Alternate Dispute Resolution + Arbitration Act

BarHacker

`

Alternate Dispute Resolution and the Arbitration Act

The AIBE has allocated a weight-age of Four marks for "ADR + Arbitration Act"

The difficulty level of the questions can range from simple fill in the blank type multiple choice questions like: *".....is the process whereby interested parties resolve disputes, agree upon courses of action, bargain for collective or individual advantage, and/or attempt to craft outcomes with serve their mutual interests"* (the answer is **conciliation**)

Then there are questions which require some navigation of the bare act or casebook, like: "*The commencement of arbitral proceedings is not dependant on interim relief being allowed or denied under S.9 of Arbitration or Conciliation Act, 1996. Supreme Court held this in which case?* "

For this purpose, an explanation of the concepts and an outline of the scheme of the Arbitration and Conciliation Act is provided below (along with an outline of what courts have held), to be used as reference.

The best strategy for tackling this section is to be familiar with the basic concepts of ADR and the scheme of the Arbitration and Conciliation Act, 1996.

Types of alternate dispute resolution methods

Alternate dispute resolution (**ADR**) does not refer only to arbitration - there are several alternate dispute resolution methods, such as mediation, conciliation, expert determination, etc. which are explained in detail below. After that, arbitration is explained in greater detail with an attempt to keep the structure intuitive.

1. Arbitration

Arbitration is typically selected as a method for dispute resolution by the parties to the contract (courts also have the powers to suggest this method to disputing parties). The parties submit to privately appointed individuals ('arbitrators') for resolving their disputes (instead of state-constituted courts). Decisions of these individuals are binding on the parties and enforceable as orders of the court. They can be challenged on extremely limited grounds.

Refer to S. 2(1)(a), Arbitration & Conciliation Act, 1996 for the statutory definition - *Arbitration is a method of adjudication of dispute(s) between the parties by non-judicial process wherein arbitrator(s) is appointed by the parties themselves under a contract whereby the parties agree for adjudication of such dispute(s) by way of arbitration proceedings.*

*The Supreme Court had said in Renusagar Power Co Ltd vs. General Electric (AIR 1985 SC 1156**)** that the object of this legislation was to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration…If there was no arbitration clause at the time of entry of the arbitrators on their duties, the whole proceedings would be without jurisdiction.*

2. Mediation

Section 89 of Code of Civil Procedure, 1908

Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.

Various courts in India have set up mediation centers. Disputes ranging from personal to corporate can be resolved through mediation. The decision of the mediator is not binding on the

parties but he only tries to get the parties to talk to each other in a controlled environment helping to clear the air of confusion (if any) between them. A mediator acts as a facilitator.

3. <u>Conciliation</u> (Part III, Arbitration & Conciliation Act, 1996)

It is a confidential, voluntary and private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. This method provides the disputing parties with an opportunity to explore options aided by an objective third party to exhaustively determine if a settlement is possible.

The parties are aided by a third party in reaching a conclusion which is mutually beneficial to both. It differs from mediation as here the conciliator is more active and can suggest measures to settle the dispute. A conciliator can also formulate or reformulate the terms of a possible settlement.

4. <u>Expert Determination</u>

It is an alternative method of dispute resolution that is frequently used for disputes where there is a requirement for technical expertise, for example, in the IT, accountancy or construction fields. It is not, however, confined to specialized areas, and can be deployed in a wide range of disputes where the parties prefer a quick and confidential determination rather than undertaking comparatively expensive and protracted court or arbitration proceedings.

Stages of arbitration and the scheme of the Arbitration and Conciliation Act

1. <u>Arbitration Agreement</u>

   Arbitration is commenced only under a written agreement to arbitrate between parties. This can be through an independent written agreement (executed before or after the dispute has

arisen) or as a separate clause in the contract whereby the parties submit to arbitration all or some disputes which arise between them.

If the parties have not named an arbitrator or specified a mechanism for his appointment in the contract, the court can appoint one.

Arbitration can also be commenced under S. 89 of the Civil Procedure Code, if the court refers parties to an ongoing legal dispute to arbitration (in this case a prior written agreement to arbitrate is not necessary).

As per S.7 of the Arbitration and Conciliation Act, an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Essentials of an arbitration agreement (case law)

In *K. K. Modi v. K. N. Modi* (AIR 1998 SC 1297), the court has discussed the attributes that make an agreement, an arbitration agreement. A clause will amount to an arbitration clause only if it contemplates that the decision of the tribunal will be binding on the parties to the agreement. If the parties consent to going with the procedure of arbitration for dispute resolution or if the court or a statute enables the tribunal to conduct the arbitration process, only then must the jurisdiction of the arbitration tribunal may be exercised. The agreement must also agree to it that the tribunal will determine the substantive rights of the parties. The agreement must also contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal. Other important factors include whether the agreement contemplates that tribunal will receive evidence from both sides and give the parties opportunity to put forth their issues and hear their contentions; whether the wording of the agreement is consistent with the view that the process was

intended to be an arbitration; and whether the agreement requires the tribunal to decide the dispute according to law.

