Law relating to Arbitration, Mediation and Conciliation

Lesson 10

KEY CONCEPTS

■ Alternate Disputes Resolution (ADR) ■ Arbitration ■ Conciliation ■ Mediation ■ Arbitral Proceedings ■ International Commercial ■ Arbitral Institution ■ Arbitral Award ■ Conciliation Agreement ■ Mediation Agreement ■ Interim Measures ■ Grounds for Challenge ■ Challenge Procedure ■ Fast Track Procedure ■ Settlement ■ Termination of Proceedings ■ Enforcement ■ Appealable Orders ■ Arbitration Council of India (ACI) ■ Foreign Arbitral Award

Learning Objectives

To understand:

- Alternate Dispute Resolutions (ADR)
- Types of Arbitration, Mediation and Conciliation
- The process involved in Alternate Dispute Resolutions
- The role of courts in ADR proceedings
- Challenge/Enforceability of Arbitral Awards or Mediation/Conciliation Agreements
- Law relating to International Arbitration
- Provisions of corrections and interpretation of the Arbitral Awards
- Development of Law relating to Mediation

Lesson Outline

- Introduction
- Important definitions
- Number of arbitrators
- Powers of central government to amend fourth schedule
- Challenge procedure
- Failure or impossibility to act as an arbitrator
- Termination of mandate and substitution of arbitrator
- Competence of arbitral tribunal to rule on its jurisdiction
- Interim measures ordered by arbitral tribunal
- Equal treatment of parties

- Place of arbitration
- Commencement of arbitral proceedings
- Language
- Statements of claim and defence
- Hearings and written proceedings
- Default of a party
- Expert appointed by arbitral tribunal
- Court assistance in taking evidence
- Rules applicable to substance of dispute
- Decision making by panel of arbitrators
- Essential of awards
- Time limit for arbitral award
- Fast track procedure
- Settlement
- Form and contents of arbitral award
- Regime for costs
- Correction and interpretation of award; additional award
- Finality of arbitral awards and enforcement
- Appealable orders
- Arbitration Council of India (ACI)
- Enforcement of certain foreign arbitral awards
- Conciliation
- Commencement of conciliation proceedings
- Termination of conciliation proceedings
- Role of conciliator in other proceedings
- Development of mediation law
- Mediation rules made by high courts
- Lesson Round-Up
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- Test Yourself
- List of Further Readings and References

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

REGULATORY FRAMEWORK

- The Arbitration and Conciliation Act, 1996
- Alternate Dispute Resolution Rules
- The Mediation Act, 2023

The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

INTRODUCTION

The history of the law of arbitration in India commences with (erstwhile Civil procedure Code) Act VIII of 1859 which codified the procedure of Civil Courts. Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between the parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. These provisions were in operation when the Indian Contract Act, 1872, came into force which permitted settlement of disputes by arbitration under Section 28 thereof. Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely, Act X of 1877 and Act XIV of 1882 but not much change was brought about by the law relating to arbitration proceedings. It was in the year 1899 that an Indian Act entitled the Arbitration Act of 1899 came to be passed. It was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matter submitted to the arbitration was the subject of a suit, the suit could whether with leave or otherwise, be instituted in a Presidency town. Then came the Code of Civil Procedure of 1908. Schedule II to the said Code contained the provisions relating to the law of arbitration which extended to the other parts of British India.

The Civil Justice Committee in 1925 recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee, the Indian Legislature passed the Act, i.e., the Arbitration Act of 1940. This Act as its preamble indicated was a consolidating and amending Act and was an exhaustive code insofar as the law relating to arbitration is concerned. Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or it may be arbitration in a suit.

With the passage of time, the 1940 Act became outmoded, and need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment so as to be more responsive to the contemporary requirements, and to render Indian economic reforms more effective. Besides, arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms.

Arbitration and Conciliation Act, 1996

With a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to provide for a law relating to conciliation and related matters, a new law called Arbitration and Conciliation Act, 1996 has been passed. The new Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration.

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognises the autonomy of parties in the conduct of arbitral proceedings by

the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

With the passage of time, some difficulties in the applicability of the Arbitration and Conciliation Act, 1996 have been noticed. Interpretation of the provisions of the Act by Courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of Courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, Arbitration and Conciliation (Amendment) Act, 2015 passed by the Parliament. Arbitration and Conciliation (Amendment) Act, 2015 facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

Further, the promotion of the institutional arbitration in India by strengthening Indian arbitral institutions has been identified critical to the dispute resolution through arbitration. Though arbitral institutions have been working in India, they have not been preferred by parties, who have leaned in favour of ad hoc arbitration or arbitral institutions located abroad. Therefore, in order to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape and also to prepare a road map for making India a robust centre for institutional arbitration both domestic and international, the Central Government constituted a High Level Committee under the Chairmanship of Justice B. N. Srikrishna, Former Judge of the Supreme Court of India. The High Level Committee submitted its Report on 30th July, 2017.

With a view to strengthen institutional arbitration in the country, the said Committee, inter alia, recommended for the establishment of an independent body for grading of arbitral institutions and accreditation of arbitrators, etc. The Committee has also recommended certain amendments to the said Act to minimise the need to approach the Courts for appointment of arbitrators. After examination of the said recommendations with a view to make India a hub of institutional arbitration for both domestic and international arbitration, it was decided to amend the Arbitration and Conciliation Act, 1996. Accordingly, the Arbitration and conciliation (Amendment) Act, 2019 passed by the Parliament.

A recent amendment has been made in section 36 of Arbitration and Conciliation Act, 1996 in 2021. The amendment provides that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption,

it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Further an Explanation has also been added which provides that for the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Types of Arbitration

1. ***Ad hoc Arbitration -*** This is a type of arbitration that is not handled by a formal organisation rather the number of arbitrators, mode of selection, and how the arbitration will be conducted, may be decided by the parties. The procedural aspects should also be decided by the parties.

2. ***Domestic Arbitration -*** The arbitration in which the disputes are subject to Indian laws and the cause of action is entirely based in India are called Domestic arbitration.

3. ***International Arbitration -*** It is an arbitration relating to disputes where at least one of the parties is:

   (i) an individual who is a national of, or habitually resident in, any country other than India; or

   (ii) a body corporate which is incorporated in any country other than India; or

   (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

4. ***Institutional arbitration -*** In Institutional arbitration, the matter is to be administered by established arbitration institutions.

Essentials of Arbitral Process

1. **Seat of Arbitration** – The parties are free to select any location as the arbitration's seat.
2. **Venue of Arbitration** – The Venue or location, for the sessions of the arbitral proceedings may be decided by the parties.
3. **Arbitral Institution** – The parties may select the arbitral institution for conducting the proceedings. The rules of such arbitration institution will apply to proceedings.
4. **Law** – The parties may by agreement choose any law .
5. **Language** – The parties may also agree on the language of the arbitration proceedings.
6. **Number of arbitrators** – The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, Failing the determination, the arbitral tribunal shall consist of a sole arbitrator.
7. **Cost** – The Court or arbitral tribunal have the discretion to determine the cost which includes the decision as to:
   (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.

Cases that do not fall under purview of arbitration

Most civil rights disputes with damages as the remedy are reffered to arbitration. However Section 2(3) of the Act provides that Part I shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

IMPORTANT DEFINITIONS

Arbitration

Section 2(1) (a) of the Act, defines the term "arbitration" as to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitrator

The term "arbitrator" is not defined in the Arbitration and Conciliation Act. But "arbitrator" is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference. The arbitrator must be absolutely disinterested and impartial. He is an extra-judicial tribunal whose decision is binding on the parties.

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.

