Notes on Alternate Dispute Resolution - Paper II

LL.B II (Sem. IV)

Module 01

ADR Mechanism ,concept and History.

The Parliament enacted the Arbitration and Conciliation Act of 1996 with a view to making arbitration less technical and more useful and effective, which not only removes many serious defects of the earlier arbitration law, but also incorporates modern concepts of arbitration. What it now needs is inculcation of the culture of arbitration within the bar, the bench and the arbitral community.

INTRODUCTION

"I realized that the true fiction of a lawyer was to unite parties… A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing out private compromise of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul."

–Mahatma Gandhi

ADR is not immune from criticism. Some have seen in it a waste of time; others recognize the risk that it be only initiated to check what is the minimum offer that the other party would accept.[3] he delay in disposal of cases in Law Courts, for whatever reason it may be, has really defeated the purpose for which the people approach the Courts for their redressal. In many parts of India, rapid development has meant increased caseloads for already overburdened courts, further leading to notoriously slow adjudication.

As a result, alternative dispute resolution mechanisms have become more crucial for businesses operating in India as well as those doing businesses with Indian firms.[1] So Alternate Dispute Resolution (herein after as ADR) is necessary as a substitute to existing methods of dispute resolution such as litigation, conflict, violence and physical fights or rough handling of situations. It is a movement with a drive from evolving positive approach and attitude towards resolving a dispute.

In the subsequent parts of the paper we will discuss the evolution of ADR and its present scenario in the Indian context.

HISTORY

In India, the law and practice of private and transactional commercial disputes without court intervention can be dated back to ancient times. Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India from Vedic times.

The earliest known treatise is the Bhradarnayaka Upanishad, in which various types of arbitral bodies viz (i) the Puga (ii) the Sreni (iii) the Kula are referred to. These arbitral bodies, known as Panchayats, dealt with variety of disputes, such as disputes of contractual, matrimonial and even of a criminal nature.[4] The disputants would ordinarily accept the decision of the panchayat and hence a settlement arrived consequent to conciliation by the panchayat would be as binding as the decision that was on clear legal obligations.

The Muslim rule in India saw the incorporation of the principles of Muslim law in the Indian culture. Those laws were systematically compiled in the form of a commentary and came to be known as Hedaya. During Muslim rule, all Muslims in India were governed by Islamic laws- the Shari'ah as contained in the Hedaya. The Hedaya contains provisions for arbitration as well.

The Arabic word for arbitration is Tahkeem, while the word for an arbitrator is Hakam. An arbitrator was required to posses the qualities essential for a Kazee–an official Judge presiding over a court of law, whose decision was binding on the parties subject to legality and validity of the award. The court has the jurisdiction to enforce such awards given under Shari'ah though it is not entitled to review the merits of the dispute or the reasoning of the arbitrator.

ADR picked up pace in the country, with the coming of the East India Company. The British government gave legislative form to the law of arbitration by promulgating regulations in the three presidency towns: Calcutta, Bombay and Madras. Bengal Resolution Act, 1772 and Bengal Regulation Act, 1781 provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties.[6] These remained in force till the Civil Procedure Code 1859, and were extended in 1862 to the Presidency towns.

LEGISLATIONS for ADR IN INDIA

Code of Civil Procedure

The Code of Civil Procedure, 1859 in its sections 312 to 325 dealt with arbitration in suits while sections 326 and 327 provided for arbitration without court intervention. The Code of Civil Procedure (Act 5 of 1908) repealed the Act of 1882. The Code of Civil Procedure, 1908 has laid down that cases must be encouraged to go in for ADR under section 89(1).[7] Under the First Schedule, Order XXXII A, Rule 3 a duty is cast upon the courts that it shall make an endeavor to assist the parties in the first instance, in arriving at a settlement in respect of the

subject matter of the suit.

The second schedule related to arbitration in suits while briefly providing arbitration without intervention of a court. Order I, Rule 1 of the schedule says that where in any suit, all the parties agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced; apply to the court for an order of reference. This schedule, in a way supplemented the provisions of the Arbitration Act of 1899.

Indian Arbitration Act, 1899:

This Act was substantially based on the British Arbitration Act of 1889. It expanded the area of arbitration by defining the expression 'submission' to mean "a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not".

Arbitration (Protocol and Convention) Act 1937:

The Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 were implemented in India by the Arbitration (Protocol and Convention) Act, 1937. This Act was enacted with the object of giving effect to the Protocol and enabling the Convention to become operative in India.

The Arbitration Act of 1940:

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration in the tribunal, i.e. prior to the reference of the dispute, in the duration of the proceedings, and after the award was passed.

This Act made provision for- a) arbitration without court intervention; b) arbitration in suits i.e. arbitration with court intervention in pending suits and c) arbitration with court intervention, in cases where no suit was pending before the court.

Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award.

Finally, before the award could be enforced, it was required to be made the rule of the court.[10] This Act did not fulfill the essential functions of ADR. The extent of Judicial Interference under the Act defeated its very purpose. Itdid not provide a speedy, effective and transparent mechanism to address disputes arising out of foreign trade and investment transactions.

Arbitration and Conciliation Act, 1996:

The government enacted the Arbitration and Conciliation Act, 1996 in an effort to modernize

the 1940 Act. In 1978, the UNCITRAL Secretariat, the Asian African Legal Consultative Committee (AALCC), the International Council for Commercial Arbitration (ICCA) and the International Chamber of Commerce (ICC) met for a consultative meeting, where the participants were of the unanimous view that it would be in the interest of International Commercial Arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure.

The preparation of a Model Law on arbitration was considered the most appropriate way to achieve the desired uniformity. The full text of this Model Law was adopted on 21st June 1985 by UNCITRAL. This is a remarkable legacy given by the United Nations to International Commercial Arbitration, which has influenced Indian Law. In India, the Model Law has been adopted almost in its entirety in the 1996 Act.

This Act repealed all the three previous statutes. Its primary purpose was to encourage arbitration as a cost- effective and quick mechanism for the settlement of commercial disputes. It covers both domestic arbitration and international commercial arbitration. It marked an epoch in the struggle to find an alternative to the traditional adversarial system of litigation in India.

The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty- six years on arbitration was rendered superfluous. Unfortunately, there was no widespread debate and understanding of the changes before such an important legislative change was enacted. The Government of India enacted the 1996 Act by an ordinance, and then extended its life by another ordinance, before Parliament eventually passed it without reference to Parliamentary Committee.

Arbitration, as practiced in India, instead of shortening the lifespan of the dispute resolution, became one more “inning” in the game. Not only that, the arbitrator and the parties’ lawyers treated arbitration as “extra time” or overtime work to be done after attending to court matters. The result was that the normal session of an arbitration hearing was always for a short duration. Absence of a full-fledged Arbitration Bar effectively prevented arbitrations being heard continuously on day-to-day basis over the normal working hours, viz. 4-5 hours every day. This resulted in elongation of the period for disposal.

Veerappa Moily also said in the ADR congress held in the year 2010 that the 1996 Act, although modeled along international standards, has so far proved to be insufficient in meeting the needs of the business community, for the speedy and impartial resolution of disputes in India.

The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments. Based on the recommendations of the Commission, the Government of India introduced the Arbitration and Conciliation (Amendment) Bill, 2003, in the Parliament. The standing committee of law ministry felt that provisions of the Bill gave room for excessive intervention by the courts in arbitration proceedings.

ADR IN INDIA

ADR can be broadly classified into two categories: court-annexed options (Mediation, Conciliation) and community based dispute resolution mechanism (Lok-Adalat).

The following are the modes of ADR practiced in India: Arbitration

Mediation

Conciliation

Negotiation

Lok Adalat

1. Arbitration:

The definition of 'arbitration' in section 2(1) (a) verbatim reproduces the text of article 2(a) of the Model Law-'arbitration means any arbitration whether or not administered by a permanent arbitral institution'.[17] It is a procedure in which the dispute is submitted to an arbitral tribunal which makes a decision (an "award") on the dispute that is binding on the parties.

It is a private, generally informal and non- judicial trial procedure for adjudicating disputes. There are four requirements of the concept of arbitration: an arbitration agreement; a dispute; a reference to a third party for its determination; and an award by the third party.

The essence lies in the point that it is a forum chosen by the parties with an intention that it must act judicially after taking into account relevant evidence before it and the submission of the parties.Hence it follows that if the forum chosen is not required to act judicially, the process it is not arbitration.

Types of arbitration are:

Ad Hoc Arbitration

An ad hoc arbitration is one which is not administered by an institution and therefore, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, etc. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The advantage is that, it is agreed to and arranged by the parties themselves. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation.

Institutional Arbitration

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as

according to the rules of that institution. It is important to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inapt and only the rules of the institution apply.

Incorporation of book of rules in the "arbitration agreement" is one of the principle advantages of institutional arbitration. Institutional Arbitration, throughout the world, is recognized as the primary mode of resolution of international commercial disputes. It is an arbitration administered by an arbitral institution.

Further, in many arbitral institutions such as the International Chamber of Commerce (ICC), before theaward is finalized and given, an experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal.

Statutory Arbitration When a law specifies that if a dispute arises in a particular case it has to be referred to arbitration, the arbitration proceedings are called "statutory arbitration". Section 2(4) of the Arbitration and Conciliation Act 1996 provides, with the exception of section 40(1), section 41 and section 43, that the provisions of Part I shall apply to every arbitration under any other act for the time being in force in India.

Fast track arbitration Fast track arbitration is a time- bound arbitration, with stricter rules of procedure, which do not allow any laxity for extensions of time, and the resultant delays, and the reduced span of time makes it more cost effective. Sections 11(2) and 13(2) of the 1996 Act provides that the parties are free to agree on a procedure for appointing an arbitrator and choose the fastest way to challenge an arbitral award respectively. The Indian Council of Arbitration (ICA) has pioneered the concept of fast track arbitration in India and under its rules, parties may request the arbitral tribunal to settle disputes within a fixed timeframe.

2. Mediation:

Mediation is a process in which the mediator, an external person, neutral to the dispute, works with the parties to find a solution which is acceptable to all of them.[26] The basic motive of mediation is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, to exhaustively determine if a settlement is possible.

Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations.[28] The concept of mediation is not foreign to Indian legal system, as there existed, different aspects of mediation.

The Village Panchayats and the Nyaya Panchayats are good examples for this. A brief perusal of the laws pertaining to mediation highlights that it has been largely confined to commercial transactions. The Arbitration and Conciliation Act, 1996 is framed in such a manner that it is concerned mainly with commercial transactions that involves the common man rather than

the common man's interest.

In India, mediation has not yet been very popular. One of the reasons for this is that mediation is not a formal proceeding and it cannot be enforced by courts of law. There is a lack of initiative on the part of the government or any other institutions to take up the cause of encouraging and spreading awareness to the people at large.

3. Conciliation:

Conciliation is "a process in which a neutral person meets with the parties to a dispute which might be resolved; a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences".

This consists in an attempt by a third party, designated by the litigants, to reconcile them either before they resort to litigation (whether to court or arbitration), or after. The attempt to conciliate is generally based on showing each side the contrary aspects of the dispute, in order to bring each side together and to reach a solution.

Section 61 of the 1996 Act provides for conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. After its enactment, there can be no objection, for not permitting the parties to enter into a conciliation agreement regarding the settlement of even future disputes.

There is a subtle difference between mediation and conciliation. While in meditation, the third party, neutral intermediary, termed as mediator plays more active role by giving independent compromise formulas after hearing both the parties; in conciliation, the third neutral intermediary's role, is to bring the parties together in a frame of mind to forget their animosities and be prepared for an acceptable compromise on terms midway between the stands taken before the commencement of conciliation proceedings.

4. Negotiation:

Negotiation- communication for the purpose of persuasion- is the pre- eminent mode of dispute resolution. Compared to processes using mutual third parties, it has the advantage of allowing the parties themselves to control the process and the solution.

Essentials of Negotiation are:

It is a communication process;

It resolves conflicts;

It is a voluntary exercise;

It is a non- binding process;

Parties retain control over outcome and procedure;

There is a possibility of achieving wide ranging solutions, and of maximizing joint gains.

In India, Negotiation doesn't have any statutory recognition. Negotiation is self counseling between the parties to resolve their dispute. Negotiation is a process that has no fixed rules but follows a predictable pattern.

5. Lok Adalats:

Lok Adalat was a historic necessity in a country like India where illiteracy dominated other aspects of governance. It was introduced in 1982 and the first Lok Adalat was initiated in Gujarat. The evolution of this movement was a part of the strategy to relieve heavy burden on courts with pending cases. It was the conglomeration of concepts of social justice, speedy justice, conciliated result and negotiating efforts.

They cater the need of weaker sections of society. It is a suitable alternative mechanism to resolve disputes in place of litigation. Lok Adalats have assumed statutory recognition under the Legal Services Authorities Act, 1987. These are being regularly organized primarily by the State Legal Aid and the Advice Boards with the help of District Legal Aid and Advice Committees.

Legal Services Authorities Act, 1987:

The Legal Services Authorities Act, 1987 was brought into force on 19 November 1995. The object of the Act was to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen. The concept of legal services which includes Lok Adalat is a revolutionary evolution of resolution of disputes.

Though settlements were affected by conducting Lok Nyayalayas prior to this Act, the same has not been given any statutory recognition. But under the new Act, a settlement arrived at in the Lok Adalats has been given the force of a decree which can be executed through Court as if it is passed by it. Sections 19, 20, 21 and 22 of the Act deal with Lok Adalat. Section 20 provides for different situations where cases can be referred for consideration of Lok Adalat.

Honorable Delhi High court has given a landmark decision highlighting the significance of Lok Adalat movement in the case of Abdul Hasan and National Legal Services Authority v. Delhi Vidyut Board and Others[35]. The court passed the order giving directions for setting up of permanent Lok Adalats.

The evolution of ADR mechanisms was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court

i) Courts are authorized to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance. Power is also conferred upon the courts so that it can intervene in different stages of proceedings. But these goals cannot be achieved unless requisite infrastructure is provided and institutional frame work is put to place.

ii) The institutional framework must be brought about at three stages, which are:

Awareness: It can be brought about by holding seminars, workshops, etc. ADR literacy program has to be done for mass awareness and awareness camp should be to change the mindset of all concerned disputants, the lawyers and judges.

Acceptance: In this regard training of the ADR practitioners should be made by some University together with other institutions. Extensive training would also be necessary to be imparted to those who intend to act as a facilitator, mediators, and conciliators. Imparting of training should be made a part of continuing education on different facets of ADR so far as judicial officers and judges are concerned.

Implementation: For this purpose, judicial officers must be trained to identify cases which would be suitable for taking recourse to a particular form of ADR. [36]

iii) ADR Mechanisms to be made more viable: The inflow of cases cannot be stopped because the doors of justice cannot be closed. But there is a dire need to increase the outflow either by strengthening the capacity of the existing system or by way of finding some additional outlets.

iv) Setting up of Mediation Centres in all districts of each state with a view to mediate all disputes will bring about a profound change in the Indian Legal system. These Mediation centres would function with an efficient team of mediators who are selected from the local community itself.

v) Not many Indians can afford litigation. This kind of state of affairs makes common people, especially rural people, cynical about judicial process. We must take the ADR mechanism beyond the cities. Gram Nyayalayas should process 60 to 70 percent of rural litigation leaving the regular courts to devote their time to complex civil and criminal matters.

vi) More and more ADR centres should be created for settling disputes out-of-court. ADR methods will achieve the objective of rendering social justice to the people, which is the goal of a successful judicial system.

vii) The major lacuna in ADR is that it is not binding. One could still appeal against the award or delay the implementation of the award. “Justice delayed is justice denied.” The very essence of ADR is lost if it is not implemented in the true spirit. The award should be made binding on the parties and no appeal to the court should be allowed unless it is arrived at fraudulently or if it against public policy.