In *P. Anand Gajapathi v. P.V.G. Raju* (2000) 4 SCC 539, the issue was whether an arbitration agreement can be entered into after a suit is filed. The parties in this case entered into an arbitration agreement during the pendency of the appeal in the court and agreed to refer their disputes to an arbitrator. The court held that it is possible if both the parties consent to it. The phrase 'subject to an arbitration agreement' does not necessarily require that the agreement must be already in existence before the action is brought in the court.

In *M.V. Baltic Confidence v. State Trading Corporation of India Ltd.*, (2001) 7 SCC 473, the Supreme Court held that the intent of the parties to enter into an arbitration agreement should be considered and the words of the clause can be overlooked if the intent is clear.

2. Referral to Arbitration

Defaulting parties often use delaying tactics to their advantage. What should be done if a party approaches a court in respect of a dispute which is covered by an arbitration clause? The court has the power to refer parties to arbitration if the matter brought before it is a subject of an arbitration agreement. As per S.8, a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party applies before or at the time of submitting its first statement on the substance of the dispute, refer the parties to arbitration. The arbitrator's decision shall be final and binding.

However, what if the party which approaches the court is a consumer? Should he or she be compelled to use an arbitration mechanism that is specified in the contract with goods supplier or service provider? See the case law below.

Case law - In *Skypak Couriers Ltd. v. Tata Chemicals Ltd.*, (2000) 5 SCC 294, the court held that if there is an arbitration clause in an agreement and a complaint is made by a consumer regarding a certain deficiency of service, the redressal agency constituted under the Consumer Protection Act can still entertain such a complaint, despite the existence of an arbitration agreement.

3. Creation of the tribunal and appointment of arbitrators

How should the arbitral tribunal be constituted? How many arbitrators should be appointed?

As per S. 10, parties are free to determine the number of arbitrators, so long as it is not an even number. However, courts have permitted parties to appoint an even number of arbitrators as well.

In *Narayan Prasad Lohia v. Nikunj Kumar Lohia*, 2002 (1) RAJ 381 (SC), the question was whether an arbitration agreement becomes invalid on the ground that it provided for appointment of only two arbitrators, considering that the act requires an odd number of arbitrators. It was held that even if the parties provided for appointment of 2 arbitrators, the agreement does not become invalid. The two arbitrators can together come to a unanimous conclusion. Alternately, if there are chances of a tie, then under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as presiding arbitrator. A third arbitrator can be appointed as a preventive measure as well.

If the parties have not specified the number of arbitrators in the contract, then by default the arbitral tribunal shall consist of sole arbitrator.

Appointment of Arbitrators – S.11

A person of any nationality can be appointed as an arbitrator, unless otherwise agreed by the parties. For example, if the arbitral tribunal comprises three members, either party can appoint three arbitrators by themselves, or they shall appoint an arbitrator each who shall jointly appoint the third arbitrator.

In case of failure of the parties to appoint the arbitrators and constitute the tribunal or in case of disagreement on third arbitrator, the Chief Justice of the High Court (in case of a domestic arbitration) and the Chief Justice of India (in case of an international commercial arbitration). The Chief Justice usually tries to comply as closely as possible with the mechanism stipulated by the parties in the agreement.

In *National Aluminium Company Ltd. v. Metalimpex Ltd.*, 2001(1) RAJ 548 (SC), the arbitration agreement in this case envisaged that two arbitrators would in turn appoint an umpire. One arbitrator was appointed by the petitioner who requested the respondent to appoint the other. On the failure of the respondent to do so, the petitioner approached the Chief Justice for appointment of sole arbitrator. It was held that a sole arbitrator cannot be appointed in such circumstances in the absence of an agreement between the parties in this regard. Since the arbitration agreement envisages two arbitrators who in turn would appoint the presiding arbitrator, it will not be legal to appoint the sole arbitrator, unless both parties agree to it before the court.

The issue in *Datar Switchgears Ltd. v. Tata Finance Ltd.*, 2000 (3) RAJ 181 (SC), was about the appointment of an arbitrator under Section 11(6). It was held that Section 11(5) can be invoked by a party who has requested the other party to appoint an arbitrator and the latter fails to make any appointment within 30 days from the receipt of the notice. An application u/s 11 (6) can be filed when there is a failure of procedure for appointment of arbitrator. This failure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to do so or where the 2 appointed arbitrators fail to appoint the

3rd arbitrator. If the appointment of an arbitrator is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of arbitrator. In this case, it cannot be said that there was a failure of procedure as prescribed by the Act.

In *Konkan Railways Corporation Ltd. v. Mehul Construction Co.*, AIR 2000 SC 2821, it was held that the order of the Chief Justice in case of appointment of arbitrators in case of domestic arbitrations and that of the Chief Justice of the India in an International commercial arbitrations (this is made under Section 11 of the Arbitration and Conciliation Act), shall be deemed to have been made in his administrative capacity and the aggrieved party could approach the arbitral tribunal itself under Section 16 for challenging the jurisdiction of the tribunal. It could not go to a court. However, in the *Patel Engineering* case (2005), this was reversed and it was held that the determination is a judicial determination.

