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(New Syllabus 2022)

for

December, 2024 Examination

ARBITRATION, MEDIATION & CONCILIATION

GROUP 2

ELECTIVE PAPER 7.1

Index

Lesson 1: Arbitration: Introduction, Agreements and its Institutions

1. Chennai Metro Rail Limited Administrative Building v. M/s Transtonnelstroy Afcons (JV) & Anr. decided by Supreme Court on 19th October, 2023

In this case, Chennai Metro Rail Limited("Chennai Metro"), a joint venture between the Central Government and the Government of Tamil Nadu, had awarded the contract to the respondent ("Afcons").

The tribunal recorded the agreement of parties, that the hearing fee for each arbitrator was fixed at ₹ 1,00,000/- per session of hearing date. A member of tribunal was substituted. Further, in the 10th Meeting, the tribunal sought to revise the fee payable from ₹ 1,00,000/- to ₹ 2,00,000/. Chennai Metro objected to this revision and Afcons requested the tribunal to keep its direction for modification of fee, in abeyance till the decision of this court.

Later, Afcons informed Chennai Metro that it had paid the revised fee for five hearings but Chennai Metro filed an application before the Madras High Court. In this proceeding under Section 14, the relief sought was a declaration that the mandate of the tribunal was terminated in respect of the disputes referred to them.

All three members of the tribunal filed affidavits, in response to the Section 14 petition acknowledging that Supreme Court's judgment in *ONGC v. AFCONS Gunasa JV2* (hereafter "ONGC") had decided the issue and thus members of the tribunal decided to revert back to the originally agreed fee i.e., ₹1,00,000.

Initially, the High Court granted an interim order, staying the proceedings. However, after hearing counsel for the parties, and considering the materials on the record, the court dismissed the application, filed by Chennai Metro through the impugned judgment.

In the present SLP filed before Hon'ble Supreme Court, it was decided that the attempt by Chennai Metro to say that the concept of *de jure* ineligibility because of existence of justifiable doubts about impartiality or independence of the tribunal on unenumerated grounds [or other than those outlined as statutory ineligibility conditions in terms of Sections 12 (5)], therefore cannot be sustained. We can hardly conceive of grounds other than those mentioned in the said schedule, occasioning an application in terms of Section 12(3). In case, this court were in fact make an exception to uphold Chennai Metro's plea, the consequences could well be an explosion in the court docket and other unforeseen results. Skipping the statutory route carefully devised by Parliament can cast yet more spells of uncertainty upon the arbitration process….

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

1. Applicability of provisions relating to Arbitration Council of India (October 13, 2023)

The Central Government has appointed 12th day of October, 2023 as the date on which the provisions of section 10 of the Arbitration and Conciliation (Amendment) Act, 2019 (said Act) has come into force.

Section 10 of the said Act has inserted Part IA containing sections 43A to 43M to the Arbitration and Conciliation Act, 1996, which are relating to the Arbitration Council of India.

Details of Change

Part IA has come into force w.e.f. 12th day of October, 2023.

For details: https://egazette.gov.in/WriteReadData/2023/249358.pdf

https://legalaffairs.gov.in/sites/default/files/arbitration-and-conciliation%28amendment%29-act-2019.pdf

2. NTPC LTD. v. M/S SPML Infra Ltd. decided by Supreme Court on 10.04.2024

The pre-referral jurisdiction of the courts under Section 11(6) inheres two inquiries: (i) primarily the existence and the validity of an arbitration agreement and (ii) secondary inquiry with respect to the non-arbitrability of the dispute

Brief Facts

The present appeal arose out of a decision of the High Court of Delhi, allowing the Respondent's application under Section 11(6) of the Arbitration and Conciliation Act, 19962 for the constitution of an Arbitral Tribunal. It is the case of Appellant NTPC that there were no subsisting disputes between the parties in view of the Settlement Agreement and that the application for arbitration is an afterthought and abuse of the process.

The Appellant and Respondent entered into a contract for "Installation Services for Station Piping Package for Simhadri Super Thermal Power Project Stage II". In terms of the contract agreement, SPML furnished Performance Bank Guarantees and Advanced Bank Guarantees to secure the Appellant.

Pursuant to the successful completion of the project, a Completion Certificate was issued by NTPC. NTPC informed SPML that the final payment under the contract would be released upon the receipt of a No-Demand Certificate from SPML. The No-Demand Certificate was issued by SPML and NTPC also released the final payment. The Bank Guarantees were however withheld.

NTPC informed SPML that the Bank Guarantees were withheld on account of pending liabilities and disputes between the parties with respect to other projects. SPML naturally protested. SPML informed NTPC that the retention of Bank Guarantees, despite issuance of the Completion Certificate and the No-Demand Certificate, by linking them to some other projects, was unjustified. Following the protest, SPML raised a demand from NTPC as liabilities recoverable for actions attributable to NTPC under this very contract.

SPML called upon NTPC to appoint an Adjudicator for resolving pending disputes in terms of the General and Special Conditions of Contract. As no action was taken by NTPC, SPML moved the Delhi High Court by filing Writ Petition, for the release of the Bank Guarantees.

While issuing notice, the High Court directed NTPC not to encash the Bank Guarantees, and further directed SPML to keep the Bank Guarantees alive.

Pending the Writ Petition, negotiations between the parties culminated in a Settlement Agreement. Through the Settlement Agreement, NTPC agreed to release the withheld Bank Guarantees. SPML also agreed to withdraw its pending Writ Petition and undertook not to initiate any other proceedings, including arbitration, under the subject contract.

Following the Settlement Agreement, the Bank Guarantees were released by NTPC. SPML withdrew the Writ Petition.

After the aforesaid settlement of the disputes, followed by its implementation, SPML repudiated the Settlement Agreement and filed the present application under Section 11(6) of the Arbitration & Conciliation Act, 1996 in the Delhi High Court. In this Arbitration Petition, SPML alleged coercion and economic duress in the execution of the Settlement Agreement. The allegation was, that the retention of the Bank Guarantees compelled SPML to accept the terms of Settlement Agreement. SPML also averred that NTPC had failed to appoint an arbitrator in spite of repeated requests, and therefore the High Court must constitute an Arbitral Tribunal, in exercise of its jurisdiction under the Act.

The High Court examined the correspondence between the parties in detail. It rejected the first contention of NTPC that SPML should have first resorted to an alternative dispute resolution mechanism under the Dispute Resolution Clause. It noted that such a request was, in fact, made by SPML on an earlier occasion, but NTPC failed to respond to the same. On the request for arbitration and the allegation of economic duress that allegedly prevailed in signing the Settlement Agreement.

Issue

In the present case, the court was primarily concerned with the pre-referral jurisdiction of the High Court under Section 11 of the Act and would like to underscore the limited scope within which an application under Section 11(6) of the Act has to be considered.

Decision

The position of law with respect to the pre-referral jurisdiction, as it existed before the advent of Section 11(6A) in the Act, was based on a well-articulated principle formulated by Supreme Court in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*. In Boghara Polyfab, the Supreme Court held that the issue of non-arbitrability of a dispute will have to be examined by the court in cases where accord and discharge of the contract is alleged. Following the principle in Boghara Polyfab, the Court in *Union of India & Ors. v. Master Construction Co.* observed that when the validity of a discharge voucher, no-claim certificate or a settlement agreement is in dispute, the court must prima facie examine the credibility of the allegations before referring the parties to arbitration. Yet again in *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.*, this Court observed that allegations of fraud, coercion, duress or undue influence must be *prima facie* substantiated through evidence by the party raising the allegations.

Taking cognizance of the legislative change, this Court in *Duro Felguera*, noted that post the 2015 Amendments, the jurisdiction of the court under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties – "nothing more, nothing less".

Eye of the Needle: The referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

For details:
https://main.sci.gov.in/supremecourt/2021/13794/13794_2021_1_1501_43311_Judgement_10-Apr-2023.pdf

3. NBCC (India) Limited versus Zillion Infra Projects Pvt. Ltd. decided by Supreme Court on 19.03.2024

Reference in one contract to the terms and conditions of the other contract would not ipso facto make the arbitration clause applicable unless there is a specific mention/reference thereto

Facts

The appellant, NBCC (India) Limited is a Government of India undertaking, engaged in construction of power plants and other infrastructure projects. The respondent, M/s Zillion Infraprojects Pvt. Ltd. is engaged in the construction and infrastructure sector. The appellant issued an Invitation to tender majorly for Construction of the Weir. The Respondent submitted the bid and appellant awarded the contract for Construction of the Weir to the respondent. A

dispute arose and the respondent issued a notice invoking arbitration and further seeking consent for the appointment of a former Judge of a High Court, as Sole Arbitrator. The appellant did not respond so the respondent filed an application at the High Court under Section 11(6) of the Arbitration Act. The High Court confirmed the proposed appointment of the former Judge of the Delhi High Court, as the Sole Arbitrator. Aggrieved by the orders, the appellant filed the appeals before Supreme Court.

