

CHAPTER 11:

LAW RELATING TO ARBITRATION, MEDIATION AND CONCILIATION

- (i) *Arbitration means an act of parties through which arbitration is done whether administered or not by an arbitral institution.*
- (ii) *Arbitrator is any person who has been appointed by the parties by mutual consent to settle the dispute between them.*
- (iii) *Arbitral Tribunal means the arbitrator appointed or the panel of arbitrators*
- (iv) *Court means the City Civil Court or the High Court in case of domestic arbitration and the High Court alone in case of international commercial arbitration. However, in certain disputes in relation to international commercial arbitration supreme court is the appropriate court.*
- (v) *It is mandatory to enter into a written arbitration agreement and further it can be in the form of an arbitration clause.*
- (vi) *It is mandatory for the court to refer the parties to arbitration if the parties before the dispute had entered in an arbitration agreement and either of the parties have applied to the court for the same not later than the date of submission of the first statement.*
- (vii) *One noteworthy point here is that the party applying must also submit a certified copy or the original arbitration agreement along with the application.*
- (viii) *If the original copy or the certified copy is not available then any copy along with a prayer that the court should call upon the original or the certified copy from the other party.*

INTERIM MEASURES

- (i) *It may be applied any time before/during or after the arbitral proceedings but before the enforcement of the arbitral award.*
- (ii) *It may be applied for obtaining an injunction or for the purpose of securing the amount of dispute in the arbitration.*
- (iii) *For example: It may also be applied for obtaining an order of inspection of any property or thing or for the preservation or sale of any goods which is the subject matter of arbitration.*
- (iv) *If the order of interim measure is passed before the commencement of arbitral proceeding then the arbitral proceeding must commence within 90 days.*
- (v) *The parties are free to decide upon the number of arbitrators however it should not be an even number.*

ARBITRATOR APPOINTMENT RULES

- (i) *A person of any nationality may be appointed as an arbitrator.*
- (ii) *The process of appointment is up to the parties failing which in case of sole arbitrator both the parties should mutually decide and in case of arbitration of three each party may elect one arbitrator and the appointed arbitrator have to appoint a presiding arbitrator also known as umpire.*
- (iii) *If the parties fail or the appointed arbitrators fail and were unable to appoint arbitrator within a period of 30 days then the Supreme Court or the High Court or their designated arbitral institution shall appoint the arbitrator.*
- (iv) *While appointing an arbitrator a disclosure from prospective arbitrator is taken as to his impartiality and the required qualification.*
- (v) *In case of international commercial arbitration the Supreme Court appoints an arbitrator of a nationality other than the parties.*
- (vi) *There appointment shall be made as expeditiously as possible but not later than 60 days.*

GROUND FOR CHALLENGE

- (i) Means the right of the parties to challenge an arbitrator.*
- (ii) Every prospective arbitrator must disclose in writing any circumstance which shows any direct, indirect, present or past relationship with the parties or with the subject matter and the relation further can be of any kind which gives a justifiable doubt as to the independence or impartiality.*
- (iii) Or any other circumstance which is likely to affect his ability to complete the arbitration within 12 months.*

CHALLENGE PROCEDURE

- (i) There can be two ways i.e. either the parties decide upon the procedure for challenging and if there is no procedure then the challenge procedure given under the act.*
- (ii) If the parties have agreed for a procedure by but they couldn't be successful in challenging the arbitrator then the tribunal may continue and pass an arbitral award.*
- (iii) Failing any agreement the parties may within 15 days of becoming aware of the constitution of the tribunal should challenge the arbitral tribunal in front of the arbitrator.*
- (iv) The arbitrator shall decide the challenge unless he himself withdraws from the office or the other party agrees with the challenge.*
- (v) In either of the cases any party may apply for a review in the court and the court may set aside such arbitral award.*

MISCELLANEOUS POINTS:

- (i) The arbitral proceedings commence from the date on which the request for arbitration is received by the respondent.*
- (ii) The parties are free to choose any language failing which the tribunal may decide upon the same.*
- (iii) Once the proceedings start the claimant should file his claim and the Defense should submit his response and both of the filing must be completed within 6 months.*

- (iv) Any party can amend or supplement their claim unless the tribunal considers it inappropriate.
- (v) The arbitral tribunal has the right to decide whether to hold oral hearing or to proceed with written proceedings.
- (vi) Provided if the parties request or even any party request the tribunal to hold oral hearings then the tribunal shall hold oral hearing
- (vii) If at any stage in between the arbitral proceeding the tribunal requires or any party requires that an expert should be call upon then the tribunal may appoint one or more expert.

DEFAULT BY A PARTY

- (i) If Claimant fails to communicate his statement of claim arbitral tribunal shall terminate the proceedings.
- (ii) If Respondent fails to communicate his statement of defence arbitral tribunal shall continue the proceedings.