CONCLUSION

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly has acquired good popularity among the public and this has really given rise to a new force to ADR and this will no doubt reduce the pendency in law Courts. There is an urgent need for justice dispensation through ADR mechanisms.

The ADR movement needs to be carried forward with greater speed. This will considerably reduce the load on the courts apart from providing instant justice at the door-step, without substantial cost being involved. If they are successfully given effect then it will really achieve the goal of rendering social justice to the parties to the dispute.

FORMS OF ADR.

Alternative Dispute Resolution is the use of methods such as mediation and arbitration to resolve a dispute instead of litigation.

Alternative Dispute Resolution (ADR) is a way to settle disputes without litigation. Using ADR procedures can avoid the acrimony that often accompanies extended trials and allows parties to understand each other's position and craft their own solutionCommon Forms of Alternative Dispute Resolution (ADR)

alternative dispute resolution

The most common forms of ADR for civil cases are conciliation, mediation, arbitration, neutral evaluation, settlement conferences and community dispute resolution programs.

Facilitation

Facilitation is the least formal of the ADR procedures. A neutral third-party works with both sides to reach a resolution of their dispute. Facilitation assumes that the parties want to reach a settlement. The negotiation is done through telephone contacts, written correspondence, or via e-mail. Facilitation is sometimes used by judges at settlement teleconferences exploring alternatives to taking the dispute to trial.

Mediation

Mediation is more formal but still leaves control of the outcome to the parties. An impartial mediator helps the parties try to reach a mutually acceptable resolution to the dispute. The parties control the substance of the discussions and any agreement reached. A typical session starts with each party telling their story. The mediator listens and helps them identify the issues in the dispute, offering options for resolution and assisting them in crafting a settlement.

Mediation can take many forms, depending on the needs of the parties, such as:

Face to face –parties directly communicate during the process,

Shuttle –the mediator separates the parties and shuttles between each one with proposals for settlement,

Facilitative –the mediator helps the parties directly communicate with each other, or

Evaluative –the mediator makes an assessment of the merit of the parties' claims during separate meetings and may propose terms of settlement.

WHEN MEDIATION?

Mediation should be considered when the parties have a relationship they want to preserve. So when family members, neighbors or business partners have a dispute, mediation may be the best ADR procedure to use. Mediation is also effective when emotions may get in the way of a solution. A mediator can help the parties communicate in a non- threatening and effective manner.

Mediation is available to the parties at any point in the litigation process including through the appeal.

Arbitration

Arbitration is the most formal of the ADR procedures and takes the decision making away from the parties. The arbitrator hears the arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial and the rules of evidence are usually relaxed. Each party can present proofs and arguments at the hearing. There isn't, however, any facilitative discussion between the parties. Unlike other forms of ADR, the award is often supported by a reasoned opinion (though the parties can agree that no opinion will issue).

Arbitration can be "binding" or "non- binding." Binding arbitration means the parties have waived their right to a trial, agree to accept the arbitrator's decision as final and, usually, there is no right of appeal of the decision. If there is a binding arbitration clause in a contract, the matter must proceed to arbitration and there is no trial.

Non- binding arbitration means the parties can request a trial if they don't accept the arbitrator's decision. Some courts will impose costs and fines if the court decision is not more favorable than that awarded in arbitration. Non- binding arbitration is increasingly rare.

WHEN ARBITRATION?

Arbitration is good for cases where the parties want a third person to settle the dispute but want to avoid the cost of money and time that accompanies a court trial. It is also appropriate where the parties want a decision maker experienced in the subject of the disputes.

Settlement Conferences

Settlement Conferences may be voluntary or mandatory depending on the judge. The parties will meet with the judge or a referee to discuss a possible settlement of their dispute. The judge will not make a decision but will assist the parties in evaluating the strengths and weaknesses of their case.

Community Dispute Resolution Program

In Michigan there are Community Dispute Resolution Centers that are staffed with trained community volunteers who provide low- cost mediation as an alternative to costly court procedures. This type of mediation is tailored to handle a wide range of private and public conflicts such as landlord/tenant, business dissolutions, land use, public education or adult guardianships/conservatorships. Most of the cases are referred by the courts.

ADR is becoming more popular with courts across the country. The main reason parties prefer ADR proceedings is that, unlike adversarial litigation, ADR proceedings allow the parties to understand each person's position and create a solution .

Judicial Approach towards ADR

"There is no better test of the excellence of a government than the efficiency of its judicial system".…….Lord Bryce.

There are few methods accessible for resolving dispute between two parties. The first and most common method is resolving dispute through courts when a dispute arise two persons belonging to the same nation, there medium of resolve the dispute is the same meaning there by the parties get resolve their dispute through the courts established by law of that country. This has been the most common and important method followed by the citizen of India for the resolution of their dispute with the fellow citizens.

As the time was passed it was realized that our traditional courtsystem has become outdated and there was need of a other mechanism also which support our Judicial System as a substitute or Alternate in settlement of dispute of peoples.

There are some drawback with our Judicial System like –

Over burdened court

Time consuming

Expensive

Technical Process

Low Ratio of Judges to Population

Unfilled Vacancies.

Long Procedural.

Pendency of cases.

About 40 years ago, late Mr. M.C. Setalvad, the first Attorney General of India, address the bar Association of India and said: “No doubt, the British system of administration was very good and led to excellent results, but it had its defects which have been accentuated .

. In these days, therefore, what is required is a radical change in the method of administration of justice. We want court to which people can go with ease and with as little cost as possible. It is not merely the quickness of justice but it is the easy approach and quick disposal both of which are needed and that only can be achieved if the system is completely overhauled.”

Justice R.C. Lahoti also observed that “Working under considerable handicaps such as inadequate funds, budgetary allocations for law and justice not being part of plan expenditure, lack of resources, shortage of staff and infrastructure, and the Indian judiciary can still claim a better standing with the other wings of governance in performance.”

An Analysis of Evaluation of Alternative Dispute Resolution

Mechanism in Indian Judiciary

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for

generations down the line. Dispute resolution is one of the major function

Indian Judiciary and it is important for a stable society. Through the medium of the State, norms and institutions are created to secure social

order and to attain the ends of justice or the least to establish dispute resolution processes. Government of India works through different organs and the judiciary is one that which is directly responsible for theadministration ofjustice.

In India judiciary is the tangible delivery point of justice.

Resolving disputes is one of the important factor for the peaceful existence of society.

Arbitration, the mode of ADR, is recognized by Indian Judiciary as a tool of settlement of dispute.

The arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940.

The Courts mainly concerned over the supervision of Arbitral

Tribunals and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue, which has been referred to him for arbitration.

It is clear from the study of Preamble to our Constitution also aspiration as "justice- social, economic and political". Article 39A of the

Constitution provides for ensuring equal access to justice. Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

We all know that our Indian judicial system is very broad, fatigued,

boring, unexciting and tiring. Not only is the judicial process extremely expensive for an ordinary person but also takes years and years to deliver

justice. In order to overcome the much criticised delay in justice delivery,

the adoption of Alternative Dispute Resolution (ADR) mechanisms like Lok Adalats, arbitration, mediation and conciliation was thought of and

subsequently practiced with commendable success. Although the resolution be encouraged, but confined to matters where it is more suitable/ appropriate as compared to the "efficient and proper" court procedures. It should not merely be regarded as an escape route form the

inability of the courts to dispense justice in time.

Contribution of Alternative Dispute Resolution in the Administration of Justice

In Sundaram Finance Ltd. v. NEPC India Ltd.148, the Supreme Court explicitly made it clear that the 1996 Act is very much different from that of Act, 1940. The provisions made in Act of 1940 lead to some misconstruction and so the Act of 1996 was enacted

In order to get help in construing these provisions made in Act of 1996, it is more relevant to refer to the UNCITRAL Model Law besides the Act of 1996 rather than following the provisions of the Act of 1940.

In Grid Corp. of Orissa Ltd. v. Indian Charge Chrome Ltd.149,

Section- 37(1) of the Indian Electricity Act, 1910 provides for arbitration by the Commission or its nominee any dispute arising between the licensees or in respect of matters provided under.

The Orissa High Court held that Section- 7 of the Arbitration Act, 1996 would apply to the present case in view of the fact that the scope of the Arbitration Act, is very wide and it not only contains arbitration agreement in writing but also other agreements as mentioned in subject.

It also held that if there is any arbitration agreement in any other enactment for there solution be encouraged, but confined to matters where it is more suitable/ appropriate as compared to the "efficient and proper"court procedures. It should not merely be regarded as an escape route form the inability of the courts to dispense justice in time.

AUTHORITIES POWERS AND FUNCTIONS CONSTITUTED UNDER LEGAL SERVICES AUTHORITIES ACT 1987.

THE NATIONAL LEGAL SERVICES AUTHORITY-

Section 3. Constitution of the National Legal Services Authority

(1) The Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on, or assigned to the Central Authority under this Act.

(2) The Central Authority shall consist of -

(a) The Chief Justice of India who shall be the Patron- in- Chief.

(b) A serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India, who shall be the Executive Chairman; and

(c) Such number of other members, possessing such experience and qualifications, as may be prescribed by the Central Government, to be nominated by that government in consultation with the Chief Justice of India.

(3) The Central Government shall in consultation with the Chief Justice of India, appoint a person to be the Member- Secretary of the Central Authority, possessing such experience and qualifications as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman o that Authority.

(4) The terms of office and other conditions relating thereto, of Members and the Member-Secretary of the Central Authority shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(5) The Central Authority may appoint such number of officers and other employees as may be prescribed by the Central Government in consultation with the Chief Justice of India, for the efficient discharge of its functions under this Act.

(6) The officers and other employees of the Central Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(7) The administrative expenses of the Central Authority, including the salaries, allowances and pensions payable to the Member- Secretary, officers and other employees of the Central Authority, shall be defrayed out of the Consolidated Fund of India.

(8) All orders and decisions of the Central Authority shall be authenticated by the Member Secretary or any other officer of the Central Authority duly authorised by the Executive Chairman of that Authority.

(9) No act or proceeding of the Central Authority shall be invalid merely on the ground of the existence of any vacancy in or any defect in the constitution of the Central Authority.

Section 3A. Supreme Court Legal Services Committee

(1) The Central Authority shall constitute a Committee to be called the Supreme Court Legal Services Committee for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the Central Authority.

(2) The Committee shall consist of -

(a) A sitting judge of the Supreme Court who shall be the Chairman; and

(b) Such number of other members possessing such experience and qualifications as may be prescribed by the Central Government to be nominated by the Chief Justice of India.

3) The Chief Justice of India shall appoint a person to be the Secretary to the Committee, possessing such experience and qualifications as may be prescribed by the Central Government.

(4) The terms of office and other conditions relating thereto, of the Members and Secretary of the Committee shall be such as may be determined by regulations made by the Central Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions.

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

Section 4. Functions of the Central Authority

The Central Authority shall perform all or any of the following functions, namely:-

(a) Lay down policies and principles for making legal services available under the provisions of this Act.

(b) Frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act.

(c) Utilise the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities.

(d) Take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills.

(e) Organise legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through Lok Adalats.

(f) Encourage the settlement of disputes by way of negotiations, arbitration and conciliation.

(g) Undertake and promote research in the field of legal services with special reference to the need for such services among the poor.

(h) To do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IVA of the Constitution.

(i) Monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act.

(j) Provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities, from out of the amounts placed at its disposal for the implementation of legal services schemes under the provisions of this Act.

(k) Develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions.

(l) Take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures.

(m) Make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level, particularly among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and

(n) Coordinate and monitor the functioning of State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social service institutions and other legal services organisations

and given general directions for the proper implementation of the Legal Services programmes.

Section 5. Central Authroity to Work in Coordination with Other Agencies

In the discharge of its functions under this act, the Central Authority shall, wherever appropriate, act in coordinating with other governmental and non-governmental agencies, universities and others engaged in the work of promoting the cause of legal services to the poor.

STATE LEGAL SERVICES AUTHORITY-

Section 6. Constitution of State Legal Services Authority

(1) Every State Government shall constitute a body to be called the Legal Services Authority for the State to exercise the powers and perform the functions conferred on or assigned to, a State Authority under this Act.

(2) A State Authority shall consist of-

(a) The Chief Justice of the High Court who shall be the Patron-in-Chief.

(b) A serving or retired Judge of the High Court, to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and

(c) Such number of other Members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service not lower in rank than that of a District Judge, as the Member-Secretary of the State Authority, to exercise such powers and perform such duties under the Executive Chairman of the State Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

Provided that a person functions as Secretary of a State Legal Aid & Advice Board immediately before the date of constitution of the State Authority may be appointed as Member-Secretary of that Authority, even if he is not qualified to be appointed a such under this sub-section, for a period not exceeding five years.

(4) The terms of office and other conditions relating thereto, of Members and the Member-Secretary of the State Authority shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) The State Authority may appoint such number of officers and other employees may be prescribed by the State Government, in consultation with the Chief Justice of the High Court, for the efficient discharge of its functions under this Act.

(6) The officers and other employees of the State Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses of the State Authority, including the salaries, allowances and pensions payable to the Member- Secretary, officers and other employees of the State Authority shall be defrayed out of the Consolidated Fund of the State.

(8) All orders and decisions of the State Authority shall be authenticated by the Member-Secretary or any other officer of the State Authority duly authorised by the Executive Chairman of the State Authority.

(9) No act or proceeding of a State Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of the State Authority.

Section 7. Functions of the State Authority

(1) It shall be the duty of the State Authority to give effect to the policy and directions of the Central Authority.

(2) Without prejudice to the generality of the functions referred to in sub-section (1), the State Authority shall perform all or any of the following functions, namely:-

(a) Give legal service to persons who satisfy the criteria laid down under this Act.

(b) Conduct Lok Adalats, including Lok Adalats for High Court cases.

(c) Undertake preventive and strategic legal aid programmes; and

(d) Perform such other functions as the State Authority may, in consultation with the Central Authority, fix by regulations.

Section 8. State Authority to Act in Coordination with Other Agencies, etc., and be Subject to Directions given by Central Authority

In the discharge of its functions the State Authority shall appropriately act in co- ordination with other governmental agencies, non- governmental voluntary social service institutions, universities and other bodies engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority may give to it in writing.

Section 8A. High Court Legal Services Committee

(1) The State Authority shall constitute a Committee to be called the High Court Legal Services Committee for every High Court, for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority.

(2) The Committee shall consist of :-

(a) A sitting Judge of the High Court who shall be the Chairman; and

(b) Such number of other Members possessing such experience and qualifications as may be determined by regulations made by the State Authority, to be nominated by the Chief Justice of the High Court.

(3) The Chief Justice of the High Court shall appoint a Secretary to the Committee possessing such experience and qualifications as may be prescribed by the State Government.

(4) The terms of office and other conditions relating thereto, of the Members and Secretary of the Committee shall be such as may be determined by the regulations, made by the State Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

Section 9. District Legal Services Authorities

(1) The State Government shall in consultation with the Chief Justice of the High Court, constitute a body to be called the District Legal Services Authority for every District in the State to exercise the powers and perform the functions conferred on, or assigned to the District Authority under this Act.

(2) A District Authority shall consist of :-

(a) The District Judge who shall be its Chairman; and

(b) Such number of other Members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Authority shall, in consultation with the Chairman of the District Authority appoint a person belonging to the State Judicial Service not lower in rank than that of a Subordinate Judge or Civil Judge posted at the seat of the District Judiciary as Secretary of the District Authority to exercise such powers and perform such duties under the Chairman of

that Committee as maybe assigned to him by such Chairman.

(4) The terms of office and other conditions relating thereto, of Members and Secretary of the District Authority shall be such as may be determined by regulations made by the State Authority in consultation with the Chief Justice of the High Court.