Issue

Learned Senior Counsel *inter alia* submitted before the Supreme Court that a mere reference to the terms and conditions without there being an incorporation in the L.O.I. would not make the *lis* between the parties amenable to the arbitration proceedings. Relying on the judgment of Supreme Court in the case of *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*, he submitted that unless the L.O.I. specifically provides for incorporation of the arbitration clause, a reference to the arbitration proceedings would not be permitted in view of the provisions of sub-section (5) of Section 7 of the Arbitration Act.

Decision

The Hon'ble Supreme Court held that:

"when there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not ipso facto be applicable to the second contract unless there is a specific mention/reference thereto.

We are of the considered view that the present case is not a case of 'incorporation' but a case of 'reference'. As such, a general reference would not have the effect of incorporating the arbitration clause. In any case, Clause 7.0 of the L.O.I., which is also a part of the agreement, makes it amply clear that the redressal of the dispute between the NBCC and the respondent has to be only through civil courts having jurisdiction of Delhi alone."

For details: https://www.sci.gov.in/wp-admin/admin-ajax.php?action=get_judgements_pdf&diary_no=127472021&type=j&order_date=2024-03-19

Lesson 5: Preparation and Execution of Arbitral Award

1. M/s Obulapuram Mining Company Pvt. Ltd. v. R.K. Mining Private Limited decided by High Court of Andhra Pradesh on 12th September, 2023

In this case, the essential objection before the court was raised that after the Commercial Courts Act, 2015 came into force an Award can only be executed before the Commercial Court and that the regular District Judge did not have the jurisdiction to entertain this case. He points out that initially by virtue of G.O.Ms.No.74, dated 10.06.2016, the Principal District and Sessions Courts in all the districts of the State of Andhra Pradesh were designated as Commercial Courts.

The contention of the respondents on the other hand, as far as jurisdiction is concerned, was that the Commercial Courts do not have the power to execute an Arbitration Award. Learned senior counsel contends that the execution of an Award, even if the same relates to a dispute of commercial value and commercial industry, can only be before a regular Civil Court as per the provisions of Order 21 of the Code of Civil Procedure, 1908.

The Hon'ble High Court of Andhra Pradesh in the Judgement stated that with reference to the provisions of Arbitration and Conciliation Act, 1996, Commercial Courts Act and Code of Civil Procedure that *"A reading of these sections and amendments in seriatim shows that the intention of the legislature was only to modify and streamline the procedures and practices relating to suits and applications in suits etc., which are pending for disposal."*

The silence or failure to refer to Order 21 does not mean that the Commercial Court cannot execute a decree. A purposive interpretation has to be given to the provisions of the Act. If it is not so interpreted the Commercial Courts will be powerless in many aspects.

2. M/S Larsen Air Conditioning and Refrigration Company versus Union of India & Ors. decided by Supreme Court on 11.08.2023

Old Arbitration Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Arbitration and Conciliation Act, 1996.

Facts

The dispute between the appellant and Union of India ('respondent-state') arose from a contract entered into pursuant to being awarded the tender. In the course of work, certain disputes arose. The respondent-state referred the dispute to arbitration. The tribunal published its award and directed the first four respondents to pay 18% *pendente lite* and future compound interest on the award in respect of certain Claims.

The respondent-state challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act'). The district court, dismissed the challenge on the ground that it could not sit in appeal over the award and since the respondent-state had failed to file any proof of the

grounds alleged. Aggrieved, the respondent-state, preferred an appeal before the High Court. In the interim, the respondent-state deposited ₹10,00,000 in the District Court, Kanpur against ₹1,82,878.11 due at the time.

Partly allowing the appeal, the High Court disapproved the reasoning in the award on one of the claims; it held that the sum of ₹3 lakhs awarded towards compensation for loss caused due to non-issue of tender document and paralysing business could not have been granted. The High Court held that it could not be said that the proceedings (in the present case) were under the Arbitration Act, 1940, and therefore, the rate of interest granted should not be 18%. The High Court referred to Supreme court's judgments in *K. Marappan v. Superintending Engineer TBPHLC Circle Anantapur, M/s Raveechee & Co. v. Union of India* and *Ambica Construction v. Union of India* while deciding this question of *pendente lite* interest; it was held that the bar to award interest on the amounts payable under the contract would not be sufficient to deny the payment of interest *pendente lite*. The High Court proceeded to reduce the rate of interest from 18% (as ordered by the arbitrator), to 9% per annum.

Issue

Reduction of Rate of Interest by the Courts

Decision

The Hon'ble Supreme Court said that the limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground" [ref: Associate Builders]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court.

…. the impugned judgment warrants interference and is hereby set aside to the extent of modification of rate of interest for past, *pendente lite* and future interest. The 18% per annum rate of interest, as awarded by the arbitrator is reinstated.

For details: https://main.sci.gov.in/supremecourt/2019/35835/35835_2019_8_1501_46026_Judgement_11-Aug-2023.pdf

Lesson 6: Challenge to Award and Appeals

1. Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking decided by Supreme Court dated 17th August, 2023

This case may be studied for the purpose of deeper understanding of the law and scope relating to Appealable orders provided under section 37 of the Arbitration and Conciliation Act, 1996(Act).

This appeal by Konkan Railway Corporation Limited challenges the legality of the order passed by the Division Bench of the High Court while exercising jurisdiction under Section 37 of the Act.

In the present case, the Arbitral Tribunal interpreted the contractual clauses and rejected the Respondent's claims pertaining to Disputes I, III and IV. The findings were affirmed by the Single Judge of the High Court in a challenge under Section 34 of the Act, who concluded that the interpretation of the Arbitral Tribunal was clearly a possible view, that was reasonable and fair-minded in approach.

The Single Judge of the High Court affirmed the findings of the Arbitral Tribunal. The reason for upholding the decision of the Tribunal is not that the Single Judge exercising jurisdiction under Section 34 of the Act is in complete agreement with the interpretation of the contractual clauses by the Arbitral Tribunal. The Learned Judge exercising jurisdiction under Section 34 of the Act kept in mind the scope of challenge to an Arbitral Award as elucidated by a number of decisions of this Court. Section 34 jurisdiction will not be exercised merely because an alternative view on facts and interpretation of contract exists.

In appeal under Section 37 of the Act, the Division Bench of the High Court took a different position. It opined that the construction of the clauses by the Arbitral Tribunal was not even a possible view.

The principle of interpretation of contracts adopted by the Division Bench of the High Court that when two constructions are possible, then courts must prefer the one which gives effect and voice to all clauses, does not have absolute application. The said interpretation is subject to the jurisdiction which a court is called upon to exercise. While exercising jurisdiction under Section 37 of the Act, the Court is concerned about the jurisdiction that the Section 34 Court exercised while considering the challenge to the Arbitral Award. The jurisdiction under Section 34 of the Act is exercised only to see if the Arbitral Tribunal's view is perverse or manifestly arbitrary. Accordingly, the question of reinterpreting the contract on an alternative view does not arise. If this is the principle applicable to exercise of jurisdiction under Section 34 of the Act, a Division Bench exercising jurisdiction under Section 37 of the Act cannot reverse an Award, much less the decision of a Single Judge, on the ground that they have not given effect and voice to all clauses of the contract. This is where the Division Bench of the High Court committed an error, in re-interpreting a contractual clause while exercising jurisdiction under Section 37 of the Act. In any event, the decision in *Radha Sundar Dutta* (supra), relied on by the High Court was decided in 1959, and it pertains to proceedings arising under the Village Chaukidari Act, 1870

and Bengal Patni Taluks Regulation of 1819. Reliance on this judgment particularly for interfering with the concurrent interpretations of the contractual clause by the Arbitral Tribunal and Single Judge under Section 34 of the Act is not justified.

2. M/s Unibros v. All India Radio decided by Supreme Court dated October 19, 2023

This case is important to develop enhanced understanding of Law relating to setting aside of an Award more particularly on the grounds of "opposed to Public Policy of India" under section 34 of Arbitration and Conciliation Act, 1996.

This appeal, at the instance of M/s Unibros ("appellant"), registers a challenge to the judgment and order passed by the High Court of Delhi ("High Court") dismissing an appeal carried by the appellant under section 37 of the Arbitration and Conciliation Act, 1996 ("the Act"). Vide the impugned judgment, a Division Bench affirmed the judgment and order of a learned Single Judge whereby an objection of the All India Radio ("respondent") under section 34 of the Act was allowed resulting in setting aside of an arbitral Award to the extent it awarded loss of profit to the appellant.

The court said that the contentions advanced on behalf of the appellant tasks us to resolve a recurring issue which, while not unprecedented, has consistently confronted the courts leading it to navigate various circumstances under which a claim for loss of profit may be allowed in cases of delay simpliciter in the execution of a contract.

In para 16, the Hon'ble Court stated that to support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

Para 17 states that One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

Para 18 stated that Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered.

While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions: first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.

