 50 Crore.

Medium Enterprises

Medium Enterprises are enterprises with an investment of less than Rs. 20 crores and turnover up to Rs.100 Crore.

Conciliation

There is no set definition of Conciliation provided in the Arbitration and Conciliation Act, 1996. However, as per the Halsbury Laws of England, conciliation is a process of persuading parties to reach an agreement. According to Wharton's Law Lexicon, conciliation is a non-adjudicatory alternative dispute resolution process which is governed by the conditions of the Arbitration and Conciliation Act, 1996. Section 61 of the Arbitration and Conciliation Act of 1996 outlines the scope and application of conciliation. It specifies that conciliation can be applied to disputes, regardless of whether they are contractual or not, as long as they arise from a legal relationship where one party has the right to sue and the other party is liable to be sued. Additionally, the process of conciliation can be applied to all proceedings related to the dispute. The provisions regarding

conciliation are provided in part III of the Arbitration and Conciliation Act, 1996. However, Part III of the Act does not apply to disputes that cannot be submitted to conciliation due to any prevailing law.

NATURE & MODES OF CONCILIATION

There are two modes of conciliation and their nature depends on their type:

1. Voluntary Conciliation
2. Involuntary Conciliation

Voluntary Conciliation

Voluntary conciliation is when the parties willingly engage to settling their dispute. Voluntary conciliation is also called as formal conciliation. It refers to a process where a lawyer and their client meet with a conciliator present to discuss and attempt to resolve an issue. This type of conciliation is voluntary and also known as voluntary conciliation. During the process, the lawyer and client analyse and try to determine the issue at hand with the assistance of the conciliator.

Illustration of Voluntary Conciliation: There is a Technology Transfer Agreement between a company based in India and a Company Based in Germany. The agreement provides that any dispute arising out under the terms and conditions may be referred for settlement through conciliation with the agreement of both the parties. The conciliation process initiated under the agreement can be said voluntary conciliation. It facilitates the parties to resolve the dispute amicably.

Involuntary Conciliation

Involuntary conciliation or compulsory conciliation is when the parties are not willing to settle their disputes voluntarily and amicably. Informal conciliation involves the resolution of disputes between a lawyer and their client through electronic media, such as phone calls, emails, or written notices. This type of conciliation is also known as compulsory conciliation, where questions and answers are exchanged between the lawyer and client through electronic communication or in writing.

Illustration of Involuntary Conciliation: According to section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council. On receipt of such reference, the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act. The conciliation process initiated under the can be said involuntary conciliation.

IMPORTANCE OF CONCILIATION FOR MSME

The Legislature has passed several laws mandating disputing parties to go through mandatory conciliation or mediation processes before starting arbitration or going to court as a result of the growing pressure on civil courts. With the intention of relieving the Civil Courts of some of their workload by weeding out issues that can be settled through conciliation or mediation, these regulations act as a necessary prerequisite to initiating arbitration or court procedures. One of the most important sectors for India's economic growth is the Micro, Small, and Medium-Sized Enterprises (MSMEs) sector, especially in light of the COVID-19 pandemic's difficult circumstances, which led to the Central Government's implementation of specific financial stimulus programs for this industry.

The Micro, Small and Medium Enterprises Development Act of 2006 (the "Act") governs MSMEs which increases the scope of Mediation for resolution of disputes under MSMEs.

However in case of BSNL vs. Maharashtra Micro and Small Enterprises, the Bombay High Court found that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. Further, the Court found that we find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. The court found that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7 (1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. The court, thus found that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect.

CONCILIATION PROCEEDINGS

Part III of The Arbitration and Conciliation Act, 1996 contains the law pertaining to conciliation. Conciliation proceedings are covered in Sections 62 to 79.

Introduction

Conciliation is a non-adjudicatory alternative dispute resolution procedure that is governed by the terms of the Arbitration and Conciliation Act, 1996, according to Wharton's Law Lexicon.

Conciliation Proceedings Process

Step 1.

Beginning of conciliation process

Step 2.

Appointment of Conciliators

Step 3.

Furnishing written Statements by both parties

Step 4.

Availability of Administrative Help

Step 5.

Conducting Conciliation Process

Step 6.

Submission of Settlement Agreement or Failure Report

1. **Step 1: The first step is to start the conciliation process.**

   The start of the proceedings is discussed in Section 62 of the legislation. Either party must send the other party a written invitation before the conciliation proceedings can begin. The conciliation process will only proceed if the other side accepts the invitation. After 30 days of sending the invitation, it will be deemed that it was not accepted if the inviting party has not received a response.

2. **Step 2: Conciliators are appointed.**

   An arbitrator must be chosen after the parties have consented to the conciliation process. In Section 64, the appointment of arbitrators is discussed. A solo conciliator may be chosen by the parties if they so choose. Each party will choose one conciliator if the parties decide to select two conciliators. If the parties decide to nominate three conciliators, each party will choose one, and the parties may decide to appoint a third conciliator who will serve as the presiding conciliator.

3. **Step 3: The conciliator must receive a written statement.**

   The conciliator may ask each party to provide a written statement outlining the pertinent details of the current dispute. Both sides are required to provide the conciliator with written statements. The parties are also asked to send written statements to one another in addition to the conciliator.

4. **Step 4: Administrative help**

   The act's section 68 discusses administrative support. If necessary, the parties or the conciliator may ask a person or an institution to provide administrative support. The parties must agree in order to request administrative aid.

6. **Step 5: Conducting the conciliation process**

   Regarding how conciliation proceedings are conducted, see Sections 67(3) and 69(1). The conciliator has the option of communicating with the parties verbally or in writing. Additionally, he has the option of meeting the parties jointly or separately. He is free to conduct any processes that appear appropriate for the current situation.

5. **Step 6: Conciliation Agreement or Report of Failure**

   If the settlement has been arrived the parties shall enter into a Settlement Agreement. If the conciliation fails, the conciliator should send the failure report to the authority which referred for conciliation or submit the failure report to the parties in case of voluntary conciliation.

LAW RELATING TO CONCILIATION

Sections 61–81 of Part III of the Arbitration and Conciliation Act, 1996 include the laws governing conciliation processes. Conciliation, which is a voluntary process when parties in disagreement agree to resolve their issue through conciliation, is covered in Part III of the Arbitration and Conciliation Act, 1996. It is a flexible method that permits the parties to choose the venue, the date, the time, the subject matter, and the parameters of the discussions.

In conciliation, a neutral person who is trained and qualified, known as the conciliator, assists the disputing parties in understanding the issues at hand and their respective interests, with the goal of reaching a mutually acceptable agreement. The conciliation process involves discussions between the parties, which are conducted in the presence of the conciliator.

The scope of conciliation extends to a wide range of disputes, including industrial disputes, marital disputes, family disputes, and so on. This allows the parties to have greater control over the outcome of their dispute, and the results are generally more satisfactory.

Conciliation Proceedings according to the Law

Procedure for commencement of Conciliation Proceedings

Section 62 of the Arbitration and Conciliation Act, 1996 lays down the procedure for the commencement of conciliation proceedings.

According to this Section:

1. The party initiating the conciliation shall send the other party a written invitation which briefly identifies the subject of the dispute.
2. Once the other party accepts the invitation in writing, the conciliation proceedings start.
3. If the other party rejects the conciliation proceedings, there will be no conciliation.
4. If the party initiating conciliation does not receive a reply within 30 days from the date on which he send the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as rejection of the invitation to conciliate and if he so elects, he shall inform the other party in writing accordingly.

If the conciliation invitation is accepted by the other party, then, the conciliator or conciliators are appointed by the parties.

Appointment of Conciliators

According to Section 63 of the Act, there shall be one conciliator unless agreed by the parties that there shall be two or three conciliators and in case of more than one conciliators, they must act jointly. The conciliator / conciliators are appointed in accordance with Section 64 of the Arbitration and Conciliation Act, 1996.

According to Section 64 of Act the parties may agree on the name of the conciliator in case of proceedings with one conciliator.

In case of conciliation of more than one conciliator, the parties may each appoint one conciliator in case of conciliation proceedings with two conciliators.

Further, the parties may each appoint one conciliator and agree upon the name of a third conciliator who will be the presiding conciliator in case of proceedings with three conciliators.

The parties may also seek the assistance of a suitable institution or person for the appointment of conciliator or conciliators provided that the institution or individual recommend and appoint an impartial and independent conciliator.

Submissions of Statements

Upon appointment, the conciliator may request each party to submit certain statements to the conciliator.

According to Section 65 of the Arbitration and Conciliation Act, 1996:

(1) When appointed, the conciliator can ask each party to provide a brief written statement describing the general nature of the dispute and the issues involved. Each party must send a copy of the statement to the other party.

(2) The conciliator can also ask each party to submit a written statement of their position, along with facts, evidence, and any relevant documents. The party should provide a copy of this statement, along with the documents and evidence, to the other party.

(3) The conciliator can ask for additional information from either party during any stage of the conciliation proceedings if they deem it necessary.

Administrative Assistance

According to section 68 of the Arbitration and Conciliation Act, 1996, the parties involved in conciliation proceedings, or the conciliator with the agreement of the parties, can enlist the help of a suitable organization or individual to provide administrative support and make the process easier to carry out.

Communication with the Parties

According to section 69 of the Arbitration and Conciliation Act, 1996, the conciliator has the authority to communicate with the parties involved in the conciliation proceedings either in writing or orally. The conciliator can also meet with the parties together or separately based on their preference. If there is no prior agreement on the location of these meetings, the conciliator can determine a suitable location in consultation with the parties, taking into account the circumstances of the proceedings.

Information to the Conciliator

According to section 70 of the Arbitration and Conciliation Act, 1996, the conciliator is required to disclose any factual information related to the dispute that they receive from one party to the other party. This allows the other party to provide an explanation if necessary. However, if a party provides information to the conciliator under the condition that it remains confidential, the conciliator is not allowed to share that information with the other party.

Cooperation with the conciliator

According to sections 71 & 72 of the Arbitration and Conciliation Act, 1996, the parties involved in conciliation proceedings are required to cooperate with the conciliator and make a good-faith effort to fulfill their requests. This includes submitting written materials, providing evidence, and attending meetings as requested by the conciliator. Each party is allowed to provide suggestions for settling the dispute either on their own initiative or at the conciliator's invitation.

If the conciliator believes that there are potential settlement terms that may be acceptable to both parties, they will create the terms and present them to the parties for their feedback. The conciliator may adjust the terms based on the parties' observations.

If the parties come to an agreement on the settlement terms, they can create a written settlement agreement and sign it. The conciliator may assist in creating the settlement agreement if requested by the parties.

Once the parties have signed the settlement agreement, it becomes final and binding for them and anyone claiming under them.

The conciliator must authenticate the settlement agreement and provide a copy to each party.

The settlements agreement has the same effect as an arbitral award.

Confidentiality

According to section 75, The conciliator and the parties involved in the proceedings are required to keep all matters related to the conciliation confidential, regardless of any other laws in effect. This confidentiality also applies to the settlement agreement, unless disclosure is necessary for the purpose of implementing or enforcing the agreement.

Termination of conciliation proceedings

The termination proceeding can be concluded in four ways:

1. By signing of the settlement agreement by the parties on the date of the agreement
2. By a written declaration of the conciliator with the consent of the parties
3. By a written declaration by the parties addressed to the conciliator
4. By a written declaration by one party addressed to the other party and to the conciliator, if appointed.

Deposits

Sections 78 and 79 of the Act talk about costs and deposits with respect to conciliation proceedings. The conciliator will determine the costs of the proceedings, which include the conciliator's fees and expenses, expert advice, and any other related expenses. The parties will be equally responsible for these costs unless the settlement agreement specifies a different arrangement. The conciliator will provide written notice of the costs to the parties upon conclusion of the proceedings.

The conciliator may ask both parties to deposit an equal amount as an advance for expected costs, and may ask for supplementary deposits during the proceedings. If the required deposits are not paid within thirty days, the conciliator may suspend or terminate the proceedings. After the proceedings, the conciliator will account for the deposits received and return any unexpended balance to the parties.

Additional information on Appointment of Conciliator

The parties may choose a conciliator of their own choosing with unanimous consent; that is, both parties must approve the conciliator's appointment. The IDRC maintains a panel of conciliators with extensive expertise in a range of industries.

Any of the following procedures are used by the parties.

(a) The parties may choose a conciliator from the IDRC Panel themselves.

(b) Each party may select one conciliator from the IDRC Panel, and the third conciliator may be chosen by mutual agreement.

(c) The parties may seek the aid of an appropriate organization, such as the IDRC, in connection with the selection of conciliators.

In the case of family court, labour court, etc., it is required to consult with the councillor, or conciliator, who is appointed by the government for settling between the parties prior to the trial. Only on the councillor's report is the matter presented for trial.

A Conciliator in this situation shouldn't have any special qualifications, but he also shouldn't be an expert on the issue. He could be an authority in the subject area at issue, such as a civil engineer who is knowledgeable about building construction if the issue is the expense of constructing a structure.

The crucial point, which cannot be overlooked, is that conciliation is not a decision-maker; rather, he is a party who helps the parties reach an acceptable settlement, with the parties making the final call.

Roles of Conciliator

The conciliator has a special function in conflict resolution. Contrary to mediators, the conciliator participates in the resolution of the conflict. A conciliator has an active role in the conciliation and can offer solutions for the parties to consider, unlike a mediator who prefers to manage the mediation process but not the outcome. Contrary to an arbitrator, who can render a binding decision in the dispute, a conciliator can only make recommendations

that the parties may choose to accept. The main responsibility of the conciliator is to strike a balance between encouraging the parties to create their own solutions and offering useful advice and suggestions. The role of conciliator includes:

1. Hold individual meetings with each side to discuss the meeting's agenda.
2. Examine pertinent records and data to aid in making decisions.
3. Retain a neutral stance throughout a discussion to guarantee that both viewpoints are given due treatment.
4. Permit each party to come to their own decision.
5. Be ready to issue their own settlement to disagreements should the parties request it.
6. Meet with witnesses and other parties' associates to get their statements and further details about the controversy in question.
7. Based on the agreement made by the parties, write the settlement agreement documents.
8. Maintain secrecy with regard to the parties, their personal information, and the specifics of the dispute.

Conciliators have a difficult job since they must juggle numerous duties and responsibilities at once. Conciliators do not decide who is at blame, support one party over the other, or offer legal advice. The conciliator's role is to direct the parties' attention to potential solutions and to promote dialogue about them. The finest mediators will make recommendations that inspire additional discussion and help the parties reflect more deeply on what they want and need from the settlement. Parties can reach a settlement with the aid of conciliators in a way that makes everyone feel as though their objectives were met.

Responsibilities of a Conciliator

Some important responsibilities of a conciliator are:

1. **Neutral:** Playing the role of a neutral is one of the most crucial responsibilities of a conciliator. A conciliator is not allowed to favour one side over the other or imply that one has a stronger case. Being impartial helps to preserve the validity of the recommendations made by a conciliator and makes sure that both parties are completely comprehended and accepted. Additionally, knowing that their positions will be respected makes it easier for the parties to feel at ease discussing them with the conciliator.
2. **Authority:** The parties and the procedure are both under the conciliator's authority. This gives the parties a point of reference and enables them to concentrate on the problems at hand rather than the negotiation's course of action. The parties can trust the conciliator's recommendations since they know that he or she is in charge of bringing about a settlement thanks to this authority.
3. **Experienced:** Conciliators frequently have some background in the issue they are helping to resolve. Because the parties perceive the conciliator as having more expertise and experience with the subject matter, this adds another layer to the idea of authority. In turn, this fosters greater confidence between the parties and the conciliator.
4. **Intuitive:** A significant portion of the conciliation process depends on the conciliator accurately identifying the parties' wants and interests, which the parties may not even completely recognize themselves. As a result, the conciliator will be able to help the parties relate to one another and cooperate more effectively.
5. **Creative:** The conciliator must utilize creativity while presenting proposals to the parties for how to

settle the conflict. Conciliators are intuitive, therefore they will pick up on factors that may aid in settling that the parties themselves might not even be aware of. This, together with creativity, enables the conciliator to come up with fresh ideas for how to assist the parties in reaching a resolution and moving on.

6. **Relational:** Because the goal of conciliation is to create a solution to the dispute while allowing the parties to maintain or mend their relationship, a conciliator needs to be relational and understand relationships between the parties. This will allow the conciliator to make suggestions at a time when they will not disrupt the relationship between the parties. A good conciliator may also work to mend the relationship before they discuss the issues at hand because they see the value in restoring the relationship and the value that will add to the negotiations.

7. **Facilitator:** The conciliator will also see to it that the conciliation process proceeds as planned and that all parties are given an opportunity to participate fully in discussions. This might imply that the mediator halts the conversation to hear from a party that couldn't express themselves as freely.

8. **Approach the scenario without judging:** Last but not least, a conciliator must be able to approach every scenario without passing judgment on the parties or their arguments. Unlike evaluative mediators, they do not assess how the parties would likely fare in court, instead encouraging them to keep working towards a settlement.

CASE STUDY

CASE STUDY ON CONCILIATION UNDER MSME

1. A party that was dissatisfied with a decision of the MSME Council recently approached the Supreme Court. The MSME Council had issued notices and summons to Jharkhand Urja Vikas Nigam Limited ("JUVNL") on behalf of a small-scale company, but JUVNL did not respond, and the MSME Council ruled against JUVNL and directed it to make payments as claimed within 30 days. The Rajasthan High Court upheld the decision, but the Supreme Court subsequently invalidated it. The Court stated that the MSME Act mandates conciliation and that only if it is unsuccessful may the MSME Council refer the dispute to arbitration, either on its own or through another institution. During conciliation, the MSME Council cannot combine the two processes of conciliation and arbitration and issue a payment order. The Court also clarified that if a statute specifies a dispute resolution mechanism, it is compulsory and cannot be circumvented by any authority. The Court explained that there is a significant difference between conciliation and arbitration, and held that the MSME Council was required to conduct conciliation in compliance with Sections 65 to 81 of the Arbitration and Conciliation Act, 1996. If conciliation fails, the dispute will be referred to arbitration. The Court dismissed the objection that JUVNL's remedy was to apply for setting aside the MSME Council's decision as an arbitral award. The Court held that the MSME Council's decision was made without recourse to arbitration and in violation of the provisions of the Arbitration and Conciliation Act 1996, and therefore it was not an arbitral award, and JUVNL did not need to take steps to set it aside.

2. Two MSMEs were involved in a commercial disagreement in which one claimed the other had not timely delivered the items that had been agreed upon. Delly Ltd. is a performance silicone products manufacturer for the Indian and global markets offering over 80 high performance products across sectors such as agriculture, phamaceuticals, personal care, petrochemicals, construction, textiles, industrial/ distillery etc. On other hand, SFS Ltd. is a manufacturer of screws and automotive parts. The company manufactures a wide range of industrial set up for spherodised annealing and wire-drawing to be able to provide desired mechanical properties for machining facilities. The manufacturing plants are equipped with CNC machines, vertical milling machine, heat treatment line, PLC controlled Surface treatment facility etc.

They both had an agreement for the supply of material but the SFS Ltd. made a delay in providing the material to Delly ltd. which caused significant loss to the complainant company. The Complainant company filed a complaint before MSME Development Institute (MSME-DI), a government agency accountable for resolving disagreements related to MSMEs.

A mediator was assigned by the MSME-DI to mediate a meeting between the parties. The conciliator assisted the parties in identifying the underlying problems and difficulties during the meeting and in exploring alternative solutions that would be agreeable to both parties.

The parties arrived at a settlement agreement over multiple rounds of negotiation. The agreement laid forth the conditions for the delivery of the products and the payment schedule, both of which were intended to make up for the complainant's losses as a result of the delay.

3. ABC Pvt. Ltd. Is a micro-enterprise produces handicrafts as its primary line of company. They sent a shipment of handicrafts to XYZ Exporters, a significant business. However, XYZ Exporters put off paying for the shipment, which put ABC Pvt. Ltd. in a precarious financial situation. Before the Micro and Small Enterprises Facilitation Council (MSEFC), ABC Pvt. Ltd. submitted a claim for the collection of their unpaid debts. The parties must take part in conciliation proceedings, the MSEFC ordered.

The MSEFC appointed a mediator for the settlement of dispute. After numerous rounds of negotiations with each party, the mediator was able to persuade XYZ Exporters to pay the unpaid balances with interest in accordance with the terms of the contract.

Additionally, the mediator assisted both sides in coming to an agreement about upcoming commercial transactions. Therefore, ABC Pvt. Ltd. consented to provide the handicrafts to XYZ Exporters on credit, subject to the payment being paid within a predetermined timeframe. In order to maintain a stable cash flow, XYZ Exporters also promised to give ABC Pvt. Ltd. frequent business orders. The parties' disagreement was successfully resolved through the conciliation process.

LESSON ROUND-UP

- Due to the increasing burden on the civil court, various legislations provide that the disputing parties must attempt to resolve their issues through conciliation and mediation before invoking arbitration or approaching the civil courts. This results in reducing the burden of the civil courts and is time effective at the same time
- India has a tradition of employing "Panchayat," or elder-led conciliation or mediation, to resolve disputes even if there is no formal law. Many of the choices made during this process were enforceable in order to show respect for the elders.
- According to Wharton's Law Lexicon, conciliation is a non-adjudicatory alternative dispute resolution process which is governed by the conditions of the Arbitration and Conciliation Act, 1996
- Voluntary conciliation is when the parties willingly engage to settling their dispute. Voluntary conciliation is also called as formal conciliation.
- One of the most important sectors for India's economic growth is the Micro, Small, and Medium-Sized Enterprises (MSMEs) sector, especially in light of the COVID-19 pandemic's difficult circumstances, which led to the Central Government's implementation of specific financial stimulus programs for this industry.

- Sections 61–81 of Part III of the Arbitration and Conciliation Act, 1996 include the laws governing conciliation processes. Conciliation, which is a voluntary process when parties in disagreement agree to resolve their issue through conciliation, is covered in Part III of the Arbitration and Conciliation Act, 1996. It is a flexible method that permits the parties to choose the venue, the date, the time, the subject matter, and the parameters of the discussions
- According to Section 63 of the Act, there shall be one conciliator unless agreed by the parties that there shall be two or three conciliators and in case of more than one conciliators, they must act jointly.
- The parties may choose a conciliator of their own choosing with unanimous consent; that is, both parties must approve the conciliator's appointment. The IDRC maintains a panel of conciliators with extensive expertise in a range of industries.
- Conciliators have a difficult job since they must juggle numerous duties and responsibilities at once. Conciliators do not decide who is at blame, support one party over the other, or offer legal advice.

GLOSSARY

Small Enterprises: Small Enterprises are enterprises with an investment of less than Rs. 10 crore and turnover less than Rs. 50 Crore.

Medium Enterprises: Medium Enterprises are enterprises with an investment of less than Rs. 20 crores and turnover up to Rs.100 Crore.

Micro Enterprises: Micro Enterprises are enterprises with an investment of less than Rs. 1 crore and turnover less than Rs. 5 Crore.

Voluntary Conciliation: It refers to a process where a lawyer and their client meet with a conciliator present to discuss and attempt to resolve an issue

Involuntary Conciliation: It involves the resolution of disputes between a lawyer and their client through electronic media, such as phone calls, emails, or written notices.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Define Conciliation. Describe its Nature and modes with Illustration.
2. How the Conciliation is necessary for the growth of MSME sector. Briefly explain.
3. Describe the process of Conciliation Proceedings.
4. Write short notes on
    - Administrative Assistance under conciliation
    - Deposits under conciliation
5. Explain the roles and responsibilities of the Conciliator.

LIST OF FURTHER READINGS
• Arbitration and conciliation act. • MSME guidelines • Supreme court judgements.

OTHER REFERENCES (Including Websites / Video Links)
• https://www.jstor.org/ • https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf • https://www.indiacode.nic.in/bitstream/123456789/2013/3/A2006-27.pdf

Conciliation Proceedings and International Perspective of Conciliation

Lesson 12

KEY CONCEPTS

■ Process during Conciliation Proceedings ■ Terms of Settlement ■ Conciliated Settlement Agreement ■ Conciliation Clause/Agreement

Learning Objectives

To understand:

- Conciliation Process
- Role, Responsibilities and Appointment of Conciliator
- Drafting of Settlement Terms
- Drafting of Conciliation Clause/Agreement
- Law relating to Conciliation
- Practical aspects of Conciliation
- Position of Conciliation as Dispute Resolution System Internationally
- International Rules of Conciliation

Lesson Outline

- The process during Conciliation and Procedural Aspects
- Appointment, Roles and Responsibilities of Conciliator
- Drafting terms of Settlement under Conciliation
- Status and Effect of Settlement Agreement
- Drafting of Conciliation Clause/Agreement
- Sections relating to Conciliation under Arbitration and Conciliation Act, 1996
- Comparative Study of Conciliation
- International Rules on Conciliation
- Case Studies on International Conciliation
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

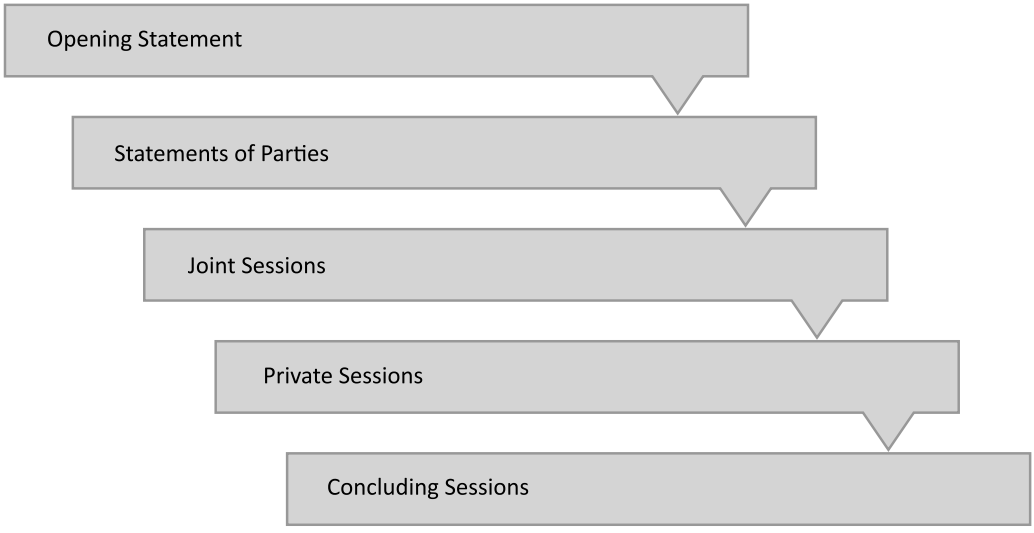
- Arbitration and Conciliation Act, 1996
- Indian Contract Act, 1872
- Negotiable Instruments Act, 1881

[1]THE PROCESS DURING CONCILIATION AND PROCEDURAL ASPECTS

Conciliation as a process is in which the parties to a dispute with the aid of conciliator identify the issues and attemot to find out mutually acceptable solution. The Conciliator can *inter alia* do any of the following:

1. Give advice on the probable solution.
2. Offer opinion of the facts.
3. Give advice on non legal consequences
4. Prepare the settlement agreement

PROCESS DURING CONCILIATION



The process of conciliation can include the following steps:

Step 1: Opening Statement

During the proceedings, the conciliator explains the purpose of conciliation and the rules to be observed during the conciliation proceedings.

Step 2: Statements of Parties

After the opening statement, each party presents the dispute from their perspective. At this stage, the parties can also suggest the options for resolution of the dispute.

Step 3: Joint Sessions

After the Statement of Parties, Joint Sessions are conducted in which the parties negotiate for arriving at a solution. Negotiation Strategies are explained in Lesson no. 14 of this study material.

1. Source: https://www.aat.gov.au/AAT/media/AAT/Files/ADR/Conciliation-process-model.pdf

Step 4: Private Sessions

If required, the conciliator may conduct private meetings with individual parties. In these meeting, the conciliator may comment on the possible outcome, consequence of non-settlement and strength and weaknesses of the parties.

Step 5: Concluding Sessions

At the last stage, concluding sessions are conducted. In these concluding sessions, the conciliator explains the settlement arrived in case all the parties agree for mutual settlement or give statements relating to the failure of conciliation proceedings.

APPOINTMENT, ROLES AND RESPONSIBILITIES OF CONCILIATOR

Appointment

A conciliator is tasked with assisting two or more parties in reaching a settlement. The provisions relating to appointment of Conciliator has been provided under Section 64 of Arbitration and Conciliation Act, 1996.

Subject to provisions as explained in the following paragraph, the appointment of the conciliator can be as follows:

(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.

However, the above is subject to that the 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:

Further, 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.

Roles and Responsibilities of Conciliator

Section 67 along with other provisions of the Arbitration and Conciliation Act, 1996 specifies the provisions relating to the Role and Responsibilities of Conciliator in the conciliation proceedings. The roles and responsibilities of conciliator are as under:

1. **Assistance:** The most important role of conciliator is to assist the parties to reach the amicable solution. It is duty of conciliator to guide the parties wherever they require. The conciliator can advise when the parties are stuck over a point.
2. **Being independent and Impartial:** The conciliator shall at all the times be independent and Impartial. He should not be in favour of one party or against the other. He can give the suggestions impartially.
3. **Objectivity:** A Conciliator should focus on the objective of the conciliation proceedings as decided by the parties. He should not deviate from the purpose of conciliation proceeding.
4. **Fairness:** While advising, he should give fair advices that are beneficial for both the parties.

5. **Justice:** ADR proceedings are alternate to judicial proceedings, the purpose of which are to give justice to the parties. Therefore, while directing the parties towards a mutually acceptable solution, a conciliator should attempt that Justice has been done to both the parties.
6. **Consideration to Rights and Obligations:** During the conciliation proceedings, a conciliator should give proper considerations to the rights and Obligation of the Parties. For example: If Specific Relief Act obliges a party to perform a duty, due consideration be given to that obligation.
7. **Usage and Business Practices: A conciliator should** give due consideration to the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
8. **Conducting Conciliation Proceeding according to the wishes of the Parties: A** conciliator should conduct the conciliation proceedings in such a manner taking into account the circumstances of the case, the wishes the parties, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
9. **Making Proposal:** The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.
10. **Arranging Administrative assistance**: In order to facilitate the conduct of the conciliation proceedings, the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.
11. **Communication between conciliator and parties** According to section 69 of the Arbitration and Conciliation Act, 1996, the conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

DRAFTING TERMS OF SETTLEMENT UNDER CONCILIATION

The role of the conciliator is limited to guiding the parties towards the settlement but the reaching out to the mutually acceptable solution is totally dependent on the parties. The conciliator assists the parties to reach to the solution according their interests and needs. He also explore and suggest potential solutions to the dispute. There cannot be a standard format for preparing the settlement as each case is different in the domain of conciliation. Therefore, the settlement agreement should be drafted with due care and attention ensuring all the aspects of the proceedings have been taken care of and nothing is left out. A settlement agreement is arrived after negotiations between the parties.

A Settlement Agreement should satisfy all the requirement of the Indian Contract Act, 1872. It is a binding contract in terms of section 2(h) of the Contract Law.

Section 73 of the Arbitration and Conciliation Act, 1996 gives an idea about the procedure that may be followed for arriving at the Settlement Agreement. The following procedure can be followed:

Step 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.

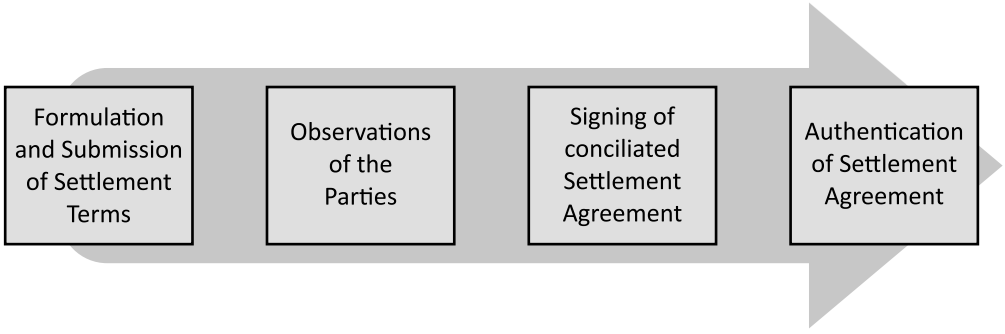
Step 2: After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Step 3: 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.

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

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

Arriving at the Settlement Agreement



Points to remember while Drafting Settlement Agreement

A draftsman while drafting a settlement agreement along with the other essential conditions of an agreement should also take into consideration the following points:

1. **Identifying Rights and Responsibilities of each party:** Attempt should be made to draft an agreement that is exhaustive with respect to all the rights and responsibilities agreed between the parties being mentioned thereunder.
2. **No admissions:** There is no specific need of mentioning of admission of a fault by the parties. Therefore, the language of the settlement agreement should not be written in such a manner as it seems like an admission of a fault.
3. **Condition under Section 73 of the Act:** The draftsman should take into consideration and include all the conditions provided under section 73 of Arbitration and Conciliation Act, 1996.
4. **Secrecy:** According to Section 75 of Arbitration and Conciliation Act, 1996, notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement. From this provision, it is clear that confidentially is of utmost importance for conciliation proceedings.
5. **Procedure in case of breach:** In case a party breach it is advisable to make provision relating execution of settlement agreement, Costs of Proceeding, Fees of Conciliator etc.

SETTLEMENT AGREEMENT

The settlement agreement is made on this _____ day of _____, 20____at _____.

Between

_____ herein after referred to as 'the 1st party' of the one part

and

_____ herein after referred to as '2nd Party' of the other part.

WHEREAS

1. There was a dispute between the 1st party and party 2nd relating to the alleged defective goods provided by 2nd Party to the 2nd Party.
2. The parties had agreed to refer the dispute to a panel of conciliators.
3. _____
4. The parties have settled the dispute with the assistance of the conciliator.

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

1. 1st Party shall return the alleged defective goods as mentioned under Annexure A to this agreement to the 2nd Party on or before _____
2. The 1st party shall make the payment through electronic transfer on or before _____.
3. Any other terms_____
4. _____
5. _____
6. _____
7. This Agreement shall be binding upon on both the parties and their respective heirs, successors, assigns and representatives.
8. This Agreement shall not be produced as an evidence except for the purpose of enforcement of its terms and shall not be treated as admission of a fault by any of the parties.
9. Notwithstanding anything contained in any law for the time being in force other than Arbitration and Conciliation Act, 1996, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.
10. In case of breach of its terms by any of the party, this 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.
11. The parties hereby agrees that irrespective of the status of this settlement agreement, the cost of the conciliation proceedings and fees of the conciliator amounting to Rs. _____ and Rs. _____ respectively shall be paid by both the parties in the ratio of 50:50.
12. _____
13. _____

IN WITNESS WHEREOF the parties hereto have hereunto set and subscribed their respective hands and seals the day and year first hereinabove written.

_____ _____

Signed by the above named 1st party — Signed by the above named 2nd Party

(Name, Signature and Details) — (Name, Signature and Details)

Witnesses

1. _____

   (Name, Signature and Details)

2. _____ _____

   (Name, Signature and Details) — Authenticated by (Conciliator) _____

STATUS AND EFFECT OF SETTLEMENT AGREEMENT

According to section 74 of the Arbitration and Conciliation Act, 1996, 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. The essential ingredients of Section 30 of Arbitration and Conciliation Act, 1996 are as under:

1. The arbitral tribunal can use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement of the disputes.
2. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings.
3. On termination of proceeding and if requested by the parties and not objected to by the arbitral tribunal, the tribunal can record the settlement in the form of an arbitral award on agreed terms.
4. An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
5. An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Accordingly, the settlement agreement shall have the same status and effect as any other arbitral award.

HOW THE AWARDS ARE ENFORCED

The provisions relating to enforcement of Awards are provided under section 36 of the Arbitration and Conciliation Act, 1996. Section 36 is reproduced as under:

(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

Provided further that where the Court is satisfied that a *Prima facie* case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015

CASE STUDY

Case Study on Domestic Conciliation

In a matter between 2 companies, the decree Holder was an spot exchange which provide an electronic platform for the willing buyers and willing sellers to trade in commodities. The Judgment Debtors were the trading members of the Decree Holder. In course of their dealings and trading in commodity like sugar done by the Judgment Debtors on the electronic platform of the Decree Holder, as on __ .07, 2013 they incurred a liability of Rs. _____ Crores towards the Decree Holder.

Owing to the failure of the Judgment Debtors to clear their aforesaid liability the Judgment Debtor were declared as "defaulter" in terms of Bye-Laws of Decree holder.

Decree Holder and Judgment Debtors initiated a conciliation process under the Arbitration and Conciliation Act, 1996 and appointed a Conciliator under Section 73 of the Arbitration and Conciliation Act, 1996.

During the Conciliation Process, Judgment Debtors acknowledged their liability and entered into a Settlement Agreement dated ____.10, 2013 ("Settlement Agreement") whereby they undertook to pay an amount of Rs. _____ Crores as Settlement amount to the Decree Holder. The Settlement Agreement was signed by Judgment Debtors. This Settlement Agreement is equivalent to a settlement award as contemplated under Section 74 of the Act. By way of this settlement agreement the Judgment Debtors agreed to pay the settlement amount of Rs._____ Crores to the Decree Holder in certain installments.

The Judgment Debtors paid a total amount of Rs._____ Crores from time to time from November 2013 to October 2014 towards its admitted liability at that point in time as per the Settlement Agreement but then defaulted in the payment of other installments. In fact the other post dated cheques issued by the Judgment Debtors got dishonoured for the reason "Funds Insufficient" whereafter the Decree Holder filed the complaint cases under Negotiable Instruments Act, 1881 for dishonor of cheques against the Judgment Debtor.

Civil suits were filed against the Judgment Debtors by the Decree Holder for the recovery of the defaulted amount of Rs. _____ Crores. In the said civil suit various notice of motions were filed and orders were passed against the Judgment Debtors from time to time.

The Hon'ble High Court of Judicature at Bombay disposed of the suits. The Hon'ble High Court observed that" ..... A settlement agreement between the parties arrived at under Section 73 of the Arbitration and Conciliation Act has been signed by the parties and authenticated by the conciliator. The agreement has an effect of an arbitral award. Since the controversy in the present suit has thus been adjudicated upon and disposed of in terms of the settlement agreement, it is agreed between learned counsel for all the parties that the present suit does not survive and may be disposed of; instead the Plaintiff may be permitted to apply for execution of the settlement agreement as an arbitral award".

Therefore, the proper remedy is to file an execution petition before the court having jurisdiction.

DRAFTING OF CONCILIATION CLAUSE/AGREEMENT

The Parties agree that if at any time, any Disputes (which term shall mean and include any dispute, difference, question or disagreement arising in connection with construction, meaning, operation, effect, interpretation or breach of the agreement, contract or the Memorandum of Understanding, which the Parties are unable to settle mutually), arise *inter-se* the Parties, the same may, be referred by either party to Conciliation to be conducted through a penal of 3 (three) Conciliators.

[2]MODEL CONCILIATION AGREEMENT

This agreement made this _____ day of _____, 20_____

BETWEEN

_____ (Full description and address of the Party to be given) of the ONE PART

and

_____ (full description and address of the Party to be given) of the OTHER PART.

WHEREAS certain disputes and differences have arisen and are subsisting between the aforesaid parties relating to _____(details of contract to be given).

AND WHEREAS the Parties agree to submit their dispute(s) for an amicable settlement in accordance with the _____ Conciliation Rules;

Now the parties hereby agree as follows:

1. The Parties agree to resolve their dispute(s) by Conciliation/Mediation in accordance with the _____ Conciliation Rules
2. The parties shall mutually appoint the Conciliator.
3. The Conciliation shall be administered by the in accordance with the Conciliation Rules.
4. The place of Conciliation shall be _____

In Witness Whereof, this Agreement has been signed this_____day of_____20_____at_____, By

1. _____for and on behalf of_____
2. _____for and on behalf of _____

Note: The parties may :- (a) provide for qualification(s) of the Conciliator(s) including, but not limited to, language, technical experience, nationality and legal experience; (b) specify the language for the conduct of Conciliation.

SECTIONS RELATING TO CONCILIATION UNDER ARBITRATION AND CONCILIATION ACT, 1996 (THE ACT)

1. Section 61 provides the provisions relating to Application and scope.
2. Section 62 provides the provisions relating to Commencement of conciliation proceedings.
3. Section 63 provides the provisions relating to Number of conciliators.
4. Section 64 provides the provisions relating to Appointment of conciliators.
5. Section 65 provides the provisions relating to Submission of statements to conciliator.
6. Section 66 provides the provisions relating to Conciliator not bound by certain enactments.
7. Section 67 provides for Role of conciliator.
8. Section 68 provides the provisions relating to Administrative assistance by a suitable institution or person.
9. Section 69 provides the provisions relating to Communication between conciliator and parties.
10. Section 70 provides the provisions relating to Disclosure of information by the conciliator.

