Unit-3

Arbitration, Conciliation and ADR (Alternative Dispute Resolution) system

INTRODUCTION

Arbitration-meaning:

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.

Scope and types-distinction between laws of 1940-1996

The Arbitration Act, 1940 vs.1996 – Contrasting Scenarios

The basic difference in 1940 and 1996 Act was that in the former one a party could commence proceedings in court by moving an application under Section 20 for appointment of an arbitrator and simultaneously could also move an application for interim relief under the Schedule read with Section 41(b) of the 1940 Act. The 1996 Act since its enactment faced many challenges and the Courts brought out what was actually intended by the Legislation, the Courts clarified the said Act and the intention by various landmark judgments. In particular, the landmark case of Bharat Aluminium Co., saw at least three phases before the Hon'ble Supreme Court of India since the year 2001 till now i.e 2016 carrying from two Hon'ble Judges to the Constitution Bench.

In the first case, the Hon'ble Supreme Court was of the view that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions, it was also held that the Arbitration Act of 1996 was not a well drafted act and had some lacunas[13].

UNCITRAL model law:

UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form required of an arbitration agreement to better conform

with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.

Arbitration and expert determination

Arbitration:

Arbitration is similar to court proceedings but without the potentially quite long wait for a hearing date and usually with a simplified procedure[2].

WHAT GOVERNS THE ARBITRATION?

Arbitration is governed by an agreement to arbitrate, usually found in the contract that is the subject of the arbitration together with the Arbitration Act 1996 (referred to as 'AA 1996' below). A comprehensive arbitration provision sets out the following.

- The types of disputes that will go to arbitration.
- The number of arbitrators (usually one).
- The body who is to nominate the arbitrator[3] or less often named arbitrators.
- What institution's rules apply, if any[4].
- The nationality of the 'seat' of arbitration, see below. The nationality of the seat of the arbitration dictates which arbitration statute applies to the arbitration. If the seat is England or Wales AA 1996 applies[5].
- The arbitration provision does not need to state that the arbitration will be binding, because AA 1996 provides for that.

The only essential provision is an agreement to determine specified types of dispute by arbitration. If any other provisions are lacking AA 1996 rides to the rescue allowing the courts to set the arbitration up and the arbitrator to do the rest[6]. Specifying the number of arbitrators, setting out the nominating body and providing for the seat of arbitration is sensible though, because needing to use the courts will add to the cost and delay the arbitration.

Expert determination:

The procedure for expert determination is considerably less formal than arbitration. It may simply consist of submissions to the expert by both parties, sometimes with a 'right of reply' and with the expert then issuing their determination.

WHAT GOVERNS EXPERT DETERMINATION?

As with arbitration, expert determination is governed by the agreement to appoint them. Here however neither AA 1996 nor any other Act rescues parties who have not put their minds to equipping the expert with everything that they need to make a binding determination.

The expert determination provision should contain all of the following:

- The types of disputes that will go to expert determination.
- An agreement that the expert is an expert not an arbitrator.
- The number of experts, usually one.
- The body who is to nominate the expert [9] or less often the named experts.
- A requirement that the expert provides a written determination, usually within an agreed timescale.
- A provision to deal with what happens if the expert dies or becomes incapable.
- Procedural rules (number of submissions, etc.) or a provision stating that the expert can dictate these.
- Requirements that the parties produce evidence for the expert.
- Agreement as to whether or not the expert can award interest or costs.
- An agreement that the expert's determination will be final and binding, usually in the absence of manifest error or fraud, sometimes also in the absence of compliance with natural justice or provided that they act fairly.

If there is no 'final and binding' statement the expert's determination will not be final and binding and either party is free to go to court for a full hearing of the case. There may however be a costs penalty[10]. If there is no statement that the expert is not an arbitrator the courts are quite likely to find that the expert is an arbitrator with AA 1996 applying to them.

If there is a clear intention to specify an expert and not arbitrator for the dispute in question but other provisions are lacking the parties will have to go to court for a declaration of what provisions apply. This is an expensive and uncertain process because there are no statutes and only very slender case law to assist them.

Extent of judicial intervention

Although arbitration is a whole different process/method to resolve the dispute, the Courts can intervene in the proceedings as mentioned under the Act, 1996 itself. According to Section 5 of the Act, 1996 the Courts have very limited scope to intervene in between the arbitration proceedings in very circumstances i.e., to appoint an arbitrator, where the

arbitration agreement is not valid under the eyes of the law, the arbitration procedure was not in accordance with the agreement, etc. Judicial Intervention in arbitral proceedings is just to ensure fairness and protect the rights of the parties.