20. The First Award was interfered with by the High Court for the reasons noted above. The Arbitrator, in view of such previous determination made by the High Court, could have granted damages to the appellant based on the evidence on record. There was, so to say, none which on proof could have translated into an award for damages towards loss of profit. A claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. The arbitral award in question, in our opinion, is patently illegal in that it is based on no evidence and is, thus, outrightly perverse; therefore, again, it is in conflict with the "public policy of India" as contemplated by section 34(2)(b) of the Act.

3. M/s Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal and Others decided by Supreme Court on 19.01.2023

In exceptional cases and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the issues arising under section 34(2)(a), then the party who has assailed the award can be permitted to file affidavit in the form of evidence

Brief Facts

This appeal was filed from a Judgment passed by High Court of Karnataka in which the court had set aside the order passed by the learned Additional City Civil and Sessions Judge, Bengaluru, has permitted the respondents – original writ petitioners to adduce evidence in an application under Section 34 of the Arbitration & Conciliation Act, 1996.

That against the award passed by the learned arbitrators, an application under Section 34 of the Act was filed by the respondents. The respondents filed an interim application in section 34 application to adduce additional evidence. At this stage, it is required to be noted that as such the award passed by the learned arbitrators was an *ex-parte* award and no evidence was led by the respondents herein, who subsequently assailed the award by way of section 34 application. The appellant filed objections to the said interim application seeking permission to adduce evidence on the ground that the same was not maintainable in accordance with the provisions of the Arbitration Act, 1996.

Issue

The short question which is posed for the consideration of Supreme Court was, whether the applicant can be permitted to adduce evidence to support the ground relating to Public Policy in an application filed under Section 34 of the Arbitration & Conciliation Act, 1996?

Decision

The Hon'ble Supreme Court said that the ratio of the three decisions(referred in the Judgment) on the scope and ambit of section 34(2)(a) pre-amendment would be that applications under sections 34 of the Act are summary proceedings; an award can be set aside only on the grounds set out in section 34(2)(a) and section 34(2) (b); speedy resolution of the arbitral disputes has been the reason for enactment of 1996 Act and continues to be a reason for adding amendments to the said Act to strengthen the aforesaid object; therefore in the proceedings under section 34 of the Arbitration Act, the issues are not required to be framed, otherwise if the issues are to be framed and oral evidence is taken in a summary proceedings, the said object will be defeated; an application for setting aside the arbitral award will not ordinarily require anything beyond the record that was before the arbitrator, however, if there are matters not containing such records and the relevant determination to the issues arising under section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties' the cross-examination of the persons swearing in to the affidavits should not be allowed unless absolutely necessary as the truth will emerge on the reading of the affidavits filed by both the parties. Therefore, in an exceptional case being made out and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out in section 34(2)(a) can be permitted to file affidavit in the form of evidence. However, the same shall be allowed **unless absolutely necessary**.

For details: https://main.sci.gov.in/supremecourt/2022/2236/2236_2022_4_1503_41103_Judgement_19-Jan-2023.pdf

4. M/s Hindustan Contruction Company Limited v. M/s National Highway Authority of India decided by Supreme Court on 24.08.2023

Dissenting Award not to be treated as award even if Majority Award is Set aside

A dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings. This court is of the opinion that there is another dimension to the matter. When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to

challenge the soundness, plausibility, illegality or perversity in the approach or conclusions in the dissenting opinion.

For
details: https://main.sci.gov.in/supremecourt/2012/40706/40706_2012_5_1501_46332_Judgement_24-Aug-2023.pdf

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

1. Amendment to SEBI Circulars pertaining to Investor Grievance Redressal System and Arbitration Mechanism

Circular No. CIR/CDMRD/DEICE/CIR/P/2017/77 dated July 11, 2017

Through this circular, it has been clarified that "Forming of exclusive panel for appellate arbitration is not required and members can serve on both the panels. However, it is imperative for the exchanges to ensure that in the same matter, the members of arbitration panel are not considered for constituting the appellate arbitration panel if the matter goes to appeal."

Clause 2.A (viii) and Clause 2.A (xi) (iii) of the aforesaid Circular shall be substituted with the following:

a. 2.A (viii). 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."

b. 2.A (xi) (iii). Threshold limit for interim relief paid out of IPF in Stock Exchanges

"(iii) 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."

Circular No. CIR/CDMRD/DCE/CIR/P/2018/48 dated March 14, 2018

The following shall be inserted at the end of Clause 2 (ii) of the aforesaid Circular:

2 (ii). 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."

https://www.sebi.gov.in/legal/circulars/oct-2021/amendment-to-sebi-circulars-pertaining-to-investor-grievance-redressal-system-and-arbitration-mechanism_53450.html

https://www.sebi.gov.in/sebi_data/commondocs/oct-2023/CHAPTER-6-SE_&_CC_p.pdf

2. Online Web Based Complaints Redressal System

SEBI vide its circular number SEBI/HO/MRD1/ICC1/CIR/P/2022/94 dated July 04, 2022, launched a redressal system for exchanges. As read above, SEBI has implemented an online platform (SCORES) designed to help investors to lodge their complaints, pertaining to securities market, against listed companies and SEBI registered intermediaries.

Further, in order to enable investors to lodge and follow up their complaints and track the status of redressal of such complaints from anywhere, all Recognized Stock Exchanges including Commodity Derivatives Exchanges / Depositories has been advised to design and implement an online web based complaints redressal system of their own, which will facilitate investors to file complaints and escalate complaints for redressal through Grievance Redressal Committee (GRC), arbitration, appellate arbitration etc. in accordance with their respective byelaws, rules and regulations.

The system is intended to expedite redressal / disposal of investors' complaints as it would also obviate the need for physical movement of complaints. Further, the possibility of loss, damage or misdirection of the physical complaints would be avoided. It would also facilitate easy retrieval and tracking of complaints at any time.

Salient features:

The system should be web enabled and provide online access 24 x 7 with the following salient features:

- Complaints/GRC/Arbitration/Appellate Arbitration and reminders thereon are lodged online at anytime from anywhere;

- An email is generated instantaneously acknowledging the receipt of the complaint and allotting a unique registration number for future reference and tracking;
- The matter/case moves online to the entity (intermediary or listed company) concerned for its redressal;
- The entity concerned can indicate the mode i.e. online or offline for GRC and arbitration.
- The access of the online system should be given to the Trading Members and Depository Participants.
- The entity concerned uploads an Action Taken Report (ATR) on the Complaints/GRC/Arbitration/Appellate Arbitration;
- All Recognized Stock Exchanges including Commodity Derivatives Exchanges / Depositories peruse the ATR and dispose of the Complaints/GRC/Arbitration/Appellate Arbitration if it is satisfied that the complaint has been redressed adequately;
- The concerned investor can view the status of the complaint online;
- The entity concerned and the concerned investor can seek and provide clarification(s) online to each other;
- The life cycle of a Complaints/GRC/Arbitration/Appellate Arbitration has an audit trail; and
- All the Complaints/GRC/Arbitration/Appellate Arbitration are saved in a central database which would generate relevant MIS reports to enable all Recognized Stock Exchanges including Commodity Derivatives Exchanges / Depositories to take appropriate policy decisions and or remedial actions.
- There should be a provision to link the online system with SCORES.

3. The matter of *Arpit Mehra vs. Kotak Securities Ltd.*

This arbitration matter has been filed by applicant Dr. Arpit Mehra agarnst respondent Kotak Securities Ltd. for setting aside the order dated 15.05.2023 of IGRP.

The matter has come up for arbitration wherein the IGRP has rejected the claim of the applicant for losses suffered for about Rs. 3,75,000/- due to mishandling of trading in derivatives by the representative of respondent, the trading member. The applicant is a Doctor by profession. He is having trading account with respondent which is a stock broking company since the year 2019. In the month of October - November 2022 an employee of respondent, who was assigned as Applicant's RM advised to trade in derivatives.

The Applicant informed that he was not an expert in the field but she assured that she would deal on his behalf. The applicant suffered a loss of approximately Rs. 80,000/- in the beginning, he directed her to stop trading and further directed her to revive the losses. she assured that she will recover losses and thereafter will stop trading in derivatives. Despite recovery of said loss, she continued to deal and further purchased 30 lots, no stop loss was demarcated and applicant suffered a loss of Rs. 1,50,000/-. The applicant directed the employee not to deal any further, but she assured that she will recover losses incurred and purchased 250 shares of Adani Green which started lossing due to the Hindenburg report. She did not sell these shares despite request by the applicant resulting in huge losses. The respondent trading member has opposed the claim. The

account opening form of the applicant - claimant has been filed to show that he became registered constituent since June 2020.

The applicant is a well-educated person used to trade regularly in securities market. He was using online trading himself and was well aware of the trading and its position in his account. Relevant contract notes were emailed to him and SMS logs were also sent which has been filed as annexures. Copy of applicant's combined segment ledger for regular trades and payments are also annexed. The statement of applicant that representative of respondent promised to recover the loss is denied.

