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Paper IL-1001

Alternative Dispute Resolution

Unit I

Objectives: This course explores the basic components of Arbitration and Conciliation Act of 1996 . The main object of this Act is to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation and to minimise the supervisory role of courts in the arbitral process.

Unit-I

- a. ADR: Concept and Need
- b. Negotiation: concept and techniques, collaborative practices
- c. Conciliation: Relevant Sections of Arbitration and Conciliation Act of 1996

Course Title: Alternative Dispute Resolution

Course Code: IL-1001

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Unit I

A--- ADR : Concept and Need

INTRODUCTION

ADR or Alternate Dispute Resolution is an attempt to devise a machinery which should be capable of providing an alternative methods of resolving disputes. ADR is not an alternative to the court system but only a supplement. Human conflicts are inevitable disputes equally are inevitable. It is difficult to imagine a human society without conflict of interests. Disputes must be resolved at minimum possible cost both in terms of money and time. According to official report of the year 2000 there is a pendency of over two core cases in our district courts. Naturally litigants have to face so much loss of time and money that at long lost when a relief is obtained it may not be worth the cost. Thus there was search for alternatives to the conventional court system. A large number of quasi-judicial and administrative tribunals have been created for quicker reliefs. All these tribunals and forums are in a way an alternative methods of dispute redressal. But even these tribunals and forums have become overcrowded with the result they are not able to provide relief within good time.

ADR is a technique of dispute resolution through the intervention of a third party .It is also described as a mediation though mediation is one of the modes of ADR. The method is neither that of litigation nor that of arbitration. ADR flourishes because it avoids rigidity and inflexibility which is inevitable in the litigation process apart from high lawyer and court fee and long delays. ADR aims at providing a remedy which is most appropriate in the circumstances of the case. This makes ADR a viable substitution for Arbitration or litigation.

HISTORICAL BACKGROUND

In *Guru Nanak Foundation V. Ratten Singh and Sons* , (1981) 4 SCC 634 Supreme court observed that 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 them to the Arbitration Act of 1940. The movement towards ADR was endorsed by a meeting of Chief Ministers and Chief Justice held in Dec.1993. The meeting noted that the courts were not in a position to undertake the entire burden of administration of justice and that number of disputes are being capable of disposal by alternative methods such as Mediation, Arbitration, Conciliation and Negotiations.

From the time of inauguration of the International Centre for ADR (ICADR) one may get an impression that it is a recent concept. Actually Arbitration, Conciliation and Mediation have long tradition in India of the encouragement of disputes resolution outside the formal legal system. Disputes were decided by the intervention of elders or assemblies of learned men and other such bodies. Naya panchayats were at the grass root level even before the advent of britishers. The ADR was started in many societies of the world in 12th century in China, England and America. The business world has rightly recognized the advantages that the ADR in one form or other is a right solution. It is felt that it is less costly and more conducive to the preservation of business relationships which is of vital importance in business world. The use of ADR has grown tremendously in the international business world because of certain factors like tremendous expansion of international commerce and recognition of global economy. It has also become a common provision in United States Trade Treaties and United States is the strongest supporter of International Commercial Arbitration. In this background the necessity of setting up the international centre for ADR though, was felt for quite sometime came to be true by the inauguration of the international center for India. The Govt. of India introduced the Arbitration and Conciliation Bill 1995 in Parliament. The bill is very comprehensive and has been largely modeled on United Nations Commission on International Trade Law. It provides for only two occasions when the parties can approach the court namely:

1-For seeking interim measures,

2-For determining the question of termination of mandate of an arbitrator.

The International Centre of ADR is a unique centre in this country which makes a provision for promoting teaching and research in the field of ADR and

also for offering ADR services not only in India but also to parties all over the world. The ADR covers all disputes, including commercial, civil, labour, and family disputes in which parties are entitled to conclude a settlement and to be settled by ADR procedure. The international centre is intended to spread ADR concept effectively throughout the country. The main objectives of the centre are:

1-To propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR.

2-To provide facilities and administrative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings.

3-To support conciliators, mediators, arbitrators when required by the parties

4-To develop infra structure for education ,research and training in the field of ADR

5-To impart training in ADR.

LEGISLATIVE RECOGNITION OF ADR

ADR has received parliamentary recognition and support. The legal service authorities Act 1987 brought about the establishment of lok- Adalat system for settlement of disputes quickly and cheaply. Sec 30 of the Arbitration and Conciliation Act 1996 encourages arbitrators, with the agreement of the parties to use Mediation, Conciliation or other procedures at any time during arbitration proceedings to encourage settlement. Further C.P.C Amendment Act 1999 carries Sec. 89 which is designed to enable the courts to bring about settlement of disputes outside the court. Sec. 89 deals with settlement of disputes outside the court this section provides:-

1 Where it appears to the court that there exist elements of settlement which may be acceptable to the parties the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties the court may reformulate the terms of a possible settlement and refer the same for-

- a) Arbitration, Conciliation, Judicial settlement including settlement through lok Adalat or Mediation

2 Where the dispute has been referred-

- a. For Arbitration or Conciliation the provisions of the Arbitration and Conciliation Act 1996 shall apply
- b. To lok Adalat, the court shall refer the same to the lok adalat in accordance with the provisions of sub-sec (1) of Sec. 20 of the Legal Service Authority Act 1987
- c. For Judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a lok Adalat.
- d. For Mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. Thus this section has been introduced for the court to settle the dispute outside the court. thus alternative techniques are Arbitration, Conciliation, Mediation, and Judicial settlement (lok Adalat)

Where the parties fail to get their disputes settled through any of the alternative dispute system the suit would come back to proceed further in the court in which it was filed.

The rules inserted in order x by Amendment Act of 1999-

1-A -After recording the administrations the court shall direct the parties to suit to Opt the mode of settlement outside the court the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1-B- Where the suit is referred under rule 1-A the parties shall appear before such forum or authority for conciliation of the suit.

1-C –Where a suit is referred under rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper then it shall refer the matter again to the court on the date fixed by it.

CONSTITUTIONAL BACKGROUND OF ADR

It is settled law that free legal aid to the indigent persons who cannot defend themselves in a court of law is a constitutional mandate under Article 39-A and 21 of the Indian Constitution. The right to life is guaranteed by Article 21 of the Indian constitution. The law has to help the poor who do not have means i.e, economic means to fight their causes. The constitutional mandate. The

constitutional mandate rescue operation began with Justice V.R Krishna Iyer and Justice P.N Bhagwati's Committees Report, weaker sections thus became enable to approach law courts, right from Munsif courts to the Supreme court. based on this states adopted Lok Adalats and legal aid camps, family courts ,village courts, mediation centers, commercial arbitration, women s centers, consumer protection forums etc which are various facets of effective ADR.

JUSTICE MALLIMATH COMMITTEE REPORT

This committee agreeing with the law commission recommendations that conciliation courts should be established all over the country with power authority and jurisdiction to initiate conciliation proceedings. The conciliation procedure should also be made applicable to the motor accident claims tribunal.

OTHER FORMS OF ADR

1. Mini Lok Adalat—Legal Aid Camps or Lok Adalats at Sub District level and in villages are like forums function in rural areas, especially to cater to rural and tribal people completely. Those who participate in Mini Lok Adalats are local advocates two or three and officials and social workers.
2. Village Courts—Village Courts Act like village Panchayats consists of 5 members, local residents without legal qualifications act as members of village courts. They follow principles of natural justice. lawyers cannot participate in it.
3. Mediation centers—First mediation centers were established in 1983 in Tamil Nadu in rural areas where there is no court. Consists of lawyer and social workers. If settlement fails under Tamil Nadu legal aid and advice boards parties are provided legal aid to go to law courts.
4. Centers for Women—To give a special status to women and their exclusive problems Tamil Nadu state gave thrust and expansion to women centers. Their role is to deal with matrimonial problems
5. The Family Courts Act 1984—It was enacted to provide establishment of family courts to promote conciliation and speedy settlement in marriage and family cases like conjugal rights restitution, decree of nullity ,judicial separation and dissolution of marriages.

B---NEGOCIATION: Concept and Techniques ,Collaborative Practices

Negotiation is a process where parties to a dispute can start process of negotiation through one or two mediators to find mutual solution of the problem. Law has encouraged this process .There are provisions in CPC. where courts are directed to provide facilities for bringing about compromise settlement. The compromise agreement is submitted for approval to the court. If court approves the compromise, a consent decree is passes. It has binding effect upon the parties. It constitutes res-judicata.The counsels of the parties play the role of mediators. For protection purposes, Sec.23 of the Evidence Act 1872 provides protection against disclosure of information submitted by parties to each other such communication becomes confidential. Any disclosure would be breach of confidence and is actionable. The Indian contract Act 1872 also contains provisions for encouraging mutual settlement through the process described as accord and satisfaction. The liability arising out of breach of contract may be discharged by accord and satisfaction. In Union of India V. Kishori Lal .Court held that the accord is an agreement made after breach where by some consideration other than his legal remedy is to be accepted by the party not in fault followed by performance of substituted consideration. The principle of accord and satisfaction was explained in a decision of privy council in Saminathan Chetty V. Palaniappa Chetty, that receipt given by appellants and accepted by the respondents and acted upon by both proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the receipt. It is example of accord and satisfaction .No matter what were the respective rights of parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such accord and satisfaction takes place the prior rights of parties are extinguished by the new rights and the rights of all the parties are fully represented by it.

Sec.62 and Sec.63 enable parties to arrive at any alternative solution in respect of bargain they have made. Under the doctrine of 'consideration'', decision decisions have been delivered by the courts to the effect that compromise of a pending suit is a good consideration. In Com. Wealth Tax V. Vijayaba. In this case two brothers were quarrelling over the division of their late fathers property. The mother persuaded the junior to give up the struggle on her promise if the elder brother did not provide him a sum of money she would subsidies him. The promise was held to be enforceable. Similarly a compromise about a court decree was that if the tenant would pay all the money found due

against him by certain date. The land lord would not enforce the decree of dispossession. This was held to be enforceable.