(5) The District Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(6) The officers and other employees of the District Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses of every District Authority, including the salaries, allowances and pensions payable to the Secretary, officers and other employees of the District Authority shall be defrayed out of the Consolidated Fund of the State.

(8) All orders and decisions of the District Authority shall be authenticated by the Secretary or by any other officer of the District Authority duly authorised by the Chairman of that Authority.

(9) No Act or proceeding of a District Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the District Authority.

Section 10. Functions of District Authority

(1) It shall be the duty of every District Authority to perform such of the functions of the State Authority in the District as may be delegated to it from time to time by the State Authority.

(2) Without prejudice to the generality of the functions referred to in sub-section (1) the District Authority may perform all or any of the following functions, namely:-

(a) Co-ordinate the activities of the Taluk Legal Services Committee and other legal services in the District.

(b) Organise Lok Adalats within the Districts; and

(c) Perform such other functions as the State Authority may fix by regulations.

Section 11. District Authority to Act in Coordination with Other Agencies and be Subject to Directions given by the Central Authority, etc

In the discharge of its functions under this Act, the District Authority shall, wherever appropriate, act in co- ordination with other governmental and non- governmental institutions, universities and others engaged in the workof promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority or the State

Authority may give to it in writing.

Section 11A. Taluk Legal Services Committee

(1) The State Authority may constitute a Committee, to be called the Taluk Legal Services Committee, for each Taluk or Mandal or for group of Taluks or Mandals.

(2) The Committee shall consist of -

(a) The Senior Civil Judge operating within the jurisdiction of the Committee who shall be the ex- officio Chairman and

(b) Such number of other Members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(4) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) The administrative expenses of the Committee shall be defrayed out of the District Legal Aid Fund by the District Authority.

Section 11B. Functions of Taluk Legal Services Committee

The Taluk Legal Services Committee may perform all or any of the following functions, namely: -

(a) Co- ordinate the activities of legal services in the taluk.

(b) Organise Lok Adalats within the taluk and

(c) Perform such other functions as the District Authority may assign to it.

LOK ADALATS-

Section 19 - Organization of Lok Adalats

(1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(2) Every Lok Adalat organised for an area shall consist of such number of :-

(a) Serving or retired judicial officers and

(b) Other persons,of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluk Legal Services Committee, organising such Lok Adalats.

(3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(4) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of :-

(i) Any case pending before or

(ii) Any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

Section 20. Cognizance of Cases by Lok Adalats

(1) Where in any case referred to in clause (i) of sub-section (5) of Section 19- (i)

(i) (a) The parties thereof agree or

(i) (b) One of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement or

(ii) The court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat: Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (1) of Section 19 may, on receipt of an application from any, one of the parties to any matter referred to in clause (ii) of sub-section (5) of Section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination; Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advice the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub- section (5) to the court, such court shall proceed to deal such reference under sub-section (1).

Section 21. Award of Lok Adalat

(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to under sub-section (1) of Section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

Section 22. Powers of Lok Adalat or Permanent Lok Adalat

(1) The Lok Adalat shall, for the purposes of holding any determination under this Act, have

the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:-

(a) The summoning and enforcing the attendance of any witness and examining him on oath.

(b) The discovery and production of any document.

(c) The reception of evidence on affidavits.

(d) The requisitioning of any public record or document or copy of such record or document from any court or office and

(e) Such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code (45 of 1860) and every Lok Adalat shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973(2 of 1974).

Section 22B. Establishment of Permanent Lok Adalats

(1) Notwithstanding anything contained in section 19, the Central Authority or, as the case may be, every State Authority shall, be notification, establish Permanent LokAdalat at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

(2) Every Permanent LokAdalat established for an area notified under sub-section (1) shall consist of :-

(a) A person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge, shall be the Chairman of the Permanent LokAdalat and

(b) Two other persons having adequate experience in public utility services to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may, the State Authority, establishing such Permanent LokAdalat and the other terms and conditions of the appointment of the Chairman and other persons referred to in clause (b) shall be prescribed by the Central Government.

Section 22C. Cognizance of cases by Permanent LokAdalat

(1) Any party to a dispute may, before the dispute is brought before nay court, make an

application to the Permanent LokAdalat for the settlement of dispute; Provided that the Permanent LokAdalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law; Provided further that the Permanent LokAdalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees;

Provided also that the Central Government, may, by notification, increase the limit of ten lakhrepees specified in the second proviso in consultation with the Central Authority.

(2) After an application is made under sub-section (1) to the Permanent LokAdalat, no party to that application shall invoke jurisdiction of any court in the same dispute.

(3) where an application is made to a Permanent LokAdalat under sub-section (1), it

(a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the applicant;

(b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings;

(c) shall communicate any document or statement received by it from any party to the application to the other party, to enable such other party to present reply thereto.

(4) When statement, additionail statement and reply, if any, have been filed under sub-section (3), to the satisfaction of the Permanent LokAdalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstance of the dispute.

(5) The Permanent LokAdalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent LokAdalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent LokAdalat to produce evidence and other related documents before it.

(7) When a Permanent LokAdalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the partes, it may formulate the tersm of a possible settlement of the dispute and give to the parties

concerned for their observations and in case the parties reach at an agreement on the settlement or the dispute, they shall sign the settlement agreement and the Permanent LokAdalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties faile to reach at an agreement under sub-section (7), the Permanent LokAdalat shall, if the dispute does not relate to any offence, decide the dispute.

Section 22D. Procedure of Permanent Lok Adalat

The Permanent LokAdalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity fail play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.

Section 22E. Award of Permanent Lok Adalat to be Final

(1) Every award of the Permanent LokAdalat under this Act made either on merit or in terms of a settlementagreement shall be final and binding on all the parties thereto and on persons claiming under them.

(2) Every award of the Permanent LokAdalat under this Act shall be deemed to bea decree of a civil court.

(3) The award made by the Permanent LokAdalat under this Act shall be by a majority of the persons constituting the PermanentLokAdalat.

(4) Every award made by the Permanent LokAdalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceedings.

(5) The Permanent LokAdalat may transmit any award made by it to a Civil Court having local Jurisdiction and such civil court shall execute tgeirder as if it were a decree made by that court.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the number, experience and qualifications of other Members of the State Authority under clause (c) of sub-section (2) of Section 6;

(b) the powers and functions of the Member-Secretary of the State Authority under sub-section (3) of Section 6;

(c) the terms of office and other conditions relating thereto, of Members and Member-Secretary of the State Authority under sub-section (4) of Section 6;

(d) the number of officers and other employees of the State Authority under sub-section (5) of Section 6;

(e) the conditions of service and the salary and allowances of officers and other employees of the State Authority under sub- section (6) of Section

(f) the experience and qualifications of Secretary of the High Court Legal Services Committee under sub- section (3) of Section 8A;

(g) the number of officers and other employees of the High Court Legal Services Committee under sub- section (5) of Section 8A and the conditions of service and the salary and allowances payable to them under sub- section (6) of that Section;

(h) the number, experience and qualifications of Members of the District Authority under clause (b) of sub- section (2) of Section 9 (i) the number of officers and other employees of the District Authority under sub - section (5) of Section 9;

(j) the conditions of service and the salary and allowances of the officers and other employees of the District Authority under sub- section (6) of Sectio

(k) the number, experience and qualifications of Members of the Taluk Legal Services Committee under clause (b) of sub- section (2) of Section 11A

(l) the number of officers and other employees of the Taluk Legal Services Committee under sub- section (3) of Section 11A;

(m) the conditions of service and the salary and allowances of officers and other employees of the Taluk Legal Services Committee under sub- section (4) of Section 11A;

(n) the upper limit of annual income of a person entitling him to legal services under clause (h) of Section 12, if the case is before a court, other than the Supreme Court;

(o) the experience and qualifications of other persons of the Lok Adalats other than referred to in sub- section (4) of Section 19;

(p) any other matter which is to be, or may be, prescribed.

MODULE 02

NEGOTIATION AND MEDIATION.

In the eyes of the law, there are several ways a dispute can be settled. Some disputes can simply be negotiated to a win- win outcome. Others may require a third party to assist in coming up with solutions to remedy a situation.

Conflict Resolution Processes

Once, lovebirds Harold and Melba married and had a few kids. After several years of bickering

over laundry, bills and Harold's weekly poker game, they decided to call it quits. However, during the marriage, they accumulated quite a few assets, like a house, a boat and several vintage cars. Unable to settle on the splitting of their stuff, the duo decided on dispute resolution.

Dispute resolution is a process of bringing in a third party to help sort out the situation through communication and negotiation. There are several types of resolutions, and they are mainly used in employment and legal disputes. The forms of dispute resolution are:

Negotiations

Negotiations occur when two parties set forth the type of remedy each desires, and try to reach some sort of an agreement that satisfies everyone involved. In the best-case scenario, negotiations are done between the parties and both come to a happy agreement. The first step towards dissolving Harold and Melba's assets may be negotiations.

THIS IS HOW A TYPICAL NEGOTIATION MAY LOOK:

Each party will prepare a list of what each party wants (house, boat, car, money)

Each will decide upon a timeframe to acquire the assets, and

Each will have an alternative or other options for the settlement of assets

Once agreement has been reached, the parties will create a written statement to reflect the terms of the negotiated assets. While Harold and Melba tried very hard to divide the dowry fairly, each wanted what the other person wanted. It was a mess!

Mediation

It is important to note that each state court functions differently, but in New York, Harold and Melba would be referred to mediation. Mediation is an alternate form of resolution that involves assigning a neutral third party to assist the couple in coming to a fair and equitable agreement on the distribution of assets.

Mediation is not always voluntary. Sometimes the court will order mediation, especially if the divorce dispute involves child support, alimony or child custody. Not to confuse things, remember negotiations and mediation are not solely used for divorce situations. Both alternative resolutions are used for employment issues aes. It is beneficial for a company to go this route, because the sky- high cost of hiring legal

professionals can crush a company financially.

Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached while avoiding argument and dispute.

In any disagreement, individuals understandably aim to achieve the best possible outcome for their position (or perhaps an organisation they represent). However, the principles of fairness, seeking mutual benefit and maintaining a relationship are the keys to a successful outcome.

Specific forms of negotiation are used in many situations: international affairs, the legal system, government, industrial disputes or domestic relationships as examples. However, general negotiation skills can be learned and applied in a wide range of activities. Negotiation skills can be of great benefit in resolving any differences that arise between you and others.

Stages/ process of Negotiation

In order to achieve a desirable outcome, it may be useful to follow a structured approach to negotiation. For example, in a work situation a meeting may need to be arranged in which all parties involved can cometogether.

The process of negotiation includes the following stages:

Preparation

Discussion

Clarification of goals

Negotiate towards a Win- Win outcome

Agreement

Implementation of a course of action

1. Preparation

Before any negotiation takes place, a decision needs to be taken as to when and where a meeting will take place to discuss the problem and who will attend. Setting a limited time-scale can also be helpful to prevent the disagreement continuing.

This stage involves ensuring all the pertinent facts of the situation are known in order to clarify your own position. In the work example above, this would include knowing the 'rules' of your organisation, to whom help is given, when help is not felt appropriate and the grounds for such refusals. Your organisation may well have policies to which you can refer in preparation for the negotiation.

Undertaking preparation before discussing the disagreement will help to avoid further conflict

and unnecessarily wasting time during the meeting.

2. Discussion

During this stage, individuals or members of each side put forward the case as they see it, i.e. their understanding of the situation.

Key skills during this stage include questioning, listening and clarifying.

Sometimes it is helpful to take notes during the discussion stage to record all points put forward in case there is need for further clarification. It is extremely important to listen, as when disagreement takes place it is easy to make the mistake of saying too much and listening too little. Each side should have an equal opportunity to present their case.

3. Clarifying Goals

From the discussion, the goals, interests and viewpoints of both sides of the disagreement need to be clarified.

It is helpful to list these factors in order of priority. Through this clarification it is often possible to identify or establish some common ground. Clarification is an essential part of the negotiation process, without it misunderstandings are likely to occur which may cause problems and barriers to reaching a beneficial outcome.

4. Negotiate Towards a Win-Win Outcome

This stage focuses on what is termed a 'win-win' outcome where both sides feel they have gained something positive through the process of negotiation and both sides feel their point of view has been taken into consideration.

A win- win outcome is usually the best result. Although this may not always be possible, through negotiation, it should be the ultimate goal.

Suggestions of alternative strategies and compromises need to be considered at this point. Compromises are often positive alternatives which can often achieve greater benefit for all concerned compared to holding to the original positions.

5. Agreement

Agreement can be achieved once understanding of both sides' viewpoints and interests have been considered.

It is essential to for everybody involved to keep an open mind in order to achieve an acceptable solution. Any agreement needs to be made perfectly clear so that both sides know what has been decided.

6. Implementing a Course of Action

From the agreement, a course of action has to be implemented to carry through the decision.

Informal Negotiation

There are times when there is a need to negotiate more informally. At such times, when a difference of opinion arises, it might not be possible or appropriate to go through the stages set out above in a formal manner.

Nevertheless, remembering the key points in the stages of formal negotiation may be very helpful in a variety of informal situations.

In any negotiation, the following three elements are important and likely to affect the ultimate outcome of the negotiation:

Attitudes

Knowledge

Interpersonal Skills

Attitudes

All negotiation is strongly influenced by underlying attitudes to the process itself, for example attitudes to the issues and personalities involved in the particular case or attitudes linked to personal needs for recognition.

Always be aware that:

Negotiation is not an arena for the realisation of individual achievements.

There can be resentment of the need to negotiate by those in authority.

Certain features of negotiation may influence a person's behaviour, for example some people may become defensive.

Knowledge

The more knowledge you possess of the issues in question, the greater your participation in the process of negotiation. In other words, good preparation is essential.

Do your homework and gather as much information about the issues as you can.

Furthermore, the way issues are negotiated must be understood as negotiating will require different methods in different situations.

Interpersonal Skills

Good interpersonal skills are essential for effective negotiations, both in formal situations and

in less formal or one-to-one negotiations.

These skills include:

Effective verbal communication.

See our pages: Verbal Communication and Effective Speaking.

Listening.

We provide a lot of advice to help you improve your listening skills, see our page Active Listening.

Reducing misunderstandings is a key part of effective negotiation.

See our pages: Reflection, Clarification and The Ladder of Inference for more information.

Rapport Building.

Build stronger working relationships based on mutual respect. See our pages: Building Rapport and How to be Polite.

Problem Solving.

See our section on effective Problem Solving.

Decision Making.

Learn some simple techniques to help you make better decisions, see our section: Decision Making.

Assertiveness.

Assertiveness is an essential skill for successful negotiation.

Negotiations are formal discussions between people who have different aims or intentions, especially in business or politics, during which they try to reach an agreement. They try to reach a common ground eliminating their differences.

Negotiation in business has become one of the most important skills and abilities. While negotiation will happen between two parties for reaching an agreement, it is said that the most effective negotiator will be both competing as well as collaborating. An effective negotiator is one who creates value for the other while claiming value for the self. There must be meaningful give and take that should happen in negotiation.

Negotiation should always be win-win, where agreements are created by taking care of the interests of both the sides. Negotiation requires interpersonal skills, communication skills as well as problem solving skills.

Types of negotiation

There are broadly two types of negotiation namely distributive negotiation and integrative negotiation.

In distributive negotiation, the parties area only looking for their gain. It leads to a win-lose kind of outcome. In distributive negotiation, negotiation is carried out more as an one time transaction, not keeping in mind any kind of long term relationship.

While in integrative negotiation, the negotiators look for long term relationships and they try to ensure value for both sides. It leads to a win- win outcome.