COURT ASSISTANCE IN TAKING EVIDENCE

- (i) Any party or the tribunal itself may apply to the court for their assistance in taking any evidence.
- (ii) The application shall specify:-
 - (a) The name and address of the parties and the arbitrators.
 - (b) The evidence to be obtained in particulars if it is a witness than their details and if it is a documentary evidence then its description.
 - (c) The court while making an order issue the same process to the arbitral tribunal as the court follows while taking any evidence of like nature.

RULES APPLICABLE TO SUBSTANCE OF DISPUTE

- (i) If it is a domestic commercial arbitration then the substantive law of India shall be followed and in case of international commercial arbitration it is up to the parties to designate the substantive law, if the parties fail to decide so, the arbitrator may decide.*
- (ii) While making any reference it is assumed that the reference is for substantive law.*

WHAT ARE THE ESSENTIALS OF ARBITRAL AWARD?

- (i) An arbitral award is the final expression of an arbitral tribunal.*
- (ii) Following are certain features of an arbitral award:*
 - (a) It must be written and stamped.*
 - (b) The award must be signed by the arbitral tribunal and if not all then by the majority.*
 - (c) It must always be reasoned, unless:*
 - 1. When the arbitration agreement clearly says that the decision doesn't need to include reasons,*
 - 2. It is a settlement award.*
 - (d) It must be dated.*
 - (e) The place of arbitration must be maintained.*
 - (f) The award should clearly mention the amount to be paid.*
 - (g) Lastly the award must include the direction and decision as to the cost of arbitration.*

TIME LIMIT FOR ARBITRAL AWARD

29A - In normal arbitration cases, the arbitration must complete within 12 months from the completion of pleadings.

- (i) Further the parties may extend this period for a further period not exceeding 6 months.*
- (ii) If the tribunal fails to pass an award within that extended period then the mandate of arbitrator terminates unless the court extends the time further.*
- (iii) The extension can be given by the court on the request of parties or even on the request of arbitrator.*

FAST TRACK PROCEDURE

- (i) It is up to the parties to decide upon to settle the dispute through fast track arbitration.*
- (ii) The fast track arbitration must be completed within a period of 6 months from the date the arbitral tribunal accepts the reference.*
- (iii) The decision of parties moving to fast track arbitration must be made before or at the time of appointment of arbitrator.*

MISCELLANEOUS

- (i) The tribunal is to decide the procedure to be followed and may dispense upon any technical formalities.*
- (ii) Generally written pleadings are followed and if the parties request oral hearing may be called upon.*

SETTLEMENT

The arbitrator is free to first settle the dispute through mediation and conciliation and in doing that he may a settlement award which has the same effect as that of an normal arbitral award.

REGIME FOR COSTS

- (i) The general rule is that the unsuccessful party will be ordered to pay the cost however the tribunal may decide any other cost bearing proportion.*
- (ii) The arbitral tribunal has the discretion to determine:-*
 - (a) The amount of cost to be paid.*
 - (b) Whether the cost will be borne by one or by both.*
 - (c) The time period as to when such cost is to be paid.*
- (iii) The court while deciding the cost gives regards to the following:-*
 - (a) The conduct of the parties.*
 - (b) Whether the party partially succeeded or completely succeeded*
 - (c) If there was any frivolous counter-claim.*
 - (d) If any of them offered to settle the dispute.*

- (iv) *Apart from the above, the court may also order that a party should pay a proportion of another's party's cost.*
 - (a) *a particular stated amount.*
 - (b) *cost until a certain date.*
 - (c) *Interest on cost.*
- (v) *The parties are free to decide as to who bears the cost via an agreement which should be made after the dispute has arose.*

TERMINATION OF PROCEEDINGS.

The arbitral proceeding shall terminate in the following cases :-

- (i) *The final arbitral award.*
- (ii) *where the parties agree on term of proceeding.*
- (iii) *The tribunal finds the continuation unnecessary.*
- (iv) *The claimant withdraws his claim however in such cases the respondent if has objected then the termination cannot be done.*

CORRECTION INTERPRETATION AND ADDITIONAL AWARD

- (i) *Any party with prior notice to the other party may apply to the tribunal within 30 days of the arbitral award to:*
 - (a) *correct any award and if the tribunal finds justified provided as they inform the other party about the request.*
 - (b) *To provide interpretation of any specific point**in both above cases, the tribunal passes an order within 30 days.*
- (ii) *To make an additional award and if the tribunal considers it justified it may order within 60 days. And The tribunal may suo moto correct any error within 30 days of passing of arbitral award.*

MISCELLANEOUS POINTS

- (i) The death of the party does not discharge the Arbitration agreement rather their legal representative can be compelled.*
- (ii) Where a party to an arbitration agreement becomes insolvent and the receiver has adopted the contract then the parties must go to Arbitration irrespective of insolvency.*
- (iii) If the above rule does not apply then any party including the receiver may apply to the court and if the court finds it appropriate it may refer the parties to arbitration.*

REMOVAL OF MEMBER

The central government shall remove any member on the following grounds:

- (i) Insolvency*
- (ii) Those who have accepted any other employment (except for part time members)*
- (iii) Convicts*
- (iv) Has become mentally or physically incapable.*

Apart from the above, there are 2 more grounds on which the central government may remove a member but only after an enquiry has been made by the supreme court and the report suggest that the member ought to be removed.