The Arbitration and Conciliation Act 1996 contains Sec.30 which deals with settlement. Sec. 30 cl(1)- provides that arbitral Tribunal may encourage settlement of dispute with the agreement of parties. The arbitration tribunal may use mediation, conciliation or other procedures at any time during arbitral proceedings to encourage settlement.

Cl(2)-If during arbitral proceedings the parties settle the dispute the arbitral Tribunal shall terminate the proceedings if requested by the parties and not objected by the arbitral tribunal, record the settlement in the form of arbitral award on agreed terms.

Cl3- An arbitral award on agreed terms shall be made in accordance with Sec.31 and shall state it is an arbitral award.

Cl 4- An arbitral award on agreed terms shall have the same status and effect as any other award on the substance of the dispute.

C--- CONCILIATION: RELEVANT SECTIONS OF ARBITRATION AND CONCILIATION ACT 1996

Part III of the Arbitration and Conciliation Act 1996 deals with conciliation. Conciliation means settling of disputes without litigation. It is a process by which discussion between parties is kept going through the participation of a conciliator. The main difference between arbitration and conciliation is that in arbitration proceedings the award is the decision of arbitral tribunal while in case of conciliation the decision is that of parties arrived at with the assistance of the conciliator.

Application and scope (Sec.61). Conciliation means that dispute must be such as to give one party the right to sue and other party the liability to be sued. The process of conciliation extends in the second place, to all proceedings relating to it, but part II of the Act shall not apply where due to any law such dispute can not be submitted to conciliation. For instance part III of the Act relates to conciliation between the parties at dispute which arises out of legal relationship e.g, husband and wife, father and son etc. which may be

contractual like a Muslim marriage or a ritual relationship such as of the Hindus.

Commencement of conciliation proceedings (Sec.62) .This Sec. provides that conciliation proceedings are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If other party rejects the invitation then no conciliation proceeds. If the arty inviting conciliation does not receive a reply within 30 days from 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.

Number and qualification of conciliators (Sec.63) There shall be one conciliator but the parties may by their agreement provide for two or 3 conciliators. where the number of conciliators is more than one, they should act jointly.

Appointment of conciliators Sec.64 there are three rules for the appointment of conciliators-

Cl(1) a provides that if there is one conciliator in a conciliation proceedings, each party may agree on the name of a sole conciliator.

b) If there are two, then each party may appoint one

c) If there are three, each party may appoint one and the parties may agree on the name of third conciliator who shall act as the presiding conciliator.

Cl (2)-Provides for the assistance of a suitable institution or person in the appointment of conciliators. Either a party may request such institution or person to recommend the names of suitable individuals to act as conciliators or the parties may agree that the appointment of one or more conciliators be made directly by such institution or person.

Submission of statement to conciliator Sec.65-The conciliator may request each party to submit to him a brief written statement .The statement should describe the general nature of dispute and the point at issue. It may be supplemented by appropriate documents and evidence 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.

Rule of procedure Sec.66-The conciliator is not bound by the rules contained in C.P.C 1908 or Indian Evidence Act 1872.Though he is not bound by the technical rules of procedure but he should not ignore the principles of natural justice. The principle of natural justice require, both parties must be heard each in the presence of the other.

Role of conciliators Sec.67-

cl 1 of Sec.67 provides that conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of dispute

Cl 2 The conciliator shall be guided by principles of objectivity, fairness and justice

Cl 3 Conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate taking into account the circumstances of the case for speedy settlement of dispute.

Administrative assistance Sec.68-provides for the assistance of a suitable institution or person in the appointment of conciliators. Either a party may request such institution or person to recommend the names of suitable individuals to act as conciliators or the parties may agree that the appointment of one or more conciliators be made directly by such institution or person.

Communication between Conciliator and parties sec.69-

Cl 1 Provides that the conciliator may invite the parties to meet him or may communicate with them orally or in writing

Cl 2 Provides that the parties have right to fix by their agreements the place where meetings with the conciliator are to be held. Where there is no such agreement the place of meeting will be fixed by the conciliator after conciliation with parties.

Disclosure of information Sec.70-This sec provides that when the conciliator receives an 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 is to enable the other party to present an explanation which is appropriate. When a party gives an information the conciliator should not disclose that information to other party.

Co-operation of parties with conciliator Sec.71- This sec provides that the parties should in good faith co-operate with the conciliator. They should submit the written materials ,provide evidence and attend meetings when the conciliator requests them for this purpose.

Suggestions by parties for settlement of dispute.Sec.72-This Sec. provides that each party may on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement agreement Sec.73-

cl 1 of Sec.73 Provides that when it appears to conciliator that there exist elements of settlement which may be acceptable to the parties he may formulate terms of settlement and submit them to the parties for their observations

Cl 2- Provides that if the parties reach agreement on a settlement then they may draw up and sign a written settlement agreement if requested by the parties the conciliator may draw up or assist the parties in drawing the same.

Cl 3- When the parties sign the settlement agreement, it shall be final and binding on the parties.

Cl 4- Provides that the conciliator shall authenticate the settlement agreement and send a copy to each party.

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

Confidentiality Sec 75- This Sec. provides that the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. This confidentiality shall extend also to the settlement agreement except where its disclosure is necessary for the purposes of implementation and enforcement.

Termination of conciliation proceedings Sec.76- This Sec. provides that termination of conciliation proceedings shall be terminated

A) By the signing of the settlement agreement by the parties.

B) By the written declaration of conciliator

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 declaration

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 declaration.

Resort to arbitral or judicial proceedings Sec.77-The parties shall not initiate, during the conciliation proceedings any arbitral or judicial proceedings in respect of dispute subject –matter to conciliation. except that a party may initiate arbitral or judicial proceedings necessary for preserving his rights.

Costs Sec.78-

cl 1 provides that upon termination of conciliation proceedings the conciliator shall fix the costs of the conciliation and give written notice there of to the parties.

Cl 2- provides that costs means –

a) Fee and expenses of conciliator and witnesses requested by the conciliator with the consent of parties

b)Any expert advice requested by the conciliator with the consent of parties

c) Any assistance provided under Sec.64 and 68

D) Any expenses incurred in connection with the conciliation proceedings and the settlement agreement

Cl 3 -Costs shall be borne by parties

Deposits Sec.79- This Sec. provides that under cl 1 conciliator may direct each party to deposit an equal amount in advance for the costs

Cl 2 Conciliator may direct supplementary deposits in an equal amount from each party

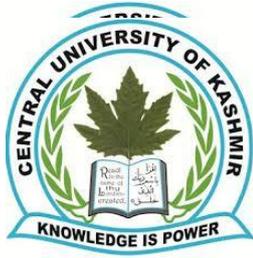
Cl 3 If the deposits under cl 1 and 2 are not paid in full by both parties within 30 days, the conciliator may suspend the proceedings or terminate the proceedings

Cl 4 Upon termination of conciliation proceedings the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

Role of conciliator in other proceedings Sec.80- This sec. provides that unless otherwise agreed by the parties-

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

b)The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.



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Alternative Dispute Resolution

Unit II

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Unit-II

- a. Arbitration Agreement-Sec 2(b),
 - b. Composition and Jurisdiction of Arbitral Tribunal-Sec. s 10-11,16-17
 - c. Conduct of Arbitral Proceedings and Making of Arbitral Award—Sections.18-27
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Alternative Dispute Resolution

Unit II

INTRODUCTION

Arbitration is a method of settlement of disputes by way of an alternative to the normal judicial method which is activated by instituting legal proceedings. thus arbitration is a method of alternative dispute resolution .Of all forms of other alternative dispute resolution mechanisms like Conciliation, Mediation, Negotiations, etc. Arbitration has become the most dominant form of ADR. The function of arbitral tribunal is a statutory functioning and hence it does not require judicial supervision

MEANING OF ARBITRATION-

Arbitration is a method of settlement of dispute by way of an alternative to the normal judicial method which is activated by instituting legal proceedings. hence arbitration is a method of alternative dispute resolution(ADR).Of all forms of other alternative dispute resolution mechanisms, like conciliation, mediation, negotiations, etc arbitration has become the most dominant form of ADR. The function of arbitral tribunal is a statutory functioning and hence it does not require judicial supervision.

Sec-2(1) provides that Arbitration means the submission by two or more parties of their to the judgment's of a third person called the arbitrator who decides the controversy in a judicial manner. Arbitration is defined by Romilly

M.R in a well known case of Collins V. Collins ,in this case the parties to a sale wanted the price to be determined by a third party. Holding that this was not an arbitration, Rommily M.R said , an arbitration is reference to the decision of one or more persons either with or without umpire (presiding arbitrator) of some matter or matters in difference between the parties.

As a general rule the seller wants to get the highest price for his property and the purchaser wishes to give the lowest but unless a difference has actually arisen it is not an arbitration. However if two persons enter into an agreement for the sale of any particular property and try to settle the terms but cannot and after dispute and discussions they refer this question of price to 'A ' and he settles it that would be an arbitration in proper sense of the term.

VALUER-The position of valuer is different from that of an arbitrator in this respect that a valuer would be liable if a party suffers loss on account of his negligent judgment. But an arbitrator enjoys the status and immunity of a judge.

In Sutcliffe V. Thackrah 1974. AC 727 it was held that where a building owner paid the building contractor on the basis of a certificate of his architect that the work was good, the architect was held liable to the owner for his loss when it turned out that the work was defective. Negligent assessment and valuation rendered him liable as the function he performed was not that of judicial nature but "performance of his specialized skill."

EXPERTS—In many cases experts like engineers ,accountants and architects are appointed as arbitrators. In such cases the expert has to act in a judicial manner and the fact that he has also to make some valuation or assessment in the process will not reduce his status as an arbitrator. He will enjoy immunity unless he acted fraudulently.

VALUATION—Carus, Willson sold some land to Greene on which there was some standing timber and Greene agreed to pay for it at a valuation. The parties further agreed that each should appoint an umpire. The valuers failed to agree and the umpire made a valuation. The question was whether this was an arbitration. It was held that the intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner thus it is an arbitration.

DISPUTE WITHIN THE MEANING OF ARBITRATION

The term has not been defined under the Act nor there is any judicial definition for the purposes of the Act. In English case-Dawlish –a contract provided that in case of any dispute arising at loading ports it should be submitted to a local arbitration court. Court held that dispute means contention and that therefore it arises where the contention is made on the other hand dispute means the matter or question in dispute. If the latter is right then the matter in dispute arose at the port of loading. Thus the word dispute means the matter in dispute and not the contention. The expression shall include disputes of law as well as of fact.