Scope of judicial intervention

The issue of judicial intervention in arbitration is swamped with conundrums which makes it easy to sink into the technicalities of the definition and limitations. The ever-changing and evolving state of Arbitration in India contributes to the diversity of this topic. The key question in this regard comes down to the intervention of the judiciary in Arbitration proceedings and to what extent its intervention is acceptable. The Act, 1996 along with the amendments done in 2015 and 2019, was enacted to lessen the overburdened court and use arbitration as a means to dispute resolution. The Act aimed to divert the traffic of cases from the traditional route of litigation to arbitration, so the legislators made sure to include provisions that could limit judicial interference which would be a time-consuming process that would inhibit the speedy disposition that Alternate Dispute Resolution offers.

As mentioned above, the Courts or Judicial Intervention has very limited scope in the Arbitration proceedings. This article discusses the scope of intervention by the Judiciary in three parts. Part 1 talks about the interference done before the arbitration proceedings start. Part 2 deals with the intervention during the proceedings and Part 3 is about arbitral awards i.e., intervention after the proceedings.

International commercial arbitration

International commercial arbitration is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allows the parties to avoid litigation in national courts.

This guide identifies the best tools for locating primary law materials related to international commercial arbitration, including treaties, national legislation, procedural rules, and arbitral awards. It also covers secondary sources, which are essential for conducting thorough research.

Arbitration agreements

An arbitration agreement can be either in the form of an arbitration clause in a contract itself, or a separate agreement can be made for it.

Arbitration agreements – essential and kinds

Arbitration agreement must be

The arbitration agreement must be in writing. An agreement is considered to be in writing, if:

Unit-IV Pg No 3 04/10

- Both parties have signed the document.
- Letters, telexes, telegrams, and other forms of communication are used to agree.
- If there is an exchange of defendants and claimants statements.

Validity

the quality or state of being valid: such as. a : the state of being acceptable according to the law The validity of the contract is being questioned.

reference and interim measures by court

Interim measures:

Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm.

Section 9 of the Act empowers the courts to furnish interim measures against either party to a particular dispute. The courts can grant interim measures of protection as and when they think it fit to do so. Section 9 loosely draws inspiration from the Article 9 of the Model Law, but it differs substantially from the international provision. Article 9 states that the parties to the arbitration agreement cannot move to the courts for interim protection. On the other hand, Section 9 provides that the parties can request such a grant by the courts. They can apply for the same before or after the initiation of the arbitral proceedings. But even during these prescribed periods, the interim protection must mandatorily relate to the subject matter of the arbitration agreement. It must originate from the terms and conditions of the same. If not, then the order so passed shall be void. Grant of interim relief is dependent on the discretion of the courts. There are no set standards for the same.

Arbitration tribunal appointment

The first party to appoint an arbitrator also proposes a candidate to serve as President of the Tribunal. The other party then appoints an arbitrator and either agrees to the appointment of the arbitrator proposed for President or proposes another candidate.

Challenge

a call or summons to engage in any contest, as of skill, strength, etc. something that by its nature or character serves as a call to battle, contest, special

Jurisdiction of arbitral tribunal

There is no "inherent" jurisdiction in an arbitral tribunal. The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. An arbitral tribunal does not get its jurisdiction from any legislation.

Powers

Unit-III P.9 NO:5/10

The Power of Ethics is an invaluable tool to empower individuals and businesses to make ethical decisions to build competitive and trustworthy organizations." "Actionable and ready to use by all, The Power of Ethics makes ethical dilemmas clear instead of leaving you to agonize over impossible choices.

Grounds of challenge

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

procedure and court assistance

Judicial assistance may consist of the enforcement of a judgment rendered by a court of another state or other actions to assist current judicial proceedings taking place in the state requesting the cooperation of the foreign court.

Distinction between conciliation, negotiation, mediation and arbitration, confidentiality

Alternate Dispute Resolution (ADR) is a dispute resolution method that employs non-adversarial (i.e. out of court) ways to adjudicate legal controversies. ADR methods are informal, cheaper and faster, in comparison to the traditional litigation process. It includes arbitration, conciliation and mediation.

The primary difference between arbitration, conciliation and Mediation is based on the role played by the third party who is selected by the parties seeking a settlement, in consensus. That

Arbitration is the process by which parties select an independent person, who renders a decision regarding the case.

Conversely Conciliation attempts to make parties come to an agreement about the problem at hand.

In Mediation, the mediator acts as a facilitator who helps the parties in agreeing.

