

UNIT-I CONCEPT

1. ARBITRATION : MEANING SCOPE AND TYPES

ARBITRATION

Arbitration is the process of bringing a business dispute before a disinterested third party for resolution. The third party, an arbitrator, hears the evidence brought by both sides and makes a decision. Sometimes that decision is binding on the parties. To **arbitrate** a matter is to bring it before an arbitrator. Arbitration is a form of alternative dispute resolution (ADR), used in place of litigation in the hope of settling a dispute without the cost and time of going to court. Arbitration is often confused with mediation, which is an informal process of bringing in a third party who goes between the disputing parties to help them settle a dispute. The mediation process is not binding on the parties, and the mediator does not hear evidence. At the end of the arbitration process, the arbitrator made the decision, which was binding on both parties.

The meaning of arbitration is securing an award on a conflict issued by reference to a third party. Under the process of arbitration, a dispute is submitted to an impartial outsider who makes a decision which is usually binding on both parties. In the process of arbitration, there is hearing and determination of a cause between parties in controversy by a person or persons chosen by the parties or appointed under statutory authority. The purpose of arbitration is adjudication, that is why there is no chance for compromise in awards. In the word of Kurt Brenn, the objective of arbitration is not compromise... but adjudicating though parties are at liberty to compromise. A wise arbitrator will certainly promote such agreement but as a rule there is no place for compromise in the awards. In time of issuing decision, the arbitrator should take in to consideration the fact that the decision must be based upon some sound principle of natural justice, it must be workable, and it must be based upon a 'Split the difference' approach.

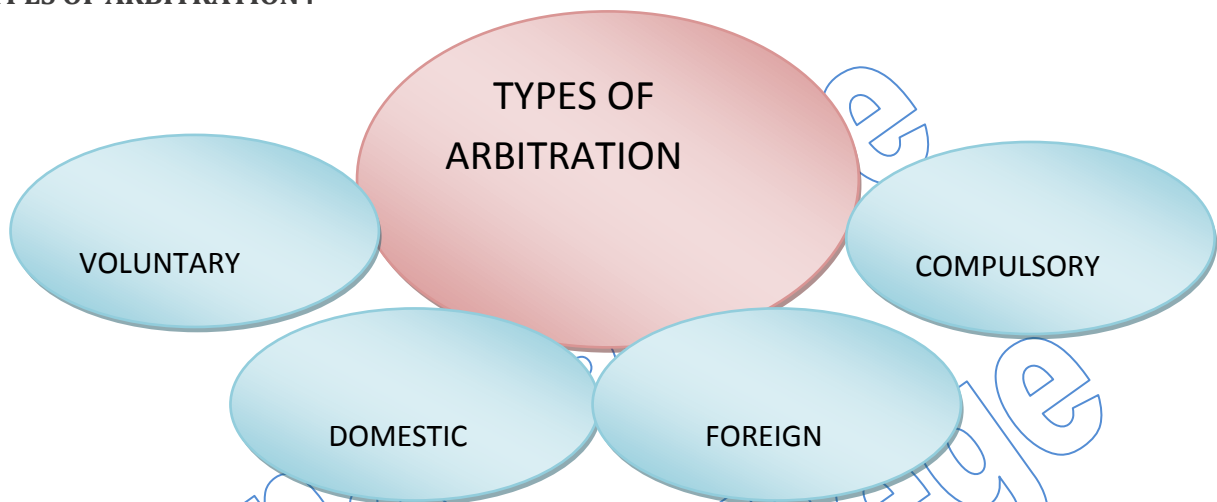
In order to clear the concept of arbitration we should know the difference between arbitration and conciliation as well as the difference between arbitration and mediation.

Arbitration can be distinguished from conciliation on the basis of that its decision is binding on the parties and its different approach and spirit. The main objectives of arbitration is adjudication and so there is no place for compromise in awards though the parties are long as it brings about an agreement between the contending parties, an arbitrator enforces his own point of view on the contending parties and the opinions of the disputants are not given any predominance. Moreover, arbitration produce justice and fair approach to a dispute. So, it is more judicial in character than conciliation.

Difference between Arbitration and mediation is that arbitration is a judicial process, but mediation has a legislative tint. The award of the arbitrator rests on equity and justice. There is no chance of compromise in arbitration but, in case of mediation compromise is the main essence. The award of arbitration is mandatory but in case of mediation, it is not so. Arbitration may sometime terminate the dispute, Which is not happened in mediator. Arbitration is best suited to settlement of contractual rights, but mediation is suited to the adjustment of disputes.

The Arbitration and Conciliation Act, 1996 is the prime legislation relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matters connected therewith or incidental thereto. It repealed the three statutory provisions for arbitration:- (i) **the Arbitration Act, 1940**; (ii) **the Arbitration (Protocol and Convention) Act, 1937**; and (iii) **the Foreign Awards (Recognition and Enforcement) Act, 1961**.

TYPES OF ARBITRATION :



Voluntary Arbitration : In case of voluntary arbitration the two contending parties unable to compose their difference by themselves or with the help of the mediator or conciliator, agree to submit the conflict / dispute between them to be resolved by an impartial authority, where they are ready to accept the decision of that authority. In case of voluntary arbitration before the dispute is referred for adjudication, the parties can and do themselves refer voluntarily the dispute to arbitration.

To be voluntary arbitration, following elements are essentials.

- (i) Voluntary submission of disputes to an arbitrator.
- (ii) Subsequent attendance of witness and investigations.
- (iii) Enforcement of an award may not be necessary and binding because there is no compulsion. The award may be favorable or unfavorable.
- (iv) Voluntary arbitration may be specially needed for disputes arising under agreements.

Compulsory Arbitration : In case of compulsory arbitration parties are required to arbitrate without any willingness on their part. If one of the parties thinks aggrieved by an act of the other, then that particular party can apply to the appropriate govt. to refer the dispute to adjudication machinery. This type of dispute is called as compulsory arbitration. In case of the following condition, the parties under compulsory arbitration are forced to arbitration by the state-

- (i) If the parties fail to arrive at a settlement by voluntary method.
- (ii) If there is a national emergency which requires that wheels of production should not be obstructed by frequent work-stoppages.
- (iii) Of the country is passing through grave economic crisis.
- (iv) If there is a grave public dissatisfaction with the existing industrial relations.

(v) If Industries of Strategic importance are involved.

(vi) If the parties are ill balanced, where the unions are weak ill-organised and powerless and the means of production are in the hands of the capitalists.

(vii) If the public interest and the working conditions are desired to be safeguarded and regulated by the state.

Domestic Arbitration is defined as an alternative dispute resolution mechanism in which the parties get their disputes settled through the intervention of a third person and without having recourse to the court of law. It is a mode in which the dispute is referred to a nominated person who decides the issue in a quasi-judicial manner after hearing both sides. Generally, the disputing parties refer their case to an arbitral tribunal and the decision arrived at by the tribunal is known as an 'award'.

While, the term **FOREIGN ARBITRATION / 'international commercial arbitration'** means "an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in India and where at least one of the parties is:- (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country".

2. ARBITRATION AGREEMENT- ESSENTIALS, KINDS

Under section 2 (a) of the Arbitration Act 1940 an arbitration agreement is defined as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Arbitration agreement or arbitration clause in an agreement is sometimes called submission. An Arbitration agreement is also called as 'reference'. In the word of Halsbury, 'It is agreement made by two or more parties between whom some difference has wise or may thereafter arise whereby they appoint another person to adjudicate upon such dispute and agree to be bound by his decision. The characteristics of arbitration, is that, it is a private tribunal chosen by the parties. The person, who is appointed to settle the differences or disputes is called an 'arbitrator', the proceeding before him are known as an 'arbitration' and his decision is known as 'award'.

Essentials of a Valid Arbitration agreement are as following:-

1) **Written** : The arbitration agreement should be in written form of course, in the written arbitration agreement, there is no need of signatures of the parties. In the written agreement, the terms of arbitration should be minimum. The main purpose of the written arbitration agreement is to establish that the parties agreed to the settlement of disputes by arbitration.

2) **Present or Future Dispute** : Without the existence of dispute, the arbitration is meaningless. Arbitration pre-supposes the existence or the possible existence of a dispute. In this connection, dispute implies assertion of a right by one party and denial of that right by the other party.

3) **Essential of a valid contract** : To be a valid arbitration agreement, it should fulfil the all essential elements of a valid contract. Such as : offer and acceptance, face consent, legal relationship, complaint to control, lawful consideration, lawful object, not declared without vatic contract, arbitration clause is not binding.

3. WHO CAN ENTER INTO ARBITRATION AGREEMENT ?

- Every person (including a foreigner) who is competent to contract can enter into an arbitration agreement. He must have attained the age of majority according to the law to which he is subject and must be of sound mind and must not be disqualified from contracting by the law by which he is governed.

- In the case of a partnership, a partner may enter into an arbitration agreement on behalf of the partnership, only if he is so authorised in writing by the other partners or in the partnership agreement itself.
- The Directors or other officers of a company can enter into an arbitration agreement on behalf of the company, subject to the restrictions, if any, contained in the Memorandum of Association or Articles of Association of the Company.
- Central and State Governments can enter into such agreement, subject to fulfillment of Constitutional requirements.
- Public undertakings can enter into an arbitration agreement like any private party. Such agreement can be with private parties within the country or with foreign parties or foreign States and State agencies.

4. VALIDITY

“Agreement in writing” and the formal validity of arbitration agreements

Most jurisdictions require arbitration agreements to be in writing if they are to be recognised. Article II of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (“**the New York Convention**”), Article 7 of the original *UNCITRAL Model Law on International Commercial Arbitration (1985)* before it was amended in 2006 (“**the 1985 Model Law**”), and Section 7 of India’s *Arbitration and Conciliation Act, 1996* (“**the Indian Act**”), all contain this requirement.

We know that there are different ways of entering into contracts — including electronically, by reference to other documents, and orally. Sweden and Norway could not find any rational basis for treating arbitration agreements any differently. Article 1 of the *Swedish Arbitration Act* and Articles 3 to 10 of the *Norwegian Arbitration Act* recognise any kind of agreement through which the parties have reached a consensus to arbitrate. The 2006 version of the *UNCITRAL Model Law on International Commercial Arbitration* (“**the 2006 Model Law**”), in Article 7, allows states to abolish all formal requirements of validity. Some states, like England, have taken a halfway house approach. While requiring the arbitration agreement to be in writing, they also allow that requirement to be met quite easily.

The recent Bombay High Court decision in *Mody v. Kerwala* (September 19, 2013) is in contrast to this approach. The Court held that not only must an arbitration agreement be in writing according to Section 7(3) of the Indian Act, the fact that the agreement is in writing can only be proved as specified in Section 7(4) of the Act.

Without debating the relative merits of the strict “in writing” approach, let us look at the enforcement issues that arise from the multiplicity of legal approaches on this point.

Written agreement required	Written agreement not required
- New York Convention	- 2006 UNCITRAL Model Law
- 1985 UNCITRAL Model Law	- Swedish Arbitration Act
- Sections 7 and 44 of India's Arbitration Act	- Norwegian Arbitration Act
- 2013 Bombay High Court decision	

Consider Part II of the Indian Act, which gives effect to India's obligations under the New York Convention. Section 44 of the Indian Act defines a "foreign award" as an award made in a New York Convention signatory state (and notified by the Central Government as fulfilling the reciprocity requirement), *and made pursuant to an agreement in writing*. Every other provision in Part II, including an Indian court's obligation to refer stay proceedings brought in breach of foreign-seated arbitration agreements (Section 45), its obligation to recognise a foreign award as final and binding (Section 46), and its obligation to enforce and execute the award (Sections 47 to 49), is contingent on the award being a "foreign award" under Section 44, that is, made pursuant to an agreement *in writing*. So, would an award made pursuant to an oral agreement in say Sweden (a country notified by the Central Government), be a "foreign award" under Section 44? Can it be enforced in India? How would it satisfy Section 47's evidentiary requirement of producing the original arbitration agreement for enforcement?

Chances are, an Indian court will not enforce such an award. It has no reason to, considering the scheme of Part II and the New York Convention. The same goes for other NY Convention signatories. There is an inherent discrepancy in the New York Convention approach and the approach endorsed in the 2006 UNCITRAL Model Law that states like Norway and Sweden follow.

However this is resolved at the national and international level, the drafting lesson here is very clear. Always ensure that your arbitration agreement is valid under the law of the seat, the law applicable to the arbitration agreement (which should always be specified), as well as the law at the place of enforcement. Otherwise, there is a very real danger that your award might not be enforceable, even if your agreement and award are perfectly valid at your seat.

From the reading of the Section 7 of the Arbitration and Conciliation Act, 1996, it appears that an arrangement to submit to arbitrational all or certain disputes between the parties itself constitutes an arbitration agreement. It may be a Clause or contract or may be a separate agreement between them. The only requirement is that it should be in writing and signed by the parties. An arbitration agreement can be created even by separate documents.

5. REFERENCE TO ARBITRATION

Rules for Arbitration / Reference

SECTION-7 ARBITRATION AGREEMENT

IN SECTION -7(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

SECTION-45 Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Rules to the Contrary

1. These rules are rules to the contrary and supersede the applicable rules of Arbitration or Reference in the province or territory where the Arbitration or Reference is being conducted.
2. **Arbitrator/Referee**-A Reference or Arbitration will be heard by one Arbitrator or Referee appointed from the roster of Arbitrators and Referees, as established by the Court having jurisdiction in the Class Action in which the claimant is a Class Member.