The IGRP has rejected the claim on a sound reasoning that applicant himself was doing online and off-line trading. There is nothing to show that trading was done by the trading member without the consent or knowledge of applicant for which contract notes and emails & SMSs are available. A person involved in trading may earn or loose. There is nothing to show that respondent is under any legal obligation to compensate the losses. Before any such trade, the risk factor is to be considered. Since the applicant- claimant is doing online trading he is always in a position to act according to his wishes. Even if anyone promises to recover the loss, the act of trading must be done with full cautious. The applicant has submitted that after purchase of Adani Green shares, he asked for its disposal but the representative of Respondent, failed to do so. Nothing prevented him to dispose it as he had earlier traded online. In suffering huge losses, responsibility cannot be attributed to the respondent in the absence of any documented condition for indemnity. The findings of IGRP deserves to be confirmed.

The Arbitrator rejected the arbitration application claiming Rs. 3,73,276/ -. No orders as to cost.

Source: *https://www.nseindia.com/invest/new-disposal-of-arbitration-proceedings*

Lesson 9: Conceptual Framework of International Commercial Arbitration

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.

Role of Courts as per Arbitration & Conciliation Act, 1996

Meaning of Court in International Commercial Arbitration

In the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

Appointment of Arbitrator under section 11 in case of International Commercial Arbitration

Appointment of Arbitrator where parties did not agree on Procedure to Appoint Arbitrators

The parties are free to agree on a procedure for appointing the arbitrator or arbitrators subject to section 11(6). Failing any agreement, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator, in an arbitration with three arbitrators. If this procedure applies and:

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

Failure to appoint an Arbitrator where parties agreed on Procedure to Appoint Arbitrators

Where, under an appointment procedure agreed upon by the parties,—

> (a) a party fails to act as required under that procedure; or
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

The Supreme Court or, as the case may be, the High Court, while considering any application under section 11(4) or 11(5) or 11(6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

A decision on a matter entrusted by section 11(4), 11(5) or 11(6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

Appointment of Arbitrator of Any Nationality

As per section 11(9), in the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

Interim Measures by the Courts

A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:—

> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;
(c) the detention, preservation or inspection of any property or thing which is the subjectmatter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection as mentioned above, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

Once the arbitral tribunal has been constituted, the Court shall not entertain an application as explained above, unless the Court finds that circumstances exist which may not render the remedy provided under section 17(relating to Interim Measures by Arbitral Tribunal) efficacious.

Assistance of Courts in taking evidence(Section 27)

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

The application shall specify—

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,—

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;
(ii) the description of any document to be produced or property to be inspected.

The Court is also, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

The Court is also empowered, while making an above order, issue the same processes to witnesses as it may issue in suits tried before it.

Any Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the

conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

For this purpose, the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Imposition of Costs

In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, shall have the discretion to determine—

(a) whether costs are payable by one party to another;
(b) the amount of such costs; and
(c) when such costs are to be paid.

Explanation.—For the purpose of determining the cost, "costs" means reasonable costs relating to—

(i) the fees and expenses of the arbitrators, Courts and witnesses;
(ii) legal fees and expenses;
(iii) any administration fees of the institution supervising the arbitration; and
(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

If the Court or arbitral tribunal decides to make an order as to payment of costs,

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing

Challenges and Enforcement of Awards

The courts *inter alia* can entertain the application for setting aside arbitral award under section 34, take necessary action for enforcement of award under section 36 and entertain appeals under section 37.

The provisions relating to Arbitral Proceedings from commence to enforcement of Awards are mutatis mutandis also applicable to International Commercial Arbitration.

EVALUATION OF INTERNATIONAL ARBITRAL INSTITUTIONS

The inclusive list of International Arbitration is as provided hereinafter:

S. No.	Name of the Institution	About the Institution	Weblink
1	Indian Council of Arbitration	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 your 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.	*https://icaindia.co.in/commercial-arbitration*
2	London Court of International Arbitration	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 LCIA has access to the eminent and experienced arbitrators, mediators and experts from many jurisdictions, and with the widest range of expertise.	*https://www.lcia.org/LCIA/introduction.aspx*
3	International Centre for Dispute Resolution	The ICDR—International Centre for Dispute Resolution is the international division of the American Arbitration Association. The ICDR is the foremost provider of global conflict-resolution solutions to businesses and organizations involved in cross-border disputes. Drawing on the AAA's 95+ years of experience, the ICDR administrative system offers a range of international alternative dispute resolution (ADR) services providing time and cost savings, along with vetted, skilled arbitrators and advanced technology.	*https://www.icdr.org/about_icdr*

4	Permanent Court of Arbitration	The PCA is intergovernmental organization to provide a forum for the resolution of international disputes through arbitration and other peaceful means. The PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference. The Conference had been convened at the initiative of Czar Nicolas II of Russia "with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments."	*https://pca-cpa.org/en/about/introduction/history/*
5	Swiss Arbitration Center	The Swiss Arbitration Centre is an independent institution that provides high-quality arbitration and mediation services worldwide. The Centre is well known for its Swiss Rules, the golden standard for arbitration and mediation. As a platform of expertise, the Centre is supported by a global network of arbitration and ADR users, legal professionals, the Swiss Arbitration Association (ASA) and the chambers of commerce of Basel, Bern, Central Switzerland, Geneva, Neuchâtel, Ticino, and Zurich.	*https://www.swissarbitration.org/centre/*
6	Vienna International Arbitration Center	Representing one of Europe's leading arbitral institutions, the Vienna International Arbitral Centre ("VIAC") serves as a focal point for the settlement of commercial disputes in the regional and international community. It has greatly benefited from its traditional position in a neutral country between east and west. Founded in 1975 as a department of the Austrian Federal Economic Chamber ("AFEC"), VIAC has in recent years enjoyed a steadily increasing caseload from a diverse range of parties spanning Europe, the Americas, and Asia.	*https://viac.eu/en/about-us*
7	SCC Arbitration Institute	Since 1917, SCC Arbitration Institute provide a neutral, independent, and impartial venue for dispute resolution in commercial business around	*https://sccarbitrationinstitute.se/en*

		the world.	
8	Singapore International Arbitration Center	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.	*https://siac.org.sg/about-us/why-siac*
9	WIPO Arbitration and Mediation Center	The WIPO Arbitration and Mediation Center offers time- and cost-efficient alternative dispute resolution (ADR) options, such as mediation, arbitration, expedited arbitration, and expert determination to enable private parties to settle their domestic or cross-border commercial disputes. The WIPO Center is international and specialized in IP and technology disputes. The WIPO Center is also the global leader in the provision of domain name dispute resolution services under the WIPO-designed UDRP.	*https://www.wipo.int/amc/en/*
10	German Arbitration Institute	The roots of the German Arbitration Institute can be traced back to the year 1920, when the German Arbitration Committee (DAS) was established in Berlin. In its present form, the DIS is the result of a merger between the DAS and the German Arbitration Institute (DIS) in 1992. The DIS assumed the main tasks of its predecessors.	*https://www.disarb.org/en/about-us/history*
11	The Japan Commercial Arbitration Association	JCAA is an independent and private non-profit institution. It has a track record spanning 70 years over which it has continuously endeavored to provide international and domestic arbitration services tailored to parties' specific needs.	*https://www.jcaa.or.jp/en/arbitration/whyjcaa.html*
12	Australian Centre for International Commercial Arbitration	The Australian Centre for International Commercial Arbitration (ACICA) is Australia's international dispute resolution institution. Established in 1985 as an independent, not-for-profit organisation, ACICA's objective is to promote and facilitate the efficient resolution of commercial disputes throughout Australia and internationally by arbitration and mediation, with the aim of delivering expediency and neutrality of process, enforceability of outcome and commercial privacy to parties in dispute.	*https://acica.org.au/*

DRAFTING OF AN INTERNATIONAL ARBITRATION CLAUSE AND SUBMISSION AGREEMENT

International Arbitration Clause

It is hereby agreed by and between the parties that if any controversy, dispute or difference shall arise concerning construction, meaning, violation, termination, validity or nullity including without limitation the scope of any Clause or effect of this Agreement or any part thereof, or of the respective rights or liabilities herein contained, the parties shall refer such controversy, dispute or difference to be resolved by arbitration in accordance with the Rules of _____ (Name of the Institution) and Arbitration and Conciliation Act, 1996 or any statutory modifications on re-enactment thereof as in force. The award made in pursuance thereof shall be binding on the parties**.** The language to be used in the arbitration shall be English. In any arbitration commenced pursuant to this clause, the sole arbitrator shall be appointed by the mutual consent of the parties as per the provisions of the Arbitration and Conciliation Act, 1996. The seat, or legal place, of arbitration shall be _____. The cost of the Arbitration proceedings shall be shared equally by both the parties.

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.