2. https://icadr.telangana.gov.in/PdfFiles/MenuPdfs/MODELCONCILIATIONMEDIATIONAGREEMENT.pdf

11. Section 71 makes the provisions relating to Co-operation of parties with conciliator.
12. Section 72 provides for the provisions relating to Suggestions by parties to conciliator for settlement of dispute.
13. Section 73 provides the provisions relating to Settlement agreement.
14. Section 74 provides for the provisions relating to Status and effect of settlement agreement.
15. Section 75 talks about the Confidentiality of conciliation proceedings.
16. Section 76 provides the mode in which conciliation proceedings can be terminated.
17. Section 77 provide the provisions relating to restriction and Resorting to arbitral or judicial proceedings.
18. Section 78 provides for the provisions relating to the Costs.
19. Section 79 talks about Deposits to be made by parties.
20. Section 80 provides the provisions relating to Role of conciliator in other proceedings.
21. Section 81 provides the provisions relating to Admissibility of evidence in other proceedings.

These provisions in details has been discussed in Lesson 11 of this study.

[3]COMPARATIVE STUDY OF CONCILIATION

Conciliation as method of dispute resolution has gaining its popularity as it can be an effective alternative to Arbitration. The conciliation can be said to be an effective resolution method as it is quick, Economic and mutual decision making process is appreciated in conciliation proceedings.

The Supreme Court in the case of Guru Nanak Foundation V. Rattan Singh & Sons has discussed the difficulties being faced by the parties during Arbitration Proceedings. The discussion is mentioned hereunder:

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal more effective and speedy for resolution of disputes avoiding procedural claptrap and this led to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in the courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the court been clothed with "Legalese" of unforeseeable complexity.

Conciliation as a method of dispute resolution has already developed in many economically developed countries and growing in other nations. It is necessary to study the position of conciliation in different countries.

American judicial system and Conciliation

[4]Conciliation and mediation are often used interchangeably in the American legal system. The distinction between mediation and conciliation in terms of technical or legal distinctions is quite small. The terms "mediation" and

3. Source: Conciliation as an Effective Mode of Alternative Dispute Resolving System Dr. Ujwala Shinde Principal I/C Shri. Shivaji Maratha Society's Law College Pune University Maharashtra. India; IOSR Journal Of Humanities And Social Science (JHSS) and can be accessed from the link https://ghconline.gov.in/library/document/conference2728072018/II2Conciliation%20as%20an%20Effective%20Mode%20of%20Alternative%20Dispute.PDF

4. Source: https://viamediationcentre.org/readnews/MTQ0MA==/Conciliation-practice-in-the-US-Judicial-System

"conciliation" are synonymous. In both practices, successful completion of the procedure results in a mutually agreed settlement of the dispute between the parties, though mediation is treated differently than conciliation in some jurisdictions because mediation places a greater emphasis on the neutral third party's positive role than conciliation does. However, this distinction should not be made between mediation and conciliation since the breadth of the role that a neutral third party can play is determined by the nature of the disagreement, the parties' desire, and the neutrals' expertise.

[5]Conciliation under German Law

According to Dispute Resolution – Hamburg.com, there is no explicit legal foundation for conciliation under German law. Consequently, it is up to the parties to establish and agree upon a set of guidelines that will govern the conciliation. In actuality, the conciliator or a specialised conciliation institution will normally present the parties with a set of conciliation guidelines. The conciliation guidelines of the Hamburg-Beijing Conciliation Centre, for instance.

The Main benefits according to Dispute Resolution – Hamburg.com are:

- **Conciliation ensures party autonomy.**

  The parties can choose the timing, language, place, structure and content of the conciliation proceedings.

- **Conciliation ensures the expertise of the decision maker.**

  The parties are free to select their conciliator. A conciliator does not have to have a specific professional background. The parties may base their selection on criteria such as; experience, professional and / or personal expertise, availability, language and cultural skills. A conciliator should be impartial and independent.

- **Conciliation is time and cost efficient.**

  Due to the informal and flexible nature of conciliation proceedings, they can be conducted in a time and cost-efficient manner.

- **Conciliation ensures confidentiality.**

  The parties usually agree on confidentiality. Thus, disputes can be settled discretely and business secrets will remain confidential.

Further the website states that the following steps are often included in conciliation proceedings:

- The parties will first create an agreement in which they commit to trying to resolve their issue through conciliation. Either before or after the disagreement arises, a decision can be made on such an agreement. Several organisations provide what are referred to as "model clauses," which help the parties design the conciliation agreement.
- The parties must next decide who would serve as their conciliator. The word "conciliator" is not legally protected in Germany. Therefore, in theory, anyone may mediate conflicts. Therefore, the aim is to choose a person who exemplifies the attributes necessary to aid the parties in resolving their specific conflict. The parties might choose from a number of institutions that can help them. On their websites, several of them post conciliator lists. These websites may or may not list the mentioned individuals' individual qualifications and expertise.
- The conciliator is responsible for scheduling, organising, and conducting the conciliation procedures after they have been established. Different conciliators will adopt various strategies in achieving this.

5. Source: https://www.dispute-resolution-hamburg.com/information/conciliation

This will rely on the specifics and nature of the disagreement, as well as the history and goals of the parties. At all times, the conciliator will work to make sure that the procedures go as planned for all parties.

- The conciliator, like a mediator, will work to get the parties to agree on a resolution. The conciliator will be ready to offer a non-binding resolution suggestion to the parties, nevertheless. The proposal is open for acceptance or rejection by the parties. It will normally be documented as the settlement agreement if they accept the offer. The settlement agreement is not enforceable by itself, but it can be made enforceable in Germany by having it notarized and/or in other nations by having it included in an arbitral ruling.

[6]Conciliation under Canadian Law

The Federal Mediation and Conciliation Service (FMCS) was established to provide dispute resolution and relationship development assistance to trade unions and employers under the jurisdiction of the Canada Labour Code (Code). The Code governs federally regulated employees in key sectors of the economy.

The FMCS offers employers and unionized employees:

dispute resolution support through the services of conciliation and mediation officers—third parties whose mandate is to assist both parties in reaching a mutual agreement; and

relationship development services that are intended to prevent disputes before they occur. This is achieved by training workshops on collective bargaining and joint conflict resolution. The FMCS also provides grievance mediation services. These are all ways of resolving disagreements and improving industrial relations during the term of the collective agreement.

The FMCS also plays an important role in another method of conflict resolution: arbitration. It coordinates the appointment of arbitrators, adjudicators and referees to resolve certain types of disputes governed by the Code, such as grievances, unjust dismissal complaints and wage recovery appeals. The FMCS also coordinates appointments under the Wage Earner Protection Program Act (WEPP Act).

In Canada, the use of neutral third parties (conciliation and mediation officers) appointed by the government to resolve labour relation disputes dates back to the Conciliation Act of 1900. The Conciliation Act created the federal Labour Department with a mandate to assist unions and employers in the prevention and resolution of labour disputes.

Over the years, the FMCS and its forerunners have provided employers and unions with professional skills essential to the resolution of their collective bargaining disputes.

Conciliation and mediation: During fiscal year 2016 to 2017, conciliation and mediation officers from the FMCS dealt with 180 collective bargaining disputes under the Code. Ninety-seven percent of the disputes that were settled during the year were resolved without a work stoppage. Just less than one hundredth of one percent (0.01%) of all available work time was lost due to work stoppages during the same period. These negotiations involved companies in most of the industrial sectors covered by Part I of the Code and resulted in major agreements in such industrial sectors as road, air, rail and marine transportation, grain handling, broadcasting and communications.

6. Source: Website of Government of Canada and can be accessed from the link: https://www.canada.ca/en/employment-social-development/services/labour-relations/reports/2017-federal-mediation-conciliation.html

INTERNATIONAL RULES ON CONCILIATION

[7]United Nations Commission on International Trade Law (UNCITRAL)

Model Law on International Commercial Arbitration Conciliation Rules

Article 1: Application of the rules

Article 2: Commencement of conciliation proceedings

Article 3: Number of conciliators

Article 4: Appointment of conciliators

Article 5: Submission of statements to conciliator

Article 6: Representation and assistance

Article 7: Role of conciliator

Article 8: Administrative assistance

Article 9: Communication between conciliator and parties

Article 10: Disclosure of information

Article 11: Co-operation of parties with conciliator

Article 12: Suggestions by parties for settlement of dispute

Article 13: Settlement agreement

Article 14: Confidentiality

Article 15: Termination of conciliation proceedings

Article 16: Resort to arbitral or judicial proceedings

Article 17: Costs

Article 18: Deposits

Article 19: Role of conciliator in other proceedings

Article 20: Admissibility of evidence in other proceedings

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

7. Source: Reproduced from the website of SICE – Foreign Trade and Information System and can accessed from: http://www.sice.oas.org/dispute/comarb/uncitral/con_rule.asp

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(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. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. 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.

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.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his 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 sends a copy of his statement 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.

*In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, 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 between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator

subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits 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 draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

**The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

CONFIDENTIALITY

Article 14

The Conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the 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.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The cost of any assistance provided pursuant to articles 4, paragraph (2)(b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

CASE STUDY

[8]CASE STUDIES ON INTERNATIONAL CONCILIATION

"NICA and dispute owner- strike committee" (selection of conciliator by parties, strike threat, failed dialogue/communications, attempt of one party to transform conciliation into arbitration, lack of understanding of the conciliation process)

The collective labour dispute arose in a profitable private company working primarily for the foreign market and employing around 120 people, mostly women. There was one trade union in the company. At the time of the commencement of the conciliation procedure, the collective labour agreement had expired for several months. The employer owned another company with a similar object of activity where there was no trade union and no collective labour agreement was concluded.

People Involved

The employer and a Strike Committee were the disputing parties. The Strike Committee was supported by the company based trade union. In the negotiations held at the beginning of the dispute the employer was represented by the Human Resources director and the Production manager. The Chairman of the Strike Committee and experts from the branch trade union federation represented the employees' side.

How the Conciliator became Involved

Both parties requested NICA[9] to initiate a conciliation procedure and they mutually selected a conciliator. The conciliator was a well-known public person, an ex-minister of labour and social policy. Both the employer and the trade unions (at the company and branch levels) had previous contacts with him related to other issues. The conciliator's selection was a result of the personal qualities of the conciliator and the expectations that he would be the one able to solve the problem.

The Issue in Dispute

The collective labour dispute arose over the changes introduced unilaterally by the employer to the wage fixing system in the company, which led to decrease in net wages.

During the conciliation procedure, the conciliator determined that one reason for the collective labour

8. Source: https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_486213.pdf

9. Source: National Council for Conciliation and Arbitration of Bulgaria with the legal competency to provide conciliation and arbitration services.

dispute was the decrease by 10-15 % of net wages through the introduction of the new pay system. The employer claimed that the changes were made as a sanction for production loss-making. On their side, the workers did not deny such liability but claimed it should be individual and not collective.

Another specific reason was the tension in the company due to the failed direct dialogue between the employees and the trade union that represented them, on one hand, and the employer (owner), on the other. The trade union had made efforts to restore direct dialogue with the owner with the support of the branch federation, but the owner mandated the Production managers and the Human Resources director to represent him in negotiations.

During the first meeting of the conciliator with the disputing parties, the representatives of the branch union federation tried to take over the conciliator's role. On the one hand, these representatives wanted to negotiate on behalf of the Strike Committee and on the other, they tried to assimilate the role of the conciliator to that of an expert and at the same time to transform him into an arbitrator of the dispute. The qualities and the personality of the conciliator prevented that to happen.

An Outline of the Process

The procedure had some specifics that challenged the rules for conciliation established by NICA. Since the beginning it became clear that the disputing parties agreed to start negotiations with the participation of the conciliator one month after their application was registered with NICA and the procedure was put in motion.

The conciliator decided to use the technique of direct contact between the parties – everybody else, but the owner and the Strike Committee, left the room. After several hours, the employer and the Strike Committee expressed to the conciliator their readiness to conclude an agreement. Later the owner - employer told the conciliator that during the "tête-à-tête" meeting with the representatives of the employees they discussed a range of issues, not only the subject of the dispute. They discussed also problems and relationships in the enterprise the employer was not aware about until then.

Outcomes of the Conciliation

As a result of the conciliation the disputing parties signed an agreement, which covered in principle all disputing issues. After conciliation and until the signing of the agreement, the wage cut decreased from 10-15% to 2%. An important result was the fact that the employer agreed to negotiate a new collective labour agreement, which was signed few months later and, according to NICA records, has since then been renewed annually.

"Dispute in private transport company" (compulsory conciliation, personal interest of representative, value of questioning, commitment to conciliation process)

The People Involved

A private transport company and one union representing approximately 150 workers.

How the Agency/Conciliator became Involved in the Dispute

The parties had a company-union agreement which required that any dispute not resolved following the decision of an internal tribunal would be referred by the conciliation service to the labour court at the request of the parties. In the jurisdiction in question, a conciliator can only refer a case to the labour court once they are satisfied that they have done everything they can through the process of conciliation to resolve the matter.

The company and union approached the conciliation service and requested a referral of the case to the labour court. The conciliator assigned to the case told the parties that they would have to attend conciliation and work in good faith within the process before any such referral could be made. The parties expressed their dissatisfaction and frustration with the situation but nonetheless agreed to attend.

The Issue in Dispute

The issue presented at conciliation was a dispute over proposed roster changes.

An Outline of the Process and its Outcome

Conciliation began with a brief Joint Meeting and then continued with Separate Meetings. During the Separate Meetings the conciliator discovered that the attitude to the change in rosters was being affected by concerns that the change was being put in place in order to reduce the number of supervisors. The shop steward representing the staff was a supervisor and outlined the concerns of his fellow supervisors in relation to the roster changes. It became clear through the meetings that management had not been aware of these concerns and that the workers had not previously voiced them. After the first day of conciliation the conciliator asked the parties to reflect on the new developments and return. At the next day of conciliation the parties reached an agreement on rosters and the company made a commitment that new rosters would not be used to reduce the number of supervisors.

"LRC and reforming pensions at the Bank of Ireland" (parties stuck in their positions, strike threat, conciliation as follow up to labour court recommendation)[10]

The Bank of Ireland is the premier financial institution in the country. In October 2006, the Bank announced that it was going to introduce a new 'hybrid' pension scheme for new employees. Whereas its longstanding defined benefit (DB) pension scheme would remain for existing employees, the new scheme would combine the DB system with elements of what is known as a defined contribution (DC) scheme.

People Involved and Issue in Dispute

The main unions recognised at the Bank, the IBOA and UNITE, reacted with fury to this announcement. It argued that as one of the most successful and profitable companies in the country, the Bank could easily afford to retain its DB scheme for new staff. It also argued that the Bank's unilateral decision was a breach of existing negotiation procedures and established collective agreements. The unions declared in response that it would ballot members for strike action.

How the Conciliator became Involved

In an effort to avert industrial action, the dispute was referred by the trade unions to the LRC.

An Outline of the Process

After two Conciliation Conferences, it was evident to LRC that the views of both sides were so entrenched that the only viable avenue open was to pass the case to the Labour Court, the country's main arbitration and adjudication body. The Labour Court after a complex investigation and hearing issued a Recommendation which criticized the Bank for not using its established internal negotiating machinery to seek changes to its DB pension scheme. At the same time, the Recommendation acknowledged that management had legitimate concerns about the long term viability of DB pension scheme and that the unions had equally valid concerns about the future livelihoods of their members. The Court recommended that the parties get round the negotiating table to thrash out their differences.

Both parties accepted the Labour Court's Recommendation. They also agreed to use the LRC as the thirdparty to oversee the negotiations. The Deputy Director of the Conciliation Division took responsibility for the case. Before starting negotiations proper between the parties, he spent considerable time with both parties not only to get familiar with their positions, but to get a sense of the reservation points of both sides

10. Source: Resolving workplace disputes in Ireland: The role of the Labour Relations Commission, Paul Teague, 2013, Working Paper No. 48, ILO, Geneva, 2013.

the point at which a party is unlikely to go. In addition, he networked widely to see how similar disputes about pensions were addressed in the financial services industries and closely related sectors.

This preliminary work was deemed essential by he for two reasons. One was that it allowed him to get an insight into key issues such as the desire on both sides to resolve the dispute amicably, whether a negotiated solution could be framed as a win-win settlement and whether the LRC would ultimately need the assistance of another dispute resolution body like the Labour Court to secure a settlement. In other words, he was able to develop a roadmap for the negotiations. The other reason was that it allowed him to set the agenda for the negotiations in a manner so that difficult, contentious matters were not discussed at the beginning.

Negotiations started and unsurprisingly proved difficult. But the LRC team worked continuously with each side to ensure that both remained committed to achieving a negotiated solution even though discussions on a particular did not fully go their way.

Outcome of Conciliation

Finally, a settlement was reached which involved the Bank agreeing to introduce a revised hybrid pension plan at a later date. The union was not fully happy having to give up the DB scheme for new entrants, but calculated that it would unable to negotiate a better deal in the circumstances.

LESSON ROUND-UP

- Conciliation as a process is in which the parties to a dispute with the aid of conciliator identify the issues and attempt to find out mutually acceptable solution.
- There cannot be a standard format for preparing the settlement as each case is different in the domain of conciliation. Therefore, the settlement agreement should be drafted with due care and attention ensuring all the aspects of the proceedings have been taken care of and nothing is left out.
- Section 67 along with other provisions of the Arbitration and Conciliation Act, 1996 specifies the provisions relating to the Role and Responsibilities of Conciliator in the conciliation proceedings.
- According to section 74 of the Arbitration and Conciliation Act, 1996, 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.
- The Parties agree that if at any time, any Disputes (which term shall mean and include any dispute, difference, question or disagreement arising in connection with construction, meaning, operation, effect, interpretation or breach of the agreement, contract or the Memorandum of Understanding, which the Parties are unable to settle mutually), arise *inter-se* the Parties, the same may, be referred by either party to Conciliation to be conducted through a penal of 3(three) Conciliators.
- The role of the conciliator is limited to guiding the parties towards the settlement but the reaching out to the mutually acceptable solution is totally dependent on the parties.
- The Parties agree that if at any time, any Disputes (which term shall mean and include any dispute, difference, question or disagreement arising in connection with construction, meaning, operation, effect, interpretation or breach of the agreement, contract or the Memorandum of Understanding, which the Parties are unable to settle mutually), arise *inter-se* the Parties, the same may, be referred by either party to Conciliation to be conducted through a penal of 3(three) Conciliators.

- Conciliation as method of dispute resolution has gaining its popularity as it can be an effective alternative to Arbitration. The conciliation can be said to be an effective resolution method as it is quick, Economic and mutual decision making process is appreciated in conciliation proceedings.
- Conciliation and mediation are often used interchangeably in the American legal system. The distinction between mediation and conciliation in terms of technical or legal distinctions is quite small.
- According to Dispute Resolution – Hamburg.com, there is no explicit legal foundation for conciliation under German law. Consequently, it is up to the parties to establish and agree upon a set of guidelines that will govern the conciliation. In actuality, the conciliator or a specialised conciliation institution will normally present the parties with a set of conciliation guidelines.
- The Federal Mediation and Conciliation Service (FMCS) was established to provide dispute resolution and relationship development assistance to trade unions and employers under the jurisdiction of the Canada Labour Code (Code).

GLOSSARY

Settlement Agreement: A settlement agreement is a legal binding document created to end a conflict between the disputed parties. A settlement agreement's goal is to prevent the opposite party from filing a lawsuit.

Conciliation: It is the process of resolving conflicts without going to court.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain the Roles and Responsibilities of Conciliator.
2. Describe the process of conciliation.
3. Draft a Conciliated Settlement Agreement. Assume necessary facts.
4. Can Conciliated Settlement Agreement be enforced in Courts? Explain.
5. Explain the position of conciliation in Canadian Law.

LIST OF FURTHER READINGS

- Handbook on Arbitration: A Practical Guide for Professionals

  – ICSI Publication

- Bare Act of Arbitration and Conciliation Act, 1996

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf
- http://www.nationalspotexchange.com/pdf/Execution-Petition.pdf

PART II

MEDIATION

Mediation: An Introduction and its Process along with Rules

Lesson 13

KEY CONCEPTS

■ Conflicts ■ Development of Mediation ■ Types of Mediation ■ Mediation Process ■ Pre-litigation mediation ■ Private Mediation vs. Court Annexed Mediation ■ Role of Judiciary in Mediation ■ Communication in Mediation ■ Settlements ■ Co-mediator

Learning Objectives

To understand:

- Meaning of conflict and its forms
- Socio Political Roots of Mediation
- Laws related to Mediation in India and internationally
- Basic understanding of Mediation and Conciliation and differences between the two concepts
- Advantages of Mediation
- Qualifications and Disqualifications of a Mediator
- The process of appointing a Mediator
- The process of Mediation and Conciliation
- Different types of Mediation
- Concept of Settlement Agreement

Lesson Outline

- Conflict
- Socio-Philosophical roots of Mediation
- What is Mediations?
- Concept of Conciliation
- Pre-litigation Mediation
- *Private Mediation* vs. *Court Ordered Mediation*
- Appointment of Mediator
- Court-ordered Mediation
- Adhoc Mediation and Institutional Mediation
- Procedure of Mediation
- Fees of Mediator and Costs
- Mediation – Role of Judiciary and Legal Status
- The Mediation Bill, 2021
- Ethics to be followed by a Mediator
- Communication in Mediation
- Negotiation in Mediation
- Settlement
- The Singapore Convention on Mediation
- Co-Mediator
- Domestic Mediation
- Mediation Clause
- Case Study & Role Play
- Lesson Round-Up
- Glossary
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REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Civil Procedure Code (CPC), 1908
- Commercial Courts Act, 2015
- Limitation Act, 1963
- The Companies Act, 2013
- Consumer Protection Act, 2019
- Indian Contract Act, 1872

CONFLICT

Meaning of Conflict

The term conflict means disagreements or differences of opinion. Conflict is central to existence of human beings. It arises from incompatible aims, attitudes, beliefs, or requirements.

Social structures, cultural interaction, and ideologies plays an important role in conflict. An individual's perception, principles, standards, ethics, and morality, are shaped by such structures and institutions. Social needs, security, status recognition, or similar factors may also influence an individual's mindset.

According to United Nations Institute for Training and Research (UNITAR) program of correspondence instructions in peacekeeping operations, Conflict is defined as the pursuit of incompatible goals by individuals or groups.

In other words, conflict situations arise when individuals or groups pursue positions, interests, needs, or values that may lead to actions that conflict with the interests, needs, and values of others while also pursuing their own goals.

A 'nested conflict' exists when hidden and exposed conflicts coexist. It usually occurs when the presented or reflected conflict is not the only factor and another factor, disguised as an exposed factor, is to blame for the conflict.

Nature of Conflict

After ascertaining the meaning of conflict, our focus shifts to the nature of conflict.

Conflicts can be categorized as expressive or non-expressive. The essential elements of an expressive conflict are anger, argument, abuse, and anguish.

A. Expressive forms of Conflict

(i) Anger

Anger can range from mild irritation to rage, and it can be triggered by a variety of factors (specific people, events, memories, or personal problems). Anger is a common and valuable emotion. According to Gary Ginter, a psychologist who specializes in anger management, there are three sources of anger: physiological, cognitive, and behavioural.

Raised voices, flashing eyes, and twisted facial expressions are common indicators of rage. When examined closely, however, anger appears to be a generated emotion rather than an instantaneous reaction. Several underlying factors influence this generation, including unmet needs, fear, social or

personal insecurities, or retaliation against any situation. As a result, we can say that anger is not limited to expressions of violence, rage, and hostility.

(ii) Argument

In the case of a conflict, an argument is defined as a quarrel or a heated exchange of words. But if viewed from a broad perspective, an argument is a statement or set of statements used to try to persuade people that your opinion about something is correct, or an argument is a discussion or debate in which several people present different or opposing viewpoints. Arguments may not always lead to negative outcomes. It is highly possible that two intellectuals can differ in opinion, with little to no loss in their composure and respect for one another. A different way of perceiving any fact, definition, or evaluation of any policy is also an argument.

(iii) Abuse

Uncontrolled rage and ignored arguments can lead to abuse. This could even be the start of hostile and aggressive behaviour in person. This is usually the result of a deep-seated high level of attachment or insecurity, and it is a severe and negative sign of underlying conflict. When there is a truly abusive situation, it is because one party is attempting to control the other through abuse. And that the party abusing or expressing aggression has feelings of ill will because the issue of conflict is not only about differences and disagreements, but also about dispossessing the other party or causing such irreplaceable harm. Abuse indicates personal grudges and a negative urge to cause damage.

(iv) Anguish

Anguish is defined as a state of agony or self-suffering manifested through a bad temper. It is a highly sensitive mode of expression, and the point of contention is frequently difficult to identify. The person may not express the accurate conflict but does express a bad temper in random situations. It basically indicated the nature of non-acceptance.

B. Non-Expressive Forms of Conflict

This is far more sensitive and difficult to identify, which may result in the conflict resolution process being delayed or even denied entirely. Silence, Avoidance and Resistance are the essential features of the non-expressive forms of conflict.

(i) Silence

Meaning of silence is forbearance from speech or noise and cessation of commination which may have a severe impact on the resolution of the conflict. Silence is observed when the party or parties ignore the fact or have little interest in prospects.

(ii) Avoidance

The dismissive approach to conflict is avoidance. Many times, parties refrain from dissenting because they are afraid of losing their relationship, upsetting the other party, or other similar reasons. The disturbing factor is avoided in the hope that it will disappear; however, such a non-engagement strategy may result in a compounding of emotions because they are repeatedly suppressed. Avoidance may also have other facets such as lack of confidence, mistrust and inability to express oneself.

(iii) Resistance

Resistance is defined by stubbornness, inflexibility, and rigidity, which leads to frustration. In this situation, a party may fail to express his dissatisfaction clearly and may remain steadfast in his position, thereby avoiding the interests of the other party. This could be an impediment because the individual does not attempt to communicate.

SOCIO- PHILOSOPHICAL ROOTS OF MEDIATION

India

In the field of ADR in India, mediation has emerged as a preferred method of resolving disputes. In our nation, the idea of mediation has a long history and solid foundation. The ancient Indian literature, illustrates the long history of intercultural coexistence. This is possible only if collaborative dispute resolution techniques were in existence at that time. At assemblies and parishads, now known as conferences, intellectual and legal discussions (*shastrarth*) were organized with the goal of discovering the truth. It has persisted in our communities and has also been maintained in our tribal areas in its traditional form. According to the ancient Indian ancient sage Patanjali, "progress comes swiftly in mediation for those who try hardest instead of deciding who was right and who was wrong."

Indians find significant mention of the practise of mediation in all of their religious texts. The major religions in India such as Hinduism, Islam, Christianity, Buddhism, Jainism, Sikhism regard mediation as an accepted virtue for resolving disputes.

Hinduism

The Bhagavad Gita and the Mahabharata, two major Hindu scriptures, mention two levels of dispute resolution: first, an internal dispute between the soul and the ego, and second, an external dispute between human beings. Lord Krishna acts as a mediator in the Bhagavad Gita. Assisting Arjuna in resolving internal and external conflicts. The texts lay out ethical grounds for resolving family conflicts.

The solution to such disputes can be found in Hindu mythology, more commonly known as the Mahabharata. According to this epic, there are two major factors to consider when resolving such disputes.

To begin with, an individual should not sacrifice one's needs because doing so is worse than death. Second, regardless of how unlikely it may appear, an individual should acquire his or her needs peacefully to the best of one's ability. The epic mentions various mechanisms for ensuring and maintaining peace, such as reminding the individual of the benefits of doing Dharma or the dangers of practising adharma, making concessions, and expressing oneself in a humble and kind manner.

One instance is the KULA tribunal, which was proposed and established by the renowned scholar Yagnavalkya and dealt with conflicts between members of families, communities, tribes, castes, or races.

Internal conflicts were resolved by a different tribunal known as SHRENI, a corporation of artisans engaged in the same line of work. A similar group of traders from all sectors of commerce existed under the name PUGA.

Yagnavalkya's reign saw an unheard-of expansion of trade, industry, and commerce, and it is said that Indian traders travelled the seven seas, sowing the seeds of modern international trade. According to Parashar, certain issues should be decided by an assembly of learned people known as a parishad.

Buddhism promoted mediation as the most sage approach to problem-solving. Buddha declared, Wisdom comes from meditation; ignorance comes from lack of meditation.

Choose what leads to wisdom by being aware of what moves you ahead and what holds you back.

This Buddhist saying affirms the idea that during meditation, one should avoid ruminating on the past and instead concentrate on the present.

Islam

Sulah, an important concept in Islamic jurisprudence, discusses compromise, settlement, or agreement between parties as a crucial method of resolving a dispute. The stated concept's goal is to eliminate hostility and conflict among people who believe in religion so that they can maintain a peaceful relationship in society.

Sulah is facilitated by an *ad hoc* mediator-arbitrator known as a hakam, who is appointed by the parties seeking resolution. These are *kahin*, or clergymen of established religions or cults. Several mediation and arbitration disputes between members of the community were facilitated and adjudicated by the Prophet during his time in Medina. For example, in a *Sunnah*, the Prophet successfully resolved a dispute between a creditor and a debtor through mediation by having the parties agree that the creditor shall accept half of the money owed to him by the debtor on the condition that the debtor pays in full rather than in instalments.

Furthermore, the holy *Quran* contains several verses that specifically advocate mediation as a method of dispute resolution. The widespread acceptance of Islam as a religion ensured the promotion of universal identity and the de-emphasis of tribal loyalties among Muslims. This facilitated mediation between all Muslims, regardless of tribal affiliation. Perhaps the most important reason for the importance of mediation in Islamic Law is Islam's strong aversion to third-party binding dispute resolution, such as arbitration and litigation.

Development of Mediation in India

Abraham Lincoln once stated: "discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time"

India had been using a system known as the Panchayat system for centuries before the British arrived, where respected village leaders helped settle community problems. Even now, towns use this type of conventional mediation. Also, businesses in pre-British India were using mediation. Members of the business group asked impartial and reputable businesspeople known as Mahajans to settle conflicts using a non-binding process that blended mediation and arbitration. Some tribes in India still use Panchas or Pancha Parmeshwars as neutral third parties to settle disputes informally between erring individuals or groups. With the advent of British colonialism, however, mediation came to be recognised as a formal and legalised ADR mechanism.

With the reintroduction of Lok Adalat into the Indian judicial system, mediation gained popularity as an ADR mechanism. The Legal Services Authority Act, passed in 1987, gave Lok Adalat statutory status in India for the first time. The Lok Adalat's decisions have been given the same legal standing as those of civil courts under this act.

The terms "mediation" and "conciliation," which were previously considered synonymous, received significant distinctions in their usages when the Arbitration and Conciliation Act was passed in 1996. The act not only established a clear definition for conciliation, but it also consolidated the laws governing domestic arbitration in India.Because the mediator, unlike the conciliator, does not actively participate in the mediation process, the terms cannot be used interchangeably.

Section 89 of the Civil Procedure Code (CPC), 1908, which was inserted by the CPC (Amendment) Act, 1999, can also be credited with the development of mediation as an ADR mechanism. Hon'ble Mr. Justice A M Ahmadi's efforts were responsible for this particular development. The Institute for the Study and Development of Legal Systems (ISDLS) was invited to India by Ahmadi, the then Chief Justice of India, for a national legal exchange programme between India and the United States.The ISDLS investigated the problems of institutional backlogs in the Indian judicial system and proposed ADR mechanisms as well as legislative and structural reforms to the laws relating to these mechanisms, after which new reforms were introduced in 2002 in the form of an amendment to Section 89 of the CPC. However, the amendment was challenged by a group of lawyers, prompting the formation of the Malimath Committee and the 129th Law Commission. In light of the committees' reports, the Supreme Court, in the case of *Salem Advocates Bar Association vs. Union of India*, made it mandatory for courts to refer cases to alternative forums if they so desired. This case is a landmark one in the development of mediation in India.

Since then, Supreme Court justices have made significant contributions to the advancement of mediation as an ADR mechanism. A Mediation and Conciliation Committee was formed under Hon'ble Mr. Justice R C Lahoti,

and a Mediation Project was launched in Delhi in 2005. In the same year, the Tis Hazari court complex opened a Permanent Mediation Centre, and judicial mediation began at the Karkardooma court complex. In 2015, two mediation centres were also established, one at the Karkardooma court complex in Delhi and the other at the Patiala court. Thus, mediation as an Alternate Dispute Resolution mechanism has received significant impetus over the years as a result of various legislations and the efforts of various Supreme Court judges. Pre-Independence era mediation status in India -development of mediation in India under various statutes -recent developments in the field of mediation in India.

WHAT IS MEDIATION?

According to the Mediation and Conciliation Project Committee Supreme Court of India[1]- "Mediation is a structured process where a neutral person uses specialized communication and negotiation techniques. A process of facilitating parties in resolving their disputes. A settlement process whereby disputing parties arrive at a mutually acceptable agreement".

Mediation is a process in which a third party who is impartial or neutral assists disputants in reaching a mutually acceptable solution. It is both private and voluntary. It is a collaborative effort. Parties have the opportunity to voice their feelings and are involved in creating solutions to end their dispute. Mediation is thus a combination of the parties' willingness to resolve their disputes and the Mediator's ability to guide parties towards a settlement. A mediator is someone who structures the dialogue between the parties and helps them understand their competing interests. The mediator also suggests appropriate approaches for the parties to take in order to solve the problem. The lack of formality allows for an open discussion of issues and a free exchange of ideas, making it easier to determine the interests of the parties and craft solutions to satisfy those interests. It is a very informal process in which the parties hold the reins of the process. It seeks court guidance only when an interpretation of a law or statute is required.

Advantages of Mediation

According to the Mediation and Conciliation Project Committee, Supreme Court of India

Following are the advantages:

Mediation is well suited to resolve a conflict because-

1. **Informal -** Attorneys are not required because the process is informal and flexible. There are no witnesses and no formal rules of evidence.
2. **Confidential -** Mediation is a private process. Any information revealed during the mediation will not be disclosed by the mediators. The sessions are neither taped nor transcribed. Mediators destroy any notes they took during the mediation session at the end of the session.
3. **Simple and inexpensive** - Mediation is an option to consider when parties want to get back to business and their lives. Mediation generally takes less time to complete, allowing for a faster resolution than investigation.

Moreover, mediation generally produces or promotes-

Increased level of party control- Parties who negotiate their own settlements have a greater degree of control over the outcome of their dispute. In the process, all parties have an equal say. There is no finding of fault; rather, the parties reach a mutually acceptable resolution to their dispute.

- Relationship maintenance. Many conflicts arise as a result of ongoing work relationships. Mediated settlements that address all parties' interests frequently preserve working relationships in ways that a

1. Mediation and Conciliation Project Committee, Supreme Court of India, Delhi, Mediation Training Manual of India 42

win/lose decision-making procedure would not. Mediation can also help to make the end of a working relationship more amicable.

- Results that are mutually satisfactory- Parties are generally more satisfied with solutions that they helped to develop rather than solutions imposed by a third-party decision maker.
- Agreements that are both comprehensive and customised - Mediated agreements frequently aid in the resolution of procedural and interpersonal issues that are not always amenable to legal resolution. The parties can tailor their agreement to their specific situation and attend to implementation details.
- A Foundation for Future Problem Solving - If a subsequent dispute arises after a mediation resolution, parties are more likely to use a cooperative problem-solving forum to resolve their differences rather than an adversarial approach.

Further, Mediation has no effect on the parties' legal rights, and they can use it before filing a case in court or at any stage of their litigation in court because the process is completely confidential and cannot be used as evidence in court. As a result, if Mediation fails, the parties' rights in Court remain unaffected.

TYPES OF MEDIATION

A. Facilitative Mediation

A professional mediator in facilitative or traditional mediation attempts to facilitate negotiation between the parties in conflict. The mediator helps the parties identify issues, explore options for resolution, and find common ground. The mediator does not make decisions or provide advice, but rather helps the parties to reach their own agreements. Rather than making recommendations or imposing a decision, the mediator encourages disputants to reach their own voluntary solution by probing deeper into each other's interests. Mediators in facilitative mediation tend to keep their own perspectives on the conflict hidden.

B. Court- Mandated Mediation

Although mediation is typically defined as a completely voluntary process, it can be mandated by a court in order to promote a quick and cost-effective settlement. When parties and their attorneys are hesitant to participate in mediation, their chances of reaching an agreement through court-mandated mediation are low, as they may simply be going through the motions. Settlement rates are much higher when both parties see the benefits of participating in the process.

C. Evaluative Mediation

Evaluative mediation, in contrast to facilitative mediation, is a type of mediation in which mediators are more likely to make recommendations and suggestions, as well as express opinions. Instead of focusing solely on the parties' underlying interests, evaluative mediators may be more likely to assist parties in assessing the legal merits of their arguments and making fairness determinations. Evaluative mediation is most commonly used in court-ordered mediation, and evaluative mediators are frequently attorneys with legal expertise in the subject matter of the dispute.

D. Transformative Mediation

This style of mediation focuses on empowering the parties to improve their relationship and communication skills. The mediator works to facilitate the parties' understanding of each other's perspectives, goals, and needs, and helps them to find mutually beneficial solutions.

Transformative mediation is rooted in the facilitative mediation tradition, as described by Robert A. Baruch Bush and Joseph P. Folger in their 1994 book The Promise of Mediation. At its most ambitious,

the process aims to transform the parties and their relationship by acquiring the skills required to effect positive change.

E. Narrative Mediation

This style of mediation involves the parties telling their stories and exploring the underlying emotions and motivations behind their positions. The mediator helps the parties to identify and challenge negative assumptions and biases, and to reframe their narratives in a more positive and constructive light.

F. Med- Arb

This is a process that combines mediation and arbitration. In a med-arb process, the parties attempt to resolve their dispute through mediation first. If they are unable to reach a settlement, the mediator becomes an arbitrator and makes a binding decision on the remaining issues.

Sam Kagel first coined this hybrid alternate dispute resolution mechanism by mixing two-methods 'mediation and arbitration' into one 'Med-Arb' for settling the San Francisco Nurses' Strike in the 1970s.

***G.* Arb-Med**

This is the opposite of med-arb. In an arb-med process, the parties first go through arbitration, where an arbitrator makes a binding decision on the disputed issues. If the parties are unable to accept the arbitrator's decision, they can then go through mediation to attempt to reach a settlement.

This procedure keeps the pressure on parties to come to a resolution while removing the worry expressed in med-arb regarding the misuse of personal information. It should be noted that the arbitrator or mediator cannot modify her previous decision in light of fresh information from the mediation.

There is another hybrid mechanism Med-Arb-Med. This is a process that combines mediation, arbitration, and mediation again. In a med-arb-med process, the parties first attempt to resolve their dispute through mediation. If they are unable to reach a settlement, an arbitrator makes a binding decision on the disputed issues. After the arbitration, the parties return to mediation to attempt to reach a settlement on the remaining issues.

H. Arb-Med-Arb

Singapore International Arbitration Centre (SIAC) and Singapore International Mediation Centre (SIMC) jointly provide the Arb-Med-Arb Protocol.The AMA Protocol allows a party to commence arbitration under the auspices of the SIAC, and then proceed to mediation under the SIMC.

In practice, parties will, as they would in a regular arbitration, commence proceedings under the AMA Protocol by filing with the Registrar of the SIAC a Notice of Arbitration, who will proceed to notify SIMC of the filing. After the filing of the Response to the Notice of Arbitration and the constitution of the Tribunal, the Tribunal will stay the arbitration for mediation at SIMC.

The SIMC will then fix a date for the commencement of mediation at SIMC ("Mediation Commencement Date"), which will be conducted under the SIMC Mediation Rules. Unless the Registrar of SIAC, in consultation with the SIMC, extends the time, the mediation shall be completed within eight weeks of the Mediation Commencement Date.

The AMA procedure can be chosen by the parties by incorporating the Model Clause in their contract which goes as below:

All disputes, controversies or differences ("Dispute") arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

I. E-Mediation

E-mediation refers to the use of electronic communication and technology to facilitate the resolution of disputes between parties. It is a form of online dispute resolution (ODR) that allows people to participate in mediation from different locations and through various digital means, such as video conferencing, email, instant messaging, or web-based platforms.

E-mediation can be used to resolve a wide range of disputes, including consumer complaints, workplace conflicts, family disputes, and international disputes. The process typically involves a neutral third-party mediator who helps the parties communicate, identify their needs and interests, explore options, and reach a mutually acceptable solution. The mediator may use various tools and techniques to facilitate the process, such as online whiteboards, document sharing, and virtual breakout rooms.

According to UNCITRAL 'Technical Notes on Online Dispute Resolution 2017' there are three stages in the ODR process:

- First stage – a technology enabled negotiation – parties to the dispute attempting to negotiate directly to resolve the matter;
- Second stage – facilitated settlement stage – mediator to communicate with disputants to arrive at an amicable settlement;
- Third stage – commencement of ODR proceedings – parties will be informed of the process by a neutral third party appointed.