3. **Nature of Review**-An Arbitration or Reference shall be a review of the Administrator's decision utilizing the simplest, least expensive and most expeditious procedure for the Arbitration or Reference.
4. In meeting this objective, the Arbitrator/Referee may conduct the Arbitration or Reference in whatever manner he or she considers appropriate, provided that the parties are treated with equality and each party is given a fair opportunity to present his, her or its case.
5. **Representation**-The Claimant may act in person on an Arbitration/Reference or through a representative; in which case, the representative shall notify the Administrator and Arbitrator/Referee in writing providing the written consent of the Claimant.
6. **Commencement**- In order to commence an Arbitration or Reference, the Claimant shall file a Request for Review by an Arbitrator/Referee in the prescribed form.
7. The Administrator shall forward to a Referee or Arbitrator, as the case may be, in the Province or Territory where the claimant resides or is deemed to reside, to the Claimant and to the Fund Counsel the following:
 - a. a copy of the Claim and the Request for Review by an Arbitrator/Referee;
 - b. a copy of all the written submissions and material in support of the submissions and other evidence pertaining to the Claim in the possession of the Administrator;
 - c. a copy of the Administrator's decision; and
 - d. such other information or material as the Referee, Arbitrator or Fund Counsel may request.
8. The Administrator shall forward the Claimant's file to the Claimant, Fund Counsel and the Chair and/or Vice-Chair of the Roster of Arbitrators/Referees within ten (10) days of receipt of the Request for Review by an Arbitrator/Referee.
9. The Claimant shall have fifteen (15) days upon receipt of the Claimant's file to forward any supplementary submissions to the Chair and/or Vice-Chair of the Roster of Arbitrators/Referees and Administrator.
10. The Fund Counsel shall have fifteen (15) days from the date of the Administrator's receipt of the Claimant's submissions to forward any submissions in reply to the Chair and/or Vice-Chair of the Roster of Arbitrators/Referees and Administrator.
11. The Chair and/or Vice-Chair of the Roster of Arbitrators/Referees shall appoint an Arbitrator or Referee to take carriage of the matter.
12. **Mediations**
The Arbitrator has jurisdiction to request that the parties enter into mediation. The Referee has discretion to attempt to mediate the dispute at any time in the process.
13. **Mode of Hearing**-Within five (5) days of the receipt of the Request for Review by an Arbitrator/Referee, any supplementary submissions by the Claimant and the Claimant's file from the Administrator or reply submissions from Fund Counsel, the Arbitrator/Referee shall verify with the parties if:
 - a. an oral hearing is necessary; or
 - b. further written submissions are necessary.
14. Notwithstanding the Arbitrator/Referee's discretion in paragraph 13, an oral hearing will be required where the Claimant or Fund Counsel wishes to adduce oral evidence.
15. If no further written submissions are provided and no oral hearing is required, the Arbitrator/Referee shall notify the parties that he/she will proceed on the basis of the Request for Review by an Arbitrator/Referee, the Claimant's file, the Claimant's supplementary submissions, if any, and any reply submissions.
16. Within thirty (30) days following notification by the parties that no further written submissions or oral hearings will be necessary, the Arbitrator/Referee shall release his/her Reasons for Decision.

17. **Further Written Submissions**-If further written submissions are required, the Arbitrator/Referee shall notify the Claimant and Fund Counsel of the issues to be addressed in the written submissions and the time limits for the receipt of such submissions, including any submissions in reply.
18. Within thirty (30) days following the receipt of the final submissions, the Arbitrator/Referee shall release his/her Reasons for Decision.
19. **Oral Hearing**-If an oral hearing is requested by one or more of the parties because the requesting party wishes to adduce oral evidence, the Arbitrator/Referee shall:
 - a. determine the time, date and location of the hearing and give all parties fifteen (15) days prior written notice of such time, date and location;
 - b. give directions as to the issues to be addressed at the oral hearing;
 - c. if necessary, give directions as to the issues which require oral evidence; and
 - d. provide any other directions, as the Arbitrator/Referee deems appropriate.
20. If an oral hearing with evidence is requested by one or more of the parties because the requesting party wishes to lead oral evidence, the Arbitrator/Referee orders an oral hearing with evidence, the following rules will apply, unless the Arbitrator/Referee makes an order to the contrary:
 - a. any documentation, including medical records, medical reports and/or loss of income documentation, intended to be relied upon by the Claimant shall be produced to the Administrator and Arbitrator/Referee at least fifteen (15) days prior to the Arbitration or Reference;
 - b. the Arbitrator/Referee, upon his/her own Notice or upon written request by the Administrator, has the jurisdiction to order an independent medical examination of the Claimant;
 - c. subject to issues of privilege, an Arbitrator/Referee may accept all oral or written evidence as the Arbitrator/Referee, in his or her discretion, considers proper, whether admissible in a Court of law or not; and
 - d. if an oral hearing with evidence is required, the Arbitrator/Referee may require production of documents and examination for discovery, if necessary.
21. Within thirty (30) days following the completion of the oral hearing, the Arbitrator/Referee shall release his/her Reasons for Decision.
22. **Process Confidential**-The Arbitration/Reference process is private and all information and evidence utilized in the Arbitration/Reference process is confidential.
23. **Reasons for Decision**-Any Reasons for Decisions by an Arbitrator/Referee shall state the facts and conclusions without identifying the Claimant by name or location. The Arbitrators and Referees may rely upon earlier decisions of other Arbitrators or Referees to arrive at their Reasons for Decisions.
24. The Arbitrator/Referee may extend the time for the release of the Reasons for Decision if he/she considers such an extension is justified.

6. INTERIM MEASURES BY COURT

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

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

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UNIT-II ARBITRATION TRIBUNAL-

ARBITRATION-TRIBUNAL

ARBITRATION TRIBUNAL-COMPOSITION

Composition of arbitral tribunal

Number of arbitrators—

1. The 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-section (1), the arbitral tribunal shall consist of a sole arbitrator.

Appointment of arbitrators—

3. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
4. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
5. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
6. If the appointment procedure in sub-section (3) applies and—
 - a. a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
 - b. the two appointed arbitrators fail to agree on their arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
7. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
8. Where, under an appointment procedure agreed upon by the parties,—
 - a. a party fails to act as required under that procedure; or
 - b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
 - c. a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
9. A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.
10. The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—
 - a. any qualifications required of the arbitrator by the agreement of the parties; and

- b. other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
11. In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
 12. The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.
 13. Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.
 14. Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the “Chief Justice of India”.
 15. Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

2. JURISDICTION

The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by a party at the first instance, i.e., either prior to or along with the filing of the statement of defence. If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under Section 34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up by the arbitral tribunal and in the event of an adverse order, it is open to the aggrieved party to challenge the award.

3. GROUNDS FOR CHALLENGE—

An arbitrator may be challenged only in two situations. First, if circumstances exist that give rise to justifiable grounds as to his independence or impartiality; second, if he does not possess the qualifications agreed to by the parties. A challenge is required to be made within 15 days of the petitioner becoming aware of the constitution of the arbitral tribunal or of the circumstances furnishing grounds for challenge. Further, subject to the parties' agreement, it is the arbitral tribunal (and not the court - unlike under the old Act of 1940) which shall decide on the challenge. If the challenge is not successful the tribunal shall continue with the arbitral proceedings and render the award, which can be challenged by an aggrieved party at that stage. This is another significant departure from the Model Law, which envisages recourse to a court of law in the event the arbitral tribunal rejects the challenge. The Indian courts have held that “the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision.

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.

An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

An arbitrator may be challenged only if—

- A) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- B) he does not possess the qualifications agreed to by the parties.

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

Challenge procedure—

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

Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

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

If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

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

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

Failure or impossibility to act—

The mandate of an arbitrator shall terminate if—

- A) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
- B) he withdraws from his office or the parties agree to the termination of his mandate.

If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

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

Termination of mandate and substitution of arbitrator—

In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

- A) where he withdraws from office for any reason; or
- B) by or pursuant to agreement of the parties.

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

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

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

4. POWERS

Under Section 2(1)(d) of the Arbitration and Conciliation Act, arbitral tribunal means a sole arbitrator or a panel of arbitrators.

The parties are free to agree on a procedure on the appointment of an arbitrator. In a panel or board of arbitrators the award of the majority will prevail. The duties and powers of the arbitral tribunal include the following:

- To give ruling on the existence or validity of the arbitration agreement or on its own jurisdiction.
- To order interim measures of protection.
- To determine the admissibility and the weight of evidence lead before the forum.
- To decide the dispute on merits as per the substantive law of the parties and according to the terms of contract and usage of trade.
- To encourage voluntary dispute settlement through Alternative Dispute Resolution (ADR) mechanisms including conciliation
- To deliver reasoned arbitral award.
- To determine the cost of arbitration and its apportionment among the parties.
- To render accounts of deposits to the parties and return unspent balance.

Rule on its own jurisdiction

The arbitration tribunal shall decide any challenge to the very existence or validity of the arbitration agreement in question or decide any objection taken on the ground of lack of its jurisdiction. Any party, including even those who have participated in the appointment of the arbitrator, can take such objection or challenge latest with his defence statement.

Any objection that the arbitral tribunal is exceeding its authority must be taken at once during the arbitration proceedings.

However, the arbitral tribunal can consider any of the aforesaid preliminary objections, even if delayed, for good reasons.

In case such preliminary objection is overruled, the arbitral tribunal shall continue with arbitration and make the award. The aggrieved party can now apply to the court for setting aside the award re agitating the said preliminary objection amongst other grounds of challenge to the award.

5. PROCEDURE

The arbitrators are masters of their own procedure and subject to parties agreement, may conduct the proceedings “in the manner they consider appropriate.” This power includes- “the power to determine the admissibility, relevance, materiality and weight of any evidence”.

The only restraint on them is that they shall treat the parties with equality and each party shall be given a full opportunity to present his case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure nor the Indian Evidence Act applies to arbitrations. Unless the parties agree otherwise, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for arguments or whether the proceedings shall be conducted on the basis of documents or other material alone. However the arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held). Arbitrators have power to proceed exparte where the respondent, without sufficient cause, fails to communicate his statement of defence or appear for an oral hearing or produce evidence. However, in such situation the tribunal shall not treat the failure as an admission of the allegations by the respondent and shall decide the

matter on the evidence, if any, before it. If the claimant fails to communicate his statement of the claim, the arbitral tribunal shall be entitled to terminate the proceedings.

6. COURT ASSISTANCE

Section-27 Court assistance in taking evidence

- (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.
- (2) The application shall specify –
 - (a) the raises and addresses of the panics and the arbitrators,
 - (b) the general nature of the claim and the relief sought –
 - (c) the evidence to be obtained, in particular –
 - (i) the name and addresses of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;
 - (ii) the description of any document to be produced or property to be inspected.
- (3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.
- (4) The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.
- (5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would for the like offences in suits tried before the Court.
- (6) In this section the expression “Processes” includes summonses and commissions for the examination of witnesses and summonses to produce documents.

7. AWARD, RULES OF GUIDANCE, FORM AND CONTENT, CORRECTION AND INTERPRETATION

SECTION –2(1) (c) “Arbitral award” includes an interim award

SECTION 7- An arbitral award made under this Part shall be considered as a domestic award.

FORM AND CONTENTS OF AWARD:

The arbitrators are required to set out the reasons on which their award is based, unless the parties agree that no reasons are to be given or if it arises out of agreed terms of settlement. The tribunal may make an interim award on matters on which it can also make a final award. Indian law provides for a very healthy 18% interest rate on sums due under an award. Thus, unless the arbitral tribunal directs otherwise, the award will carry interest at 18% per annum from the date of the award till the date of payment. The tribunal is free to award costs, including the cost of any institution supervising the arbitration or any other expense incurred in connection with the arbitration proceedings.

SECTION 31. FORM AND CONTENTS OF ARBITRAL AWARD. –

- (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
- (2) For the purposes of sub-section (1), in arbitrat proceeding with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.
- (3) The arbitral award shall state the reasons upon which it is based, unless
 - (a) The parties have agreed that no reasons are to be given, or
 - (b) The award is an arbitral award on a-reed terms under section 30.
- (4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

- (5) After the arbitral award is made, a signed copy shall be delivered to each party.
- (6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.
- (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
- (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.
- (8) Unless otherwise agreed by the parties, -
- (a) The costs of an arbitration shall be fixed by the arbitral tribunal
- (b) The arbitral tribunal shall specify

- (i) The party entitled to costs,
- (ii) The party who shall pay the costs,
- (iii) The amount of costs or method of determining that amount, and
- (iv) The manner in which the costs shall be paid.

Explanation. -For the purpose of clause (a), "costs" means reasonable costs relating to

- (i) The fees and expenses of the arbitrators and witnesses,
- (ii) Legal fees and expenses,
- (iii) Any administration fees of the institution supervising the arbitration, and
- (iv) Any other expenses incurred in connection with the arbitral proceeding and the arbitral award.

SECTION 33. CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD. -

- (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties
- (a) A party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
- (b) If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
- (2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.
- (3) The arbitral tribunal may correct any error of the type referred to in clause
- (a) of subsection (1), on its own initiative, within thirty days from the date of the arbitral award.
- (4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
- (5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
- (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).
- (7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

8. GROUNDS OF SETTING ASIDE AN AWARD-WANT OF PROPER NOTICE AND HEARING,CONTRAVENTION OF COMPOSITION AND PROCEDURE.

SETTING ASIDE OF AWARDS: The grounds for setting aside an award rendered in India (in a domestic or international arbitration) are provided for under **Section 34** of the Act. These are materially the same as in Article 34 of the Model Law for challenging an enforcement application. An award can be set aside if:

- a) a party was under some incapacity; or
- b) the arbitration agreement was not valid under the governing law; or
- c) a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or
- d) the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or
- e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
- f) the subject matter of the dispute is not capable of settlement by arbitration; or
- g) the arbitral award is in conflict with the public policy of India. A challenge to an award is to be made within three months from the date of receipt of the same. The courts may, however, condone a delay of maximum 30 days on evidence of sufficient cause. Subject to any challenge to an award, the same is final and binding on the parties and enforceable as a decree of the Court. Considerable controversy has been generated as to whether an award is liable to be challenged under Section 34 on merits.

In *Sanshin Chemical Industry v. Oriental Carbons & chemical Ltd.*, there arose a dispute between the parties regarding the decision of the Joint Arbitration Committee relating to venue of arbitration. The Apex Court held that a decision on the question of venue will not be either an award or an interim award so as to be appealable under Section 34 of the act.

In *Brijendra Nath v. Mayank*, the court held that where the parties have acted upon the arbitral award during the pendency of the application challenging its validity, it would amount to estoppel against attacking the award.

9. IMPARTIALITY OF THE ARBITRATOR

Independence and Impartiality

Accepting appointment

Parties to international arbitrations are entitled to expect of the process, a just, well reasoned and enforceable award. To that end, they are entitled to expect arbitrators to disclose possible conflicts of interest at the outset; to avoid putting themselves in the position where conflicts will arise during the course of the proceedings; to conduct the arbitration fairly, in a timely manner and with careful regard to due process; to maintain the confidentiality of the arbitration; and to reach their decision in an impartial manner.