The parties may appoint whomsoever they please to arbitrate on their dispute. Usually the parties themselves appoint the arbitrator or arbitrators. In certain cases, the Court can appoint an arbitrator or umpire. The parties to an arbitration agreement may agree that any reference there under shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Arbitral Institution

"Arbitral Institution" means an arbitral institution designated by the Supreme Court or a High Court under this Act. [Section 2(1) (ca)]

Arbitral Tribunal

"Arbitral tribunal" means a sole arbitrator or a panel of arbitrators. [Section 2(1)(d)].

Court

Court means,

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes 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, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) 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. [Section 2(1)(e)].

International Commercial Arbitration

International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is:

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country. [Section 2(1)(f)]

Legal Representative

Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting. [Section 2(1)(g)]

Party

Party means a party to an arbitration agreement. [Section 2(1)(h)]

Arbitration Agreement

"Arbitration agreement" means an agreement referred to in Section 7 [Section 2(1)(b)].

Under Section 7, the Arbitration agreement has been defined to mean an agreement by the parties to submit to

arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- An arbitration agreement shall be in writing.
- An arbitration agreement is in writing if it is contained in,
  - a document signed by the parties;
  - an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
  - an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Specimen ADR 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 any part thereof, or of the respective rights or liabilities herein contained, the Parties shall make an attempt first to resolve the same by discussion or mediation. However, if the Parties hereto fail to resolve the controversy, dispute or difference amicably within 7 (seven) days of commencement of discussions, conciliation or mediation, then any Party shall upon expiry of such period of 15 (fifteen) days be entitled to refer such controversy, dispute or difference to be resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modifications on re-enactment thereof as in force. The language to be used in the mediation and 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 New Delhi, India. The cost of the Arbitration proceedings shall be shared equally by both the parties.

CASE LAWS

NBCC (India) Limited versus Zillion Infra Projects Pvt. Ltd.*, 2024 INSC 218 *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 of the Case/Background

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 Hon’ble Supreme Court.

Key Issue/Allegation

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."

Glencore International AG v. M/s. Shree Ganesh Metals and another, Supreme Court, 25th August, 2025

In this case the Hon'ble Supreme Court has observed that the non-signing of an arbitration agreement is no bar to refer the dispute to arbitration, if the parties have otherwise consented to arbitration.

This appeal is against the Delhi High Court's decision which declined reference to arbitration merely because Respondent No.1 didn't sign the arbitration agreement.

In the present case, the court held that , since the Respondent No.1 consented to the contractual terms via email, the High Court's refusal to refer to an arbitration on the ground of non-signing of the arbitration agreement cannot be sustained. Accordingly, the Court allowed the appeal, and the case was restored to the file of the High Court to be referred to an arbitration by the High Court in accordance with law.

POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

Section 8(1) provides that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

Further sub-section (2) states that the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

It may be noted that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

Sub-section (3) states that notwithstanding that an application has been made under sub- section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.

Example

A party to the arbitration agreement applies to the judicial authority to refer for arbitration. The application is filed before first statement on the substance of the dispute. There was a decree of High Court providing

the guidelines restricting the limitation period to 15 Days from the date of receiving information regarding the suit for referring the dispute. The applicant parties applies it with a copy of agreement which is neither original nor certified copy.

Can judicial authority refer the parties to arbitration?

Solution:

Judicial authority shall notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. Where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration, and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

INTERIM MEASURES BY COURT

Section 9(1) states that a party may, before, or during arbitral proceedings or at any time after 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 subject-matter 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 part) 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.

Further, sub-section (2) states that where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), 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.

Under sub-section (3) once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

NUMBER OF ARBITRATORS

As per Section 10(1) of the Act, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Failing the determination referred to in Section 10(1) above, the arbitral tribunal shall consist of a sole arbitrator.

Example: A & B intends to commence arbitration proceedings. They should try to appoint odd number of arbitrators, i.e., 1, 3, 5 , 7 and so on.

Appointment of Arbitrators

Nationality of Arbitrator	• According to Section 11(1) of the Act, a person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
Procedure for appointment of	• Section 11(2) provides that subject to Section11 (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
General Procedure for appointment of Arbitrators	• Section 11(3) states that failing any agreement referred to in Section 11(2) above, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.
Designation of Arbitral Institution	• According to Section 11(3A) of the Act, the Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of the Act.
Failure to appoint Arbitrator under section 11(3)	• Section 11(4) provides that if the appointment procedure in section 11(3) applies; and • a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or • 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 agree on the arbitrator under section 11(2)	• According to Section 11(5) of the Act, failing any agreement referred to in Section 11(2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in Section 11(4) as provided above.

Failure to follow the procedure, agreement and function

• Section 11(6) states that where, under an appointment procedure agreed upon by the parties,-

1. a party fails to act as required under that procedure; or
2. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
3. a person, including an institution, fails to perform any function entrusted 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.

Disclosure from Arbitrator

• The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of section 12(1), and have due regard to:

1. any qualifications required for the arbitrator by the agreement of the parties; and
2. the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

Appointment of an arbitrator in International Commercial Arbitration

• Section 11(9) provides that 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.

Discretion of the Court

• Section 11 (11) states that where more than one request has been made under Section 11(4), Section 11(5) and Section 11(6), to the Chief Justices of different High Courts or their designates, different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

Reference to courts

• Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) of section 11 arise in an international commercial arbitration, the reference shall be construed as a reference to the "Supreme Court" and in other cases reference shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in section 2 (1)(e) is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

Limitation period for appointment	• Section 11(13) provides that an application for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
Fees and Manner of payment	• Section 11(14) states that For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule. • it was clarified that section 11(4) shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

Example

A & B intends to commence arbitration proceedings. A is willing to appoint X as their arbitrator while B wants Y to arbitrate their matter. Both A and B, failed to appoint arbitrator within 30 days. Both A and B has an option to approach the Court for such appointment of arbitrator.

CASE LAWS

Cox & Kings Ltd. V. SAP India Pvt. Ltd. & Anr, 2024 INSC 670, decided by Supreme Court on 09.09.2024

Jurisdiction of the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 is limited to examining whether an arbitration agreement exists between the parties. Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement.

This case can be referred to *inter alia* understand the issues relating to the scope of powers of the referral court and scope of enquiry at the referral stage.

The Apex Court said that having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether the application of the petitioner for the appointment of an arbitrator deserves to be allowed.

On the scope of powers of the referral court at the stage of Section 11(6), it was observed by the Supreme Court in *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.* reported in 2023 INSC 976 as follows:

"26. Taking cognizance of the legislative change, this Court in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , noted that post 2015 Amendment, the jurisdiction of the Court under Section 11(6) of the 1996 Act is limited to examining whether an arbitration agreement exists between the parties — "nothing more, nothing less."

In a recent decision in *SBI General Insurance Co. Ltd. v. Krish Spinning reported in 2024 INSC 532*, it was observed by us that the arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts.

Further, on the scope of enquiry at the referral stage for the determination of whether a non-signatory can be impleaded as a party in the arbitration proceedings, it was observed by the Constitution Bench in Cox and Kings, 2023 INSC 1051 as follows:

"158. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. [*Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570*] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.

Also, the Apex Court has laid down that Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the available objections in law, and it is only after (and if) the preliminary objections are considered and rejected by the tribunal that it shall proceed to adjudicate the claims of the petitioner.

Ajay Madhusudan Patel & Ors. V. Jyotrindra S. Patel & Ors., 2024 INSC 710, decided by Supreme Court on 20.09.2024

Facts of the Case/Background

This petition has been filed under Section 11(6) read with Section 11(9) of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") seeking appointment of a Sole Arbitrator under an Agreement entered into between the petitioner AMP Group and respondent JRS Group.

Key Issue/Allegations

Whether the SRG Group, being a non-signatory to the FAA, should also be referred to arbitration along with the AMP and JRS Groups?