Lesson 10: International Law of Arbitration

1. CIArb Rules

CIArb Rules were made effective from 1st December, 2015 for domestic as well as International Arbitration. The major outline of the rules are as under:

1. Parties may decide to resolve the dispute through Arbitration under CIArb Rules. However parties may modify the rules as per their convenience.

2. The communication under these rules is to be in English Language.

3. In these rules place of Arbitration and Seat of Arbitration are same.

4. The process of Arbitration starts from sending the notice. The mode of sending notice is defined under these rules.

5. The timelines for various activities are also provided under these rules.

6. The proceedings starts on the date when respondent receives the notice of commencement of the proceedings. The matter of the notice has also been mentioned under the rules.

7. The notice can also have a mention of proposal for appointment of arbitrator for sole arbitrator and notification in case of more than one Arbitrator.

8. The time line for the reply by the respondent has been kept as Within 30 days of the receipt of the notice.

9. Representation of Parties is allowed.

10. The appointing authority under these rules are CIArb. They charge administrative fees for its services as set out in Appendix III.

11. The request for appointment of Arbitrator can be made to CIArb through website, post, Fax, email etc.

12. The provisions related to appointment of Arbitrator is provided under Article 8.

13. The procedure for appointment of three arbitrators is provided under Article 9 and 10.

14. Article 11 provides for the requirement of disclosure by the Arbitrator.

15. The grounds of Challenge has been provided under Article 12.

16. Article 13 provides for procedure for challenge of Arbitrator.

17. On replacement of Arbitrator, the repetition of proceedings can be avoided unless decided by the tribunal otherwise.

18. The tribunal, any emergency arbitrator, the CIArb, including the President, the Deputy President and its employees have been excluded from the liability except for Intentional Wrongs.

19. The treatment of the parties with equality is one of the important aspect of Arbitration under these rules.

20. There are provision for preparation of provisional timetable.

21. On request of the parties, the tribunal should hold hearings for evidence by witnesses or for oral argument. Otherwise, the tribunal may decide whether to hold the oral hearing or decide the matter on the basis of documents.

22. The time period for submission of statement of claim and Statement of Defence is decided by the tribunal. The content of these statements are provided in these rules.

23. The tribunal is empowered to decide on its own jurisdiction.

24. There is a provision for appointment of Emergency Arbitrator in case of need of conservatory or urgent interim measures prior to the constitution of the arbitral tribunal.

25. The parties relying the facts has the Burden of Proof.

26. The tribunal may appoint the experts.

27. In case of default by the claimant, order for termination of arbitral proceedings can be made by the tribunal.

28. The decision (Award or other decision) of tribunal should be made by the majority in case of more than One Arbitrator. Otherwise by the sole Arbitrator.

29. The laws as designated by the parties are applied by the tribunal. (*amiable compositeur*)

30. The parties are also allowed to settle the dispute between Arbitration Proceedings.

31. The parties my request the tribunal for giving interpretation of the Award within 30 days after the receipt of the award. Additional Award can also be made on request by any of the party.

32. The tribunal should fix the fees and cost.

Students are advised to read the complete rules from the website of CIArb. The following link can also be referred for ready reference: https://www.ciarb.org/media/1552/ciarb-arbitration-rules.pdf

2. APCAM Arbitration and Mediation Rules

Arbitration Rules

The APCAM arbitration is conducted on the basis of the APCAM Arbitration Rules. The purpose of these rules are to **"**provide maximum flexibility to parties and ensure maximum efficacy in arbitration proceedings, aiding resolution of disputes quickly and economically through international arbitration." The highlights of these rules is as under:

1. When the parties agree to resolve their dispute by APCAM, these rules become applicable.

2. If the rules and laws are in conflict with each other, the law applicable to Arbitration will prevail.

3. The parties should send the application to APCAM and pay requisite registration/filing Fees.

4. APCAM to send a copy of request for Arbitration to the other party. A time of 15 days is required to be given to respondent by APCAM.

5. On receipt of response, the same is to be forwarded to claimant may be given a time of 7 days for submission of comments.

6. If response is not submitted by respondent, it does not prevent the Arbitration Proceedings.

7. There are rules for notice and time periods.

8. The parties may decide the number of Arbitrators (One or Three). However, this is subject to the laws applicable to the Arbitration.

9. There are different procedure and rule for appointment of Sole Arbitrator and three arbitrators.

10. These rules also provides for the challenge procedure on the ground of impartiality and/or independence.

11. The parties may determine the seat failing which the Arbitral Tribunal is empowered to determine the seat.

12. The parties may decide to represented or assisted by a counsel/ consultant/ adviser.

13. There are provisions for Emergency Arbitrator in these rules. Arbitration-Mediation-Arbitration is also a beneficial provision for the parties.

14. The following interim measures may be obtained by the parties:

(i) Maintaining or restoring the status quo;

(ii) Restricting harm or prejudice to the arbitral process itself by necessary action;

(iii) preserving assets which may be a subject of award; or

(iv) Preserve relevant evidences.

15. A party may apply to APCAM for Fast Track Arbitration before full constitution of the Arbitral tribunal. The procedure under 14.2 applies on determination of the same by APCAM.

16. Consolidation of proceedings is possible on request of the parties to APCAM.

17. The Arbitration procedure includes Manner, Holding of Hearings, Witness and Evidences, Time limit for completion of Proceedings, Video conferencing under the Seoul Protocol on Video Conferencing.

18. The burden of proof is on the party which asserted the Facts that is relied by the parties.

19. There are time limits for Awards within a period which is limited to forty-five days from the date of the closing of final oral or written submissions

20. Provisions relating to Interpretation of Awards and costs has also been provided.

21. The provision of Scrutiny of Awards has been made in which draft Award is submitted by the Arbitral Tribunal to APCAM and the draft is submitted to Scrutiny Board consisting of one or more legal experts or senior arbitrators, before finalization.

22. The rules have a good confidentiality award which is an essential for any ADR method for resolution of dispute.

23. If a matter has not provided in these rules or any discrepancy, UNCITRAL rules applies on that matter.

Students are advised to read the complete rules from the website of APCAM. The following link can also be referred for ready reference: https://apcam.asia/arbitration-rules/#rule1

3. APCAM Accreditation system and International Arbitration

There are stringent accreditation norms by APCAM. APCAM Accreditation is based on Experience Qualification Path (EQP) or the Qualifying Assessment Programs (QAP).

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)

According to APCAM Accreditation System, there are also three levels of Accreditation for Mediators:

1. APCAM Accredited Mediator (AAM)
2. APCAM Certified Mediator (ACM)
3. APCAM International Certified Mediator (AICM)

APCAM also gives International ADR Awards. The Awards honours all significant contributions working towards ensuring quality ADR services and for path-breaking innovations and partnerships. APCAM gives awards in 10 categories.

Students are advised to read the complete rules from the website of APCAM. The following link can also be referred for ready reference: https://apcam.asia/our_services/accreditation/

4. The International Bar Association (IBA) rules on Conflict of Interest

International Arbitration required the parties to decide Conflict of Interests (COI) such as Institution and Courts. In 2004, the IBA Arbitration Committee published guidelines covering the following aspects:

(i) Impartiality and Independence of Arbitrator,

(ii) Autonomy of the Parties,

(iii) Disclosures, and

(iv) Consequence and costs of frivolous challenges.

These guidelines are applicable to International Arbitration irrespective of being carried out with the help or Lawyers or not. These guidelines are not having any over-riding effect over any applicable law, guidelines, rules, code of conduct or any other binding instrument.

Part I of the guidelines provides for General Standards Regarding Impartiality, Independence and Disclosure. The Highlight includes:

1. Arbitrator should be impartial and independent starting from accepting to become Arbitrator until the final award or termination of the proceedings.

2. In case of Conflict of Interest, the Arbitrator should deny the appointment or continuance.

3. If facts and circumstances can give raise doubts in the eyes of third party, Arbitrator should disclose.

4. If with the time provided in the guidelines, a party does not raise an express objection the party is generally deemed to have waived any potential conflict of interest. However, this does not apply in case if facts or circumstances exist as described in the Non-Waivable Red List and also a person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists.

5. Guidelines are applicable to tribunal chairs, sole arbitrators, and co-arbitrators.

6. The guidelines also provides about the duties of parties and Arbitrators.

7. Part II of these guidelines provides for Practical Application of the General Standards.

8. The Red List consists of two parts: a 'Non-Waivable Red List'; and a 'Waivable Red List'. The lists provides the situations that can give rise to justifiable doubts as to the arbitrator's impartiality and independence non-exhaustively.

9. The Orange List provides for the situations which can give rise to doubts to impartiality or independence of Arbitrators.

10. The Green List provides for a non-exhaustive situations where no appearance and no actual conflict of interest can exist.