Defination of Arbitration:

Arbitration is a powerful means of resolving disputes between the organization and its employees. It is a process in which an independent third party analyses the bargaining situation, listens to both parties and collects necessary data and make recommendations which are binding on the parties concerned.

Arbitration is proved successful in resolving disputes between labour and management. The parties themselves establish arbitration and decision is acceptable to them. The decision taken by the arbitrator is accompanied by a written opinion providing reasons supporting the decision.

Further, the procedure is comparatively expeditious than courts and tribunals. However, the process is a bit expensive, and if there is a mistake in selecting an arbitrator, the judgement becomes arbitrary.

Definition of Conciliation:

Conciliation can be described as the method adopted by the parties for resolving the dispute, wherein the parties out of their free consent appoint an unbiased and disinterested third party, who attempts to persuade them to arrive at an agreement, by way of mutual discussion and dialogue.

Conciliation is characterized by the voluntary will of the parties who want to conciliate the dispute. Its basic component is confidentiality in which the parties and the conciliator are not permitted to share or disclose to the external party, anything associated with the proceedings.

The conciliator plays an advisory role, wherein he/she suggests potential remedies to the problem. The conciliation process completes with a settlement between the parties which is final and binding upon the parties.

Definition of Mediation:

Mediation is a form of alternate dispute resolution, wherein parties mutually appoint an independent and impartial third party, called as the mediator who helps the parties in reaching an agreement which is mutually accepted by the parties concerned.

Mediation is a systematic and interactive process, which employs negotiation techniques to assist the parties in finding the best possible solution to their problem.

As a facilitator, mediator attempts to facilitate discussion and build an agreement between the parties with an aim to settle the dispute. The decision made by the mediator is not binding like an arbitral award.

Definition of Negotiation

Negotiation refers to a systematic process based on bipartite dialogue between parties in conflict that seek to reach a mutual agreement, by finding a win-win solution for both. Here, the term conflict does not mean quarrel, unrest, or disruption, rather it implies disagreement between parties concerning their interest and rights.

However, it requires compromise from both sides in order to be effective. And so both the parties must gain and lose something.

In the case of negotiation, the focus is made on the issue relating to the conflict, rather than the overall relationship. Moreover, the mutually settled agreement arrived at, by way of negotiation can be in the form of a treaty, code, or contract.

Negotiation arises when there are alternative outcomes of a situation, in which the parties in dispute are interested, however, there is a disagreement regarding the final outcome.

Example: Suppose you go to the market to buy some fruits, and you asked for the price of 1 kg grapes and the shopkeeper replied Rs. 120. Then you requested to sell those grapes at Rs. 100 per kg, but the shopkeeper negotiated and settled at Rs. 110 per kg. This process is called Negotiation.

Definition of Mediation

Mediation is an industrial dispute settlement system, which is non-binding in nature. In this method, an independent and unbiased third party is called in by the parties under dispute, to assist them in arriving at a solution that is mutually agreeable to both.

During mediation, the mediator appointed by the parties attempts to bring agreement between the parties concerned by initiating communication and offering multiple solutions, to the stand-off issue. Further, it creates such an environment that eases interaction between the parties.

Mediation is sought when:

- Parties are looking for a negotiated outcome.
- Maintain confidentiality
- Parties want to control the outcome.
- Quick settlement is required.
- Parties want to maintain and strengthen their relations in the future.

resort to judicial proceedings

Resort To Arbitral or Judicial Proceedings- Sec 77

As a general rule,the parties can not initiate arbitral or judicial proceedings during the Conciliation proceedings in respct of a dispute which is the subject matter of the conciliation proceedings. But in exceptional cases a party may initiate arbitral or judicial proceedings if in his opinion such proceedings are necessary for preserving his rights.

Costs

the amount or equivalent paid or charged for something : price The average cost of a college education has gone up dramatically.

Dispute Resolution Boards

Admittedly, we aren't the DRB experts, but our friends at Construction Executive have a nice overview of the subject of DRBs. Also, keep in mind that DRBs can

go by a number of different names: Dispute Resolution Boards, Dispute Review Boards, Dispute Adjudication Boards, or simply Dispute Boards. For the sake of clarity, at least for this article, we're sticking to "Dispute Resolution Boards" or "DRBs."

Lok Adalats

The Lok Adalat Mechanism is available throughout the State through the Legal Services Authorities / Committees for amicable settlement of cases.

Lok Adalat Benches consisting of Judicial Officers, Advocates and social workers deal with cases referred to them and help the parties in arriving at a settlement.