Decision

The Hon'ble Apex Court in Cox and Kings held that the definition of "parties" under Section 2(1)(h) read with Section 7 of the Act, 1996 includes both the signatory as well as non-signatory parties. Persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may also intend to be bound by the terms of the agreement. Further, the requirement of a written agreement under Section 7 of the Act, 1996 does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties. Therefore, the issue as to who is a "party" to an arbitration agreement is primarily an issue of consent. Actions or conduct could be an indicator of the consent of a party to be bound by the arbitration agreement. This aspect is also evident from a reading of Section 7(4)(b) which emphasises on the manifestation of the consent of persons or entities through actions of exchanging documents.

It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration

agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement.

Therefore, considering the complexity involved in the determination of the question whether the SRG Group is a veritable party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence that may be adduced by the parties before it and the application of the legal doctrine as elaborated in the decision in Cox and Kings.

POWER OF CENTRAL GOVERNMENT TO AMEND FOURTH SCHEDULE

In terms of Section 11A of the Act, if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Fourth Schedule(Model fee) and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

GROUNDS FOR CHALLENGE

Section 12(1) provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1

The grounds stated in the Fifth Schedule of the Act shall guide in determining whether circumstances exist\ which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2

The disclosure shall be made by such person in the form specified in the Sixth Schedule of the Act.

According to Section 12(2), an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him. Section 12(3) states an arbitrator may be challenged only if,

a. circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

b. he does not possess the qualifications agreed to by the parties.

Section 12(4) provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason, of which he becomes aware after the appointment has been made.

Section 12(5) states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule of the Act shall be ineligible to be appointed as an arbitrator.

Section 12(6) states that where an arbitral award is set aside on an application made under section 12(5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

CASE LAWS

Jivan Kumar Lohia v. Durgadutt Lohia AIR 1992 SC 188

In this case, revocation of the authority of the arbitrator was sought by the respondent applicants before the High Court on the ground of bias on the part of the arbitrator. It was stated that

"reasonable apprehension of bias or likelihood of bias in the mind of either party is a ground for termination of the arbitrator."

BCC Developers & Promoters Ltd v. DMRC (dated 28.10.2021 in ARB.P 813/2021)

In this case, it was observed that just because the appointed arbitrators happen to be ex-employees of one of the parties, it shall not make them ineligible for such appointment.

"the plea urged by petitioner seeking appointment of sole Arbitrator and disqualification of panel of proposed/nominated Arbitrators by the respondent being hit by provision of Section12 of the Act, is not maintainable."

CHALLENGE PROCEDURE

Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Sub-Section (4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

Sub-section (2) provides that failing any agreement referred to in sub-section (1) of Section 13, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under sub- section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

FAILURE OR IMPOSSIBILITY TO ACT AS AN ARBITRATOR

As per Section 14(1), the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator,

(a) if he becomes de jure or de facto unable to perform his functions, or fails to act without undue delay due to some other reasons; and

(b) if he withdraws from his office, or the parties agree to the termination of his mandate.

Further, if there is a controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court under Section 14(2).

According to Section 14(3) if, under section 14 or section 13(3), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATOR UNDER SECTION 15

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate,

(a) where he withdraws from office for any reasons; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to such appointment being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal [Section 15].

CASE LAW

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....

COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

Section 16 deals with competence of arbitral tribunal to rule on its jurisdiction. According to section 16(1) the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b. a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

As per Section 16(2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator, (Sub-section 2).

Section 16(3) provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

The arbitral tribunal may, in either of the cases referred it, in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified. Further, the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

A party aggrieve by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

CASE LAW

Chloro Controls (I) P. Ltd v. Severn Trent Water Purification Inc and Ors 2012(9) N SCALE 595

In this case, court observed on the rule of *kompetenz kompetenz.* Court held

"challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. The negative effect of the kompetenz kompetenz principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed."

INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL

Section 17(1) provides that a party may, during the arbitral proceedings apply to the arbitral tribunal,

(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 subject-matter 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 arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

Sub-section (2) states that Subject to any orders passed in an appeal under section 37 of the Act, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.

Example

An order of interim injunction under section 17 of the Act is deemed to be an order of the court and enforceable under the Code of Civil Procedure, 1908.

EQUAL TREATMENT OF PARTIES

The parties shall be treated with equality and each party shall be given a full opportunity to present this case.

Determination of Rules of Procedure

Section 19 deals with determination of rules of procedure. It says that:

1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.
2. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
3. Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
4. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of' any evidence.

PLACE OF ARBITRATION

As per Section 20(1) the parties are free to agree on the place of arbitration and sub-section (2) states that if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. Section 20(3) introduces an option by providing that the arbitrator/tribunal may, unless otherwise agreed by the parties, may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

CASE LAWS

Brahmani River Pellets Limited (Appellant) vs. Kamachi Industries Limited (Respondent) decided by Supreme Court on 25.07.2019

Parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction.

Facts of the Case: The appellant entered into an agreement with the respondent for sale of 40,000 WMT (Wet Metric Tonne) of Iron Ore Pellets. Dispute arose between the parties regarding the price and payment terms and the appellant did not deliver the goods to the respondent. The respondent claimed for damages and the appellant denied any liability. Clause 18 of the agreement between the parties contains an arbitration clause. The respondent invoked arbitration clause and the appellant did not agree for the appointment of arbitrator. Hence, the respondent filed petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 before the Madras High Court.

The appellant contested the petition challenging the jurisdiction of the Madras High Court on the ground that the parties have agreed that Seat of arbitration be Bhubaneswar. The Madras High Court vide impugned order appointed a former judge of the Madras High Court as the sole arbitrator. The appellant preferred the appeal to the Supreme Court.

The Hon'ble supreme court observed that Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 (the Act) defines the "Court" with reference to the term "subject-matter of the suit". As per Section 2(1)(e) of the Act, if the "subject-matter of the suit" is situated within the arbitral jurisdiction of two or more courts, the parties can agree to confine the jurisdiction in one of the competent courts. In para (96) of BALCO, the Supreme Court held that the term "subject matter" in Section 2(1)(e) of the Act is to identify the court having supervisory control over the arbitral proceedings. As per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction. The Supreme Court observed that when the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act. The impugned order was liable to be set aside.

Judgement:

For details:
https://main.sci.gov.in/supremecourt/2019/9962/9962_2019_7_1501_15263_Judgement_25- Jul-2019. pdf

Uttar Pradesh Ban Nigam, Almora V Bishan Nath Goswami, AIR 1985 all 351, 353

In this case, it was held that no arbitrator can decide or fix the place of seat, venue of arbitration without taking into account the material information such as convenience of parties, their residence, subject matter, their witnesses etc. Tribunal shall take into consideration all the above material information while fixing the place of venue of arbitration. Court stated that

"It was not open to the arbitrator to fix the venue of his choice regardless of the convenience of parties etc. Under Section 13 of Arbitration Act, which contemplates the powers and duties of arbitrator, be cannot violate the principles of natural justice and has to give fair hearing to the parties. There was no condition in the arbitration agreement to empower the arbitrator to fix the venue of arbitration as he thought fit. It must be in consonance with the principles of natural justice also."

Union of India v. Hardy Exploration and Production (India) unreported 2018 (Sup Ct (Ind)

In this case, it was decided that the terms 'place' and 'seat' can be used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. It was stated that

"The word 'determination' has to be contextually determined. When a 'place' is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it

is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place."

COMMENCEMENT OF ARBITRAL PROCEEDINGS

According to Section 21 of the Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

LANGUAGE

Section 22(1) provides that the parties are free to agree upon the language or languages to be used in the arbitral proceedings and under sub-section (2) if they fail to reach an agreement, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

Sub-section (3) states that the agreement or determination, unless otherwise specified shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

As per sub-section (4) the arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENTS OF CLAIM AND DEFENCE

Section 23(1) provides that within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

Sub-section (2) states that the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Sub-section (2A) provides that the respondent, in support of his case, may also submit a counter claim or plead a set -off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

Sub-section (3) states that unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Section 23 (4) as inserted in the Amendment Act, 2019 states that the statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

HEARINGS AND WRITTEN PROCEEDINGS

Section 24(1) provides that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

- Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

- Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.