E-mediation can offer several benefits over traditional face-to-face mediation, including convenience, accessibility, cost-effectiveness, and time savings. However, it also poses some challenges, such as ensuring the security and privacy of the communication, dealing with technical issues, and maintaining the same level of rapport and trust between the parties and the mediator.

CONCEPT OF CONCILIATION

Conciliation is a form of alternative out-of-court dispute resolution.

Conciliation, like mediation, is a voluntary, flexible, confidential, and interest-driven process. The parties attempt to reach an amicable dispute resolution with the help of the conciliator, who serves as a neutral third party. Conciliation is a voluntary proceeding in which the parties are free to agree and try to resolve their dispute through conciliation. The process is adaptable, with parties determining the timing, structure, and content of the conciliation proceedings. These proceedings are almost never made public. They are interest-based because the conciliator will consider not only the parties' legal positions, but also their commercial, financial, and/or personal interests when proposing a settlement. The parties, as in mediation proceedings, have the final say on whether or not to reach an agreement.

Benefits

- Conciliation protects the autonomy of the parties.
- The parties have the ability to control the timing, language, location, structure, and content of the conciliation proceedings.

- Conciliation ensures the decision maker's expertise.
- The parties are free to choose their own mediator. A professional background is not required for a conciliator. The parties' selection criteria may include experience, professional and/or personal expertise, availability, language and cultural skills, and so on. A conciliator should be objective and impartial.
- Conciliation saves time and money.
- Conciliation proceedings can be conducted in a time and cost-effective manner due to their informal and flexible nature.
- Confidentiality is ensured through conciliation.
- Confidentiality is usually agreed upon by the parties. As a result, disputes can be settled discreetly, and business secrets can be kept private.

The conciliator, like a mediator, will attempt to guide the parties to an amicable settlement. The conciliator, on the other hand, will be prepared to present the parties with a non-binding resolution proposal. The parties have the option of accepting or declining the proposal.If they accept the proposal, it is usually documented as the settlement agreement. While the settlement agreement is not enforceable in and of itself, it can be made so in Germany by having it notarized and/or in other countries by having it incorporated into an arbitral award.

Difference between Mediation and Conciliation

Generally, mediation and conciliation are considered synonymous. Supreme Court of India in Afcons v. Cherian case noted, *"Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'."*

However, section 89 of the CPC mentions about them as distinct processes. Therefore, following distinctions are pertinent in India:

There is no specific law on mediation. Conciliation is covered by part III of the Arbitration and Conciliation Act, 1996.

Mediation is process driven. Conciliation is subject-matter driven.

The role of a mediator is facilitative. The role of a conciliator is evaluative.

Settlement agreement pursuant to voluntary mediation is not binding. Conciliation agreement has same value like an arbitral award.

Thus, the main distinction between conciliation and mediation proceedings is that the parties will ask the conciliator to provide them with a non-binding settlement proposal at some point during the conciliation. A mediator, on the other hand, will, in most cases and on principle, refrain from making such a proposal.

Does a Mediator give his/her own opinion?

According to Mediation and Conciliation Project Committee, Supreme Court of India:

Because mediation is non-binding, a decision cannot be imposed on the parties. Any settlement must be accepted voluntarily by the parties in order to be finalised.As a result, unlike a judge or an arbitrator, the mediator does not make decisions. The role of the mediator is rather to assist the parties in reaching their own decision on a settlement of the dispute. Moreover, mediator also doesn't suggest solutions. This is generally true about facilitative mediation.

However, in Evaluative Mediation, the mediation assists the parties in reaching resolution by pointing out the

weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcomes of the issues.

The Florida Rules for Certified and Court- Appointed Mediators do not forbit a mediator from offering opinions such as 10.306(c), only prohibit opinions that are "intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of the case." However, Mediators are not permitted to use their opinions to decide any aspect of the dispute or to coerce the parties or their representatives to accept any resolution option.

WHO INITIATES THE MEDIATION PROCESS ?

The process for starting mediation depends on whether it is mandatory or voluntary. Mandatory mediation is governed by legal or judicial processes. Voluntary mediation is carried out subject to the parties' agreement.

Mandatory mediation is initiated as a result of a court order or by law (statute or regulation).For example, it is common for jurisdictions or courts to require that parties to a family dispute, such as a divorce, work with a government-approved mediator before proceeding with litigation.

Keep in mind that mediation does not involve a decision-maker.

Mandatory mediation simply requires that the parties initiate the process. The parties are not compelled to negotiate or reach an agreement.The hope is that requiring the parties to participate in mediation will assist them in voluntarily resolving the legal dispute without resorting to litigation.

Voluntary mediation is initiated when the parties reach an agreement. This agreement may be established before or after a legal dispute arises.Pre-dispute mediation agreements are typically included in a separate contract between the parties.In other words, the parties enter into any type of contract.

A post-dispute mediation agreement is typically formed as a result of the parties' separate agreement to hire a mediator to resolve the dispute.That is, the parties seeking to settle a legal dispute recognise the value of mediation and voluntarily seek the services of a mediator. People frequently mix up mandatory and voluntary mediation, assuming that mediation is required because a contract contains a mediation clause.

Under the Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018 following process has been laid down to initiate the mediation:[2]

- A party to a commercial dispute may make an application to the Authority as per Form-1 specified in Schedule-I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee of one thousand rupees.
- The Authority shall, having regard to the territorial and pecuniary jurisdiction and the nature of commercial dispute, issue a notice, as per Form-2 specified in Schedule-I through a registered or speed post and electronic means including e-mail and the like to the opposite party to appear and give consent to participate in the mediation process on such date not beyond a period of ten days from the date of issue of the said notice.
- Where no response is received from the opposite party either by post or by e-mail, the Authority shall issue a final notice to it.
- Where the notice issued remains unacknowledged or where the opposite party refuses to participate in the mediation process, the Authority shall treat the mediation process to be a non-starter and make a report.
- Where the opposite party, after receiving the notice seeks further time for his appearance, the Authority may, if it thinks fit, fix an alternate date not later than ten days from the date of receipt of such request from the opposite party.

2. The Commercial Courts (Pre- Institution Mediation And Settlement) Rules, 2018

- If party still fails to appear, authority to treat the mediation process to be a non-starter and make a report.
- Where both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a Mediator and fix a date.
- The Authority shall ensure that the mediation process is completed within a period of three months from the date of receipt of application for pre-institution mediation unless the period is extended for further two months with the consent of the applicant and the opposite party.

Mediation application form for commercial disputes

Details of Parties:

1. Name of applicant:
2. Address and contact details of applicant:

   Address: -

   Telephone. No._____ Mobile._____E-mail ID:_____
3. Name of opposite party:
4. Address and contact details of opposite party:

   Address:-

   Telephone. No. _____ Mobile. _____E-mail ID: _____

Details of Dispute:

1. Nature of dispute as per section 2 (1)(c) of the Commercial Courts Act 2015 (4 of 2016):
2. Quantum of claim:
3. Territorial jurisdiction of the competent court:
4. Brief synopsis of commercial dispute (not to exceed 5000 words):
5. Additional points of relevance:

Details of Fee Paid:

Fee paid by DD No. _____ dated _____ Name of Bank and branch _____.

Online transaction No. _____ dated _____.

Date:

Signature of Authority

Note: Form shall be submitted to the Authority with a fee of one thousand rupees.

For Office Use:
Form received on :
File No. allotted:

Mode of sending notice to the opposite party:
Notice to opposite party sent on:
Whether Notice acknowledged by opposite party or not:
Date of Non-starter report/ Assignment of commercial dispute to Mediator:

Form for notice/ final notice to the opposite party for pre-institution mediation

Name of the Authority and address

1. Whereas a commercial dispute has been submitted to (name of Authority) by (name of applicant) against (name of opposite party) requesting for pre-institution mediation in terms of section 12A of Chapter IIIA of Commercial Courts Act, 2015. A copy of the mediation application Form is attached herewith.
2. The opposite party is hereby directed to appear in person or through his duly authorised representative or Counsel on _____ (Date) _____ (Time) at the (Authority address) and convey his consent to participate in mediation process.
3. Failure to appear before the Authority by opposite party would be deemed as his refusal to participate in mediation process initiated by the applicant.
4. In case, the date and time mentioned in para 2 is sought to be rescheduled the same can be done by the opposite party either on its own or through its authorised representative or counsel by making a request in writing at-least two days prior to the scheduled date of appearance.

Signature of the Authority

Date:

PRE- LITIGATION MEDIATION

Section 12 A of the Commercial Act 2015 outlines the provision requiring the parties to exhaust pre-institution mediation remedies before bringing a lawsuit of a commercial nature. With the intention of giving clarity to the pre-institution mediation procedure within a predetermined time range, the Commercial Courts (Pre-Institution Mediation and Settlement) Regulations, 2018, were created.

12A. Pre-Institution Mediation and Settlement. —

(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).

The State Legal Services Authority, established pursuant to the Legal Services Authorities Act, 1987, are responsible for conducting the time-bound mediation process required by Section 12-A. For instance, pursuant to Section 12-A, the parties to a suit brought under the Act before the District Courts of Delhi are directed to the Delhi Legal Services Authority for mediation. Guardrails have been set up to prevent the proposed mediation from being used by the parties as nothing more than a stalling tactic and to guarantee that it is handled efficiently. The sole situation in which Section 12-A allows for an exception is where a party requests urgent temporary relief. However, the Act does not specify what constitutes "urgent temporary relief," and the same.

After the introduction of Section 12-A, there was disagreement among the courts on whether or not to dismiss complaints brought out without using the requisite pre-institution mediation required by Order 7 Rule 11 of the Code of Civil Procedure, 1908. While some people saw the legislative requirement as mandatory under Section 12-A, others saw it as simply directory. The Supreme Court has resolved this dispute with its ruling in Patil Automation. The Court has ruled that any suit filed violating the mandate of Section 12-A must be visited with rejection of the plaint under Order 7 Rule 11 and that it is obligatory to exhaust pre-institution mediation as required by Section 12-A of the Act.[3]

Conditions For Pre-Litigation Mediation as per Mediation Centre, Punjab and Haryana High Court, Chandigarh

Under the P&H High Court Rules on pre-litigation mediation, the applicant must fill out a Pre- Litigation Mediation Information form in which he/she must submit his/her details, the details of the second party, the nature of the dispute, and give an undertaking to comply with certain Pre-Litigation Mediation conditions.

Conditions for Pre-Litigation Mediation:

a. Both parties together or singly shall pay Rs. 1000/- in all as administrative charges of the Mediation Centre;

b. The fee of the Mediator i.e., Rs. 10000/- in all together, or singly, shall be paid by the parties at the initial stage on appointment of the Mediator by depositing it with the Mediation Centre.

c. Both parties together or singly shall pay Rs. 500/- per sitting for the use of the Mediation Centre.

d. The above amount/s shall be paid either cash or through Pay Order/ Demand Draft drawn in favour of the Mediation & Conciliation Committee, Punjab & Haryana High Court, Chandigarh.

e. Both parties together or singly shall pay additional fee of the Mediators, depending upon the nature of the dispute, which would be decided by Hon'ble Chairman.

f. That in terms of section 74 of Arbitration and Conciliation Act, 1996, settlement agreement would have the same status and effect as of it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 of the Act.

g. It would not be treated as Court Litigation.

h. That the settlement reached between the parties would be in a shape of decree and can be enforced.

3. Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd., 2022 SCC OnLine SC 1028.

Form-2: Notice/Final Notice to the Opposite party for Pre-Institution Mediation

[*See* Rule 3(2) and Rule 3(3)]

Name of the Authority and address

1. Whereas a commercial dispute has been submitted to (name of Authority) by (name of applicant) against (name of opposite party) requesting for pre-institution mediation in terms of section 12A of Chapter IIIA of Commercial Courts Act, 2015. A copy of the mediation application Form is attached herewith.
2. The opposite party is hereby directed to appear in person or through his duly authorised representative or Counsel on _____ (Date) _____ (Time) at the (Authority address) and convey his consent to participate in mediation process.
3. Failure to appear before the Authority by opposite party would be deemed as his refusal to participate in mediation process initiated by the applicant.
4. In case, the date and time mentioned in para 2 is sought to be rescheduled the same can be done by the opposite party either on its own or through its authorised representative or counsel by making a request in writing at-least two days prior to the scheduled date of appearance.

Signature of the Authority

Date:

Form 3: Non-Starter Report

[*See* Rule 3 (4) and (6)]

Name of the Authority and address

1. Name of the applicant:
2. Date of application for Pre-Institution mediation:
3. Name of the opposite party:
4. Date scheduled for appearance of opposite party:
5. Report made under rule 3(4) or 3(6):
6. Non Starter Report reason:_____

   _____

   _____

Date:

Signature of the Authority

Copy to:

Applicant.

Opposite Party.

PRIVATE MEDIATION VS. COURT ORDERED MEDIATION

Mediation is a method of resolving disputes with the help of a neutral third-party mediator. Arbitration, on the other hand, is very similar to a court trial. Arbitration includes elements of litigation such as discovery and testimony, as well as arbitrators who listen to the facts, review the evidence, and make a final decision.

Private Mediation

Both parties must agree to participate in private mediation, and the mediator must be agreed upon. There are numerous mediators available, each with their own set of experiences and areas of expertise. Choosing the right mediator is a critical decision that can affect whether or not the mediation is successful. When using a private mediator, you can schedule the mediation at a time that is convenient for both parties, but there is a cost for the mediator's time. It is recommended that when using private mediation, each party pay half of the mediation fee to ensure that both parties are financially invested in the process and want to work towards resolution.

How to find Private Mediators?

A private mediator does not have to be a lawyer, but it is preferable that the person is qualified as a mediator.

Finding a private mediator can be done in a few different ways, including:

- *Referral from a lawyer*: If you have a lawyer, they may be able to refer you to a private mediator. Lawyers often have professional networks and may know of mediators who specialize in specific types of disputes.
- *Mediator directories*: There are several directories that list private mediators, including those offered by professional organizations such as the Association for Conflict Resolution, mediate.com or the International Mediation Institute.
- *Online search*: A simple online search for private mediators in your area can yield many results. You can also look for online reviews and ratings to help you choose a mediator. One may verify social media profile of mediator such as LinkedIn to verify the credentials.
- *Local bar association*: Your local bar association may have a list of mediators who are available for private mediation.
- *Referral from friends or family*: You may know someone who has used a private mediator in the past and can provide a recommendation.
- *List of empanelled mediators*: The details of Mediators who are empanelled with various mediation institutions and their bios can be found online.
- *Rankings*: These days many private organizations rank mediators based on their work and client feedback. Such rankings may help you in identifying people who are active in mediation practice. However, one should be cautious in solely relying on rankings.

It is important to research the mediator's qualifications, experience, and reputation before selecting one. It may also be helpful to schedule an initial consultation to discuss your case and determine if the mediator is a good fit for your needs.

APPOINTMENT OF MEDIATOR

In ad hoc mediation, the parties involved in a dispute choose a mediator themselves instead of going through a mediation institution or program. Here are the typical steps for the appointment of a mediator in ad hoc mediation:

1. *Selection of Mediator*: The parties to the dispute should agree on the selection of a mediator. This can be done through mutual discussion or with the help of a third party who is not involved in the dispute.
2. *Communication*: Once the mediator is selected, the parties should communicate with the mediator to confirm their availability and willingness to mediate the dispute.

3. *Appointment Letter*: Once the mediator agrees to mediate the dispute, an appointment letter should be sent to the mediator confirming the appointment. The appointment letter should include the terms of reference, the scope of the mediation, and the time frame for the mediation.
4. *Agreement*: The mediator and the parties should enter into an agreement that outlines the terms and conditions of the mediation process. The agreement should include the mediator's fees, the duration of the mediation, and the confidentiality of the proceedings.
5. *Commencement of Mediation*: Once the mediator is appointed and the agreement is signed, the mediation process can commence.

It is important to note that in ad hoc mediation, the parties are responsible for choosing a mediator who has the necessary qualifications and experience to handle the dispute. The mediator should be neutral, impartial, and have the necessary skills to facilitate communication and understanding between the parties. In law, no qualifications are prescribed for a person to act as mediator in ad hoc mediations. Any person upon whom parties repose a trust may be appointed as a mediator.

Nowadays, most High Courts and District Courts have mediation centres attached to the Court that are administered by the Court, and whenever a matter needs to be referred, it is referred to such centres. The matter is then assigned to the panel mediator by the centre's in-charge. In that case, the parties are not required to pay any mediation fees or charges.

Qualifications of a Person to be appointed as Mediators in Court annexed or referred Mediation

As per Delhi High Court rules,[4] following persons may be enlisted in the panel of Mediators/Conciliators under rule 3:

- Retired judges of the Supreme Court of India
- Retired judges of the High Court
- Retired District & Sessions Judges or retired Officers of Delhi Higher Judicial Service
- District & Sessions Judge or Officers of Delhi Higher Judicial Service
- Legal practitioners with at least ten years standing at the Bar at the level of the Supreme Court or the High Court of the District Courts
- Experts or other professionals with at least fifteen years of standing
- Persons who are themselves experts in mediation/ conciliation
- Social worker.

Similar qualifications are also stipulated by the Bombay High Court rules as well.

As per Bombay High Court Mediation Rules,[5] parties to a suit may all agree on the name of the sole mediator for mediating between them. Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator. Where parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5. Further, where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

4. Mediation and Conciliation Rules, 2004

5. Civil Procedure Mediation Rules, 2006

Under ICSID rules, the parties may choose one mediator or two co-mediators. The parties jointly appoint each mediator (Mediation Rule 13(1)). If the parties are unable to reach an agreement on whether to appoint one or two co-mediators within 30 days of registration, the rules state that one mediator will be appointed by party agreement (Mediation Rule 13(2)).If the parties agreed to two co-mediators and one resigns during the mediation, the parties may agree to continue the mediation with the remaining mediator as the sole mediator.

In addition to the requirements established by the Mediation Rules, parties may wish to consider practical considerations when selecting a mediator. These are some examples:

- mediation training, including any accreditation as a mediator by an internationally recognised organisation
- experience in international dispute resolution involving States, including various forms of negotiation, mediation, or conciliation
- experience working in or with governments or public entities understanding of the context and framework of investor-State disputes, including economic, legal, social, and cultural considerations.

ICSID has a large network of mediators and is always available to assist parties in locating experienced mediators (Mediation Rule 13(3)). At any time, the parties may jointly request the Secretary-assistance General's with an appointment (Mediation Rule 13(3)).If the parties are unable to appoint the mediator(s) within 60 days of the request for mediation being registered, either party may request that the Secretary-General appoint the mediator who has not yet been appointed (Mediation Rule 13(4)). Alternatively, the parties can agree on a different time frame or procedure.

Disqualifications in Court Annexed Mediation

A person will be disqualified from appointment as mediator if:

- any person who has been adjudged insolvent or is of unsound mind;
- any person against whom criminal charges involving moral turpitude have been framed by a criminal court and are pending;
- any persons who has been convicted by a criminal court for any offence involving moral turpitude;
- any person against whom disciplinary proceedings have been initiated by the competent authority or who has been punished in such proceedings;
- such other categories of persons as may be notified by the High Court;
- any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing;
- any legal practitioner who has or is appearing for any of the parties in the suit or in other suit or proceedings.

In accordance with Delhi High Court Mediation Rule 7, when a person is contacted regarding his potential appointment as a mediator or conciliator, he is required to inform the parties in writing of any circumstances that would give rise to a reasonable doubt about his independence or impartiality. After being appointed as a mediator or conciliator, if such a factor emerges, it must be immediately notified to the parties in writing.

The rules also provide that while appointing mediator/conciliator the Court concerned shall ensure that the person to be appointed is not interested or connected with the subject matter of the dispute and is not related to any of the parties or to those who represent them. However, the parties shall be free to waive such objection in writing. While choosing a mediator or conciliator, the court in question must make sure the candidate has no stake in or connection to the dispute and is unrelated to any of the parties or the legal counsel for them. The parties may, however, expressly waive such objection in writing.

COURT- ORDERED MEDIATION

As opposed to **Court Referred Mediation**, when the court only refers the matter to a mediator, **Court Annexed Mediation** involves the court providing mediation services as an integral component of the same judicial system. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. The benefit of court-annexed mediation is that judges, attorneys, and litigants participate in it, giving them the impression that all three actors in the justice delivery system worked together to reach a settlement. No one would sense that the system isolates from the case when a judge assigns a case to the Court-annexed Mediation Service while maintaining overall oversight of the process.

Because the process of mediation is often the same between voluntary and court-ordered mediation, the fundamentals of mediation apply to both. The procedure follows a similar pattern, though it may differ slightly depending on the style of the mediator. Mediation typically involves the following steps:-

- **Introduction** – The mediator and the parties will introduce themselves to each other at the start of the mediation. The mediator will also frequently provide an overview of how the process will proceed and establish any ground rules that may be required for the day.
- **Opening Statements-** During this section, the parties will have the opportunity to present their case to the mediator and the other party, explaining what they want and why they want it. This is usually the only opportunity for the parties to present their side of the story to the other party.
- **Caucuses**- After the opening statements, the mediator will frequently separate the parties and participate in individual meetings with each of the parties to gain a better understanding of the case from each side. Whatever either party says to the mediator during these meetings will not be shared with the other party unless both parties agree.
- **Bargaining**- Eventually, the parties will start bargaining for their version of the settlement. In family law cases, this may imply that the parties are negotiating how to divide parenting time, assets, money, and other aspects of their lives. The mediator may direct that the parties work together in the same room, or that the offers be shuttled back and forth.
- **Agreement**- The mediation will conclude with the parties reaching an agreement. This can be an agreement to settle the case or an agreement that the parties are unable to settle the case at this time and would like to proceed with litigation.

Mediation is an extremely useful tool in cases where the parties must agree on certain aspects of the case. Mediation is usually voluntary, but courts will occasionally order it, particularly in family law cases. Mediation can assist the parties in working together to solve their problems and find a way to move forward together. Mediation provides the parties with a sense of control over their futures and can assist them in making better decisions together in the future. While court-ordered mediation can be intimidating, keep in mind that the parties' best interests are at the forefront of the process. Mediation allows the parties to resolve their disagreement amicably and move on with their lives.

ADHOC MEDIATION AND INSTITUTIONAL MEDIATION

Ad hoc mediation and institutional mediation are two different types of mediation that differ in several ways. Here are the key differences between ad hoc mediation and institutional mediation:

- **Definition**: Ad hoc mediation refers to mediation that is arranged on an as-needed basis and is not part of a formalized dispute resolution process. Institutional mediation, on the other hand, is mediation that is provided by a formal organization or institution termed as mediation service provider.

- **Structure**: Ad hoc mediation is typically more flexible and informal than institutional mediation. The mediator may be selected by the parties or appointed by a court or other authority, and the mediation may take place in a variety of settings, such as a mediator's office, a conference room, or even online. Institutional mediation, on the other hand, typically follows a set of established procedures and protocols, and may be conducted in a specific location or online platform.
- **Expertise**: Ad hoc mediators may or may not have specific expertise or training in mediation, depending on how they are selected. Institutional mediators, on the other hand, are typically trained and certified in mediation, and may have specific expertise in certain types of disputes or industries.
- **Cost**: Ad hoc mediation may be less expensive than institutional mediation, as the parties may only pay for the mediator's services and any associated costs, such as room rental or travel expenses. Institutional mediation may involve additional costs, such as administrative fees, overhead costs, and other expenses associated with the formal organization providing the mediation services. However, the cost of institutional mediation may be offset by the infrastructure, technical expertise and human resource assistance provided by such institutions.
- **Availability**: Ad hoc mediation may be more readily available than institutional mediation, as the parties can arrange for mediation as needed. Institutional mediation, on the other hand, may have limited availability depending on the resources and schedule of the mediation service provider. In Ad hoc mediation you can directly liaison with the mediator regarding availability. In institutional mediation, it will be routed through mediation service provider.

PROCEDURE OF MEDIATION

A Mediation is a structured process designed to assist parties in resolving disputes. Here are the typical steps involved in mediation:

i. **Introduction**: The mediator will introduce themselves and explain the mediation process to the parties involved. They will also explain the role of the mediator and the ground rules for the mediation process.

ii. **Opening statements:** Each party will have the opportunity to make an opening statement to explain their perspective on the dispute.

iii. **Information gathering:** The mediator will gather information about the dispute from both parties. They will ask questions and clarify any misunderstandings to ensure they have a clear understanding of the issues at hand.

iv. **Identifying issues:** The mediator will help the parties identify the issues in dispute and prioritize them.

v. **Generating options**: The parties will brainstorm and generate potential solutions to the issues in dispute. The mediator will help facilitate this process and encourage the parties to consider a wide range of options.

vi. **Negotiation**: The parties will engage in negotiations to reach a mutually acceptable agreement. The mediator will assist in this process by helping the parties to communicate effectively, explore potential compromises and consider the consequences of their decisions.

vii. **Closure**: Once an agreement has been reached, the mediator will summarize the terms of the agreement and ensure that both parties understand and agree to them. The parties will then sign a written agreement.

viii. **Follow-up:** The mediator may follow up with the parties after the mediation to ensure that the agreement

In Court-annexed mediation and pre-institution mediation following rules are followed:

Delhi High Court Rules	***Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018***
Party Autonomy: The parties may agree on the procedure to be followed by the mediator/conciliator in the conduct of the mediation/conciliation proceedings.	The mediation shall be conducted as per the following procedure- **At Commencement:** Mediator shall explain to the parties the mediation process.
If Parties don't agree: i. **Attendance**: Mediator shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all the parties have to be present; ii. **Venue:** He shall hold the mediation at any convenient location agreeable to him and the parties, as he may determine; iii. **Sessions:** He may conduct joint or separate meetings with the parties; iv. **Memorandum:** Each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues and its position in respect of those issues and all information reasonably required for the mediator to understand the issues; v. **Exchange of Memoranda:** Such memoranda shall also be mutually exchanged between the parties; Each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved: Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix. vi. **Co-mediator:** where there is more than one mediator/conciliator, the mediator/conciliator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediator with a view to resolve the disputes.	**Deciding Date and Venue:** The date and time of each mediation sitting shall be fixed by the Mediator in consultation with the parties to the commercial dispute. **Sessions:** The Mediator may, during the course of mediation, hold meetings with the parties jointly or separately, as he thinks fit; **Private Session:** The applicant or opposite party may share their settlement proposals with the Mediator in separate sittings with specific instruction as to what part thereof can be shared with the other party; **Settlement Proposal:** The parties to the mediation can exchange settlement proposals with each other during mediation sitting either orally or in writing.

Agreement on procedure: The parties may agree on the procedure that the mediator will use to conduct the mediation proceedings.	During the process of mediation, the Mediator shall maintain confidentiality of discussions made in the separate sittings with each party and only those facts which a party permits can be shared with the other party.
On Day of Mediation: On the scheduled date, the Mediator meets with the parties to explain the entire mediation process and to establish neutrality and confidentiality. He then builds momentum in the direction of open settlement discussions. The parties may be accompanied by their respective lawyers when meeting with the mediator**.**	**Settlement Agreement:** Once both the parties reach to a mutually agreed settlement, the same shall be reduced in writing by the Mediator and shall be signed by the parties to the commercial dispute and the Mediator as per Form-4 specified in the Schedule-I.
Settlement agreement: When the parties reach an agreement on all or some of the issues in the suit or proceeding, it is reduced to writing and signed by the parties or their constituted attorney. If the parties' counsel has represented them, the mediator may obtain his signature on the settlement agreement as well. The parties are then given the settlement agreement, while the original is sent to the referral Court by the Mediator.	**Settlement Agreement to Parties:** The Mediator shall provide the settlement agreement, in original, to all the parties to a commercial dispute and shall also forward a signed copy of the same to the Authority.
Role of Court: Upon receipt of the settlement agreement, the court shall set a hearing date, normally within seven days, but not exceeding fourteen days. If the Court is satisfied that the parties have resolved their dispute(s) on the date of hearing, it shall issue a decree in accordance with the agreement.	**Failure to Settle:** Where no settlement is arrived at between the parties within the time specified in the sub-section (3) of section 12A of the Act or where the Mediator is of the opinion that the settlement is not possible, the Mediator shall submit a report to the Authority, with reasons in writing, as per Form-5 specified in Schedule-I.
Failure to Settle: If the parties are unable to reach an agreement, the case is returned to the referral Court with a simple report of non-agreement/failure to settle, without assigning any reason, and litigation between the parties begins.	**Retaining Document:** The Authority or the Mediator, as the case may be, shall not retain the hard or soft copies of the documents exchanged between the parties or submitted to the Mediator or notes prepared by the Mediator beyond a period of six months other than the application for mediation under sub-rule (1) of rule 3, notice issued under sub-rule (2) or (3) of rule 3, settlement agreement under clause (vii) of sub-rule (1) of rule 7 and the Failure report under clause (ix) of sub-rule (1) of rule 7.

FEES OF MEDIATOR AND COSTS

The cost and fees for mediation in India can vary depending on several factors, such as the type of dispute, the complexity of the case, and the mediator's experience and qualifications. Generally, the cost of mediation in India is much lower than the cost of going to court.

In India, there are two types of mediation services: court-annexed mediation and private mediation. Court-annexed mediation is provided by the courts, and the fees are generally fixed and regulated by the court. Private mediation, on the other hand, is conducted by private mediators, and the fees are negotiable between the parties and the mediator.

For court-annexed mediation, the fees are usually fixed by the court, and parties are required to pay a nominal fee for the mediation process. Furthermore, in court-annexed mediation, particularly when the case is referred to the Mediation Centre, the parties are not required to pay any court fees. If the case is resolved through mediation, the court fee is also refunded.

The fees for private mediation are negotiable and can vary depending on the mediator's experience and qualifications, the nature of the dispute, the number of sessions required, and other factors. In some cases, parties may also need to bear additional costs such as travel expenses, venue rental, and other expenses incurred during the mediation process.

It is advisable to discuss the fees and costs of mediation with the mediator or the mediation centre before starting the process to avoid any confusion or disputes later on.

Under Rule 6 of the ICSID mediation and conciliation rules a mediator is entitled to:

a. a fee for each hour of work performed in connection with the mediation;

b. reimbursement of expenses reasonably incurred for the sole purpose of the mediation when not travelling to attend a meeting or session;

c. when required to travel to attend a meeting or session held away from the place of residence of the mediator:

   i. reimbursement of the cost of ground transportation between the points of departure and arrival;

   ii. reimbursement of the cost of air and ground transportation to and from the city in which the meeting or session is held; and

   iii. a per diem allowance for each day spent away from the mediator's place of residence.

The fee and per-diem allowance amounts will be decided by the Secretary-General and made public. Any request for a greater sum by a mediator must be addressed in writing to the Secretary-General rather than the parties directly. According to ICSID Mediation Rule 15, such a request must be submitted prior to the mediator receiving the request for mediation and it must include justification for the sought increase.

The rules also provide that Secretary-General shall determine and publish administrative charges payable by the parties to the Centre. Clause 4 of Rule 6 it is provided that, all payments, including reimbursement of expenses, shall be made by the Centre to:mediators and any assistants approved by the parties; any experts appointed by a mediator pursuant to ICSID Mediation Rule 21(3); service providers that the Centre engages for a mediation; and the host of any meeting or session held outside an ICSID facility.

Under Rule 26 (1) of the Bombay High Court Rules, the court at the time of mediation reference shall fix the fee of the mediation after consulting the mediator and the parties. The rules lay down following general provision regarding fees and cost:

- As far as possible a consolidated sum may be fixed rather than for each session or meeting.
- Where there are two mediators as in clause (b) of Rule 2, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.
- The expenses of the mediation including the fee of the mediator costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.

- Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.
- The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the court.
- The expenses of mediation including fees, if not paid by the parties the Court shall, on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the mediator or the parties, as the case may be, shall recover the said amount as if there was a decree.
- Where a party is entitled to legal aid under section 12 of the Legal Services Authority Act, 1987 the amount of fee payable to the mediator and costs shall be paid by the concerned Legal services Authority under that Act.

Under Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018, the parties to the commercial dispute shall pay to the Authority a one-time mediation fee, to be shared equally, as per the quantum of claim as specified in Schedule-II.

MEDIATION – ROLE OF JUDICIARY AND LEGAL STATUS

The Indian Judiciary has played a significant role in promoting and encouraging mediation as a method of dispute resolution. Mediation is a voluntary process in which a neutral third party, the mediator, helps the parties to resolve their disputes amicably by facilitating communication, identifying interests, and exploring options for settlement.

In recent years, the Indian Judiciary has taken several steps to promote mediation as an alternative dispute resolution mechanism. The Supreme Court of India, in its landmark judgment in the case of Salem Advocate Bar Association v. Union of India, has emphasized the importance of mediation as a means of resolving disputes and has directed the courts to encourage parties to explore mediation as a first step in the dispute resolution process.

In accordance with the aforementioned judgement, the Law Commission of India drafted a consultation paper on Alternative Dispute Resolution and Mediation Rules in 2003, which was adopted by several High Courts to formulate their own Mediation Rules.

The Indian Judiciary has also established mediation centres in various courts across the country, where trained mediators provide mediation services to parties who wish to resolve their disputes through this process. These centres have been successful in resolving a significant number of disputes, and the parties have reported high levels of satisfaction with the process. The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) to oversee the effective implementation of Mediation and Conciliation in the country.

The Indian Judiciary has also passed several judgments that promote mediation as a method of dispute resolution. By promoting mediation, the Indian Judiciary has contributed to the development of a more effective and efficient justice system that is better able to meet the needs of its citizens.

Here are some ways in which the courts support mediation:

- *Referral to mediation*: The courts have the power to refer cases to mediation. This means that when parties file a case in court, the judge can suggest that they try mediation to resolve their dispute before going through a full trial.
- *Training and certification of mediators*: The courts encourage the training and certification of mediators to ensure that they have the necessary skills and knowledge to effectively mediate disputes.

- *Mediation centres*: Many courts have established mediation centers, which provide facilities for mediation and also help parties to find qualified mediators.
- *Court-connected mediation*: In some cases, the courts may provide for court-connected mediation, where the mediator is appointed by the court and is responsible for reporting back to the court on the progress of the mediation.
- *Enforceability of settlement agreements*: The courts in India generally recognize and enforce settlement agreements that are reached through mediation. This provides parties with an added incentive to participate in mediation, knowing that the settlement they reach will be legally binding.

Legislative Provisions on Mediation

Mediation in India is governed by the following legal provisions:

i. **The Arbitration and Conciliation Act, 1996:** This Act governs conciliation in India and provides a framework for the conduct of conciliation proceedings. Section 30 of the Act also emphasize on the role of arbitrator to facilitate settlement, if possible.

ii. **The Code of Civil Procedure, 1908:** Section 89 of the Code of Civil Procedure provides for the settlement of disputes through alternative dispute resolution mechanisms, including mediation.

iii. **The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015:** This Act requires parties to attempt to resolve commercial disputes through mediation before proceeding to trial.

iv. **The National Legal Services Authority Act, 1987:** This Act provides for the establishment of legal services authorities at the national, state and district levels to provide legal aid and services to the poor and marginalized sections of society, including through the use of mediation.

v. **The Companies Act, 2013:** Section 442 of the Companies Act provides for the settlement of disputes between companies and their shareholders or creditors through mediation.

vi. **The Consumer Protection Act, 2019:** This Act provides for the settlement of disputes between consumers and businesses through mediation.

vii. Internationally, India demonstrated its support for mediation by signing the UN Convention on International Settlement Agreement.

viii. Furthermore, Section 16 of the Court Fees Act, 1870, provides for a refund of all court fees if the matter is finally settled using the alternative dispute redressal mechanism.

THE MEDIATION BILL, 2021

Mediation Bill 2021 was introduced "to promote and facilitate mediation, particularly institutional mediation, for the resolution of commercial or other disputes, to enforce mediated settlement agreements, to establish a body for the registration of mediators, to encourage community mediation, and to make online mediation an acceptable and cost-effective process, and for matters connected with or incidental thereto."

Highlights of the Bill

- The Bill requires people to use mediation to settle civil or commercial disputes before going to court or tribunal. After two mediation sessions, a party may withdraw from the process. The mediation process must be completed within 180 days, which can be extended by the parties by another 180 days.
- The Indian Mediation Council will be established. Its functions include the registration of mediators as well as the recognition of mediation service providers and mediation institutes (which train and certify mediators).

- The Bill specifies which disputes are unsuitable for mediation (such as those involving criminal prosecution, or affecting the rights of third parties). This list may be amended by the central government.
- If the parties agree, any person may be appointed as a mediator. If not, they may request that a mediator from a mediation service provider be appointed. Mediation agreements will be binding and enforceable in the same way that court judgements are.
- Mediation agreements (other than community mediation) will be final, binding, and enforceable in the same way that court judgements are.
- Mediators can be appointed by either the parties themselves or by a mediation service provider (an institution administering mediation).
- Mediation proceedings will be kept private and must be concluded within 180 days (may be extended by 180 days by the parties). After two sessions, a party may withdraw from mediation.

Standing Committee Report

The Standing Committee on Personnel, Public Grievances, Law and Justice (Chair: Mr. Sushil Kumar Modi) submitted its report on the Mediation Bill, 2021 on July 13, 2022.

Following suggestions were given by Standing Committee on Mediation Bill:

i. **Pre-litigation mediation:** The Bill mandates parties to attend at least two mediation sessions. A cost may be imposed on them if they fail to attend the sessions without reasonable cause. The Committee observed that by mandating pre-litigation mediation, parties

ii. will have to wait for several months before being allowed to approach a court or tribunal. This may result in delaying of cases. The Committee recommended reconsidering mandating prelitigation, making it optional and introducing it in a phased manner.

iii. **Timeline for mediation**: Mediation process must be completed within 180 days, which may be extended by another 180 days. The Committee recommended reducing it to 90 days with an extension of 60 days.

iv. **Disputes not fit for mediation:** The First Schedule of the Bill specifies disputes not fit for mediation. The central government may amend this list. The Committee noted that this amounts to excessive delegation. It recommended that the number of disputes in the Schedule should be reduced to ensure that maximum number of disputes go through prelitigation mediation.

v. **Definition of exceptional circumstances:** Under pre-litigation mediation, parties can seek interim relief from a court or tribunal in exceptional circumstances. The Committee noted that the term 'exceptional circumstances' has not been defined and it can lead to parties approaching the court under various situations.

vi. **The Committee recommended:** (i) adding qualifying criteria for exceptional circumstances to avoid wide interpretation, and (ii) providing a fixed time period for deciding interim relief applications and for commencing mediation proceedings after an interim order has been received.

vii. **Mediation Council of India:** The central government will establish the Mediation Council of India. Members of the Council include a chairperson and two full-time members with experience in mediation or alternate dispute resolution (ADR).

viii. The Committee noted that this may lead to appointment of members with experience in ADR mechanisms other than mediation. It recommended: (i) considering appointing only members with experience in mediation, and (ii) appointing the chairperson and members on recommendation of a committee constituted by the central government.

ix. **Confidentiality in proceedings:** The Committee noted that there is no punishment/liability for breaching confidentiality.

x. **Registration of agreements:** The Bill provides for mandatory registration of mediated settlement agreement. The Committee recommended leaving registration to the discretion of the parties.

xi. **International mediation:** The Bill does not apply to international mediations conducted outside India. The Singapore Convention provides a framework for cross-border enforcement of settlement agreements resulting from international mediation. The Committee recommended revisiting the definition of international mediation so that the Bill can be brought in line with the Convention in the future.

ETHICS TO BE FOLLOWED BY A MEDIATOR

Mediators are expected to adhere to a set of ethical principles in order to maintain their impartiality and promote fairness in the mediation process. Some of the key ethical principles for mediators include:

i. **Impartiality**: Mediators should remain neutral and not take sides in the dispute. They should treat all parties fairly and ensure that each party has an equal opportunity to be heard.

ii. **Confidentiality**: Mediators should keep all information related to the mediation process confidential, unless required by law or with the explicit consent of the parties involved.

iii. **Informed Consent:** Mediators should ensure that all parties understand the mediation process and voluntarily agree to participate.

iv. **Competence**: Mediators should possess the necessary skills and knowledge to facilitate the mediation process effectively.

v. **Conflict of Interest:** Mediators should disclose any conflicts of interest and recuse themselves from the process if they have a personal or professional relationship with one of the parties involved.

vi. **Respect**: Mediators should treat all parties with respect and dignity, and create an environment that is conducive to open communication and productive problem-solving.

vii. **Professionalism**: Mediators should conduct themselves in a professional manner at all times, and avoid any behavior that could undermine the integrity of the mediation process.