The dispute may relate to an act of omission or commission, e.g withholding a certificate to which a person is entitled or refusal o register a transfer of shares.

DISPUTES OF CIVIL NATURE-Whatever be the type of dispute, the matter must be of civil nature. Matters of criminal nature cannot be referred to arbitration. Since criminal courts cannot be deprived of their jurisdiction to try criminals. No criminal matter can be referred to arbitration. The Magistrate cannot delegate his authority under Sec. 145 Cr.P.C to record evidence and hence proceedings under Sec. 145 cannot be referred to arbitration. But in cases where the injured party has a remedy by civil action as well as by criminal prosecution a reference to arbitration can be made disputes under Sec. 145 Cr.P.C(as to possession) are mostly of a civil nature and may be referred to arbitration.

Any matter of civil nature can be referred to arbitration e,g. disputes relating to property, ownership or tenancy, claims for damages, partnership matters, disputes between an institution like company can all be referred to arbitration

For instance matters involving insolvency or probate jurisdiction or those involving breach of trust, created for public purpose under Sec.92 of C.P.C cannot be referred as involve public consequences and not merely adjudication of rights between private individuals.

Matters under Electricity Supply Act 1948 which contain its own statutory provisions are not arbitable except as provided. In Punjab State Electricity Board V. Guru Nanak Cold Storage and Ice Factory Manufactures (1996) 5 SCC

411. A defaulter in payment of bills was sued by the electricity board and decree for payment was obtained. The consumer instead of satisfying the decree claimed compensation for losses caused because of the sudden disruption of supply and he demanded arbitration. The court held that the matter was not arbitrable because of special provisions of the electricity supply Act .

TORT MATTERS- In WOLF V. Collis Removal Service .The court held that the arbitrator can decide matters connected with the contract. Where a charterer arrested the ship because it refused to deliver the whole of the cargo the ship owners claim for damages for the arrest. Court held that it is a matter of tort because the claim has arisen out of breach of the charter party therefore arbitrator was competent to adjudicate upon the connected matter.

WINDING UP OF COMPANY-In Haryana Telecom Ltd. V. Sterlite Industries India Ltd 1999 SCC 688.The court held that the matter of winding up of a company cannot be referred to arbitration because the power to order winding up of a company is contained in the companies Act and is conferred on the court .An arbitrator would have no jurisdiction to order winding up of a company.

ENHANCEMENT OF RENT—In Vinayak Balakrishna V. Mahanagar Telephone Nigam Ltd Bombay AIR 2004 BOM.227. Court held that such a dispute could be decided only by the authority under the applicable rent control Act and not otherwise.

IMPORTANCE-Arbitration is considered to be an important alternative dispute redressal process which is to be encouraged because of high pendency of cases in the courts and costs of litigation and is a speedy process of resolving of disputes.

SECTION 3-RECEIPT OF WRITTEN COMMUNICATIONS

1 - provides that unless otherwise agreed by the parties-

A) Any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address and

B) If none of the places referred to in clause a can be found after making a reasonable inquiry, a written communication is deemed to have been received

if it is sent to the addressees last known places of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it

2-The communication is deemed to have been received on the day it is so delivered.

3 This Sec. does not apply to written communications in respect of proceedings of any judicial authority.

SECTION 4-WAIVER OF RIGHT TO OBJECT---

A party who knows that-

A) any provision of this part from which the parties may derogate, or

B)any requirement under the arbitration agreement

Has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

In Pioneer Engineering Works V. Union of India AIR 1959

Where an irregularity is committed by the arbitrator in proceedings with the reference the party who considers itself adversely affected by it must object to it immediately. He will be deemed to have waived the objection and cannot raise it at a later stage.

SECTION 5—EXTENT OF JUDICIAL INTERVENTION-

Nothing withstanding 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.

Explanation- This sec. simply and expressly means that no judicial authority shall interfere with the arbitration matters. Which contains all probable rules in respect of arbitration proceedings. The courts discretionary powers here before utilized have been curtailed by this section.

SECTION 6—ADMINISTRATIVE ASSISTANCE-

In order to facilitate the conduct of the arbitral proceedings the parties or the arbitral tribunal with the consent of the parties may arrange for administrative assistance by a suitable institution or person.

A---ARBITRATION AGREEMENT (SEC.7)---

1 Provides that 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 Arbitration agreement must be in writing

4 An arbitration agreement is in writing if it is contained in-

- a) A document signed by parties
- b) An exchange of letters, telex, telegrams or other means of telecommunications which provide a record of 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 constituting an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

In *MMT.C Ltd V. Sterlite Industries India Ltd* AIR 1997 SC 605 It was held that where the arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceedings with the reference court held that the arbitration agreement is valid as it satisfies the requirement of Sec 7 of the act.

ARBITRATION AGREEMENT AND REFERENCE

The expression arbitration agreement and reference have been defined separately in *Banwari Lal Kotiya V.P.C. Agarwal* 1985 SC 1003. Supreme court held that the expression reference refers to an actual reference made jointly by the parties after disputes have arisen between them for adjudication to

arbitrator while the expression arbitration agreement is wider and contains two concepts

- a) A bare agreement between the parties ,that disputes arising between them should be decided by arbitration
- b) That actual reference of a particular dispute for adjudication to named arbitrator.

Facts of the case:- were that there was a dealing about shares between a stock exchange member and an outsider under which a sum of money has become due to the member. The parties signed the contract. The transaction was subject to the rules, regulations and bye –laws of the stock-exchange. One of which provided for arbitration in such matters. The member appointed his arbitrator. The other refused to reciprocate. In such cases the rules provided for appointment by the exchange. The latter accordingly appointed one. The other party participated in the proceedings under the protest that he had not given his consent and therefore award would not be binding on him. Supreme court came to the conclusion that no fresh consent is necessary on his part he had consented to the rules and regulations.

ESSENTIALS OF ARBITRATION AGREEMENT

The essentials of arbitration agreement are

- a) Written communication (Sec.3)
- b) Waiver of right to object (Sec.4)
- c) Judicial intervention.(Sec.5)
- d) Administrative assistance (Sec.6)

B---COMPOSITION AND JURISDICTION OF ARBITRAL TRIBUNAL SECTIONS-10-11,16-17

SECTION -10 –NUMBER OF ARBITRATORS

- 1) Provides that parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
- 2) Failing the determination referred to in Sub-sec 1 the arbitral tribunal shall consist of a sole arbitrator.

SOLE ARBITRATOR—If the parties want more than one arbitrator, they will have to expressly so provide in the agreement otherwise the reference is to be to a sole arbitrator appointed with the consent of parties. Where the opposite party declined to give consent even after second notice the court would get the power on the application of the other party to appoint an arbitrator.

AGREEMENT FOR EVEN NUMBER—The parties are free to determine the number of arbitrators. Sec. 10 (1) also adds that such number shall not be even number. where the parties do not determine the number presumption of law arises that the arbitral tribunal shall consist of a sole arbitrator.

However if the parties provide for appointment of only two arbitrators it does not mean that agreement becomes invalid.

Under Sec.11 (3) the two arbitrators appoint a third arbitrator who acts as a presiding arbitrator. Such appointment can be made at the beginning and there is no reason why the two arbitrators cannot appoint a 3rd at a later stage i.e, if and when they differ. In *Atul R. Shah V. Vrijlal Laloobhai and Co* 1999. The arbitral tribunal was constituted in accordance with the rules framed by the Bombay stock exchange. There was nothing wrong in that respect but the high court observed if the tribunal is not properly constituted the award would have to be quashed and set aside in terms of Sec.34 (a) (11) even if no objection was raised before the tribunal.

In stock exchange ,*Mumbai V. Vinay Babna* AIR 1999.The provisions of the securities contract Act 1956 as to matters of arbitration under the Act would prevail over Sec.10 of 1996 Act and the award of an arbitral tribunal consisting of even number of arbitrators was held to be valid.

In *Ethiopian Airlines V. Stic Travels pvt.ltd* 2001.It was held that where the arbitration clause provided that the two arbitrators nominated by the parties shall appoint a third arbitrator who would act as chairman. The court held that the 3rd appointed arbitrator would sit as a member of the arbitral tribunal along with the other two arbitrators. He could not be deemed as umpire. Meanwhile one of the arbitrator died. Court held that the party could nominate a new arbitrator no fresh right accrued to appoint a new chairman.

AGREEMENT FOR MORE THAN TWO ARBITRATORS.

In Narayan Prasad Lohia V. Nikunj Kumar Lohia 2002. Court held that by agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Sec.11 does not contain any provision for such a contingency. The agreement of the parties is not invalid and the procedure provided in Sec.11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators.

SECTION -11 –APPOINTMENT OF ARBITRATORS—

Sub-sec 1 of sec 11 makes provisions for appointment of a person of any country of India or any foreign country, as agreed by the parties

Sub-sec 2 provides a new thing that the parties are free to choose or adopt any procedure to appoint such arbitrator. It may be even by casting lots in case of non-agreement

Sub- sec 3 provides that if the parties fail to appoint arbitrators by mutual consent then each party shall appoint a 3rd arbitrator who shall be called presiding arbitrator or umpire

Sub-sec 4 and 5 provides that if a party or the appointed arbitrators fail to appoint an arbitrator or presiding officer, as the case may be, the Chief justice of high court or a person designated by him shall make such appointment

Sub-sec.6-12 provides that if the parties belong to different nationalities ,then Chief justice of India shall have the aforesaid jurisdiction.

Sub –sec.10 provides for making a scheme by the chief justice in dealing with clauses 4,5 or 6

APPOINTMENT ACCORDING TO AGREED PROCEDURE SEC 11 (2)

In Konkan Railway Corporation Ltd V. Rani Constructions Pvt. Ltd.2002

Court held that where the procedure for appointment has been agreed upon between the parties the courts function is only to implement the agreed procedure. Court cannot appoint an independent arbitrator at the first instance.