Section 24(2) state that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

Section 24(3) says that all statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

DEFAULT OF A PARTY

Section 25 provides that unless otherwise agreed by the parties, where, without showing sufficient cause,-

a. the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

b. the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the allegation by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited;

c. a party fails to appear an oral hearing or to produce documentary evidence. The arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Failure under the Act	***Consequence***
Claimant fails to communicate his statement of claim	Arbitral tribunal shall terminate the proceedings
Respondent fails to communicate his statement of defence	Arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegation of the allegation by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited
Party fails to appear an oral hearing or to produce documentary evidence	Arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it

EXPERT APPOINTED BY ARBITRAL TRIBUNAL

Sub-section (1) of section 26 provides that subject to agreement between the parties, the arbitral tribunal may,

a. appoint one or more expert to report to it on specific issues to be determined by the arbitral tribunal, and

b. require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection.

Section 26 (2) states that if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Further Section 26 (3) provides that the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

COURT ASSISTANCE IN TAKING EVIDENCE

According to Section 27(1) the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

Under Section 27 (2) 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 addresses 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.

Section 27 (3) provides that the Court may, 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.

Under Section 27 (4) the Court may, while making an order, issue the same processes to witnesses as it may issue in suits tried before it.

Section 27 (5) provides that 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.

As per Section 27 (6) the expression “Processes” includes summons and commissions for the examination of witnesses and summons to produce documents.

RULES APPLICABLE TO SUBSTANCE OF DISPUTE

Section 28(1) provides that where the place of arbitration is situate in India,

a. in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

b. in international commercial arbitration,

    i. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

    ii. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

iii. failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

As per Section 28(2) the arbitral tribunal shall decide *ex aequo et bono or as amiable compositeur* only if the parties have expressly authorised it to do so.

Under Section 28(3) while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

DECISION MAKING BY PANEL OF ARBITRATORS

As per section 29(1) unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

However section 29(2) states that notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

ESSENTIAL OF AWARDS

Arbitral Awards means and includes on interim award.

Arbitral Award

As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much detail of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

Essential Features of Arbitral award	
1. Written and stamped	An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing.
2. Signed	The award is to be signed by the members of the arbitral tribunal. However, the signature of majority of the members of the tribunal is sufficient if the reason for any omitted signature is stated.
3. Reasoned	The making of an award is a rational process which is accentuated by recording the reasons. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e. (a) Where the arbitration agreement expressly provides that no reasons are to be given, or (b) Where the award has been made under Section 30 of the Act i.e. where the parties settled the dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms. The formulation of reasons is a powerful discipline and it may lead the arbitrator to change his initial view on the matter. Recording of reasons involves, analysis of the dispute to reach a logical conclusion. The tribunal should explain its view of the evidence and reasons of its conclusions. The preamble of the award may contain reference to the arbitration agreement, constitution of the tribunal, procedure adopted by the tribunal etc. and the second part of the award may contain points at issue, argument for the claimant, argument for the respondent and findings of

	the tribunal. The points at issue may be divided into two heads i.e. issue of fact and issue of law.
4. Dated	The award should be dated i.e. the date of making of the award should be mentioned in the award.
5. Mention of Place	Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral tribunal is under obligation to state the place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.
6. Clarity of Value and Interest	The arbitral tribunal may include in the sum for which award is made, interest up to the date of award and also a direction regarding future interest.
7. Cost of Arbitration	The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
8. Delivery of copies	After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

Types of Arbitral Awards

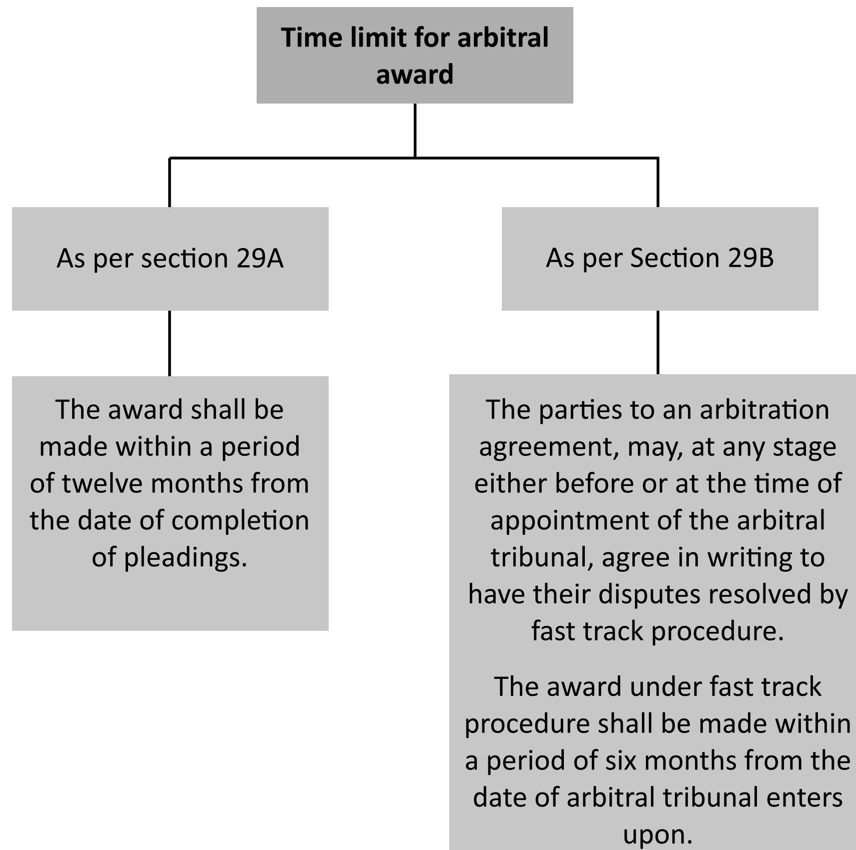
1. **Interim award** – It is an award made by a tribunal during the pendency of the matter. .
2. **Additional award** – Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
3. **Settlement awards** – With the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. An award. If the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. .
4. **Final award** – An award which finally determines all the issues in a dispute.

CASE LAW

Union of India v. Om Vajrakaya Construction Company (dated 20.12.2021) in OMP (COMM) 299/2021

In this case, the High Court of Delhi held unlike the tribunal's ability to award interest, the court's ability to award costs within the meaning of section 31A is unrestricted, and any agreement between the parties that forbids the awarding of costs would be irrelevant unless they do so after a dispute has already arisen.

TIME LIMIT FOR ARBITRAL AWARD



The award shall be made within a period of twelve months from the date of completion of pleadings. The parties may extend this period for making award for a further period not exceeding six months.

The parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure.

The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon. Section 29A(1) provides that the award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under section 23(4).

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose off the matter within a period of twelve months from the date of completion of pleadings under section 23(4).

Section 29A(2) states that if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

Under Section 29A(3) the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

Section 29A(4) states that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application.

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

As per Section 29A(5) the extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

Section 29A(6) provides that while extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

Section 29A(7) states that in the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

Section 29A(8) provides that it shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

As per Section 29A(9) an application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party (Section 29A).

CASE LAW

Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal Thermal Power Ltd. OMP (MISC) (COMM) 512/2019

It was stated that amended section 29A (1) of Arbitration and Conciliation Act shall have a retrospective effect with respect to the pending arbitration suits as on the date of amendment.

FAST TRACK PROCEDURE

Section 29B(1) provides that notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub- section (3).