These ethical principles help ensure that the mediation process is conducted in a fair and impartial manner, and that the parties involved are able to work together to reach a mutually beneficial solution

Rule 4 of Commercial Courts (Pre- Institution Mediation And Settlement) Rules, 2018 lay down following ethical standards for mediators:

i. Uphold the integrity and fairness of the mediation process;

ii. Ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the mediation process;

iii. Disclose any financial interest or other interest in the subject matter of the commercial dispute;

iv. Avoid any impropriety, while communicating with the parties to the commercial dispute;

v. To be faithful to the relationship of trust and confidentiality reposed in him;

vi. Conduct mediation related to the resolution of a commercial dispute, in accordance with the applicable laws for the time being in force;

vii. Recognise that the mediation is based on the principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary agreement;

viii. Refrain from promises or guarantees of results;

ix. Not meet the parties, their representatives, or their counsels or communicate with them, privately except during the mediation sittings in the premises of the Authority;

x. Not interact with the media or make public the details of commercial dispute case, being mediated by him or any other allied activity carried out by him as a mediator, which may prejudice the interest of the parties to the commercial dispute.

Further, Rule 27 of the Bombay High Court Rules lay down following ethical standards for the mediators:

i. not carry on any activity or conduct which could reasonably be considered as a conduct unbecoming of a mediator;

ii. uphold the integrity and fairness of the mediation process;

iii. ensure that the parties involved in the mediation and fairly informed and have an adequate understanding of the procedural aspects of the process;

iv. satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;

v. disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality of bias;

vi. avoid, while communicating with the parties, any impropriety or appearance of impropriety;

vii. be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

viii. conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

ix. recognize that mediation is based on principles of self-determination by the parties and that mediation process relied upon the ability of parties to each a voluntary, undisclosed agreement;

x. maintain the reasonable expectations of the parties as to confidentiality; refrain from promises or guarantees of results.

COMMUNICATION IN MEDIATION

Communication is at the heart of mediation. As a result, effective communication among all mediation participants is required for mediation to be successful. Communication consists of more than just talking and listening. Communication is the process of transmitting information.

- The goal of communication is to convey information.
- The communication's goal could be any or all of the following:
    - communicate one's feelings/thoughts/ideas/emotions/desires to others.
    - to make others understand how we feel and think.
    - obtaining a benefit or advantage.
    - to express an unsatisfied need or desire.

Communication is the act of conveying a message to another in the manner desired. A message of disapproval, for example, can be conveyed through spoken words, gestures, or facial expressions.

Communication is also information sent from one person to another. The receiver understands it in the same way that it was intended to be conveyed. Communication begins with a thought, feeling, idea, or emotion, which

is then translated into words/gestures/acts/expressions. It is then converted into a message. This message is delivered to the recipient. The message is understood by the receiver by assigning reasons and attributing thoughts, feelings, or ideas to it. It elicits a response in the receiver, who conveys it to the sender via words/gestures/acts/expressions.

Requirement for effective communication

i) Use simple and straightforward language.

ii) Avoid using difficult words or phrases.

iii) Avoid excessive repetition.

iv) Be exact and logical.

v) Think and express yourself clearly.

vi) Show empathy, warmth, and interest.

vii) Maintain proper eye contact.

viii) Show patience, attentiveness, and courtesy.

ix) Refrain from making unnecessary interruptions.

x) Possess strong listening abilities and skills.

xi) Avoid making statements, comments, or responses that could backfire.

NEGOTIATION IN MEDIATION

Though the terms negotiation and bargaining are frequently used interchangeably, there is a distinction in mediation. Negotiation entails bargaining, and bargaining is a component of negotiation. Negotiation is the process of communicating between parties in order to find a mutually acceptable solution to a dispute. Bargaining can take many forms during a negotiation.

What is Negotiation?

In human life, negotiation is an important form of decision making. Negotiation is persuasion through communication.

Mediation is essentially a facilitated negotiation process. In mediation, negotiation is the process of back-and-forth communication between disputing parties in order to reach an agreement. The goal of negotiation in mediation is to assist the parties in reaching an agreement that is as satisfactory to both parties as possible. The mediator helps the parties negotiate by shifting them from an adversarial to a problem-solving and interest-based approach. The mediator passes proposals from one party to the other until a mutually acceptable solution is reached. This is known as 'shuttle diplomacy'.

Principled Negotiation is any negotiation that is based on merits and the interests of both parties and can result in a fair agreement, preserving and enhancing the parties' relationship. The mediator facilitates negotiations by using reality testing, brainstorming, exchanging offers, breaking impasses, and other techniques.

SETTLEMENT

While the mediators guide the parties and facilitate communication, the entire process grows and enriches itself with the parties' free will, as they steer the process by opening up and collaborating on various outcomes. As a result, there can be no standardised document that represents the mediation's conclusions, because each proceeding has a unique direction and outcome. To give this result the authority and enforcement it

requires, a final settlement agreement must be drafted with artistry, taking into account all of the nuances of the proceeding.

A mediation settlement agreement is a legally binding contract between parties who have reached an agreement through mediation.

The final step in an amicable mediation is to write a mediation settlement agreement, which formalises the decisions taken during the mediation. The settlement agreement is essentially a contract signed by the parties to follow up on what was agreed upon during mediation. The signing of a settlement agreement is equivalent to the signing of a contract for the fulfilment of the terms of the agreement.

A settlement agreement in mediation is typically reached through a process of negotiation and compromise. The parties work together with the mediator to identify their respective interests and needs, explore potential solutions to the dispute, and negotiate the terms of a settlement that meets their respective needs and interests.

Once the parties reach a settlement agreement, it is typically documented in writing and signed by the parties. The settlement agreement may also include provisions for the resolution of any outstanding issues or disputes that may arise in the future.

Enforceability of Settlement Agreement

Depending upon the nature of mediation, settlement agreement can be enforced as:

i. Contract in Private mediation.

ii. Arbitral decree when settlement agreement is entered while using section 30 of the A&C Act, 1996.

iii. Arbitral decree when settlement agreement is under section 74 of the A&C Act, 1996 (applicable to conciliation).

iv. Decree of civil court in court annexed mediation or compulsory pre-litigation mediation.

A settlement agreement in mediation is a legally binding contract, and the parties are obligated to comply with its terms. If either party fails to comply with the terms of the settlement agreement, the other party may be able to enforce the agreement through legal action.

The settlement agreement must be signed. Also, the mediation process and the settlement agreement reached through mediation are confidential, and the mediator and the parties are prohibited from disclosing any information about the mediation proceedings or the settlement agreement without the consent of the other party.

In the case of a settlement arrived at in a court-annexed mediation, the same should be reduced to writing and presented to the court, which will pass an order or decree on the terms thereof.

In mediation settlement agreements arising out of arbitral proceedings, parties may by consent file the same with the arbitrator and request the arbitrator to take the same on record and pass an award in terms thereof or request the Tribunal to just make reference to the mediation settlement agreement and state that as the arbitration is settled in terms of the mediation settlement agreement, the proceedings stand terminated.

As regards the court, a similar process may be followed by consent of parties where the court may be informed of and shown the mediation settlement agreement and requested to dispose of the proceedings in terms of the same. Parties may request the court to refer to the same but may not file the same in the court. If filed in the court, a request may be made to the court to place the agreement in a sealed envelope due to the nature of its confidentiality.

Section 74 of the Arbitration and Conciliation Act 1996 provides that a settlement agreement has the same effect as an arbitral award on agreed terms. The position in the Commercial Courts Act is also the same as a settlement in a pre-institution mediation proceeding under the Act and is given the same status as that of an arbitral award under the ACA. Such an arbitral award is enforceable as a decree of court as per section 36 of the ACA.

The Delhi High Court while interpreting section 74 of the A&C Act 1996 held, "The said provisions fall in Part III of the said Act dealing with conciliation. Conciliation proceedings had to be initiated in terms of Section 62 of the said Act. The settlement agreement envisaged under Section 73 of the said Act has to be one which is in pursuance to a duly constituted conciliation proceedings as per Section 62 of the said Act. If such a settlement comes about then that settlement is enforceable as an arbitral award in terms of Section 74 of the said Act. The legislature in its wisdom has not considered it appropriate to provide for a mediation settlement privately arrived at to be enforced as a decree de hors Part III of the said Act."[6]

Therefore, section 74 can't be used to enforce private mediation settlement agreements. For such private mediations settlement agreements to be enforceable they must qualify as a contract as defined in Section 2(h) of the Contract Act, 1872. It is because of this issue of enforceability of settlement agreement in private mediation, Mediation Bill 2021 was passed.

What does a settlement agreement consist of?

The specific contents of a mediation settlement agreement may vary depending on the nature of the dispute, the parties involved, and the terms of the agreement. However, here are some common elements that may be included:

- **Parties**: The agreement should identify the parties involved in the dispute.
- **Mediator**: The agreement should identify the mediator who facilitated the mediation process.
- **Issues**: The agreement should identify the specific issues or disputes that were addressed during the mediation process.
- **Agreement Terms:** The agreement should clearly outline the terms of the settlement that the parties have agreed to, including any monetary payments, property transfers, or other actions required by one or both parties.
- **Release of Claims:** The agreement should include a provision that states that the parties agree to release each other from any future claims related to the dispute.
- **Confidentiality**: The agreement may include a confidentiality clause, which restricts the parties from discussing the details of the dispute and settlement.
- **Signatures**: The agreement should be signed by all parties involved in the dispute, as well as the mediator.
- **Date**: The agreement should include the date when it was signed by all parties involved.

It's important to note that the contents of a mediation settlement agreement may vary depending on the specific circumstances of the dispute and the preferences of the parties involved.

The rules under Commercial Courts Act provide following draft of the settlement agreement as well as failure report i.e. cases wherein mediation didn't materialized. In any case, a report must be prepared in the court annexed mediation.

6. Shri Ravi Aggarwal v. Shri Anil Jagota, Judgment dated 18 May 2019 in EFA (OS) No. 19 of 2009 (Del. HC)

Form 4: Settlement

[*See* Rule 7 (1) (vii)]

Name of the Authority and address

1. Name of the Mediator:
2. Name of the applicant:
3. Name of the opposite party:
4. Date of application for Pre-Institution mediation:
5. Venue of mediation:
6. Date(s) of mediation:
7. No. of sittings and duration of sittings:
8. Terms of settlement:

Date:

Signature of Applicant

Signature of Opposite Party

Signature of Mediator

Form 5: Failure Report

[*See* Rule 7 (1) (ix)]

Name of the Authority and address

1. Name of the Mediator:
2. Name of the applicant:
3. Name of the opposite party:
4. Date of application for Pre-Institution mediation:
5. Venue of mediation:
6. Date(s) of mediation:
7. No. of sittings and duration of sittings:
8. Reasons for failure:

Date:

Signature of Applicant

Signature of Opposite Party

Signature of Mediator

SETTLEMENT IN COURT ANNEXED MEDIATION

The High court rule regarding mediation regarding settlement in court annexed mediation usually provide as below:

(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced into writing and signed by the parties or their power of attorney holders. If any counsel have represented the parties, they shall attest the signatures of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator/conciliator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending.

(3) Where no agreement is arrived at between the parties, before the time limit specified or where, the mediator/conciliator is of the view that no settlement is possible, he shall report the same to the Court in writing.

Court to Fix a Date for Recording Settlement and Passing Decree

(1) Within seven days of the receipt of a settlement, the Court shall issue notice to the parties fixing a date for their appearance which date shall not be beyond 14 days from the date of receipt of the settlement and the Court shall then take the settlement on record.

(2) Thereafter, the Court shall pass a decree in accordance with the settlement, so taken on record, if the same disposes of all the issues in the suit.

(3) If the settlement disposes of only certain issues arising in the suit, the Court shall take on record the settlement on the date fixed and shall include the terms of the said settlement in the judgment, while deciding the other issues.

THE SINGAPORE CONVENTION ON MEDIATION

The Singapore Convention on Mediation, also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, is a multilateral treaty that aims to facilitate the enforcement of international commercial settlement agreements reached through mediation. The convention was signed in Singapore on August 7, 2019, and entered into force on September 12, 2020.

The convention is the first global treaty to focus on the enforcement of settlement agreements resulting from mediation, and it aims to provide a harmonized legal framework for the recognition and enforcement of such agreements across different countries. It applies to settlement agreements resulting from mediation of commercial disputes, regardless of the country in which the mediation took place.

Under the convention, parties to a settlement agreement can request its enforcement in a country that has ratified the convention. The requesting party must provide evidence that the settlement agreement resulted from mediation and that it is in writing and signed by the parties. Once the settlement agreement is deemed enforceable, it can be enforced in the same way as a court judgment in that country.

The convention is seen as a significant development in international commercial dispute resolution, as it provides a more efficient and cost-effective alternative to litigation for resolving cross-border commercial disputes. It is expected to enhance the attractiveness of mediation as a means of resolving disputes and increase the certainty and predictability of outcomes for parties involved in such disputes.

The Singapore Convention on Mediation applies to settlement agreements resulting from mediation of commercial disputes, regardless of the country in which the mediation took place. However, there are some instances when the convention does not apply. Here are a few examples:

- **Settlement agreements not resulting from mediation:** The convention only applies to settlement agreements that result from mediation. It does not apply to settlement agreements that result from other forms of alternative dispute resolution, such as arbitration or conciliation.
- **Non-commercial disputes:** The convention only applies to settlement agreements resulting from mediation of commercial disputes. It does not apply to settlement agreements resulting from mediation of non-commercial disputes, such as family disputes or labor disputes.

- **Settlement agreements that are not in writing:** To be enforceable under the convention, a settlement agreement must be in writing and signed by the parties. If a settlement agreement is not in writing, it cannot be enforced under the convention.
- **Settlement agreements that are not final and binding:** The convention only applies to settlement agreements that are final and binding. If a settlement agreement is not final and binding, it cannot be enforced under the convention.
- **Countries that have not ratified the convention:** The convention only applies to settlement agreements in countries that have ratified the convention. If a country has not ratified the convention, the settlement agreement cannot be enforced under the convention in that country.

It's important to note that the convention is relatively new and its interpretation and application may evolve over time as more cases are decided under it.

Here are the key provisions of the Singapore Convention on Mediation:

- **Scope**: The convention applies to settlement agreements resulting from mediation of commercial disputes, regardless of the country in which the mediation took place.
- **Grounds for refusal:** A country may refuse to enforce a settlement agreement if, for example, it is contrary to its public policy or the subject matter of the dispute is not capable of settlement by mediation under its laws.
- **Requirements for enforceability:** To be enforceable, a settlement agreement must be in writing and signed by the parties, and it must result from mediation.
- **Procedure for requesting enforcement:** Parties can request enforcement by submitting the settlement agreement and evidence that it resulted from mediation to a competent authority in the country where enforcement is sought.
- **Competent authorities:** Each country must designate one or more competent authorities responsible for receiving and processing requests for enforcement.
- **Time limits for enforcement:** Countries must ensure that the enforcement process is completed within a reasonable time.

Relationship with other international instruments: The convention does not affect the rights or obligations of parties under other international instruments, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

CO-MEDIATOR

Utility of Co-mediation

Co-mediation can be extremely helpful in many disputes, especially those involving complex disputes as well as delicate topics like gender, conflicts between cultures, or the interaction of various subject areas. A co-mediation involves a team of mediators, rather than just one, who are experts in different areas of the dispute. A specific, concentrated strategy that attends to gender, language and ethnic confrontations, or family conflicts by a professional in those subjects helps mediators organise and completely understand the information that is exchanged on the table. It also gives the parties multiple points of contact to help the mediator steer the conversation through informed questioning and follow-ups.

Advantages of Co-Mediator

- Each person brings unique strengths, skills, and experience to the mediation process. Co-mediators can share resources, provide opportunities for consultation, and reduce mediator fatigue.

- Two mediators are twice as likely to share some of the parties' characteristics, potentially making the process feel more balanced and approachable. Matching can happen based on race, gender, age, or other factors. A young single mother in a dispute with a middle-aged male, for example, may feel more at ease and confident if one mediator is also female, rather than two middle-aged male mediators.
- Co-mediators can serve as role models for cooperative and constructive communication. This could serve as a model for the parties to follow.
- Co-mediation checks mediator bias, for example, through undue client influence - Co-mediation can alleviate the mediator's burden of responsibility and tension. Two mediators can share tasks while giving each other breathing room.
- Co-mediation can be used to train and develop less experienced mediators in a less exposed environment, as well as to encourage self-learning and the development of existing skills. All mediators should be able to learn from other people's approaches.

Challenges of Co-Mediation

- If the co-mediator's model poor communication (e.g., disagreeing, contradicting, speaking over each other), the entire process will suffer.
- If the co-mediators are too closely matched to the parties, the parties may see their "representative" mediator as an ally. Even if the mediator in question does not accept or desire this role, it may create a problematic imbalance in the process.
- If the clients pay for the mediation, using two mediators obviously raises the cost. This will not be a major consideration for most community services.

Do's and Don'ts for Co-mediators

Before the mediation meeting

- Talk about your personal styles, strengths, and areas where you need help.
- Plan how you will share roles and tasks, such as who will introduce the meeting, go over ground rules and Health and Safety, and so on, or whether a "lead" mediator will take overall responsibility. Discuss signals - some mediators use pre-programmed signals to communicate certain information.
- Predict - what positive or negative events may occur, and how you can support one another.
- Get to know one another - and consider how you can put your combined experience to good use.

During mediation meeting

- Talk to each other.
- Listen - if your co-mediator is speaking, pay close attention to what is being said and try to figure out where she/he is trying to go.
- Check in with your partner and the parties to see what is going on, how people are feeling, and what progress they believe is being made.
- Keep an eye on your co-mediator while he or she is speaking; it is also your responsibility to keep an eye on what is going on. ask questions - It is acceptable to openly consult with your partner in front of the parties, such as checking to see if he/she has finished before asking some follow-up questions.

After mediating

- Take time to debrief, receive and provide feedback, and evaluate the mediation, possibly using a structured process.
- Assign administrative tasks associated with the visit/mediation session.

DOMESTIC MEDIATION

The term domestic mediation is used in contrast with international mediation. It is equivalent to domestic arbitration. Mediation Bill 2021 defined international mediation in following terms:

"**International Mediation**" means mediation undertaken under this Act and relates to a commercial dispute arising out of a legal relationship, contractual or otherwise, under any law for the time being in force in India, and where at least one of the parties, is—

(i) an individual who is a national of, or habitually resides in, any country other than India; or

(ii) a body corporate including a Limited Liability Partnership of any nature,with its place of business outside India; or

(iii) an association or body of individuals whose place of business is outside India; or

(iv) the Government of a foreign country.

The primary difference is of the nationality of parties. If all the parties of same nationality conduct voluntary mediation in their own country then such mediation can be termed as domestic mediation.

Under Singapore Convention a dispute is considered to be international if:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

   i. The State in which a substantial part of the obligations under the settlement agreement is performed; or

   ii. The State with which the subject matter of the settlement agreement is most closely connected.

Some disputes may not be mediated in international mediation but can be mediated in domestic mediation. Example of such disputes are family disputes, household disputes, consumer disputes, employment disputes etc. (See, Singapore Convention). Therefore, irrespective of nationality of the parties in such disputes, domestic mediation regime of parties may apply. It will depend upon applicable law, language of contract and conflict of law principles.

MEDIATION CLAUSE

"The parties shall attempt to settle the dispute arising out of this contract through Mediation at first instance. The parties shall attempt to agree on the name of the arbitrator with 3(three) months of the dispute along with the intention of getting it resolved through mediation being communicated by one party to the other party. The party shall also agree on the rules of mediation by entering into an agreement to this effect within 1(One) month of appointment of Mediator. The mediation proceedings shall be held as may be decided by the Mediator within the territorial limits of New Delhi."

CASE STUDY

Mr. X lodged an instrument of transfer of 500 shares of NFJ Constructions Pvt. Limited. The company refused to register transferee as its shareholder due the restriction in the Article of Association of the Company. The company has send notice of the refusal to the transferor and the transferee within fifteen days from the date on which the instrument was delivered to the company. Mr. X has filled the appeal before NCLT under section 58(3) of the Companies Act, 2013 for resolving the matter. Later, Mr. X and the company have intended to go for Mediation and Conciliation. Can Mr. X and the company initiate the Mediation and Conciliation Proceedings? Advice the procedure.

Mr. X and the Company may agree on the name of the sole mediator or conciliator for mediation or conciliation between them. Further, the application to the Central Government or the NCLT for referring the matter pertaining to any proceeding pending before it for mediation or conciliation can be made in Form MDC-2 with a fee of one thousand rupees.

For the purposes of mediation and conciliation, the mediator or conciliator shall follow the following procedure, namely :-

(i) he shall fix, in consultation with the parties, the dates and the time of each mediation or conciliation session, where all parties have to be present ;

(ii) he shall hold the mediation or conciliation at the place decided by the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, or such other place where the parties and the mediator or conciliator jointly agree ;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall, ten days before a session, provide to the mediator or conciliator a brief memorandum setting forth the issues, which need to be resolved, and his position in respect of those issues and all information reasonably required for the mediator or conciliator to understand the issue and a copy of such memorandum shall also be given to the opposite party or parties:

Provided that in suitable or appropriate cases, the above mentioned period may be reduced at the discretion of the mediator or conciliator;

(v) each party shall furnish to the mediator or conciliator such other information as may be required by him in connection with the issues to be resolved.

Practical Exercise

The students are advised to make a group with the following roles and conduct the Mediation and Conciliation Proceedings:

1. NCLT members
2. Mr. X
3. Managing Director/Authorised Representative of NFJ Constructions Pvt. Limited
4. 2(two) Mediators.

Further, the students are advised to prepare the following documents:

1. Mediated/Conciliated Settlement Agreement.
2. Report of Failure to NCLT.

LESSON ROUND-UP

- According to The Mediation and Conciliation Project Committee Supreme Court of India- "Mediation is a structured process where a neutral person uses specialized communication and negotiation techniques. A process of facilitating parties in resolving their disputes. A settlement process whereby disputing parties arrive at a mutually acceptable agreement".
- India had been using a system known as the Panchayat system for centuries before the British arrived, where respected village leaders helped settle community problems. Even now, towns use this type of conventional mediation. Also, businesses in pre-British India were using mediation. Members of the business group asked impartial and reputable businesspeople known as Mahajans to settle conflicts using a non-binding process that blended mediation and arbitration.
- E-mediation refers to the use of electronic communication and technology to facilitate the resolution of disputes between parties. It is a form of online dispute resolution (ODR) that allows people to participate in mediation from different locations and through various digital means, such as video conferencing, email, instant messaging, or web-based platforms.
- Conciliation, like mediation, is a voluntary, flexible, confidential, and interest-driven process. The parties attempt to reach an amicable dispute resolution with the help of the conciliator, who serves as a neutral third party. Conciliation is a voluntary proceeding in which the parties are free to agree and try to resolve their dispute through conciliation.
- Mediation is a method of resolving disputes with the help of a neutral third-party mediator. Arbitration, on the other hand, is very similar to a court trial. Arbitration includes elements of litigation such as discovery and testimony, as well as arbitrators who listen to the facts, review the evidence, and make a final decision.
- The cost and fees for mediation in India can vary depending on several factors, such as the type of dispute, the complexity of the case, and the mediator's experience and qualifications. Generally, the cost of mediation in India is much lower than the cost of going to court.
- The Indian Judiciary has played a significant role in promoting and encouraging mediation as a method of dispute resolution. Mediation is a voluntary process in which a neutral third party, the mediator, helps the parties to resolve their disputes amicably by facilitating communication, identifying interests, and exploring options for settlement.
- Communication is at the heart of mediation. As a result, effective communication among all mediation participants is required for mediation to be successful. Communication consists of more than just talking and listening. Communication is the process of transmitting information.
- A mediation settlement agreement is a legally binding contract between parties who have reached an agreement through mediation
- The Singapore Convention on Mediation, also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, is a multilateral treaty that aims to facilitate the enforcement of international commercial settlement agreements reached through mediation. The convention was signed in Singapore on August 7, 2019, and entered into force on September 12, 2020.

GLOSSARY

Conflict : It refers to a situation in which people, groups or countries disagree strongly or are involved in a serious argument

Dispute : A dispute is a disagreement, argument, or controversy—often one that gives rise to a legal proceeding (such as arbitration, mediation).

Mediation : Mediation is a process in which the parties meet with an impartial and neutral third party who assists them in resolving their differences and such third party lacks authority to impose a solution.

Institutional Mediation: It mediation conducted under the aegis of a mediation service provider.

Mediator: A mediator is an impartial and independent third party who mediates—helps to settle a dispute or create agreement when there is a dispute between two or more people or groups by acting as an intermediary for those parties.

Conciliation: Conciliation, like mediation, is a voluntary, flexible, confidential, and interest-driven process. The parties attempt to reach an amicable dispute resolution with the help of the conciliator, who serves as a neutral third party.

Conciliator: A conciliator is a person, usually subject-matter expert who is to proactively assist the parties with solutions and to settle the disputes between them amicably. Conciliator can't pass a binding decision.

Mediation Bill: A bill enacted to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost-effective process and for matters connected therewith or incidental thereto.

Mediation Settlement Agreement: A mediation settlement agreement is a document created after a successful mediation. It is a binding contract that outlines the terms and conditions of the dispute resolution reached by the parties.

Co- Mediation : Co- Mediation involves two or more mediators working together to assist the parties in dispute resolution

Pre-litigation mediation: It means a process of undertaking mediation for settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature.

Domestic Mediation: The term domestic mediation is used in contrast with international mediation. The primary difference is of the nationality of parties. If all the parties of same nationality conduct voluntary mediation in their own country then such mediation can be termed as domestic mediation.

Some disputes may not be mediated in international mediation but can be mediated in domestic mediation. Example of such disputes are family disputes, household disputes, consumer disputes, employment disputes etc. (See, Singapore Convention). Therefore, irrespective of nationality of the parties in such disputes, domestic mediation regime of parties may apply. It will depend upon applicable law, language of contract and conflict of law principles.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain the meaning of and the different types of conflict.
2. What is Conciliation? Explain the difference between Mediation and Conciliation.
3. What is the difference between Private Mediation and Court-ordered Mediation?
4. What are the ethics and duties to be followed by a Mediator during a Mediation Session?

5. What is a Settlement Agreement? Explain its advantages and legal enforceability.
6. Write Short Notes on:
    - Disqualification and Qualification of Mediators
    - Mediation Bill, 2021.

LIST OF FURTHER READINGS

- Mediation: Theory to Practice by Iram Majid
- The Mediation Process by Christopher W. Moor
- Bringing Peace into The Room by Dainel Bowling and David Hoffman
- The Mediator's Handbook by Jennifer E. Beer and Caroline C. Packard
- Handbook on Mediation by Nandani Gore

Negotiation Skills and Communication

Lesson 14

KEY CONCEPTS

■ Conflicts ■ Negotiation ■ *Interest* v. *Position* ■ Bargaining

Learning Objectives

To understand:

- The meaning of Conflict
- The ways of resolving a dispute or conflict
- The meaning of negotiation
- Steps of Negotiation
- Type of bargaining
- Negotiation styles and techniques
- *Interest* v. *Position* with the help of Iceberg concept

Lesson Outline

- Specific Negotiations
  - What is a Conflict?
  - What is Negotiation?
  - Kinds of Negotiation
- Importance of Dialogue
- Negotiation Techniques and Styles
- Communication in Mediation and Negotiation
- *Interest* v. *Position* (Iceberg Concept)
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Arbitration and Conciliation Act, 1996
- Commercial Courts Act, 2015

SPECIFIC NEGOTIATIONS

What is a Conflict?

Conflict can be defined as contradictory view resulting into an antagonistic state between the parties. The clashing of thoughts and ideas is a part of the human experience. However, it turns destructive if it is not controlled. A conflict should not always be seen as something that brings negativity. It is a way to come up with more meaningful realizations that can be helpful to individuals involved. The positive outcomes can be reached through an effective implementation of conflict resolution. Conflict can be seen as an opportunity for learning and understanding our differences.

According to American psychologist Daniel Katz, there are three primary causes of conflict. They are as follows:

Economic Conflict: It is caused on account of paucity of resources. The groups or individuals involved get into a conflict to attain the maximum possible share of these resources thus bringing forth hostile behaviors among those involved.

Value Conflict: It is occasioned by varied preferences and ideologies that people carry as their principles. They get demonstrated in cases where separate parties have separate sets of beliefs that they assert aggressively.

Power Conflict: It occurs when the parties involved intend to maximize the influence they weild in social settings. Such a situation can arise among individuals, groups or even nations.

Many a times there are several contradictions, difference of opinions and perceptions, cultural differences, personality differences. There are angry and irrational moments, anxious and emotional moments, fear and negative emotions. These differences often result in disputes and conflicts.

A Dispute is often described as a particular incident that is in continuation to the conflict. If a dispute is not resolved it affects the relationship.

Human conflicts are inexorable, so disputes are inescapable. We cannot avoid disputes but, an effort can be made to resolve them in a faster and time efficient manner so that the parties to dispute can be benefitted. Since the primitive era the job of dispute resolution has been done either by authoritative people like kings, queen or tribal chiefs or community councils like village panchayats or religious persons like Qazis.

Ways to resolve the Dispute and the Conflict

Procedure of the Courts is such that the parties may not be able to sit and talk to each other addressing their issues while the case is going on hence increasing the possibility of delay in justice. Arbitration, Mediation, Conciliation, Negotiation and Judicial Settlement by Lok Adalat are collectively referred to as the alternative means of resolution of disputes (ADR).

Indian Legal System is well known for delay. It is a conventional fact that the Hon'ble Courts are over burdened with pending cases and it is almost impossible to provide quick and efficient relief to the aggrieved parties. Alternative Dispute Resolution in India is an endeavor made by the legislators to attain Constitutional Goal of achieving complete justice in India. Therefore, to meet the situation these mechanisms are well used all across the globe as they're much more effective and are less expensive.

When the state came into being, the Court system and legal procedure became very formal and instead of laymen, the Courts that were presided over by trained judges took charge. They used to look at evidence as a whole and monitor the witnesses and used to find a solution on legal and moral grounds.

Negotiation as a means of resolving disputes can be traced back to the time of Mahabharata. Before the epic battle of Kurukshetra, Lord Krishna tried to negotiate and settle the disputes amongst his kins peacefully.

At any stage if the Hon'ble Court witnesses a chance of settlement among the parties, the matter is referred to any of the alternative ways of dispute redressal mechanisms i.e. Arbitration, Mediation, Conciliation, Negotiation or Judicial Settlement by Lok Adalat for speedy redressal. In. many cases it is mandatory to refer to any of these alternative ways of dispute redressal mechanisms at the pre litigation stage.

For example, Section 12A of the Commercial Courts Act envisages a mandatory reference to mediation to attempt to resolve the disputes out of the court before a suit can be instituted. In today's era we can see a constant increase in people resorting to various ways of alternative dispute redressal mechanisms for resolving their disputes amicably. Even the intention of legislature is to resolve the disputes among the parties.

Approaching the Court for the dispute redressal has its own drawbacks. Some of them are as follows:

- Time Consuming
- It is binding on the parties. Not a win-win situation for both parties.
- Costly affair for the parties.
- Involvement of parties is minimal.
- Lay man does not understand the technicalities of law.

Alternate ways to resolve Dispute and Conflict

1. **Arbitration:** It is an adjudicatory process in which the parties present their disputes to a neutral third party (Arbitrator) for decision. While the Arbitrator has greater flexibility than a Judge in terms of procedure and rules of evidence, the arbitration process is similar to the litigation process. The result of the arbitration is an Arbitral Award, which is enforceable as a decree of the Court by approaching the Hon'ble Court for execution.
2. **Mediation:** It is a voluntary, disputant centered, non-binding, confidential and structured process controlled by a neutral and credible third party who uses special communication, negotiation and social skills to facilitate a binding negotiated settlement by the disputants themselves. Simply putting, mediation is an assisted negotiation. The result of the mediation is a settlement agreement, not a decision.
3. **Conciliation:** It is viewed as a pro-active mediation where the neutral third party takes a more active role in exploring and making suggestions to the disputants as to how to resolve their disputes. The result of the conciliation is a settlement agreement, not a decision.
4. **Negotiation:** It is a voluntary process between the disputants directly to reach at a settlement by which one disputant strives to satisfy his or her needs which is under the control of the other disputant. The result of negotiation is a settlement agreement, not a decision.
5. **Lok Adalat:** It is an alternative to Judicial Justice. The matter which are pending adjudication before the Hon'ble Court are taken up on the basis of the principles of Justice, Equity and Good Conscience. The result of this proceeding is called an Award and this is deemed to be a decree of Civil Court and is binding on the parties.

What is Negotiation?

Negotiation is a process which focusses on protection of interests of the parties through adjustment. This is in contrast to the approach of the judiciary which tries to protect the right of an individual by enforcing it or ordering compensation for it. Negotiation concentrates on protection of relationship between the parties.

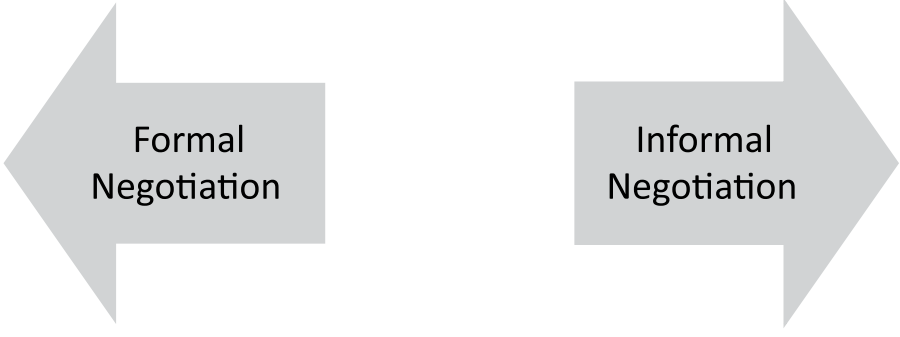
Every day in our lives is a series of negotiation. People differ in ideologies and they use negotiation to resolve their differences by using negotiation as a method. Imagine if a person was to buy a laptop, would he/she agree to buy the laptop at the price quoted by the seller or would this person bargain. Is bargaining a way of negotiation and resolving the differences between the buyer and seller, the answer is yes. In the professional aspect, cracking a deal on some specified terms agreeable to both parties to the personal aspect of who will do what all household chores.

Many a times we negotiate with ourselves and sometimes we negotiate with the people we are surrounded by in our day to day life. In the words of William Ury - "If we can learn to influence ourselves first before we seek to influence others, we will be able to satisfy the needs of others in a better way". Many people lack the convincing power and hence they are not able to present their side of the story to the concerned person. Sometimes discussing a problem can seem problematic, especially if the points of discussions involve emotions and finances.

Therefore, everyone is a negotiator and everyone negotiates several times in their lives. The success and failure of negotiation has resulted in the development of the more refined methods i.e. Arbitration, Mediation, Conciliation. All these refined processes have negotiation as the foundation on which the disputes are resolved amongst the parties.

Negotiation is a voluntary, non-binding process between the disputants to resolve their disputes amongst themselves. It is party centric i.e. the parties have greater control over the procedure and final outcome. Since the parties are sitting adjacently while discussing their issues, so it becomes easy to open up to wide range of possible solutions. It ends up preserving their interests while adjusting their views and positions in the joint effort to reach an agreement.

Kinds of Negotiation



	Informal Negotiation	*formal negotiation*
Definition	It is a direct communication between the parties with the sole objective of resolving the dispute, where the intervention of third person is not there.	each party appoints a negotiator who is supposed to negotiate on behalf of the parties. Here parties remain in control of the process through the negotiator.

Process	Importance is given to the emotional factor which results in failure many a times as the interests of the parties are not protected.	The addition of the negotiator as a third person helps to cure the defects of the informal negotiation as there is absence of emotions.
Deadlocks	Chances of deadlocks are high.	Negotiator can successfully avoid deadlocks.

Seven elements of Negotiation

For a successful negotiation process, it is important that various principles must be followed to eliminate selfish bargain by replacing it with principled bargain. According to the Harvard Negotiation Project, there are seven elements of negotiation.

I. **Communication** - The parties must talk to each other while negotiating as the success of negotiation depends upon communication choices. Miscommunication or vague communication may lead to misunderstandings. This misunderstanding may prejudice the relationship between the parties. Therefore it is important to communicate effectively.

II. **Relationship** - Parties must deal with one another while negotiating, even if this is a one-time transaction and they have no past or ongoing relation. The relationship can be strengthened by building rapport with the parties. Remove people from the problem. The emphasis should be on how to resolve the dispute without destroying the relationship.

III. **Interests** - Concerns, objectives, needs, desires or fears must be addressed and satisfied in some way if the parties are to reach a negotiated agreement. The interests are often hidden and unspoken. A good negotiator always addresses the fears of the other party, thereby building a rapport which is essential for a successful negotiation.

IV. **Options** - The various possible ways the parties could work together so their interests are included and satisfied to some degree in a negotiated agreement are called options. The success of negotiation depends upon the number of options the parties propose. Options come from brainstorming. While brainstorming all the ideas must be recorded. Once the ideas are recorded they must be evaluated in terms of feasibility and thereafter they must be proceeded in negotiation.

V. **Legitimacy** - Objective standards (e.g. market value, precedents, industry practices) and fair procedures (e.g., appraisals, bidding, split-the-difference) that can be used to evaluate options. The success of the negotiation depends upon the fact that the negotiator follows a fair procedure. Being fair is not enough. The fairness has to be rather manifested in the negotiator's approach and dealing.

VI. **Alternatives** - The range of possible things a party can take from the table are the alternatives. As a lawyer does not depend on single argument, similarly, a negotiator should also not depend upon a single alternative. This helps in making a decision as to whether to agree to the proposal given by the opposite party or not. If there are no alternatives a person will be forced to settle in the negotiation. The attempt to settle the dispute depends upon BATNA.

BATNA (Best Alternative to a Negotiated Agreement) - In simple words it means what the party to the settlement actually wants and how far they want to go for settling it. It is important to know the BATNA, as, the better BATNA, the greater is the power to negotiate. It protects the negotiator from agreeing to unfavorable terms.

WATNA (Worst Alternative to a Negotiated Agreement) - It is the settlement that the parties to the dispute don't want to choose and would never settle for.

MLATNA (Most Likely Alternative to a Negotiated Agreement) - It is the most likely alternative in case of a dispute if the BATNA is not achieved. This is known as the second best alternative that the parties to the dispute would resort to settle.

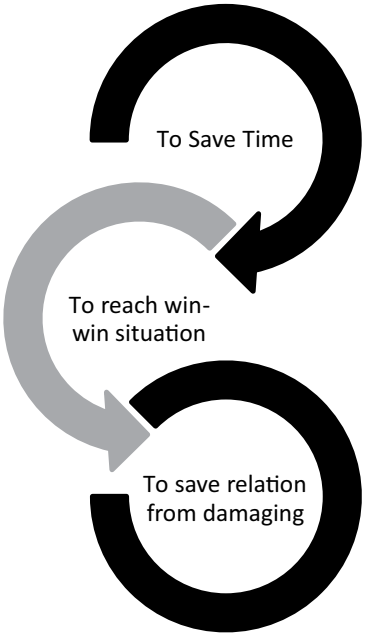
VII. Commitment - Any preconditions of the parties that must be met in order to negotiate and reach a final, binding agreement. A commitment can range from meeting at a particular place at a particular time.

IMPORTANCE OF DIALOGUE

Dialogue helps during the process of Negotiation and Mediation in the following ways:

1. Dialogue increase understanding amongst the parties
2. Dialogue reduces the disbeliefs
3. Dialogue helps out reduce the misunderstanding and misrepresentation
4. Dialogue clarify the interests and positions
5. Dialogue increases the chances of reaching out the solutions
6. Dialogue allows the parties to discuss and find new solution to the problem.

Why do we negotiate?



Negotiation is “back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed”.

It is an “Interpersonal decision-making process necessary whenever we cannot achieve our objectives single-handedly”.

“When two or more parties need to reach a joint decision but have different preferences, they negotiate”.

“Negotiation is any communication where the parties discuss a change in the terms of their relationship”.

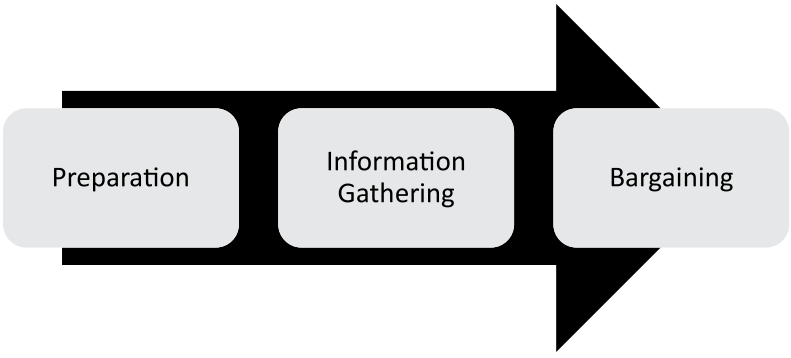
It is “a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable

legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests".