Under Article 5.3 of the LCIA (Launched in April 2009, LCIA India is the first independent subsidiary of the London Court of International Arbitration) India Rules, all arbitrators will, before appointment, be required to sign a declaration that there are no circumstances known to them likely to give rise to any justified doubts as to their impartiality or independence.

In completing their statements of independence, arbitrators will take into account, inter alia, the existence and nature of any past or present relationships, direct or indirect, with any of the parties or their counsel; any doubt as to which must be resolved in favour of disclosure.

There is a continuing obligation on all arbitrators immediately to disclose any circumstances that might give rise to conflicts, if such circumstances arise at any time during the course of the arbitration.

Communications

All communications between the tribunal and the parties must be copied to the LCIA India secretariat. No arbitrator is permitted, during the course of the arbitration, to make any unilateral communication with any party or with any party's representative. If an arbitrator who has been nominated by a party wishes to communicate with that party before the tribunal has been formally constituted, he must do so through the LCIA India Registrar, in accordance with Article 13.1 of the LCIA India Rules.

Availability

It is, of course, essential that an arbitrator should not only be impartial and independent of the parties, but that his diary commitments should permit him to undertake and to fulfil his mandate without delay.

Before appointment, therefore, all arbitrators will also be required to confirm their ability to devote sufficient time to the proceedings, over an appropriate timeframe, including drafting the Award.

Confidentiality

Article 30 of the LCIA India Rules imposes duties of confidentiality on parties and arbitrators, with which arbitrators should familiarise themselves, and with which the tribunal should ensure that it and the parties comply.

10. BAR OF LIMITATIONS, RES JUDICATA

The doctrine of res judicata can come into play in relation to international arbitration in a variety of ways. In the context of a discussion devoted to "Post-award issues", res judicata is relevant only insofar as it relates to the effects of arbitral awards. In this connection, the issues that arise are whether a given arbitral award has res judicata effect in the same arbitration (in which case the question is that of the effects of partial or interim awards in subsequent phases of the same arbitration), in other arbitrations (whether or not based on the same arbitration agreement) and in proceedings before domestic courts. Other aspects of the doctrine which do not involve the effects of awards, and are therefore beyond the scope of this discussion, are the res judicata effects in arbitral or in domestic court proceedings of judgments of domestic courts which deal with arbitration (for instance a finding of nullity or inapplicability of an arbitration agreement) and the res judicata effects in arbitration proceedings of national judgments on issues of substance.

RES JUDICATA:

Res judicata or res judicata (RJ), also known as claim preclusion, is the Latin term for "a matter [already] judged", and may refer to two concepts: in both civil law and common law legal systems, a case in which there has been a final judgment and is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) continued litigation of such cases between the same parties, which is different between the two legal systems. In this latter usage, the term is synonymous with "preclusion".

In the case of res judicata, the matter cannot be raised again, either in the same court or in a different court. A court will use res judicata to deny reconsideration of a matter.

The legal concept of res judicata arose as a method of preventing injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court system. Res judicata does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, so a prevailing plaintiff could not recover damages from the defendant twice for the same injury.

11. CONSENT OF PARTIES

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.

SECTION-68. Administrative assistance.—In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

SECTION-78. Costs.—

(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1), “costs” means reasonable costs relating to—

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

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

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

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

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

12. ENFORCEMENT

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

SECTION-47. Evidence.—

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—

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

(b) the original agreement for arbitration or a duly certified copy thereof; and

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

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. Explanation.—In this section and all the following sections of this Chapter, “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

SECTION-48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have

subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

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

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

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

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

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

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.— Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

SECTION-49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

SECTION-57. Conditions for enforcement of foreign awards.—

(1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that—

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

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

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

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

(e) the enforcement of the award is not contrary to the public policy or the law of India. Explanation.— Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

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

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

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

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration: Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

SECTION-58. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

13. APPEALS

It is sometimes said that arbitration awards are not normally subject to appeal (often another reason given in favour of using arbitration), but that is usually an over simplification.

Most countries in the world allow arbitration awards to be "challenged" although they usually limit the circumstances in which such challenges may be brought. The two most commonly permitted grounds of challenge are:

1. that the tribunal did not have jurisdiction to make the award; or
2. serious irregularity on the part of the tribunal.

Arbitration awards are non-justiciable. Distinguish from an "expert determination" where the expert determines a matter of fact (which is ordinarily not subject to any form of appeal at all, except in cases of obvious bias or manifest error or bad faith).

In addition, although not by way of challenge, many countries permit appeals on a point of law (although almost no countries permit appeals to be made in relation to findings of fact). This right is usually closely circumscribed to avoid undermining the commercial efficacy of arbitration.

SECTION-37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

- (a) granting or refusing to grant any measure under section 9;
- (b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

- (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or
- (b) granting or refusing to grant an interim measure under section 17.

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

SECTION-50. Appealable orders.—

(1) An appeal shall lie from the order refusing to—

- (a) refer the parties to arbitration under section 45;
- (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

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

SECTION-59. Appealable orders.—

(1) An appeal shall lie from the order refusing—

(a) to refer the parties to arbitration under section 54; and

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

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



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Renaissance
Law College

UNIT-III CONCILIATION

CONCILIATION

1. Distinction between “conciliation”, “mediation”, and “arbitration”.

Historically, methods used to settle disputes have ranged from negotiation, to courtroom litigation, and even to physical combat. The legal needs of countries, multinational companies, and ordinary people have changed over the last decade. When faced with a dispute, business people are learning that, whenever possible, it is more advantageous to reach practical and private agreements than to fight for years and spend huge amounts of money in courtroom battles. Due to the vast amounts of time and money involved in the trial process, the American and Italian business communities have increasingly turned to legal alternatives that are more prompt, private and economical than the courtroom. Alternative Dispute Resolution (ADR) refers to the wide spectrum of legal avenues that use means other than trial to settle disputes.

The main ADR alternatives to civil litigation are negotiation, arbitration, conciliation and mediation. Other, more particular ADR processes available are early neutral evaluation, mini-trial, summary jury trial, and the judicial settlement conference. Disputing parties use these ADR methods because they are expeditious, private, and generally much less expensive than a trial. While each of these ADR processes may be effective in various circumstances, mediation in the United States has proven to offer superior advantages for the resolution of disputes that resist resolution.

In comparing the use of ADR processes in the U.S to those available in Italy, it is paramount to recognize the fundamental legal difference between the two nations; the American common law system is very different from Italy’s civil law system. Despite that basic difference, both countries have the concept of arbitration firmly entrenched within each of their respective legal systems, as an alternative to the courtroom. While mediation is a concept widely used in U.S., it has yet to truly benefit the legal community in Italy as a viable means to settle disputes. In Italy, mediation is a concept that is often mistakenly confused with conciliation; although the two methods have similar aspects, they are fundamentally different. To appreciate the differences between arbitration, mediation, and conciliation, it is helpful to explain them separately.

Arbitration.

Arbitration is an ADR (alternative dispute resolution) method where the disputing parties involved present their disagreement to one arbitrator or a panel of private, independent and qualified third party “arbitrators.” The arbitrator(s) determine the outcome of the case. While it may be less expensive and more accessible than trial, the arbitration process has well-defined disadvantages. Some of disadvantages include the risk losing, formal or semi-formal rules of procedure and evidence, as well as the potential loss of control over the decision after transfer by the parties of decision-making authority to the arbitrator. By employing arbitration, the parties lose their ability to participate directly in the process. In addition, parties in arbitration are confined by traditional legal remedies that do not encompass creative, innovative, or forward-looking solutions to business disputes.

According to the Italian Civil Procedure Code (I.C.P.C.) § 806, parties in conflict may chose neutral arbitrators to decide and settle a dispute between them, as long as those disputes are not already of the type designated to be handled within the court system. In Italy, arbitrators are generally attorneys

or law professors, and are chosen by disputing parties in respect to their experience and competence in specific areas of law. When a disputed matter is to be given to a panel of arbitrators, each party selects their own arbitrator, and together, both arbitrators appoint a third one as the president of the panel. If they are able to agree on a common choice, the parties may instead appoint and utilize one sole arbitrator to assist with the dispute. Typically, to use arbitration in Italy, there must be an “arbitration clause” already written into contract that exists between the two parties. I.C.P.C § 808 labels this clause the “compromise clause” (clausola compromissoria). The procedures that the arbitrator or the panel must follow during arbitration are inserted along with these contractual arbitration clauses. Without this contractual arbitration clause, parties may agree once a dispute surfaces, to allow arbitrators to hear and resolve their disputes; this is known as a “compromise agreement” (compromesso). Although this approach is laid out in I.C.P.C. § 806, this avenue to arbitration is not very common because Italian legal precedent has effectively demonstrated the need for those clauses to be written into contracts before any disputes would surface.

Generally, the procedural rules regarding Italian arbitration are formal but not as strict as the ordinary procedural rules that govern litigation. Technically, the process of arbitration concludes with a decision called an “award” (lodo arbitrale) and possibly an agreement to deposit that amount within 180 days from the date the arbitrator accepted the dispute (I.C.P.C § 820). In reality, however, the conclusion of an arbitrated dispute is a debatable topic, since arbitrators can prolong the process for a long time. There are two types of arbitration either in U.S. than in Italy. First, in “binding arbitration” (arbitrato rituale), the arbitral award (lodo arbitrale) is comparable to a litigated judgment and is enforceable in respect to the parties’ damages. Second, in “non-binding arbitration” (arbitrato non-rituale) in Italy, the arbitrator renders a final decision similar to that of a contractual agreement; specifically, the parties owe each other an obligation as they would in a contractual arrangement. Under Italian codes, this type of proceeding carries its own scheme of rules and permits parties to obtain substantial justice by asserting a “sentence of equity.” I.C.P.C. § 114 spells out what constitutes a sentence of equity (pronuncia secondo equità); a judge will decide how the dispute will be resolved based on principles of equity, as long as these rights are available to the parties and they request that the judge should decide in this manner. Otherwise, the judge will decide on traditional principles of law (pronuncia secondo diritto, I.C.P.C. 113). In the United States, non-binding arbitration constitutes an advisory ruling by the arbitrator; the parties are not required to carry out the decision unless they choose to do so.

The processes of appeal also demonstrate the differences between binding and non-binding arbitration. An arbitration decision generally has the force of law behind it, but does not set a legal precedent. A determination arrived at through binding arbitration (arbitrato rituale) can be appealed only when a party wishes to seek revocation, and, when appropriate, can be done by a third party objection in front of ordinary judge (I.C.P.C § 827). A third party objection is the usual procedure that extends the length of the overall arbitration proceedings, essentially becoming a double procedure, private at the beginning and then in the enforcement phase. When a determination is made through non-binding arbitration (arbitrato non-rituale), the decision can be appealed only in exclusive and limited cases involving sentences that can be enforced by an equity judgment. The appeal must be heard by new arbitrators, who must be chosen with an increasingly selective eye in regards to their experience and competency- a process, of course, which involves more money and time.

Ultimately, the power of an arbitrator or panel of arbitrators is granted directly by the parties. By including contractual arbitration clauses, parties are agreeing to the resolution of their disputes through a process that consists of very simple proceedings, which are similar, but not equal to the traditional route of litigated settlements. The arbitral award that concludes a dispute has the same value as an ordinary judicial judgment, on the condition that parties will proceed with the next formal step of registering this private decision with the Italian Court of Appeal.

Mediation.

Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Mediation is a “peaceful” dispute resolution tool that is complementary to the existing court system and the practice of arbitration.

Arbitration and mediation both promote the same ideals, such as access to justice, a prompt hearing, fair outcomes and reduced congestion in the courts. Mediation, however, is a voluntary and non-binding process - it is a creative alternative to the court system. Mediation often is successful because it offers parties the rare opportunity to directly express their own interests and anxieties relevant to the dispute. In addition, mediation provides parties with the opportunity to develop a mutually satisfying outcome by creating solutions that are uniquely tailored to meet the needs of the particular parties. A mediator is a neutral and impartial person; mediators do not decide or judge, but instead becomes an active driver during the negotiation between the parties. A mediator uses specialized communication techniques and negotiation techniques to assist the parties in reaching optimal solutions.

Mediation is a structured process with a number of procedural stages in which the mediator assists the parties in resolving their disputes. The mediator and the parties follow a specific set of protocols that require everyone involved to be working together. This process permits the mediator and disputants to focus on the real problems and actual difficulties between the parties. Moreover, the parties are free to express their own interests and needs through an open dialogue in a less adversarial setting than a courtroom. The main aim of mediation is to assist people in dedicating more time and attention to the creation of a voluntary, functional and durable agreement. The parties themselves possess the power to control the process- they reserve the right to determine the parameters of the agreement. In mediation, the parties also reserve the right to stop anytime and refer a dispute to the court system or perhaps arbitration.

In addition to economic and legal skills, mediators are professionals who possess specialized technical training in the resolution of disputes. A mediator plays a dual role during the mediation process- as a facilitator of the parties’ positive relationship, and as an evaluator adept at examining the different aspects of the dispute. After analyzing a dispute, a mediator can help parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is product of the parties’ discussions and decisions. The aim of mediation is to find a mutually satisfactory agreement that all parties believe is beneficial. Their agreement serves as a landmark and reminds parties of their historical, confrontational period, and ultimately helps them anticipate the potential for future disputes.

Generally, an agreement reached through mediation specifies time periods for performance and is customarily specific, measurable, achievable, and realistic. It is advisable for the parties to put their agreement in writing to create tangible evidence that they accomplished something together. The written agreement reminds the parties of their newly achieved common ground and helps to prevent arguments and misunderstandings afterward. Most importantly, a written agreement provides a clear ending point to the mediation process. The agreement binds the parties contractually. In case of disputes concerning compliance with the mediated agreement (e.g., whether a party carries out an agreement) or implementation of a mediated agreement (e.g., disputes concerning the precise terms for carrying out an agreement), the agreement is enforceable as a contract, as it would be in cases of the non-fulfilment of any ordinary contractual provision. Enforceability is necessary for mediation, as an ADR process, to possess any legal strength or to impose any liability on the parties. It should be noted that, in the United States, compliance with mediated settlement agreements is high because the parties, themselves, create the terms of the settlement agreement. Thus, enforcement proceedings are relatively rare because the parties voluntarily carry out their own agreements.