Section 29B (2) states that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

Section 29B (3) says that the arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

Written pleadings without oral hearing	(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
Further clarification	(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them

Oral hearing on request	(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues
Procedural Discretion	(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

Section 29B(4) states that the award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

Section 29B(5) provides that if the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

Section 29B (6) says that the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

SETTLEMENT

Section 30(1) provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Under Section 30(2) if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

As per Section 30(3) an arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

Section 30(4) states that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

CASE LAW

State of Jharkhand v. Gitanjali Enterprises Arb. Appeal No. 09 of 2017

It is stated that Section 73 forms part III of the Arbitration and Conciliation Act, 1996 and is only applicable to conciliation proceedings and will not have any effect on Section 30 of the Act.

FORM AND CONTENTS OF ARBITRAL AWARD

As per section 31(1) an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

Section 31(2) states that for the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

Under Section 31 (3) the arbitral award shall state the reasons upon which it is based, unless-

a. the parties have agreed that no reasons are to be given, or

b. the award is an arbitral award on agreed terms under section 30.

Section 31(4) provides that the arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

Section 31(5) says that after the arbitral award is made, a signed copy shall be delivered to each party.

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

Under Section 31(7)

a. Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

b. A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation -The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978

As per Section 31(8) the cost of arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.

CASE LAW

R.P. Garg v. The Chief General Manager, Telecom Department & Ors., 2024 INSC 743 decided by Supreme Court on 10.09.2024

Facts of the Case/Background

The Arbitrator denied payment of such interest under a misplaced impression that the contract between the parties prohibited it. The executing Court affirmed the finding of the Arbitrator and rejected the prayer. However, allowing the appeal, the District Court held that the appellant will be entitled to post award interest. By the order impugned before Hon’ble Apex Court, the High Court allowed the revision and set aside the District Court order while holding that the contract between the parties did not permit grant of post award interest.

Key Issue/Allegations

Whether the appellant is entitled to post award interest on the sum awarded by the Arbitrator.

Decision

For the reasons to follow, while allowing the appeal the Apex Court have held that as this is a case arising out of the Arbitration and Conciliation Act, 1996, by operation of Section 31(7)(b), the sum directed to be paid under the Arbitral Award shall carry interest. This is a first principle. A sum directed to be paid by an Arbitral Award must carry interest. In this view of the matter, we have restored the judgment of the District Court granting 18% interest from the date of the award to its realization.

The interest granted by the First Appellate Court only related to post award period, and therefore, for this period, the agreement between the parties has no bearing. Section 31(7)(b) deals with grant of interest for post award period i.e., from the date of the award till its realization. The statutory scheme relating to grant of interest provided in Section 31(7) creates a distinction between interest payable before and after the award. So far as the interest before the passing of the award is concerned, it is regulated by Section 31(7)(a) of the

Act which provides that the grant of interest shall be subject to the agreement between the parties. This is evident from the specific expression at the commencement of the sub-section which says "unless otherwise agreed by the parties".

So far as the entitlement of the post-award interest is concerned, sub-Section (b) of Section 31(7) provides that the sum directed to be paid by the Arbitral Tribunal shall carry interest. The rate of interest can be provided by the Arbitrator and in default the statutory prescription will apply. Clause (b) of Section 31(7) is therefore in contrast with clause (a) and is not subject to party autonomy. In other words, clause (b) does not give the parties the right to "contract out" interest for the post-award period. The expression 'unless the award otherwise directs' in Section 31(7)(b) relates to rate of interest and not entitlement of interest. The only distinction made by Section 31(7)(b) is that the rate of interest granted under the Award is to be given precedence over the statutorily prescribed rate.

REGIME FOR COSTS

Section 31A (1) provides that 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 this sub-section, "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.

Under Section 31A (2) 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 will 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.

Section 31A (3) provides that in determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including,

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

Under Section 31A (4) the Court or arbitral tribunal may make any order under this section including the order that a party shall pay,

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) (f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

Section 31A (5) states that an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Termination of Proceedings

As per section 32 (1) the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

Under section 32 (2) the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where,

a. the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in, obtaining a final settlement of the dispute,

b. the parties agree on the termination of the proceedings, or

c. the arbitral tribunal finds that the continuation of the proceedings has for any other mason become unnecessary or impossible.

Section 32(3) says that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. This is subject to the provisions of Sections 33 and 34(4) of the Act.

CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD

Section 33(1) provides that within 30 days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties

a. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

b. if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Further Section 33 (2) states that if the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

Further Section 33 (3) states that the arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

Section 33 (4) provides that unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

Section 33 (5) provides that if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

Under Section 33 (6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub- section (5).

Section 33 (7) states that section 31 shall apply to a connection or interpretation of the arbitral award or to an additional arbitral award made under this section.

APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

Section 34(1) provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

Section 34 (2) states that an arbitral award may be set aside by the Court only if, –

a. the party making the application establishes on the basis of the record of the arbitral tribunal that, –

   i. a party was under some incapacity, or

   ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

   iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

   iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

   v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

b. the Court finds that,

   i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

   ii. the arbitral award is in conflict with the public policy of India.

Explanation 1

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 ; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2

For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

As per Section 34(2A) an arbitral award arising out of arbitrations, other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

Section 34 (3) provides that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Under Section 34(4) on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

As per Section 34(5) an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

Under Section 34(6) an application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

CASE LAWS

State of Maharashtra v. Hindustan Construction Co. AIR 2010 SC 1299

It was decided that if any ground not initially raised cannot be raised after the expiry of prescribed period given under section 34.

TPI Ltd. v. Union of India, 2001(3) RAJ 70 (Del)

The Court upheld the constitutionality of Section 34 stating that matter in dispute is not related to judicial review, challenge to arbitral award can be made only on the grounds specified by the legislature and not just on merits.

Oil and Natural Gas Corpn. Ltd v. Saw Pipes Ltd AIR 2003 SC 262

It was decided that 'public policy' should not be interpreted in narrow terms with respect to just the Indian Laws, it should be interpreted in a way that aims at broadening public interest and fairness.

"Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. It must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. If the arbitral tribunal does not dispense justice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India."

FINALITY OF ARBITRAL AWARDS AND ENFORCEMENT

Section 35 provides that an arbitral award made under the Act is final and binding on the parties and persons claiming under them respectively.

Enforcement

Section 36(1) provides that where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

Further Section 36(2) provides that where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

Section 36(3) states that upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

The below proviso has been added by the Arbitration and Conciliation (Amendment) Act, 2021:

Provided further that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation. – For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

APPEALABLE ORDERS

Section 37(1) provides that notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely,

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

Further Section 37(2) provides that appeal shall also lie to a court from an order of the arbitral tribunal –

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

Section 37(3) states that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CASE LAWS

Augmont Gold Pvt Ltd. v. One97 Communication Limited (dated 27.09.202021) ARB A. (COMM.) 30/2021

It was held that no appeal shall lie under section 37 of Arbitration and Conciliation Act, 1996 with court if the order of the tribunal has been made under section 17 of the act owing its discretionary and final nature.

Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Co. (dated 13.11.2021) (civil appeal no. 6832/2021)

It was observed that power of High Court while exercising its jurisdiction under section 37 is different from that of First Appellate Court against an order under section 34 Arbitration and Conciliation Act, 1996.

State of Chhattisgarh v. M/s. Sal Udyog Private Ltd. (dated 08.11.2021) Civil Appeal no. 4353 of 2010)

It was held that "patent illegality" serves as a ground available under section of 37 of the Arbitration and Conciliation Act, 1996 and can be raised as a fresh ground under an appeal. A party is not barred from raising a fresh ground of challenge in an appeal.

Deposits

As per Section 38(1) the arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counterclaim.

Further Section 38 (2) states that the deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

Section 38 (3) provides that upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Lien on Arbitral Award and Deposits as to Costs

Section 39(1) provides that subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

Section 39 (2) states that if in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

As per Section 39 (3) an application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal and the arbitral tribunal shall be entitled to appear and he heard on any such application.