To sum up, Negotiation is a process which focusses on the protection of interests of the parties through adjustments. This is in contrast to the approach of judiciary which tries to protect the rights of an individual by enforcing it or ordering compensation for it. Further, it concentrates on protection of relationship between the parties, for which judiciary shows complete disregard. Therefore, we can say that negotiation can be most suitable for resolving disputes where the protection of relationship of the parties is of paramount importance.

STEPS DURING NEGOTIATION

The outcomes of the negotiation depend upon how well a negotiator prepares for it. A negotiation starts when the intention of the parties gets to "problem solving" and not holding onto their ego and clashes. When the parties take a step for resolving their disputes through negotiation, the responsibility of the negotiator to resolve their dispute increases. Therefore, a negotiator should prepare well in advance for the negotiation so that desired goals can be achieved through proper communication.



Preparation

- Try to control the outside influences. Negotiation should happen in a quiet and calm atmosphere with no interference.
- Give proper introduction to the parties in Negotiation.
  - Describe the process to the parties.
  - Discuss the time available.
  - Lay down ground rules.
- Understand the interests and expectations of the parties to the Negotiation.
- Assess the nature of relationship of the parties.
- Identify the issues to be discussed.

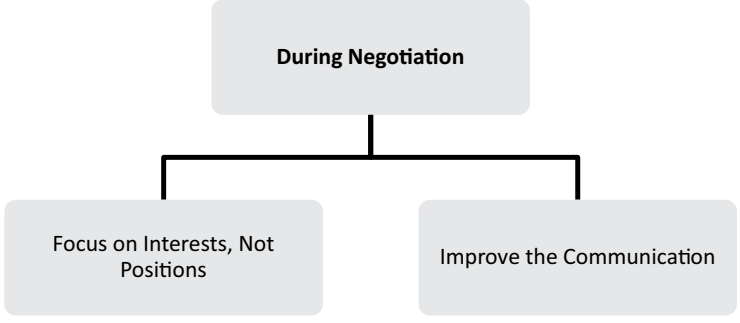
It is very important that the negotiator prepares the case thoroughly. It is imperative for the negotiator to assess the objectives of both the sides. The negotiator should consider the consequences of failed negotiation. It is crucial to choose the right time for negotiation. The negotiator should avoid spontaneous negotiations. A proper research helps in reaching the desired set of goals for settlement. Like right time, right place is also important for the negotiation. The negotiator should be well aware of the neutral territory where the information can be gathered without interruptions. Entire success of negotiation depends upon how the negotiator prepares for the negotiation and what all strategies he adopts during the entire process of negotiation.

The skilled negotiator does not use predictable tactics. He will set out very good and effective opening tactics. In fact from the opening move the negotiator one can visualize the end result of the negotiation. During the entire process a skilled negotiator will use strategic thinking and action planning and will focus on a win-win approach for the parties. It is important that a respectful environment is maintained.

Information Gathering

- Actively Listen the parties.
- Ask questions.
- Identify the areas of Agreement and Disagreement between the parties.
- Set the stage for problem solving.
- Study their responses to initiate the resolution.
- While having a "problem - solving approach" share the information with the parties after taking caution.
- Explain the parties rationale and benefit of resolving the dispute.
- Segregate the information to come to solution.

Once the information is gathered it is important that the negotiator segregates the resourceful information and proceeds further with caution. The skilled negotiator knows how much to speak and when to speak. At this stage the negotiator has to focus on interest of the parties.



It is important for the negotiator to have the right set of skills during the negotiation. Effective communication and strong decision making is amongst them. A negotiator should know how to discuss the facts without showing all his cards and at the same time come to a settlement as effective communication is the essence of negotiation.

A negotiator should listen actively and passively while remembering the BATNA and WATNA of the during the negotiation and should aim for the Zone of Possible Agreement (ZOPA).

ZOPA, means "A zone of possible agreement (ZOPA) is a bargaining range in an area where two or more negotiating parties may find common ground. A ZOPA can only exist when there is some overlap between each party's expectations regarding an agreement".

After the fruitful discussions, when the parties are to come to a settlement, they enter into ZOPA. It is the common ground where the interests of both the parties are met. ZOPA is BATNA for both the parties.

Bargaining

- Deal with one issue at a time.
- Compare the proposals given by the parties.
- Leave room for concessions.

- Don't lose track of underlying interests.
- Don't apply pressure on the parties for resolution. Remain Party Centric.
- Break impasse between the parties.
- Don't rush conclusions.

There are 4 types of Bargaining:

1. *Soft Bargaining* - Here the negotiator gives in to the demands of the other party easily without bargaining.
2. *Hard Bargaining* - This occurs when the negotiators use a rigid and inflexible approach to acquire their respective demands.
3. *Positional Bargaining* - This occurs when the negotiators take adversarial positions irrespective of the interest of the other side and stick to a position.
4. *Distributive Bargaining* - Here the positions are changed through a series of compromises between the negotiators and after a long discussions they come to their Zone of Possible Agreement.

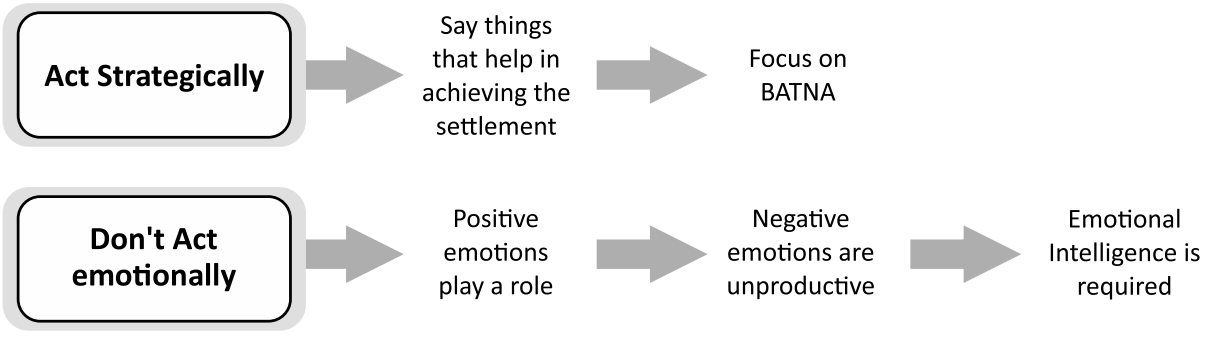
How to Negotiate?

It is important to keep the following points in consideration while negotiating:

- Begin Cooperatively and be polite.
- Pay attention to the body language.
- Be transparent of the needs.
- Set your goals in advance.
- Act confident and informed.
- Build trust.
- Try to understand the perspective of the other person.
- Look for common good and not the areas of conflicts.
- Ask Questions.
- Active and Passive listening is required.
- Recognize the dirty tricks if being used.
- Be willing to refer various other means of dispute resolution.
- Be forgiving if the conversation turns into a heated argument.
- Be prepared to walk away if the settlement doesn't come.
- Don't narrow down the discussions to one issue.
- Discuss all the issues one by one.
- Reframe negative statements.
- Separate the people from the problem.
- Justify all offers and concessions.
- Protect the facts and use them when necessary.
- Use silence at the appropriate time.

A negotiator should not take anything personally. Negotiations often fail as the parties forget their professional responsibility and get side tracked by their personal feelings and concerns which are not at all related to the subject matter of the negotiation.

Negotiator should not get affected by the behavior of the parties and should never take anything personally during or after the negotiation.



NEGOTIATION TECHNIQUES AND STYLES

While negotiation are going on different styles and strategies are adopted by the negotiators to reach the settlement and they depend upon the way parties act during the negotiation.

1. **Competing style:** This is an assertive and non-cooperative style in which the attitude is "I win, you lose". The participant values his/her own concerns and needs over those of others. He/she pursues his/her own concerns at the other person's expense using whatever power seems appropriate to win his/her position. He/she is forthright and conveys what he/she expects from others. Competing might also mean standing up for your rights or defending what you believe is correct.
2. **Accommodating style:** This is an unassertive and cooperative style in which the attitude is "You win, I lose". The participant values concerns of others equally as his/her own needs. He/she values relationships equally as his/her own concerns and enjoys pleasing and making others happy. He/she neglects his/her own concerns to satisfy the concerns of the other person; there is an element of self-sacrifice-in this mode. Accommodating might take the form of selfless generosity or charity, obeying another person's order when one would prefer not to, or yielding to another's point of view.
3. **Avoiding style:** This is an unassertive and non-cooperative style in which the attitude is "I don't care if I win or lose". The participant stays away from the issues over which the conflict is taking place and from the persons they are in conflict with. He/she does not address the conflict. Avoiding might take the form of diplomatically sidestepping the issue, postponing an issue until a better time or simply withdrawing from a threatening situation. He/she believes it is easier to withdraw (physically and psychologically) from a conflict than to face it.
4. **Compromising style:** This is intermediate in both assertiveness and cooperativeness where the attitude is "I win some, you win some". The participant values his/her own as well as others' concerns, and values fairness and equality. He/she recognizes that both have to give up something to receive something. He/she aims to find some expedient, mutually acceptable solution, which partially satisfies both parties. They seek solutions in which both sides gain something and they will give up a part of their goal and relationship in order to find agreement for the common good. Compromising might mean splitting the difference, exchanging concessions or seeking a quick middle-ground position.
5. **Collaborating style:** This is an assertive and cooperative style in which the attitude is "You win, I win". The participant values discussion of the conflict and desires to jointly solve the problem. He /she values his/her own concerns as well as those of others and aims to work towards a deeper level of clarity. He/she

attempts to work with the other person to find some solution that fully satisfies the concerns of both persons. Collaborating between two persons might take the form of exploring a disagreement to learn from each other's insights, concluding to resolve some condition which would otherwise have them competing for resources, or confronting and trying to find a creative solution to an interpersonal problem.

COMMUNICATION IN MEDIATION AND NEGOTIATION

The most essential part of Mediation and Negotiation process is communication. Mediation or Negotiation cannot succeed without effective communication. The purpose of communication in negotiation is transfer of Information. The other party should understand what has been communicated. It is necessary to choose the correct words in order to communication the intention of a party.

A communication in mediation or negotiation helps out one party, understand the intent, feeling and understanding of the other party and reach a mutually acceptable solution. Communication is transmitting a message to other party in a manner in which it is intended. For example, by words or gestures or facial Expressions etc.

An efficacious communication is backbone of any negotiation or mediation. While communicating during mediation or negotiation, there is no need being aggressive and uproar. Only communication of idea is enough. Voice modulation can help the process of communication but it should be kept in mind the voice does not get aggressive. One party should effectively transmit his thoughts into a speech by selecting appropriate words.

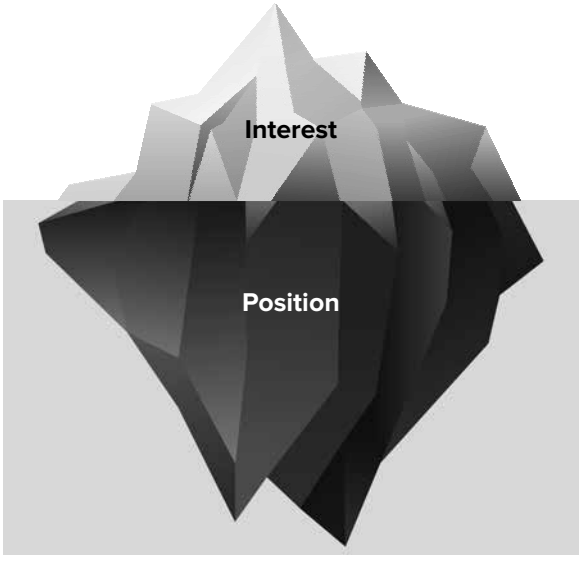
The types of communications in Mediation and Negotiations generally includes:

1. Invitation mediate or negotiate and its acceptance or rejection.
2. Submission of Statement of Claims and Defences
3. Communication between Mediator and Parties
4. Communication between Parties *inter se.*

INTEREST V. *POSITION* (ICEBERG CONCEPT)

According to Cambridge dictionary, Interest means the feeling of wanting to give your attention to something or of wanting to be involved with and to discover more about something. And the meaning of Position is the place where something or someone is, often in relation to other things.

Iceberg Concept Model



Position	*Interests*
What they say they expect.	What actually they expect.
Positions are surface communication of where a person stands.	Interests are party's reasons, values or motivations. Interests explain why someone is in that position.
Example: The party to the mediation claims Rs. 1,00,000/- as compensation for breach of contract.	Example: The party to mediation has intended to claim the loss they have incurred due to breach of contract and additional money for the loss of business goodwill, the business has suffered.

LESSON ROUND-UP

- Conflict can be defined as contradictory view resulting into an antagonistic state between the parties. The clashing of thoughts and ideas is a part of the human experience. However, it turns destructive if it is not controlled. A conflict should not always be seen as something that brings negativity.
- Procedure of the Courts is such that the parties may not be able to sit and talk to each other addressing their issues while the case is going on hence increasing the possibility of delay in justice. Arbitration, Mediation, Conciliation, Negotiation and Judicial Settlement by Lok Adalat are collectively referred to as the alternative means of resolution of disputes (ADR).
- Negotiation is a process which focusses on protection of interests of the parties through adjustment. This is in contrast to the approach of the judiciary which tries to protect the right of an individual by enforcing it or ordering compensation for it. Negotiation concentrates on protection of relationship between the parties.
- For a successful negotiation process, it is important that various principles must be followed to eliminate selfish bargain by replacing it with principled bargain.
- Negotiation is "back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed".
- The outcomes of the negotiation depend upon how well a negotiator prepares for it. A negotiation starts when the intention of the parties gets to "problem solving" and not holding onto their ego and clashes. When the parties take a step for resolving their disputes through negotiation, the responsibility of the negotiator to resolve their dispute increases.
- While negotiation are going on different styles and strategies are adopted by the negotiators to reach the settlement and they depend upon the way parties act during the negotiation.
- The most essential part of Mediation and Negotiation process is communication. Mediation or Negotiation cannot succeed without effective communication. The purpose of communication in negotiation is transfer of Information.
- According to Cambridge dictionary, Interest means the feeling of wanting to give your attention to something or of wanting to be involved with and to discover more about something. And the meaning of Position is the place where something or someone is, often in relation to other things.

GLOSSARY

Economic Conflict: It is caused on account of paucity of resources. The groups or individuals involved get into a conflict to attain the maximum possible share of these resources thus bringing forth hostile behaviors among those involved.

Value Conflict: It is occasioned by varied preferences and ideologies that people carry as their principles. They get demonstrated in cases where separate parties have separate sets of beliefs that they assert aggressively.

Power Conflict: It occurs when the parties involved intend to maximize the influence they weild in social settings. Such a situation can arise among individuals, groups or even nations.

BATNA (Best Alternative to a Negotiated Agreement): In simple words it means what the party to the settlement actually wants and how far they want to go for settling it. It is important to know the BATNA, as, the better BATNA, the greater is the power to negotiate. It protects the negotiator from agreeing to unfavorable terms.

WATNA (Worst Alternative to a Negotiated Agreement): It is the settlement that the parties to the dispute don't want to choose and would never settle for.

MLATNA (Most Likely Alternative to a Negotiated Agreement): It is the most likely alternative in case of a dispute if the BATNA is not achieved. This is known as the second best alternative that the parties to the dispute would resort to settle.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the ways to resolve a conflict under ADR domain?
2. Differentiate between Informal and Formal Negotiation.
3. Why dialogues are important in Negotiations? Explain
4. What are steps involved in Negotiation?
5. Explain Iceberg Concept with reference to Interest v. Position.

LIST OF FURTHER READINGS

- Reference Material of Certificate Course on Commercial Contract Management

OTHER REFERENCES (Including Websites/Video Links)

- https://districts.ecourts.gov.in/sites/default/files/Excise%20Courtwrkshopiv.pdf
- https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf

Various Modes and Scope of Mediation including Role of Mediation in other ADR Domains

Lesson 15

KEY CONCEPTS

■ Mediation ■ Negotiation ■ Private Mediation ■ Employment Mediation ■ Online Dispute Resolution ■ Court Annexed Mediation

Learning Objectives

To understand:

- Mediation under various Statutory Enactments
- Stages of Mediation
- Reflective Practice
- Phases of mediation
- Roles of a mediator
- Principles and code of conduct for mediators
- Categories of bargaining used in negotiation
- Characteristic of mediation
- Advantages of mediation

Lesson Outline

- Mediation in Civil and Commercial Litigation
- Court Annexed and Private Mediation
- Employment Mediation
- Online Mediation and use of Artificial Intelligence
- Reflective Practice
- Stages of Mediation
- Role of Mediators
- Mediation Clause in Commercial Agreement
- Overview: Corporate and Commercial Negotiations
- Mediation Check List (Requisites)
- Mediation Confidentiality and Neutrality
- Mediated Settlement Agreement
- Role of Mediation in other ADR domains
- Commercial Courts Act
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Code of Civil Procedure, 1908
- Commercial Courts Act, 2015
- Consumer Protection Act, 2019
- Arbitration and Conciliation Act, 1996
- The Companies Act, 2013
- Indian Contract Act, 1872
- Right to Information Act, 2005

MEDIATION IN CIVIL AND COMMERCIAL LITIGATION

Mediation in Civil and Commercial Litigation refers to a process where a neutral and independent third party facilitates negotiation between disputing parties to arrive at a mutually beneficial solution. This form of alternative dispute resolution is commonly used in the legal system to resolve disputes between two or more parties with concrete effects. The mediator remains impartial and does not direct the process but facilitates the parties to arrive at a mutually acceptable agreement, which is usually a win-win situation. Mediation proceedings are usually voluntary, confidential, transparent, time and cost-effective. The Code of Civil Procedure, 1908, provides for mandatory court-annexed mediation, and the procedure for court-mandated mediation is detailed in the Rules formulated by various High Courts. Mediation is mandatory in nature as provided under Order X, Rules 1-A, 1-B, and 1-C of the Code of Civil Procedure, 1908. The Consumer Protection Act, of 2019, also provides for mediation in consumer disputes, and the Commercial Courts Act, of 2015, makes pre-litigation mediation mandatory. To conclude, it can be said that Mediation is an efficient and cost-effective way of resolving disputes while preserving, and at times even enhancing, the relationship of the parties. Further, mediation can also be seen as beneficial mode of resolution before resorting to Civil or Commercial Litigation.

STATUTES

Civil Procedure Code

Section 89 of the Civil Procedure Code provides for the provisions relating to Settlement of disputes outside the Court, According to section 89(1) where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

According to section 89(2), where a dispute has been referred

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall .apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Accordingly, a court can refer the parties for Settlement of disputes outside the Court including mediation. Commercial Courts Act, 2015 also furthers this object.

Consumer Protection Act

Consumers and the organisations are the beneficiaries by Mediation under Consumer Protection Act, 2019. This act has provided for the detailed provisions from reference stage to the Settlement of the disputes.

Therefore, the District Commission is the competent authority for referring the matter to Mediation. It may at the first hearing or at a later stage may refer the parties. However, there are certain procedure described which cannot be referred to mediation. Further, it should appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties and parties should consent to have their dispute settled by mediation in accordance with the provisions of Chapter V. On receipt of the consent of the parties in writing, the District Commission shall refer the matter for mediation within five days.

According to Rule 4 of Consumer Protection (Mediation) Rules, 2020, all the consumer disputes can be referred for mediation, except the matters relating to proceedings in respect of medical negligence resulting in grievous injury or death or cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion among other matters mentioned in the said rules.

Commercial Courts Act, 2015

Commercial Courts Act is one Another legislation that provides for mandatory pre-litigation mediation. Section 12A of the Act provides for the provisions relating to Pre-Institution Mediation and Settlement. The requirements under section 12A are as under:

1. There shall be a suit which does not contemplate any urgent interim relief under this Act.
2. The suit should not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation.

The Central Government has made the Commercial Courts (Pre-jnstitution Mediation and Settlement) Rules, 2018. According to rule 3 of these rules a party to a commercial dispute may make an application to the Central Government as per form – I specified in schedule – I either online or by post or by hand for initiation of Mediation Process.

These rules inter alia provides for the provisions relating to Mediation Process, venue, role of mediators, Procedure of Mediation etc.

Given the relative similarities between mediation and conciliation, the Arbitration and Conciliation Act does not have provisions strictly applicable to mediation, one can look to this Act for statutory guidance on matters such as disclosure of information and confidentiality.

Companies Act, 2013

According to section 442 of the Companies Act, 2013, the Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under the Act.

The following qualifications are prescribed under the Companies (Mediation and Conciliation) Rules, 2016:

A person shall not be qualified for being empanelled as mediator or conciliator unless he -

(a) has been a Judge of the Supreme Court of India; or

(b) has been a Judge of a High Court; or

(c) has been a District and Sessions Judge; or

(d) has been a Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force; or

(e) has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years experience; or

(f) is a qualified legal practitioner for not less than ten years; or

(g) is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary; or

(h) has been a Member or President of any State Consumer Forum; or

(i) is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation.

Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, shall appoint one or more experts from the panel referred above.

The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may also suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel.

Any party aggreived by the recommendation of the Mediation and Conciliation Panel can file objections to the Central Government or the Tribunal or the Appellate Tribunal.

Procedure of Mediation or Conciliation

The mediator or conciliator shall follow the following procedure, namely :-

(i) he shall fix, in consultation with the parties, the dates and the time of each mediation or conciliation session, where all parties have to be present;

(ii) he shall hold the mediation or conciliation at the place decided by the Central Government or the Tribunal or the Appellate Tribunal, or such other place where the parties and the mediator or conciliator jointly agree;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall, ten days before a session, provide to the mediator or conciliator a brief memorandum setting forth the issues, which need to be resolved, and his position in respect of those issues and all information reasonably required for the mediator or conciliator to understand the issue and a copy of such memorandum shall also be given to the opposite party or parties:

Provided that in suitable or appropriate cases, the above mentioned period may be reduced at the discretion of the mediator or conciliator;

(v) each party shall furnish to the mediator or conciliator such other information as may be required by him in connection with the issues to be resolved.

Further, where there is more than one mediator or conciliator, the mediator or conciliators may first concur with the party that agreed to nominate him and thereafter interact with the other mediator or conciliator, with a view to resolve the dispute.

Land Mark Cases

There have been some significant judgments which have clarified the position of law on some crucial aspects regarding ADR methods in India, including mediation.

In the case of *Salem Advocate Bar Association v. Union of India*, the Supreme Court held that section 89 required the courts to necessarily refer such matters for resolution by ADR means if it believed it to be appropriate depending on the facts of the case. Moreover, it stated that the terms of settlement were to be settled by the parties before the mediator and not before the court. It also instructed High Courts to formulate rules for court-annexed mediation and establish mediator panels for the same.

The case of *Afcons Infrastructure v. Cherian Varkey Constructions* comprehensively dealt with the court reference to each of the ADR methods listed under section 89 of the Code of Civil Procedure, 1908 including mediation. It also laid down details regarding the laws applicable to each process and the enforcement of settlements in each situation.

In the case of *Moti Ram (D) Tr. LRs and Anr. v. Ashok Kumar and Anr.*, the mediator had submitted the mediation report before the court. The Supreme Court held that mediation proceedings were to be completely confidential in nature and that very limited information ought to be conveyed to the court regarding mediation sessions. It also held that the mediator should only submit the executed mediated agreement or merely a statement that mediation was unsuccessful, depending on the outcome. Elaborate details regarding the sessions were not to be revealed before the court.

In the case of *M.R. Krishna Murthi v. New India Assurance Co. Ltd. [(2020) 15 SCC 493, (India)*, 27*]* which is relating to justice for road accident victims. It was *inter alia* mentioned that having regard to the fact that large number of accidents are giving rise to phenomenal quantum jump in such cases, methods need to be adopted for quick resolution. Here, mediation as a concept of dispute resolution, even before dispute becomes part of adversarial adjudicatory process, would be of great significance. Advantages of mediation are manifold. This stands recognised by the Legislature as well as policy makers and need no elaboration. Mediation is here to stay. It is here to evolve. It is because of the advantages of mediation as a method here to find new grounds. It is here to prosper, as its time has come. It is now finding statutory recognition and has been introduced in few Statutes as well. Examples are the Companies Act, Insolvency and Bankruptcy Code, Commercial Courts Act etc. In these enactments provisions are made even for pre-litigation mediation by making this process mandatory. There is, in any case, umbrella provisions in the form of Section 89 of the Code of Civil Procedure which, *inter alia*, provides for court annexed mediation as well.

COURT ANNEXED AND PRIVATE MEDIATION

[1]Court Annexed Mediation

Mediation, has a means of resolution of disputes, has been growing significantly over the past few decades. It is considered to be the most appropriate method amidst the 'Alternative Dispute Resolution' Mechanisms as it is cost effective, flexible, amicable and addresses the conflict in the most cordial of manners. In the year 1996, the then Hon'ble Chief Justice of India. Mr. A H Ahmedi called for the institute for the Study and

1. Source : https://nyayadegula.kar.nic.in/court_annex.html

Development of Legal Systems (ISDLS), USA to take part in a national assessment of the backlog in the civil courts in India. Various studies were conducted there after to probe and look into the causes of delay in disposal of cases under achieve civil jurisdiction in India. Based on the studies and suggestions to promote the alternative dispute resolution mechanisms, in the year 1999, the Parliament, on the recommendations of the Law Commission of India and the Justice Malimath Committee, amended Section 89 of the Code of Civil Procedure (Amendment) Act, 1999, which came into effect from 2002. The amended Section 89 provides for reference of disputes to various modes like, Arbitration, Conciliation, Judicial Settlement, Lok Adalat and Mediation. Though there were certain anomalies in the drafting of amended Section 89 but the same were set right later by the Hon'ble Supreme Court in *Afcons Infrastructure Ltd. and Another* vs. *Cherian Varkey Construction Co. Pvt. Ltd*.

The advantage of Court annexed Mediation is that the disputing parties, their lawyers all collectively participate in the process of mediation, with mediators. In the Court annexure Mediation, the process of Mediation begins the referral Judge and ends with the same judge as the settlement of the parties culminates into final order passed by the referral judge. The same sets of lawyers who represent the parties in the court retain there briefs for their clients for looking after their interest in the process of mediation. The lawyers who are perceived as litigating lawyers use their clients and helping them to resolve their disputes making by think out of the box and find creative solutions to their problems. The protective environment of the parties due to availability of the assistance of the lawyers does not change and side by side they enjoy their participative role in finding solution to their own problem.

Statutory provisions dealing with court referred mediation

Section 89 of the Code of Civil Procedure laid down the foundation for the Court Referred Mediation process in India. As Per section 89, where it appears to the court that their exist elements of settlement, the court shall refer the matter for Arbitration ; Conciliation ; Judicial Settlement including settlement through Lok Adalat or Mediation. The stage at which the court should explore whether the matter should be referred to ADR processes is after the pleadings are completed and before framing of issues, when the matter us taken up for preliminary hearing for examination of parties under Order 10 of the code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to section 89 before framing of issues. In family disputes or matrimonial cases, the relationship becomes "hostile on account of the various allegations in the petition against the spouse, siblings. So, is the case in commercial disputes involving business partners or co-workers. The hostility further gets aggravated by the counter- allegations made by the respondent / defendant in the written statement. Therefore, wherever relationship is involved, ideal stage for mediation is immediately after service on the opponent more particularly before filing of response to the petition.

Advantages of court annexed mediation

In COURT ANNEXED MEDIATION the mediation services are provided by the court as a part and parcel of the same judicial system as against COURT REFERRED MEDIATION, wherein the court merely refers the matter to a mediator. The advantage of court annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving to them a feeling that negotiated settlement is achieved by all the three actors in justice delivery system. When a judge refers a case to the Court annexed mediation service, keeping overall supervision on the process, no one would feel that the system parts with the case. The Judge would feel that he refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants feel that they are given an opportunity to play their own participatory role in the resolution of disputes. This will also give a larger public acceptance for the process as the same time tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provide an additional service. The court is the parental institution for resolution of disputes and if ADR models are directed under Court's supervision,

atleast in those cases which are referred through courts, the effort of dispensing justice can become more co-ordinated. ADR services under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complimentary and not competitive with the court system.

Private Mediation

Private mediation is a voluntary process for resolution of dispute between parties. Private Mediation may be *Adhoc* or Institutional. In *Adhoc* Private mediation, the parties agree on the rules of Mediation and attempt to resolve the dispute with the assistance of the appointed mediator. In case of unsuccessful mediation, the parties can resort to the courts to exercise legal remedies. There is no law that prohibits private mediation or approaching the court on failure of Mediation process. Even, the upcoming law of Mediation may increases the scope of resolution of disputes through Mediation.

An agreement arrived at through private mediation is a "contract" as defined in Section 2(h) of the Contract Act, 1872. Therefore, if a private mediation settlement agreement (an enforceable contract), then the terms and conditions can be enforced by seeking recourse to provisions of the Indian Contract Act, 1872.

EMPLOYMENT MEDIATION

Employment Mediation means a mediation in which an independent person called a 'mediator' assists Employer and Employee for resolution of a dispute arising out of employment relationship in a semi-formal and confidential environment. However, there may be more than one mediator depending on the requirement of the parties. It is essentially a meeting between two or more parties who are experiencing employment conflict, with the aim of finding a resolution. It is meant to resolve disputes such as employment discrimination, workplace harassment, wage and overtime disputes, termination issues etc.

These mediation can prove to be beneficial to the Employer as well as employee as the same is less costly alternative to litigation for parties who are willing to choose Mediation. The process of mediation is often faster and less expensive than going through the courts and spend time litigating. Litigation usually requires extensive amounts of court filings and appearances which is very less in case mediation.

Mediation is just one form of managing conflict within the workplace between the Employees and the Employer. Mediation allows the people involved in the dispute to speak on the problem they have faced. It provides an opportunity for an issue or issues to be openly discussed. In most situations the dispute has occurred because the parties involved have differing opinions or a different understanding of the situation. In these situations, mediation allows each party to explain their perspective in a controlled manner, in a non-threatening, non-confrontational environment. It also allows each party to get an understanding of the other party's perspective.

Employees and employers also enter into employment contracts with each other that cover a range of matters including conditions and terms of employment. Mediation can be decided to be a mode of dispute resolution by inserting a clause to this effect in employment contracts itself. It will save the time and money for Employer as well Employees.

Mediation is being used regularly and successfully in helping people resolve their disputes informally. It works better because it enables people to hear each other and work out their own disputes in a safe environment with neutral assistance. It also works because it de-emphasizes guilt and punishment and emphasizes understanding and creating a plan for how people will get along in the future.

In order to come to a conclusion and find a solution to all the work related conflicts, disputes and issues, Employment Mediation is the most valuable tool.

What happens after the mediation?

a) **If there is an agreement:** The mediator will write up what both parties agreed to as a Record of Settlement. Once it is signed by the parties and the mediator, this document becomes confidential, binding, final and enforceable through the courts. The mediator will give a copy of the document to the parties. Both parties must then do what they agreed to do when they signed the document.

b) **If the parties cannot agree on a solution:** The parties may then: ask the mediator to make a recommendation. If the recommendation is not declined by either party (before a specified time limit), it will become final, binding and enforceable, or ask the mediator to make a decision. The decision will be final, binding, and enforceable.

All of the above factors also constrain the parties involved in Employment Mediation and prevent them from arriving at agreements, or resolution of their conflict that may impinge on their employment rights, or those of another person or that may have a significant impact on the employer's business needs or operational requirements.

In mediation there is no assurance of a goal. It tends to be viewed as a costly cycle if a result can't be reached. It is subsequently just advantageous if the two players are set up to settle. A few people need to 'have their day in court' and feel a feeling of injustice if the cycle isn't seen through until the end.

Mediation works as a tool for both the Employer and the Employee in order to find a safe way out of disputes and conflicts that arise in the workplace.

[2]ONLINE MEDIATION AND USE OF ARTIFICIAL INTELLIGENCE

Online Dispute Resolution (ODR) refers to the use of digital technology to resolve small and medium-value disputes through methods like negotiation, mediation, and arbitration. This process is conducted entirely remotely, using platforms such as Zoom, Skype etc. In ODR mediation, parties may be supported by individuals through telephone or video conferencing. The Indian government has taken steps to strengthen ODR mechanisms in the country, recognizing its significance. The Mediation Bill of 2021 aims to include online mediation as a method for resolving disputes. It was introduced in the Rajya Sabha on December 20, 2021.

The use of Online Dispute Resolution (ODR) in India is still in its early stages, and to establish a comprehensive framework for implementing ODR in the country, the NITI Aayog formed a high-level committee in June 2020, led by Justice A K Sikri, a retired judge of the Supreme Court of India. The goal of the committee was to develop an action plan that would help integrate ODR into mainstream dispute resolution practices and make justice more accessible through ODR. On November 29, 2021, the committee released its report, "Designing the future of dispute Resolution: the ODR Policy Plan for India," which recommends measures to address the challenges in adopting an ODR framework in India at three different levels. Firstly, at the structural level, it proposes actions to increase digital literacy, improve access to digital infrastructure, and train professionals to provide ODR services as neutrals. Secondly, at the behavioural level, the report suggests using ODR to resolve disputes involving government departments and ministries. Finally, at the regulatory level, the report recommends a soft-touch approach to regulating ODR platforms and services, which involves developing ethical and design principles to guide ODR service providers to self-regulate while promoting growth and innovation in the ecosystem.

The report suggests amending existing laws to improve the legislative framework for ODR and outlines a phased plan for its implementation in India. The Indian government has already taken steps to strengthen ODR, including proposing online mediation under the Mediation Bill, 2021. The bill outlines the process for online mediation, to be conducted according to the Mediation Council of India's guidelines. Currently, the bill is being reviewed by the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law, and Justice.

2. Source : https://pib.gov.in/PressReleasePage.aspx?PRID=1776202

USE OF ARTIFICIAL INTELLIGENCE

The use of Artificial Intelligence (AI) in the Mediation process is considered to be the future of Dispute resolution.

I) AI in ODR can be used as follows:

A. Decision Support System (DSS): A DSS can perform simple activities ranging from compiling data to more complex analysis, like suggesting the best strategy for the fairest possible outcome.

B. Expert System (ES): Another way in which AI can be used is as an expert system. An expert system would have the capability to work at the standard of humans and may even be able to exceed the standard. Such a system will be capable of learning by itself and develop knowledge with each case. They differ on the ground that a DSS would assist a human, whereas an expert system would be able to decide and give advice as a human.

II) Software and Tool

Support tools are becoming increasingly popular among practitioners. With expert systems, contracts can be analysed in minutes as compared to hours taken by a human. Famous Software/tools which are known and recognised globally are SmartSettle, Adjusted Winner, eBrevia, etc.

III) Benefits

Artificial Intelligence (AI) is a field that uses computer science and robust datasets to solve problems. It includes sub-fields like machine learning and deep learning that are commonly associated with AI. In mediation, the first priority of the neutral party is to make the disputing parties feel comfortable and confident in their confidentiality. AI programs could provide an advantage in this aspect as people might feel more at ease sharing personal information with a non-human party, especially when dealing with sensitive issues like matrimonial disputes. This could benefit parties who don't want their details disclosed to a third person. However, it raises concerns about confidentiality. AI has the potential to reduce the burden on courts since the volume of civil cases in India is high, and many of them can be resolved through alternative dispute resolution (ADR). AI in online dispute resolution (ODR) could make the process more accessible to those who can't afford litigation or physical ADR, especially since miscommunication is a common cause of disputes in civil cases.

IV) Limitations

The confidentiality of physical ADR processes is not full proof, as there is always a possibility of information being leaked by the parties or a third party, whereas AI-based systems are vulnerable to cyber-attacks and security breaches. AI systems can be used in two ways, manual data entry or voice commands, both of which can be attacked through the internet. Furthermore, the development cost of such technology is expected to be high and unlikely to be offered at a low cost.

The lack of emotions in AI systems can prove to be a drawback in family disputes. Human communication involves more than just words, and robots may not be able to consider factors that the parties don't mention. Although some robots can analyze non-verbal cues, they may come at a high cost. Another challenge is that AI may not understand colloquial language, different accents, or mixed languages that people use in communication, especially in India, where the use of local languages and the mixing of languages is common. Developing AI to accommodate these complexities will also increase development costs. Therefore, AI as a neutral party or representative may not be as efficient as human beings.

Mediation and other alternative dispute resolution methods are seen as a way of bringing back the "human element" to dispute resolution and moving away from the rather mechanical adversarial system wherever possible. Humans communicate not only from their words but also their tone, facial expressions, etc. The efficiency of AI as a full-fledged neutral party or a representative will not be very high. There are certain

robots that can analyse such signs and react accordingly; however, the cost they come at may be very high.

Another problem that an AI neutral party or representative comes with is the syntax of the language. AI may not be able to understand the colloquial language in which we speak. There might be problems with the accent the person speaks in or the mixing up of the languages. There are times when a language like Hindi mixes with the local language, and it leads to a totally new colloquial language, with words from multiple languages and flexible rules of grammar. Developing AI to suit these requirements will further increase the cost of development.

V) Conclusion

In the application of Artificial Intelligence to streamlining dispute processes and disputants, online settlement may help resolve conflicts, keep the classic informality, cost-effectiveness and speed. Online Conflict Resolution referred to dispute resolution methods based on information and links. The aim of this study is to focus on the various benefits which the judicial system in India will have with the introduction of artificial intelligence tools in mediation and alternative dispute resolution. The study will focus on the relief that the judiciary will get as it can be seen that due to lack of time the apex court is flooded with numerous pending cases so adding AI in the mediation would be beneficial as this would assist in speedy disposal of the pending cases. The study will also focus on the issues that the judicial system in India would face while implementing the AI tools.

REFLECTIVE PRACTICE

The concept of reflective practice in mediation has gained attention in recent years, but it is still not widely used among mediators. This may be because many mediators are not familiar with the practical application and benefits of reflective practice. Additionally, research on expertise development suggests that simply having years of experience does not necessarily lead to mastery. Instead, mediators must remain aware and engaged in their practice in order to continue improving.

Reflective practice groups, also known as Case Consultation or Advanced Practice groups, offer mediators a supportive space to explore and reflect on their assumptions and motivations in a non-judgmental way. This type of self-reflection is essential for professional development and growth. By reviewing their mediation sessions and analyzing the choices they made, mediators can become more aware of their effectiveness and ultimately improve their practice. Overall, greater emphasis should be placed on systematizing the use of the reflective practice in the field of mediation.

Who will benefit from a reflective practice/case consultation (RP) group?

i. Experienced Practitioners

Experienced mediators who have been practicing for several years have developed successful patterns of practice that have become rigid and automatic. They want to re-energize their practice by learning to use their intuition more effectively, challenging their underlying assumptions, and improving their ability to adapt to complex situations. To achieve this, they can attend workshops, seek feedback, experiment with different techniques, reflect on their practice, and seek supervision from more experienced mediators. By doing so, they can enhance their skills, become more responsive to clients, and improve their overall practice

ii. Apprentices

They have limited experience as practitioners. Apprentice mediators who will benefit from participating in peer groups recognize the limits of their knowledge and skills. While performing with competence

and effectiveness, they frequently experience confusion when faced with behaviors that are surprising, unexpected and disruptive. The limits of their skills and knowledge are frequently challenged by increasingly complicated and unique conflict situations.

iii. Novices

Novice mediators are individuals who have received some training, and taken part in role-playing exercises, but lack practical experience. Although they possess a fundamental understanding of conflict and mediation, their skills have not been tested in real-life conflict situations. Due to their lack of experience, these mediators tend to rely on the techniques they have learned or those that they intuitively feel would be effective. However, as they encounter real-life situations, they will begin to question their assumptions and reflect on their approaches to conflict, which will make them more intentional and considerate in their interventions.

STAGES OF MEDIATION

There are four functional stages of the mediation process, namely:

1. Introduction and Opening Statement
2. Joint Session
3. Separate Session(s)
4. Closing

1. Introduction and Opening Statements

The objectives of this stage are:

a) to establish neutrality

b) to create an understanding of the process

c) to develop rapport with the parties

d) to gain the confidence and trust of the parties

e) to establish an environment that is conducive to constructive negotiations

f) to motivate the parties for an amicable settlement of disputes

g) to establish control over the process.

Introduction

To begin the mediation process, the mediator first introduces himself by sharing his name, qualifications, areas of expertise, and years of experience. Then, he informs the parties that he has been appointed as the mediator and shares any past experience he may have in mediating similar cases. The mediator clarifies that he has no affiliation with either party and has no personal interest in the dispute. Next, the mediator encourages the parties to resolve their dispute amicably, establishing trust in his impartiality and skills. The mediator then asks the parties and their lawyers to introduce themselves. The mediator also confirms that all necessary parties are present and authorized to settle the dispute. In case the senior advocate is not present, the mediator may obtain information from the junior advocate about the senior and ensure that they are authorized to represent the client.