According to 1965 of the Italian Civil Code (I:C.C.), a mediation agreement is characterized as a transactional contract. A transactional contract is one in which the parties, with concessions to each other, resolve and terminate the present dispute between them. With the same contract, they also resolve the issues that can arise in the future. Disputing parties can initiate mediation anytime, whenever they believe it would be beneficial. Disputes reach mediation in a number of different ways such as through consent of the parties, a mediation clause in a contract, or even a court order. Parties to a contract may be required to submit a dispute to mediation according to insertion mediation clauses in their contracts. Under such a clause, the parties usually retain the right to choose their mediator and to schedule the mediation session on mutually agreeable date.

Mediation clauses, in contrast to arbitration clauses, are not “vexatious clauses” (clausole vessatorie) or what is known in the U.S. as “unconscionable”. If the parties do not arrive at any settlement agreement as a result of the mediation process, they are always allowed to go to arbitration or litigation; thus, mediation does not deprive parties of their right to due process. Binding arbitration clauses are qualified as “vexatious”. As laid out in I.C.C 1341, paragraph 2, and 1469, paragraph 3, nn.18 and 19, a vexatious clause is a provision in an agreement that disadvantages one party, typically the consumer, to the agreement. These types of clauses have to be signed separately by the parties. Such a clause can be vexatious if not signed separately and knowingly by each party because they can ultimately limit options and deprive parties of their due process rights under the traditional judicial system. I.C.P.C. 808 provides a sort of exception to the constitutional principle of natural jurisdiction, and, therefore has to be regarded as vexatious. Again, a contractual mediation clause is not vexatious, because the parties can always take their dispute through the ordinary judicial channels or utilize arbitration for resolution, without any penalty for doing so.

There are some particular advantages that exist in choosing an alternative method of dispute resolution (ADR) such as mediation or arbitration, as opposed to pursuing ordinary judicial proceedings. The first advantage concerns the all-important consideration of economics and the daunting costs of resolving disputes; arbitration and mediation proceedings are by far cheaper in monetary expense than ordinary judicial proceedings. Mediation fees vary in accordance with the hourly rate of the mediator and the length of the mediation session, and are usually shared equally by the parties participating in the mediation. Another important advantage of alternative dispute resolution proceedings is in the decreased time these proceedings customarily take as opposed to the traditionally litigated dispute. Mediation is regarded to be more time-efficient than even arbitration, since proceedings have the potential to come to a productive close in under 3 hours. Mediation is not as formal as arbitration, and there are a variety of mediation techniques available and employed depending on the mediator’s personality, the parties’ personalities, and the complexity of the dispute; mediation is an incredibly flexible yet functional process. What substantially sets mediation apart from traditional judicial proceedings and even arbitration is that the parties strive personally to find common ground, and they work to develop mutually agreeable solutions directly with each other and without any exterior imposition of a decision by a judge or arbitrator. The efficiency of the mediation process is evident in that it aims to avoid further complication of the dispute and animosity between the parties- a mediator actively uses specialized communication and negotiation techniques to guide the parties to the realization of a mutually beneficial agreement. Another advantage of mediation, specifically, is that it seeks to generate an agreement that is realistic, which takes into consideration the financial condition of the parties as well as all other relevant circumstances and factors. Again, mediation is a voluntary process and often it produces such desirable results because it permits parties to express their own interests and anxieties directly, while helping them to create a suitable solution.

Generally, choosing arbitration or mediation is attractive to parties because they get to participate in these proceeding more directly than they would in a courtroom or in a litigated dispute proceeding. However in arbitration, the arbitrator still makes the final determinations of fault and compensation, and the parties must accept those decisions as though they were made by a judge. Also, an arbitration

proceeding is governed by formal rules and the role of parties' attorneys is still central to the representation of their interests. With a mediator's help, the parties are increasingly empowered to participate directly in the process and determine the outcome of their own dispute, thus regulating and protecting their own interests.

Another important difference between arbitration and mediation exists in regards to choosing the neutral party. In choosing an arbitrator, the parties seek to select an individual that possesses particular legal skills, knowledge and competence. With the exception of non-binding arbitration in Italy, the arbitrator determines that outcome of the dispute according to traditional legal principles, so the arbitrator must be highly knowledgeable in the relevant area of law. In mediation, the selection of a mediator can be made among individuals with a variety of degrees and particular experience or specialized training in the mediation of disputes. Mediators are often described as experts in the process (of mediation), although it is generally helpful to designate a mediator with some degree of subject matter knowledge as well. Ultimately, mediation is a collaborative effort by all involved, and to arrive at a satisfactory outcome, it includes the willing cooperation and respect of all parties.

The mediation process is both informal and confidential. In contrast to arbitration and its relatively formal rules of evidence and procedure, mediation is flexible in terms of evidence, procedure, and formality. Both procedures are confidential as the parties allow a neutral third-party to discuss or decide the dispute without the exposing the parties' dealings to public scrutiny or judgment. Specifically, the statements of a party during mediation are confidential and may not be disclosed without written consent. Generally, confidentiality in mediation also extends to documents specifically prepared for mediation, such as mediation briefs. Confidentiality is paramount to the effectiveness of the mediation process—it creates an atmosphere where all parties are increasingly comfortable to discuss their dispute without fear that their words will be used against them at a later date. Confidentiality promotes open communication about the issues involved between the parties.

In regards to the logistics of the confidentiality component of mediation, there are varied rules and customs. Typically, in the U.S., confidentiality of statements made during mediation is provided by law (California Evidence Code Sections 1115-1128). In the alternative, before a mediation begins, the parties may sign a confidentiality agreement, acknowledging that all the statements made during the mediation as well as documents prepared for the mediation are confidential and inadmissible against another party in any subsequent civil proceeding. All participants in mediation are bound by confidentiality, including the parties, the mediator, and non-parties. The scope of confidentiality is broad, usually covering both statements made by parties during mediation and documents prepared for mediation (e.g., mediation briefs). One generally recognized exception to the rule of confidentiality is the mediated settlement agreement itself, which may be used to enforce the terms of the agreement in the event of non-compliance. Nevertheless, in order to promote open communication and disclosure of relevant information, confidentiality in the mediation process is broad.

One unique feature of mediation is that any party, unilaterally, can decide to stop the mediation at anytime if they believe the process is not productive, as opposed to an arbitration proceeding, which needs a common approval to discontinue. To be effective, mediation must be considered by the parties as a tool or instrument that the parties can use to manage directly the resolution of their disputes between one another. The focus is their direct, active participation as opposed to the increasingly detached role the parties play in an arbitration proceeding "run" by an arbitrator. In Italy, because mediation is new and generally unregulated by legislators, the parties will sign a confidentiality agreement prior to the commencement of a mediation session. The pre-mediation confidentiality agreement will have the force and effect of a contract acknowledging confidentiality as an integral element of the mediation process.

Conciliation.

Conciliation is another dispute resolution process that involves building a positive relationship between the parties of dispute, however, it is fundamentally different than mediation and arbitration

in several respects. Conciliation is a method employed in civil law countries, like Italy, and is a more common concept there than is mediation. While conciliation is typically employed in labour and consumer disputes, Italian judges encourage conciliation in every type of dispute. The “conciliator” is an impartial person that assists the parties by driving their negotiations and directing them towards a satisfactory agreement. It is unlike arbitration in that conciliation is a much less adversarial proceeding; it seeks to identify a right that has been violated and searches to find the optimal solution. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. Although this sounds strikingly similar to mediation, there are important differences between the two methods of dispute resolution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for the figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In this regard, the role of a conciliator is distinct from the role of a mediator. The mediator at all times maintains his or her neutrality and impartiality. A mediator does not focus only on traditional notions of fault and a mediator does not assume sole responsibility for generating solutions. Instead, a mediator works together with the parties as a partner to assist them in finding the best solution to further their interests. A mediator’s priority is to facilitate the parties’ own discussion and representation of their own interests, and guide them to their own suitable solution—a good common solution that is fair, durable, and workable. The parties play an active role in mediation, identifying interests, suggesting possible solutions, and making decisions concerning proposals made by other parties. The parties come to mediator seeking help in finding their own best solution.

Also the role of the attorneys is different in mediation. Attorneys are more active in mediation in generating and developing innovative solutions for settlement. In conciliation, they generally offer advice and guidance to clients about proposals made by conciliators.

Conciliation and mediation both look to maintain an existing business relationship and to rekindle a lost balance of power between two parties. These concepts are sometimes used as synonyms, but they do indeed vary substantially in their procedures. In mediation, the mediator controls the process through different and specific stages: introduction, joint session, caucus, and agreement, while the parties control the outcome. By contrast, in conciliation the conciliator may not follow a structured process, instead administering the conciliation process as a traditional negotiation, which may take different forms depending on the case.

Conciliation is used almost preventively, as soon as a dispute or misunderstanding surfaces: a conciliator pushes to stop a substantial conflict from developing. Mediation is closer to arbitration in the respect that it “intervenes” in a substantial dispute that has already surfaced that is very difficult to resolve without “professional” assistance. The parties approach mediation as an alternative method to resolve their dispute, due to the fact that they both recognize that the conflict has grown potentially serious enough for litigation. Mediation may be used, however, any time after the emergence of a dispute, including the early stages.

Each of the ADR (alternative dispute resolution) processes addressed herein, arbitration, mediation, and conciliation, provides important benefits to parties and may be seen as complementary to the judicial process. In the United States, mediation has emerged as perhaps the most predominant ADR process because it affords the parties the opportunity to develop settlements that are practical, economical, and durable. For commercial disputes, mediation also offers the opportunity to create innovative solutions to business disputes that further the unique interests of the parties in an analytical framework that is broader than traditional legal rights and remedies. In this sense, the mediation process may be used to secure “business solutions to business disputes,” because it encourages the parties to consider all the dimensions of a dispute, including both legal issues and

business interests. In all parts of the world, including North and South America, Asia, and India, large and small commercial entities are recognizing the business benefits of mediation. According to international and European trends, mediation is emerging as an effective and often preferred method for private commercial companies and government agencies to fulfil their organizational objectives by privately and promptly resolving disputes in a manner that saves time, money, and business relationships.

2. APPOINTMENT OF CONCILIATOR

SECTION 61. Application and scope.—

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

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

SECTION 62. Commencement of conciliation proceedings.—

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

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

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

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

SECTION 63. Number of conciliators.—

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

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

SECTION 64. Appointment of conciliators.—

(1) Subject to sub-section (2),—

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

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

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

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

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

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

3. INTERACTION BETWEEN CONCILIATOR AND PARTIES

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

- (2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, taking into consideration the circumstances of the conciliation proceedings.
- Provided that where administrative assistance by the FACT [FICCI Arbitration and Conciliation Tribunal (Federation of Indian Chambers of Commerce and Industry (FICCI) is the largest and oldest apex business organization of Indian business.) is sought under Rule 11, all such conciliation proceedings shall be conducted at the offices of FICCI or at a place designated by FACT as the venue for such proceedings

4. COMMUNICATION, DISCLOSURE AND CONFIDENTIALITY

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

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

The conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of its implementation and enforcement.

SECTION-69. Communication between conciliator and parties.—

(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

SECTION-70. Disclosure of information.—When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

SECTION-71. Co-operation of parties with conciliator.—The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

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

5. SUGGESTIONS BY PARTIES

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.

SECTION-72. Suggestions by parties for settlement of dispute.—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.

6. SETTLEMENT AGREEMENT AND ITS EFFECT

SECTION-73. Settlement agreement.—

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

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

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

SECTION-74. Status and effect of settlement agreement.—The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

7. RESORT TO JUDICIAL PROCEEDINGS, LEGAL EFFECT

SECTION -77. Resort to arbitral or judicial proceedings.—

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

8. COSTS AND DEPOSIT

SECTION -78. Costs.—

(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1), "costs" means reasonable costs relating to—

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

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

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

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

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

SECTION -79. Deposits.—

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

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

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

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



UNIT-IV INTERNATIONAL ARBITRATION

INTERNATIONAL
ARBITRATION

Arbitration is particularly popular as a means of **dispute resolution** in the commercial sphere (for a summary of the various arenas in which arbitration is usually chosen, see the specific article on "**arbitration**"). One of the reasons for doing so is that, in international trade, it is often easier to enforce an arbitration award in a foreign country than it is to enforce a judgment of the court.

Under the **New York Convention 1958**, an award issued in a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defences. Those defences are:

1. a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
2. the arbitration agreement was not valid under its governing law;
3. a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
4. the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);
5. the composition of the arbitral authority was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "**lex loci arbitri**");
6. the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement;
7. the subject matter of the award was not capable of resolution by arbitration; or
8. enforcement would be contrary to "**public policy**".

Virtually every significant commercial country in the world is a party to the Convention, but relatively few countries have a comprehensive network for cross-border enforcement of judgments of the court.^[1] Hence in many countries, particularly in **emerging markets**, a foreign arbitration award is much easier to enforce than an award of the court. For example, it is very difficult to enforce foreign judgments in the former **CIS** countries, but it is considerably easier to enforce awards of an arbitration tribunal.

The other characteristic of cross-border enforcement of arbitration awards that makes them appealing to commercial parties is that they are not limited to awards of damages. Whereas in most countries only monetary judgments are enforceable in the cross-border context, no such restrictions are imposed on arbitration awards and so it is theoretically possible (although unusual in practice) to obtain an **injunction** or an order for **specific performance** in an arbitration proceeding which could then be enforced in another New York Convention contracting state.

The New York Convention is not actually the only treaty dealing with cross-border enforcement of arbitration awards. The earlier Geneva Convention on the Execution of Foreign Arbitral Awards 1927 remains in force, but the success of the New York Convention means that the Geneva Convention is rarely utilised in practise.

Arbitration with sovereign governments

In judicial proceedings in many countries, governments enjoy **sovereign immunity** from suit. However, governments can submit to arbitration, and certain international conventions exist in relation to the enforcement of awards against nation states.

- The Washington Convention 1965 relates to settlement of investment disputes between nation states and citizens of other countries. The Convention created the **International Centre for Settlement of Investment Disputes** (or ICSID). The Convention was primarily designed to create investor confidence, and to promote inward investment into developing countries. Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.
- The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. Although formed in good faith,^[3] the tribunal has not been a notable success, and has even been held by an English court to be **void** under its own governing law.