In Subash Projects and Marketing Ltd. V. South Eastern Coalfields Ltd. 1998

Court held that under Sec.11 (6) where the agreement lays down a procedure for appointment of arbitrator referable to sub-sec. (2) the Chief justice has merely to take necessary measures for enforcing the procedure laid down in the agreement for arbitration. Under sub –sec.(6) the chief justice or his designate has not to enforce or compel the party to make the appointment in accordance with the agreed procedure. The court referred to the contrary decisions of AP., Bombay and Delhi High courts.

The A.P. High court in Deepak Galvanizing and Engg. Industries pvt. ltd V. Govt of India 1998. Delhi High court in Continental Constructions Ltd. V. NHPC Ltd.2000, and Bombay high court in R.P Souza and Co. v. chief Eng PWD 2000

There it was held that the court has to appoint an independent arbitrator when the opposite party has failed to appoint the named arbitrator. The court was of the opinion that the failure in this respect was the forfeiture of right giving the court the right to appoint a person of its choice.

In K. Ven Kateswarlu V. State of A.P 2003 It was held, where the agreement required a panel of arbitrators to be constituted by the parties but one of them refused to co-operate in this process. It was held that their agreement ceased to exist so far as the panel aspect was concerned. The Chief justice could on a party's request, appoint a sole arbitrator.

In Universal Constructions and Trading Co .ltd V. Garhwal Mandal Vikas Nigam ltd.2004.Court held that where the opposite party remained silent as to the request for reference to the agreed arbitrator and arbitrator also did not work and an application was then made to the chief justice an award given by the arbitrator after such application was held to be without jurisdiction and non – est in the eyes of law.

APPOINTMENT OF NAMED ARBITRATOR

In Punjab Agricultural University V. Association Constructions 2003, court held that, where the agreement itself specifies the arbitrator it is obligatory upon the court not to ignore such an arbitration clause and appoint another person as an arbitrator.

FAILURE OF NAMED ARBITRATOR TO ACT

In Universal Constructions and Trading Co. V. Garhwal Mandal Vikas Nigam Ltd. 2004. Court held that if the named arbitrator does not work it cannot be contended that no other person should be appointed. In this case a contract carried the clause to the effect that any dispute should be decided by the commissioner. The court held that this had the effect of being an arbitration clause irrespective of the fact that the word arbitrator or arbitration were not used in the clause. But the commissioner failed to enter upon the reference within 30 days of receipt of notice. This enabled the aggrieved party to seek appointment under Sec 11 (6) of the Act.

APPOINTMENT BY CHIEF JUSTICE SEC.11 (6)

In Konkan Rly Corp. V. Rani Constructions 2002. Court held that the expression Chief justice in this connection virtually means the court because in most cases the chief justices have authorized civil Judges. The reason for the provision is to ensure that the appointment is made by a person occupying a high judicial office, who would naturally act with due care and caution to make certain that a competent, independent and impartial arbitrator is appointed. In the three cases mentioned in the Sec. The chief justice gets the power to appoint an arbitrator. They are:-

- a) Where the parties fail to appoint an arbitrator or arbitrators
- b) Where the two appointed arbitrators fail to appoint or concur in the appointment of the presiding arbitrator
- c) Where the person or institution designated by the parties for appointment fails to act.

In Atlantic Group Insurance V. Hassneh Insurance.Co. of Israel 1992. It was held that before asking the Chief justice to act in the matter, a 30 days notice should be given to the other party to concur in the appointment and if he fails to do so then an application can be made to the court. The court will give an opportunity to the other party to explain his position. The person in question. The Chief Justice must have due regard to the qualifications of the arbitrators required by the parties under their agreement and also independence and impartiality.

In Nikon India Pvt. Ltd.V. Delhi Vidyut Board 2001. In this case High court of Delhi held that running out of 30 days does not deprive the defaulting party of his right to make the appointment. The right continues even after the

expiry of 30 days. It ceases only when an application is made under Sec.11 (6) for appointment by the chief justice.

CHIEF JUSTICE IS NOT COURT FOR THIS PURPOSE.

In Garden Finance Ltd.V. Prakash Industries Ltd..2002.Bombay High court held that it is clear from the provisions of Sec.42 that in order to activate the provisions of Sec.42 it has to be shown that an application in respect of an arbitration agreement has been made in the court .The term court is defined by Sec 2(e) to mean principal civil court of original jurisdiction in a district.

ORDER UNDER SEC.11 INVOLVES SELF-ADJUDICATION ON JURISDICTION

SEC.11 (7) has given a finality to the decisions taken by the chief justice or any person or institution designated by him in respect of matters falling under sec 's 11 (4),(5)and(6). Once a statute creates an authority ,confers on it power to adjudicate and makes its decisions final on matters to be decided by it, normally that decision can not be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of power conferred by the statute or to perform the duties imposed by the statute. So it is difficult to call the power or order of the chief justice merely an administrative order.

POWER CONFERED ON JUDICIAL AUTHORITY

The power is conferred not on an administrative authority but on a judicial authority ,the highest judicial authority in the State. No doubt, such authorities also perform administrative functions but when a statute confers a power or imposes a duty on the highest judicial authority in the state or in the country hat authority unless shown otherwise has to act judicially and has necessary to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

In Fertilizer Corp. Of India V.Ravi Kumar Ohri.1979. In this case Orissa High court held that the court does not make reference of any dispute. Its powers are limited only to the appointment of an arbitrator. After the appointment is made it is for the parties to file their claim before the arbitrator who is to decide the same on merits.

RECALL OF ORDER OF APPOINTMENT SEC.11 (5)

In *Shiva Enterprises V. Tamura Electric Works* 2002. In this case a sole arbitrator was appointed on the petitioners application. He wished that he no longer wished to pursue the proceedings and sought recall of the order. The court held that the behavior of the petitioner was objectionable. But because he was not in a state of good health the order be recalled. He was ordered to suffer costs to the extent already expended.

APPOINTMENT IN CASE OF INTERNATIONAL ARBITRATION SEC.11 (9)

Sub-sec.(9) provides that in the case of sole or third arbitrator in an International Commercial Arbitration the Chief Justice of India or his nominee may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

In *Grid Corp. Of Orissa Pvt.ltd. V. A.E.S CORP.* 2002

There was no quarrel with the proposition that Sec.11 (9) of the Act is not mandatory and the word 'may' there in cannot be read as shall and to appoint an arbitrator not belonging to the nationality of either of the parties is not mandatory. However there is nothing in the two arbitrators having formed an opinion in consultation with each other that a person of a 3rd nationality would be preferable as presiding arbitrator,

APPEAL OR REVIEW—A petition under Art 136 of the constitution can lie for challenging a judgment ,decree or matter passed or made by any court or tribunal in the territory of India. According to Sec.11 (6) the Chief justice or his designate acts in administrative capacity.

In *Ador Samia Pvt. ltd V. V.Peekay Holidings Ltd* .1999. In this case it was held that an order of Chief justice is not an order of any court exercising any judicial function nor is it a tribunal having the tapings of a judicial authority. It must be held that orders passed by chief justice under Sec.11 6 cannot be subjected to any challenge directly under art-136 of the constitution.

In *Konkan Railway Corp.ltd V. Mehul Constructions Co.* 2000. It was held that in case of non-performance of duty the writ of Mandamus would lie i.e,

Mandamus would lie where there is failure to exercise power but not where there is a justified refusal on facts.

SECTION 11 (10)-SCHEME BY CHIEF JUSTICE

In *Konkan Rly Corp. Ltd . V. Rani Constructions Pvt. Ltd.* 2002, it was held that if provisions of such scheme go beyond the terms of Sec.11 they would be vitiated and have to be amended. It was held that a clause of chief justice scheme 1996 for appointment of arbitrators stipulating the service of notice to the other party to show cause why an arbitrator should not be nominated as requested was bad and must be amended. The other party must be given notice only of the request itself.

SECTION -16—JURISDICTION OF ARBITRAL TRIBUNAL

Under Sec.16 Arbitral Tribunal has been conferred absolute jurisdiction over the matter before it.

Sub-sec 1 provides that it has jurisdiction on any question of existence or validity of arbitration agreement.

Sub- sec 2 deals with limitation on raising objection as to jurisdiction of the arbitral tribunal ,should be submitted before submission of defence statement.

Sub-sec 3 provides for limitation to raise plea of excess from jurisdiction ,when the arbitral tribunal so acts in the arbitral proceedings.

Sub-sec 4 deals with condonation of delay of the above pleas beyond time

Sub-sec 5 provides that arbitral tribunal shall dispose of such pleas if rejects and shall proceed forth and make award.

Sub-sec 6 provides for making application to set aside an award in accordance with Sec. 34 of the Arbitration Act 1996

In *Vessel M.V Baltic Confidence V. S.T.C* 2001 IT was held that Sec.16 (1) empowers the arbitral tribunal to decide-

a)the question as to its jurisdiction

b) the objection as to the existence or validity of the arbitration agreement.

In Secur Industries Ltd V. Godrej and Boyce Manufacturing Co. Ltd 2004

It was held that where the Arbitral Tribunal is entertaining some matter beyond its jurisdiction or authority .Objection must be raised as soon as such matter is raised before the tribunal.

In Society Iberico V. Nadera Handles 1990 ,it was held that where the arbitrator received fresh evidence after the conclusion of hearing and also acted upon it without giving parties the opportunity to be heard. This amounted to procedural mishap entitling the party to seek setting aside and remission.

SECTION -17- INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL

Sec. 9 deals with interim measures by court in certain matters and Sec.17 deals with interim measures by Arbitral Tribunal in respect of subject matter of dispute.

Sub-sec.1 provides that if a party requests Arbitral Tribunal may order a party to take any interim measures of protection regarding subject matter of dispute

Sub-sec.2 provides that the Arbitral Tribunal may require a party to provide proper security relating to the measures ordered by tribunal.