Opening Statements

The opening statement is a vital phase of the mediation process. The mediator starts the mediation by introducing and explaining the key concepts, processes, stages, and roles involved in mediation in simple and clear language. They also highlight important aspects of the mediation and provide the

ground rules for the process. The mediator ensures that the parties have understood the process and the rules and offers them the opportunity to ask questions and seek clarification if needed.

2. Joint Sessions

The objectives of this stage are:

a) To gather information

b) To provide opportunity to the parties to hear the perspectives of the other parties

c) To understand perspectives, relationships and feelings

d) To understand facts and issues

e) To understand obstacles and possibilities

f) To ensure that each participant feels heard.

Procedure

The mediator commences the discussion by inviting both parties to present their respective cases and provide an explanation of their perspective. The plaintiff is given the first opportunity to present the case in their own words, followed by their counsel who will explain the legal issues involved. The defendant is then allowed to present their perspective in their own words, followed by their counsel who will state the legal issues involved.

1. The mediator may ask questions in order to clarify any unclear facts and then summarize the facts to identify areas of agreement and disagreement between the parties.
2. The mediator makes sure that the session is not disrupted by aggressive behavior or interruptions from either party.
3. After the joint session is completed, the mediator may meet each party and their respective counsels separately multiple times.
4. At any point in the process, the mediator has the option to revert back to a joint session if needed.

3. Separate Session

The objectives of this stage are:

a) To understand the dispute at a deeper value.

b) Provide a forum for parties to further vent their emotions.

c) Provide a forum for parties to disclose confidential information which they do not wish to share with other parties.

d) Understand the underlying interests of the parties.

e) Help parties to realistically understand the case.

f) Shift parties to a solution-finding mood.

g) Encourage parties to generate options and find terms that are mutually acceptable.

Procedure

The separate session has three steps, they are as follows:

i. RE-AFFIRMING CONFIDENTIALITY:

The mediator reaffirms the parties of the confidential nature of the process.

ii. GATHERING FURTHER INFORMATION:

The mediator gathers specific information and takes a follow up on the issues raised by the parties during the joint session.

In this session, the mediator identifies emotional factors and acknowledges them, explores sensitive and embarrassing issues, distinguishes between positions taken by parties, identifies the cause behind the positions, identifies the areas of disputes and what they have previously agreed upon, identifies common interests, identifies differential priorities of each parties on different aspects of the disputes and ascertains the possibility of any trade off.

The mediator, then, formulates issues for resolution.

iii. REALITY-TESTING:

If the mediator feels after gathering the information and allowing the parties to vent their emotions, that it is necessary to challenge or test the conclusions and perceptions of the parties, then, the mediator can engage in reality testing.

Reality testing is generally done in a separate session, it includes the following techniques:

1. Asking effective questions
2. Discussing the strengths and weaknesses of the parties without any breach in confidentiality
3. Considering the consequences of any failure to reach an agreement.

iv. BRAIN STORMING:

In this technique, the mediator first creates as many options and ideas for settlement as possible and proceeds to evaluate the options critically. This process involves lateral thinking as opposed to linear thinking.

v. SUB-SESSIONS:

This is a separate session held with all the members including members and advocates and members of the counsel of one party to discuss the positions and expectations of the parties or in case of any divergence of interest among the parties on the same side.

vi. EXCHANGE OF OFFERS:

Finally, the mediator communicates the offers generated by one party to the other and the parties negotiate through the mediator and come to a mutual settlement. If this fails to happen, then the cases are sent back to the referral Court.

4. CLOSING:-

A) In Case of Settlement:

- The parties re-assemble and orally confirm the terms of settlement and the mediator further reduces them to writing.
- The parties and the counsels representing sign the agreement in the presence of the mediator.
- The parties receive a copy of the signed agreement and the original signed document is sent to the referral Court.
- The parties agree upon a date of appearance in court and the date is intimated by the mediator to the court.
- The settlement is then said to be reached and the mediator congratulates the parties.

B) In Case of No Settlement:

The case is returned to the referral court clearly reporting that the matter is “NOT SETTLED.” The statements made during the mediation remain confidential.

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help to disputing parties reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) Function of Mediator

The functions of a mediator are to :-

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement.

(I) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.

(II) EVALUATIVE ROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

(B) Qualities of Mediator

It is necessary that a mediator must possess certain basic qualities which include:

(i) complete, genuine and unconditional faith in the process of mediation and its efficacy.

(ii) ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

(iii) sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

(iv) highest standards of honesty and integrity in conduct and behaviour.

(v) neutrality, objectivity and non-judgmental.

(vi) ability to be an attentive, active and patient listener.

(vii) a calm, pleasant and cheerful disposition.

(viii) patience, persistence and perseverance.

(ix) good communication skills.

(x) open mindedness and flexibility.

(xi) empathy.

(xii) creativity.

(C) Qualifications of Mediators

The Supreme Court of India in *Salem Advocate Bar Association V Union of India, (2005) 6 SCC 344* approved the Model Civil Procedure Mediation Rules prepared by the Committee headed by Hon'ble Justice M.J. Rao, the then Chairman, Law Commission of India. These Rules have already been adopted by most of the High Courts with modifications according to the requirements of the State concerned.

a. As per the Model Rules the following persons are qualified and eligible for being enlisted in the panel of mediators:-

   i. Retired Judges of the Supreme Court of India;

   ii. Retired Judges of the High Court;

   iii. Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.

b. Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

c. Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

d. Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(D) Ethics and Code of Conduct for Mediators

1. **Avoid conflict of interest:** A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest. Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated. A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. **Awareness about competence and professional role boundaries**: Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience. Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. **Practice Neutrality:** Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even-handed approach.

4. **Ensure Voluntariness:** The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. **Do no harm:** Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

6. **Promote Self-determination:** Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

7. **Facilitate Informed Consent:** Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

8. **Discharge Duties to third parties**: Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

9. **Maintain Confidentiality:** Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless;

    a. the mediator is specifically given permission to do so by the party concerned; or

    b. the mediator is required by law to do so.

MEDIATION CLAUSE IN COMMERCIAL AGREEMENT

Mediation Clause in Commercial Agreement

A mediation clause in a commercial contract must clearly describe the steps which the parties are required to take or incorporate a structure for a mediation. A clause that simply requires the parties to attempt to resolve a dispute through mediation, has been regarded as unenforceable.

A) Template of Clause

1. "Mediation"

If a dispute arises, between or among the Parties, and it is not resolved, the Parties shall first proceed in good faith to submit the matter to mediation. Costs related to mediation shall be mutually shared between or among the Parties. Unless otherwise agreed in mediation, the Parties retain their rights to proceed to arbitration or litigation.

a) The parties shall endeavour to settle any dispute arising out of or relating to this agreement, including with regard to its existence, validity or termination, by mediation administered before having recourse to arbitration or litigation.

b) The mediation shall be conducted in accordance with the guidelines for Commercial Mediation operating at the time of the matter.

c) The terms of the Guidelines are hereby deemed incorporated into this agreement.

d) This clause shall survive termination of this agreement."

The above clause provides clarity as to the type of disputes the clause is operated on, the manner in which the mediation process is to be administered and the Guidelines which the mediation process must follow.

B) Validity and Effectiveness

a) The inclusion of a mediation clause in a contractual agreement promotes the increased effectiveness of the process, as the parties thereby decide, in advance of any litigation dispute, to participate in the process and how they will do so. It is moreover now common practice to include a mediation clause in several types of contracts in order to encourage the parties, in the event of a disagreement, to consider this alternative.

b) In order to maximise the effectiveness of a mediation clause, certain important elements must be included in it. For it is not enough to merely provide for a mediation process in a contractual agreement, the terms, conditions and procedural rules must be addressed as well.

c) Mediation has the significant potential not merely for reducing the burden of arrears, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication to the settlement of disputes.

d) Mediation cost far less than arbitration, takes less time, and is regarded as a more satisfactory process than arbitration. Findings indicated compelling reasons to use mediation, as well as situations in which mediation should not be used. Therefore, mediation should be the first option to consider when selecting an alternative dispute resolution procedure.

OVERVIEW: CORPORATE AND COMMERCIAL NEGOTIATIONS

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of the negotiation. Negotiation refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. Negotiation may involve different types of bargaining.

What is Negotiation?

Although Negotiation and Bargaining are often used interchangeably, there is a difference between the two in mediation. Negotiation involves bargaining, which is just one aspect of negotiation. Negotiation refers to the process of communication between parties in an attempt to come to a mutually acceptable resolution. Different types of bargaining may be involved in the negotiation.

Negotiation is a significant form of decision-making in human life and involves communication for the purpose of persuasion. In mediation, negotiation is an assisted process of back-and-forth communication aimed at reaching an agreement between the parties to a dispute. The mediator's role is to shift the parties from an adversarial approach to a problem-solving and interest-based approach. The mediator helps the parties negotiate by carrying proposals from one party to the other until a mutually acceptable settlement is reached, which is also referred to as 'Shuttle Diplomacy'. Any negotiation that is based on the merits and interests of both parties is considered Principled Negotiation and can result in a fair agreement that preserves and enhances the relationship between the parties. The mediator facilitates negotiation by utilizing techniques such as reality-testing, brainstorming, exchanging of offers, and breaking impasses.

Why does one negotiate?

a. To put across one's view points, claims and interests.

b. To prevent exploitation/harassment.

c. To seek cooperation of the other side.

d. To avoid litigation.

e. To arrive at mutually acceptable agreement.

Negotiation Styles

1. The first style is the Avoiding Style, which is characterized by being unassertive and uncooperative. The participant avoids confronting the problem or addressing the issues.

2. The second style is the Accommodating Style, which is also unassertive but cooperative. The participant does not insist on their own interests and instead accommodates the interests of others. There may be an element of sacrifice involved.

3. The third style is the Compromising Style, which involves a moderate level of assertiveness and cooperation. The participant recognizes that both sides have to give up something to arrive at a settlement, and is willing to reduce their demands. The emphasis is on achieving apparent equality.

4. The fourth style is the Competing Style, which is characterized by being assertive but uncooperative. The participant values only their own interests and is not concerned about the interests of others. They are aggressive and insist on their demands.

5. The fifth style is the Collaborating Style, which is assertive, cooperative, and constructive. The participant values not only their own interests but also the interests of others. They actively participate in the negotiation and work towards a deeper level of understanding of the issues, seeking a mutually acceptable solution that satisfies the interests of all parties to the greatest extent possible.

What is Bargaining?

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

Types of Bargaining used in negotiation

There are different types of Bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

(i) Distributive Bargaining

(ii) Interest based Bargaining

(iii) Integrative Bargaining

i) Distributive Bargaining

Distributive bargaining is often referred to as "zero sum game", where any gain by one party results in an equivalent loss by the other party. It is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc)

The two forms of distributive bargaining are:

Positional Bargaining: Positional Bargaining, is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation and is often the first method people adopt.

Rights-Based Bargaining: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, s/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages." Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining.

ii) Interest-Based Bargaining

A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and / or interests they want to preserve.

iii) Integrative Bargaining

Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

Meaning of Corporate and Commercial Negotiation

Corporate and Commercial negotiation is the process of negotiating a business deal over a product or service. It can be done between two parties, a company, an individual, or two companies.

Types of Deals

In Corporate and Commercial negotiation, there are two basic types of deals:

A. A sale at a price negotiated by both parties (usually called a "sale"). The buyer pays the seller for the product or service they want.

B. An agreement to supply goods or services without payment upfront (known as an "option"). The seller gives their products or services to the buyer on a trial basis in exchange for a percentage of future sales.

It's one of the most important parts of the business because it can hugely impact whether or not you get what you want. Thus, Corporate and Commercial negotiations are often complicated because both parties have different goals. A company may want to sell its products at a high price, while another wants to buy them as cheaply as possible. The seller may want to sell quickly, while the buyer may be willing to wait until they can find a better deal elsewhere.

Tips for Successful Negotiating

While some individuals may possess natural negotiation skills, there are still some tips that can benefit those who don't.

One should be prepared to justify their position and show evidence that they have done their research. Additionally, it's important to consider the other party's goals and what you can offer to help them achieve their objectives without compromising your own.

It's crucial to keep emotions in check, especially negative ones such as anger or frustration, and remain focused on the goal. Knowing when to walk away is also essential, as it's important to have a minimum acceptable outcome and to recognize when negotiations are not progressing positively.

Taking a break can provide everyone involved an opportunity to reassess and potentially return with a fresh outlook.

MEDIATION CHECK LIST (REQUISITES)

If the parties have agreed to refer their dispute to the Rules, and one or more parties want to initiate mediation under the Rules, they must submit a written Request for Mediation. The Request should contain the following information, which is also included in a checklist:

a) The contact details of all parties involved in the dispute and their representatives in the Proceedings, such as names, addresses, telephone numbers, and email addresses;

b) A description of the dispute, including an estimated value if possible;

c) Any agreement to use a settlement procedure other than mediation or any proposal for such a procedure if there is no agreement;

d) Any agreement or proposal regarding the time limits for conducting the mediation;

e) Any agreement or proposal regarding the language(s) to be used in the mediation;

f) Any agreement or proposal regarding the location of any physical meetings;

g) If the parties have agreed on a mediator, then the nomination should be included. If there is no joint nomination, then the parties should agree on the attributes of the mediator. If there is no such agreement, then a proposal for the attributes of the mediator should be made;

h) If there is a written agreement under which the Request is made, a copy of that agreement should be included.

Points to be considered for Mediation

1. Place and Language(s) of the Mediation
2. Selection of the Mediator
3. Fees and Costs
4. Conduct of the Mediation
5. Termination of the Proceedings.

The following Points are to be considered Pre Mediation

1. To prepare for a successful mediation, it is important to first decide when it should take place.
2. Early mediation, before a complaint, has been filed or during the preliminary stages of discovery, can be beneficial for the party with more knowledge of the facts and can save on legal fees.
3. Mediation just before a trial can also be effective due to uncertainty and fear of additional fees. The next step is to establish mediation goals, with settlement being the primary objective.
4. Even if parties cannot agree, mediation can still be useful for learning about the opponent's goals and resolving discovery disputes.
5. It is also important to be familiar with applicable legal principles and to provide a thorough and timely mediation brief. Additionally, understanding the different negotiation processes used in mediations, such as distributive bargaining and "best and final" offers, can be helpful in reaching a settlement. The mediator may propose a settlement in writing, which can also be an effective negotiating technique.

MEDIATION CONFIDENTIALITY AND NEUTRALITY

Introduction

Mediation is a method of resolution of disputes in which an independent third party facilitates negotiation between disputing between disputing parties to arrive at a mutually beneficial solution. Since the objective of the process of mediation is to arrive at a mutually beneficial solution, the mediator must be an independent third party who is neutral, unbiased and impartial. The mediator must not have any interest in the matter or either of the disputing parties. The focus in the process of mediation is that it is non-coercive and consensual. The two parties voluntarily take part and active efforts along with the help of the mediator to come to a mutually beneficial solution, hence, co-operation of the parties and neutrality of the mediator are aspects of extreme significance in the process of resolving disputes by means of mediation.

Features of Mediation

1. **Voluntary settlement:**

   More often than not, mediation is a voluntary process. Both the disputing parties come together with the motive of arriving at a mutually beneficial conclusion with the help of a mediator. Since the parties actively participate in the process, it is a voluntary process and the likeability of arriving at a conclusion increase. The parties voluntarily come together and mutually decide upon the terms of the agreement before arriving at a mutually beneficial conclusion.

2. **Autonomous Parties**:

   In mediation, the parties are granted a higher degree of autonomy in making decisions as opposed to other forms of dispute resolution, such as litigation. The parties are actively engaged in discussions

and negotiations while the mediator serves the purpose of facilitating the conversation. The parties are responsible for the outcome of the mediation and are at liberty to mutually agree on the settlement terms.

3. **Confidentiality and Neutrality:**

Mediation is a confidential process where anything discussed during the mediation sessions must remain confidential as required by law. This includes all details revealed during the process and they cannot be disclosed during legal proceedings. The mediator and the parties are bound by the confidentiality agreement. Private sessions (or caucuses) between one of the parties and the mediator are also expected to be confidential, and the mediator should not disclose this information during joint sessions without the explicit consent of the party. However, there may be certain situations where it is necessary to disclose confidential information before a court, and the confidentiality is not absolute.

Confidentiality

Confidentiality is crucial in mediation because it allows for open and honest communication between parties, ensures fairness to all parties involved, and maintains the mediator's neutrality. Privacy is also a significant reason why many choose mediation as a form of dispute resolution. Confidentiality laws protect mediators and programs from distractions, harassment, and misuse of limited resources. Section 75 of the Arbitration and Conciliation Act, 1996 talks about confidentiality in conciliation proceedings.

The case of *Moti Ram Thr. L.Rs. and Anr. v. Ashok Kumar and Anr.* established that mediation proceedings should be kept confidential. Prior to this case, parties had the option to choose whether or not to maintain confidentiality in their mediation proceedings. In this case, the Supreme Court directed that successful mediation results should be presented to the court in the form of a settlement agreement, signed by both parties, without mentioning any communication between them. If mediation is unsuccessful, the mediator should only report the result to the court without discussing the proceedings. In the *Salem Bar Association v. Union of India* case, a committee was formed to regulate mediation proceedings, and the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 were introduced, which provide non-binding guidelines for court-referred mediation. Rule 20 of these rules establishes all aspects of mediation as confidential, and the Supreme Court recommended that all High courts adopt these rules with certain modifications.

Mediation proceedings are typically kept confidential, and it is considered unethical to disclose any communication that takes place during mediation sessions. This confidentiality has been upheld by courts in various cases, and it is generally not permissible to seek information regarding mediation proceedings through the Right to Information Act, 2005. However, in the *Perry Kansagra* case, an exception was made to the confidentiality rule for the first time.

MEDIATED SETTLEMENT AGREEMENT

After the parties agree upon the terms of the settlement, the mutually decided terms of compromise or settlement are put into writing before a mediator. Such an agreement is called as a mediated settlement agreement. The mediation settlement agreement is signed by all parties and their counsels.

The written agreement should clearly specify all the material terms agreed to, it should be drafted in plain, precise, and clear language, it should be concise, it should use active voice, wherever possible, it should clearly state what is to be done, by whom it is to be done, when it is to be done, where it is to be done and how it is to be done. Moreover, as the agreement relates to mediation and settlement, it should use language and expressions that is neutral so that neither of the parties should feel favoured or biased, no party should feel like they are

"lost." As this is a legal agreement, binding on the parties, the agreement should be executed in terms that are in accordance with the law. The agreement should avoid legal jargon or ambiguous language and should mainly contain words and expressions used by the parties.

It should positively state what the parties have agreed to do and should avoid ambiguous words such as reasonable, soon, etc. which can be misinterpreted or can lead to difficulty in interpretation.

Given below is a template for a mediated settlement agreement:

Settlement Agreement

Mediated Settlement Agreement

This agreement made this _____ day of _____, 20____ at _____.

BETWEEN

_____ (Full description and address of the Party to be given) of the ONE PART

AND

_____ (full description and address of the Party to be given) of the OTHER PART.

WHEREAS certain disputes and differences have arisen and are subsisting between the aforesaid parties relating to _____(details of contract to be given).

AND WHEREAS the Parties submitted their dispute(s) for an amicable settlement in accordance with the _____ Mediation Rules;

AND WHEREAS the parties agreed to settle the dispute on mutually acceptable terms as finalised during the course of mediation.

NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The undersigned parties agree to the terms and conditions of this Mediation Settlement Agreement ("Agreement"), in full settlement of any and all claims which have been or could have been asserted in this action.
2. First party agrees to provide all the raw materials to the second party in exchange for the sum of Rs. 10 lacs ("Settlement Sum").
3. Second party agrees to make the full payment of Settlement Sum by 02nd August, 2023(the "Settlement Date").
4. Simultaneous with payment of the Settlement Sum in full at the Settlement Date, the parties shall execute and exchange mutual general releases.
5. Simultaneous with payment of the Settlement Sum in full, the First party shall execute and deliver any documents necessary to effectuate the transfer of raw materials.
6. The parties mutually agree that neither of them shall solicit financial advisors or employees of the other for a period of two years from the date of this Agreement.
7. Each party shall bear its own fees and costs for this action.
8. _____
9. _____

10. _____ etc.

11. In order to carry out the terms and circumstances of this mediation settlement agreement, the parties shall execute and exchange any further documents that may be deemed appropriate.

IN WITNESS WHEREOF the parties hereto have hereunto set and subscribed their respective hands and seals the day and year first hereinabove written.

_____ _____

Signed by the above named 1st party

(Name, Signature and Details)

Signed by the above named 2nd Party

(Name, Signature and Details)

Witnesses

1. _____

   (Name, Signature and Details)

2. _____

   (Name, Signature and Details)

_____

Authenticated by (Mediator) _____

ROLE OF MEDIATION IN OTHER ADR DOMAINS

Mediation in Conciliation

Both conciliation and mediation seek to find out the disputed issues and solutions for the same. These are non-judicial, non-adversarial processes, wherein the parties seek a solution to their issue rather than competing against each other. These are voluntary in nature, i.e. both parties should agree to mediate or conciliate the dispute.

Mediation is an alternative form of dispute resolution and is supported by an unbiased third-party mediator. With conciliation, the conciliator will play an advisory role and may intervene in order to offer feasible solutions to both parties and help settle their disputes.

Mediation in Arbitration

In a mediation process, a neutral, trained mediator works to help disputants come to a consensus on their own. In arbitration, a neutral, trained arbitrator serves as a judge who is responsible for resolving the dispute.

Mediation and arbitration can help parties solve serious conflicts without the expense and hassle of litigation.

In mediation and arbitration, parties first attempt to collaborate on an agreement with the help of a mediator. If the mediation ends in impasse, or if issues remain unresolved, the parties can then move on to arbitration.

The mediator can assume the role of arbitrator (if qualified) and render a binding decision quickly, or an arbitrator can take over the case after consulting with the mediator.

In a med-arb process, parties first reach agreement on the terms of the process itself. Typically—and unlike in most mediations—they must agree in writing that the outcome of the process will be binding.

Med-arb can be a wise choice when parties are facing intense pressure to reach a resolution by a deadline, as in a labor dispute. It can also be beneficial when disputants need to work effectively with one another in the future. Med-arb can also be cost-effective: when disputants hire one person to serve as mediator and arbitrator, they eliminate the need to start the arbitration from square one if mediation fails.

Mediation in Negotiation

Negotiation and mediation are complementary tools in the deal making process. But you need to use them strategically for the best outcomes.

The purpose of mediation in negotiation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach.

To gain parties' trust and confidence, rapport must be genuine. You can't fake it. Before people are willing to settle, they must feel that their interests are truly understood. Only then can you achieve a true win-win outcome in both negotiation and mediation.

The importance of relationship building, especially in contentious situations, cannot be overstated. Some measure of trust is required before people will open up and reveal their true interests.

We tend to think negotiation and mediation processes are all alike, but in fact, negotiators and mediators follow different approaches depending on the type of situation they are dealing with. There are many different kinds of negotiation and mediation you can employ to reach successful agreements.

Mediation in Settlement

In order for any settlement to be concluded, the parties must voluntarily agree to accept it. Unlike a judge or an arbitrator, therefore, the mediator is not a decision-maker. The role of the mediator is rather to assist the parties in reaching their own decision on a settlement of the dispute.

Mediated settlement agreements are important because they can turn risks, delays into decisions of the parties. A good mediated settlement agreement can help the parties to remove misunderstandings and conflicts. It also lessens the burden on courts and also reduces legal expenses. Settlement Agreements which are entered into in the course of mediation are acceptable and stand the greatest chance of being implemented because the outcome of mediation is not imposed by a third party adjudicator but represents a solution that has been voluntarily agreed to by mutual agreement.

COMMERCIAL COURTS ACT

In 2015, the Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act was enacted to resolve commercial disputes efficiently and expeditiously. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 were framed in line with the act to achieve this goal. The act mandates that any commercial dispute falling under Section 2(1)(c) and valued at Rs. 3 lakhs or more must undergo Pre-Institution Mediation, which is conducted by Legal Services Institutions. Chapter IIIA, Section 12A of the Commercial Courts Act, 2015 governs Pre-Institution Mediation and Settlement. According to this section, a person filing a suit must exhaust the remedy of Pre-Institution Mediation, as prescribed by rules made by the Central government. The authorities constituted under the Legal Service Authorities Act, 1987 may be authorized for Pre-Institution Mediation by the Central government. The authorized authority must complete the mediation process within three months of the application date, and this period may be extended by two months with the consent of the parties. The period spent on pre-institution mediation is not considered for the purpose of limitation under the Limitation Act, 1963. If the parties arrive at a settlement, it is reduced to writing and signed by the parties and the mediator. This settlement has the same effect as an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996.

LESSON ROUND-UP

- Mediation in Civil and Commercial Litigation refers to a process where a neutral and independent third party facilitates negotiation between disputing parties to arrive at a mutually beneficial solution. This form of alternative dispute resolution is commonly used in the legal system to resolve disputes between two or more parties with concrete effects.
- Employment mediation is meant to help resolve disputes like employment discrimination, workplace harassment, wage and overtime disputes, and termination issues. It can be a less costly alternative to litigation for parties willing and able to participate in the process.
- In Online Dispute Resolution (ODR) mediation, parties may be supported by individuals through telephone or video conferencing. The Indian government has taken steps to strengthen ODR mechanisms in the country, recognizing its significance. The proposed Mediation Bill of 2021 aims to include online mediation as a method for resolving disputes. It was introduced in the Rajya Sabha on December 20, 2021.
- The concept of reflective practice in mediation has gained attention in recent years, but it is still not widely used among mediators. This may be because many mediators are not familiar with the practical application and benefits of reflective practice. Additionally, research on expertise development suggests that simply having years of experience does not necessarily lead to mastery. Instead, mediators must remain aware and engaged in their practice in order to continue improving.
- The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties.
- After the parties agree upon the terms of the settlement, the mutually decided terms of compromise or settlement are put into writing before a mediator. Such an agreement is called as a mediated settlement agreement. The mediation settlement agreement is signed by all parties and their counsels.
- In a mediation process, a neutral, trained mediator works to help disputants come to a consensus on their own. In arbitration, a neutral, trained arbitrator serves as a judge who is responsible for resolving the dispute.
- In 2015, the Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act was enacted to resolve commercial disputes efficiently and expeditiously. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 were framed in line with the act to achieve this goal.

GLOSSARY

Court annexed mediation: It refers to the cases that are pending in the court which the Court refers for mediation under Section 89 of the Code of Civil Procedure, 1908.

Employment Mediation: It is when an independent person called a mediator helps an employee and an employer resolve an employment relationship problem in a semi-formal and confidential environment.

Online Dispute Resolution (ODR): It refers to the use of digital technology to resolve small and medium-value disputes through methods like negotiation, mediation, and arbitration. This process is conducted entirely remotely, using platforms such as Zoom or Skype.

Reflective practice: It also known as Case Consultation or Advanced Practice groups, offer mediators a supportive space to explore and reflect on their assumptions and motivations in a non-judgmental way. This type of self-reflection is essential for professional development and growth.

Negotiation: Negotiation refers to the process of communication between parties in an attempt to come to a mutually acceptable resolution. Different types of bargaining may be involved in the negotiation.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the forms of Mediation?
2. Define Employment Mediation. What happens after the mediation?
3. Explain the uses, benefits and limitations of Artificial Intelligence in Mediation?
4. What are the stages of Mediation?
5. What is the Qualification, Ethics and Code of Conduct of Mediators?
6. Explain Negotiation. What are the Types of Bargaining used in Negotiation?
7. Explain the Role of Mediation in other ADR domains?

LIST OF FURTHER READINGS

- MSME guidelines
- Supreme Court Judgements.

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf
- https://www.jstor.org/
- https://www.scconline.com/blog/post/2021/11/29/legitimacy-of-private-mediation-in-the-pre-legislation-era-busting-myths-with-facts/
- https://www.legalmatch.com/law-library/article/what-is-employment-mediation.html
- https://apcam.asia/2020/09/23/the-court-annexed-mediation-mechanism-an-overlooked-avenue-for-justice/
- https://www.legalmatch.com/law-library/article/what-is-employment-mediation.html
- https://legalserviceindia.com/legal/article-11578-mediation-scope-process-and-techniques-an-introspective-study-into-the-practical-aspects-of-the-procedure-of-mediation.html

International and Emerging Aspects under Mediation Law

Lesson 16

KEY CONCEPTS

■ Mediation ■ Mediation process ■ Mandatory pre-litigation mediation ■ Mandatory mediation ■ International negotiations

Learning Objectives

To understand:

- Conceptual Framework of Mediation
- Details of Mediation bill and upcoming law
- Mediation procedure under various laws
- Key aspects of United Nations convention on international settlement agreements resulting from mediation.
- Singapore Convention on Mediation
- Particulars on International Negotiations and Diplomacy
- Effect and Significance of Culture
- Differentiation between World Culture and Organizational Culture
- Details of International Rules

Lesson Outline

- Introduction
- Conceptual Framework
- Principle Ethics
- Ethics of a Mediator
- Mediation Bill and Upcoming Law
- Mediation under Various Statutes
- United Nations Convention on International Settlement Agreements Resulting From Mediation
- Resolution Adopted By the General Assembly on 20 December 2018
- Singapore Convention on Mediation
- International Negotiations and Diplomacy
- International Rules
- Singapore Mediation Settlement Agreement
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites/ Video Links)

REGULATORY FRAMEWORK

- Right to Information Act 2005
- Information Technology Act, 2000
- Commercial Courts Act, 2015
- Consumer Protection Act, 2019
- Arbitration and Conciliation Act, 1996
- Code of Civil Procedure, 1908
- The Companies Act, 2013

INTRODUCTION

Disputes are indigenous in every society. An ideal society cannot exist without disputes being forming a part of it. Senescent methods of litigation have witnessed delays and more expenses involved it. The drawbacks on part of such traditional methods have arisen the need of questing into alternative methods of dispute resolution. Such alternative techniques were looked into for the purpose of settling the dispute in a more responsive and positive way so that the broken human relations can once again be tied up. There has been different methods falling under the alternate dispute resolution mechanism but 'mediation' is one of such mechanisms that lead to the winning of both the conflicting parties as it is more of a negotiated process. After a deep analysis it would be correct to say that the idea of mediation relies on intrinsic sense of decency as well as an approval of participated values in the society even if they are jeopardized as a consequence of any dispute. According to D.K. Sampath: "The poor lose in a conflict, because they have nothing, no resources, no will to fight to the finish, no stamina to sustain the fight and no ability to take advantage of the system even when facilities are made available.

Thus, they are the losers in terms of anticipation, skill, tactics and strategy. All these are high in an adversary system. So the poor gain by annulling these potent advantages of the opponent bypassing the system and by opting for Mediation". It would not be wrong to say that this is party-oriented process wherein the mediator just acts in a facilitative role. Though this method seems to be the most informal techniques amongst all, still it has to maintain its ethical norms which are the core requirement of this process. Such ethical aspects in mediation are mostly linked up with confidentiality and conflict of interest of the parties. For instance, the performance of a mediator is entirely guided on the basis of some standard models, the actions of disputants are guided by community models or community norms, the entire mediation process is controlled by basic rules of mediation as formulated, and lastly, the resultant outcome is guided by the principled decision making.

Maintaining such ethical aspects in mediation may sound easy but it is a complex and tangled task. In India, mediation lacks any legislative enforcement on thereby making it little tedious to carry on its functioning effectively. But however, the same cannot be ruled out as far as its ethics are concerned because that has to be obeyed and maintained irrespective of any legislative recognition by the government.

CONCEPTUAL FRAMEWORK

Mediation is most casual and relaxed process that involves in it discussions and deliberations between the parties and the mediator at every stage on the disputed issue. The process offers with an opportunity to explore various possible outcomes by the parties with the aid and assistance of a mediator, who acts as a neutral impartial third person. Just because there is more of communication between the parties in the process rather than the mediator, it is often known as 'party-oriented negotiation'. However, it is to be borne in mind that the parties can resort to mediation only if there is a consensual agreement between them. Mediator is neither allowed to provide for any settlement outcomes nor permitted to compel parties to reach at some solution. Moreover, he has no power to decide as to what is wrong and what is right but can just assist the parties to reconcile their

points of differences. But the only task that mediator can perform in the process is that of facilitating the parties with an urge to come out with some amicable solution that suits to both the disputants. So, mediation is not only a process rather it is facilitation and an empowerment to parties to end up their conflict. Mediation begins with the conversation of both the parties with mediator. The mediator then makes an opening statement to the parties and lay down ground rules of mediation that are expected to be followed by the disputants during the entire process. This is the moment when the ethical aspects of mediation starts. Thereafter, the parties are given favourable opening to state their points of conflict one by one. Now once they have briefed their issues, they initiate with the settlement options. It then comes in the hands of mediator whether he wants to have 'joint caucus' or 'separate caucus'? This decision of conducting joint caucus or separate caucus depends upon the nature and depth of conflict between the parties. If the mediator thinks that the nature of dispute of is not very exhaustive or rigorous then he may continue with the joint caucus, whilst if he feels that the dispute is of grave intensity then he will prefer to conduct separate caucus. Keeping hold of such caucus is essential on part of mediator which actually acts as an ethical norm in mediation. This is so because if mediator fails to opt for correct session, it will affect the parties as well as the mediation process thereby vandalizing the ethical outlook of mediation. Subsequently once the parties come to a consensual point, the same will be then reduced in a written form so as to make it a settlement agreement. Such settlement agreement is binding on the parties. After this the process gets wind up and the most advantageous feature of this process is that whatever conversations are made during the sittings cannot become the subject matter for challenge or evidence in any court of law.

PRINCIPLE ETHICS

Ethics are the social norms of determining as to what is right and what is wrong. Established ethical reasoning can be understood as by those who not only concerns for themselves but focuses on the concerns of others as well. This supports the principle of mediation as well. Mediation ethics spotlights three various aspects, namely:

1. **Virtue ethics:** Virtues are the values of oneself. The party is just concerned as to what he wants from the mediation, what are his expectations, what does he demand from the other party and the mediator etc. Such ethics revolves around the belief of individual person only.
2. **Principle ethics:** In order to support virtue ethics, principle ethics specifies as to what the party shall do in order to end up the dispute. Here comes the duty of the party to perform at his own level with a view to settle the dispute.
3. **Reciprocity:** The most signifycant and influential aspect is the 'reciprocity' i.e., with the demands and responses of one party how will it affect the opposite party. Whether the demands and needs of opposite party too will be satisfied or not? So it peeps into the interest of the other party. In Mediation, these ethics are to be understood and followed in order to make the process more viable and feasible in nature.

Apart from these, there are five principle ethics of mediation that are highlighted as follows:

(a) Autonomy:

This is the core principle of mediation ethics. Autonomy implies to independence. As aware of the process of mediation, everything happens according to the wills and wishes of the parties. The parties are free to decide the time, place, language etc. in the mediation process. There is full freedom of choice and action in mediation.

(b) Loyalty:

This principle bring into the concepts of being faithful, committed and a sense of fidelity in the process. This loyalty or fidelity of one party should not be only with the mediator but should be with the opposite party as well. Such allegiance will boost up the process by inculcating trust and faith in their relationship which will further cause the blissful growth to happen.

(c) Beneficence:

This principle highlights over doing good for others. It imposes the responsibility on both the parties as well as the mediator to contribute towards the welfare of everyone involved in the mediation process.

(d) Justice:

It simply does not mean treating everyone equally. In fact it entails that one should treat equals equally and unequals unequally but according to their pertinent differences. The mediation process unlike court oriented method does not pronounce any judgment favouring or disfavouring anyone. It talks about justice in the light of providing a win-win solution to both the disputing parties.

(e) Non-malfeasance:

This means 'not causing harm to any one'. Therefore, it enunciates that during the mediation process, none involved in it should cause any intentional harm to anyone. One should not aim at such solutions that benefit himself and injures the other party, otherwise this will go against the norms of mediation ethics. These principle ethics are to be pursued both by the parties as well as by the mediator. No doubt there are some separate ethical codes of conduct for mediators that are to be followed but however, these principle ethics forms the basis of all other codes of conduct in mediation process.

ETHICS OF A MEDIATOR [1]

The entire success of mediation rests upon the basic guidelines provided to the mediators about ethical aspects of the process. It is accurate to say that there are some evolving principles and standards in the arena of mediation skill as well.

They are listed as under:

1) Self Determination

Self Determination is one of the core principles of mediation. It is the act of coming to an intentional as well as un-coerced result where in each of the parties makes informed consent about the outcome of the process. Self determination rests on the principle of party's autonomy which every mediator is bound to respect and persuade. This principle implies that a mediator should rely solely upon the parties for them to reach at a consensual agreement. A mediator must take all rational and sensible efforts to ensure that the disputants understand the nature and spirit of mediation process which includes the discussion of all issues as well as the available option for settlement. Moreover, a mediator must also inform the parties about the ground rules of the process thereby also informing that the parties have the full chance to withdraw from mediation at any stage of process. If mediator feels that at any time the parties are unable to understand the actual scope of this process or the parties are not able to participate entirely in it then in such situations, mediator must suggest the parties to take appropriate assistance with their intent to continue further with the process. If in the same situation even after taking any assistance, the parties are still unable to continue with the process, then mediator must inform the parties about the other activated options available to them for settling their conflict.

2) Mediator's Role

The only point that mediator is to keep in mind is that his position is that of a facilitator only and he is not allowed effectuate the process by giving his own submissions. But however, this facilitative role would also impose the duty on mediator to make the parties aware about the importance of consulting any expert opinion or professionals to assist them to make fully informed choices. No doubt, mediator controls the process but he is not empowered to control the discussions and outcome of the conflict.

1. Rattan Singh & Shikha Dhiman, Ethical Perspectives of Mediation: The Voice of a Mediator, VIII (1) BHARATI LAW REVIEW 01-14 (JulySept., 2019)

Therefore, mediator must make it clear to the parties at the outset that:

a. His duty is to smooth the progress of discussion of the content of parties and not to act as a judge for resolving their dispute.

b. He is to inform the parties that the dispute is their own and consequently they themselves have to play an active role in resolving the dispute.

c. His job is to let the parties know that they are to deliberate the point of issues between themselves on merits of probable settlement.

d. He is to put in picture for the parties that they are required to persuade each other and not to persuade the mediator.

Thence, the role of mediator is to help the parties to sneak a look into some new ways and means to settle their differences and not to give any suggestions for their settlement.

3) Voluntary Participation of Parties

The voluntary involvement of parties is central to the theme of mediation process. Mediator should also conduct the process in such a way that maximizes the parties' voluntariness. In a situation where the parties themselves go to mediation centre, the aspect of voluntariness is already imbibed in the parties and hence it is easy for them to come to a mutual satisfaction on their own. But however the picture is different in court ordered mediation. This is so because the parties lack an aspect of voluntariness. Therefore in such circumstances, a mediator should be sensitive enough to assure the parties that even though they have been ordered by the court for mediation, a settlement agreement will only be reached if they willingly come up with consensual outcomes with their shared contentment.

4) Informed Consent Parties

Consent and their representational status form the part and parcel of their informed consent. It is to be borne in mind that without informed consent of parties, principle of autonomy and self determination stands nowhere in mediation. The theory of informed consent of the parties focuses on the parties' conduct of decision making during the entire mediation procedure. Especially the parties who are not backed by the professionals assistance need to comprehend as to how the consent operates in mediation and what it actually means to reach a settlement agreement. By informed consent principle, the parties are expected to have waived off their all legal rights and remedies as far as they chose to continue with mediation.

5) Impartiality

Impartiality implies freedom from favoritism, discrimination and nepotism both in conduct of process as well as in appearance of mediator. A mediator has to remain balanced and even handed during the entire mediation process. If at times the mediator becomes unable to continue with the process in an impartial or unbiased manner, he shall himself chose to withdraw from the process and should not conduct any proceedings thereon. The beauty of the process depends upon the impartiality of the mediator. A mediator should neither give nor take any gifts, money or any other valuable thing that amounts to raise question regarding his perceived partiality in conduct. Therefore, in order to maintain the norms of impartiality, the mediators are usually appointed by the court or court nominated institutions and the appointing authority shall ensure that the mediator appointed by them serves the criteria of being impartial. Moreover, mediator should make such conduct which guards against partiality and prejudice of the process.

6) Conflicts of Interest

It is obligatory to find out in the beginning itself that mediator should not settle such disputes wherein he himself has any personal, professional or financial interest. Before initiating the process, a mediator

must disclose his actual or any other potential interests. If such disclosure of interest is made well before the process begins then the parties have the opportunity to opt for any other mediator. The acceptance of same mediator even after his (mediator's) full disclosure of interest, usually settle the potential conflict of disputing parties. Such an acceptance by the parties must be recorded in writing to avoid any future conflicts in this regard. Even if the parties agree to continue with the same mediator after knowing his interest but however the mediator feels that such an interest might affect mediator's impartiality, then he should withdraw from the process irrespective of the parties express desire to continue.