Students are advised to read the complete guidelines from the website of IBA Guidelines on Conflicts of Interest in International Arbitration. The following link can also be referred for ready reference: https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024

5. International Chamber of Commerce (ICC) Rules on International Commercial Arbitration

The International Chamber of Commerce (ICC) has an independent Arbitration Body namely The International Court of Arbitration. This Court administers the resolution of disputes in accordance to the ICC Rules on Arbitration. It does not resolve the dispute by itself. The highlights of the rules are as under:

1. All documents such as pleadings and other written communications submitted by one party should be provided to all the parties, Arbitrator and Secretariat.

2. The parties are required to submit the request for Arbitration to the Secretariat.

3. The date on which the secretariat receives the notice is deemed to be the date of commencement of Arbitration.

4. The time limit of 30 days has been provided to the respondent from receipt of the Request from the Secretariat under the rules.

5. If parties have agreed to submit to arbitration under these Rules, they are deemed to have submitted ipso facto for these Rules in effect, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

6. A request to join additional parties may also be made to the secretariat.

7. Claim arising out of more than one contract can also be subject to Arbitration in Single Arbitration.

8. There are rules for Impartiality and Independence of the Arbitrator. Challenge can also be made by the submission to the Secretariat of a written statement mentioning the facts and circumstances of the challenge.

9. The parties may appoint or change the representator. However, information should be given to Secretariat and Arbitral Tribunal. The parties may also assisted by the Advisers.

10. The parties can agree on Place of Arbitration or it can be fixed by the Court.

11. The tribunal should determine the language of the proceedings in absence of the Agreement by the parties.

12. The parties can agree on the rules of Law to be applied on the dispute.

13. There are special provisions for Case Management and Procedural Timetable.

14. The Arbitral tribunal may decide to take oral evidences.

15. The Arbitral Tribunal may also appoint expert after consulting the parties.

16. After the final hearing or the filing of the last authorized submissions(whichever is later), the tribunal should declare the proceedings to be closed and inform the date by which it expects to submit its draft award to Secretariat and parties. The Award are approved under Article 34.

17. There are special provisions for specific Circumstances such as for Interim Measures, Emergency Arbitrator and Expedited Procedure.

18. If parties reach on settlement, the settlement is to be recorded in form of an Award.

19. Corrections, Interpretations and additional Awards can also be made.

20. The arbitrators or person appointed by tribunal, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and

representatives are not be held 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.

Students are advised to read the complete rules from the website of International Chamber of Commerce. The following link can also be referred for ready reference: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-43

6. New York Convention

New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

In India, Chapter I of Part II of the Arbitration and Conciliation Act, 1996 has provided for the treatment of Awards by Contracting State under New York Convention.

Students are advised to read the complete text of New York Convention. The following link can also be referred for ready reference: https://www.newyorkconvention.org/media/uploads/pdf/1/2/12_english-text-of-the-new-york-convention.pdf

https://www.newyorkconvention.org/english

7. Geneva Convention

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 are two important conventions. Further to the Geneva Convention, New York Convention was established.

In India, Chapter II of Part II of Arbitration and Conciliation Act, 1996 has provided for the treatment of Awards by Contracting State under New York Convention.

Students are advised to read the complete text of Geneva Convention. The following link can also be referred for ready reference: https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/

8. Case Study on International Commercial Arbitration

Facts

The applicant-SSTA, the first respondent-ISSA and SSTE executed a share subscription agreement for the issuance and allotment of shares of SSTE to ISSA. Subsequently, a share subscription agreement was entered into between DCO Inc, the applicant-SSTA and SSTE. Also, DCO Inc and the first respondent executed a secondary share purchase agreement. The applicant, SSTE and DCO Inc executed a Shareholders' Agreement to record the terms and conditions of the understanding between the parties regarding the rights, obligations and duties with respect to DCO Inc's ownership of shares of SSTE. Thereafter, the applicant, SSTE and the respondents executed an Inter se agreement. The agreement, *inter alia*, obliged the respondents to purchase the SSTE shares on a pro-rata basis in the event DCO Inc exercised its sale option under the Shareholder's Agreement.

DCO Inc addressed a sale notice to the applicant while invoking its sale option under Shareholder's Agreement. Disputes arose between the applicant and DCO Inc, the latter invoked arbitration against the applicant under the Rules of the London Council for International Arbitration. A three-member Tribunal made its award, consequent upon which the applicant was called upon to make payment to DCO Inc and to acquire the shares of SSTE which were put by DCO Inc.

Thereupon, the applicant-SSTA called upon the first respondent-ISSA under the *Inter se* agreement to proportionately pay for and acquire back its shareholdings in TTCL from DCO Inc. The applicant-SSTA issued a notice of arbitration to the first respondent and to the second respondent (a foreign party, being a resident of Seychelles) under Clause 10 of the *Inter se* agreement and nominated an arbitrator.

The respondents-ISSA did not appoint their nominee arbitrator despite the service of the arbitration notice. The applicant-SSTA filed a petition before Hon'ble Supreme Court under Section 11(6) of the Arbitration and Conciliation Act 1996 for the constitution of an arbitral tribunal in an international commercial arbitration.

By an order, an Honourable retd. Judge was appointed as the sole arbitrator with the consent of the parties.

The arbitrator entered upon the reference. A preliminary meeting was held between the parties and the arbitrator at which the parties agreed to a six months extension, if the arbitral proceedings could not be completed within a period of twelve months commencing from the date the arbitral tribunal entered reference. The time to deliver the award in the proceedings before the arbitral tribunal stood extended since the parties had consented to an extension of six months.

During the pendency of the arbitral proceedings, A Bank initiated insolvency proceedings against the first respondent- ISSA under the Insolvency and Bankruptcy Code 2016. By an order, the National Company Law Tribunal, Chennai initiated the Corporate Insolvency Resolution Process under the IBC and placed a moratorium on all proceedings against the first respondent, including arbitral proceedings.

The original period of one year and the extension of six months which was agreed upon by the parties expired. A Miscellaneous Application was filed by the applicant before the Supreme Court seeking an extension of the mandate of the tribunal. The applicant sought an extension of the mandate of the arbitral tribunal for a period of six months after the date on which the moratorium imposed under the IBC against the first respondent would stand vacated.

The first respondent has been freed from the rigours of the CIRP in pursuance of an order passed by the Supreme Court. Accordingly, there is no longer a moratorium over proceedings against the first respondent.

Analysis the above facts and answer the following:

The Arbitration Proceedings between the parties, presided over by the Ld. Sole Arbitrator Honourable Judge (Retd.), may be allowed to continue without any need for an extension of the term of the Ld. Sole Arbitrator; or

b. Alternatively, in the event this Hon'ble Court is of the opinion that the amended Section 29A (following the 2019 Amendment) is inapplicable to the present Arbitration Proceedings, allow the extension of the time limit within which Ld. Sole Arbitrator (Retd.) Judge is to render an award in the Arbitration Proceedings between the parties by a period of 1 year.

Read the relevant case at https://webapi.sci.gov.in/supremecourt/2019/43763/43763_2019_1_31_40844_Judgement_05-Jan-2023.pdf

Lesson 12: Conciliation Proceedings and International Perspective of Conciliation

1. Comparative Study of Conciliation

Mediation and Conciliation are often used interchangeably. Though, they are different but the purpose of both the proceedings is similar. In India also, both Mediation and Conciliation are used as methods of Alternate Dispute resolution along with Arbitration. In US, the existence of professional organisations such as Federal Mediation and Conciliation Service, Nation Mediation Board, Civil Mediation Council are evidence that the conciliation and Mediation both have been used as Methods of Alternate Dispute Resolution. The Federal Mediation and Conciliation Service (FMCS) of Canada was established to provide dispute resolution and relationship development assistance to trade unions and employers under the jurisdiction of the Canada Labour Code. Countries such as Belgium, Denmark, New Zealand, Indonesia also provides the services of mediation. The Conciliation/Mediation methods are widely use in European countries as well for eg. UK, Germany, Portugal, France. UK has started using the methods of Mediation/Conciliation since last of 18th Century.

However, Mediation Act, 2023 has made an attempt to replace the word conciliation with the Mediations in India.

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

1. Applicability of various provisions of Mediation Act, 2023

Mediation Act, 2023 has received the assent of the Hon'ble President of India on the 14th September, 2023. The object of this law *inter alia* is to promote and facilitate mediation, resolution of disputes, 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. The provisions of this law will come into force on such date(s) as the Central Government will notify. However, the following sections of the Mediation Act, 2013 has already come into force w.e.f. 9th October, 2023.

These sections are as follows:

CHAPTER I: PRELIMINARY

Section 1. Short title, extent and commencement

(1) This Act may be called the Mediation Act, 2023.