C—CONDUCT OF ARBITRAL PROCEEDINGS AND MAKING OF ARBITRAL AWARD(SECTIONS -18—27)

SECTION-18-Equal Treatment of Parties

This section provides that parties should be treated with equality and each party should be given an opportunity to present his case. This section casts twofold duty on arbitral tribunal

- a) Arbitral tribunal should be independent and impartial and should treat each party equally
- b) It must give each party full opportunity to present its case as laid down in Sections 23 and 24

Procedure of Arbitral Tribunal:-

- a) Time and place for hearing should be fixed and notice should be given to each party
- b) Parties are free to fix the place for hearing by agreement
- c) If they fail then Arbitral Tribunal shall be given an opportunity to fix place.
- d) While doing so due consideration should be given to the circumstances of the case and convenience of parties, for hearing witnesses, experts, other parties for inspection of documents and property.

SECTION -19-Rule of Procedure of Arbitral Tribunal.

Sub-sec 1 provides that arbitral tribunal is not bound to follow the procedure as laid down in C.P.C 1908 and the procedure of Indian Evidence Act 1872. But the procedure should be subject to Arbitration and Conciliation Act 1996. It may or may not adopt the procedure laid down in C.P.C 1908 and Indian Evidence Act 1872.

Sub-sec. 2 provides opportunity to the parties to adopt mutually a procedure to be followed by arbitral tribunal but that should be subject to arbitration and conciliation act 1996.

Sub-sec 3 provides that if parties fail to adopt a procedure then arbitral Tribunal shall adopt a procedure as it thinks proper.

Sub-sec 4 gives power to Arbitral Tribunal to determine admissibility, relevance, materiality and weight of any evidence produced before it.

In Malik Arjun V. Gulbarga University 2004, In this case court held that Arbitral Tribunal is not bound by the technical rules of procedure but it cannot ignore principles of natural justice.

In Kamala Saha V. Jogeshwar Saha 2002, court held that failure to give adequate opportunity to the parties to prove their cases is a good ground for setting aside the award and also amounts to violation of principles of natural justice.

SECTION -20- Place of Arbitration,

This Sec. deals with place of arbitration, where arbitrators, Arbitral Tribunal is to meet.

Sub-sec 1 mandates that the parties are free to fix any place of meeting

Sub-sec 2 provides ,if they fail then it is to be determined by the arbitral tribunal having regard to the circumstances of the case and should be convenient to the parties.

Sub –sec 3 provides that the arbitral tribunal may unless agreed by the parties meet at any place for hearing witnesses, experts or parties or for inspection of documents goods or other property.

In *sanshin chemicals industry v. oriental carbons and chemicals ltd* 2001

Court held that where the decision as to venue of arbitration was required under the agreement to be determined by the joint arbitration committee such a determination is not a decision of any aspect of the dispute. It was not an award nor even an Interim Award. The decision was not appealable

SECTION -21-Commencement of Arbitral Proceedings

This sec. provides that if the parties do not otherwise agree the Arbitral proceedings are deemed to begin on the date on which request to refer to arbitration is received by the other party.

In *Union of India V. Manoranjan Modal*.2000

It was held that it is open to the parties by agreement to determine the date of commencement of the proceedings. In absence of such agreement Sec.21 provides that such date shall be the date on which a request is received by one party from the other to make reference of dispute to arbitration.

SECTION -22 –Language Of Proceedings

Sub-sec 1 provides that the parties are free to agree on any language to be used in arbitral proceedings.

Sub-sec 2 provides that if they fail to decide then Arbitral Tribunal itself shall determine the language to be used in the proceedings

Sub-sec 3 provides that the statement of claim, written statement ,applications ,hearing and award shall be in the language so determined.

Sub-sec 4 states about the translated copies of documents produced in the proceedings which are in the language than that or those determined, shall be

furnished in the determined language with the original documents or certified copies there of.

Parties choice of language:-

It is open to the parties by agreement to decide what language or languages are to be used in the arbitral proceedings. If there is no such agreement the arbitral tribunal shall determine the language to be used. The agreement of parties or the determination of arbitral tribunal to use particular language shall apply to-

- a) Any written statement, claim, defence by a party.
- b) Any hearing
- c) Any Arbitral Award, decision or other communications by the Arbitral Tribunal.

All pleadings, all applications, all statements, all orders, etc. would have to be in the language or languages agreed upon or determined. If any documentary evidence is not in any of such languages the arbitral tribunal may order it to be accompanied by translation into the said languages or languages.

SECTION -23-Statement of Claim and Defence.

Sections 23 to 27 lay down the procedure to be followed in arbitration proceedings. Sec 23 provides as to what facts the parties shall state in their statement of claim or statement of defence.

Sub-sec 1 provides that the claimant shall state the facts supporting his claim the points at issue and the relief or remedy he seeks. Similarly the respondent shall state in his statement of defence the available defences regarding the particulars given in the statement of claim within the period agreed by parties.

Sub-sec 2 provides that the parties may submit their documents in support of their respective claims, or they may submit other evidence available in support of their claim or defence.

Sub-sec 3 lays down that the parties may amend their claim or defence in the course of the proceedings. But the Arbitral Tribunal may refuse such amendment or supplement due to delay made in presenting it and it is thought not proper to amend or supplement at that stage.

COUNTER CLAIM:- In Punj Sons Pvt. Ltd. V. National Aluminum Co. Ltd.,1999

Court held that an arbitrator should receive a counter-claim as a part of pleadings of the parties and take into account in deciding the dispute on its merits. He should not refuse to take the counter –claims simply by saying that it is outside the agreement and along with their statements of claim and defence the parties may submit all relevant documents.

AMENDMENT OF STATEMENTS:-The parties may, during arbitral proceedings amend or supplement their claim or defence unless-

- a)The parties have agreed otherwise or
- b) The arbitral tribunal considers it inappropriate to allow the amendment or supplement due to the delay in making it.

In Grange Ford Structures V. S.H ,1990,the respondent in this case indicated to the arbitrator that he intended to lodge a counter-claim. The arbitrator allowed him a fixed period of time for the purpose and told him no further extension would be allowed. The party could not keep the time and sought grant of extension. The arbitrator refused. The party protested. The arbitrator made award and was in favour of claimant. Respondent said that arbitrator acted unreasonably. Court held that arbitrator had power to set a reasonable time limit for filing claim and had jurisdiction to continue the proceedings even in the absence of respondent.

SECTION -24- HEARING AND WRITTEN PROCEEDINGS

Sub –sec 1 provides that if the parties have not agreed relating to the mode of proceedings, the Arbitral Tribunal may decide whether it will hold the proceedings on oral hearing of parties and their witnesses, or the proceedings shall be conducted in writing, on the basis of documents and other materials. The parties may decide to have no oral hearing.

Sub-sec 2 lays down about giving sufficient time notice as to hearing or as to meeting of Arbitral Tribunal for inspection of documents, goods or other property, concerning the dispute referred to it.

Sub-sec 3 makes it incumbent upon the arbitral tribunal to issue copies of all documents, applications or information supplied by one party to the other party, similarly copies of any expert report received by the Arbitral Tribunal or

evidentiary document on which the arbitral tribunal relies are to be supplied to all parties

ORAL HEARING:-It is open to parties to agree whether any oral hearing should be held by the arbitral tribunal or not. If there is no such agreement it is for tribunal to decide

a)Whether to hold oral hearing for the presentation of evidence or for oral arguments or

b) Whether the proceedings shall be conducted on the basis of documents and other materials

NOTICE TO PARTIES:- The Arbitral Tribunal must give to the parties sufficient advance notice-

a) Of any hearing

b) Of any meeting of arbitral tribunal for inspection of documents, goods or other property.

In Manni V. Ram Charan Lal ,1944,it was held that an award would not be binding upon the parties if the arbitrators do not give notice of the date of hearing to the parties.

SUPPLY OF DOCUMENTS ,ETC.: -SEC 24 makes two provisions as

a)That the tribunal shall communicate to the other party all the materials including statements, documents, information and applications supplied to the tribunal by one party, that the tribunal shall communicate to all

b) That the tribunal shall communicate to all parties any expert report or evidentiary material on which it seeks to rely.

In Cursetji Jehangir Kambatta V. W.Crowden.1994 ,court held that neither side can be allowed to use any means of influencing the arbitrators mind not known to the other side. As for as possible the arbitrator should deny private communications from either side respecting subject matter of reference i.e, arbitrator should be impartial and independent.

SECTION -25 –DEFAULT OF A PARTY-

This section deals with default of parties and its consequences

Sub-sec 1 provides that if the claimant fails to communicate his statement of claim as provided in Sec.23 (1) the arbitral tribunal shall terminate the proceedings that is to say, dismiss the would be claim of the claimant in advance due to his default.

Sub-sec.2 mandates about the consequences of default of the respondent in communicating his statement of defence under Sec.23 (1).He shall continue the proceedings ex-parte the respondent taking his default as admission of claim by acquiescence.

Sub-sec.3 states that if a party fails at the oral hearing or to produce his documentary evidence, the arbitral tribunal may continue the proceedings and make award on the evidence before it.

In LT, Office Charifien Des Phosphates V. Yamashita Shinmon Steam Ship Co. 1993,it was held that if the claimant fails to submit the statement of his claim, the Arbitral Tribunal shall terminate the proceedings. The reference will be dismissed. It is obvious that if no claim is filed there can be no arbitration proceedings

SECTION -26- EXPERT APPOINTED BY ARBITRAL TRIBUNAL

Sub-sec.1 deals with appointment of expert:-The Arbitral Tribunal can appoint one or more experts unless there is a contrary agreement between the parties. The tribunal may refer to the expert for his report on certain specific issues. The tribunal can direct a party---

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

Sub-sec.2 deals with participation of expert in hearing---

If there is no agreement to the contrary by the parties an expert can be asked to participate in the hearing after he has submitted his report, oral or in writing. He can be asked to do so if a party makes such a request or if the tribunal considers it necessary.

At such a hearing the parties will be at liberty to put questions to the expert, and to produce expert evidence to depose on the points at issue.

Sub-sec.3 deals with disclosure of material by expert.----

If a party makes such a request the expert shall make available to him for examination all documents ,goods or other property with which he was provided in order to prepare his report. Such a request can be made only if there is no agreement between the parties to the contrary.

SECTION -27-COURTS ASSISTANCE IN TAKING EVIDENCE.

Sec.27 is a remarkable nature of arbitration where under an Arbitral Tribunal may take assistance of a court in obtaining evidence through that court under courts process.