1. ENFORCEMENT OF FOREIGN AWARD

SECTION-48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

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

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

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

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

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

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

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

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.— Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

SECTION-49. Enforcement of foreign awards.—

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

SECTION-57. Conditions for enforcement of foreign awards.—

- (1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that—
- (a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
 - (b) the subject-matter of the award is capable of settlement by arbitration under the law of India;
 - (c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
 - (d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
 - (e) the enforcement of the award is not contrary to the public policy or the law of India. Explanation.— Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.
- (2) Even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that—
- (a) the award has been annulled in the country in which it was made;
 - (b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
 - (c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration: Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.
- (3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

SECTION-58. Enforcement of foreign awards.—

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

2. NEW YORK CONVENTION AWARD

The **Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, also known as the **New York Convention**, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, it applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought. Though other international conventions apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important.

Background

In 1953, the International Chamber of Commerce (ICC) produced the first draft Convention on the Recognition and Enforcement of International Arbitral Awards to the United Nations Economic and Social Council. With slight modifications, the Council submitted the convention to the International

Conference in the Spring of 1958. The Conference was chaired by Willem Schurmann, the Dutch Permanent Representative to the United Nations and Oscar Schachter, a leading figure in international law who later taught at Columbia Law School and the Columbia School of International and Public Affairs, and served as the President of the American Society of International Law.

International arbitration is an increasingly popular means of alternative dispute resolution for cross-border commercial transactions. The primary advantage of international arbitration over court litigation is enforceability: an international arbitration award is enforceable in most countries in the world. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes, that arbitration awards are final and not ordinarily subject to appeal, the ability to choose flexible procedures for the arbitration, and confidentiality.

Once a dispute between parties is settled, the winning party needs to collect the award or judgment. Unless the assets of the losing party are located in the country where the court judgment was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition of court judgments between the country where the judgment is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect.

Countries which have adopted the New York Convention have agreed to recognize and enforce international arbitration awards. As of January 2015, there are 154 State parties which have adopted the New York Convention: 151 of the 193 United Nations Member States, the Cook Islands, the Holy See, and the State of Palestine.¹¹ Forty-six UN Member States have not adopted the New York Convention and a number of British dependent territories have not had the Convention extended to them by Order in Council.

Parties to the Convention

As of January 2015, the Convention has 154 state parties, which includes 151 of the 193 United Nations member states plus the Cook Islands, the Holy See, and the State of Palestine. Forty-six UN member states have not adopted the Convention. In addition, Taiwan has not been permitted to adopt the Convention (but generally enforces foreign arbitration judgments) and a number of British Overseas Territories have not had the Convention extended to them by Order in Council. British Overseas Territories to which the New York Convention has not yet been extended by Order in Council are: Anguilla, Falkland Islands, Turks and Caicos Islands, Montserrat, Saint Helena (including Ascension and Tristan da Cunha).

The Convention has also been extended to a number of British Crown Dependencies, Overseas Territories, Overseas departments, Unincorporated Territories and other subsidiary territories of sovereign states.

PROVISION UNDER ARBITRATION AND CONCILIATION ACT- NEW YORK CONVENTION AWARD

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

- (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
- (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

SECTION - 45 Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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

SECTION - 47. Evidence.—

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—

- (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- (b) the original agreement for arbitration or a duly certified copy thereof; and
- (c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. Explanation.—In this section and all the following sections of this Chapter, “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

SECTION - 48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

- (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

- (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
- (b) the enforcement of the award would be contrary to the public policy of India. Explanation.— Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.
- (3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

SECTION - 49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

SECTION - 50. Appealable orders.—

- (1) An appeal shall lie from the order refusing to—
- (a) refer the parties to arbitration under section 45;
- (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.
- (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

SECTION - 51. Saving.—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

SECTION - 52. Chapter II not to apply.—Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

4. GENEVA CONVENTION AWARD

Geneva Convention Awards-

BACKGROUND- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (the New York Convention), is described as the most successful treaty in private international law. It is adhered to by more than 140 nations. The more than 1,400 court decisions reported in the *Yearbook: Commercial Arbitration* show that enforcement of an arbitral award is granted in almost 90 per cent of the cases.

The Convention was established as a result of dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. The initiative to replace the Geneva treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953. The ICC's initiative was taken over by the United Nations Economic and Social Council, which produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the New York Convention.

The following briefly describes the two basic actions contemplated by the New York Convention.

The first action is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards made in the territory of another State. This field of application is defined in article I. The general obligation for the Contracting States to recognize such awards as binding and to enforce them in accordance with their rules of procedure is laid down in article III. A party seeking enforcement of a foreign award needs to supply to the court: (a) the arbitral award; and (b) the arbitration agreement

(article IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are limitatively listed in article V, paragraph 1. The court may on its own motion refuse enforcement for reasons of public policy as provided in article V, paragraph 2. If the award is subject to an action for setting aside in the country in which, or under the law of which, it is made (“the country of origin”), the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement (article VI). Finally, if a party seeking enforcement prefers to base its request for enforcement on the court’s domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more-favourable-right-provision of article VII, paragraph 1.

The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II, paragraph 3, provides that a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration.

In both actions, the arbitration agreement must satisfy the requirements of article II, paragraphs 1 and 2, which include, in particular, that the agreement be in writing.

The influence of the New York Convention on the development of international commercial arbitration has been phenomenal. The New York Convention solidified two essential pillars of the legal framework by providing for the obligatory referral by a national court to arbitration in the event of a valid arbitration agreement and for the enforcement of the arbitral award. The Convention provided impetus to the hugely successful UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006). The New York Convention is probably the main reason why arbitration is the preferred method for the resolution of international business disputes.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. 2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. 3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II 1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration. 2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative and incapable of being performed.

ARTICLE III Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the

conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply— (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that— (a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that— (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. 2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound by this Convention.

ARTICLE VIII 1. This Convention shall be open until 31st December, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations. 2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX 1. This Convention shall be open for accession to all States referred to in article VIII. 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X 1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned. 2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later. 3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI In the case of a federal or non-unitary State, the following provisions shall apply:— (a) with respect of those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States; (b) with respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment; (c) a federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII 1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession. 2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII 1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. 2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General. 3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:— (a) signatures and ratifications in accordance with article VIII; (b) accessions in accordance with article IX; (c) declarations and notifications under articles I, X and XI; (d) the date upon which this Convention enters into force in accordance with article XII; (e) denunciations and notifications in accordance with article XIII.

ARTICLE XVI 1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations. 2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article XIII.

**PROVISION UNDER ARBITRATION AND CONCILIATION ACT-
GENEVA CONVENTION AWARD**

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

- (a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and
- (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and
- (c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

SECTION - 54. Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or further differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

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

SECTION - 56. Evidence.- (1) The party applying for the enforcement of a foreign award shall, at the time of application procedure before the Court—

- (a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;
- (b) evidence proving that the award has become final; and
- (c) such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

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

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

SECTION - 57. Conditions for enforcement of foreign awards.- (1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that—

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

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

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

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

(e) the enforcement of the award is not contrary to the public policy or the law of India.

Explanation.—Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

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

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

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

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

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

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

58. Enforcement of foreign awards.- Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

59. Appealable orders.- (1) An appeal shall lie from the order refusing—

(a) to refer the parties to arbitration under section 54: and

(b) to enforce a foreign award under section 57,

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

SECTION - 60. Saving.- Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

1961 GENEVA CONVENTION (EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION)

Preamble

The undersigned, duly authorized,

Convened under the auspices of the Economic Commission for Europe of the United Nations, Having noted that on 10th June 1958 at the United Nations Conference on International Commercial Arbitration has been signed in New York a Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Desirous of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries, Have agreed on the following provisions:

Article I - Scope of the Convention

1. This Convention shall apply:

- (a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States;
- (b) to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above.

2. For the purpose of this Convention,

- (a) the term "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws;
- (b) the term "arbitration" shall mean not only settlement by arbitrators appointed for each case (ad hoc arbitration) but also by permanent arbitral institutions;
- (c) the term "seat" shall mean the place of the situation of the establishment that has made the arbitration agreement.

Article II - Right of legal persons of public law to resort to arbitration

- 1. In the cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.
- 2. On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.

Article III - Right of foreign nationals to be designated as arbitrators

In arbitration covered by this Convention, foreign nationals may be designated as arbitrators.

Article IV - Organization of the arbitration

- 1. The parties to an arbitration agreement shall be free to submit their disputes:
 - (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution;
 - (b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia:
 - (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
 - (ii) to determine the place of arbitration; and
 - (iii) to lay down the procedure to be followed by the arbitrators.

2. Where the parties have agreed to submit any disputes to an ad hoc arbitration, and where within thirty days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting

party's habitual place of residence or seat at the time of the introduction of the request for arbitration. This paragraph shall also apply to the replacement of the arbitrator(s) appointed by one of the parties or by the President of the Chamber of Commerce above referred to.

3. Where the parties have agreed to submit any disputes to an ad hoc arbitration by one or more arbitrators and the arbitration agreement contains no indication regarding the organization of the arbitration, as mentioned in paragraph 1 of this article, the necessary steps shall be taken by the arbitrator(s) already appointed, unless the parties are able to agree thereon and without prejudice to the case referred to in paragraph 2 above. Where the parties cannot agree on the appointment of the sole arbitrator or where the arbitrators appointed cannot agree on the measures to be taken, the claimant shall apply for the necessary action, where the place of arbitration has been agreed upon by the parties, at his option to the President of the Chamber of Commerce of the place of arbitration agreed upon or to the President of the competent Chamber of Commerce of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration. Where such a place has not been agreed upon, the claimant shall be entitled at his option to apply for the necessary action either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee whose composition and procedure are specified in the Annex to this Convention. Where the claimant fails to exercise the rights given to him under this paragraph the respondent or the arbitrator(s) shall be entitled to do so.

4. When seized of a request the President or the Special Committee shall be entitled as need be:

- (a) to appoint the sole arbitrator, presiding arbitrator, umpire, or referee;
- (b) to replace the arbitrator(s) appointed under any procedure other than that referred to in paragraph 2 above;
- (c) to determine the place of arbitration, provided that the arbitrator(s) may fix another place of arbitration;
- (d) to establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s), provided that the arbitrators have not established these rules themselves in the absence of any agreement thereon between the parties.

5. Where the parties have agreed to submit their disputes to a permanent arbitral institution without determining the institution in question and cannot agree thereon, the claimant may request the determination of such institution in conformity with the procedure referred to in paragraph 3 above.

6. Where the arbitration agreement does not specify the mode of arbitration (arbitration by a permanent arbitral institution or an ad hoc arbitration) to which the parties have agreed to submit their dispute, and where the parties cannot agree thereon, the claimant shall be entitled to have recourse in this case to the procedure referred to in paragraph 3 above to determine the question. The President of the competent Chamber of Commerce or the Special Committee, shall be entitled either to refer the parties to a permanent arbitral institution or to request the parties to appoint their arbitrators within such time-limits as the President of the competent Chamber of Commerce or the Special Committee may have fixed and to agree within such time-limits on the necessary measures for the functioning of the arbitration. In the latter case, the provisions of paragraphs 2, 3 and 4 of this Article shall apply.

7. Where within a period of sixty days from the moment when he was requested to fulfil one of the functions set out in paragraphs 2, 3, 4, 5 and 6 of this Article, the President of the Chamber of Commerce designated by virtue of these paragraphs has not fulfilled one of these functions, the party requesting shall be entitled to ask the Special Committee to do so.

Article V - Plea as to arbitral jurisdiction

1. The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral procedure. Where the delay in raising the plea is due to a cause which the arbitrator deems justified, the arbitrator shall declare the plea admissible.

2. Pleas to the jurisdiction referred to in paragraph 1 above that have not been raised during the time-limits there referred to, may not be entered either during a subsequent stage of the arbitral proceedings where they are pleas left to the sole discretion of the parties under the law applicable by the arbitrator, or during subsequent court proceedings concerning the substance or the enforcement of the award where such pleas are left to the discretion of the parties under the rule of conflict of the court seized of the substance of the dispute or the enforcement of the award. The arbitrator's decision on the delay in raising the plea, will, however, be subject to judicial control.

3. Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

Article VI - Jurisdiction of courts of law

1. A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance.

2. In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions: (a) under the law to which the parties have subjected their arbitration agreement; (b) failing any indication thereon, under the law of the country in which the award is to be made; (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.

3. Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.

4. A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.

Article VII - Applicable law

1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.
2. The arbitrators shall act as amiables compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration.

Article VIII - Reasons for the award

The parties shall be presumed to have agreed that reasons shall be given for the award unless they:

- (a) either expressly declare that reasons shall not be given; or
- (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

Article IX - Setting aside of the arbitral award

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
 - (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
 - (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
 - (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.
2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

Article X - Final clauses

1. This Convention is open for signature or accession by countries members of the Economic Commission for Europe and countries admitted to the Commission in a consultative capacity under paragraph 8 of the Commission's terms of reference.
2. Such countries as may participate in certain activities of the Economic Commission for Europe in accordance with paragraph 11 of the Commission's terms of reference may become Contracting Parties to this Convention by acceding thereto after its entry into force.
3. The Convention shall be open for signature until 31 December 1961 inclusive. Thereafter, it shall be open for accession.

4. This Convention shall be ratified.
 5. Ratification or accession shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.
 6. When signing, ratifying or acceding to this Convention, the Contracting Parties shall communicate to the Secretary-General of the United Nations a list of the Chambers of Commerce or other institutions in their country who will exercise the functions conferred by virtue of Article IV of this Convention on Presidents of the competent Chambers of Commerce.
 7. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States.
 8. This Convention shall come into force on the ninetieth day after five of the countries referred to in paragraph 1 above have deposited their instruments of ratification or accession. For any country ratifying or acceding to it later this Convention shall enter into force on the ninetieth day after the said country has deposited its instrument of ratification or accession.
 9. Any Contracting Party may denounce this Convention by so notifying the Secretary-General of the United Nations. Denunciation shall take effect twelve months after the date of receipt by the Secretary-General of the notification of denunciation.
 10. If, after the entry into force of this Convention, the number of Contracting Parties is reduced, as a result of denunciations, to less than five, the Convention shall cease to be in force from the date on which the last of such denunciations takes effect.
 11. The Secretary-General of the United Nations shall notify the countries referred to in paragraph 1, and the countries which have become Contracting Parties under paragraph 2 above, of:
 - (a) declarations made under Article II, paragraph 2;
 - (b) ratifications and accessions under paragraphs 1 and 2 above;
 - (c) communications received in pursuance of paragraph 6 above;
 - (d) the dates of entry into force of this Convention in accordance with paragraph 8 above;
 - (e) denunciations under paragraph 9 above;
 - (f) the termination of this Convention in accordance with paragraph 10 above.
 12. After 31 December 1961, the original of this Convention shall be deposited with the Secretary-General of the United Nations, who shall transmit certified true copies to each of the countries mentioned in paragraphs 1 and 2 above.
- IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.
DONE at Geneva, this twenty-first day of April, one thousand nine hundred and sixty-one, in a single copy in the English, French and Russian languages, each text being equally authentic.