4. Venue, Language and Place of Proceedings

S.18 – Equal treatment of parties

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

S.20 – Place of Arbitration

The parties are free to agree on the place of arbitration. Failing to do so, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Notwithstanding the above, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

S.22 – Language

The parties are free to agree upon the language(s) to be used in the arbitral proceedings. On failing in the above, the arbitral tribunal shall determine the language(s) to be used in the arbitral proceedings. The agreement or determination shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

5. Rules and substantive law applicable to arbitration proceedings

(S. 28 – Rules applicable to substance of dispute)

Where the place of arbitration is in India, in any arbitration where both parties are Indian citizens), the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with Arbitration and Conciliation Act, 1996.

In cases of international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the substantive rules of the legal system designated by the parties, even if it is conducted in India.

If no designation has been made, the arbitral tribunal shall apply the rules of law it considers appropriate considering the circumstances of the dispute.

In *National Thermal Power Corporation v. Singer Company*, 1992 SCR (3) 106, it was held that the Judge has to apply the proper law for the parties by putting himself in the place of a "*reasonable man*". He has to determine the intention of the parties by asking himself "*how a just and a reasonable person would have regarded the problem"*. It has been held that where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by

applying the objective test to determine. The judge has to apply the proper law for the parties by putting himself in the place of a reasonable man.

6. Enforcement of awards

S.35 – Finality of arbitral awards

An arbitral award shall be final and binding on the parties and persons claiming under them.

S.36 – Enforcement

Where the time of making an application to set aside the arbitral award under S.34 has expired, or has been refused, the award shall be enforced under the Code of Criminal Procedure, 1908, as it were a decree of the court.

Satish Kumar v. Surinder Kumar, AIR 1970 SC 833, talked about Section 35 that contemplates the finality of arbitral awards. The Supreme Court held that after the award becomes final, the rights and liabilities of the parties in respect of said claims can be determined only on the basis of the said award, thereafter, no action can be started on the original claim which had been the subject matter of the arbitral proceedings. It was held by the Supreme Court, that the award is in fact, a final adjudication of a court of the rights and liabilities of the parties, which on the face of it is conclusive upon the merits of the controversy submitted. It was further held that, an award given under the Arbitration Act requires registration under section 17(1) (b) of the Registration Act if the award affects partition of an immovable property exceeding the value of Rs. 100/-.

7. Challenges to an arbitral award

S. 34 – Application for setting aside arbitral award

An application for setting aside an arbitral award can be made to the court. The award can be set aside if the party was under some incapacity, the agreement is invalid, proper notice to appoint arbitrator was not given to either party and the dispute is not under the scope of the

arbitration agreement. Award can also be set aside if the composition of the tribunal was not in accordance with the Act, the subject-matter is not capable of settlement under the law in force and the arbitral award is in conflict with the public policy of India.

The application must be made within 3 months from the date on which the party making the application had received the arbitral award.

In *Puri Construction Co. v. Union of India*, AIR 1986 SC 777, it was held by the SC that when the court is called upon to decide the objections raised by a party against an award, the jurisdiction of the court is limited, as expressly indicated in the act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits. The Court also held that if there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors, are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court.

It was held in *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190, that the enforcement of foreign awards need not be restricted to grounds under Section 45 (which were narrower), but can also be challenged on the grounds of **domestic public policy** in India (under **Section 34** of the Act). Prior to this judgment the judicial position was that Part I of the Act applies only to domestic awards and Part II applies to foreign awards.

The SC held that the Indian courts have the power to intervene in foreign awards issued in international arbitrations held outside India. According to the Court the award was issued outside India; the parties had not expressly excluded the application of Part I of the Act in its contract; and in view of the non-obstante provision of the shareholders agreement, Indian law is applicable. This means that the parties have a right to go to court in India seeking an injunction against the enforcement of a foreign award. It was held by the SC that if the new facts are

relevant and material, the concealment of which opposes fraud, it opposes general public policy principles and a party attempting to set aside the arbitral award, will be allowed to introduce the new facts and materials.

In *ONGC v. Saw Pipes*, AIR 2003 SC 2629, the idea of patent illegality was discussed at length in this case. The Supreme Court held that an award shown to be suffering from 'patent error of law' could also be challenged under the head "award being in conflict with public policy of India" thereby expanding the grounds for setting aside of a foreign award. In ONGC, the Supreme Court interpreted 'patent illegality' to be under the scope of 'public policy' under Section 34. When the award is erroneous on the basis of record with regard to the propositions of law or its application, the court will have jurisdiction to interfere in the award. However, such failure of procedure should be patent, thereby affecting the rights of the parties.

However, Indian courts have become more arbitration-friendly. In *BALCO vs. Kaiser Aluminium*, the Supreme Court adopted a different stand from what it had taken in *Bhatia International* and *Venture Global* - where it had essentially recognized the power of Indian courts to set aside foreign awards and to also provide interim measures for arbitrations conducted outside India. As per the new position, Indian courts would not be in a position to award interim measures with respect to an arbitration occurring outside India, or set aside arbitral awards passed outside India (they can, however, restrict enforcement of the award on very limited grounds). This new position was effective for arbitration agreements executed from 6th September 2012 onwards.