Approach for negotiation

Negotiation can always be sensitive and should be carries out in a planned manner keeping in mind the end goals to be achieved. We should take care to ensure that negotiation does not get into an argumentative situation.

The negotiations process is made up of five stages:

Preparation and planning

Definition of ground rules

Clarification and justification

Bargaining and problem solving and

Closure and implementation

In order to achieve the desired outcomes from negotiation, it will be extremely important to do the initial homework. We must identify what we are looking at achieving from the negotiation. What are our best alternatives to a negotiated agreement (BATNA). It is also important for us to understand about the expectations of the other party and more information about their BATNA.

It is important to lay down the procedures for carrying out the negotiation, such as who will be part of negotiation, where the negotiation will happen and some basic ground rules to be followed.

Then the actual information and offers must be exchanged between the parties. Arguments and confrontations must be avoided in the process. At this stage the required bargaining should be done keeping good faith. Negotiation should always be done as a win-win outcome for both sides.

Once agreement is reached, the same should be implemented.

Skills in Negotiation

An effective negotiator will be using some of the below skills during the process of negotiation.

Active listening

Asking good questions

Communication skills (Specially verbal communication)

Decision making ability

Emotional control

Interpersonal skills

Preparing BATNA (Best alternative to a negotiated agreement, your alternatives)

Problem solving

Smart trade-off development

Ethics and collaboration

Conclusion

Negotiation skill is one of the most important skills. It is through effective negotiation we are able to eliminate differences and we arrive at common agreements. While we can adopt a structured approach for negotiation, but negotiation is an art which one can master only with time and experience.

Roles of the Mediator

The mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

Convener

The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

Educator

The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

Communication Facilitator

The mediator seeks to ensure that each party is fully heard in the mediation process.

Translator

When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Questioner and Clarifier

The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

Process Advisor

The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

International Negotiation

International negotiation requires the ability to meet special challenges and deal with the unknown. Even those experienced in cross- cultural communication can sometimes work against their own best interests during international negotiations. Skilled business negotiators know how to analyze each situation, set up negotiations in ways that are advantageous for their side, cope with cultural differences, deal with foreign bureaucracies, and manage the international negotiation process to reach a deal.

The Program on Negotiation notes that in any international negotiation, several critical tactics should be considered:

At the same time, diplomatic negotiations, such as those between the U.S. and Iran over nuclear capabilities, can be quite different from business negotiations. For example, it's critical to maintain a reputation for impartiality, and to be aware how your international goals potentially interact and contradict, so you can establish a consistent stance in your relations with groups you are trying to woo.

Finally, due to the enormous influence of China in today's world markets, PON offers numerous insights into Chinese negotiation styles, which include a strong emphasis on relationships, a lack of interest in ironclad contracts, a slow dealmaking process and

widespread opportunism.

Good offices and mediation

Mediation and good offices are diplomatic methods of dispute settlement involving third parties. The third party can be a single state or a group of states, an individual, an organ of a universal or regional international organisation, or a joint body.

The good offices method is where the third party offers 'good offices' to the conflicting states to facilitate dialogue and assist states towards peaceful settlement of the dispute. The third party offering good offices must be acceptable to all the parties. Once the negotiations have started, the functions of good offices are usually considered to be completed.

Mediation involves more active third party participation in the negotiations. The mediator conducts the negotiations between contending parties on the basis of proposals made by the mediator aimed at a mutually acceptable compromise solution.499 Mediation may be set in motion either upon the initiative of a third party whose offer to mediate is accepted by the parties to the dispute, or initiated by the parties to the dispute themselves agreeing to mediation.500 The mediator's role can involve communication, clarification of issues, drafting of proposals, identifying areas of agreement between parties, and elaboration of provisional arrangements to minimise contentious and propose alternate solutions.501 The World Bank provided good offices and mediated the solution to the Indus River dispute, which resulted in the negotiation of the 1960 Indus Waters Treaty. Another example of a mediated dispute is the Israeli–Jordanian bilateral negotiations which were combined with informal discussions where American and Russian diplomats acted as mediators which resulted in the 1994 Treaty of Peace between Israel and Jordan.93).

MODULE O3

CONCILIATION

'The process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and usually after hearing the parties and endeavouring to bring them to an agreement to make a report containing proposals for a settlement, which is not binding'

Such is the object and finality of conciliation. Gone are the days when arbitration was considered to be a cheap and efficacious remedy. Now the situation is completely reversed. Arbitration proceedings have become too technical and expensive. Therefore, Conciliation is considered a better alternative to the formal justice system. For selecting the mode of the conciliation it is not necessary to enter into a formal agreement. Because where the arbitration clause is included in the agreement it is implied that the matter would be referred for conciliation first & if amicable settlement fails then only, it is referred to the arbitration. The other advantage of choosing conciliation is that though the amicable settlement in

conciliation could not be reached then the evidence leaded, the proposal made during the conciliation proceedings cannot be disclosed in any other proceedings (in arbitration also). This protection has been provided by the Arbitration & Conciliation Act itself. Therefore parties can attempt conciliation without any risk.

Conciliation means the settling the disputes without litigation. It is a process in which independent person or persons are appointed by the parties with mutual consent by agreement to bring about a settlement of their dispute through consensus or by using of the similar techniques which are persuasive. In the Halsbury's Laws of England, the terms arbitration and conciliation have been differentiated as under: "The term arbitration" is used in several senses. It may refer either to a judicial process or to a non- judicial process is concerned with the ascertainment, declaration and enforcement of rights and liabilities, as they exist, in accordance with some recognized system of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce, what in the parties, and such a function is non- judicial. Conciliation is a process of persuading parties to reach an agreement, and is plainly not arbitration; nor is the chairman of a conciliation board an arbitrator" Confidence, trust & Faith are the essential ingredients of conciliation. This effective means of ADR is often used for domestic as well as international disputes. Some Significant difference is there while using it for domestic or international disputes.

CONCILIATION UNDER THE ARBITRATION AND CONCILIATION ACT

The Act, for the first time in India, provides for recognition of conciliation in commercial disputes. Part III of the Act provides for "…conciliation of disputes arising out of legal relationships, whether contractual or not and to all proceedings relating thereto " This provision similar to that relating to arbitration, is arguably, the most important issue and needs careful attention. The choice of the method of ADR is a function of the kind of relationship and the nature of the dispute between the parties[. The Act clearly applies only to commercial arbitration and conciliation. From the description of the scope and application in section 61 one needs to understand if only legal obligations may be the subject of conciliation. Can differences of opinions that have an impact on the relationship between the parties be the subject matter of the conciliation? If the subject matter of the dispute is the legal obligation of the parties then a choice of the ADR mechanism is clearly available: the parties may choose either arbitration or conciliation. To equate conciliation to arbitration on so simplistic an analysis is to grossly understate the relevance of conciliation. While it is no doubt true that conciliation could be used in place of arbitration and parties may be happier with a settlement than an award, it must be recognised that conciliation has one special characteristic, i.e., it can go to the root of the difference, the real problem between the parties that had led them to disagree with each other.

Illustration: In a joint venture agreement between an Indian and an American company, each holding 50% of the shares in the Indian joint venture company, certain matters are "reserved" i.e, decisions on these matters may be taken only if the directors nominated by both the parties vote in favour of the resolution in a meeting of the Board of Directors. Typically these would include expansion of the capital base, diversification of activities, the creation of

subsidiaries, mergers and acquisitions, the creation of liabilities exceeding a certain amount, etc. If the American partner wishes to expand the equity base of the joint venture company so that it may undertake larger projects or expand its activities but the Indian partner is unable to match the capital contribution required to maintain the ratio of shareholding due to unavailability of free resources at that point of time, the Indian partner will instruct its nominee directors to vote against the resolution even though it agrees, in principle, that the company needs additional funds for the expansion. The Indian partner may wish to increase the debt exposure of the joint venture company, which the American partner may view as an ad- hoc response, rather than as a long- term solution.

The Indian partner may perceive this action as a threat by the American partner to suppress the Indian partner by forcing the dilution of its control in the joint venture company. This may be the first sign of insecurity of the Indian company and the beginning of the loss of trust between the partners. Once the resolution fails, the American partner may not be very interested in the joint venture as it sees that the company is unlikely to grow in a manner that it expects. It may also perceive the Indian company as lacking in vision and ambition. This may be a natural inferenceby the persons who make the policies and direct the activities of the American partner. If the American partner is allowed to continue to hold this view, it would sour the relationship between parties that was based on the understanding of equality.

The difference of perception of the situation could not be the subject of arbitration since there is no breach of any obligation of the parties under the joint venture agreement. There is no obligation on the parties to vote in a particular manner on issues that are in the list of reserved matters. At best the parties could allege that the other did not act in good faith and in the best interest of the joint venture company. This, however, could be a matter that could be referred to conciliation. The parties could express their concerns and feelings in the matter to the conciliator who could help them find a solution to the problem after understanding their concerns. It may be that the parties have not been able to communicate their understanding of the situation to each other adequately, have failed to understand each other's perception of the situation, have a difference of opinion regarding the future of their relationship or differ in their vision for the joint venture company. In most of these cases, conciliation will help them communicate their views so that, at the very least, the air may be cleared for a review of the relationship.

In the present illustration, a possible solution that may be acceptable to both parties could be an expansion of the capital base of the company by a fresh issue of shares to the American partner with a right to the Indian partner to purchase half the shares at an agreed price(or formula) within a fixed period of time in the future. Thus, though the Indian partner may hold fewer shares for a short while, the American partner may continue to treat the Indian partner as a full and equal partner thereby putting to rest the fear of the Indian partner that the increase in the share capital is a ploy to dilute its control in the joint venture. Whether the 'difference of opinion' in the above illustration qualifies for the benefits under section 61[4] Part III of the Act is, therefore, an issue. It would if one takes a view that it is a proceeding relating to disputes arising out of a legal relationship. The Supreme Court of India has held that the phrase "arising out of" is of the widest amplitude and should not be read restrictively.

Whether the fact situation in the illustration would qualify as a 'dispute' would be the next

level of enquiry. While dealing with the issue of the date from which limitation runs in a matter to be referred to arbitration, the Supreme Court was required to determine the date when the dispute or difference arose. It held that the "…dispute or difference arises on unequivocal denial of a claim of one party by the other party as a result of which the claimant acquires the right to refer the dispute to arbitration[6] ." If one were to expect that the courts would interpret the word "dispute" in the context of conciliation in a similar manner, it may be necessary for the agreement containing the conciliation agreement to confer a right on the parties to resort to conciliation in situation where the difference of opinion, which may not be a breach of any legal obligation, is likely to affect their relationship. This would ensure that the parties have always a course of action to resolve their differences and are not left without a chance to resolve such differences that could be fatal to the joint venture company (in the illustration above).

NEED FOR THE INCREASE IN CONCILIATION MECHANISM IN INDIA

The importance of conciliation in the present Indian court system is increased as courts are facing with the problem of mounting arrears of pending cases & there is a serious need of disposing of them & for that amicable settlement, conciliation is the best alternative. The Himachal Pradesh High court undertook the project of disposing of the pending cases by conciliation & insisting on pretrial conciliation in fresh cases. This idea was based upon the mediation in Canada & Michigan. The said project had great success in Himachal Pradesh. The Law Commission of India in its various reports (77th & 13th) has appreciated the project in Himachal Pradesh and recommended the other States to follow the same path.

The other important point to uplift the Conciliation is that it has got statutory recognition as included in Arbitration & Conciliation act 1996 which is based on UNCITRAL Model & because of that it has Universal familiarity & can be used for the settlement of domestic disputes as well as international commercial disputes. The Concept of conciliation has received a new dimension because of the successful Himachal experiment.The movement of conciliation of awareness of conciliation has started long before, the only difference is, previously parties were willingly coming together & opting for conciliation but now, the conciliation on Himachal pattern is a court- induced conciliation, making it mandatory for the parties to attempt a conciliation for settlement of their dispute & approach the court if conciliation fails. In Maharashtra also Mumbai High court is taking initiative for Himachal pattern i.e. pre- trial conciliation Therefore it is necessary to study conciliation as an organized procedure for settlement of the dispute through formal proceedings.

IMPEDIMENTS IN OPTING CONCILIATION IN INDIA:

Although conciliation services are available to civil litigants through the innovation of Lok Adalats (panels of conciliators) and Conciliation Committees, several problems remain unsolved.

1. India generally lacks obligatory mediation such as early neutral evaluation utilized in the United States which is especially useful when imposed shortly after litigation is filed. Conciliation processes in India require the consent of both parties or the request of one party and the decision by the court that the matter is suitable for conciliation.

2. The subject matter of disputes that may be sent to Lok Adalats is limited to auto accidents and family matters.

3. The conciliation process normally involves the lawyers, not the disputing parties themselves. This problem is particularly acute in writ proceedings in which the government is the responding party since counsel frequently claims to lack authority to make decisions about terms of the settlement.

4. Current conciliation processes do not require the parties to meet and confer prior to entering either traditional litigation venues or their alternatives. No joint statement of the specific points of disagreement is required. The absence of meeting, conference and/or joint statements requirement is required. The absence of a meeting, conference or joint statement requirements allows competing sides to remain insulated from one another.

5. The Lok Adalats themselves have experienced backlog, and some defendants agree to conciliation as a way of further delaying the litigation process.

6. Finally, there is no set time or point within the litigation process at which a decision is made, by the courts, the parties or otherwise regarding referral of the case to some form of alternative dispute resolution.

CONCILIATION BETTER THAN OTHER MODES OF ADR:

Gone are the days when arbitration was considered to be a cheap and efficacious remedy. Now the situation is completely reversed. Arbitration proceedings have become too technical and expensive. In this context, reference may be made to the judgment of the Supreme Court of India. In Guru Nanak Foundation v. Rattan Singh & Sons, it was observed:

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal more effective and speedy for resolution of disputes avoiding procedural claptrap and this led to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in the courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the court been clothed with “legalese” of unforeseeable complexity. Broadly speaking, there are at least three advantages if the parties are able to a reasonable settlement of their disputes through conciliation, viz.

1) Quickness:- The parties can devote their time and energy for better and useful work.

2) Economic:- Instead of spending hard earned money on litigation, one can invest it for better dividends.

3) Social:- The parties go happily to their respective places and stand relieved from bickering, enmity, which in certain cases might have lingered on for generations.

There is a growing feeling amongst the litigants that they would have been better off if there had been no arbitration clause so that they could file a civil suit, which entails only three steps, viz. (i) Filing of the pleadings; (2) Conduct of the proceedings; and, (3) Judgment.

As against three stages involved in a civil suit, there are as many as six in an arbitration matter, viz.

(1) appointment of the arbitrator either by the parties or by the court;

(2) pleadings before the arbitrator;

(3) proceedings before the arbitrator;

(4) award;

(5) filing of the award in the court; and,

(6) recourse to a court against an arbitral award.

To overcome the ordeals involved, the best course available to the parties is to look to reasons, appreciate the viewpoint of the opposite party, not to stand on false prestige and resolve the controversy in an amicable manner. It does not help either party to pursue litigation –whether in courts or before an arbitral tribunal. Both parties are losers, at least in terms of time, at the time of final outcome of litigation. It is at this stage the parties appreciate that they would have been better off had they taken the path of conciliation. It is not only the fees of lawyers but also of the arbitrators, which have started pinching the parties. Though presently the number is small but nevertheless a serious beginning has been made in some cases to settle the matter outside arbitration to avoid unnecessary expense. The resort to conciliation, directly or through a trusted common person/ institution, is the only remedy to achieve early success.