Annex - Composition and procedure of the special committee referred to in Article IV of the Convention

1. The Special Committee referred to in Article IV of the Convention shall consist of two regular members and a Chairman. One of the regular members shall be elected by the Chambers of Commerce or other institutions designated, under Article X, paragraph 6, of the Convention, by States in which at the time when the Convention is open to signature National Committees of the International Chamber of Commerce exist, and which at the time of the election are parties to the Convention. The other member shall be elected by the Chambers of Commerce or other institutions designated, under Article

X, paragraph 6, of the Convention, by States in which at the time when the Convention is open to signature no National Committees of the International Chamber of Commerce exist and which at the time of the election are parties to the Convention.

2. The persons who are to act as Chairman of the Special Committee pursuant to paragraph 7 of this Annex shall also be elected in like manner by the Chambers of Commerce or other institutions referred to in paragraph 1 of this Annex.

3. The Chambers of Commerce or other institutions referred to in paragraph 1 of this Annex shall elect alternates at the same time and in the same manner as they elect the Chairman and other regular members, in case of the temporary inability of the Chairman or regular members to act. In the event of the permanent inability to act or of the resignation of a Chairman or of a regular member, then the alternate elected to replace him shall become, as the case may be, the Chairman or regular member, and the group of Chambers of Commerce or other institutions which had elected the alternate who has become Chairman or regular member shall elect another alternate.

4. The first elections to the Committee shall be held within ninety days from the date of the deposit of the fifth instrument of ratification or accession. Chambers of Commerce and other institutions designated by Signatory States who are not yet parties to the Convention shall also be entitled to take part in these elections. If however it should not be possible to hold elections within the prescribed period, the entry into force of paragraphs 3 to 7 of Article IV of the Convention shall be postponed until elections are held as provided for above.

5. Subject to the provisions of paragraph 7 below, the members of the Special Committee shall be elected for a term of four years. New elections shall be held within the first six months of the fourth year following the previous elections. Nevertheless, if a new procedure for the election of the members of the Special Committee has not produced results, the members previously elected shall continue to exercise their functions until the election of new members.

6. The results of the elections of the members of the Special Committee shall be communicated to the Secretary-General of the United Nations who shall notify the States referred to in Article X, paragraph 1, of the Convention and the States which have become Contracting Parties under Article X, paragraph 2. The Secretary-General shall likewise notify the said States of any postponement and of the entry into force of paragraphs 3 to 7 of Article IV of the Convention in pursuance of paragraph 4 of this Annex.

7. The persons elected to the office of Chairman shall exercise their functions in rotation, each during a period of two years. The question which of these two persons shall act as Chairman during the first two-year period after the entry into force of the Convention shall be decided by the drawing of lots. The office of Chairman shall thereafter be vested, for each successive two-year period, in the person elected Chairman by the group of countries other than that by which the Chairman exercising his functions during the immediately preceding two-year period was elected.

8. The reference to the Special Committee of one of the requests referred to in paragraphs 3 to 7 of the aforesaid Article IV shall be addressed to the Executive Secretary of the Economic Commission for Europe. The Executive Secretary shall in the first instance lay the request before the member of the Special Committee elected by the group of countries other than that by which the Chairman holding office at the time of the introduction of the request was elected. The proposal of the member applied to in the first instance shall be communicated by the Executive Secretary to the other member of the Committee and, if that other member agrees to this proposal, it shall be deemed to be the Committee's ruling and shall be communicated as such by the Executive Secretary to the person who made the

request.

9. If the two members of the Special Committee applied to by the Executive Secretary are unable to agree on a ruling by correspondence, the Executive Secretary of the Economic Commission for Europe shall convene a meeting of the said Committee at Geneva in an attempt to secure a unanimous decision on the request. In the absence of unanimity, the Committee's decision shall be given by a majority vote and shall be communicated by the Executive Secretary to the person who made the request.

10. The expenses connected with the Special Committee's action shall be advanced by the person requesting such action but shall be considered as costs in the cause.



Renaissance
Law College

Unit-V Rule making Power

RULE MAKING
POWER

1. Legal Service Authorities Act, 1987

LEGAL SERVICES AUTHORITIES ACT, 1987

This Act is to constitute Legal Services Authorities which shall provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to see that the operation of the legal system promotes justice on a basis of equal opportunity. Definitions - “case” includes a suit or any proceeding before a court; - “Central Authority” means the National Legal Services Authority; - “court” means a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law, to exercise judicial or quasi-judicial functions; -

“District Authority” means a District Legal Services Authority; - “legal service” includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter;

THE NATIONAL LEGAL SERVICES AUTHORITY

Constitution of the National Legal Services Authority -

- The Central Authority shall consist of:

- (a) the Chief Justice of India who shall be the Patron-in-Chief;
- (b) a serving or retired Judge of the Supreme Court to be nominated by the President, - in consultation with the Chief Justice of India, who shall be the Executive Chairman; and
- (c) such number of other members, - to be nominated by that Government - in consultation with the Chief Justice of India. - A Member Secretary shall be appointed, - in consultation with the Chief Justice of India, to work with the Executive Chairman of the Central Authority. - The terms and conditions shall be prescribed by the Central Government in consultation with the Chief Justice of India. - Such number of officers and employees, appointed by the central Authority in consultation with the Chief Justice of India. - The Salary and allowances to the officers and other employees of the Central Authority may be prescribed by the Central Government in consultation with the Chief Justice of India. - The administrative expenses, including the salaries etc., shall be from the Consolidated Fund of India. - All orders and decisions of the Central Authority shall be, authenticated by the Member-Secretary or any officer authorized by the Executive Chairman. =

Supreme Court Legal Services Committee - The Central Authority shall constitute a committee to be called the Supreme Court Legal Services Committee for performing such functions determined by the Central Authority.

- The Committee shall consist of – a sitting Judge of the Supreme Court who shall be the Chairman; and such number of other members prescribed by the Central Government, to be nominated by the Chief Justice of India. - The Chief Justice of India shall appoint a person to be the Secretary to the Committee. - The terms of office and other conditions are determined by the Central Authority. such number of officers and employees are appointed by the committee, in consultation with the Chief Justice of India. The salaries and allowances of officers and other employees of the Committee shall be prescribed by the Central Government in consultation with the Chief Justice of India.

Functions of the Central Authority - The Central Authority shall perform all or any of the following functions, namely: - (a) lay down policies and principles; (b) frame the most effective and economical schemes; (c) utilize the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities; (d) take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills; (e) organize legal aid camps, especially in rural area, slums or labour colonies with the dual propose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through Lok Adalats. (f) encourage the settlement of disputes by way of negotiations, arbitration and conciliation; (g) undertake and promote research in the field of legal services with special reference to the need for such services among the poor; (h) to do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IVA of the Constitution; (i) monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act; (j) provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities, from out of the amounts placed at its disposal for the implementation of legal services schemes under the provisions of this Act; (k) develop, in consultation with the Bar Council of India, programmes or clinical legal education and promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions; (l) take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures; (m) make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level, particularly among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and coordinate and monitor the functioning of State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social services institutions and other legal services organizations and give general directions for the proper implementation of the legal services programmes. =Central Authority to work in Coordination with other agencies;

STATE LEGAL SERVICES AUTHORITY

=**Constitution of State Legal Services Authority** - (1) Every State Government shall constitute a body to be called the Legal Services Authority.

(2) A State Authority shall consist of -

- (a) the Chief Justice of the High Court who shall be the Patron-in-Chief;
- (b) (b) a serving or retired Judge of the High Court to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and
- (c) (c) such number of other members, prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service, not lower in rank than that of a District Judge, as the Member Secretary of the State Authority, to work with the Executive Chairman of the State Authority;

(4) The terms and conditions may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) such number of officers and other employees appointed by the State authority in consultation with the Chief Justice of the High Court.

(6) salary and allowances prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses, including the salaries, etc., shall be from the consolidated fund of the State.

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

Functions of the State Authority –

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

(2) Without prejudice to the generality of the functions referred to in subsection (1), the State Authority shall perform all or any of the following functions, namely:- (a) give legal service to persons who satisfy the criteria laid down under this Act; (b) conduct Lok Adalats, including Lok Adalats for High Court cases; (c) undertake preventive and strategic legal aid programmes; and (d) other functions as the State Authority may, in consultation with the Central Authority, fix by regulations. State Authority to act in coordination with other agencies, etc., and be subject to directions given by Central Authority.

High Court Legal Services Committee –

(1) The State Authority shall constitute a committee to be called the High Court Legal Services Committee for High Court, for performing such functions determined by the State Authority.

(2) The Committee shall consists of- (a) a sitting Judge of the High Court who shall be the Chairman; and (b) such number of other members nominated by the Chief Justice of the High Court.

(3) The Chief Justice of the High Court shall appoint a Secretary to the Committee.

(4) The terms of office and other conditions are determined by the State Authority. (5) such number of officers and employees are appointed by the committee in consultation with the Chief Justice of the High Court.

(6) The salaries and allowances of officers and other employees of the Committee shall be prescribed by the State Government in consultation with the Chief Justice of the High Court.

District Legal Services Authorities –

(1) The State Government shall, in consultation with the Chief Justice of the High Court, constitute a body to be called the District Legal Services Authority for every District in the State.

(2) A District Authority shall consist of:- (a) the District Judge who shall be its Chairman; and (b) such number of other members, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Authority shall, in consultation with the Chairman of the District Authority, appoint a person belonging to the State Judicial Service not lower in rank than that of a Subordinate Judge or Civil Judge posted at the seat of the District Judiciary as Secretary of the District Authority to work with the Chairman of that Committee.

(4) The terms of office and other conditions are determined by the State Authority in consultation with the Chief Justice of the High Court.

(5) such number of officers and employees are appointed by the committee, in consultation with the Chief Justice of the High Court

(6) The salaries and allowances officers and other employees of the Committee shall be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses, including the salaries, etc., shall be from the consolidated fund of the State.

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

Functions of District Authority –

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

(2) Without prejudice to the generality of the functions referred to in subsection (1), the District Authority may perform all or any of the following functions, namely:- (a) coordinate the activities of the Taluk Legal Services Committee and other legal services in the District; (b) organize Lok Adalats within the District; and (c) perform such other functions as the State Authority may fix by regulations.

District Authority to act in coordination with other agencies and be subject to directions given by the Central Authority, etc.- **Taluk Legal Services Committee –** (1) The State Authority may constitute a Committee, to be called the Taluk Legal Services Committee, for each taluk or mandal or for group of taluks or mandals. (2) The Committee shall consist of --- (a) the Senior Most Judicial Officer operating within the jurisdiction of the Committee who shall be the ex-officio Chairman; and (b) such number of other members, nominated by that Government in consultation with the Chief Justice of the High Court.

(3) such number of officers, appointed by the committee in consultation with the Chief Justice of the High Court.

(4) The salaries and allowances of officers and employees of the Committee shall be prescribed by the State Government in consultation with Chief Justice of the High Court,

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

Functions of Taluk Legal Services Committee - The Taluk Legal Services Committee may perform all or any of the following functions, namely:-- (a) coordinate the activities of legal services in the taluk; (b) organize Lok Adalats within the taluk; and (c) perform such other functions as the District Authority may assign to it.

ENTITLEMENT TO LEGAL SERVICES = Criteria for giving legal services - Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-- (a) a member of a Scheduled Caste or Scheduled Tribe; (b) a victim of trafficking in human beings or beggar as referred in article 23 of the Constitution; (c) a woman or a child; (d) a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or (f) an industrial workman; or (g) in custody, including custody in a protective home, or in a Juvenile home, or in a psychiatric hospital or psychiatric nursing home; or (h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court. Entitlement to legal services Persons who satisfy or any of the criteria specified in this Act [in section 12] shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend. =An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

FINANCE, ACCOUNTS AND AUDIT Grants by the Central Government - The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Central Authority, by way of grants, such sums of money as the Central Government may think fit for being utilized for the purposes of this Act.

National Legal Aid Fund - The Central Authority shall establish a fund to be called the National Legal Aid fund and there shall be credited thereto— (a) all sums of money given as grants by the Central Government; (b) any grants or donations that may be made to the Central Authority by any other person for the purposes of this Act; (c) any amount received by the Central Authority under the orders of any court or from any other source. - The National Legal Aid Fund shall be applied for meeting-- (a) the cost of legal services provided under this Act including grants made to State Authorities; (b) the cost of legal services provided by the Supreme Court Legal Services Committee; (c) any other expenses which are required to be met by the Central Authority.

State Legal Aid Fund - (1) A State Authority shall establish a fund to be called the State Legal Aid Fund and there shall be credited thereto — (a) all sums of money paid to it or any grants made by the Central Authority for the purposes of this Act; (b) any grants or donations that may be made to the State Authority by the State Government or by any person for the purposes of this Act; (c) any other amount received by the State Authority under the orders of any court or from any other source. - A State Legal Aid Fund shall be applied for meeting-- (a) the cost of functions referred to in this Act [in section 7]; (b) the cost of legal services provided by the High Court Legal Services Committees; (c) any other expenses which are required to be met by the State Authority.