Sub-sec 1 provides that the Arbitral Tribunal or a party taking prior approval of the arbitral tribunal, may apply to the court for assistance to take evidence through process in court.

Sub-sec.2 provides for the contents of such application, the names and addresses of parties, nature of claim, relief sought and required evidence sought through court.

Sub-sec 3 obliges the court to execute the request of the Arbitral Tribunal in taking evidence according to rules and competence of the court and such evidence is to be provided to the arbitral tribunal.

Sub-sec 4 authorises the court to issue same processes to witnesses as it would in suits before it

Sub-sec 5 provides for disadvantages ,penalties and punishments to persons who fail to attend according to the issued process, in the same way as in regular suits before the civil courts.

Sub-sec 6 explains 'processes' to include summons and commissions for the examinations of the witnesses and summons to produce documents.

SEEKING COURTS ASSISTANCE:- under Sec.27 (1) the Arbitral Tribunal as well as any party with the approval of arbitral tribunal can apply to the court for assistance in taking evidence.

CONTENTS OF APPLICATION:- SEC27 (2) sets out the particulars that are to be specified in the application to be made to the court for assistance in taking evidence. Sub-sec 3 details such particulars ,namely, the name and address of any party or person to be heard as a witness or of expert witness and a statement of the subject matter of the testimony required giving the description of any document to be produced or of the property to be inspected.

ORDERS OF COURT:-The court may order that the evidence be provided directly to the Arbitral Tribunal. It will issue to the witnesses the same processes as it issues in the suits before it. The processes that may be issued include-

- a) Summons for the examination of witnesses
- b) Commissions for the examinations of witnesses
- c) Summons for the production of documents.

DISOBEDIENCE OF ORDERS:- Persons who fail to attend as required or make any other default, or refuse to give evidence or are guilty of contempt of Arbitral Tribunal shall be dealt with by the court on the representation of the Arbitral Tribunal in the same way as a person who was guilty of like offences in suits before the court.

CHALLENGE TO ORDERS:- in Harinarayan G. Bajaj V. Sharedeal Financial Consultants Pvt.Ltd..2004 .In this case court held that an order rejecting an application for taking evidence of certain documents is neither an interim nor a final award. It was passes in the course of a continuing proceedings. It could be challenged only at the time of challenging the final award. The court held that every order is not an arbitral award .



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Paper IL-1001

Alternative Dispute Resolution

Unit III

Objectives: This course explores the basic components of Arbitration and Conciliation Act of 1996 . The main object of this Act is to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation and to minimise the supervisory role of courts in the arbitral process.

UNIT-III

- a. Making of Arbitral Award and Termination of Proceedings Sec.28-33
 - b. Setting aside Arbitral Award Sec.34
 - c. Finality and Enforcement of Arbitral Awards Sec.35-37
-

Course Title: Alternative Dispute Resolution

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CENTRAL UNIVERSITY OF KASHMIR

Alternative Dispute Resolution

Unit III

MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS

INTRODUCTION

In Russel on arbitration it has been stated that while making an arbitral award the arbitrators must all act. They must all act together. They must each be present at every meeting; and the witnesses and parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving at a just decision. As to the meaning of disagreement Russel on Arbitration has stated that the question what constitutes such a disagreement between arbitrators as will entitle the umpire to make an award.... Is one on which no definite rule can be laid down. It has been held that there was such a disagreement where one of the arbitrators declined to proceed further with the case and also where one arbitrator refused to permit certain evidence to be produced which his fellow arbitrator declared to be essential, and in another case it was decided that non agreement on important points was equivalent to disagreement. Thus the institution of presiding arbitrator and majority decision prevails.

SECTION-28- RULES APPLICABLE TO SUBSTANCE OF DISPUTE.

Sub-sec 1 mandates the applicability of Indian law if the arbitration is not international commercial arbitration and in case of international commercial arbitration the law applicable shall be the law of that country as provided

under the contract if that is not provided then the arbitral tribunal is at liberty to use the law as is appropriate to the circumstances of the case.

Sub-sec 2 deals with the situation that the Arbitral Tribunal shall do so if parties authorize him to do so.

Sub-sec.3 deals with the general rule that in doing so the arbitral tribunal shall take into account the usages of trade applicable to the transactions before him.

In *Sikkim Subba Associations V. State of Sikkim 2001*, it was held that in other than International commercial arbitration the law applicable to the dispute shall be the substantive law in force in India. Domestic arbitrations have to be carried out according to the substantive law of the country.

In *Godrej Properties and Investment Ltd.V. Tripura Constructions.2003* it was held that the Arbitral Tribunal shall decide the dispute in accordance with the terms of contract and after taking into account the usage of the trade applicable to the transaction.

The Tribunal can decide the matter according to its own good sense (*ex aequo et bono*) or on the basis of (*amiable compositor*) but only if expressly authorized by the parties.

SECTION-29-DECISION MAKING BY PENAL OF ARBITRATORS.

SUB-SEC-1 Provides that unless otherwise agreed by the parties. In case of Arbitral Tribunal consisting of penal of arbitrators the decision shall be made by majority

Sub-sec 2 provides that unless otherwise agreed by the parties .The question of procedure shall be determined by presiding arbitrator.

In *sheodutt V. Vishnu Dutt 1955*, in this case the court cited two propositions :-

- a) All the arbitrators must act together
- b) All must make award together. If they do not the award will be invalid

In *Abu Hamid Zahir Ala V. Golam Sarvar,1918*

In this case court held that the presence of all the arbitrators at all the meetings and above all at the last meeting when the final act of arbitration is done is essential to the validity of the award.

SECTION-30- SETTLEMENT-

Sub-sec 1 provides that the Arbitral Tribunal can ask the parties to settle the dispute with mutual agreement and the way used by Arbitral Tribunal must be mediation or conciliation as provided in the act.

Sub –sec 2 provides that if they arrive to a settlement then the proceedings will terminate and the settlement must be recorded in the form of Arbitral award. For that the parties must request and the tribunal should not have objected.

Sub-sec 3 provides that the award shall be in the form and contents of Sec. 31 of the Act

Sub-sec 4 provides that the settlement award shall have the same effect and status as that of arbitral award.

SECTION -31- FORM AND CONTENTS OF ARBITRAL AWARD.INTERIM AWARD.INTEREST TO BE PAID AND COSTS OF PARTIES INCURRED IN ARBITRAL PROCEEDINGS.

Sub-sec 1 provides that award should be in writing and signed by members of Arbitral Tribunal

Sub-sec 2 provides that in case of Arbitral Tribunal consisting of more than one arbitrator signature of majority of members will be sufficient but reasons should be given in the award why the signature of remaining members are omitted.

Sub-sec 3 provides that reasons to be given on which the award is based.

Sub-sec 4 provides that arbitral award shall state date and place of arbitration.

Sub-sec 5 provides that a copy of award shall be delivered to each party duly signed.

Sub-sec 6 provides for making an interim award at any time during arbitral proceedings

Sub-sec 7 provides that unless agreed by the parties where the 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. If no rate of interest is mentioned then it shall be at the rate of 18% per annum.

Sub-sec 8 mentions about the costs to be awarded by the Arbitral Tribunal. The arbitral tribunal shall specify

- a) The party entitled to costs
- b) The party who shall pay costs
- c) The amount of costs or the method of determining the amount

COSTS:- means

- a) Fee and expenses of arbitration and witnesses
- b) Legal fee and expenses
- c) Any admission fee of the institution supervising the Arbitral Tribunal
- d) Any expenses incurred relating to arbitral proceedings and award.

In Executive Engineer V. Abha Dutta, in this case it was held that if the reference was made before August 1981 when the International Arbitration Act 1939 was in force the arbitrator could not award interest for this period but if the reference was made when the international Act of 1978 was in force interest for this period could be granted.

UNDER 1996 ACT :- Sec.31 (7) provides for the grant of interest by the arbitral tribunal on an award for payment of money for the period between the date on which the cause of action arose and the date on which the award is made. This is subject to the agreement of the parties. To the contrary the arbitral tribunal may grant interest :-

- a) At a rate it considers reasonable
- b) On the whole or part of money found due
- c) For the whole or any part of period.

Sec.31 (7) (b) provides for the grant of interest on the sum of money awarded for a period from the date of award to the date of payment the rate of interest shall be 18% per annum.

INTEREST ON ADVANCES:-In Inderjit Singh and Avtar Singh V. Nathpa Power Corp. Ltd. 2003,it was held that where the agreement provided for charge of interest on advance payments made to the contractor, an objection against award of interest by the arbitrator on advance payments was dismissed.

SECTION -32- TERMINATION OF PROCEEDINGS

Sub-sec 1 provides that arbitral proceedings are terminated either by the final arbitral award or by an order of the Arbitral Tribunal.

Sub-sec 2 provides that Arbitral Tribunal can order termination in 3 ways

- a) When the claimant withdraws his claim
- b) Parties agree to termination
- c) Where arbitrator finds it difficult to continue proceedings

Sub-sec 3 provides that subject to Sec.33,34 (4) the mandate of Arbitral Tribunal shall terminate with termination of proceedings.

SECTION-33-CORRECTION AND INTERPRETATION OF AWARD: ADDITIONAL AWARD

Sub-sec 1 provides that a party with notice to other party may apply for correction and computation of errors, any clerical or typographical error or any other error of a similar nature which have occurred in award. Similarly a party with notice to other party may seek elucidation of a point or decision in arbitral tribunal but application for the same must be made within 30 days from the receipt of arbitral award or as agreed by the parties.

Sub –sec 2 provides that the arbitral tribunal shall correct the mistakes or give interpretation within 30 days from the receipt of request if the request is found justified.

Sub-sec 3 empowers the Arbitral Tribunal to correct the mistakes on its own within 30 days from the date of award.

Sub-sec 4 provides that if something is left to be decided in the arbitral award the aggrieved party may with notice to the other party request the arbitral tribunal to make an additional award. Request can be made within 30 days from the date of award.

Sub-sec 5 provides that Arbitral Tribunal may make such additional award if the request is found justified within 60 days.

Sub-sec 6 empowers the Arbitral Tribunal to extend time beyond 30 days for making corrections in or giving interpretation of arbitral award.