Conciliation is a better alternative to the formal justice system. For selecting the mode of the conciliation it is not necessary to enter into a formal agreement. Because where the arbitration clause is included in the agreement it is implied that the matter would be referred for conciliation first & if amicable settlement fails then only, it is referred to the arbitration. The other advantage of choosing conciliation is that though the amicable settlement in conciliation could not be reached then the evidence leaded, the proposal made during the conciliation proceedings cannot be disclosed in any other proceedings (in arbitration also) This protection has been provided by the Arbitration & Conciliation Act itself. Therefore parties can attempt Conciliation without any risk. It is a non- binding procedure in which an impartial third party assists the parties to a dispute in reaching a mutually agreed settlement of the dispute. For effective conciliation, it is necessary that the parties to the dispute should be brought together face to face at a common place where they can interact with each other & with the conciliator to arrive at a settlement of the dispute. The importance of conciliation is that in other proceeding decision is given by the presiding authority & it is binding accordingly. But in conciliation, there is an amicable settlement where parties themselves have reached to the decision i.e. settlement & which is binding as per their decision. Third party i.e. conciliator is

just helping to arrive at settlement & not dictating the term or decision.

CONCLUSION:

However, the success of conciliation depends on the mental attitude of the parties, the skill of the conciliator and the proper environment, backed by infrastructure facilities for servicing the conciliation procedure. The mental attitude required for conciliation ranges, on the one end from the inclination of all the parties to arrive at a mutually agreeds ettlement, though there may be mental reservation in making the first move, to the absence of any objection to such settlement, so that the conciliator may have scope to induce the parties to attempt conciliation.

On ultimate analytical observation, reciprocity is the hallmark of the conciliation process. For healthy business relationship mutual understanding & to solve the dispute through settlementare the eventual qualities or eventual base. When the party is having a healthy business relationship, he is bound to succeed in conciliation. The need is therefore to develop a will to accommodate other party's genuine interest, a faith in the others objects & capacity to reason to evolve cultivates the wish to sit together & reciprocate & to solve out the difference amicably. Therefore it is always preferable to resolve the dispute by conciliation.

1. Difference between Arbitration and Conciliation?

For arbitration, the parties shall select arbitrators. The selected arbitrators then shall resolve the dispute and render an arbitration award which is final and binding. For conciliation, a third party shall play the role of a conciliator helping the parties to resolve the dispute through negotiation.

2. What is therole of conciliator?

The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

3. What is a conciliation Agreement?

conciliation agreement. A settlement or compromise agreement between a regulatory agency and an individual or entity charged with violating rules, regulations, or laws.

4. What is Administrative Assistance?

Section 68 of the Arbitration and Conciliation Act, facilitates administrative assistance for the conduct of conciliation proceedings. Accordingly, the parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.

5. How does Submission of Statement to Conciliator?

The conciliator may request each party to submit to him a brief written statement. The statement should describe the general nature of the dispute and the points at issue. Each party should send a copy of such statement to the other party. The conciliator may require each party to submit to him a further written statement of his position and the facts and grounds in its support. It may be supplemented by appropriate documents and evidence. The party should send the copy of such statements, documents and evidence to the other party. At any stage of the conciliation proceedings, the conciliator may request a party to submit to him any additional information which he may deem approp.

conciliation under Arbitration and Conciliation Act 1996.

Conciliation is one of the non binding procedures where an impartial third party, known as the conciliator, assist the parties to a dispute in reaching a mutually agreed settlement of the dispute. As per the Halsbury Laws of England, conciliation is a process of persuading parties to each an agreement. Because of its non judicial character, conciliation is considered to be fundamentally different from that of litigation. Generally Judges and Arbitrators decide the case in the form of a judgment or an award which is binding on the parties while in the procedure of the conciliation ,the conciliator who is often a government official gives its report in the form of recommendations which is made public.

DEFINITION AND MEANING OF CONCILIATION-

The simplest meaning of conciliation is the settlement of the disputes outside the court .It is a process by which the discussion between the parties are kept going through the participation of a conciliator. Conciliation is one of the non binding procedures where an impartial third party, known as the conciliator, assist the parties to a dispute in reaching a mutually agreed settlement of the dispute. As per the Halsbury Laws of England, conciliation is a process of persuading parties to each an agreement. Because of its non judicial character, conciliation is considered to be fundamentally different from that of litigation. Generally Judges and Arbitrators decide the case in the form of a judgment or an award which is binding on the parties while in the procedure of the conciliation ,the conciliator who is often a government official gives its report in the form of recommendations which is made public.

HISTORY AND EVOLUTION-

The history and evolution of ADR is visible from 12th century in China , England and America. And in the Indian perspective it has been seen that the practice of amicable resolution of the disputes can be caught from the historic times , when in the villages disputes were resolved between members of a particular relations or occupations or between members of the same family was in practice in the ancient times. In the villages still the panchayat decides approximately all the disputes between the people as in earlier times the disputes were resolved by the elders. The concept of Conciliation was introduced in the statute of Industrial Disputes Act, 1947. The Conciliation is generally conducted by an officer appointed by Government under Industrial Disputes Act, 1947. Industrial Disputes Act, 1947 provides provisions for the parties to settle disputes through Negotiation, Mediation and Conciliation, for example Section 12 , Section 18 , etc. Alternate Dispute Resolution plays a major role in the family disputes settlement. Section 5 of the Family Court Act, 1984 provides provisions for the association of social welfare organizations to hold Family Courts under control of government. Section 6 of the Act provide for appointment of permanent counselors to enforce settlement decisions in the family matters. Further Section 9 of the Act imposes an obligation on the court to make effort for the settlement before taking evidence in the case . In addition to all provisions referred above, Indian Contract Act, 1872 most importantly gives a mention about Arbitration Agreement as an exception to Section 28 that renders an agreement void if it restrains a legal proceeding. Alternate Dispute Resolution whether sorted for or not can be easily inferred from presence or absence of the ‘Arbitration clause'.

APPLICATION AND SCOPE-

Section 61 of the Arbitration and Conciliation Act of 1996 provides for the Application and Scope of Conciliation. Section 61 points out that the process of conciliation extends, in the first place, to disputes, whether contractual or not. But the disputes must arise out of the legal relationship. It means that the dispute must be such as to give one party the right to sue and to the other party the liability to be sued. The process of conciliation extends, in the second place, to all proceedings relating to it. But Part III of the Act does not apply to such disputes as cannot be submitted to conciliation by the virtue of any law for the time being in force.

Number and qualification of conciliators- Section 63 fixes the number of conciliators. There shall be one conciliator. But the parties may by their agreement provide for two or three conciliators. Where the number of conciliator is more than one ,they should as general rule act jointly.

APPOINTMENT OF CONCILIATORS-

Section 64 deals with the appointment of the conciliators.When the invitation to the conciliation is accepted by the other party, the parties have to agree on the composition of the conciliation tribunal. In the absence of any agreement to the contrary ,there shall be only one conciliator. The conciliation proceeding may be conducted by a sole conciliator to be

appointed with the concent of both the parties, failing to which the same may be conducted by two conciliators (maximum limit is three), then each party appoints own conciliator ,and the third conciliator is appointed unanimously by both the parties. The third conciliator so appointed shall be the presiding conciliator. The parties to the arbitration agreement instead of appointing the conciliator themselves may enlist the assistance of an institution or person of their choice for appointment of conciliators. But the institution or the person should keep in view during appointment that, the conciliator is independent and impartial.

PRINCIPLES

1) Independence and impartiality [Section 67(1)]-

The conciliator should be independent and impartial. He should assist the parties in an independent and impartial manner while he is attempting to reach an amicable settlement of their dispute.

2) Fairness and justice[Section 67(2)]-

The conciliator should be guided by the principles of fairness and justice. He should take into consideration ,among other things , the rights and obligations of the parties, the usages of the trade concerned ,and the circumstances surrounding the dispute ,including any previous business practices between the parties.

3) Confidentiality [Section 70]-

The conciliator and the parties are duly bound to keep confidential all matters relating to conciliation proceedings. Similarly when a party gives a information to the conciliator on the condition that it be kept confidential , the conciliator should not disclose that information to the other party.

4) Disclosure of the information[Section 70]-

When the conciliator receives a information about any fact relating to the dispute from a party , he should disclose the substance of that information to the other party.The purpose of this provision is to enable the other party to present an explaination which he might consider appropriate.

5) Co-operation of the parties with Conciliator [S. 71]-

The parties should in good faith cooperate with the conciliator. They should submit the written materials , provide evidence and attend meetings when the conciliator requests them for this purpose.

PROCEDURE OF CONCILIATION

1) Commencement of the conciliation proceedings [Section 62] -

The conciliation proceeding are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of the dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If the other party rejects the invitation, there will be no conciliation proceedings. If the party inviting conciliation does not receive a reply within thirty days of the date he sends the invitation or within such period of time as is specified in the invitation, he may elect to treat this as rejection of the invitation to conciliate. If he so elects he should inform the other party in writing accordingly.

2) Submission of Statement to Conciliator [Section 65] –

The conciliator may request each party to submit to him a brief written statement. The statement should describe the general nature of the dispute and the points at issue. Each party should send a copy of such statement to the other party. The conciliator may require each party to submit to hima further written statement of his position and the facts and grounds in its support. It may be supplemented by appropriate documents and evidence. The party should send the copy of such statements , documents and evidence to the other party. At any stage of the conciliation proceedings , the conciliator may request a party to submit to him any additional information which he may deem appropriate.

3) Conduct of Conciliation Proceedings[Section 69(1),67(3)] -

The conciliator may invite the parties to meet him. He may communicate with the parties orally or in writing. He may meet or communicate with the parties together or separately. In the conduct of the conciliation proceedings, the conciliator has some freedom. He may conduct them in such manner as he may consider appropriate. But he should take in account the circumstances of the case, the express wishes of the parties, a party's request to beheard orally and the need of speedy settlement of the dispute.

4) Administrative assistance [S. 68] -

Section 68 facilitates administrative assistance for the conduct of conciliation proceedings. Accordingly , the parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.

CASE LAWS RELATING TO CONCILIATION-

1. Haresh Dayaram Thakur v. State of Maharashtra and Ors. while dealing with the provisions of Sections 73 and 74 of the Abbitration and Conciliation Act of 1996 in paragraph 19 of the judgment as expressed thus the court held that-

"19. From the statutory provisions noted above the position is manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. For this purpose the conciliator is vested with wide powers to decide the procedure to be followed by him untrammeled by the procedural law like the Code of Civil Procedure or the Indian Evidence Act, 1872. When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that their exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. Under Sub- section (3) of Section 73 the settlement agreement signed by the parties is final and binding on the parties and persons claiming under them. It follows therefore that a successful conciliation proceedings comes to end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74".

2. In Mysore Cements Ltd. v. Svedala Barmac Ltd it was said that Section 73 of the Act speaks of Settlement Agreement. Sub-section (1) says that when it appears to the Conciliator that there exist elements of 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 observation. After receiving the observations of the parties, the Conciliator may reformulates the terms of a possible settlement in the light of such observations. In the present case, we do not find there any such formulation and reformulation by the Conciliator, under Sub- section (2), if the parties reach a settlement agreement of the dispute on the possible terms of settlement formulated, they may draw up and sign a written settlement agreement. As per Sub-section

(3) when the parties sign the Settlement Agreement, it shall be final and binding on the parties and persons claiming under them respectively. UnderSub- section (4), the Conciliator shall authenticate the Settlement Agreement and furnish a copy thereof to each of the parties. From the undisputed facts and looking to the records, it is clear that all the requirements of Section 73 are not complied with.

CONCLUSION-

The process of conciliation as an alternate dispute redressal mechanism is advantageous to the parties in the sense that it is cost effective and expeditious, it is simple,fast and convenient then the lengthy litigation procedure and it eliminates any scope of biasness and corruption. The parties who wish to settle their disputes they can be provided great intensive by the process of conciliation. In order to enable the conciliator to play his role effectively ,the parties should be brought together face to face at a common place where they can interact face to face and with the conciliator, separately or together without any distraction and with only a single aim to sincerely arrive at the settlement of the dispute. Conciliation is a boon and it is a better procedure to settle any dispute as in this process it is the parties who by themselves only come to the settlement of the dispute and the role of the conciliator is to bring parties together and to make a atmosphere where parties can themselves resolve their disputes. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement.

Section 61. Application and scope.

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

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

63. Number of conciliators.

(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

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

64. Appointment of conciliators.

(1) subject to sub- section (2),-

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

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

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

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

(a) a party may 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 mom 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.

Hailshree Saksena and Sidhartha Mohapatra, "Understanding Conciliation".Lawz ,Vol 2009 P 26.

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

Section 67(2)-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.

Section 70 Proviso.

Section 70- Disclosure of information. 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.

Section 71- Co- operation of parties with conciliator. 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.

Section 62- Commencement of conciliation proceedings.

(1) 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.

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

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

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

65. Submission of statements to conciliator.

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

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

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate. Explanation.- In this section and all the following sections of this Part, the term conciliator" applies to a sole conciliator, two or, three conciliators, as the case may be.

Section 69(1)- 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.

Section 67(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.

Section 76: Termination of conciliation proceedings.

The conciliation proceedings shall be terminated—

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

MODULE O4

Historical Background of Arbitration

Once human beings started to live and trade together as a community, various forms of adjudications begin to emerge. Why the concept of Arbitration emerged as an alternative dispute resolution? For answering this question one has to look back at the history of arbitration.

In India

The earliest evolution of arbitration in India can be traced back to “Brihadaranyaka Upanishad” under the Hindu Law. It provided for various types of arbitral bodies which consisted of three primary bodies namely:

The local courts

The people engaged in the same business or profession

Panchayats.

The members of the Panchayats known as panchas, were that times arbitrators, which used to deal with the disputes under a system.

However thereafter the first legislative council for British India was formed and India got its first enactment on Arbitration known as the ‘Indian Arbitration Act, 1899’ but the Act was applicable to only presidency towns i.e., Calcutta, Bombay, and Madras. This Act was fundamentally based on the British Arbitration Act, 1889.

Thereafter came the Arbitration Act, 1940 which applied to the whole of India including Pakistan and Baluchistan. However, post independence the same was modified via ordinance.

Due to various shortcomings in the 1940 Act like lack of provisions prohibiting an arbitrator from resigning any time during an arbitration proceeding, the rules providing for filing awards differed from one High Court to another, the act was replaced by the Arbitration and Conciliation Act, 1996 that ratified the problems in 1940 Act.

What is Arbitration

“Arbitration is a form of Alternative Dispute Resolution (ADR)”.

The concept of arbitration means resolution of disputes between the parties at the earliest point of time without getting into the procedural technicalities associated with the functioning of a civil court.

The dictionary meaning of Arbitration is “hearing and determining a dispute between the parties by a person or persons chosen by the parties”.

In an English judgement named Collins v. Collins, 1858 28 LJCh 184: 53 ER 916 the court gave a wide definition to the concept of Arbitration which reads as follows:”An arbitration is a reference to the decisions of one or more persons either with or without an umpire, a particular matter in difference between the parties”. It was further observed by the court that proceedings are structured for dispute resolution wherein executives of the parties to the dispute meets in presence of a neutral advisor and on hearing both the sides and considering the facts and merits of the dispute, an attempt is made for voluntary settlement.

Arbitration can be a voluntary one i.e., agreed between the parties or it can be ordered by the court.

Unlike litigation, arbitration proceeding takes place out of the court and the arbitrator’s decision is final and the courts rarely reexamine it.

There are several modes of dispute resolution outside the Judicial process. These modes are as follows:

Negotiation

Mediation

Conciliation

Arbitration

Mini Trial

But Arbitration is considered as an important Alternative Dispute Resolution mechanism and is been encouraged in India due to the high pendency of cases in the courts.

Some Important Terms in Arbitration

Arbitration Clause

An Arbitration clause is a section of the contract that defines the rights of the parties in the

case any dispute arises over the contractual obligation or any other matter related to such contract.