(2) It shall extend to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

CHAPTER II: APPLICATION

Section 3: Definitions

In this Act, unless the context otherwise requires, —

(a) "commercial dispute" means a dispute defined in of section 2(1)(c) of the Commercial Courts Act, 2015 (4 of 2016);

(b) "community mediator" means a mediator for the purposes of conduct of community mediation under Chapter X;

(c) "Council" means the Mediation Council of India established under section 31;

(d) "court" means the competent court in India having pecuniary and territorial jurisdiction and having jurisdiction to decide the disputes forming the subject matter of mediation, if the same had been the subject matter of a suit or proceeding;

(e) “court-annexed mediation” means mediation including pre-litigation mediation conducted at the mediation centres established by any court or tribunal;

(f) “institutional mediation” means mediation conducted under the aegis of a mediation service provider;

(g) “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;

(h) “mediation” includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute;

(i) “mediator” means a person who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council.

Explanation.—Where more than one mediator is appointed for a mediation, reference to a mediator under this Act shall be a reference to all the mediators;

(j) “mediation agreement” means a mediation agreement referred to in sub-section (1) of section 4;

(k) “mediation communication” means communication made, whether in electronic form or otherwise, through—

(i) anything said or done;
(ii) any document; or
(iii) any information provided,

for the purposes of, or in relation to, or in the course of mediation, and includes a mediation agreement or a mediated settlement agreement;

(l) “mediation institute” means a body or organisation that provides training, continuous education and certification of mediators and carries out such other functions under this Act;

(m) “mediation service provider” means a mediation service provider referred to in sub-section (1) of section 40;

(n) “mediated settlement agreement” means mediated settlement agreement referred to in sub-section (1) of section 19;

(o) “Member” means a Full-Time or Part-Time Member of the Council and includes the Chairperson;

(p) “notification” means notification published in the Official Gazette and the expression ‘‘notified’’ with its cognate meanings and grammatical variations shall be construed accordingly;

(q) “online mediation” means online mediation referred to in section 30;

(r) “participants” means persons other than the parties who participate in the mediation and includes advisers, advocates, consultants and any technical experts and observers;

(s) “party” means a party to a mediation agreement or mediation proceeding whose agreement or consent is necessary to resolve the dispute and includes their successors;

(t) “place of business” includes—

(a) a place from where the business is ordinarily carried on, and includes a warehouse, a godown or any other place where a party stores it's goods, supplies or receives goods or services or both; or
(b) a place where a party maintains its books of account; or
(c) a place where a party is engaged in business through an agent, by whatever name called;

(u) “pre-litigation mediation” means a process of undertaking mediation, as provided under section 5, for settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature in respect thereof, before a court or notified tribunal under sub-section (2) of section 5;

(v) “prescribed” means prescribed by rules made by the Central Government under this Act;

(w) “Schedule” means the Schedule annexed to this Act;

(x) “secure electronic signature” with reference to online mediation means, electronic signatures referred to in section 15 of the Information Technology Act, 2000 (21 of 2000); and

(y) “specified” means specified by regulations made by the Council under this Act.

CHAPTER V: MEDIATION PROCEEDINGS

Section 26: Proceedings of Lok Adalat and Permanent Lok Adalat not to be affected

The provisions of this Act shall not apply to the proceedings conducted by Lok Adalat and Permanent Lok Adalat under the Legal Services Authorities Act, 1987.

Details of provision

The proceedings under by Lok Adalat and Permanent Lok Adalat are to be conducted according to the provisions of the Legal Services Authorities Act, 1987 only.

CHAPTER VIII: MEDIATION COUNCIL OF INDIA

Section 31: Establishment and incorporation of Mediation Council

(1) The Central Government shall, by notification, establish for the purposes of this Act, a Council to be known as the Mediation Council of India to perform the duties and discharge the functions under this Act.

(2) 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.

(3) The head office of the Council shall be at Delhi or at such other place as may be notified by the Central Government.

(4) The Council may, in consultation with the Central Government, establish offices at other places in India and abroad.

Details of provision

This section empowers the Central Government to establish Mediation Council of India. It further provides the provisions relating to nature of the Mediation Council i.e. Body Corporate and its offices.

Section 32: Composition of Council

(1) The Council shall consist of the following members, namely:—

(a) a person of ability, integrity and standing having adequate knowledge and professional experience or shown capacity in dealing with problems relating to law, alternative dispute

resolution preferably mediation, public affairs or administration to be appointed by the Central Government— Chairperson;
(b) a person having knowledge and experience in law related to mediation or alternative dispute resolution mechanisms, to be appointed by the Central Government—Member;
(c) an eminent person having experience in research or teaching in the field of mediation and alternative dispute resolution laws, to be appointed by the Central Government—Member;
(d) 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;
(e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary—Member, ex officio;
(f) Chief Executive Officer—Member-Secretary, ex officio; and
(g) one representative of a recognised body of commerce and industry, chosen by the Central Government—Part-Time Member.

(2) The Members of the Council, other than ex officio members, shall hold office as such, for a term of four years from the date on which they enter upon their office and shall be eligible for re-appointment:

Provided that no Member other than ex officio Member shall hold office after he has attained the age of seventy years, in the case of Chairperson, and sixty-seven years, in the case of other Members:

Provided further that if the Chairperson is appointed on Part-Time basis, then, at least one of the Members appointed under clauses (b) or (c) shall be a Full-Time Member.

(3) The salaries, allowances and other terms and conditions of Members other than ex officio Members shall be such as may be prescribed.

(4) The Part-Time Member shall be entitled to such travelling and other allowances as may be prescribed.

Details of provision

This section provides the provisions with respect to composition of Mediation Council including qualification, salary, allowances, terms & conditions of Chairperson and Members of the Mediation Council.

Section 33: Vacancies, etc., not to invalidate proceedings of Council.

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 as a Member of the Council; or
(c) any irregularity in the procedure of the Council not affecting the merits of the case.

Details of provision

The provision of this section nullifies the effect of vacancy, defect or irregularity on proceedings/actions.

Section 34: Resignation

The Member may, by notice in writing, under his hand addressed to the Central Government, resign his office:

Provided that the 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.

Details of provision

The provision of this section provides for manner of resignation by the members of Mediation Council.

Section 35: Removal

The Central Government may, remove any Member from his office, if he—

(a) is an undischarged insolvent; or
(b) has engaged at any time, during his term of office, in any paid employment without the permission of the Central Government; 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:

Provided that where a Member is proposed to be removed on any ground, he shall be informed of charges against him and given an opportunity of being heard in respect of those charges.

Details of provision

The provisions of this section provides the situations when a member of Mediation Council may be removed by the Central Government.

Section 36: Appointment of experts and constitution of Committees

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.

Details of provision

The provisions relating to appointment of experts and constitution of committee by the Mediation Council has been provided under this section.

Section 37: Secretariat and Chief Executive Officer of Council

(1) There shall be a Chief Executive Officer of the Council, who shall be responsible for the day to day administration and implementation of the decisions of the Council.
(2) The qualification, appointment and other terms and conditions of service of the Chief Executive Officer shall be such as may be specified.
(3) There shall be a Secretariat to the Council consisting of such number of officers and employees as may be specified.
(4) The qualification, appointment and other terms and conditions of the service of the employees and other officers of the Council shall be such as may be specified.
(5) The Central Government shall provide such number of officers and employees as may be necessary for the functioning of the Council till regulations are made under this section.

Details of provision

This section provides the provisions relating to CEO and Secretariat of the Council.

Section 38: Duties and functions of Council

The Council shall—

(a) endeavour to promote domestic and international mediation in India through appropriate guidelines; (b) endeavour to develop India to be a robust centre for domestic and international mediation;
(c) lay down the guidelines for the continuous education, certification and assessment of mediators by the recognised mediation institutes;
(d) provide for the manner of conduct of mediation proceedings, section 15(1);
(e) provide for manner of registration of mediators and renew, withdraw, suspend or cancel registration on the basis of conditions as may be specified;
(f) lay down standards for professional and ethical conduct of mediators under section 15(3);
(g) hold trainings, workshops and courses in the area of mediation in collaboration with mediation service providers, law firms and universities and other stakeholders, both Indian and international, and any other mediation institutes;

(h) enter into memoranda of understanding or agreements with domestic and international bodies or organisations or institutions;
(i) recognise mediation institutes and mediation service providers and renew, withdraw, suspend or cancel such recognition;
(j) specify the criteria for recognition of mediation institutes and mediation service providers;
(k) call for any information or record of mediation institutes and mediation service providers; (l) lay down standards for professional and ethical conduct of the mediation institutes and mediation service providers;
(m) publish such information, data, research studies and such other information as may be required;
(n) maintain an electronic depository of the mediated settlement agreements made in India and for such other records related thereto in such manner as may be specified; and
(o) perform any other function as may be assigned to it by the Central Government.

Details of provision

Duties of the Mediation Council has been provided under section 38.

CHAPTER XI: MISCELLANEOUS

Section 45: Mediation Fund

(1) There shall be a fund to be called "Mediation Fund" ("Fund") for the purposes of promotion, facilitation and encouragement of mediation under this Act, which shall be administered by the Council.