Sub-sec 7 makes Sec.31 applicable to such correction or interpretation of award or additional award as the case may be.

In *Jivraj Poddar V. Ramchandra Poddar* 1955, it was held that arbitral tribunal has been empowered under Sec.33 to correct an award any clerical mistake or error arising from any accidental slip or omission and once an arbitrator has given his award he cannot add to it or vary it in any way except to correct any clerical mistake or error arising from accidental slip or omission. Similar power has been given to court under Sec.152 C.P.C.

In *Calcutta Dev. Authority V. Gourranga Lal Chatterjee*, 1992. It was held that if award contains obvious error it can be modified without affecting the main decision as one of the requisites of valid award is that it should be certain, final and possible or otherwise it is imperfect.

B-SECTION-34-RECOURSE AGAINST ARBITRAL AWARD (Grounds and circumstances to set aside award.)

Sec -34 deals with application for setting aside the arbitral award-

Sub-sec 1 provides for an application to set aside an award made by Arbitral Tribunal

Sub-sec 2 deals with grounds and circumstances on and in which award can be set aside. These are-

- a) Where the party was under some incapacity.
- b) Arbitration agreement was not valid.
- c) Where the party was not given proper notice of appointment of arbitrator or proceedings
- d) That the award deals with a dispute which does not fall within the ambit of reference.
- e) That the settlement or composition was not in accordance with the agreement of the parties
- f) That the subject matter or dispute was not subject to arbitration.

g) That the award is in conflict with the public policy of India.

Sub-sec 3 provides for 3 months limitation to file application to set aside the award.

Sub-sec 4 deals with adjournments in case of request by a party. The Arbitral Tribunal may resume the arbitral proceedings or to take other action in order to eliminate the grounds for setting aside the award.

INCAPACITY OF PARTY:-If a party to an arbitration is not capable of looking after his own interests and he is not represented by a person who can protect his interests the award will not be binding on him and may be set aside e.g, minor, person of unsound mind.

INVALIDITY OF AGREEMENT:-If agreement is invalid the award can be set aside

NOTICE NOT GIVEN TO PARTY:-Sec.12,Sec.23 and Sec.24 mandates the parties be given advance notice of any hearing, meeting and proceedings otherwise the award can be set aside

AWARD BEYOND SCOPE OF REFERENCE:-Where award exceeds reference the award can be set aside.

ILLEGALITY IN COMPOSITION OF ARBITRAL TRIBUNAL OR IN ARBITRAL PROCEEDINGS.:-where the composition ,procedure was not followed the award can be set aside.

PUBLIC POLICY:-Sec.34 ,provides that an application for setting aside an Arbitral award can be made if the award is in conflict with public policy of India. e.g, an award obtained by fraud or corruption would be an award against public policy. Thus an award obtained by suppressing facts, by misleading or deceiving the arbitrator, by bribing the arbitrator, by exerting pressure would be liable to be set aside.

LIMITATION FOR FILING APPLICATION FOR SETTING ASIDE AWARD

Sub-sec.3 prescribes limitation of 3 months for filing an application for setting aside the award. Application cannot be made after expiry of 3 months.

OPPORTUNITY TO ARBITRAL TRIBUNAL TO ELIMINATE GROUND (REMISSION)

In Union of India V. Swadeshi Karyalaya 1991. In this case the award was returned back to arbitrator for consideration of the question of limitation as the petitioner complained that he was not heard by the arbitrator. It was held that it was not an order of remission. No consideration of award was called for court held that it was a specific question of law to be determined by arbitrator.

B-FINALITY AND ENFORCEMENT OF ARBITRAL AWARD SECTIONS -35-37

SECTION-35- DEALS WITH FINALITY OF ARBITRAL AWARD—

Sec.35 makes the arbitral award to be final order. It has binding force upon the parties and persons claiming under them. Provision of Sec.25 of 1940 Act gives power to court to supersede the award in certain circumstances. That is not the position under the present Act of 1996.

FINALITY OF AWARD:- In M/S Oriental Structural Eng. Ltd. V.M/S Rites and another 1999. It was held where the contractor omitted to claim one item in his bill. Award in respect of other item was passed and was made the rule of court. The arbitrator also gave a finding that the dispute related to the omitted claim could not be raised after submission of final bill. The contractor had accepted the payment also. Court held that there is total accord and satisfaction and the contract stood discharged.

SECTION -36-ENFORCEMENT

This Sec provides that where the time for making the application to set aside the arbitral award under Sec.34 has expired or such application having been made. It has been refused, the award shall be enforced under Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were a decree of the court.

SECTION-37-APPEALABLE ORDERS

Sub-sec 1 provides for appeals against orders of court by way of interim measures passed under Sec.9, setting aside or refusing to set aside an arbitral award under Sec. 34

Sub-sec.2 provides that an order of arbitral tribunal granting or refusing to grant interim measures under Sec.17 are appealable under this Sub. sec. This is a new phase in which orders of arbitral tribunal have been made appealable, rather than to be challenged before court under the Arbitration

Act of 1940. Under which doors of court were knocked very off and on and Arbitration Tribunal did not have so much liberty to act in a judicial way as they are granted under the new Act. 1996.

Sub-sec 3 prohibits second appeals but allows appeals to be made to the Supreme court under constitution of India and Supreme court rules.

REGISTRATION OF AWARD:- In Kottur Vishwanatham V. Kottur Rajeswar 1999. In this case an award on a matter of family partition allowed an item of immovable property to one brother and directed him to pay a sum of money to the other two brothers. Court held award needs registration.

STAMP DUTY:- In Ashok Tubes V. Steel Authority of India 1998, in this case court held that an unstamped award could not be filed in court for its enforcement.



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Paper IL-1001

Alternative Dispute Resolution

Unit IV

Objectives: This course explores the basic components of Arbitration and Conciliation Act of 1996 . The main object of this Act is to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation and to minimise the supervisory role of courts in the arbitral process.

Unit-IV

- a. International Arbitration: New York Convention Award

b. Geneva Convention Awards

Course Title: Alternative Dispute Resolution

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Year: 2016

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CENTRAL UNIVERSITY OF KASHMIR

Alternative Dispute Resolution

Unit IV

A- INTERNATIONAL ARBITRATION

INTRODUCTION-

The essence of the theory of 'transnational arbitration' is that the institution of international commercial arbitration is an autonomous juristic entity which is independent of all national courts and all national systems of law. The Arbitration and Conciliation Act, 1996 provides for certain aspects of international commercial arbitration. The term international commercial arbitration has been defined in section 2(91)(f) of the arbitration and conciliation Act, 1996.

International Commercial Arbitration is an arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is---

- a) An individual who is a national of or habitually resident in, any country other than India or

- b) A body corporate which is incorporated in any country other than India or
- c) A company or an association or a body of individuals whose central management and control is exercised in any country other than India or
- d) The Govt. of a foreign country.

Or an arbitration to be considered as international commercial arbitration within the meaning of this definition it is necessary that;

- a) The dispute must arise out of a legal relationship which is commercial, irrespective of the fact whether such relationship is contractual or not; and
- b) At least one of the parties to the dispute is a foreign national or a company registered in a foreign country or a company ,management and control of which is exercised from a foreign country or the Govt. of a foreign country.

A--- NEW YORK CONVENTION AWARDS

SECTION 44-46 Of the Arbitration and Conciliation Act of 1996 deals with New York Convention Award

Section -44- deals with definition of Foreign Award , foreign award means an award on differences between persons arising out of legal relationship, whether contractual or not. It is necessary that the relationship should fall within the meaning of the word "commercial" under the in force in India. The first Act as to Foreign awards was that of 1961 and Arbitration and Conciliation Act of 1996 takes over the provisions of the Foreign awards (Recognition and Enforcement) ACT,1961. on the analysis of this definition following attributes are drawn:-

- a) It is an arbitral award on difference between persons
- b) Difference must have arisen out of legal relationships which may be contractual or otherwise
- c) Legal relationship must have been considered as commercial under the law in force in India
- d) Award must have been made on or after 11th day of Oct 1960

a) The award should have been made in pursuance of an agreement in writing for arbitration to which the convention on the recognition and enforcement of foreign awards 1958 applies and

b) The award should have been made in such territories for which reciprocal provisions have been made and declared as such by notification that to such territories the aforesaid convention applies.

In *Hiscox V. Outh Waite*, 1991 it was held that an arbitral award becomes complete on signature. It is perfected by signature at the place where it is signed irrespective of the place where it was made. If an award is signed in a country which is party to New York Convention 1958 an English court can hear an appeal from the award if it was made under English law.

In this case the parties referred a dispute to arbitration in England on the basis of an agreement made under English law. The arbitration concluded in an award which was signed by the arbitrator in Paris. The claimant appealed against the award for remission. The House of Lords recognized it as a convention award.

SECTION -45- POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION

Sec.45 gives power to judicial authority to refer parties to arbitration at the request of one of the parties or any person claiming through such party. The court may refer the parties to arbitration according to the agreement entered between them. The court may refuse reference only if it finds that agreement is null and void or incapable of being performed.

SECTION-46- FOREIGN AWARD WHEN BINDING

Sec .46 makes foreign awards binding but condition is that the foreign award must be enforceable under chapter 1 (NEW YORK CONVENTION AWARDS) Such award shall be binding for all purposes and on all persons concerned.

In *State of Orissa v. Klockner and Co.*, 1996

In this case a suit was filed by a party to a arbitration agreement against the other party. There was marketing agreement Orissa mining corp. for selling product chrome (chromium). Agreement contained clause to refer dispute to international chamber of commerce at London. Another agreement

was entered into between Orissa Mining Corporation with its wholly –owned subsidiary Orissa Mining Corporation (alloy) for production of charge chrome for marketing. Subsequently subsidiary merged with holding company. The charge chrome division was taken by Orissa Govt. by Ordinance and then sold to TISCO.

The marketing agent invoked the arbitration clause for fulfillment of the terms of marketing agreement. The Orissa Govt. filled a suit for declaration that it was not bound by marketing arrangement made by one Orissa mining corporation and marketing agent sought to stay suit.

Court according to provision of the Act and agreement found that the Orissa state became successor to charge chrome division and therefore it was bound by the legal commitments of that division. The agreement was valid operative and capable of being performed.