Generally, an arbitration clause contains that the parties will not sue each other in the court of law, if any dispute arises, instead they will resolve the dispute through arbitration.

Arbitration Tribunal

According to Section 2(1)(d) of the Arbitration and Conciliation Act, an Arbitration Tribunal means a sole arbitrator or a panel of arbitrators.

Thus from the interpretation of this definition, the parties are free to determine the number of arbitrators.

However, if the parties fails to determine the number of arbitrators, then in that case, the arbitration tribunal shall consist of a sole arbitrator.

Arbitration Award

An arbitration award is an award granted by the arbitrator in the proceeding before it. This award can be a money award and it can also be a non- financial award.

Principale Characteristics of Arbitration

Arbitration is consensual: An arbitral proceeding can only take place if both the parties to the disputes have agreed to it. Generally, parties insert an arbitration clause in the contract for future disputes arising from non- performance of contractual obligations. An already existing dispute can also be referred to arbitration if both the parties to the dispute agree to it (submission agreement).

Parties choose the Arbitrators: Under the Indian Arbitration Act parties are allowed to select their ary bitrator and they can also select a sole arbitrator together who will act as an umpire. However, the parties should always choose an arbitrator in an odd number.

Arbitration is neutral: Apart from selecting neutral persons as arbitrators, the parties can choose other important elements of proceeding such as the law applicable, language in which the proceedings should be conducted, the venue for arbitration proceedings. All these things ensure that no party enjoys a home court advantage.

Decision of the Arbitral Tribunal is final and easy to enforce: The decision or award given by the arbitral tribunal is final and binding on the parties and persons only after the expiry of the time limit prescribed under Section 33 and 34 of the Act.

When the award becomes final it shall be enforced under the Code of Civil Procedure, 1908, in the same manner, one enforces a decree passed by the court.

Advantages of Arbitration in India

Expertise in Technical matters: An arbitrator can easily deal with technical matters which is scientific in nature because generally arbitrators are appointed based on their expertise and skill in a particular field. Thus the disputes are resolved more effectively and efficiently.

The arbitral process is cost effective and less time consuming than the traditional way of dispute resolution in the court of law.

There is the convenience of the parties as they are able to decide on the language, venue and time of the proceedings.

Privacy and confidentiality of the parties are maintained as there is no unnecessary publicity of the dispute.

Arbitral proceeding is more flexible than the court proceeding as under the arbitral proceeding one does not have to follow the strict and rigid rules and regulation as that of the court. This is due to the reason that parties set the rules and regulations of the proceedings.

Conclusion

The growth of arbitration is taken as a healthy sign by many legal commentators as it eases the load on the constantly overloaded judicial system.

What are the types of arbitration available in India?

The Indian Arbitration and Conciliation Act, 1996 applies to both domestic arbitration in India and to international arbitration. Section 2(1)(f) of the Act defines "International Commercial Arbitration" as arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India where at least one of the parties is:

an individual who is a national of, or habitually resident in any country other than India; or a body corporate which is incorporated in any country other than India; or a company or an association or a body of individuals whose central management and control is exercised in any country other than India

India is a signatory to the New York convention, which facilitates the enforcement of international arbitral awards.

There are different categories of arbitrations namely:

Domestic Arbitration

The term “Domestic Arbitration” denotes arbitration which takes place in India, when the subject matter of the contract, the merits of the dispute and the procedure for arbitration are all governed by Indian law or when the cause of action for the dispute has arisen wholly in India or where the parties are otherwise subject to Indian jurisdiction.

International Arbitration

International Arbitration” has a foreign ingredient. Arbitration becomes “International” when at least one of the parties involved is resident or domiciled, outside India or the subject matter of the dispute is abroad. The law applicable to an arbitration proceedings may be the Indian law or a foreign law, depending on the terms of the contract in this regard and the rules of conflict of laws.

Foreign Arbitration

“Foreign arbitration” is an arbitration conducted in a place outside India, where the resulting award is sought to be enforced as a "foreign award".

Ad hoc Arbitration

Ad hoc arbitration” is arbitration agreed to and arranged by the parties themselves without recourse to an Institution. The proceedings are conducted by the arbitrator(s) as per the agreement between the 'parties' or with concurrence of the parties. It can be domestic, international or foreign arbitration.

Institutional Arbitration

Institutional arbitration” is arbitration conducted under the Rules laid down by an established arbitral organization. Such Rules are meant to supplement provisions of the Arbitration and Conciliation Act in matters of procedure and other matters the Act permits. The rules may provide for domestic arbitration or for international arbitration or for both and the disputes

dealt with may be either general in character or specific.

Specialized Arbitration

"Specialized arbitration" is arbitration conducted under the auspices of arbitral institutions which might have framed special rules to meet the specific requirements for the conduct of arbitration in respect of disputes of particular types, such as, disputes as to commodities, construction or specific areas of technology. Some trade associations concerned with specific commodities or Chambers of Commerce also specify that arbitration under their rules will be conducted only between members of that organisation.

Statutory Arbitration

“Statutory Arbitrations” are arbitrations conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts. There are about 24 such Central Acts. Among them are the Cantonments Act, 1924, the Indian Electricity Act, 1910, the Land Acquisition Act, 1894, the Railways Act, 1890 and the Forward Contracts Regulation Act, 1956. Many State Acts also provide for arbitration in respect of disputes covered by those Acts, including Acts relating to co-operative societies. The provisions of the Arbitration Act, 1940 generally apply to those arbitrations unless they are inconsistent with the particular provisions of those Acts, in which case the provisions of those Acts will apply (Sections 46 and 47, Arbitration Act, 1940).

ADR- Arbitration vs Conciliation vs Mediation And their Differences, Advantages

Introduction

Litigation refers to the proceedings initiated by one or more parties against one or more parties before a court of law for the enforcement of any legal right or obtaining compensation for some wrong. In criminal cases, generally, the government is the prosecuting party seeking to get the criminal punished in accordance with the prescribed law. Litigation is not only expensive and time- consuming but also emotionally draining and unpredictable.

In countries like India where legal battles stretch over several years taking up a lot of time, energy and money of the parties involved, alternative dispute resolution (ADR) has slowly

emerged as a preferred mode of resolving legal disputes in comparison to litigation. There are mainly three recognized modes of ADR namely- arbitration, conciliation, and mediation.

This article briefly discusses the concept of arbitration, conciliation and mediation, their advantages over litigation and their comparative advantages and differences with each other.

Arbitration

Arbitration is a form of dispute resolution where the parties avoid the traditional process of litigation and get their legal dispute resolved by a neutral third party called the arbitrator. Both sides may mutually appoint one person as arbitrator or may appoint one arbitrator each who then appoint another person as the third arbitrator. In India, arbitration is statutorily recognized and regulated by the Arbitration and Conciliation Act, 1996 (Arbitration Act). The decision given by the arbitrator is known as arbitration award which is made legally binding on the concerned parties by some statutory enactment such as, in case of India, the Arbitration Act.

Arbitration is commonly preferred in case of commercial disputes arising out of a contract in which the parties mutually incorporate an arbitration clause stating that any future disputes arising between the parties shall be settled through arbitration. The arbitration clause also specifies the manner of appointment of arbitrator, the place of arbitration and the language to be used in the arbitration proceedings.

The increasing popularity of arbitration is evident from the following advantages which it has over litigation:

arbitrators are generally appointed based on their knowledge and skill in a particular field so they have the necessary expertise required to adjudicate technical matters/issues arising between the parties which a judge presiding over a court of law may not always have;

arbitration is quicker and more cost effective than litigation;

arbitration takes into account the convenience of the parties who are free to choose the arbitrator and the venue and time of the arbitration proceedings;

confidentiality of the parties is maintained in arbitration proceedings by avoiding unnecessary publicity;

arbitration is more flexible in comparison to traditional courts as arbitrators are not bound by strict procedural rules and regulations which are applicable in court proceedings.

III. Mediation

Mediation is an out- of- court settlement process where a neutral third person, called the mediator, supervises and facilitates dialogue between the parties to help them arrive at a mutually acceptable solution to their dispute. Mediation may be voluntary or court ordered. Sometimes, during adjudication of a dispute, if the Indian courts find that the parties are willing to resolve the dispute by dialogue, they refer the parties to undergo mediation while putting the court proceedings on hold. Such mediation is conducted by mediators attached to the concerned court itself. If the parties reach a settlement during mediation, the dispute stands resolved in terms of such settlement putting the court proceedings to an end but if the mediation fails, the court resumes the adjudication of the dispute.

Mediation is a very informal process compared to arbitration and litigation where the parties themselves do the talking instead of their lawyers. Both sides present their case to the mediator who can then put the issues in a proper perspective and encourage parties to arrive at possible solutions while keeping the other side's interests in mind. The result of mediation proceedings may not always be binding upon the parties unless the mediation process was undergone pursuant to a court's direction. Mediation serves as an important tool for reduction of the huge backlog of cases pending before Indian courts.

Mediation offers the following advantages over litigation:

it offers a more relaxed and informal atmosphere to the parties where they can freely and confidentially present their position before the mediator;

mediation is more flexible as the parties can withdraw at any time from the mediation proceedings if they feel that they are not comfortable mediating further or if they do not seem to be able to reach a consensus with the other party;

mediation is much quicker than litigation as the parties may reach a settlement only within a few mediation sessions;

mediation is much more cost effective than litigation and economically fair as both parties equally share the mediation fee payable to the mediator;

mediation proceedings including court ordered mediations are not bound by strict rules and regulations which apply to court proceedings.

CONCILIATION

Conciliation is an out of court settlement process where the parties try to get the dispute settled through involvement of a neutral third party called the conciliator. Conciliation is a voluntary process whereby the conciliator assists the parties in negotiating and arriving at a mutually acceptable solution to their dispute. Both sides present their case to the conciliator, through written submissions or otherwise, who thereafter assists the parties in arriving at a settlement and towards this end, may make proposals for settlement of the dispute. If a settlement is reached, the conciliator gives his/her decision in terms of the settlement arrived at between the parties and the decision is not binding on the parties unless they voluntarily choose to abide by it. Conciliation is very similar to mediation.

In India, conciliation is statutorily recognized as a method of ADR under the Arbitration Act. Part III of the Act contains detailed provisions on the conduct of conciliatory proceedings between parties who have agreed upon to be governed by the Act in this regard. Section 67 of the Arbitration Act requires the conciliator chosen by the parties to "assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute". It also permits the conciliator to make written or oral proposals for settlement of the dispute at any stage of the conciliation proceedings.

Conciliation offers the same advantages over litigation which are associated with mediation.

Arbitration vs. Mediation

The similarities and differences between arbitration and mediation are as follows:

S.No. Arbitration Mediation

1) It can be voluntary or court ordered. Section 8 of the Arbitration Act allows Indian courts to refer disputes brought before them to arbitration if there is a valid agreement existing between the concerned parties to settle the dispute by arbitration. It can also be voluntary or court ordered.

2) It replaces court proceedings/trial as parties are precluded from approaching the courts if they have earlier agreed to resolve any disputes arising between them by arbitration In case of a court directed mediation, trial is only put on hold pending outcome of the mediation proceedings but is not replaced. In other cases, mediation replaces court

proceedings if the parties voluntarily choose to mediate before approaching a court of law

3) It may consist of one or more arbitrators It generally consists of only one mediator

4) Arbitrator's role is to render a decision on the dispute Mediator does not pass his/her own decision but only records the terms of settlement, if any, reached between the parties

5) Arbitration proceedings end when the arbitrator passes the arbitration award Mediation proceedings end when a settlement is reached or parties reach an impasse

In terms of comparative benefits, mediation appears to be a more favourable alternative than arbitration as it is more informal in nature and offers a more relaxed atmosphere to the parties in comparison to arbitration wherein the same hostility may be exhibited by both parties as in the case of litigation. Mediation is also much quicker than arbitration as parties may reach a settlement in few sessions of mediation whereas it often takes several hearings before the arbitrator is in a position to pass an arbitration award.

Since mediation is voluntary, the parties are more likely to abide by the settlement reached between them. On the other hand, in case of arbitration, the unsuccessful party is often unwilling to abide by the arbitration award and challenges the award before a court of law to get the award set aside. If the unsuccessful party does not comply with the arbitration award, the successful party has to initiate separate legal proceedings before a court of law to get the award enforced/executed. In such cases where the arbitration gives rise to litigation in form of an appeal/execution proceedings, the original purpose for choosing arbitration over litigation stands defeated.

Arbitration vs. Conciliation

The differences between arbitration and conciliation are as follows:

S.No. Arbitration Conciliation

1) Arbitration involves passing of a decision by the arbitrator. Conciliation involves resolution of disputes with the assistance of the conciliator who helps the parties reach a negotiated settlement.

2) A prior agreement between the parties to resort to arbitration is required to initiate arbitration proceedings No prior agreement to conciliate is required

3) An arbitration agreement may cover existing as well as future disputes A conciliation

process covers only existing disputes

In terms of comparative benefits, conciliation appears to be a more favourable alternative than arbitration for the same reasons as in case of choosing mediation over arbitration. It is more informal in nature and offers a more relaxed atmosphere to the parties in comparison to arbitration. While conciliation may require only a few sessions for the parties to reach a settlement, it often takes several hearings before the arbitrator is in a position to pass an arbitration award. Since conciliation, like mediation, is also voluntary, there are again increased chances that the parties shall abide by the settlement reached between them while in case of arbitration, the unsuccessful party often challenges the arbitration award giving rise to appellate proceedings before a court of law.

While arbitration is voluntary in the sense of making a choice to resort to arbitration instead of litigation, it is not voluntary in the real sense because the defaulting party often has to be compelled, by issuance of a notice or otherwise, to come before the arbitral tribunal to submit its reply to the allegations/claims raised by the claimant party. On the other hand, in conciliation, the parties willingly come to the table to discuss possibilities of settlement

VII. Mediation vs. Conciliation

While mediation and conciliation are quite similar and are generally considered to be synonymous, the differences between mediation and conciliation are as follows:

Mediation and Conciliation

1) Mediation is more formal than conciliation as it involves a structured process consisting of various stages namely, introduction, joint session and caucus. Conciliation does not usually follow any structured process and progresses like a traditional negotiation

2) Mediation is resorted to when a dispute has already arisen between the parties Conciliation is usually resorted to as a preventive step to prevent a substantial conflict from developing between the parties after a misunderstanding has arisen

3) Mediators may not have the power to suggest proposals for settlement and act as mere facilitators of dialogue between the parties The powers of a conciliator are wider than that of a mediator as they can suggest proposals for settlement which is permitted under section 67 of the Arbitration Act

In terms of comparative benefits, conciliation appears to be more beneficial than mediation because it can prove to be more fruitful if it is employed as a prevent measure to prevent small misunderstandings from developing into bigger substantial conflicts. In this sense, conciliation will always precede arbitration and mediation. Since mediation is resorted to only when disputes have already arisen, chances of a settlement being arrived at shall always be more in case of conciliation than mediation. Further, since conciliators are also allowed to suggest proposals for settlement unlike mediators, this is another reason why conciliation has a greater chance of producing favorable results compared to mediation. Considering that conciliation is resorted as a preventive measure, it is likely to require to involve a lesser number of sessions compared to mediation thereby being more cost-effective compared to mediation.

MODULE 05

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.

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

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

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

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

(5) 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 contractCONCILIATION ACT, 1996

7 Arbitration agreement. —

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Scope of Section 8 of the Arbitration and Conciliation Act, 1996. To refer or not to refer?

Section 8

The trend of arbitration has increased tremendously over the past decade, at both national and international level. Arbitration is a mechanism whereby which the parties enter into an agreement, either in advance or after the dispute crops up, to resolve their dispute privately and expeditiously. But the key to a successful arbitration is restricted interference by judicial courts in the arbitration proceedings. When it comes to judicial intervention in arbitration proceedings, the reputation of Indian judiciary is undistinguished which has time and again proved to be a major roadblock for many things including but not limited to, getting FDI, India being chosen as a suitable seat in International Commercial Arbitrations etc.