Under Section 39 (4) the Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

Arbitration Agreement not to be Discharged by Death of Party Thereto

Section 40 (1) provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or, as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

Section 40 (2) states that the mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

As per Section 40 (3) nothing in this section shall affect the operation or any law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of insolvency

As per Section 41(1) where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

Further, Section 41 (2) states that where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

As per Section 41 (3) the expression “receiver” includes an Official Assignee.

Jurisdiction

Section 42 provides that notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Confidentiality of information

Section 42A provides that notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

Protection of action taken in good faith

According to Section 42B of the Act, no suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.”

Limitations

Section 43(1) provides that the Limitation Act, 1963, shall apply to arbitrations as it applies to proceedings in court.

Section 43(2) states that for the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.

As per Section 43 (3) where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some steps to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

Section 43(4) states that where the Court orders that an arbitral award be set aside, the period between the commencement of the, arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

ARBITRATION COUNCIL OF INDIA (ACI)

Part IA as inserted in the Amendment Act, 2019 deals with Arbitration Council of India. Section 43A of Act contains definitions of terms used in Part IA such as Chairperson, Council and Member.

Establishment and incorporation of Arbitration Council of India

Section 43B empowers the Central Government to establish the Arbitration Council of India to perform the duties and discharge the functions under the Arbitration Conciliation Act, 1996.

The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to enter into contract, and shall, by the said name, sue or be sued. The head office of the Council shall be at Delhi. The Council may, with the prior approval of the Central Government, establish offices at other places in India.

Composition of Council

According to Section 43C of the Act, the Council shall consist of the following Members, namely:–

(a) A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India – Chairperson;

(b) An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government – Member;

(c) An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson – Member;

(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) One representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government – Part-time Member; and

(g) Chief Executive Officer – Member-Secretary, ex officio.

The Chairperson and Members of the Council, other than ex officio Members, shall hold office as such, for a term of three years from the date on which they enter upon their office.

Chairperson or Member, other than ex officio Member, shall not hold office after he has attained the age of seventy years in the case of Chairperson and sixty-seven years in the case of Member.

The salaries, allowances and other terms and conditions of the Chairperson and Members as may be prescribed by the Central Government. The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by the Central Government.

Duties and functions of Council

Section 43D provides that it shall be the duty of the Council to take all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation or other alternative dispute resolution mechanism and for that purpose to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration.

For the purposes of performing the duties and discharging the functions under this Act, the Council may—

(a) frame policies governing the grading of arbitral institutions;

(b) recognise professional institutes providing accreditation of arbitrators;

(c) review the grading of arbitral institutions and arbitrators;

(d) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes;

(e) frame, review and update norms to ensure satisfactory level of arbitration and conciliation;

(f) act as a forum for exchange of views and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation;

(g) make recommendations to the Central Government on various measures to be adopted to make provision for easy resolution of commercial disputes;

(h) promote institutional arbitration by strengthening arbitral institutions;

(i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof;

(j) establish and maintain depository of arbitral awards made in India;

(k) make recommendations regarding personnel, training and infrastructure of arbitral institutions; and

(l) Such other functions as may be decided by the Central Government.

Vacancies, etc., not to invalidate proceedings of Council

Section 43E states that no act or proceeding of the Council shall be invalid merely by reason of—

(a) any vacancy or any defect, in the constitution of the Council;

(b) any defect in the appointment of a person acting as a Member of the Council; or

(c) any irregularity in the procedure of the Council not affecting the merits of the case.

Resignation of Members

According to Section 43F, the Chairperson or the Full-time or Part-time Member may, by notice in writing, under his hand addressed to the Central Government, resign his office. Provided that the Chairperson or the Full-time Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold

office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earlier.

Removal of Member

Section 43G (1) provides that the Central Government may, remove a Member from his office if he –

(a) is an undischarged insolvent; or

(b) has engaged at any time (except Part-time Member), during his term of office, in any paid employment; or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member.

According to Section 43G(2) notwithstanding anything contained in sub-section (1), no Member shall be removed from his office on the grounds specified in clauses (d) and (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

Appointment of experts and constitution of Committees thereof

Section 43H provides that the Council may, appoint such experts and constitute such Committees of experts as it may consider necessary to discharge its functions on such terms and conditions as may be specified by the regulations.

General norms for grading of arbitral institutions

Section 43-I states that the Council shall make grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations, in such manner as may be specified by the regulations.

Norms for accreditation

43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.

General norms applicable to Arbitrator

- the arbitrator shall be a person of general reputation of fairness, integrity and capable to apply objectivity in arriving at settlement of disputes;
- the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties;
- the arbitrator should not involve in any legal proceeding and avoid any potential conflict connected with any dispute to be arbitrated by him;

- the arbitrator should not have been convicted of an offence involving moral turpitude or economic offence;
- the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards;
- the arbitrator should possess robust understanding of the domestic and international legal system on arbitration and international best practices in regard thereto;
- the arbitrator should be able to understand key elements of contractual obligations in civil and commercial disputes and be able to apply legal principles to a situation under dispute and also to apply judicial decisions on a given matter relating to arbitration; and
- the arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication.

Depository of awards

According to the Section 43K the Council shall maintain an electronic depository of arbitral awards made in India and such other records related thereto in such manner as may be specified by the regulations.

Power to make regulations by Council

Section 43L empowers the Council may, in consultation with the Central Government, make regulations, consistent with the provisions of this Act and the rules made thereunder, for the discharge of its functions and perform its duties under the Act.

Chief Executive Officer

Section 43M states that there shall be a Chief Executive Officer of the Council, who shall be responsible for day-to-day administration of the Council.

The qualifications, appointment and other terms and conditions of the service of the Chief Executive Officer shall be such as may be prescribed by the Central Government.

The Chief Executive Officer shall discharge such functions and perform such duties as may be specified by the regulations.

There shall be a Secretariat to the Council consisting of such number of officers and employees as may be prescribed by the Central Government.

The qualifications, appointment and other terms and conditions of the service of the employees and other officers of the Council shall be such as may be prescribed by the Central Government.'

ENFORCEMENT OF CERTAIN FOREIGN ARBITRAL AWARDS

Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with the enforcement of certain foreign awards made under the New York Convention and the Geneva Convention, respectively. Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or after the 11th day of October 1960 in the case of New York Convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

CHAPTER I - NEW YORK CONVENTION AWARDS

Awards Made under New York Convention or Geneva Convention

Any foreign award, whether made under New York Convention or Geneva Convention, which would be enforceable under the respective provisions of the Act applicable to the award, have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.

Power of Judicial Authority to Refer Parties to Arbitration

Section 45 provides that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed.

When Foreign Award Binding

Section 46 states that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 47 (1) provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produces before the court-

a. the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b. the original agreement for arbitration or a duly certified thereof; and

c. such evidence as may be necessary to prove that the award is a foreign award.

Further Section 47 (2) states that if the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation

In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for Enforcement of Foreign Awards

Section 48 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party, against whom the award is invoked, may use one or more of the following grounds for the purpose of opposing enforcement of a foreign award, namely, –

(i) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which. or under the law of which, that award was made; or

Enforcement of an arbitral award may also be refused if the Court finds that:

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(ii) the enforcement of the award would be contrary to the public policy of India.

Explanation 1

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2

For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Enforcement of Foreign Awards

As per section 49 where the Court is satisfied that the foreign award is enforceable, the award is executable as a decree of the Court.

Appealable Orders

Section 50(1) provides that "notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the order refusing to-

a. refer the parties to arbitration under section 45;

b. enforce a foreign award under section 48,

to the court authorised by law to hear appeals from such order.

Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court is not affected or taken away by virtue of these provisions.