7) Competency

Only a competent mediator can best serve the purpose of mediation. The mediator appointed should be of such qualification and competence that can fulfill the necessary as well as reasonable expectation of the parties. It is essential that the conflicting parties are satisfied with the qualification of mediator. Apart from such credentials, a capable mediator envisages effective training and experience in mediation. When the person is appointed as a mediator by some court or any other designated institution, such appointing authority shall ensure that the appointed mediator have sufficient credentials which are suitable for a particular type of mediation.

8) Confidentiality

The conversation among the parties as well as the mediator happens to be there behind the scenes. The process is non-public i.e. no one from public is allowed to see any single glimpse of the dealings of mediation. The matter remains exclusively confidential and private. This feature of remaining being secret makes the 'mediation' different from court litigation procedure as well as different from other modes of alternate dispute resolution mechanism. The disputing parties also expect full secrecy in the process from a mediator. Hence, mediator is bound to preserve two forms of secrecy in mediation: i. Secrecy of parties' dispute from public ii. Secrecy of information given by one party from the other party. But however, in latter type of secrecy the mediator may disclose the information given by one party to another only with the prior approval of party who gave the information and if the situation demands such disclosure. All the rules with regard to confidentiality clause in mediation shall be deliberated among the parties and mediator before they initiate with the proceedings.

The Supreme Court in *Moti Ram v. Ashok Kumar*[2], held: "The mediation proceedings ought to be strictly confidential, and in case of court referred settlements the mediator must simply place the agreement before the court without conveying to the court what transpired during the process."

Similar to the decision of Supreme Court, the Central Information Commission in *Rama Aggarwal v. PIO, Delhi State Legal Service Authority*[3], opined: "The proceedings during mediation are protected under the exceptions in the Right to Information Act 2005 and are not subject to be disclosed as no public interest is served on disclosure and there exists larger public interest protecting the information". Confidentiality of the process should not be such which restricts the mediator to conduct effective monitoring research as well as evaluation of mediation programs during the process.

If such prohibitions are imposed, then it may affect the behaviour of mediator to accomplish his task and he will not be in a position to carry out mediation in an appropriate and valuable manner. Therefore there are some exceptions to the confidentiality of mediation process which are as follows:

a. When the conflicting parties give their written consent;

b. When there are some statutory obligations to be followed;

2. Civil Appeal No. 1095 of 2008) December 7, 2010

3. CIC/SA/A/2015/000305

c. When mediator is entailed to prepare a written brief or summary or report of mediation;

d. When there are justifiable grounds to believe that disclosure is essential in order to avert any danger or injury to any person or property;

e. When the information is of qualitative or quantitative nature which is further required to be used for research or evaluation purposes. Considering these exceptional situations in mediation, a mediator conducts private caucuses with the parties to discuss their issues and must inform the parties about the restraints to confidentiality during such sessions.

A mediator must make it certain that confidentiality is preserved in the storage as well as disposal of mediation records, documents, files etc. as well.

9) Refrain Legal Advice

It is very vital that mediator enlightens the parties about his actual role. He should make the parties aware that his role is that of a neutral intermediary and not of any advocate or representative of either of the parties. Therefore, a mediator is expected not to render any legal advice to any of the conflicting parties. If mediator proposes the parties to go for court procedure or arbitration settlement, then it does not imply that he has given any legal advice. At times when mediator assists in the grounding of settlement agreement, it does not connote that he is representing any of the party to the dispute. So, the role of mediator is cut short to just facilitate the process which itself is very flexible and fluid in nature.

10) Quality of the Process

The entire quality of the mediation process lies on the working manner of mediator. With intent to ensure the qualitative aspect of mediation, mediator must possess few qualities like meticulousness, timeliness, safety, existence of suitable participants, party participation, procedural equality, competency and deference among everyone involved in the process. He is anticipated to conduct the mediation process very diligently, fairly and honestly. Mutual respect among the parties and mediator is also one of the key aspects to maintain the eminence of process. But however, such a worth of the process can only be there if mediator ensures commitment towards his demeanor.

Hindering the parties for any sort of undue delay in the proceeding of process is also one of the ways of upholding the class and excellence of process. Furthermore, the mediator shall postpone the proceedings if there is illegal conduct on part of any of the parties or either of the parties is unable to carry on the process due to influence of any drug, alcohol or any other mental or physical incapacity, in order to sustain the value of mediation process. A mediator should not conduct the proceedings with an aim to accomplish high successful rate rather he should just act in a manner so as to raise lawful and rightful question about the veracity and uprightness of mediation process.

11) Solicitation and Publicity

A mediator should not engage himself in any misleading advertisements. He is expected not to make any deceptive or false statements about the process of mediation, quality of mediation, cost of mediation, benefits of mediation, role of mediator as well as his skill and competence. All the information or communication to the public through advertisements should be truthful and also mediators are restrained from making guarantees about the results even.

12) Fees

At the very outset of mediation, the mediator is duty bound to disclose to the parties about the fee structure and any other charges, if required, to be paid by one party to another party. It is indispensable to bring to the notice of parties about fees and compensation criteria because then only they will be

able to come to a decision whether they want to retain the services or mediator or not. A mediator should charge reasonable fees for carrying out mediation.

Therefore, he should keep following factors in mind while fixing up his fees:

i. Complexity and nature of dispute

ii. Experience of mediator

iii. Time required for entire session

iv. Type of mediation

v. Levels of mediation services.

However, if a situation arises where from the mediator is bound to withdraw from the process before the completion of mediation, then he should return back unearned fees to the parties concerned. Additionally, a mediator is also not allowed to charge any referral fees. Moreover, there should not be any fee agreement between the parties and mediator that remains contingent upon the outcome of mediation. If there is more than one mediator, then the fees should be allocated among them according to their agreement and the disputants are not permitted to interfere in that matter by any concern.

13) Obligations to the Mediation Process

There are some core obligations on mediator for effectual working of mediation. Some of the obligations are stated as under:

i. Obligation to utilize their knowledge about mediation.

ii. Obligation to educate public by various modes to come up for mediation by telling its benefits.

iii. Obligations to improvise their professional ethics.

iv. Obligations to improvise their ability and capability to settle disputes through mediation.

v. Obligation to make mediation accessible to those who cannot afford litigation process or any other mode of dispute settlement. This is only required on part of mediator. Such commitments towards the mediation process is often claimed to make the process more successful and booming over all other processes.

14) Inter-Professional Relations

Mediators are not only required to maintain the relations with the parties who came forward to him to resolve their dispute but also to preserve his relationship with other mediators as well as professional advisers too. He is anticipated to make sure that he carries good term with other experts who are responsible to complement the practice of mediation. Mediators must try to build up cooperative relations with other professionals and must persuade his clients to take the assistance of other professionals, as and when required during the process.

15) Duty towards Third Parties

The way the mediator is not allowed to cause any harm to the disputing parties, similarly he should not harm others who are not party to the dispute but still will be affected by the settlement agreement of mediation. Generally such third parties are children or elderly persons in cases of family disputes. But however, there are instances where the third party might be the general public. Example: in cases of settlement dispute regarding construction of any highway or bridge (public projects) etc. So it becomes mandatory for the mediator not to harm the interest of third parties as well. Therefore, a mediator is to act responsibly and safeguard the welfare of third parties also as and when required. Considering all

the ethics of a mediator, it would not be wrong to say that the assurance in mediation technique can be cultivated and advanced only if the mediator performs in positive manner the ethical concerns of the technique upon which the entire position of mediator is vital.

MEDIATION BILL AND UPCOMING LAW

It is common knowledge that the Indian justice system is largely adversarial. Yet, judicial and quasi-judicial forums continue to grapple with systemic inadequacies and rising case pendency. To resolve this, the government has taken several measures including promotion and development of alternate means of dispute resolution. While arbitration has evolved over the years, the focus has now shifted towards institutionalizing mediated settlements. In fact, for a long time, India has mulled over introducing an all-encompassing law on mediation. Finally, on December 20, 2021, the Mediation Bill, 2021 ("Bill") was introduced in Rajya Sabha, i.e., the upper house of the Indian Parliament. On the same day, it was sent to the Parliamentary Standing Committee on Law and Justice for further deliberation.

The present draft comprises of 65 clauses and ten schedules. It extensively covers several areas including contours of institutional mediation, establishment of a regulatory body, recognition of entities conducting mediation, role, qualifications and training of mediators, online mediation, community mediation, settlement of cross border disputes through mediation, compulsory pre-litigation mediation and enforcement of mediated settlement agreements. This newsletter aims to analyze only selective key provisions of the Bill concerning institutional mediation, compulsory pre-litigation mediation as well as enforcement and setting aside of mediated settlements and the way forward.

Mediation process

Mediation, unless court-driven, is an informal process where consenting parties come together to resolve their disputes amicably. This process is facilitated by a neutral third-party, i.e., a mediator. Due to the informal nature of proceedings, settlements arrived through mediation are not legally binding, except in cases where parties are referred by courts to mediate their disputes, and, settlement terms, if any, are recorded before the court and adopted by parties as final determination of their rights and liabilities. Where parties mediate without court intervention, they may record their understanding into a settlement agreement and abide by its terms on their own volition. In case of a breach, the aggrieved party can initiate legal proceedings against the other for breach of contract or trust, but cannot enforce the settlement agreement as a decree of court.

Now, the Bill proposes to formalize and institutionalize mediation to promote it as the first step towards dispute resolution. While procedural formality may initially lead to some degree of inflexibility, it is often considered an important tool to structure and consolidate any area of law which has, until then, remained fragmented. To this end, some of the key provisions proposed in the Bill are explained below:

1. **Application:** The Bill is applicable to (a) Indian residents or entities incorporated or having place of business in India; (b) parties who have agreed to subject their disputes to the provisions of the Bill by executing a mediation agreement; and (c) international mediation. Clause 3(f) of the Bill defines international mediation as the mediation related to commercial disputes arising out of legal or contractual relationship governed by applicable Indian laws, where at least one party is:

   (i) a foreign national, or

   (ii) body corporate, limited liability partnership, or association of individuals having place of business outside India, or

   (iii) a foreign government. In essence, parties who wish to be governed by the Bill must choose Indian law as the substantive law of the contract.

Additionally, the Bill also applies to commercial disputes where one of the parties is the Central or State government, or its agencies, public bodies, corporations, local bodies, or entities owned or controlled by the appropriate government. However, the scope is limited as matters between private and government bodies which relate to consumer grievances, industrial disputes, etc. are excluded. Nonetheless, the Bill allows the government to notify or refer more kinds of private-public disputes to mediation, if it deems necessary. Further, disputes solely between government entities are not included within the ambit of this Bill. Accordingly, the application of the Bill on government and its agencies is restricted under the current draft.

2. **Mediation Agreements:** [4]As contractual relationships become more sophisticated and nuanced, parties voluntarily factor mediation under the dispute resolution clauses. The Bill envisages a written agreement between parties to be able to submit one or more disputes to mediation. Such agreement can be (a) in the form of a standalone agreement signed by the parties or a mediation clause incorporated in an existing contract, (b) contained in an electronic communication such as e-mails, letters, etc., recognized under the Information Technology Act, 2000, or (c) stated in pleadings of a suit or other legal proceeding in which existence of a mediation agreement is alleged by one party and is not denied by the other party. For instance, a mediation agreement is executed between parties in any of the forms prescribed under (a) and (b) above, and the original agreement is lost. If one party makes an averment regarding the existence of such mediation agreement in its pleadings before a competent court, and this averment is not refuted by the other party, the mediation agreement shall be deemed valid and subsisting under the Bill.

   The requirement of a written mediation agreement can be easily fulfilled by drafting multi-tier dispute resolution clauses where mediation is the first step. This ease of submitting disputes to mediation will attract parties to mediate. As a consequence, the judicial system will benefit significantly as parties will keep out of court, at least for the foreseeable future.

3. **Mediation Council of India:** The Bill envisages establishment of an overarching body called the Mediation Council of India ("MCI") to perform functions necessary for promotion and development domestic and international mediation in India. Broadly, MCI will (a) recognize mediation service providers and mediation institutes, (b) stipulate the manner of grading mediation service providers, (c) lay down guidelines for continuous education, certification and assessment of mediators, (d) provide for registration of mediators, (f) lay down standards for professional and ethical conduct of mediators, mediation service providers and institutes, (g) prescribe framework for registration of mediated settlement agreements, (h) maintain an electronic depository of mediated settlement agreements executed in India.

   This is a positive step in a creating a robust institutional mediation ecosystem. Continuous education and training will create a pool of competent and qualified mediators. An electronic depository of mediated settlement agreements will support research and development of jurisprudence in this field of law. But it is critical that the principles of confidentiality are not compromised in the process.

4. **Mediation Service Providers:** Clause 3(l) of the Bill defines a mediation service provider as a body or organization recognized by the MCI for conducting mediation. Such service provider will also include Lok Adalats, authorities constituted under the Legal Services Authority Act and court-annexed mediation centres. The first court-annexed mediation centre was inaugurated at the Madras High Court on April 1, 2005. Subsequently various High Courts and District Courts followed suit. Recently,

4. Source : PSA Legal counsellors via Mondaq.

private mediation centres including Indian Institute of Arbitration and Mediation, New Delhi and those in Bangalore Hyderabad and others, have mushroomed. But in the absence of real time data, it is difficult to claim if the existing mediation centres, whether court-driven or private, are running successfully. By providing for recognition to mediation service providers, the Bill assures transparency, accountability and standardization in the functioning of such mediation centres.

5. **Role of a mediator:** A mediator is an individual(s) appointed by parties to settle their disputes through mediation and includes a person registered with MCI. Under the Bill, foreign nationals are allowed to be appointed as mediator(s), only if, they possess prescribed qualification, experience and accreditation. The Bill empowers MCI to make regulations in this regard. Parties have the autonomy to agree upon the number of mediators and appointment procedure. If parties are unable to collectively decide the mediator(s), they can apply to a mediation service provider for such appointment.

   The role of a mediator is to facilitate parties to reach amicable settlement of their dispute by identifying key issues, reducing misunderstandings, and creating options for compromise and a win-win situation. Such person must act objectively and in a fair and impartial manner. The Bill mandates mediators to protect the "voluntariness, confidentiality and self-determination" of the parties. Therefore, they cannot impose any settlement terms upon the parties. In essence, a mediator should act as a facilitator and not an adjudicator that works to steer the disputing parties to an outcome that is in their best interest. Practically, court-appointed mediators are often ex-judges or law officers who may not necessarily have the correct mindset to view mediation as a mere assistance to aggrieved parties. Going forward, it is important that mediators, irrespective of their affiliation to a mediation service provider, are guided and trained to leave the adjudicatory approach outside the door.

Mandatory pre-litigation mediation

Mediation can be initiated prior to and during the course of legal proceedings. Section 89 of the Code of Civil Procedure empowers courts to refer civil matters amenable to out-of-court settlement to different forms of alternate dispute resolution including mediation. The Commercial Courts Act and Consumer Protection Act also provide mediation as a mandatory first step before initiation of litigation. However, some courts have ruled that pre-litigation mediation under Section 12A of the Commercial Courts Act is not mandatory and merely directory in nature because the provision is procedural and does not affect the substantive rights of the parties.

Clause 6 of the Bill seeks to make pre-litigation mediation mandatory for civil and commercial disputes, irrespective of parties entering into a mediation agreement. The objective is two-fold: (a) to reduce burden on courts, and (b) to insist parties to try this process for resolving their disputes. The legislative intent does not appear to compel litigants to reach a settlement or infringe the spirit of voluntariness. Instead, it allows parties to explore an option which ensures confidentiality, is more flexible, cost and time efficient, before taking the conventional route.

Mediated settlement agreements: Enforcement and Challenge

Mediation is not a recent phenomenon in India. Yet, parties are reluctant to select it as a preferred mode of dispute resolution. One of the key reasons is that till date, mediated settlements, except those driven through courts, are unenforceable. The Bill aims to resolve this impending issue by making mediated settlement agreements final and binding on the parties. Additionally, such settlement agreements shall be enforceable as a decree of court and can be relied by the parties in other legal proceedings. Enforceability of mediated settlement agreements will reduce dependence on an already overburdened court system and direct parties towards a more cost-effective solution.

A party can challenge the enforcement of a mediated settlement agreement before a competent court within 90 days from the date of receipt of such agreement. This period can be extended by another 90 days if

the applicant is able to show sufficient cause. Mediated settlement agreements can be set aside on limited grounds. These are (a) fraud, (b) corruption, (c) impersonation, (d) disputes not fit for mediation. Clearly, the grounds of challenge stated in the current draft are broad, vague and open to judicial interpretation. Indian courts have dealt with cases involving allegations of fraud or corruption in passing arbitral awards. While the jurisprudence at hand is limited, it can be helpful in setting parameters for deciding challenge to mediated settlement agreements on these grounds.

India is committed to improving ease of doing business and the Bill is a welcome step in that direction. However, it has several inconsistencies which are likely to be addressed through judicial intervention or legislative amendments. The Bill proposes mandatory mediation before initiating legal proceedings of civil and commercial nature. Mandatory pre-litigation mediation is often construed as contradictory to the fundamental principle of voluntariness inherent in this process. This perspective is slightly misconceived as parties are only pushed towards using a different form of dispute resolution and not coerced into reaching a settlement. Several provisions of the Bill are procedure-driven with the underlying intent to provide structure to the law, but in that process, appear to undermine the informal and simple approach generally associated with mediation. Going forward, we hope that mediation becomes a sustainable solution to rising case pendency and does not transform into pseudo-litigation.

Review of Mediation Bill and its plausible impact:

The quest for India's comprehensive legislation on commercial mediation has culminated in the formulation of the Draft Mediation Bill 2021 ("Bill"). The Bill was tabled by the Union Law Minister in the Indian Parliament in December 2021, after which it was referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice ("Committee") for deliberations. In essence, the Bill aims to promote, strengthen, and consolidate the law on commercial mediation within the Indian legal framework to alter the mediation landscape in India.

The Bill contains several laudable features, such as the recognition of a mediated settlement agreement under the Civil Procedure Code, 1908 ("CPC"), right of parties to seek urgent interim relief in courts before the commencement of, or during the continuation of mediation proceedings, provisions in relation to timely completion of mediation proceedings, community mediation and the establishment of a Mediation Council of India to institutionalize mediation. Despite the above, the author argues that there are several gaps in some of the key provisions of the Bill that makes the Bill a work in progress. This piece is aimed at critically analysing those provisions and suggesting suitable amendments to the Bill to make it a water-tight piece of legislation.

The Unwarranted Juxtaposition of Mediation and Conciliation[5]

Under Section 4 of the Bill, the definition of Mediation includes conciliation within its ambit. This is problematic for two reasons. Firstly, conciliation and mediation are two distinct concepts in law. In conciliation, the conciliator plays a far more proactive role and is empowered to propose settlement terms [See Section 67(4)[6] of the Arbitration and Conciliation Act 1996 ("Arbitration Act")]. On the contrary, the Bill does not contemplate any such powers for a mediator. In fact, Section 18 specifies that the role of a mediator is that of a facilitator and nothing beyond. Secondly, section 61 read with the Sixth Schedule seeks to do away with the provisions on conciliation under the Arbitration and Conciliation Act, 1996 while the Bill itself does not have separate provisions for conciliation. This would have the effect of dispensing with the concept of conciliation under Indian law altogether and lead to anomalous results where parties will no longer have effective recourse to conciliation under the Arbitration and Conciliation Act, 1996. It is therefore, suggested that conciliation be excluded from the ambit of Mediation under the Bill since the law on conciliation already stands codified in the Arbitration and Conciliation Act, 1996.

5. Source : Mediationblog.kluwerarbitration

6. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Mandating Pre-Litigation Mediation: A Blessing in Disguise?

One of the distinguishing features of the Bill is the introduction of a mandatory pre-litigation mediation. According to section 6(1), the parties to a dispute shall attempt to first settle their disputes through mediation before filing any suit or proceeding in courts. Interestingly, this section makes this provision applicable regardless of the existence of a mediation agreement between parties. In other words, parties would be required to mandatorily explore mediation before litigation even if no agreement to mediate exists between them. Furthermore, this pre-litigation mediation process is also supplemented by an opt-out mechanism. Under section 19(1) read with section 25 (d), a party may withdraw from mediation at any time after the first two mediation sessions by communicating its intention to do so to the mediator and the other party. The proceedings would stand terminated as on the date of such communication having been made.

From a policy perspective, enforcing mandatory recourse to mediation prior to litigation can lead to expeditious settlement of disputes by nipping them in the bud. It will reduce costs that parties would otherwise incur in litigation, which is traditionally understood to be expensive in India. It will also reduce the judiciary's burgeoning pendency of caseload. The issue that however needs to be addressed is whether mandatory mediation as a pre-litigation tool, in the manner it is sought to be introduced in the Bill, can help achieve the objectives of the Bill.

In this regard, the language of section 6(1) does more harm than good. Firstly, the import of the words "Subject to other provisions of this Act" is not clear and to a certain extent unnecessary. If the provision is intended to be mandatory, then subjecting it to other sections in the Bill is inconsistent. Secondly, the provision does not indicate what kind of "steps" would constitute adequate compliance with the section. Furthermore, the option of opting out from the process after attending two sessions is likely to incentivize unwilling parties to exploit these conditions to first submit their disputes to mediation and then eventually resort to courts/arbitration anyway, thus relegating the entire process to an empty procedural formality. If the intent of the lawmakers is to ensure that every dispute ought to be mediated before it reaches the courts (except the ones held to be outside the purview of mediation under the Bill), then there is no reason for the Bill to give an option to parties to circumvent the process. Thirdly, and perhaps most importantly, mandating mediation prior to litigation could be construed as invasive of party autonomy. Coercing unwilling parties to mediate their disputes against their will can be counterproductive. One needs to keep in mind that mediation is a voluntary process where parties willingly share sensitive information with a neutral third party.

Pursuant to a recent decision of the Hon'ble Supreme Court of India where pre-litigation mediation has been held to be mandatory under the Commercial Courts Act 2015 ("Act of 2015"), it is possible that the legislature may be implored to retain section 6(1) as it stands today to bring parity with both sets of laws. However, circumspection ought to be exercised while mandating mediation across the board. In this context, it is relevant to note that as of July 2022, the Committee has submitted a report to the Lok Sabha (Lower House of Parliament) Speaker and the Rajya Sabha (Upper House of Parliament) Chairman making extensive recommendations to the Bill and in particular, cautioning against making pre-litigation mediation compulsory on the ground that such a tool may be used by truant litigants to delay the disposal of cases. To strike a balance between the individual interest and policy considerations, it is suggested that section 6(1) of the Bill be reconsidered, and pre-litigation mediation be made optional, at least at the inception stage. The other alternative to make it mandatory in only those cases where no interim relief is contemplated by the parties akin to Section 12(A) [7]of the Act of 2015. It may perhaps also be more prudent to gauge the performance of an optional provision first and then consider making the same mandatory basis such performance.

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7. 12A. Pre-Institution Mediation and Settlement. -- (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.

The Shaky Ground That Interim Relief Stands on Section 8(1)[8] of the Bill permits parties to approach courts for urgent interim relief only if "exceptional circumstances exist". In the author's view, the expression 'exceptional circumstances' is ambiguous and open to subjective interpretation. It also carries the risk of courts adopting unreasonable and/or non-uniform standards to decline interim relief in a purported attempt to preserve the sanctity of the mediation process. Therefore, to harmonize the interests of parties and the interest of the Bill vis-a-vis mediation, the expression "exceptional circumstances exist" should either be deleted, or its contours should be laid down in the Bill by way of an Explanation, indicatively if not exhaustively. This will also aid in streamlining the jurisprudence on this subject.

Restricting Party Autonomy in Choosing Mediators

The proviso to Section 10(1) of the Bill provides that "mediator of any foreign nationality shall possess such qualifications, experience and accreditation as may be specified". As it stands, this proviso is directly opposed to the cardinal principle of party autonomy. Parties to a collaborative ADR process such as mediation should be able to choose any mediator of a foreign nationality as they deem fit without being unduly fettered by any criteria prescribed by the Mediation Council of India in this regard [See Section 53(2)(b) of the Bill]. It is relevant to note here that a similar law prescribing qualifications for arbitrators was introduced in the Arbitration Act in 2019 by way of an amendment. The provision was however, heavily criticized for being too restrictive, so much so, that it was eventually deleted in 2021. Accordingly, the proviso to Section 10(1)[9] of the Bill also warrants similar consideration.

Other areas that need a re-look

Apart from the above, the Bill lacks nuances in several places. Under Section 15, the Bill has tied the jurisdiction of a mediation proceeding to that of courts. In other words, a mediation is mandated to take place where the court has jurisdiction to try the dispute. This is unnecessary. In an ADR system, parties are free to choose the place of mediation as well as the jurisdiction of courts if such decision is in parity with the CPC and conflict of laws. The consequences of non-registration/non-stamping of a mediated settlement agreement have also not been discussed under the Bill.

There is no doubt that the roll out of this Bill is a positive development. If enacted into law, India will be one of the few jurisdictions in the world to have its own statute on commercial mediation, like Singapore, Hongkong, Brazil and the US. This is also relevant because the new law (when enacted) will provide the much needed domestic legal framework to enforce international mediated settlement agreements under the Singapore Convention on Mediation, to which India is a signatory. It will go a long way in boosting investor confidence in India as well. The Bill in its present form, however, is, by no means complete. There is an urgent need to address the inconsistences in the Bill to make it a robust piece of legislation.

MEDIATION UNDER VARIOUS STATUTES

Reference to Mediation under Section 89 of CPC, 1908

Unlike arbitration and conciliation, which are governed by the Arbitration and Conciliation Act, 1996, there is no umbrella legislation governing mediation in the country. The enactment of Section 89 of the CPC, 1908 marked a major step towards institutionalising ADR through its incorporation in the civil procedure. This provision

8. 8(1) If exceptional circumstances exist, a party may, before the commencement of, or during the continuation of, mediation proceedings under this Act, file suit or appropriate proceedings before a court or tribunal having competent jurisdiction for seeking urgent interim relief.

(2) The court or tribunal shall after granting or rejecting urgent interim relief, as the case may be, refer the parties to undertake mediation to resolve the dispute, if deemed appropriate.

9. 10(1) Unless otherwise agreed upon by the parties, a person of any nationality may be appointed as a mediator:

empowers civil courts to refer civil disputes to, among other things, mediation, 'where it appears to the court that there exist elements of a settlement which may be acceptable to the parties.' Mediation in India received an impetus due to the Supreme Court's judgment in the case of *Salem Advocate Bar Association* v. *Union of India*[10].

In this case, a Committee was constituted by the Apex Court in order to enable better implementation of Section 89 by ensuring quicker dispensation of justice. This Committee drafted the Model Rules, 2003 which served as the model for various High Courts in framing their own mediation rules. In the landmark case of *Afcons Infrastructure Ltd. and Ors.* v. *Cherian Varkey Construction Co. (P) Ltd. and Ors.*[11] while examining Section 89 of the CPC, 1908, the Apex Court held that having regard to the tenor of the provisions of Rule 1A of Order 10 of the CPC, the civil court should invariably refer cases to the ADR process, except in certain recognised excluded categories of cases. It went on to state that where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89.

Consequently, it is mandatory to have a hearing after completion of pleadings to consider recourse to an ADR process under Section 89, but actual reference to an ADR process in all cases is not mandatory. To assess the impact of this judgment, one would have to examine the statistics pertaining to cases referred to ADR processes under Section 89. However, there is a lack of data on the number of cases referred to ADR processes across different jurisdictions under Section 89 and the final outcome of these disputes. The limited data available for specific jurisdictions referred to below (Vidhi Mediation Report 2016) suggests that the Afcons judgment has failed to have the desired impact in making ADR mechanisms the first mode of resolution for most civil disputes. In *K. Srinivas Rao* v. *D.A. Deepa*[12], while dealing with a divorce matter, the Apex Court went to the extent of saying that criminal courts could also refer to mediation cases where a complaint has been filed under Section 498-A of the Indian Penal Code, 1860. The Supreme Court further directed all mediation centres to set up pre-litigation desks or clinics to settle matrimonial disputes at the pre-litigation stage. The above case laws seem to indicate that the higher judiciary is by and large in favour of mediation and is keen on pushing all suitable matters to be resolved through mediation instead of adding to the court's burden.

However, in reality, Section 89 of the CPC and the above judicial pronouncements have not had the desired impact due to the lack of adequate training given to the judges in the district judiciary, who are empowered under Section 89 to refer matters to mediation. The discretion vested in them has not been used to reduce the court's burden in any noticeable manner. Apart from lack of training, there are several systemic issues that have prevented the adoption of mediation, as discussed in the coming section despite the clear mandate given by the judiciary in favour of mediation.

Mediation under Special Legislations[13]

Mediation is increasingly being included as a dispute resolution mechanism in newer legislations. For instance, the Parliament included a provision for mediation of consumer disputes in the new Consumer Protection Act, 2019. Section 37[14] of this Act prescribes that at the first hearing of a complaint after its admission, or at any later stage, if it appears to the District Commission that there exist elements of a settlement which may be acceptable to the parties, it may refer the matter to mediation except in such cases as may be prescribed. Chapter V of the Act provides detailed provisions pertaining to mediation of consumer disputes, including those concerning establishment of consumer mediation cells attached to each of the District Commissions and the

10. AIR 2005 (SC) 3353

11. CIVIL APPEAL NO.6000 OF 2010

12. (2013) 5 SCC 226

13. vidhilegalpolicy.in

14. A Consumer Commission may refer a consumer dispute for mediation at the first hearing of the complaint after its admission, or at any later stage, if it appears to the Consumer Commission that there exist any elements of a settlement which may be acceptable to the parties.

State Commissions of a State (Section 74), empanelment of mediators (Section 75), the procedure for mediation (Section 79), etc.

The Consumer Protection (Mediation) Rules, 2020 came into force with effect from July 20, 2020. The Rules make it amply clear that the general rule is to refer all matters under the Consumer Protection Act, 2019 to mediation. However, they make an exception for certain categories of cases that may not be considered appropriate for mediation. The proviso to Rule 4 further provides that in any case other than the ones mentioned in Rule 4, the Commission may choose not to refer it to mediation if it appears to the Commission that no elements of a settlement exist which may be acceptable to the parties or that mediation is otherwise not appropriate having regard to the circumstances of the case and the respective positions of the parties.

SECTION 442[15] OF THE COMPANIES ACT, 2013, provides for a Mediation and Conciliation Panel to be maintained by the Central Government for mediating proceedings before the Central Government or National Company Law Tribunal ('NCLT') or National Company Law Appellate Tribunal ('NCLAT'). This provision allows any of the parties to the proceedings to opt for mediation. The Central Government, the NCLT or the NCLAT may also refer a matter pending before it for mediation suo motu. The Mediation and Conciliation Panel shall dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the NCLT or the NCLAT, as the case may be.

Mandatory Pre-litigation

Mediation under the Commercial Courts Act, 2015: An example of an attempt to introduce mandatory mediation in the Indian context is the Commercial Courts Act, 2015, which was amended in 2018 to provide for pre-institution mediation and settlement. Section 12A of this Act makes it mandatory for the disputing parties to attempt mediation before initiating a suit. The only exception provided in the law is if there is a requirement of urgent relief from the court. The settlement agreement arrived at by the parties shall have the same legal force as an arbitral award mentioned under Section 30 of Arbitration and Conciliation Act, 1996. However, despite this provision having been in force for over two years, no data is readily available on its implementation.

Difficulties with the existing framework governing mediation

Even though mediation is speedier, more cost-effective and offers greater possibility of preserving the relationship between disputing parties, the existing mediation framework in India has not allowed for reaping its full potential. The Supreme Court highlighted some glaring drafting errors in Section 89 in its landmark judgment in the Afcons Infrastructure Ltd. case. These include the mixing up of definitions of the terms 'judicial settlement' and 'mediation' in Section 89 and the lack of clarity as to the procedure to be followed by the court while referring matters to mediation under Section 89. Section 89 was examined by the Law Commission of India in its 238th Report wherein it recommended substituting Section 89 with an amended provision that would bring it in line with the judgment in Afcons Infrastructure Ltd. The recommendations included specifying the stage at which the court should refer the matter to the various ADR processes mentioned in Section 89 and interchanging the definitions of mediation and judicial settlement. However, this Report has not been implemented so far.

According to data from the Bangalore Mediation Centre, between 2011-2015, 31441 cases were referred for mediation, which amounted to 4.29% of the cases freshly instituted in the Bangalore High Court (Vidhi Mediation Report 2016, 11). As per the Mediation and Conciliation Centre of the Delhi High Court, during the same period, 13646 were referred for mediation, which amounted to 2.66% of the total number of cases in the Delhi High Court. Finally, data for Allahabad High Court Mediation and Conciliation Centre reveals that during 2011-2015,

15. 442(1) The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

11618 cases were referred for mediation. These constituted 0.85% of the cases freshly instituted in the Allahabad High Court. From this data, it is evident that judges are not using Section 89 to its full potential.

There are a number of factors responsible for this. First and foremost, the fact that data on Section 89 referrals is not tracked for the National Judicial Data Grid or made a part of their assessment reports means that judges are not incentivised to refer cases to ADR processes. Further, referral judges are expected to be objective while determining the possibility of settlement between parties, but this objectivity may be hampered because judges may be more attuned to the adjudicatory processes (Vidhi Mediation Report 2016, 20). This is further aggravated by the fact that there is a lack of regular training sessions for judges to sensitise them about the benefits of mediation. Another factor why mediation has failed to take off as hoped in India is the lack of clarity in the enforceability of its outcomes. Section 89 does not talk about how the outcome of mediation will be enforced. It took the Supreme Court in Afcons Infrastructure to clarify that where the reference is to a neutral third party on a court reference, even though it will be deemed to be reference to a Lok Adalat, the mediation settlement will be governed by Section 21 of the Legal Services Authorities Act, 1987 and will have to be placed before the court for recording the settlement and disposal. Consequently, in cases referred by courts to mediation, a settlement reached by the parties is not enforceable automatically. Even then, it is unclear how a settlement arrived during pre-litigation mediation or ad-hoc mediation would be enforced if one of the parties reneges on its promises. Applying the regular law of contract to such cases would only result in delays, defeating the entire purpose of resorting to mediation. With so much confusion around enforceability, lawyers hesitate to advise their clients to opt for mediation.

Clarity is also lacking as far as the enforceability of cross border settlements is concerned. India is a signatory to the recent United Nations Convention on International Settlement Agreements resulting from Mediation (the Singapore Convention on Mediation), which applies to international settlement agreements resulting from mediation. It establishes a harmonised legal framework for the right to invoke settlement agreements as well as for their enforcement (UN Commission on International Trade Law).

However, presently there is no statutory framework for implementing the provisions of this Convention. Despite attempts to spread awareness about mediation and its inclusion as part of the legal education curriculum, knowledge of mediation is sorely lacking among the general public. Even where parties are aware about mediation, a major challenge is the lack of incentives for them to attempt mediation. In India, there are certain myths associated with mediation which make it difficult for professionals and their clients to consider it as a viable dispute resolution mechanism. For instance, it is believed that suggesting or engaging in mediation demonstrates a kind of weakness and uncertainty of success at trial (Gupta 2018, 62). Due to this 'first to blink' syndrome, each party is waiting for the other to make the first move and does not want to be seen as weak (Hutchinson 1996, 89-90). Another myth is that mediation yields a lesser form of justice and is only second to litigation (Gupta 2018, 62).

These myths essentially stem from the fact that mediation continues to be an unfamiliar process that is often misunderstood by many lawyers leading to mistrust and hence avoidance. In some cases, a barrier to initiating mediation is the client's expressed desire to punish the opposition through litigation. In such cases, it becomes incredibly difficult for the lawyer to suggest mediation without appearing weak and risking loss of the client to another lawyer (Hutchinson 1996, 90). This is where mandatory mediation comes into play. While some of the problems in the present mediation framework that have inhibited the growth of mediation in the country are institutional, a number of others can be addressed by introducing mandatory mediation in the country in a phased manner. For instance, the issues that can be addressed by introducing mandatory mediation are the ones stemming from lack of incentives for judges and lawyers to nudge parties towards mediation, hesitation amongst disputing parties to attempt mediation and the overall lack of mediation culture in India. However, what will still be left unaddressed is the issue of lack of clarity in enforceability of mediation agreements.

In this, the need of the hour is a dedicated legislative effort to recognise mediation and provide for a framework to govern all its facets, along the lines of the Arbitration and Conciliation Act, 1996. Such legislative framework becomes all the more important while introducing mandatory mediation, since easy enforceability of mediation agreements is one of the basic requirements for such an initiative to be adopted and welcomed. However, the details of a mediation legislation is beyond the scope of this article and hence the authors will restrict themselves to the manner in which mandatory mediation can be introduced in India, under the presumption that an umbrella mediation legislation will become a reality soon.

Understanding Mandatory Mediation

As often misunderstood, 'mandatory mediation' does not mean mandating parties to settle their disputes through mediation. It simply means mandating parties to attempt mediation. It has been described as 'coercion into and not within' the process of mediation (Quek 2010, 485). All that is required from the parties is to give mediation a shot. This can be done in a number of ways. For instance, a law can make mediation mandatory for particular kinds of disputes prior to institution of proceedings in courts or even after cases have been brought before courts. If it is prior to the institution of proceedings, then it is in the nature of 'mandatory pre-litigation mediation'. There are instances of both forms of mandatory mediation - prior to and after institution of proceedings - present in other jurisdictions. When considering whether to implement mandatory mediation in a jurisdiction, domestic factors like the time it takes for cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary and general public are extremely important (Hanks 2012, 929). In India, despite the long delays in courts, the failure of voluntary mediation to grow as a popular dispute resolution mechanism calls for a rethink on how mediation has been approached in the country so far.

A different approach, which takes away the initial discretion in opting for mediation, may offer the elusive solution. Mandatory mediation has been provided for in different jurisdictions through one or more of the following three modes (Hanks 2012, 930). First, some mandatory mediation schemes categorically provide for an automatic and compulsory referral of certain matters to mediation. Such schemes are generally legislative and often require parties to undertake mediation as a prerequisite to commencing proceedings in courts of law (930). A second type of mandatory mediation, often referred to as courtreferred mediation, gives judges the power to refer parties to mediation with or without the parties' consent on a case-by-case basis. Third, some mandatory mediation schemes can be described as quasicompulsory because even though they do not mandate mediation, it is effectively compelled in the form of potential adverse costs orders if mediation is not undertaken prior to commencing proceedings (931). Before we proceed to identify the suitability of one or a combination of these above modes in the Indian context, it is essential to examine the benefits and concerns associated with the very policy of mandatory mediation. Benefits of Mandatory Mediation Multiple studies have clearly shown that the best way, if not the only one, to significantly increase the number of mediated disputes is to require that litigants make a serious and reasonable initial effort at mediation (De Palo 2018, 1).

One of the major advantages of mandatory mediation is that it can help deal with some of the myths associated with mediation. As far as the 'first to blink' syndrome is concerned, when the law mandates that parties at least attempt mediation, the burden of suggesting mediation is alleviated. Because the law mandates it, parties or their lawyers do not have to risk appearing weak by suggesting mediation.

The second myth that mediation only provides second-hand justice is busted by the legitimacy that is afforded to mediation once it is mandated by law. Thus, mandatory mediation can help bring parties into the fold of mediation by helping them get over the initial inertia associated with voluntary mediation. Often, there are cases where a party is keen on litigation because they believe that forcing the other side to go through the long and painstaking process of litigation would be a form of punishment for the opposite party. This 'make them pay' attitude of the client puts even the most well-meaning lawyer in a quandary, as she may feel hesitant to suggest mediation as an alternative to her client. By shifting the burden of referring a dispute for mediation to the law or the court, mandatory mediation relieves the lawyer of this dilemma (Hutchinson 1996, 90).

Mandatory mediation is not just beneficial for the parties but also for the country's legal system. By creating massive demand for people and institutions providing mediation services, mandatory mediation offers an opportunity to mainstream mediation and create capacity at scale. The demand for mediators spurred by mandatory mediation, if met through proper capacity building, will lead to the creation of a body of skilled mediators[16].

Training lawyers in mediation will not only help overcome the shortage of qualified mediators, it will also improve 'legal health'[17] in the country. Further, once lawyer mediators understand the value of mediation, they would be more inclined to suggest mediation to their clients voluntarily (Hutchinson 1996, 90). Consequently, mandatory mediation can become a stepping stone towards voluntary adoption of mediation in the country. Lastly, the emergence of mediation as a distinct profession will not only create additional employment opportunities for professionals in various fields, but will also help create a culture of amicable settlement of disputes.

UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

Purpose[18]

Adopted in December 2018, the United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention on Mediation" (the "Convention") applies to international settlement agreements resulting from mediation ("settlement agreement"). It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement.

The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16.

The Convention is open for signature by States and regional economic integration organizations (referred to as "Parties").