Keeping all that in mind, the parliament, enacted the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "act") by virtue of which, the parliament made sure that the unnecessary intervention of judicial authorities in arbitration proceedings be restricted at all times. The biggest proof of which lies in section 5 of the act.

"Section 5 of the Arbitration and Conciliation Act, 1996: Extent of judicial intervention — Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

This clearly stipulates that, irrespective what is mentioned in any other law for the time being in force, no judicial authority shall intervene in the matters governed by part 1 of the act, and the only exception to this is when the said intervention is provided by the part 1 of the act. Therefore, it becomes clear that the power of courts to intervene has been curtailed completely except for when it is expressly provided in the act.

Now, despite having such express exclusion of judicial intervention in the arbitration proceedings, the courts have time and again usurped more power than what is provided to them under the act which has led to unnecessary interference in the arbitration proceedings. One such example is of section 8.

Section 8 states as follows:

"8: Power to refer parties to arbitration where there is an arbitration agreement.—

Section 8 (1) –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."

Section 8 (2) –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:

Provided 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.

Section 8 (3) Notwithstanding that an application has been made under sub- section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Section 8 clearly stipulates that whenever a suit is filed in a civil court and the cause of action of said suit emanates from a contract in which the parties had voluntarily and willingly agreed to settle the dispute via arbitration, then, if the essentials of section 8 are met, it is the bounden duty of court to refer the parties to the arbitration.

The position of Section 8 of the act becomes further clear when it is compared with the Uncitral Model Law as section 8 of the act differs from Article 8 of model law. Article 8 enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 has made a departure which is indicative of the wide reach and ambit of the statutory mandate.

Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find a place in section 8. This distinction clearly dictates that the legislature

has intentionally endowed less power on judicial courts with respect to section 8 applications to make sure the arbitration process is facilitated and unnecessary intervention by courts be avoided.

Despite the position being this crystal clear, this section has been subjected to various interpretation by our courts time and again which has led to a lot of confusion.

There have been instances where Courts have adopted the literal interpretation route and hence construed the section in the way it is meant to be and has referred the matter to arbitration, when the essentials of section 8 are fulfilled, irrespective of the prevailing circumstances. Yet, there had been instances where the courts had completely neglected valid precedents and had tenuously interpreted the section in a manner it is not meant to be and has denied the reference thereby deviating from the valid line of precedents. Further, it is not just the deviation alone, in one matter the SC has actually gone to the extent whereby which it has laid down certain exceptions to this rule, which in my opinion is wholly erroneous. If there would have been some need for such exceptions, the legislature would have done that by adding such exceptions in the actitself.

Judicial Decisions

In Swiss Timing Ltd v. Commonwealth Games 2010 Organising Committee[1] , the court categorically, held that even if a criminal case is pending against a party, that in itself does not disentitle said party from taking recourse under section 8 and referred the dispute to arbitration.

The dispute arose because the respondent failed to make the payment towards petitioner's services after the commonwealth games. The petitioner tried to resolve the dispute in accordance with the procedure mentioned in clause 34 of their agreement but the respondent denied the payment and when petitioner filed petition under section 11 of the act, the respondent contended that the amount is not payable as the petitioner has violated clauses 29, 30 & 34 of the agreement as the petitioner has engaged in corrupt practices on the basis of complaint bearing, CC no. 22 of 2011 u/s 120B, 420, 427, 488 and 477 IPC R/w Ss 13(1)(d) and 13(2) of the PC Act, registered against it.

The main contention of the defendant was that since a complaint case has been filed against petitioner for corruption, hence the reference of dispute to arbitration is not tenable.

The court rejected this argument of the respondent and held that such allegations as are mentioned in the criminal case, are such which have to be proved in a proper forum on the basis of the oral and documentary evidence, produced by the parties, in support of their respective claims and existence of such allegations does not disentitle the petitioner to resort to the arbitration with respect to the dispute arose on the basis of the contract.

Further, the respondent tried to contend that since the allegations of corruption is levied on the petitioner, which is in contravention to the representations and warranties undertaken by the petitioner in the contract, the contract becomes void ab initio and hence the arbitration clause dies then and there.

To support this contention, the respondent placed reliance on N. Radhakrishnan V. Maestro Engineers[2] . In the said case, even after finding that the subject matter of the suit was within the ambit of arbitration, the court refused to refer the dispute to arbitration by holding that once the contract is held to be void ab initio, the arbitration clause dies then and there.

In response to this, the court held that, the law laid down in the Radhakrishnan runs counter to the ratio laid down in Hindustan Petroleum Corpn Ltd v. Pinkcity Midway Petroleums[3] , where the court in para 14 observed that if in an agreement the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to arbitrator. In the said case, the existence of arbitral clause was not denied by either of the parties and hence in accordance with the mandatory nature of section 8, the court referred the dispute to arbitration.

The court in the present case held that, the law laid down in Hindustan Petroleum is correct law on the point and not the ratio of Radhakrishnan's judgment. The court gave two reasons on the basis of which it invalidated Radhakrishnan's judgment i.e. (a) the judgment in Hindustan Petroleum though referred, was not distinguished nor followed and (b) provisions mentioned under section 16 of arbitration act were also not brought before the court.

Section 16 provides that Arbitral tribunal would be competent to rule on its own jurisdiction including ruling on any objection with regard to existence or validity of the arbitration agreement. The arbitration act emphasizes that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It further provides that the decision by the arbitral tribunal that the contract is null and void does not entail ipso jure that the arbitration clause is invalid. Hence Radhakrishnan's judgment does not lay down correct law and hence cannot be relied upon.

Further, the court mentioned another matter i.e. Today Homes & infra pvt ltd v. Ludhiana Improvement Trust[4] in which the Punjab & Haryana High Court refused to refer the dispute to arbitration under section 8 on the basis that underlying contract is void. An SLP was filed against this decision of the Punjab & Haryana High Court in the Supreme Court and the Court held that the Ld. Judge of High Court has erred in not referring the dispute to the arbitration by going into detailed scrutiny of the agreement as at the stage of section 8, the Judge is only required to decide such preliminary issues as of jurisdiction to entertain the application, existence of valid arbitration agreement, whether a live claim existed or not for the purpose of appointment of an arbitrator. By not referring the dispute to the arbitration, the judge has sought to do more than what is required under section 11(6) of the act without any evidence being adduced by the parties. The issue regarding the continued existence of the arbitration

agreement, notwithstanding the main agreement itself being declared void, was considered by the seven- judge bench in SBP & Co. and it was held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void.

In view of Today Homes & infra pvt ltd v. Ludhiana Improvement Trust, the court held that the submission of respondent that a criminal case is registered against respondent and hence court cannot refer it to the arbitration is wholly tenuous and not maintainable.

The court further held that, it is mandatory for the courts to refer disputes to arbitration, if agreement between the parties provides for reference to arbitration and the ground that a criminal case is registered with reference to the execution of the agreement is not an absolute bar to refer the disputes to arbitration.

The court held that there is no inherent risk of prejudice to any party in permitting arbitration to proceed simultaneously with criminal proceedings since findings recorded by arbitral tribunal are not binding in criminal proceedings and in an eventuality where ultimately the award is rendered by arbitral tribunal, and criminal proceedings result in conviction rendering the contract void, such conviction can be placed on record to resist the enforcement of the award. But if the criminal proceedings end up in acquittal and the dispute is not referred to arbitration, it would result in undesirable delay in the arbitration.

After Swiss Timing Ltd, in Sundaram Finance Ltd & Anr v. T. Thankam[6] , the question as to 'what should be the approach of a civil court when an application in terms of section 8 is filed before the said civil court' again reached Supreme Court.

The court, citing P. Anand Gajapathi Raju V. PVG Raju[7] and Hindustan Petroleum Corpn. Ltd v. Pink City Midway Petroleums (Supra), held that language of section 8 of the act is peremptory in nature and therefore in cases where arbitration clause is there in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore it is clear that if as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.

The court further referred to Magma Leasing and Finance Ltd. V. Potluri Madhavilata[8] in which it was again reiterated that no option is left to the court, once the prerequisites of section 8 of act are fully satisfied.

In the end, the court held that once an application in due compliance of section 8 is filed, the approach of civil court should be not to see whether the court has jurisdiction, but to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction is barred by virtue of procedure under a special statue, the civil court should first see whether there is an ouster

of its jurisdiction in terms of compliance with the procedure under the special statue.

The basic principle of our jurisprudence is generalia specialibus non derogant i.e. a general law should yield to the special law. In such a situation, the approach shall not be to see where there is still jurisdiction of civil court under general law but whether it has been ousted by the special law.

EXCEPTIONS

In A. Ayyasamy V. A. Paramasivam[9] , the court though accepting the fact that provision in section 8 is pre- emptive and mandatory in nature and hence the court should refer the dispute to arbitration when existence of arbitration clause is not disputed, went a step ahead and laid down certain exceptions to this rule. The court carved out exceptions on the basis of which a court can refuse to refer the dispute to arbitration even when essentials of section 8 are fulfilled.

These exceptions are

Where court finds very serious allegation of fraud that makes a virtual case of criminal offence, or

Where allegations of fraud are so complicated that it becomes essential that such complex issues can be decided only by civil court on appreciation of voluminous evidence, or

Where serious allegations of forgery/fabrication of documents in support of the plea of fraud, or

Where fraud is alleged against arbitration provision itself, or

Where fraud alleged permeates the entire contract, including agreement to arbitrate where fraud goes to the validity of contract itself or contract that contains arbitration clause or validity of arbitration clause itself.

The court carved out these exceptions after considering Radhakrishnan's judgment and in my opinion, this judgment is not correct in the eyes of law for two reasons.

One is presence of section 16 of the act, which enables arbitrators to decide on its own, the jurisdiction and on the question of validity of arbitration clause and second, the reliance placed on the ratio of Radhakrishnan's case is in itself not correct as in an earlier decision i.e. Sundaram Finance, the court categorically invalidated ratio of Radhakrishnan's judgment, hence placing reliance on said judgment even after it being invalidated by Supreme Court is incorrect.

In a recent judgment, Sasan Power Ltd. vs North American Coal Corporation India Private Ltd.[10] , the Supreme Court has held that:

During section 8 proceedings, the court cannot go into the question of validity of entire agreement and can only look at the question of validity of arbitration clause/agreement i.e. whether the arbitration clause/agreement is null and void, inoperative or incapable of being performed.

Arbitrability

Besides accepting objections like 'since the contract is void hence the arbitration clause is void as well', the courts have also started entertaining objections on the arbitrability of the dispute as well, at the stage of section 8 application. The worst part of entertaining such objections is, that the courts have even accepted such objections in certain cases and had denied reference in such cases. The courts should keep in mind that first of all, there is no such classification as arbitrable or non arbitrable disputes in the entire act and second, if based on the common law principle, the parties feel that their disputes fall in one such exception where it cannot be resolved via arbitration, then they can raise the said objection before arbitrator as the arbitrator, by virtue of section 16 of the act, is competent to rule on such objections. Therefore, the interference of courts especially on the basis of objections regarding dispute being arbitrable or not arbitrable, in my opinion, is totally unjustified.

Further Sec 8(3) stipulates that pending application under section 8 will not affect proceedings under section 11. According to this, there's always a risk of reference being denied under section 8 on the basis that the court agreed with the objection that the dispute in question is non arbitrable, and on the flip side, arbitrator gets appointed under section 11 of the act as the court deem it fit to refer the dispute to arbitration. Now, in such a case, what will be the fate of that case? Wouldn't it become travesty of justice then?

CONCLUSION

From above discussion, it can safely be deduced that after Sasan Power Ltd. judgment, the question of referring the dispute under section 8 is somewhat resolved for now but this conundrum of whether to refer or not to refer under section 8 still needs a proper ruling by a larger bench of SC on this issue so that the position will settle once and for all.

section 8 of the act be put to an end and the courts should work towards fostering the arbitration by referring the dispute to arbitration when all the essentials of section 8 are fulfilled instead of halting the entire arbitration process for no reason or on unjustified reasons like accepting objections on arbitrability of dispute or existence of other proceedings against one party etc.

MODULE 06

16. Competence of arbitral tribunal to rule on its jurisdiction.

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.

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 pica merely because that he has appointed, or participated in the appointment of, an arbitrator.

3. 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.

4. 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.

5. The arbitral tribunal shall decide on a plea referred to in sub section (2) or subsection (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with die arbitral proceedings and make an arbitral award.

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

Section 11 Appointment of arbitrators. —

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub- section (2), 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.

(4) If the appointment procedure in sub-section (3) applies and—

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

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (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, upon request of a party, by the Chief Justice or any person or institution designated by him.

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

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme 1 as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub- section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to ‘‘Chief Justice" in those sub-sections

shall be construed as a reference to the ‘‘Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub- sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub- section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(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.

(3) 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.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Sec 13. Challenge procedure.—

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen 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.

(3) Unless the arbitrator challenged under sub- section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) 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.

(5) Where an arbitral award is made under sub- section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub- section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

S.9. Interim measures, etc. by Court.— A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or a 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 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.

Arbitration was devised as a method to circumvent the ills plague the process of civil litigation in courts. In India it existed early on in the form of panchayats, which consisted of people who were asked to decide on matters brought before them, and their decisions were accepted by the parties to the dispute. The British, for the first time under their rule, made use of the principle of arbitration in the Bengal regulations of 1772 and 1780. And in 1813 provisions regarding arbitration of disputes were made applicable to immovable property. [1] And in 1940, the Arbitration Act was enacted, which repealed the Arbitration Act of 1899. These statutes aimed to institutionalise the process of arbitration in India. But over a period of time it was found that the Arbitration Act of 1940 was not enough to meet the needs of a fast-changing India. Therefore in 1996 it was replaced by the Arbitration and Conciliation Act.

The Arbitration and Conciliation Act, 1996 provides the parties abundant freedom in matters such as the matter of choosing the place of arbitration, fixing the number of arbitrators, appointment of arbitrators etc. They are even free to determine the matters which they want to submit to the arbitral tribunal formed by their choice. But sometimes a problem whether the Arbitral tribunal has jurisdiction, may arise. One of the parties may claim that the Arbitral Tribunal has no jurisdiction to decide the dispute between them. In fact this happened often under the old Arbitration Act, 1940 where the mere allegation of the invalidity of the main

contract would provide jurisdiction to the courts to decide whether a valid arbitration agreement existed between the parties to the dispute. And this delayed the process of arbitration a lot, thus defeating the purpose of arbitration [2] . Now, under the Arbitration and Conciliation Act, 1996 power has been given to the Arbitral Tribunal under Section 16 (1) to rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

But does the Arbitral Tribunal have the competence to make a binding decision on its own jurisdiction, including the decision ruling on any objections with respect to the existence or validity of an arbitration agreement? Will the Arbitral Tribunal lose jurisdiction if the contract in which the arbitration agreement (clause) is inserted, is declared void? It is the answers to these questions that are sought to be found out.

NATURE AND SCOPE:

The researcher analyses whether the Arbitral tribunal has the competence to decide on its own jurisdiction and whether the Arbitral tribunal will lose jurisdiction if the contract in which the arbitration agreement or clause is inserted is declared void.

COMPETENCE OF ARBITRAL TRIBUNAL TO MAKE A BINDING DECISION ON ITS OWN JURISDICTION

There was no provision under the Arbitration Act of 1940 which allowed the Arbitral Tribunal to make a decision on its own jurisdiction and it was the job of the court to decide on the jurisdiction of the arbitral tribunal. But under Section 16 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal has been granted the power to make a ruling on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation Act states that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement.