District Legal Aid Fund - Every District Authority shall establish a fund to be called the District Legal Aid Fund and there shall be credited thereto— (a) all sums of money paid or any grants made by the State Authority to the District Authority for the purposes of this Act; (b) any grants or donations that may be made to the District Authority by any person, with the prior approval of the State Authority, for the purposes of this Act; (c) any other amount received by the District Authority under the orders of any court or from any other source. - A District Legal Aid Fund shall be applied for meeting-- (a) the cost of functions referred to in this Act [in section 10] (b) any other expenses which are required to be met by the District Authority. =

Accounts and Audit - (1) The Central Authority, State Authority or the District Authority (hereinafter referred to in this section as 'the Authority'), as the case may be, shall maintain proper accounts and other relevant records and prepare annual statement of accounts including the income and expenditure account and the balance-sheet. - (2) The accounts of the Authorities shall be audited by the Comptroller and Auditor General of India and any expenditure incurred in connection with such audit shall be payable by the Authority concerned to the Comptroller and Auditor General of India. - (3) The Comptroller and Auditor General of India and any other person appointed by him in connection with the auditing of the accounts of an Authority under this Act, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Authorities under this Act. - (4) The accounts of the Authorities, as certified by the Comptroller and Auditor General of India or any other person appointed by him in this behalf together with the audit report thereon, shall be forwarded annually by the Authorities to the Central Government or the State Governments, as the case may be. - (5) The Central Government shall cause the accounts and the audit report received by it under sub-section (4) to be laid, as soon as may be after they are received, before each house of Parliament. - (6) The State Government shall cause the accounts and the audit report received by it under sub-section (4) to be laid, as soon as may be after they are received, before the State Legislature.

LOK ADALATS Organization of Lok Adalats Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

Every Lok Adalat organized for an area shall consist of such number of- (a) serving or retired judicial officers; and (b) other persons, of the area as may be specified by the respective committees, organizing such Lok Adalat.

The experience and qualifications of other persons for Lok Adalats organized by the Supreme Court Legal Services Committee shall be prescribed by the Central Government in consultation with the Chief Justice of India. The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court. A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of-- (i) any case pending before; or (ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized: Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

Cognizance of cases by Lok Adalats -

(1) Where in any case referred to in clause (i) of sub-section (5) of section 19 [i.e., any case pending before any court for which the Lok Adalat is organized] (i) (a) the parties thereof agree; or (b) one of the parties thereof makes an application to the court for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or (ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat : Provided that no case shall be referred to the Lok Adalat by such court except after giving a reasonable opportunity of being heard to the parties.

(2) The Authority or Committee organizing the Lok Adalat may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 [i.e., any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized] that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination: Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

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

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

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

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

(7) Where the record of the case is returned to the court, such court shall proceed to deal with such case from the stage which was reached before such reference took place.

Award of Lok Adalat -

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

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

Powers of Lok Adalat or Permanent Lok Adalat

(1) The Lok Adalat “or Permanent Lok Adalat” shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:- (a) the summoning and enforcing the attendance of any witness and examining him on oath; (b) the discovery and production of any document; (c) the reception of evidence on affidavits; (d) the requisitioning of any public record or document or copy of such record or document from any court or office; and (e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat or Permanent Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it. (3) All proceedings before a Lok Adalat “or Permanent Lok Adalat” shall be deemed to be judicial proceedings.

PRE-LITIGATION CONCILIATION AND SETTLEMENT

=Definitions – (a) “Permanent Lok Adalat” means a Permanent Lok Adalat (b) “public utility service” means any- (i) transport service for the carriage of passengers or goods by air, road or water; or (ii) postal, telegraph or telephone service; or (iii) supply of power, light or water to the public by any establishment; or (iv) system of public conservancy or sanitation; or (v) service in hospital or dispensary; or (vi) insurance service, and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this chapter.

= Establishment of Permanent Lok Adalats – Notwithstanding anything contained in section 19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services

(2) Every Permanent Lok Adalat established for an area notified under sub-section (1) shall consist of -
- (a) a person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge, shall be the Chairman of the Permanent Lok Adalat; and (b) two other persons having adequate experience in public utility service to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may be, the State Authority, appointed by the Central Authority or, as the case may be, the State Authority, establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other persons referred to in clause (b) shall be such as may be prescribed by the Central Government.

= Cognizance of cases by Permanent Lok Adalat –

(1) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:

-Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law: -Provided further that the Permanent Lok Adalat shall not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

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

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

(3) Where an application is made to a Permanent Lok Adalat under subsection (1), it-- (a) shall direct each party to the application -to file before it a written statement, -stating therein the facts and nature of dispute, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, -and such party may supplement such statement with any document and other

evidence which such party deems appropriate in proof of such facts and grounds -and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application; (b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings; (c) shall communicate any document or statement received by it from any party to the application to the other party, to enable such other party to present reply thereto.

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

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

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

(7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, -is of opinion that there exist elements of settlement in such proceedings - which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute -and give to the parties concerned for their observations -and in case the parties reach at an agreement on the settlement of the dispute, -they shall sign the settlement agreement -and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

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

= Procedure of Permanent Lok Adalat - The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, -be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, -and shall not be bound by the Code of Civil Procedure, and the Indian Evidence Act, =Award of Permanent Lok Adalat to be final – Every award of the Permanent Lok Adalat under this Act -made either on merit or in terms of a settlement agreement -shall be final and binding on all the parties thereto and on persons claiming under them.

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

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

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

(5) The Permanent Lok Adalat may transmit any award made by it -to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.]

MISCELLANEOUS # Members and staff of Authorities, Committees and Lok Adalats to be public servants. –

#Protection of action taken in good faith. – -No suit, prosecution or other legal proceedings shall lie against-- Such public servants mentioned above for anything which is in good faith done or intended to be done under the provisions of this Act or any rule or regulation made there under.

2. Lok Adalat

Camps of Lok Adalat were started initially in Gujarat in March 1982 and now it has been extended throughout the Country. The evolution of this movement was a part of the strategy to relieve heavy

burden on the Courts with pending cases. The reason to create such camps were only the pending cases and to give relief to the litigants who were in a queue to get justice.

Seekers of justice are in millions and it is becoming rather difficult for the Courts to cope up with the ever-increasing cases with the present infrastructure and manpower. Courts are clogged with cases. There is serious problem of overcrowding of dockets. Because of the ever-increasing number of cases the Court system is under great pressure. Therefore, if there was at the threshold a permanent mechanism or machinery to settle the matters at a pre-trial stage, many matters would not find their way to the Courts. Similarly, if there are permanent forums to which Courts may refer cases, the load of cases could be taken off the Courts. In order to reduce the heavy demand on Court time, cases must be resolved by resorting to 'Alternative Dispute Resolution' Methods before they enter the portals of Court. Here comes the significance of Lok Adalat which has showed its significance by settling huge number of Third Party claims referred by Motor Accident Claim Tribunal (MACT). Except matters relating to offences, which are not compoundable, a Lok Adalat has jurisdiction to deal with all matters.

Matters pending or at pre-trial stage, provided a reference is made to it by a court or by the concerned authority or committee, when the dispute is at a pre-trial stage and not before a Court of Law it can be referred to Lok Adalat. Parliament enacted the Legal Services Authorities Act 1987, and one of the aims for the enactment of this Act was to organize Lok Adalat to secure that the operation of legal system promotes justice on the basis of an equal opportunity. The Act gives statutory recognition to the resolution of disputes by compromise and settlement by the Lok Adalats.

The concept has been gathered from system of Panchayats, which has roots in the history, and culture of this Country. It has a native flavor known to the people. The provisions of the Act based on indigenous concept are meant to supplement the Court system. They will go a long way in resolving the disputes at almost no cost to the litigants and with minimum delay. At the same time, the Act is not meant to replace and supplants the Court system. The Act is a legislative attempt to decongest the Courts from heavy burden of cases. There is a need for decentralization of justice.

Since April 1985, Lok Adalats have been exclusively organized for settlement of motor third party claims. Although the concept of Lok Adalat was very much vogue since early years. This form was made available for settlement of Motor Third Party claims under the initiative of former Chief Justice of India, Shir P.N.Bhagwati, since then number of lok Adalats have been organized throughout the Country through this forum to the satisfaction of the claimants. It is expected to gather further momentum for settlement of these claims through this medium as both claimants do and the Insurance Company get benefit out of it.

That is the reason why Insurance Companies are interested in settling Third Party claims by Lok Adalats. The increase in cases in Motor Accident Claim Tribunal (MACT) and backlog of pending cases pressed the insurer and the judicial system to think about the quick disposal oriented system like Lok Adalat/Conciliatory forums should be utilized to optimum level.

Lok Adalat now is playing sole role in solving disputes and settling MACT cases. It has become a Dispute Management Institution. It is an informal system of dispute resolution. This is the expeditious method to settle large number of MACT claims. It is the best provisions by the effort of judiciary. Disposal through Lok Adalat is the only panacea for controlling the arrears of cases. Insurance Company can save additional interest. This is the simplest method, which is devoid of procedural wrangles of regular trial. According to Legal Services Authorities (Amendment) Act 1994 effective from 09-11-1995 has since been passed, Lok Adalat settlement is no longer a voluntary concept. By

this Act Lok Adalat has got statutory character and has been legally recognized. Certain salient features of the Act are enumerated below:

Section 19

- 1 Central, State, District and Taluka legal Services Authority has been created who are responsible for organizing Lok Adalats at such intervals and place.
- 2 Conciliators for Lok Adalat comprise the following: -
 - A A sitting or retired judicial officer.
 - B other persons of repute as may be prescribed by the State Government in consultation with the Chief Justice of High Court.

Section 20: Reference of Cases

Cases can be referred for consideration of Lok Adalat as under:

- 1 By consent of both the parties to the disputes.
- 2 One of the parties makes an application for reference.
- 3 Where the Court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat.
- 4 Compromise settlement shall be guided by the principles of justice, equity, fairplay and other legal principles.
- 5 Where no compromise has been arrived at through conciliation, the matter shall be returned to the concerned court for disposal in accordance with Law.

Section 21

After the agreement is arrived by the consent of the parties, award is passed by the conciliators. The matter need not be referred to the concerned Court for consent decree.

The Act provisions envisages as under:

- 1 Every award of Lok Adalat shall be deemed as decree of Civil Court.
- 2 Every award made by the Lok Adalat shall be final and binding on all the parties to the dispute.
- 3 No appeal shall lie from the award of the Lok Adalat.

Section 22

Every proceedings of the Lok Adalat shall be deemed to be judicial proceedings for the purpose of

- 1 Summoning of Witnesses.
- 2 Discovery of documents.
- 3 Reception of evidences.
- 4 Requisitioning of Public record.

Hon'ble Delhi High Court has given a landmark decision highlighting the significance of Lok Adalat movement. It has far reaching ramifications.

Landmark Decision of Hon'ble Delhi High Court AIR 1999 Delhi Page-88

Facts of the Case - The petitioner filed a writ petition before Delhi High Court for restoration of electricity at his premises, which was disconnected by the Delhi Vidyut Board (DVB) on account of non-payment of Bill. Interalia, the grievances of the citizens were not only confined to the DVB but also directed against the State agencies like DDA, Municipal Corporation, MTNL, GIC and other bodies, Court notices were directed to be issued to NALSA and Delhi State Legal Service Authority. Judgment Held- His lordship Hon'ble Mr. Justice Anil Dev Singh passed the order giving directions for setting up of permanent Lok Adalats. The scholarly observations of His Lordship Mr Justice Anil Dev Singh deserve special commendations and are worthy of note. It will be profitable to reproduce the important text and abstract from this judgment, which should be an eye opener for all of us. It should

also steer the conscience of all, as there is an increasing need to make Lok Adalat movement a permanent feature.

Article 39 A of the Constitution of India provides for equal justice and free legal aid. It is, therefore clear that the State has been ordained to secure a legal system, which promotes justice on the basis of equal opportunity. The language of Article-39 A is couched in mandatory terms. This is made more than clear by the use of the twice-occurring word “shall” in Art-39 A. It is emphasized that the legal system should be able to deliver justice expeditiously on the basis of equal opportunity and provide free legal aid to secure that opportunities for securing justice are not denied to any citizens by reasons of economic or other disabilities. It was in this context that the parliament enacted the Legal Services Authority Act-1987.

The need of the hour is frantically beckoning for setting up Lok Adalats on permanent and continuous basis. What we do today will shape our tomorrow. Lok Adalat is between an ever-burdened Court System crushing the choice under its own weight and alternative dispute resolution machinery including an inexpensive and quick dispensation of justice. The Lok Adalat and alternative dispute resolution experiment must succeed otherwise the consequence for an over burdened court system would be disastrous. The system needs to inhale the life giving oxygen of justice through the note.

If we closely scrutinize the contents of the decision of Delhi High Court, there has been an alarming situation of docket-explosion and the ultimately remedy is the disposal of cases through the mechanism of Lok Adalat.

3. Legal Litreacy and Legal Aid Camp.

Legal Aid scheme was first introduced by Justice P.N. Bhagwati under the Legal Aid Committee formed in 1971. According to him, the legal aid means providing an arrangement in the society so that the missionary of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to them by law” the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and illiterate. Legal aid as defined, deals with legal aid to poor, illiterate, who don't have access to courts. One need not be a litigant to seek aid by means of legal aid. Legal aid is available to anybody on the road.

Article 39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society.}

The earliest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent. In Britain, the history of the organised efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State. Since 1952, the Govt. of India also started addressing to the question

of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes.

In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. Expert committees constituted, from 1950 onwards, to advise governments on providing legal aid to the poor have been unanimous that the formal legal system is unsuited to the needs of the poor. The 1977 report of the committee of Justices Krishna Iyer and P.N. Bhagwati, both of the Supreme Court, drew up a detailed scheme which envisaged public interest litigation (PIL) as a major tool in bringing about both institutional and law reform even while it enabled easy access to the judicial system for the poor. Their report, as those of the previous committees, was ignored. This explained partly the impatience of these two judges, in the post-emergency phase, in making the institution appear responsive to the needs of the population that had stood distanced from it. The two judges played a major role in spearheading the PIL jurisdiction.

The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987 Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Hon. Mr. Justice R.N. Mishra the then Chief Justice of India played a key role in the enforcement of the Act.

National Legal Services Authority was constituted on 5th December, 1995. His Lordship Hon. Dr. Justice A.S. Anand, Judge, Supreme Court of India took over as the Executive Chairman of National Legal Services Authority on 17th July, 1997. Soon after assuming the office, His Lordship initiated steps for making the National Legal Services Authority functional. The first Member Secretary of the authority joined in December, 1997 and by January, 1998 the other officers and staff were also appointed. By February, 1998 the office of National Legal Services Authority became properly functional for the first time.

In October, 1998, His Lordship Hon. Dr. Justice A.S. Anand assumed the Office of the Chief Justice of India and thus became the Patron-in-Chief of National Legal Services Authority. His Lordship Hon. Mr. Justice S.P. Bharucha, the senior-most Judge of the Supreme Court of India assumed the office of the Executive Chairman, National Legal Services Authority.