SECTION-47-MATTERS OF EVIDENCE

The party seeking enforcement of foreign award has to produce at the time of application the following documents

- a) The original award or copy which is duly authenticated in the manner required by the law of the country in which the award was made.
- b) The original agreement of arbitration or duly certified copy
- c) Such evidence as is necessary to prove that the award is a foreign award.

Where the award is in any other language than English ,an English version would have to be produced. The version should be certified as correct by a diplomatic or consular agent, of the country to which the party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

SECTION -48- REFUSAL OF ENFORCEMENT OF FOREIGN AWARD

Section 48(1) and (2) lay down that enforcement of a foreign award may be refused, at the request of the party against whom it is invoked ,only if---

- a) Proof is furnished by the party in respect of any of the grounds specified in clauses (a) to (e) of Sub-sec 1
 - a) Incapacity of parties or Invalidity of agreement
 - b) Lack of proper notice

- c) Award beyond the scope of reference
- d) Illegality in composition of arbitral tribunal
- e) Award not yet binding
- b) The court finds either that the subject –matter of difference is not arbitrable or that enforcement of award would be against the public policy of India

SECTION -49-ENFORCEMENT OF FOREIGN AWARDS

This section provides that if the court is certified that the foreign award is enforceable, the award shall be deemed to be a decree of that court.

SECTION -50- APPEALABLE ORDERS

Section 50 deals with orders which are appealable.

Sec.50 (1) provides that an appeal shall lie---

- a) From a judicial authority's order refusing to refer the parties to arbitration under sec.45 and
- b) From the courts order refusing to enforce a foreign award under sec.48

Appeals lie to the court authorized by law to hear appeals from such orders

Sec.50 (2) bars a second appeal against the appellate order passed under this section. However ,the right to appeal to the Supreme Court is not affected.

B--GENEVA CONVENTION AWARDS

SECTION-53-59 OF THE ARBITRATION AND CONCILIATION ACT 1996 DEALS WITH GENEVA CONVENTION AWARDS

Sec.-53 –DEFINITION-In chapter II of the Arbitration and Conciliation Act 1996 the Geneva Convention Awards have been dealt with. Foreign award has been defined as an arbitral award given on differences as to matters which are considered as commercial under the law in force in India after 28th july 1924—

- a) As a result of an agreement for arbitration to which the protocol given in 2nd schedule applies
- b) Which is between the persons one of whom is subject to the jurisdiction of such a Govt. with which there are reciprocal arrangements set forth in 3rd schedule and one of whom is subject to such powers aforesaid and

other is subject to the jurisdiction of some other having reciprocal arrangements with India.

- c) In one of such territories the central Govt. may by a like notification declare the application of convention to such territory.

But if in the country in which the award was made some proceedings challenging the validity of the award are pending then such award shall not be deemed to be final.

SECTION -54- POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION

In a matter in which Sec.53 of this Act applies, the provisions of part I of C.P.C 1908 shall not have any effect .If there is a dispute before a judicial authority relating to a contract made between such persons, the judicial authority will be obliged to refer the parties to arbitrators. Such reference shall not prejudicially affect the competence of such judicial authority where the agreement or arbitration cannot proceed or becomes inoperative.

SECTION-55- FOREIGN AWARD WHEN BINDING

A foreign award shall be binding for all purposes where it is enforceable under this chapter. Any of the parties may rely on such award by way of defence ,set off, or otherwise in any legal proceedings taken or pending in India.

SECTION- 56- EVIDENCE

Sub-sec 1 provides as to what evidence a party has to produce for enforcement of a foreign award. i.e, a party has to produce-

- a) Original award or copy of it
- b) Evidence proving that award has become final
- c) Evidence proving that conditions mentioned in clause (a) and (c) of sub-Sec (1) of Sec.57 have been satisfied

Sub-sec.2 states that if the document to be so produced is in a foreign language then the party producing it shall produce its translation in English certified by diplomatic or consular agent of that country to which the party belongs as satisfied by the law of India. It may be noted that in all sections of this chapter court means the principal civil court of original jurisdiction in a district including the high court which has original civil jurisdiction.

SECTION-57- CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARD

Sub-sec.1 provides that the conditions are five which are essential for the enforcement of award.

- a) Award made under valid law of the concerned foreign country
- b) Subject matter of award is capable of settlement by arbitration under the law of India
- c) That the award is made by an Arbitral Tribunal in the manner of reference agreed upon by parties.
- d) That the award has become final in concerned foreign country not being opposed or appealed or any proceeding pending contesting the validity of the award.
- e) That the enforcement of the award is not contrary to public policy

Sub-sec 2 deals with the refusal for enforcement of award that the-

- a) Award has been annulled in the country where it is made
- b) Party has not been given notice or failed to present himself properly
- c) Award does not deal with differences sought to be determined

Sub-sec 3 provides that the court may either refuse enforcement of award or give the party time to get award annulled by competent authority.

SECTION-58-ENFORCEMENT OF FOREIGN AWARD

This Sec provides that where the court is satisfied that the foreign award is enforceable under this chapter the award shall be deemed decree of the court.

SECTION-59-APPEALABLE ORDERS

This sec, provides that –

- a) An appeal shall lie from the order ,refusing ‘A’ to refer parties to arbitration under Sec.54
- b) To enforce a foreign award under Sec.57 clause (2) second appeal shall lie to Supreme court.

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GLOSSORY

Arbitration : Arbitration whether or not administered by permanent arbitral institution.

Arbitration Agreement: Agreement to submit differences to arbitration

Arbitration Award: Award passed by arbitral tribunal also includes interim award

Arbitral Tribunal: Sole arbitrator or panel of arbitrators

Court: Principal Civil court of original jurisdiction in a District includes High court

International Commercial Arbitration: Arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is an individual who is a national of or habitually resident in, any country other than India

Legal Representative: Person who in law represents the estate of a deceased person.

Party: A party to arbitration agreement

Reference: Subject matter in dispute

Interim Measures: Relief during mean time

F.A.Q'S

Q1. Define A D R

ANS:- ADR is an attempt to devise a machinery which is capable of providing an alternative to the conventional methods of resolving disputes. It is a technique of dispute resolution through the intervention of a third party whose decision is not legally binding on the parties. ADR provides the parties with cheap, speedy and less formalistic remedy to the aggrieved party.

Q 2 . Define Arbitration Agreement

ANS:- Arbitration agreement is 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 defined legal relationship, whether contractual or not. It shall be in writing and signed by the parties.

Q3. Define International Commercial Arbitration

ANS:-International commercial arbitration is an arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is an individual who is a national of or habitually resident in, any country outside India or a body corporate which is incorporated in any country other than India or a company or a body of individuals whose central management and control is exercised in any country other than India.

Q4 .Define Conciliation how is it different from Arbitration

ANS:- Conciliation means settling of dispute without litigation. It is a process by which discussion between the parties is kept going through the participation of a conciliator. The main difference between arbitration and conciliation is that in arbitration proceedings the award is the decision of the arbitral tribunal while in case of conciliation the decision is that of the parties arrived at with the assistance of conciliator.

Q 5 . Define Negotiation

ANS:- Negotiation is a process by which the parties to a dispute can, on their own motion, start a process of negotiation through correspondence or through one or two mediators with a view to finding a mutually acceptable solution of the problem.

Q 6 .What is the Composition of Arbitral Tribunal

ANS:- Sec. 10 of the arbitration and conciliation Act deals with the composition of arbitral tribunal. Cl (1) provides that the parties are free to determine the number of arbitrators ,provided that such number shall not be an even number. Cl (2) provides that if they fail to determine the number the arbitral tribunal shall consist of sole arbitrator.

Q7 .What are the grounds for setting aside arbitral award

ANS:- The grounds for setting aside the arbitral award under the Act are-

- 1 Incapacity of the party (Sec.34 (2) (a) (i))
- 2 Invalidity of agreement(sec.34 (2) (a) (ii))
- 3 Notice not given to party (sec.34 (2) (a) (iii))
- 4 Award beyond scope of reference (sec.34 (2)(a) (iv))

Q8. Define Foreign Award

ANS:-A Foreign Award means an award made on or after Oct 11,1960 on differences arising between persons out of legal relationship, whether contractual or not which are considered as commercial under the law in force in India. The award should have been made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on Recognition and Enforcement of Foreign Awards 1958 and not to be governed by the law in India.

M .C.Q.S

1. The law relating to Arbitration is contained in Arbitration and Conciliation Act of

- a) 1996 b) 1997 c) 1998 d) 1999

2. Arbitration and Conciliation Act 1996 provides for

- a) Domestic Arbitration b) International Commercial Arbitration c) Enforcement of Foreign Awards d) All of these

3. Arbitration has been defined under Section

- a) Sec.2 (1) (a) (b) Sec.2 c) Both (a) and (b) d) None of these

4. Which Section of Arbitration and Conciliation Act defines arbitration agreement

- a) Sec.7 b) Sec. 6 c) Sec. 4 d) Sec .8

5. Section 11 of the Arbitration Act deals with

- a) Number of arbitrators b) Appointment of arbitrators c) Both (a) and (b)
c) Neither (a) Nor (b)

6 . Section 17 of the Arbitration and Conciliation Act deals with

- a) Interim measures by Arbitral Tribunal b) Interim measures by court
c)Both (a) and (b) d) Neither (a) Nor (b)

7 . Which Section of Arbitration and Conciliation Act deals with Settlement

- a) Sec.30 b) Sec.20 c) Sec.21 d) Sec. 31

8 .Section 34 of the Arbitration and Conciliation Act deals with

- a) Application for setting aside arbitral award b)Grounds for setting aside award
c) Both (a) and (b) d) Neither (a) Nor (b)

9 . In conciliation the decision is that of parties arrived with the assistance of the
a) Conciliator b) Arbitrator c) Mediator d) None of these

10. An award made on or after Oct, 11 ,1960 on differences arising between persons, considered as commercial under the law in force in India is

- a)Foreign award b) Domestic award c) Arbitral award d) None of these

ANSWER KEY:--

1(a) 2(d) 3(a) 4(a) 5(b) 6(a) 7(a) 8 (a) 9(a) 10(a)