(2) There shall be credited to the Fund the following, namely:—

(a) all monies provided by the Central Government;
(b) all fees and other charges received from mediation service provider, mediation institutes or bodies or persons;
(c) all monies received by the Council in the form of donations, grants, contributions and income from other sources;
(d) grants made by the Central Government or the State Government for the purposes of the Fund;
(e) amounts deposited by persons as contributions to the Fund;
(f) amounts received in the Fund from any other source; and
(g) interest on the above or other income received out of the investment made from the Fund.

(3) The Fund shall be applied towards meeting the salaries and other allowances of Member, Chief Executive Officer, Officers and employees and the expenses of the Council including expenses incurred in the exercise of its powers and discharge of its duties under this Act.

Section 46: Accounts and audit

(1) The Council shall maintain proper accounts and other relevant records and prepare an annual statement of accounts, including the balance sheet, in such form and manner as may be prescribed in consultation with the Comptroller and Auditor-General of India.
(2) The accounts of the Council shall be audited by the Comptroller and Auditor-General of India and any expenditure incurred by him in connection with such audit shall be payable by the Council to the Comptroller and Auditor-General of India.
(3) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Council shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India has in connection with the audit of the Government accounts, and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect the offices of the Council.
(4) The accounts of the Council as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

Section 47: Power of Central Government to issue directions

(1) Without prejudice to the foregoing provisions of this Act, the Council shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:
Provided that the views of the Council shall be taken into consideration before any direction is given under this sub-section.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

Details of provision

The provision of this section empowers Central Government to issue directions after considering the views of the Mediation Council and make the council bound by such directions on questions of policy.

Section 50: Protection of action taken in good faith

No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer of such Government, or the Member or Officer or employee of the Council or a mediator, mediation institutes, mediation service providers, which is done or is intended to be done in good faith under this Act or the rules or regulations made thereunder.

Details of provision

This section extends protection to the Central Government, State Government, its officers, members or officer or employee of the Mediation Council or mediator, mediation institutes, mediation service providers, for any action taken in good faith under Mediation Act, 2023 or the rules or regulations made thereunder.

Section 51: Power to make rules

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may make provision for—

(a) the salaries and allowances and the terms and conditions of the Members under sub-section (3) of section 32;
(b) the travelling and other allowances payable to the Part-Time Member under sub-section (4) of section 32;
(c) the form and manner of annual statement of accounts, including the balance sheet under sub-section (1) of section 46; and
(d) any other matter which is to be, or may be prescribed.

Details of provision

This section empowers the Central Government to make rules under Mediation Act, 2023.

Section 52: Power to make regulations

(1) The Council may, with the previous approval of the Central Government, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act.
(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may make provision for—
(a) qualification, experience and accreditation for mediators of foreign nationality under the proviso to sub-section (1) of section 8;
(b) manner of conducting mediation proceeding under sub-section (1) of section 15;
(c) standards for professional and ethical conduct of mediators under sub-section (3) of section 15;
(d) manner of registration of mediated settlement agreement under sub-section (1) of section 20;
(e) fees for registration of mediated settlement agreement under the proviso to sub-section (2) of section 20;
(f) cost of mediation under sub-section (1) of section 25;
(g) manner of process of conducting online mediation under sub-section (2) of section 30;
(h) the terms and conditions of experts and committees of experts under section 36;
(i) qualifications, appointment and other terms and conditions of service of the Chief Executive Officer under sub-section (2) of section 37;

(j) the number of officers and employees of the Secretariat of the Council under sub-section (3) of section 37;
(k) the qualification, appointment and other terms and conditions of the employees and other officers of the Council under sub-section (4) of section 37;
(l) conditions for registration of mediators and renewal, withdrawal, suspension or cancellations of such registrations under clause (e) of section 38;
(m) criteria for recognition of mediation institutes and mediation service providers under clause (j) of section 38;
(n) manner of maintenance of electronic depository of mediated settlement agreement under clause (n) of section 38;
(o) manner for recognition of mediation service provider under sub-section (2) of section 40;
(p) such other functions of mediation service provider under clause (f) of section 41;
(q) duties and functions to be performed by mediation institutes under section 42; and
(r) any other matter in respect of which provision is necessary for the performance of functions of the Council under this Act.

Details of provision

This section empowers the Mediation Council to make regulations under Mediation Act, 2023.

Section 53: Laying

Every notification issued under sub-section (2) of section 6, sub-section (2) of section 55, rule and regulation made under this Act shall be laid, as soon as may be after it is issued or made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification, rule or regulation or both Houses agree that the notification, rule or regulation should not be issued or made, the notification, rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification, rule or regulation.

Details of provision

This section requires notification, rule and regulation to be laid before each house of the parliament.

Section 54: Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of five years from the date of commencement of this Act.

(2) Every order made under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament.

Details of provision

Under this section, the Central Government is empowered to make provisions for removing the difficulties within the expiry of a period of five years from the date of commencement of this Act. The order for removing the difficulties under this section is also required to be laid before each house of parliament.

Section 56: Act not to apply to pending proceedings

This Act shall not apply to, or in relation to, any mediation or conciliation commenced before the coming into force of this Act.

Detail of provision

This provision make the existing mediation or conciliation proceedings out of the purview of Mediations Act, 2023.

Section 57: Transitory provision

The rules in force governing the conduct of court-annexed mediation shall continue to apply until regulations are made under sub-section (1) of section 15:

Provided that the rules shall continue to apply in all court-annexed mediation pending as on the date of coming into force of the regulations.

Details of provision

Under this section, the concerned rules that are applicable on court-annexed mediation shall continue to apply until regulations are made by the Mediation Council. Further, these rules shall continue to apply in court-annexed mediation pending as on the date of coming into force of the regulations.

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

1. Specimen Mediated Settlement Agreement – 2

One more specimen Mediated Settlement Agreement is provided as follows:

This Mediated Settlement Agreement is executed on this _____ day of _____, 2024 at New Delhi

by and between

_____, maintaining its Registered Office at _____ (hereinafter referred to as the "FIRST PARTY")

and

_____ S/o _____ residents of _____ (hereinafter referred to as the "SECOND PARTY")

WHEREAS pursuant to agreement dated _____, disputes relating to _____,_____ and _____ has arose between the parties.

WHEREAS by virtue of the above said agreement, the parties mutually agreed to settle their dispute through Mediation by entering into a separate Mediation agreement.

WHEREAS both the parties have appointed Mr. _____ as Mediator for conduct of the proceedings.

WHEREAS the parties have now settled the disputes in the mediation proceedings held on _____, _____ and _____.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. The parties to this agreement accepts and agrees to the terms, conditions and clauses, as full and final settlement of the claims made by first party against the second party pertaining to matter indicated in mediated settlement agreement dated _____. However, any clause of this agreement should not be treated as admission of facts of dispute.

2. The second party agrees to pay Rs. _____/- by _____ (date) for the 100 computers machines delivered by the first party during the duration between _____ and _____.

3. The first party agree to provide Annual Maintenance of the above said 100 computers free of cost for a period of 3 years starting from _____ to _____.

4. The first party shall made available one of its employee during the office hours of Second Party. The employee of first party shall be entitled to 2 Earned Leaves Per month application of which should be made to Second Party 24 hours in advance and 1 Casual Leave per month that may be taken in case of exigency and 24 Sick Leaves per year.

5. The payment shall be made by second party to the first part by online transfer in the Bank accounts of later of by account payee the cheque in the name of "_____".

6.The parties agree that the obligations of First Party under the settlement agreement are fulfilled discharged on making the full and final payment under clause 2 of this Agreement to the Second Party before _____(Cut off date for making Payment).

7. The parties agree that unpaid amount after _____ (Cut off date for making Payment) shall bear interest from the date such payment was due until paid at a rate 10% compounded quarterly from time to time.

8. The parties agree that there shall be no further penalty or claim made pertaining to this transaction between the parties.

9. It is agreed between the parties that all the liabilities of the Second Party for payment as mentioned in the letter of possession dated 27.05.2016 are inclusive in the above agreed amount of Rs.25 LACS and no other payment whatsoever would be payable by the Second Party after payment of settled amount except interest for delayed payment as detailed herein above as also the maintenance charges with effect from 1.8.2021.

10. The parties agrees that parties shall pray the Hon'ble Court for a suitable adjournment of proceedings so that the parties can ensure compliance of the terms of this agreement and thereafter jointly apply to the Hon'ble Court for disposal proceedings.

It is agreed between the parties that the parties shall pray to the Hon'ble Court for a suitable adjournment of both the appeals of the two appeals as aforesaid.

In witness whereof the Bank, through its authorised officer has set its hand and stamp on this ____ day of March, 2023 at _____.

_____ _____

1st Party 2nd Party

(Name, Signature and Details) (Name, Signature and Details)

_____

Mediator

(Name, Signature and Details)

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Note: Students appearing in December, 2024 Examination should also update themselves on all the relevant Notifications, Circulars, Clarifications, Orders etc. issued by ICSI, MCA, SEBI, RBI & Central Government and Website of ICSI up to 31st may, 2024.