Criterion for providing legal aid

Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons. Section 12 of the Act reads as under:-

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is –

- (a) a member of a Scheduled Caste or Scheduled Tribe;
- (b) a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution;
- (c) a woman or a child;
- (d) a mentally ill or otherwise disabled person;

- (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- (f) an industrial workman; or
- (g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause.
- (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or
- (h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Govt., if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Govt., if the case is before the Supreme Court."(Rules have already been amended to enhance this income ceiling).

According to section 2(1) (a) of the Act, legal aid can be provided to a person for a 'case' which includes a suit or any proceeding before a court.

Section 2(1) (aaa) defines the 'court' as a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions. As per section 2(1)(c) 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter.

Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour provide him counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

Hierarchy of Bodies created under the Act

A nationwide network has been envisaged under the Act for providing legal aid and assistance. National Legal Services Authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programmes.

In every State a State Legal Services Authority is constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people and conduct Lok Adalats in the State. State Legal Services Authority is headed by the Chief Justice of the State High Court who is its Patron-in-Chief. A serving or retired Judge of the High Court is nominated as its Executive Chairman.

District Legal Services Authority is constituted in every District to implement Legal Aid Programmes and Schemes in the District. The District Judge of the District is its ex-officio Chairman.

Taluk Legal Services Committees are also constituted for each of the Taluk or Mandal or for group of Taluk or Mandals to coordinate the activities of legal services in the Taluk and to organise Lok Adalats. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.

Supreme Court Legal Services Committee

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

NALSA is laying great deal of emphasis on legal literacy and legal awareness campaign. Almost all the State Legal Services Authorities are identifying suitable and trustworthy NGOs through whom legal literacy campaign may be taken to tribal, backward and far-flung areas in the country. The effort is to publicise legal aid schemes so that the target group, for whom Legal Services Authorities Act has provided for free legal aid, may come to know about the same and approach the concerned legal services functionaries.

NALSA has also called upon State Legal Services Authorities to set up legal aid cells in jails so that the prisoners lodged therein are provided prompt and efficient legal aid to which they are entitled by virtue of section 12 of Legal Services Authorities Act, 1987.

Certain Salient Features of the Act are enumerated below:- Section 2 Definitions.-

(1)... (c) 'legal service' includes the rendering of any service in the conduct any case or other legal proceeding before any court or other Authority or tribunal and the giving of advice on any legal matter;

(d) 'Lok Adalat' means a Lok Adalat organised under Chapter VI;

(g) 'scheme' means any scheme framed by the Central Authority, a State Authority or a District Authority for the purpose of giving effect to any of the provisions of this Act;

(h) 'State Authority' means a State Legal Services Authority constituted under Section 6;

(2) Any reference in this Act to any other enactment or any provision thereof shall, in relation to an area in which such enactment or provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

Section 19

1. Central, State, District and Taluk Legal Services Authority has been created who are responsible for organizing Lok Adalats at such intervals and place.

2. Conciliators for Lok Adalat comprise the following: -

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Abdul Hasan and National Legal Services Authority Vs. Delhi Vidyut Board and others

Facts of the Case –The petitioner filed a writ petition before Delhi High Court for restoration of electricity at his premises, which was disconnected by the Delhi Vidyut Board (DVB) on account of non-payment of Bill. Inter alia, the grievances of the citizens were not only confined to the DVB but also directed against the State agencies like DDA, Municipal Corporation, MTNL, GIC and other bodies, Court notices were directed to be issued to NALSA and Delhi State Legal Service Authority.

Court Held-His lordship Hon'ble Mr. Justice Anil Dev Singh passed the order giving directions for setting up of permanent Lok Adalats. The scholarly observations of His Lordship Mr. Justice Anil Dev Singh deserve special commendations and are worthy of note. It will be profitable to reproduce the important text and abstract from this judgment, which should be an eye opener for all of us. It should also steer the conscience of all, as there is an increasing need to make Lok Adalat movement a permanent feature.

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If we closely scrutinize the contents of the decision of Delhi High Court, there has been an alarming situation of docket-explosion and the ultimately remedy is the disposal of cases through the mechanism of Lok Adalat.

Supreme Court on Legal Aid

The linkage between Article 21 and the right to free legal aid was forged in the decision in Hussainara Khatoon v. State of Bihar [3] where the court was appalled at the plight of thousands of undertrials languishing in the jails in Bihar for years on end without ever being represented by a lawyer. The court declared that "there can be no doubt that speedy trial, and by speedy trial, we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21." The court pointed out that Article 39-A emphasised that free legal service was an inalienable element of 'reasonable, fair and just' procedure and that the right to free legal services was implicit in the guarantee of Article 21.

In his inimitable style Justice Bhagwati declared:

"Legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality". He reiterated this in *Suk Das v. Union Territory of Arunachal Pradesh* [4] and said "It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21." This part of the narration would be incomplete without referring to the other astute architect of human rights jurisprudence, Justice Krishna Iyer. In *M.H. Hoskot v. State of Maharashtra* [5], he declared: "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal (to the Supreme Court) for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice'".

In *Khatri & Others v. St. of Bihar & others* [6] Bhagmati J. observed;

"Right to free legal aid, just, fair and reasonable procedures is a fundamental right (*Khatoon's Case*). It is elementary that the jeopardy to his personal liberty arises as soon as the person is arrested and is produced before a magistrate for it is at this stage that he gets the 1st opportunity to apply for bail and obtain his release as also to resist remain to police or jail custody. This is the stage at which and accused person needs competent legal advice and representation. No procedure can be said to be just, fair and reasonable which denies legal advice representation to the accused at this stage. Thus, state is under a constitutional obligation to provide free to aid to the accused not only at the stage of... Every individual of the society are entitled as a matter of prerogative."

In *Indira Gandhi v. Raj Narain* [7] the Court:

"Rule Of Law is basic structure of constitution of India. Every individual is guaranteed the its give to him under the constitution. No one so condemn unheard. Equality of justice. There ought to be a violation to the fundamental right or prerogatives, or privileges, only then remedy go to Court of Law. But also at the stage when he first is produced before the magistrate. In absence of legal aid, trial is vitiated."

Legal Aid under C.P.C and Cr.P.C

S. 304(1) Lays down that when accused facing a trial. Concept of free legal aid scheme under legal services Authority. Act is only when accused facing trial in court. When person is VV poor, then he can get legal aid. In the absence of lawyer, the entire trial becomes vitiated and then case to be remanded back to the trial court. Court to ask the accused, whether he has services to engage a lawyer or not. If not, the court is bound to give him lawyer from the bar, who should be well versed with the law and to be get paid by St. Govt. Court cannot sympathize with a lawyer. Lawyer must be a competent one. " is amicus curiae (friend of court). S. 304, CrPC plays V. imp. role." Order 33, rule 17, CPC :- Suit by or against an indigent person. When a plaint along with petition, that person unable to avail services of an lawyer, then court exempts him from court fees.

Amendments to made to the Legal Services Authorities Act, 1987

The Legal Services Authorities Act, 1987 was enacted to constitute legal services authorities for providing free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice were not denied to any citizen by reason of economic or other disabilities and to organize Lok Adalats to ensure that the operation of the legal system promoted justice on a basis of equal opportunity. The system of Lok Adalat, which is an innovative mechanism

for alternate dispute resolution, has proved effective for resolving disputes in a spirit of conciliation outside the courts.

However, the major drawback in the existing scheme of organization of the Lok Adalats under Chapter VI of the said Act is that the system of Lok Adalats is mainly based on compromise or settlement between the parties. If the parties do not arrive at any compromise or settlement, the case is either returned to the court of law or the parties are advised to seek remedy in a court of law. This causes unnecessary delay in the dispensation of justice. If Lok Adalats are given power to decide the cases on merits in case parties fails to arrive at any compromise or settlement, this problem can be tackled to a great extent. Further, the cases which arise in relation to public utility services such as Mahanagar Telephone Nigam Limited, Delhi Vidyut Board, etc., need to be settled urgently so that people get justice without delay even at pre-litigation stage and thus most of the petty cases which ought not to go in the regular courts would be settled at the pre-litigation stage itself which would result in reducing the workload of the regular courts to a great extent. It is, therefore, proposed to amend the Legal Services Authorities Act, 1987 to set up Permanent Lok Adalats for providing compulsory pre-litigative mechanism for conciliation and settlement of cases relating to public utility services.

The salient features of the amendment are as follows:

- (i) to provide for the establishment of Permanent Lok Adalats which shall consist of a Chairman who is or has been a district judge or additional district judge or has held judicial office higher in rank than that of the district judge and two other persons having adequate experience in public utility services;
- (ii) the Permanent Lok Adalat shall exercise jurisdiction in respect of one or more public utility services such as transport services of passengers or goods by air, road and water, postal, telegraph or telephone services, supply of power, light or water to the public by any establishment, public conservancy or sanitation, services in hospitals or dispensaries; and insurance services;
- (iii) the pecuniary jurisdiction of the Permanent Lok Adalat shall be up to rupees ten lakhs. However, the Central Government may increase the said pecuniary jurisdiction from time to time. It shall have not jurisdiction in respect of any matter relating to an offence not compoundable under any law;
- (iv) it also provides that before the dispute is brought before any court, any party to the dispute may make an application to the Permanent Lok Adalat for settlement of the dispute;
- (v) where it appears to the Permanent Lok Adalat that there exist elements of a settlement, which may be acceptable to the parties, it shall formulate the terms of a possible settlement and submit them to the parties for their observations and in case the parties reach an agreement, the Permanent Lok Adalat shall pass an award in terms thereof. In case parties to the dispute fail to reach an agreement, the Permanent Lok Adalat shall decide the dispute on merits; and
- (vi) every award made by the Permanent Lok Adalat shall be final and binding on all the parties thereto and shall be by a majority of the persons constituting the Permanent Lok Adalat.

Criticism by Krishna Iyer

The innovative part in the act is contained in Chapter VI. But there is considerable conceptual shrinkage in the statutory ideation of Lok Adalats. There is a Lok Adalat movement in the country which outstrips the conceptual limitations of Chapter VI. Many states have shown enthusiasm for this versatile phenomenon of informal justice with easy finality and community orientation. Gujarat has set a record in this experiment; thanks to the Chief Justice taking vigorous personal interest. Similarly, Andhra Pradesh has produced results in conciliation. Tamil Nadu also is doing good work and is a model in many respects. Why? Judges charged with the responsibility of organizing Lok Adalats in these States and in Maharashtra, Rajasthan and elsewhere have worked with inspired zeal. In Karnataka, the Law Minister has dedicated himself with restless wanderlust and soulful commitment, to this task and is a sort of Lok Adalats personified in a few States like Kerala, state Legal Aid boards have proved disappointing in their Lok Adalats performance, although partly made up for by a voluntary agency

(people's Council for Social Justice), headed by a retired judge. The drive behind the Lok Adalats is the roused consciousness of the community to prevent disruption of local unity and to secure substantial equity and social justice, in a mood of human solidarity. In many places, Lok Adalats are transfigured as People's Festivals of Justice. The participants are not merely judicial officers or lawyers as envisaged in Section 19(2), or justice, equity and fairplay. (vide Sec. 19(4) which means, again, common law) and the settlement are not necessarily according to legal principles, but with an eye on social goals like ending feuds, restoring family peace and providing for destitute, law or no law. One need not further elaborate the other provisions except to sum up and say that the defects above mentioned are cardinal and not peripheral, correctible and not irremediable.

The philosophy of autonomy and accountability for statutory authorities with democratic composition and social initiative must be accepted by the state. Such a postulate calls for the categorical imperative that free legal service in its wider sweep of semantics is the guaranteed right of every Indian and not the largess condescendingly extended by Government. The jurisprudence of judicature walks a different street paved with right, not grace.

Public interest litigation is part of the process of participate justice and 'standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps.

Accountability and democracy are close companions; a free legal service project affecting vast numbers of under privileged Indians must be accountable to the people. I wonder why there is no provision for the central or State authorities to present reports to parliament and the legislature so that there may be annual discussions at the highest levels and consequential changes brought in the system itself.

The State legal Service Authorities must face criticism more or less like what has been leveled earlier against the central authority. If the chief justice or his associate judge is to be in a committee which is to be organized Lok Adalat, [Sec 7 (2)(b)], if he is to grant legal aid by sitting and screening the means and the merits of the applicants and there cases [Sec 7(2)(a)] it may be wrong because there role may be misunderstood. The authority applies the merits test and the judge is the member of that counsel. Technically the authority therefore implicates the judge in the assessment of the merits of a case which is to be filed. This is not right. If the judges are to be kept away from screening particular cases for eligibility for legal aid, there must be statutory indication to that effect. The presence on the authority is useful. But his being directly or vicariously involved in screening the merits of the cases, even prima facie, is fraught with risk to the confidence in the impartiality of the judges who hear the cases.

In the Municipal Council, Ratlam [8], a bench of this court observed:

It is procedural rules as this appeal proves, 'which infuse life into substantive rights, which activate them to make them effective'.... the truth is that a few profound issue of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing of British Indian vintage'. if the Centre of gravity of justice is to shift , as a preamble to the constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense the case before us between the Ratlam municipality and the citizens of the Ward is a pathfinder in the field of peoples involvement in the judicious process, sans which as Prof. Sikes points the system may crumble under the burden of its own insensitivity'

In the Fertilizer Corporation, Kamagar Union Case [9] the Supreme Court has made the following meaningful observations:

'We have no doubt that in competition between Courts and Streets as dispensers of justice, the rule of law must win the aggrieved person for the law Court and wean him from the lawless street. In simple terms the locus standi must be liberalized to meet the challenges of the times. Ubi jus ibi remedium must be enlarged to embrace all in interest of public minded citizens or organizations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets'.

The United States, through Chief justice Warren Burger and the American Bar Association, has been experimenting with and discussing non-judicial routes like arbitration and negotiation as well as simpler judicial alternatives to make justice a poor man's pragmatic hope. India, like America, suffers from 'litigation neuroses' the poor are the worst victims because the rich can afford forensic mountaineering while the needy freeze to death midway. It is therefore integral to any Statute under 39 A to discover imaginatively and innovatively all methodologies of getting inexpensive, early and easy justice. In the United States, small claims Courts have been tried with success to resolve minor disputes fairly and more swiftly than any present judicial mechanisms make possible.

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