Key Provisions

Article 1 provides that the Convention applies to international settlement agreements resulting from mediation, concluded in writing by parties to resolve a commercial dispute. Article 1 also lists the exclusions from the scope of the Convention, namely, settlement agreements concluded by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law. A settlement agreement that is enforceable as a judgment or as an arbitral award is also excluded from the scope of the Convention in order to avoid possible overlap with existing and future conventions, namely the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on Choice of Court Agreements (2005) and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019).

Further, Article 3 addresses the key obligations of the Parties to the Convention with respect to both enforcement of settlement agreements and the right of a disputing party to invoke a settlement agreement covered by the Convention. Each Party to the Convention may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement. Article 4 covers the formalities for relying on a settlement agreement, namely, the disputing party shall supply to the competent authority the settlement agreement signed by them and evidence that the settlement agreement results from mediation. The competent

16. Source : Hutchinson 1996, 90

17. Source : Susskind 2019, 113

18. Source : uncitral.un.org/

authority may require any necessary document in order to verify that the requirements of the Convention are complied with.

The Convention defines in Article 5 the grounds upon which a court may refuse to grant relief at the request of the disputing party against whom it is invoked. These grounds can be grouped into three main categories, namely in relation to the disputing parties, the settlement agreement and the mediation procedure. Article 5 includes two additional grounds upon which the court may, on its own motion, refuse to grant relief. Those grounds relate to public policy and the fact that the subject matter of the dispute cannot be settled by mediation. With the aim to provide for the application of the most favourable framework for settlement agreements, Article 7 foresees the application of the more favourable law or treaty.

Article 8 includes reservations. A first reservation permits a Party to the Convention to exclude from the application of the Convention settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration. A second reservation permits a Party to the Convention to declare that it will apply the Convention only to the extent that the disputing parties have agreed to its application.

The Convention and any reservations thereto apply prospectively, to settlement agreements which have been concluded after the entry into force of the Convention for the Party concerned, as provided in Article 9.

The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018). This approach is intended to provide States with the flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation.

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY ON 20 DECEMBER 2018 [ON THE REPORT OF THE SIXTH COMMITTEE (A/73/496)] 73/198

United Nations Convention on International Settlement Agreements Resulting from Mediation The General Assembly, Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade, Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations.

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations, Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations, Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument, Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations.

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration, Taking note with satisfaction of the draft convention approved by the Commission, Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. Commends the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;
2. Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;
3. Authorizes a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";
4. Calls upon those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting 20 December 2018

SINGAPORE CONVENTION ON MEDIATION

Introduction

The Singapore Convention on Mediation (the "Singapore Convention" or "Convention") is a multilateral treaty which offers a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute.

The Singapore Convention will facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders. Businesses will benefit from mediation as an additional dispute resolution option to litigation and arbitration in settling cross-border disputes. Signing the Convention is therefore a strong statement of a country's commitment to trade, commerce and investment, and strengthens its position in the field of international trade law.

UNCITRAL WGII[19]

At its forty-seventh session in July 2014, the UNCITRAL Commission agreed that the Working Group II (Dispute Settlement) ("WGII") should consider the issue of enforcement of international settlement agreements resulting from conciliation proceedings, and report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.

In July 2015, the Commission took note of the consideration of the topic by WGII, and agreed that WGII should commence work to identify relevant issues and develop possible solutions, including the preparation of a convention, model provisions, or guidance texts. The Commission also agreed that the mandate of WGII with respect to the topic should be broad, to take into account the various approaches and concerns. 85 Member States and 35 non-governmental organisations participated in the deliberations, which took place over six sessions. Through the deliberations, WGII reached a compromise on various issues, upon which the Commission expressed support for WGII to finalise its work by preparing: a draft convention on international settlement agreements resulting from mediation, as well as a draft amendment to the UNCITRAL Model Law on International Commercial Conciliation (2002).

19. Source : https://www.singaporeconvention.org/

The Convention was finalised at the **fifty-first UNCITRAL Commission session**, which came to a close in July 2018. The amended Model Law (the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)) was also adopted at the same session.

UN General Assembly

In December 2018, the United Nations General Assembly, by consensus, passed a resolution to adopt the United Nations Convention on International Settlement Agreements Resulting from Mediation, recommended that the Convention be known as the "Singapore Convention on Mediation", and authorised the signing ceremony of the Convention to be held in Singapore on 7 August 2019.

Status of Convention

46 countries, including the world's two largest economies – the United States and China – as well as three of the four largest economies in Asia – China, India and South Korea – signed the Convention on the day it opened for signature. Another 24 countries attended the signing ceremony in Singapore to show their support for the Convention.

On 25 February 2020, Singapore and Fiji became the first two countries to deposit their respective instruments of ratification of the Convention at the United Nations Headquarters in New York. With the third instrument of ratification deposited by Qatar on 12 March 2020, the Convention entered into force on 12 September 2020.

As of 9 April 2023, the Convention has 55 signatories, of which eight are parties to the Convention. A full list of signatories and parties to the Convention can be found here.

Country	*Date Signed*	*Date Ratified*	*Entry into Force*
Afghanistan	07-Aug-19	-	-
Armenia	26-Sep-19	-	-
Australia	10-Sep-21	-	-
Belarus	07-Aug-19	15-Jul-20	15-Jan-21
Benin	07-Aug-19	-	-
Brazil	04-Jun-21	-	-
Brunei Darussalam	07-Aug-19	-	-
Chad	26-Sep-19	-	-
Chile	07-Aug-19	-	-
China	07-Aug-19	-	-
Colombia	07-Aug-19	-	-
Congo	07-Aug-19	-	-
Democratic Republic of Congo	07-Aug-19	-	-
Ecuador	25-Sep-19	09-Sep-20	09-Mar-21
Eswatini	07-Aug-19	-	-

Country	*Date Signed*	*Date Ratified*	*Entry into Force*
Fiji	07-Aug-19	25-Feb-20	12-Sep-20
Gabon	25-Sep-19	-	-
Georgia	07-Aug-19	29-Dec-21	29-Jun-22
Ghana	22-Jul-20		
Grenada	07-Aug-19	-	-
Guinea-Bissau	26-Sep-19	-	-
Haiti	07-Aug-19	-	-
Honduras	07-Aug-19	02-Sep-21	02-Mar-22
India	07-Aug-19	-	-
Iran (Islamic Republic of)	07-Aug-19	-	-
Israel	07-Aug-19	-	-
Jamaica	07-Aug-19	-	-
Jordan	07-Aug-19	-	-
Kazakhstan	07-Aug-19	23-May-22	23-Nov-22
Lao People's Democratic Republic	07-Aug-19	-	-
Malaysia	07-Aug-19	-	-
Maldives	07-Aug-19	-	-
Mauritius	07-Aug-19	-	-
Montenegro	07-Aug-19	-	-
Nigeria	07-Aug-19	-	-
North Macedonia	07-Aug-19	-	-
Palau	07-Aug-19	-	-
Paraguay	07-Aug-19	-	-
Philippines	07-Aug-19	-	-
Qatar	07-Aug-19	12-Mar-20	12-Sep-20
Republic of Korea	07-Aug-19	-	-
Rwanda	28-Jan-20		
Samoa	07-Aug-19	-	-
Saudi Arabia	07-Aug-19	05-May-20	05-Nov-20

Country	*Date Signed*	*Date Ratified*	*Entry into Force*
Serbia	07-Aug-19	-	-
Sierra Leone	07-Aug-19	-	-
Singapore	07-Aug-19	25-Feb-20	12-Sep-20
Sri Lanka	07-Aug-19	-	-
Timor-Leste	07-Aug-19	-	-
Turkey	07-Aug-19	11-Oct-21	11-Apr-22
Uganda	07-Aug-19	-	-
Ukraine	07-Aug-19	-	-
United States of America	07-Aug-19	-	-
Uruguay	07-Aug-19	28-Mar-23	28-Sep-23
Venezuela (Bolivarian Republic of)	07-Aug-19	-	-

INTERNATIONAL NEGOTIATIONS AND DIPLOMACY

Definition of International Negotiations

Any analysis of international negotiations - bilateral or multilateral - needs some key conceptual clarifications that will help to provide the reader with the basic understanding of "what, why, who, when, and how" to negotiate. Clarification of basic concepts will also provide the reader with direction through the readingson international negotiation. Negotiation, as the etymology of the word points out is composed of the Latin roots "neg' (not) and otium (ease or leisure). The word "negotiate" came into English language in the year 1599 (Lall, 1966). The two words are central to the meaning of the word as it is used today. First, a peaceful process or method is to be adopted; secondly, the objective is agreement, compromise or settlement. Current dictionary definitions of negotiation contain numerous possibilities, all peaceful and non-judicial, and thus generally support the wide sense in which we use the concept in this material.

The Significance and Necessity for Negotiation

Negotiation is a fact of life; just as humans cannot exist without communicating, so we can barely exist without negotiating. Negotiation is a basic way of getting what one party wants from another; it is an exchange of information through communication. Given the level of awareness of international situations in today's globalised world, no one needs to be convinced of the significance of negotiation. As the escalation of conflicts become evident in today's world, in diverse fields such international affairs, between state and non-state actors, environment, business and labour relations and personal relationships, the significance of negotiations and the need to negotiate increase. Negotiation aimed at conflict management seeks to limit or minimize tensions and disputes as much as possible, without necessarily changing the status quo or the relations of power, values, and interests between the disputing parties.

Parties to International Negotiations

Parties to international negotiations are also known as actors. They include states, non state actors including growing number of nongovernmental organizations (NGOs), business firms, international organizations, and

other institutions, who are drawn into the process because they are concerned in one way or another with the positive or negative values represented by the issues put on the agenda. The procedures and fora for modern international negotiation are numerous and varied. The increase in complexity year by year, and their forms and functions are evolving in adaptation to the changing needs of a rapidly expanding community of nations. Since the end of World War II, conference diplomacy in particular has significantly widened and diversified the approaches to international negotiation. It has also stimulated bilateral diplomacy. The fact that a party to a dispute or situation is now able to bring its cause to an international forum frequently operates to induce countries to take bilateral diplomacy much more seriously than they did before the era of continuous opportunities to resort to conference negotiation.

Influence and Importance of Culture

Cross-cultural Mediation can be very difficult for some practitioners and alternately be very beneficial to others. In Arbitration and Litigation, one party win over the other. But in Mediation, both parties can win. Therefore, the language and preferences of people depending upon the culture can influence the outcome of the Mediation. Intercultural Mediation necessitate a mediator to address cultural changes into consideration. For example: A practice can be acceptable in one culture and not acceptable in the other. In this situation, a mediator should address this difficulty and should try to bring parties to amicable resolution of Dispute. Language is also one barrier in any mediation process. It can be very easy to bring the parties to an agreement is their language are same. But, bringing the parties to an agreement when the other does not understand the language is a difficult task.

World Culture *vis a vis* Organisational Culture

The difficulty of language and preferences in arbitration faced internationally can also be faced when mediation is conducted between organisations. The value and practices of organisations differs from organisation to organisation. A resolution that may work for one organisation may not fit under the values of other organisations. Therefore, a mediator should keep in mind the organisation culture before conducting mediation.

INTERNATIONAL RULES

The International Chamber of Commerce ICC Mediation Rules replaced the 2001 Amicable Dispute Resolution Rules (ADR Rules) to reflect today's practices. These rules provide users with clear parameters for the conduct of proceedings while recognising and maintaining the need for flexibility.

Just as the ADR Rules before, these Rules can also be used for conducting other procedures or in combination with other procedures, such as conciliation or neutral evaluation.

Article 1 : Introductory Provisions

The Mediation Rules (the "Rules") of the International Chamber of Commerce (the "ICC") are administered by the ICC International Centre for ADR (the "Centre"), which is a separate administrative body within the ICC.

The Rules provide for the appointment of a neutral third party (the "Mediator") to assist the parties in settling their dispute.

Mediation shall be used under the Rules unless, prior to the confirmation or appointment of the Mediator or with the agreement of the Mediator, the parties agree upon a different settlement procedure or a combination of settlement procedures. The term "mediation" as used in the Rules shall be deemed to cover such settlement procedure or procedures and the term "Mediator" shall be deemed to cover the neutral who conducts such settlement procedure or procedures. Whatever settlement procedure is used, the term "Proceedings" as used in the Rules refers to the process beginning with its commencement and ending with its termination pursuant to the Rules.

All of the parties may agree to modify any of the provisions of the Rules, provided, however, that the Centre may decide not to administer the Proceedings if, in its discretion, it considers that any such modification is not in the spirit of the Rules. At any time after the confirmation or appointment of the Mediator, any agreement to modify the provisions of the Rules shall also be subject to the approval of the Mediator.

The Centre is the only body authorized to administer Proceedings under the Rules.

Article 2 : Commencement Where there is an Agreement to Refer to the Rules

Where there is an agreement between the parties to refer their dispute to the Rules, any party or parties wishing to commence mediation pursuant to the Rules shall file a written Request for Mediation (the "Request") with the Centre. The Request shall include:

a) the names, addresses, telephone numbers, email addresses and any other contact details of the parties to the dispute and of any person(s) representing the parties in the Proceedings;

b) a description of the dispute including, if possible, an assessment of its value;

c) any agreement to use a settlement procedure other than mediation, or, in the absence thereof, any proposal for such other settlement procedure that the party filing the Request may wish to make;

d) any agreement as to time limits for conducting the mediation, or, in the absence thereof, any proposal with respect thereto;

e) any agreement as to the language(s) of the mediation, or, in the absence thereof, any proposal as to such language(s);

f) any agreement as to the location of any physical meetings, or, in the absence thereof, any proposal as to such location;

g) any joint nomination by all of the parties of a Mediator or any agreement of all of the parties as to the attributes of a Mediator to be appointed by the Centre where no joint nomination has been made, or, in the absence of any such agreement, any proposal as to the attributes of a Mediator;

h) a copy of any written agreement under which the Request is made.

Together with the Request, the party or parties filing the Request shall pay the filing fee required by the Appendix hereto in force on the date the Request is filed.

The party or parties filing the Request shall simultaneously send a copy of the Request to all other parties, unless the Request has been filed jointly by all parties.

The Centre shall acknowledge receipt of the Request and of the filing fee in writing to the parties.

Where there is an agreement to refer to the Rules, the date on which the Request is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the Proceedings.

Where the parties have agreed that a time limit for settling the dispute pursuant to the Rules shall start running from the filing of a Request, such filing, for the exclusive purpose of determining the starting point of the time limit, shall be deemed to have been made on the date the Centre acknowledges receipt of the Request or of the filing fee, whichever is later.

Article 3 : Commencement Where there is No Prior Agreement to Refer to the Rules

In the absence of an agreement of the parties to refer their dispute to the Rules, any party that wishes to propose referring the dispute to the Rules to another party may do so by sending a written Request to the Centre containing the information specified in Article 2(1), subparagraphs a)-g). Upon receipt of such Request,

the Centre will inform all other parties of the proposal and may assist the parties in considering the proposal.

Together with the Request, the party or parties filing the Request shall pay the filing fee required by the Appendix hereto in force on the date the Request is filed.

Where the parties reach an agreement to refer their dispute to the Rules, the Proceedings shall commence on the date on which the Centre sends written confirmation to the parties that such an agreement has been reached.

Where the parties do not reach an agreement to refer their dispute to the Rules within 15 days from the date of the receipt of the Request by the Centre or within such additional time as may be reasonably determined by the Centre, the Proceedings shall not commence.

Article 4 : Place and Language(s) of the Mediation

In the absence of an agreement of the parties, the Centre may determine the location of any physical meeting of the Mediator and the parties or may invite the Mediator to do so after the Mediator has been confirmed or appointed.

In the absence of an agreement of the parties, the Centre may determine the language(s) in which the mediation shall be conducted or may invite the Mediator to do so after the Mediator has been confirmed or appointed.

Article 5 : Selection of the Mediator

The parties may jointly nominate a Mediator for confirmation by the Centre.

In the absence of a joint nomination of a Mediator by the parties, the Centre shall, after consulting the parties, either appoint a Mediator or propose a list of Mediators to the parties. All of the parties may jointly nominate a Mediator from the said list for confirmation by the Centre, failing which the Centre shall appoint a Mediator.

Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them.

When confirming or appointing a Mediator, the Centre shall consider the prospective Mediator's attributes, including but not limited to nationality, language skills, training, qualifications and experience, and the prospective Mediator's availability and ability to conduct the mediation in accordance with the Rules.

Where the Centre appoints a Mediator, it shall do so either on the basis of a proposal by an ICC National Committee or Group, or otherwise. The Centre shall make all reasonable efforts to appoint a Mediator having the attributes, if any, which have been agreed upon by all of the parties. If any party objects to the Mediator appointed by the Centre and notifies the Centre and all other parties in writing, stating the reasons for such objection, within 15 days of receipt of notification of the appointment, the Centre shall appoint another Mediator.

Upon agreement of all of the parties, the parties may nominate more than one Mediator or request the Centre to appoint more than one Mediator, in accordance with the provisions of the Rules. In appropriate circumstances, the Centre may propose to the parties that there be more than one Mediator.

Article 6 : Fees and Costs

The party or parties filing a Request shall include with the Request the non-refundable filing fee required by Article 2(2) or Article 3(2) of the Rules, as set out in the Appendix hereto. No Request shall be processed unless accompanied by the filing fee.

Following the receipt of a Request pursuant to Article 3, the Centre may request that the party filing the Request pay a deposit to cover the administrative expenses of the Centre.

Following the commencement of the Proceedings, the Centre shall request the parties to pay one or more deposits to cover the administrative expenses of the Centre and the fees and expenses of the Mediator, as set out in the Appendix hereto.

The Centre may stay or terminate the Proceedings under the Rules if any requested deposit is not paid.

Upon termination of the Proceedings, the Centre shall fix the total costs of the Proceedings and shall, as the case may be, reimburse the parties for any excess payment or bill the parties for any balance required pursuant to the Rules.

With respect to Proceedings that have commenced under the Rules, all deposits requested and costs fixed shall be borne in equal shares by the parties, unless they agree otherwise in writing. However, any party shall be free to pay the unpaid balance of such deposits and costs should another party fail to pay its share.

A party's other expenditure shall remain the responsibility of that party, unless otherwise agreed by the parties.

Article 7 : Conduct of the Mediation

The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted.

After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules.

In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality.

Each party shall act in good faith throughout the mediation.

Article 8 : Termination of the Proceedings

Proceedings which have been commenced pursuant to the Rules shall terminate upon written confirmation of termination by the Centre to the parties after the occurrence of the earliest of:

a) the signing by the parties of a settlement agreement;

b) the notification in writing made to the Mediator by any party, at any time after it has received the Mediator's note referred to in Article 7(2), that such party has decided no longer to pursue the mediation;

c) the notification in writing by the Mediator to the parties that the mediation has been completed;

d) the notification in writing by the Mediator to the parties that, in the Mediator's opinion, the mediation will not resolve the dispute between the parties;

e) the notification in writing by the Centre to the parties that any time limit set for the Proceedings, including any extension thereof, has expired;

f) the notification in writing by the Centre to the parties, not less than seven days after the due date for any payment by one or more parties pursuant to the Rules, that such payment has not been made; or

g) the notification in writing by the Centre to the parties that, in the judgment of the Centre, there has been a failure to nominate a Mediator or that it has not been reasonably possible to appoint a Mediator.

The Mediator shall promptly notify the Centre of the signing of a settlement agreement by the parties or of any notification given to or by the Mediator pursuant to Article 8(1), subparagraphs b)-d), and shall provide the Centre with a copy of any such notification.

Article 9 : Confidentiality

In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law:

a) the Proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential;

b) any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement.

Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:

a) any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;

b) any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;

c) any admissions made by another party within the Proceedings;

d) any views or proposals put forward by the Mediator within the Proceedings; or

(e) the fact that any party indicated within the proceedings that it was ready to accept a proposal for a settlement.

Article 10 : General Provisions

Where, prior to the date of the entry into force of the Rules, the parties have agreed to refer their dispute to the ICC ADR Rules, they shall be deemed to have referred their dispute to the ICC Mediation Rules, unless any of the parties objects thereto, in which case the ICC ADR Rules shall apply.

Unless all of the parties have agreed otherwise in writing or unless prohibited by applicable law, the parties may commence or continue any judicial, arbitral or similar proceedings in respect of the dispute, notwithstanding the Proceedings under the Rules.

Unless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the Proceedings under the Rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party.

Unless required by applicable law or unless all of the parties and the Mediator agree otherwise in writing, the Mediator shall not give testimony in any judicial, arbitral or similar proceedings concerning any aspect of the Proceedings under the Rules.

SINGAPORE MEDIATION SETTLEMENT AGREEMENT

The United Nations International Convention on Settlement Agreements for Mediation (**Singapore Convention**) was taken up for signature in Singapore on the 7th of August, 2019, and the same came into force on the 12th of September 2020. The Singapore Convention, if read in entirety corresponds to the growing demand from a body of users who rely on mediation as an enforcement mechanism that is applicable to settlement agreements in case of cross border disputes. Technically, it is an international convention that aims to help businesses resolve cross border disputes and further facilitate international trade.

This convention looks to give global businesses with some amount of certainty in resolving cross border disputes by way of mediation and making it possible for them to apply directly to the courts of countries that have ratified the convention in question. As per the latest data, there are 53 signatory countries to the convention and this convention is also called the United Nations Convention on International Settlement Agreements Resulting from Mediation, including India, China and the United States.

Applicability of the Singapore Mediation Convention

As it stands, a settlement agreement executed in country A has no legal force in country B. A party looking to enforce a mediated settlement agreement in a different country or multiple countries for that matter will have to initiate legal proceedings in each of those countries. This can be very costly and time heavy, especially for settlement agreements that are of international nature. Now, after this convention has come into effect, one of the parties to the dispute looking for enforcement of a cross border mediated settlement agreement can do so by applying to the courts of the signatory countries that have also ratified the treaty/convention. This can save time and money for all signatory countries and adds to their convenience index as well. Another big advantage of this convention is that it can always help the signatory countries during times of uncertainty like the current time of the pandemic.

Before this convention came into force, the settlements which are reached through mediation were enforceable through contracts. The only deviation from this settled procedure is where mediation is undertaken as a part of arbitration or litigation proceedings and an agreement is reached through mediation which can be enforced as an arbitral award or a decree. The convention and the accompanying Model Law intends to introduce a legal framework wherein mediated settlement agreements resulting from international commercial disputes can seek enforcement. Ergo, it can be concluded that it is similar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Now, moving towards the basics of this convention, the primary applicability criteria of this convention is that that it is applicable to two parties who have their place of business in two different countries. Certain kinds of settlement agreements that are excluded from the scope of the Singapore Convention are settlement agreements that have been approved by a court or concluded in court proceedings and those which are enforceable as a judgment in the state of such a court, or those that have been recorded and are enforceable as part of an arbitral award. Settlement agreements that pertain to a few particular subject matters are also excluded which are inheritance or employment law and those of disputes arising from transactions engaged in by a consumer purely for personal purposes.

Limitations of the Convention

There are a limited number of grounds under the Singapore Convention based on which a state party may refuse to grant relief as requested by a party to a settlement agreement. As per Article 5(1) of the Convention, relief may be refused only if the party opposing relief can furnish proof of any of the following:

- A party to the settlement agreement was somehow incapacitated;
- The settlement agreement is frustrated, declared void *ab initio* or incapable of being performed under the applicable law;
- The settlement agreement is not binding or final according to its terms; it has been subsequently modified; the obligations under the settlement agreement have either already been performed or are not clear or comprehensible, or granting of relief would be in contravention of the terms of the agreement;
- There was a breach of serious nature by the mediator in absence of which breach that party would not have entered into the agreement;

- There was a failure on the part of the mediator to disclose circumstances to the parties' which raise significant doubts as to the mediator's impartiality or independence and such a failure to disclose had a material impact or undue influence on a party in absence of which failure that party would not have entered into the agreement.

Further, as per Article 5(2) relief may be refused if the competent authority where relief is sought finds:

1. Granting relief would be in contravention of public policy;
2. The subject matter of the dispute at hand is not capable of settlement by mediation under the law where the relief is being sought;
3. It is noteworthy to mention the fact that these grounds are by and large similar to the grounds enumerated under New York Convention.

Singapore Convention & India[20]

In 2019, India was among the first group of signatories to the United Nations Convention on International Settlement Agreements which we know as the "Singapore Mediation Convention" today. To deeply engrave the results of this convention, India needs to ratify this convention. The convention is designed in such a manner that each and every signatory is required to work with their own domestic processes and procedures in order to bring them in conformity with the required protocols for ratification.

A treaty can be ratified by obtaining the instrument of ratification under the signature and seal of the President of India. Now, after analyzing the scheme of this convention, one thing which is very clear is that it is not going to have a substantial effect on the contracts which will be signed by Indian businesses having their business in India with other companies which are located in a different state who is a signatory to this convention and are doing business somewhere else. The key change which this convention will bring is regarding the dispute resolution because the conventional method of resolving the dispute which we all know is arbitration will be changed and one has to incorporate the settlement of dispute by way of mediation after this convention has come into force. In addition to this, the enforcement aspect of the settlement reached through mediation is the most attractive feature of this convention which will have its own advantages to the parties who are contesting their claim and effecting an amicable settlement through mediation and saving their time and money.

Though unlike arbitration, mediation has never been dealt with by any separate legislation in India and it is mentioned under Section 89 of the Civil Procedure Code and it says that whenever there is an element of settlement in a dispute, judges are required to give the parties an option to resolve their disputes through either Arbitration, Mediation, Conciliation, Lok Adalat or Judicial settlement. The landmark case on this point is the case of *Afcons Infrastructure and Ors.* v. *Cherian Varkey Construction and Ors.*, wherein the Hon'ble Apex Court clarified that Courts can *suo moto* order parties to go for mediation and listed out the categories of suitable cases. The court stated that mandating parties participating in mediation does not prejudice the "voluntariness" of mediation as the extent of participation and the outcome of mediation is left entirely to the free will of the parties.

As it stands, almost all High Courts in the country have a Court Annexed Mediation program that is set in place. Some of the courts including the Supreme Court, refer cases to private mediation when they feel the need to do so. The Companies Act 2013, the Real Estate (Regulation and Development) Act 2016 and the Consumer Protection Act, 2019 include mediation. The Commercial Courts Act, 2015 has a mandatory requirement for pre-institution mediation.

It is indeed a good sign that India is one of the first signatories to this convention however it remains to be seen how India ratifies this convention and how it equips its judicial system to accommodate litigation arising from

20. Source : King, Stubb & Kasiva via Mandaq

this convention. Nonetheless, in the current scenario, this move adds weightage to India's ease of business initiatives and goes a long way in ensuring that foreign businesses coming to India or working with Indian Businesses are protected by this convention when it comes to mediation.

CASE STUDIES ON INTERNATIONAL MEDIATION

Patent Mediations

A European university holding pharmaceutical patent applications in several countries negotiated a license option agreement with a European pharmaceutical company. The pharmaceutical company exercised the option and the parties started to negotiate a license agreement. After three years of negotiations the parties were unable to agree on the terms of the license. At that point the parties submitted a joint request for WIPO mediation.

The one-day meeting session allowed the parties to identify the issues and deepen their understanding of the legal circumstances. On this basis, the parties continued direct negotiations amongst themselves and reached a settlement agreement.

A WIPO Mediation of a Dispute in the Automotive Industry[21]

A US based manufacturer of automotive components concluded a settlement agreement in the form of a patent license with one of its European competitors. This agreement contained a dispute resolution clause referring to WIPO Mediation to be followed, in the absence of settlement, by WIPO Arbitration with a three-member tribunal.

Two years after the conclusion of the settlement agreement, the US company submitted a request for mediation alleging infringement of its US patents and claiming royalty payments for the licensed automotive parts technology. The request specified the preferred qualifications of the appropriate mediator and the WIPO Center provided to the parties a list of candidates with specific expertise in patents and the relevant technology.

The parties selected one of the recommended mediators who convened a two-day meeting. The meeting involved various caucus sessions and the parties engaged in a continuous exchange of proposals and discussions. Such negotiations related to the amount of royalty payments sought by the US company and the renegotiation of the terms of the license relating to royalty payments.

At the end of the hearing the parties agreed on a term sheet laying down the terms of a final agreement, which enabled the parties to efficiently continue their business activities in this market.

Trademark Mediations

WIPO Mediation of a Trademark Coexistence Dispute

After a dispute arose between them, a North American company requested mediation with two Italian companies and one Spanish company on the basis of an agreement which the parties had reached for mediation under the WIPO Mediation Rules. The goal of the mediation was to help the parties avoid confusion and misappropriation of their similar trademarks and to regulate future use of their marks. Although Italian was agreed as the language of proceedings, any settlement agreement would be recorded in both Italian and English.

The WIPO Center suggested to the parties potential mediators with specific expertise in European trademark law and fluency in Italian and English. The parties selected an Italian mediator with a trademark practice. The mediator conducted an initial telephone conference with the lawyers of the parties in which he scheduled the mediation timing, and agreed on the procedure.

21. Source : www.wipo.int

Two months later, the mediator met with the parties in a two-day session in Milan. The meeting was held in joint session with the exception of two brief caucuses. At the end of the second day the parties - with the assistance of the mediator - were able to draft and sign a settlement agreement covering all of the pending issues in dispute.

IT Mediations

A WIPO Mediation of an IT Platform Dispute[22]

A European airline entered into an agreement with a US software company concerning the development of a worldwide platform for the management of ticket sales. This was followed by a professional services agreement, which contained a more detailed description of the project as well as the support services to be delivered by the software company. The latter agreement included a WIPO mediation followed by WIPO expedited arbitration clause.

The airline paid several million USD for the application. Some years later, the airline terminated the agreement. In response, the software company asserted that, with the termination, the airline's rights in the application had lapsed and requested the software to be returned. The airline was of the position that it was entitled to retain the software application and initiated mediation. The result of the mediation was a new license between the parties.

Commercial Mediations

A WIPO Mediation concerning Supply and License Agreements for Pharmaceutical Products

Two companies involved in medical supplies entered supply and license agreements to market pharmaceutical products in some European countries. A dispute arose between the parties concerning the termination of the agreements due to an alleged material breach of contract by one of the parties. The agreements contained a dispute resolution clause referring the dispute to WIPO Mediation followed by court litigation in the absence of a settlement. Accordingly, the parties jointly requested the WIPO Center to appoint a mediator with demonstrated experience in commercial agreements within the field of medical supplies.

The preparatory conference facilitated by WIPO was conducted online, followed by an in-person mediation meeting. During the mediation meeting, the parties identified several mutual grounds for settlement. They agreed to modify the existing supply and license agreements instead of terminating them, subject to the parties' implementation of some binding terms included in the settlement term sheet concluded during the in-person meeting. After four months of direct negotiations between the parties, they re-approached the mediator and the WIPO Center to resume mediation and finally concluded a settlement agreement.

LESSON ROUND-UP

- Disputes are indigenous in every society. An ideal society cannot exist without disputes being forming a part of it. Senescent methods of litigation have witnessed delays and more expenses involved it.
- Mediation ethics spotlights three various aspects, namely: 1. Virtue ethics, 2. Principle ethics and 3. Reciprocity.
- The entire success of mediation rests upon the basic guidelines provided to the mediators about ethical aspects of the process. It is accurate to say that there are some evolving principles and standards in the arena of mediation skill as well.

22. Source : https://www.wipo.int/amc/en/mediation/case-example.html

- Mediation is not a recent phenomenon in India. Yet, parties are reluctant to select it as a preferred mode of dispute resolution. One of the key reasons is that till date, mediated settlements, except those driven through courts are unenforceable.
- Unlike arbitration and conciliation, which are governed by the Arbitration and Conciliation Act, 1996, there is no umbrella legislation governing mediation in the country. The enactment of Section 89 of the CPC, 1908 marked a major step towards institutionalising ADR through its incorporation in the civil procedure.
- Section 12A of Commercial Courts Act makes it mandatory for the disputing parties to attempt mediation before initiating a suit. The only exception provided in the law is if there is a requirement of urgent relief from the court.
- The Singapore Convention on Mediation (the "Singapore Convention" or "Convention") is a multilateral treaty which offers a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute.
- Negotiation is a fact of life; just as humans cannot exist without communicating, so we can barely exist without negotiating. Negotiation is a basic way of getting what one party wants from another; it is an exchange of information through communication.
- The United Nations International Convention on Settlement Agreements for Mediation (Singapore Convention) was taken up for signature in Singapore on the 7th of August, 2019, and the same came into force on the 12th of September 2020. The Singapore Convention, if read in entirety corresponds to the growing demand from a body of users who rely on mediation as an enforcement mechanism that is applicable to settlement agreements in case of cross border disputes.

GLOSSARY

Mandatory pre-litigation mediation: Mediation can be initiated prior to and during the course of legal proceedings. Section 89 of the Code of Civil Procedure empowers courts to refer civil matters amenable to out-of-court settlement to different forms of alternate dispute resolution including mediation.

Mandatory Mediation: It does not mean mandating parties to settle their disputes through mediation. It simply means mandating parties to attempt mediation. It has been described as 'coercion into and not within' the process of mediation (Quek 2010, 485).

International Negotiations: Negotiation, as the etymology of the word points out is composed of the Latin roots "neg' (not) and otium (ease or leisure). The two words are central to the meaning of the word as it is used today. First, a peaceful process or method is to be adopted; secondly, the objective is agreement, compromise or settlement.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. What are the Ethics of a Mediator?
2. Explain some of the key provisions proposed in the Mediation Bill.
3. Is Mandating Pre-Litigation Mediation a Blessing in Disguise? Explain.

4. What are the Difficulties with the existing framework governing mediation?
5. Explain Mandatory Mediation.
6. Describe Singapore Convention On Mediation.
7. Define International Negotiations. Explain the Significance and Necessity for Negotiation.

LIST OF FURTHER READINGS

- Mediation Bill, 2021

OTHER REFERENCES (Including Websites/Video Links)

- https://www.indiacode.nic.in/handle/123456789/2156?sam_handle=123456789/1362
- https://www.mediation.com.sg/resources/model-clauses/

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PROFESSIONAL PROGRAMME
ARBITRATION, MEDIATION & CONCILIATION
GROUP 2 • ELECTIVE PAPER 7.1

(*This test paper is for practice and self-study only and not to be sent to the Institute*)

Time allowed: 3 hours *Maximum Mark: 100*

Answer all Questions

PART I : ARBITRATION & CONCILIATION (70 MARKS)

Question No. 1

Hanesh and Joseph entered into an agreement for selling the fast foods at Nariman Point, Mumbai. They agreed to share profit and loss on equal ratio. Although their business was running at a good pace but Hanesh had an issue that Joseph is not keeping proper account and getting much more profit than the equal share. In this regard they decided to settle the dispute through Arbitration. So, they decided to appoint the arbitrator by their own without taking the outside help.

Based on the above facts, answer the following

(a) Explain the Ad-hoc arbitration.

(b) What are the Types of Arbitration?

(c) How *Ad hoc* is different from Institutional Arbitration?

(d) How the arbitrator is appointed under Ad-hoc arbitration?

Quote relevant provisions in support of your answer.

(5 Marks each)

Question No. 2

(a) Designer Information Limited and Bottle Needle Industries Limited had a contract for the supply of goods. However, there was a discrepancy over the payment, and the parties were unable to resolve the issue through negotiation. As a consequence, Designer Information Limited initiated arbitration proceedings against Bottle Needle Industries Limited. The arbitration was held in the United States as the registered office of Designer Information Limited was situated there, and the arbitrator issued an award in their favor. The award stated that Bottle Needle Industries Limited owed Designer Information Limited a Rs. 10 crore amount of money for the goods that had been supplied. Subsequently, Bottle Needle Industries Limited challenged the arbitration award in US court, arguing that it was invalid. The court rejected their argument and enforced the award.

Later, Bottle Needle Industries Limited initiated its own arbitration proceedings in its home country situated in India. The arbitrator in this second arbitration also issued an award, which stated that Bottle Needle Industries Limited owed Designer Information Limited a Rs. 10 crore amount of money for breach of contract.

With reference to above, Discuss the difference between the Foreign Award and Domestic Award. Also, Discuss the provisions relating to Enforcement of Domestic and Foreign Awards under Arbitration and Conciliation Act, 1996.

(b) Cranbery Limited was having a contract with Timber Industries Limited for the supply of the raw materials for their business. However, in the recent times Cranbery Limited was supplying the defective/faulty materials to the company. Timber Industries Limited obtained an award through Arbitral Proceedings for an amount of Rs. 10 Lakh as a loss suffered due to Cranbery Limited. Cranbery Limited denied to make the payment. Advice, how can Timber Industries Limited enforce this Award.

(c) Jai and Sanjay had an agreement for providing various services to a corporate group. However, due to some disputes among them, they settled their matter with the help of the arbitration. In the light of the of various provisions and sections of the Arbitration and Conciliation Act, 1996, Draft a Petition for Enforcement of Arbitral Award. Assume necessary Facts

(d) Roger, CFO of M/s Arti Buildwell Private limited is dissatisfied with the Arbitral award passed against them. He discussed the matter in his team and someone suggested him few grounds on which award can be challenge. In this regard, suggest Roger the grounds on which he can challenge the award.

(5 Marks each)

Question No. 3

(a) X and Y had a dispute over the piece of the property situated at Noida, UP. In this regard they wanted to take the matter to the court. However, X is inclined to settle the dispute under fast track arbitration. In this regard kindly help X by briefing him about Fast Track arbitration and its features.

(b) Mr. Ankur was working in a Cables Manufacturing Company as a Sales Manager. Company has 3 units at Pimpri (Pune), Urse (Pune) and Roorkee (Uttarakhand). The company has vide range of products including 1100 V PVC insulated cables – electrification of industrial establishments, electrical panel wiring and consumer electrical goods and 3 core flat cables – submersible pumps and electrical motors, Automotive/battery cables – wiring harness for automobile industry and battery cables for various applications, Heavy duty, underground etc. However, company terminated Mr. Ankur without giving him any reason or explanation thereof. The employee disputed the firing and said they were fired unfairly. The employer had a different take on the situation and thought the dismissal was legal. The matter was taken before an arbitrator, who used fast track arbitration to settle it. However, unavoidable circumstances, it is not possible to conduct physical hearing for the same. The parties are ready to explore the option of conducting the proceedings in any other manner. Discuss the recourse available if the parties are finding it difficult to conduct physical hearing.

(c) Mr. X, a Fresher Company Secretary wants to pursue his career in the field of Arbitration and Conciliation. In this regard, please guide him about the role of Company Secretaries in Arbitration and Conciliation Act, 1996.

(d) Cartella Industries Limited, a listed company involved in the business of FMCG with over 28 brands across 10 distinct categories including Fabric Wash, Household Care, Purifiers, Personal Wash, Skin Care, Hair Care, Colour Cosmetics, Oral Care, Deodorants, Beverages, the Company is part of the daily life of millions of consumers. Mr. Gaurav, Shareholder of the company has not received annual reports from the past few years. As a Practising Company Secretary, kindly guide Mr. Gaurav regarding the procedure to file complaint against the company through SCORES.

(5 Marks each)

Question No. 4

(a) Mr. X was a tenant and living in a room rented out by Mr. Z. in the recent time, they had a dispute over the rental payment. So they decided to settle the dispute through Conciliation instead of going to the court. However, both are unaware about the process of Conciliation. In this regard, kindly describe the process during Conciliation.

(b) In reference to the above situation, prepare a draft specimen of Conciliation Agreement.

(5 Marks each)

PART II : MEDIATION (30 MARKS)

Question No. 5

(a) A and B opened a shop of the food items. However there was some dispute regarding the profit sharing among them. In order to get the resolution they decided to take the help from the Mediator in place of Arbitration. Kindly brief them about the benefits of choosing mediation as mode of Dispute Resolution System.

(b) Two Companies are involved in a dispute over payment terms. However, both the companies are fully aware about the court procedure and time it will take for the disposal of complaint. So, both Companies have approached you to suggest them the Alternate ways to resolve Dispute and Conflict. Also explain the difference between Arbitration and Mediation.

(c) Mr. X is facing difficulty in negotiating Service Provider terms with XYZ Limited. However, even after trying they did not get the desired result. In this matter, advise Mr X that how an effective negotiation plays an important role in getting the desired result. Also discuss the elements of Negotiation.

(d) Mr. Aman, A Practising Company Secretary having an experience of more than 18 years is looking to apply for being empanelled as mediator or conciliator. Describe the conditions under the Companies Act, 2013 in which a person can qualified for being empanelled as mediator or conciliator.

(5 Marks each)

Question No. 6

(a) XYZ Limited and PQR Private Limited has resolved their dispute through Mediation. The dispute was relating to Non-releasing of Payment by XYZ Limited and In consequence stoppage of delivery of Goods by PQR Private Limited. Prepare a Mediated Settlement Agreement in this matter. Assume necessary facts.

(b) Mr. K who is a practising Company Secretary is now wants to pursue his career as a Mediator. Explain him the Ethics which a mediator should follow during the process.

(5 Marks each)

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