CHAPTER II: GENEVA CONVENTION AWARDS

Power of Judicial Authority to Refer Parties to Arbitration

Section 54 provides that notwithstanding anything contained in Part I of the Arbitration and Conciliation Act, 1996 or in the Code of Civil Procedure, 1908, a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

Foreign Awards when Binding

Section 55 provides that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 56(1) provides that the party applying for the enforcement of a foreign award shall, at the time of application produce before the Court-

a. the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

b. evidence proving that the award has become final; and

c. such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub- section (1) of section 57 are satisfied.

Further Section 56(2) provides that where any document requiring to be produced under sub- section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation 1

In this section and all the following sections of this Chapter, “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject- matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Explanation 2

In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Conditions for Enforcement of Foreign Awards

Sub-section (1) of section 57 provides that in order that a foreign award may be enforceable under the Act, it shall be necessary that,

The award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

The subject-matter of the award is capable of settlement by arbitration under the law of India;

The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitral procedure;

The award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

The enforcement of the award is not contrary to the public policy or the law of India.

Explanation 1

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2

For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Further sub-section (2) provides that even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that,

a. the award has been annulled in the country in which it was made;

b. the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

c. the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

As per sub-section (3) if the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and of sub-section

(1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Enforcement of Foreign Awards

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Appealable Orders

Sub-section (1) of section 59 provides that an appeal shall lie from the order refusing,

a. to refer the parties to arbitration under section 54; and

b. to enforce a foreign award under section 57, to the court authorised by law to hear appeals from such order.

Further, sub-section (2) provides that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CONCILIATION

Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

Basically, these processes can be successful only if the personality of the conciliator or the mediator is such that he is able to induce the parties to come to a settlement. The Act gives a formal recognition to conciliation in India. Conciliation forces earlier and greater hold of the case. It can succeed only if the parties are willing to re-adjust. According to current thinking conciliation is not an alternative to arbitration or litigation, but rather complements arbitration or litigation.

Application and Scope

Section 61(1) provides that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part III of the Arbitration and Conciliation Act, 1996 shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

As per Section 61 (2), Part III of the Arbitration and Conciliation Act, 1996 shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Sub-section (1) of section 62 provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

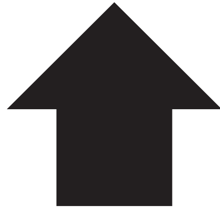
Sub-section (2) states that Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

Further sub-section (3) states that if the other party rejects the invitation, there will be no conciliation proceedings.

Sub-section (4) provides that if the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he

may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

Number of Conciliators



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

Appointment of Conciliators

Sub-section (1) of section 64 provides that subject to sub-section (2),

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

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

c. in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Further sub-section (2) provides that parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,-

a. a party may respect such an institution or person to recommend the names of suitable individuals to act as conciliator, or

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

Submission of Statements to Conciliator

Sub-section (1) of section 65 provides that the conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

Further sub-section (2) provides that the conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

Sub-section (3) states that at any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation

In this section and all the following sections of this Part, the term conciliator" applies to a sole conciliator, two or, three conciliators, as the case may be.

Conciliator not Bound by Certain Enactments

Section 66 provides that the conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

Role of Conciliator

Sub-section (1) of section 67 provides that the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

Further Sub-section (2) provides that the conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

As per sub-section (3) the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

Sub-section (4) states that the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Administrative Assistance

Section 68 provides that in order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Communication between Conciliator and Parties

Sub-section (1) of section 69 provides that the conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

Further sub-section (2) states that unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

Disclosure of Information

Section 70 provides that when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of Parties with Conciliator

Section 71 provides that the parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by Parties for Settlement of Dispute

Section 72 provides that each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement Agreement

Sub-section (1) of section 73 provides that when it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Further sub-section (2) provides that if the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

Sub-section (3) states that when the parties sign the settlement agreement, it shall be, final and binding on the parties and persons claiming under them respectively.

As per sub-section (4) the conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

Status and Effect of Settlement Agreement

Section 74 provides that the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

Confidentiality

Section 75 provides that notwithstanding anything contained in any other law for the time bring in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

The conciliation proceedings shall be terminated,

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

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

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

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

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

Resort to Arbitral or Judicial Proceedings

Section 77 provides that the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject- matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

Costs

Sub-section (1) of section 78 states that upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

Further, sub-section (2) states that for the purpose of sub-section (1), "costs" means reasonable costs relating to,

a. the fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;

b. any expert advice requested by the conciliator with the consent of the parties;

c. any assistance provided pursuant to clause (b) of sub- section (2) of section 64 and section 68;

d. any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

As per sub-section (3) the costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Deposits

Sub-section (1) of section 79 states that the conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

Further, sub-section (2) states that during the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

As per sub-section (3) if the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

Sub-sections (4) provide that upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings

The conciliator shall not be presented by the parties as a witness inany arbitral or judicial proceedings

Admissibility of Evidence in other Proceedings

Section 81 provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,

a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

b. admissions made by the other party in the course, of the conciliation proceedings;

c. proposals made by the conciliator;

d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Removal of Difficulties

Sub-section (1) of section 83 provides that 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 appear to it to be necessary or expedient for removing the difficulty:

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

Further sub-section (2) provides that every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Power to make Rules

Sub-section (1) of section 84 provides that the Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

Further sub-section (2) provides that every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is 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 rule or both Houses agree that the rule should not be made, the rule 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 rule.

MEDIATION

The adversarial method of dispute resolution is one in which the opposing claims of parties are presented to a neutral third party for resolution. As opposed to the adversarial mode of dispute resolution, non-adversarial Alternate Dispute Resolution mechanisms like mediation are informal, friendly to people, and simpler. They also enable the parties to communicate with each another about the issues driving their conflict, identify their shared interests, and concentrate on coming to a resolution on their own. Such non-adversarial conflict settlement techniques aid in the parties' time and financial savings.

Definition and Meaning

According to the Civil Procedure ADR and Mediation Rules, 2003 - *"Mediation" means the process by which a mediator appointed by the parties or by the Court, as the case may be, mediates the disputes between them by applying the provisions of the Mediation Rules contained in Part-II, and in particular by facilitating discussion*

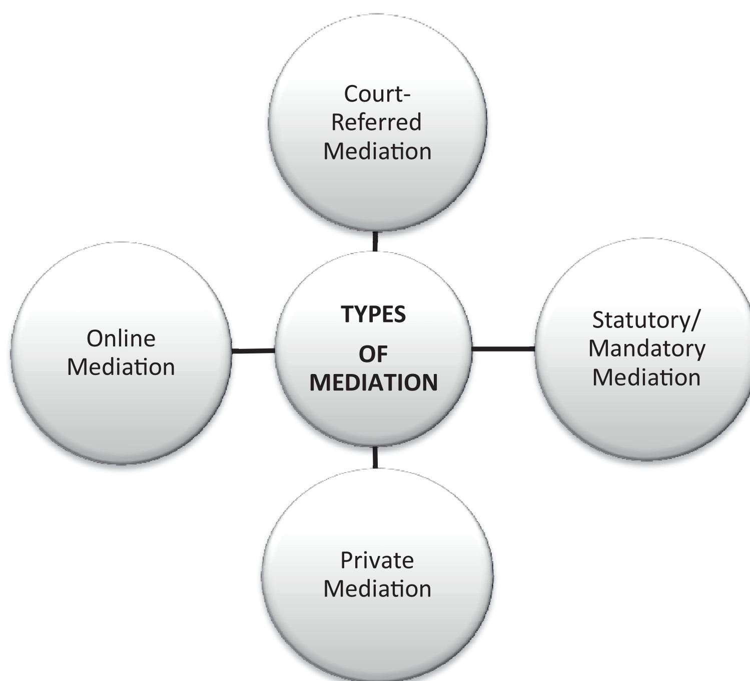
between the parties directly or by communicating with each other through the mediator, by assisting the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is their own responsibility for making decisions which affect them.