- (a) Where the member has abused his position*
- (b) He has acquired any financial interest which is likely to affect his functions as a member.*

GENERAL NORMS APPLICABLE TO ARBITRATOR

- (i) He should be a person of general reputation of fairness and integrity*
- (ii) He must be impartial and neutral.*
- (iii) Must avoid any conflict of interest*
- (iv) Must be very well versed about the constitution of India, the principles of natural justice and the arbitration laws.*
- (v) He must be capable of suggesting and providing reasoned and enforceable arbitral awards.*

FOREIGN ARBITRAL AWARDS

Foreign arbitral awards which are either made under New York Convention or under the have been treated as binding in India. Any party applying for enforcement of foreign award shall be produced:

- (i) original copy of the agreement or certified copy
- (ii) original Award or certified copy of original Award.
- (iii) Any other evidence to support the foreign award.

Note: If the foreign award is in any lang other than Eng. than a certified translated copy in english has to be submitted in India.

CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARDS

Any party which opposes the enforcement of foreign awards may apply on following grounds:

- (i) The parties to the agreement were under some Incapacity.
- (ii) The arbitral agreement is invalid.
- (iii) The party against whom the order has been passed has not given notice of appointment of arbitrator
- (iv) The award deals with a matter which was not in agreement with the parties.
- (v) The award has been set aside or suspended in a foreign country.
- (vi) The enforcement of foreign award in India will be against the public policy of India.

APPEALLABLE ORDERS

If the court refuses to refer the parties to arbitration or refuses to enforce a foreign award then any party may prefer an appeal however there lies no second appeal.

CONCILIATION

It is an informal process in which the conciliator tries to bring the disputants by lowering tension and improving communication and bringing a negotiated settle.

It is a voluntary process which results into a settlement and can be successful only when the parties

- (i) If there are 2 each party decides one name and if there are 3, one to be decided by each and the third to be decided by both.
- (ii) The parties are free to decide the place where conciliation takes place and in any event the conciliator decides the place with the consent of the parties.
- (iii) At the end the conciliator drafts an settlement agreement and submit the same to the parties for their observe and after receiving he may reformulate the agreement and get it signed from the parties which results into settlement agreement.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Any evidence which was a part of the conciliation proceedings should not be introduced in a judicial proceeding which includes the views expressed by the other party, admissions made by the other party. Proposals made by the conciliator. The fact that the other party intended to settle the dispute.

MEDIATION

Means a process through which mediator mediates the dispute by facilitating discussions between them, helping to identify their issues and generating various option.

TYPES OF MEDIATION

There are 4 types of Mediation which are as follows:-

(i) Court referred mediation

In this the court which have any case pending in front of it may refer it for mediation, the court referred mediation turns into court annexed mediation when the mediation services are provided by the court as a part and parcel of the judicial system.

(ii) Statutory Mediation

some disputes like the labour and family laws are required to go through mediation before it can be taken to court. Such mediation cases are known as statutory mediation cases.

(iii) Online Mediation

When the mediation is done through the use of electronic form by using any computer network with the written consent of the parties, the mediation becomes online mediation.

(iv) Private Mediation

In this qualified mediators offer their services to the court/public to resolve their disputes through mediation and a private mediation can be obtained pending litigation or pre-litigation.

MEDIATION RULES BY THE SUPREME COURT

- (i) The supreme court has issued a mediation training manual which can help mediation grow not as a alternate dispute redressal mechanism but rather dispute redressal mechanism.*
- (ii) They have given the 4 functional stages of mediation:*
 - (a) Introduction and Opening Statement.*
 - (b) Joint session.*
 - (c) Separate session.*
 - (d) closing.*

MEDIATION RULES BY HIGH COURT

In this they have attempted to define Arbitration / Mediation / conciliation. Further under Rule 4, it has enumerated the qualifications of mediators and conciliators.

- (i) Retired Judges of Supreme court.*
- (ii) Retired Judges of High court.*
- (iii) A legal practitioner & having 5 years.*
- (iv) Any professional with 15 years of experience.*

RULE 5 STATES THE DISQUALIFICATION OF A MEDIATOR/CONCILIATOR.

- (a) Adjudged Insolvent.*
- (b) Against whom criminal charges involving moral turpitude are pending.*
- (c) Any convict*
- (d) Against whom disciplinary proceeding have been initiated.*