Section 16 of the Arbitration and Conciliation Act incorporates the principle of competence-competence. It has two aspects: first, that the tribunal may decide on its jurisdiction without support from the courts and secondly, that the courts are prevented from determining this issue before the tribunal has made a determination on this issue. [3] But does this determination by the Arbitral Tribunal have a binding effect? Can it not be challenged in courts?
In the case of Union of India vs. M/s. East Coast Boat Builders & Engineers Ltd. [4] it was stated:

“From the scheme of the Act it is apparent that the legislature did not provide appeal against the order under section 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case, the

arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any court in their supervisory role."

In the case of Nav Sansad Vihar Coop. Group Housing Society Ltd. (Regd.) vs. Ram Sharma and Associates [5] it was stated that if a plea is rejected by the Arbitral Tribunal under section 16(5) of the Arbitration and Conciliation Act the arbitral proceedings shall continue, an award shall be given and the aggrieved party shall have to wait till the giving out of the award and there is no separate remedy against such order.

But under section 37(2) of the Arbitration and Conciliation Act a decision of the tribunal accepting the plea that it does not have jurisdiction or is exceeding its scope of authority is appealable. In the case of Pharmaceutical Products of India Ltd. vs. Tata Finance Ltd. it was stated:

"Where the Arbitral Tribunal decides to reject the plea regarding its jurisdiction, sub- section (5) clearly empowers the Tribunal to continue with the arbitral proceedings and make an arbitral award. Sub- section (5) provides for the manner in which such an arbitral award may be challenged. It provides that such an award can only be challenged in accordance with section 34. On the other hand, if the Arbitral Tribunal decides to accept the plea that it has no jurisdiction, then such an order is appealable under section 37(2) of the Act… ."

Thus we see that when the Arbitral Tribunal decides to reject a plea regarding its jurisdiction then the order made regarding its jurisdiction is not appealable but when the Arbitral tribunal decides to accept the plea that it has no jurisdiction then such an order is appealable under section 37(2) of the Arbitration and Conciliation Act.

JURISDICTION OF ARBITRAL TRIBUNAL WHEN CONTRACT CONTAINING ARBITRATION CLAUSE DECLARED VOID

There may be instances when the arbitration agreement may not be made as a separate agreement. Instead, it may be embedded, or inserted, as a clause, in the contract between the parties. And it may happen that the agreement or the contract between the parties is declared void or illegal. What happens to the agreement in such cases? Will the arbitration clause in such cases become void?

In the case of Jawaharlal Burman vs. Union of India [7] it was stated:

"It is, therefore, theoretically possible, that a contract may come to an end and the arbitration contract may not. It is also theoretically possible that the arbitration agreement may be void and yet the contact may be valid; and in that sense there is a distinction between the arbitration agreement and the contract of which it forms a part; but… in the present case, the challenge to the contract itself involves a challenge to the arbitration agreement; if there is a concluded contract the arbitration agreement is valid. If there is not a concluded contract the arbitration agreement is invalid… indeed, we apprehend that in a very large majority of cases where the arbitration agreement is a part of the main contract itself, challenge to the existence or validity of one would mean a challenge to the existence or validity of the other."

Then in the case of Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Ltd. [8] it was stated:

"A dispute as to the validity of a contract could be the subject- matter of an agreement of arbitration in the same manner as a dispute relating to a claim made under the contract. But such an agreement would be effective and operative only when it is separate from and independent of the contract which is impugned as illegal. Where, however, it is a term of the very contract whose validity is in question, it has, as held by us in Khardah Co. Ltd. case, no existence apart from the impugned contract and must perish with it."

In the case of Jaikishan Dass Mull vs. Luchhiminarain Kanoria & Co. [9] it was stated by the court:

"Now there can be no doubt that if a contract is illegal and void, an arbitration clause, which is one of the terms thereof, must also perish along with it. As pointed out by Viscount Simon, L.C. in Heyman vs. Darwins Ltd. [10] "… if one party to the alleged contract is contending that it is void ab initio, the arbitration clause cannot operate, for on this view the clause itself is void". The arbitration clause being an integral part of the contract cannot stand, if the contract itself is held to be illegal."

But the position has changed now. The Arbitration and Conciliation Act was enacted in 1996. And Section 16 (1) of this Act states that the arbitration clause if inserted in a contract shall be considered to be an independent from the rest of the contract and a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

In the case of Olympus Superstructures vs. Meena Vijay Khaitan [11] it was stated:

"It will be noticed that under the Act of 1996 the arbitral tribunal is now invested with power under sub- section (1) of section 16 to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement and for that purpose, the arbitration clause which forms part of the contract and any decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from clause (b) of section 16(1) which states that a decision by the arbitral tribunal that the main contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

And in the case of National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd. [12] it was stated that a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Thus we see that though the invalidity of the main clause affected the validity of the arbitration clause inserted in it earlier, now the law has changed after insertion of Section 16(1)

into the Arbitration and Conciliation Act, 1996. And now the invalidity of the main contract does not result in the invalidity of the arbitration clause inserted in it, ipso jure because of the application of the doctrine of separability, which results in the arbitration clause being treated as independent from the main contract.

LOSS OF COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS OWN JURISDICTION

There may be certain instances when the Arbitral Tribunal may lose the competence to rule on its jurisdiction.

Section 11(6) of the Arbitration and Conciliation Act states that a party may request the Chief Justice or his designate to take required steps when under an appointment procedure agreed to by the parties, one of them fails to act as required under the procedure, or the parties or the two arbitrators fail to reach an agreement expected of them under the procedure, or a person or institution fails to perform a function entrusted to him under such procedure. And section 11(7) states that a decision taken by the Chief justice or his designate under section 11(4), section 11(5) or section 11(6) shall be final. Which means that the arbitral tribunal cannot look into the question of its own jurisdiction when the Chief Justice has looked into it earlier.

In the case of Konkan Railway Corporation Ltd. vs. Rani Construction Pvt. Ltd. [13] it was stated by the court that the constitution of the Arbitral tribunal by the Chief Justice may be challenged before the Arbitral Tribunal on the ground of being in violation of the Act. It was observed by the court:

“It might also be that in a given case the Chief Justice or his designate may have nominated the arbitrator though the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction.”

But in the case of SBP and Co. vs. Patel Engineering Ltd. [14] it was stated that the Arbitral tribunal could not rule on its own jurisdiction once it had been appointed by the Chief Justice. It was stated:

“The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise

of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the decision of the Chief Justice, the Arbitral tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause.

Section 16 cannot be held to empower the Arbitral tribunal to ignore the decision given by the judicial authority or the Chief justice before the reference to it was made. The competence to decide does not enable the Arbitral tribunal to get over the finality conferred to an order passed prior to its entering upon the reference by the very statute that creates it."

This case overruled the judgment given in the case of Konkan Railway Corporation Ltd. vs. Rani Construction Pvt. Ltd [15] .

Thus we see that if the Chief Justice or his designate has looked into the existence of the arbitration clause and on its jurisdiction then the Arbitral Tribunal cannot look into the question of its jurisdiction. It would in such a case be barred from looking into the matter of its jurisdiction.

CONCLUSION:

The decision of the Arbitral tribunal rejecting a plea regarding its jurisdiction is not appealable but its decision regarding acceptance of plea about having no jurisdiction is appealable. And the invalidity of the main contract no longer affects the arbitration clause which is considered from the main contract. And when the Chief Justice has already looked into the question of jurisdiction the Arbitral Tribunal cannot look into its jurisdiction once again.

Setion 17 The Arbitration and Conciliation Act, 1996 ("the Act") is an imperfect legislation that has required a few illuminations from time to time to make the alternate dispute resolution ("ADR") process laid- back and interference- free. One such corrected provision is present under § 17 ("the section") that gives an arbitral tribunal the power to issue interim measures at the request of either parties. A similar right is available under § 9 of the Act where the parties can approach any Court for issuing interim orders. Now, parties can apply under either of the sections subject, however, to the rule laid down in § 9 (3). The rule prevents courts to entertain any such requests if an arbitral tribunal has been constituted unless the remedy under the section will be rendered efficacious.[2]

"17. Interim measures ordered by arbitral tribunal — (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject - matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub- section (1)."

It was certainly a development from the 1940 Act[3] where no such power was conferred on the arbitral tribunal. Sub- section (1) above indicates that the parties may by agreement

exclude the exercise of such a power thereby encouraging the autonomous nature of ADRs. However, even this provision had its shortcomings. The power was limited to the extent of reference to the arbitration agreement.[4] Incidentally, the section does not provide for any means of enforceability in the manner a court's orders are enforced.[5]

When the position was challenged, the High Court of Delhi drew attention towards § 27 (5) which clearly lays days down that any person in contempt of the arbitral tribunal during the conduct of the proceedings shall be liable to punishment from court.[6] However, if the arbitral tribunal applies to the court for contempt of its interim orders, only then will the court be able to proceed further which in due course defeats the whole purpose of ADRs. The arbitral tribunals don't have powers to enforce their interim orders on their own accord and issuance of contempt proceedings by way of application to a court seemed like a long, unnecessary and cumbersome process to put the parties through.

After the Law Commission's 246th report[7] , a need was felt to back up orders, issued under the section, by enforcement provisions. Thereafter, the section was amended accordingly –

"17. Interim measures ordered by arbitral tribunal — (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal—

for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

for an interim measure of protection in respect of any of the following matters, namely—

the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

securing the amount in dispute in the arbitration;

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;

interim injunction or the appointment of a receiver;

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.

(2) Subject to any orders passed in an appeal under Section 37, 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 (5 of 1908), in the same manner

as if it were an order of the court."

In Justice Nariman's words, section 17(2) was introduced as a complete solution to the problem.[8] Even after the amendment came into effect, certain clarifications were required to understand its practicability. Various judicial decisions have since then been announced, some of which are reiterated as follows:

Non-adherence of orders issued under the section can lead to contempt of orders and the Tribunals do not have to approach the High Court anymore for enforcing its orders.[9] Therefore, § 27(5) has now been rendered affectless and the ADR process has become a tad bit more self-sufficient.

The High Court of Kerala appropriated a detailed analysis of the term enforcement as used under the Act in the case of Pradeep K.N. vs. Station House Officer[10]. It discussed how "enforcement" is different from "execution" and the former must be enforced in terms of § 94[11] of CPC when it comes to interim orders of the tribunal. Only awards under § 36 require execution through proper procedure under CPC. The decision was relied on in the case of Sakthi Finance Ltd. vs.Ansu K.H..however, here the interim order was held to be vague as no specific time period was provided by the tribunal to deposit the security amount in question. The order was unenforceable. This means that even arbitral tribunals must pass specific orders so as to be enforced.

Further, in the case of Sundaram Finance Ltd. vs. P. Sakthivel the High Court of Madras has laid down that any interim order for attachment of property delivered by an arbitral tribunal should be read with § 94 and follow the procedure under § 136. of the CPC, and as such "any property" even if it is not the subject matter of the arbitration can be attached. This puts arbitral tribunals at par with courts. Following on these lines, the Supreme Court confirmed that tribunals do not have power to affect the rights and remedies of third parties.

In Lanco Infratech Ltd. vs. Hindustan Construction Company Ltd. it was held that the tribunal erred in passing interim orders based on substantive claims which are speculative in nature. Only losses which are quantified are under the jurisdiction of § 17. Further, even if the section puts an arbitral tribunal at par with courts, it still does not give it power to appoint the High Court's Receiver for carrying out interim orders.

The amendment has achieved part of the purpose of making the Act simple, less technical and more responsible towards the realities of the situation, but unnecessary litigation by parties in order to delay the process has resulted in a back log of cases that remain pending in courts throughout the country. Parties and even advocates need to understand and consider arbitration as serious as any other judicial proceeding.

They tend to approach the court at every step of the proceeding, starting right from referring the dispute to arbitration. If India were to develop as the world center for arbitration, such inadequacies need to be sorted with due regard to time and costs involved. Minimum

interference by courts is the primary concern to a well developed and robust arbitration proceeding in the country.

MODULE O7

Provisions under sections 18 to 27 of Act.

Equal treatment of parties

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

Determination of rules of procedure—

The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

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.

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—

The parties are free to agree on the place of arbitration.

Failing any agreement referred to in sub- section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, 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.

Commencement of arbitral proceedings—

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—

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

Failing any agreement referred to in sub- section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

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.

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—

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.

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.

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.

Hearings and written proceedings—

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.

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.

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—

Unless otherwise agreed by the parties, where, without showing sufficient cause,—

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;

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 allegations by the claimant;

a party fails to appear at 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.

Expert appointment by arbitral tribunal—

Unless otherwise agreed by the parties, the arbitral tribunal may—

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

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.

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

Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

Court assistance in taking evidence—

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

The application shall specify—

the names and addresses of the parties and the arbitrators;

the general nature of the claim and the relief sought;

the evidence to be obtained, in particular,—

the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

the description of any document to be produced or property to be inspected.

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.

The court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

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.

Making of arbitral award & termination of proceeding

Rules applicable to substance of dispute –Section 28 –

Where the place of arbitration is situate in India,-

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;

in international commercial arbitration,-

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;

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 die 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.

The arbitral tribunal shall decide ex aequo et bono or as amiable compositor only if the parties have expressly authorised it to do so.

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

RULES APPLICABLE TO SUBSTANCE OF DISPUTE—

Where the place of arbitration is situate in India,—

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; in international commercial arbitration,—

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; 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;

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

The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Decision making by panel of arbitrators—

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.

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.

Settlement—

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.

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.

An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Form and contents of arbitral award—

An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

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.

The arbitral award shall state the reasons upon which it is based, unless—

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

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

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.

After the arbitral award is made, a signed copy shall be delivered to each party.

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.

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.

A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

Unless otherwise agreed by the parties,—

the costs of an arbitration shall be fixed by the arbitral tribunal;

the arbitral tribunal shall specify—

the party entitled to costs,

the party who shall pay the costs,

the amount of costs or method of determining that amount, and

the manner in which the costs shall be paid.

Explanation— For the purpose of clause (a), “costs” means reasonable costs relating to—

the fees and expenses of the arbitrators and witnesses,

legal fees and expenses,

any administration fees of the institution supervising the arbitration, and

any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

Termination of proceedings—

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

The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

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,

the parties agree on the termination of the proceedings, or

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

Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

Correction and interpretation of award; additional award—

Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

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;

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

If the arbitral tribunal considers the request 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.

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.

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 made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

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 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

32. Termination of proceedings.—

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

(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 reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal

shall terminate with the termination of the arbitral proceedings.

I34 Application for setting aside arbitral award. —

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

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof 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. — Without prejudice to the generality of sub- clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been

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

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

36. Enforcement.— Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

MODULE 08

ENFORCEMENT OF FOREIGN AWARDS

There are two avenues available for the enforcement of foreign awards in India, viz., the New York Convention and the Geneva Convention, as the case may be

Enforcement under the New York Convention

Sections 44 to 52 of the Arbitration and Conciliation (Amendment) Act, 2015 deals with foreign awards passed under the New York Convention.

The New York Convention defines “foreign award” as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

From the abovementioned conditions, it is clear that there are two pre- requisites for enforcement of foreign awards under the New York Convention. These are:

The country must be a signatory to the New York Convention.

The award shall be made in the territory of another contracting state which is a reciprocating

territory and notified as such by the Central Government.

Section 47 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court (a) original award or a duly authenticated copy thereof; (b) original arbitration agreement or a duly certified copy thereof; and (c) any evidence required to establish that the award is a foreign award. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court.

Once an application for enforcement of a foreign award is made, the other party has the opportunity to file an objection against enforcement on the grounds recognized under Section 48 of the Act. These grounds include:

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

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

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

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

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.

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

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

44. Definition.— In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

53. Interpretation.— In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.