According to Section 4 of Mediation Bill, 2021 - *Mediation shall be a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby party or parties, request a third person referred to as mediator or mediation service provider to assist them in their attempt to reach an amicable settlement of a dispute.*

Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process.

Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties. Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

Types of Mediation



1. **Court- Referred Mediation** - It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908. The courts have mediation centres where cases are referred, and following a preliminary investigation, the cases are assigned to skilled and qualified mediators from the Mediation Centres' Panel of Mediators.

Court Annexed Mediation - In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator.

2. **Statutory/Mandatory Mediation** - Some disputes, like those involving labour and family laws, are required by law to go through the mediation procedure. Mandatory mediation simply refers to the act of attempting mediation rather than requiring parties to resolve their problems through mediation.

3. **Private Mediation** - In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

4. **Online Mediation** - Online mediation including pre-litigation mediation may be conducted at any stage of mediation under this Act, with the written consent of the parties including by the use of electronic form or computer networks.

Merits of Mediation

Mediation is :

- Quick and responsive.
- Economical.
- There is no extra cost.
- Harmonious settlement.
- Creating solutions and remedies.
- Confidential and informal.
- Parties controlling the proceedings.

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. The following sections of the Mediation Act, 2013 has come into force w.e.f. 9th October, 2023.

These sections are as follows:

Section 1: Short title, extent and commencement

This Act may be called the Mediation Act, 2023. It shall extend to the whole of India. 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.

Section 3: Definitions

The important definitions provided in section 3 *inter alia* is as under:

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

(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;

(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;

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

(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;

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

Section 31 to Section 38 relating to Mediation Council of India

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. The composition of Council shall be in accordance with provisions provided under section 32 of the Mediation Act, 2023. Other provisions inter alia relates to Vacancies, etc., not to invalidate proceedings of Council, Resignation, Removal, Appointment of experts and constitution of Committees, Secretariat and Chief Executive Officer of Council and Duties and functions of Council.

Section 45 to 47 relating to Mediation Fund, Accounts and Audits & Power of Central Government to issue directions

Section 45 provides for creation of "Mediation Fund" and prescribes the amounts that may be credited to this fund.

Further, the accounts of the Council are to 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.

In exercise of its powers or the performance of its functions under this Act, the Council shall be bound by directions on questions of policy as the Central Government may give in writing to it and the decision of the Central Government whether a question is one of policy or not shall be final.

Section 50 to 54 relating to certain Protection, power of making rules, regulations and power of removal of difficulties

Section 50 provides that 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 Mediation Act, 2023 or the rules or regulations made thereunder. This provision can aid and promote the effective implementation of this Law.

The power of making the rules has been given to the Central Government and the regulations can be made by the Mediation Council. Notification, Rules and Regulation made under this law is to be laid 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.

If case of any difficulty, the Central Government may make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary for removing the difficulty. However, 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.

Section 56 and 57 dealing with effect of this law on pending proceedings and transitory provisions

This Act does not apply to, or in relation to, any mediation or conciliation commenced before the coming into

force of this Act. The rules in force governing the conduct of court-annexed mediation shall continue to apply until regulations are made under section 15(1). However, the rules shall continue to apply in all court-annexed mediation pending as on the date of coming into force of the regulations.

Mediation under Various Laws

There are various laws that provides for mediation as dispute redressal mechanism. An inclusive list of laws along with the related provisions covering the subject matter is provided below:

1. The Companies Act, 2013
2. Industrial Disputes Act, 1947
3. Code of Civil Procedure, 1908
4. Legal Services Authority Act, 1987 read with Section 89 of CPC
5. Micro, Small and Medium Enterprises (MSME) Development Act, 2006
6. Hindu Marriage Act, 1955 and Special Marriage Act, 1954
7. Real Estate (Regulation and Development) Act, 2016
8. Commercial Courts Act, 2015 and the Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018
9. The Consumer Protection Act, 2019

CASE LAWS

Salem Advocate Bar Association v. Union of India (UOI) (25.10.2002 - SC) : (2005) 6 SCC 344

In this case, writ petitions were filed seeking to challenge Amendments made to the Code of Civil Procedure (CPC) by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002 especially Section 89 of CPC. Supreme Court emphasised on the need to promote the alternative dispute mechanisms. It stated that -

it is quite obvious that the reason why Section 89 has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delay and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refer to different acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd. and Ors. (26.07.2010 - SC) : [2010 (8) SCC 24]

In this case, question arose to whether the section 89 of Civil Procedure Code empowers the court to refer the parties to a suit to arbitration without the consent of both parties and scope of the said section. Court held that

"If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has to use its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution."

Arbitration v. Mediation

Since both options looks appealing to resolve business disputes, there is a need to distinguish between the two:

1. Mediation is when a neutral third party aims to assist the parties in arriving at a mutually agreeable solution whereas arbitration is like litigation which is outside the court and which results in an award like an order.
2. Mediation is more collaborative; arbitration is more adversarial.
3. The process of mediation is more informal than that of arbitration.
4. The outcome in mediation is controlled by the parties whereas in arbitration it is controlled by the arbitrator.
5. In mediation, the dispute may or may not be resolved whereas in arbitration it is always settled in either party's favour.

Alternative Dispute Resolution (ADR)

There is a growing awareness that courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India.

These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities. The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world. The ICADR is a Society registered under Societies Registration Act, 1860, it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes.

Areas in which ADR Works

Almost all disputes including commercial, civil, labour and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability, professional liability, real estate, securities, contract interpretation and performance and insurance coverage.

LESSON ROUND-UP

- The purpose of Arbitration Act is to provide quick redressal to commercial disputes by private arbitration.
- The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters.
- The Act has been divided into four parts. Part one deals with Arbitration; Part two deals with enforcement of certain Foreign Awards; Part three deals with conciliation; and Part four contains supplementary provisions.
- The present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.
- The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
- The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences.
- Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.
- The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
- The award under fast track procedure shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
- Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences.
- Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

- The Alternative Dispute Resolution (ADR) processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial. The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world.
- Supreme Court has made a Mediating Training Manual with regards to the benefits and/or suitability of ADR methods of dispute resolution. It aims at facilitating and help guiding mediation in growing not as an alternative dispute resolution mechanism, but as another effective mode of disputes resolution.

GLOSSARY

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

Arbitral Tribunal: Arbitral tribunal means a sole arbitrator or a panel of arbitrators.

Arbitration agreement: Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

International Commercial Arbitration: International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India.

Legal Representative: Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting.

Conciliation: Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement.

Mediation: Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques.

TEST YOURSELF

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

1. What are the grounds to challenge the appointment of an Arbitrator under the Arbitration and Conciliation Act, 1996? Discuss.
2. What do you understand by an arbitration agreement?
3. What are the grounds for setting aside of an arbitral award under the Arbitration and Conciliation Act, 1996?

4. What are the provisions relating to settlement of the dispute under the Arbitration and Conciliation Act, 1996?
5. Part I of the Arbitration and Conciliation Act, 1996 applicable only to all the arbitrations which take place within the territory of India. Comment.

LIST OF FURTHER READINGS

- Bare Act of Arbitration and Conciliation Act, 1996
- Bare Act of Mediation Act, 2023
- Alternative Disputes Resolution Rules, 2003
- P.C. Markanda, LAW RELATING TO ARBITRATION AND CONCILIATION, pp.1-8, (8th Edn. 2013) LexisNexis
- Mediation and Conciliation Rules of Delhi High Court
- Mediation Training Manual of India of Supreme Court

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.indiacode.nic.in/bitstream/123456789/1978/3/a1996-26.pdf
- https://www.indiacode.nic.in/bitstream/123456789/19637/1/A2023-32.pdf
- https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf