SATHYABAMA
INSTITUTE OF SCIENCE AND TECHNOLOGY
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SCHOOL OF LAW

DEPARTMENT OF LEGAL STUDIES

ARBITRATION, CONCILIATION AND ALTERNATIVE DISPUTE RESOLUTION SYSTEM

COURSE OBJECTIVES

- To gain knowledge about different methods of dispute resolution.
- To understand the meaning and general principles of arbitration.
- To study about the roles and responsibilities of Conciliator

COURSE OUTCOMES

- **CO1:** This Course will give a brief idea about growing new area of legislation and its scope in present scenario.
- **CO2:** Helps the students in understanding the Alternate Dispute Settlement Machinery, its significance and the ways to implement the procedures.
- **CO3:** Enhances practical based skills in students.
- **CO4:** Provides the students a brief overview about the implementation and regulation mechanisms.
- **CO5:** This course also gives an understanding about the International mechanism in ADR and its functions which can be adopted in India
- **CO6:** This Course will equip the students with the required Professional Skills

UNIT – I – INTRODUCTION – SAL1002

Meaning of ADR

Definition of Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is the procedure for settling disputes without litigation, such as arbitration, mediation, or negotiation. ADR procedures are usually less costly and more expeditious. They are increasingly being utilized in disputes that would otherwise result in litigation, including high-profile labour disputes, divorce actions, and personal injury claims.

One of the primary reasons parties may prefer ADR proceedings is that, unlike adversarial litigation, ADR procedures are often collaborative and allow the parties to understand each other's positions. ADR also allows the parties to come up with more creative solutions that a court may not be legally allowed to impose.

Important Terms:

- Arbitration - A process similar to an informal trial where an impartial third party hears each side of a dispute and issues a decision; the parties may agree to have the decision be binding or non-binding
- Binding and Non-Binding - A binding decision is a ruling that the parties must abide by whether or not they agree with it; a non-binding decision is a ruling that the parties may choose to ignore
- Arbitration - An impartial person given the power to resolve a dispute by hearing each side and coming to decision
- Hearing- A proceeding in which evidence and arguments are presented, usually to a decision-maker who will issue ruling
- Mediation - A collaborative process where a mediator works with the parties to come to a mutually agreeable solution; mediation is usually non-binding

DIFFERENT METHODDS OF DISPUTE RESOLUTION:

1. Arbitration
2. Mediation
3. Conciliation
4. Negotiation
5. Lok Adalat

1. Arbitration:

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

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

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

Types of arbitration are:

Ad Hoc Arbitration

An ad hoc arbitration is one which is not administered by an institution and therefore, the parties are required to determine all aspects of the arbitration like

the number of arbitrators, manner of their appointment, etc. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The advantage is that, it is agreed to and arranged by the parties themselves. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation.

Institutional Arbitration

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as according to the rules of that institution. It is important to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inapt and only the rules of the institution apply.

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

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

Statutory Arbitration

When a law specifies that if a dispute arises in a particular case it has to be referred to arbitration, the arbitration proceedings are called "statutory arbitration".

Section 2(4) of the Arbitration and Conciliation Act 1996 provides, with the exception of section 40(1), section 41 and section 43, that the provisions of Part I shall apply to every arbitration under any other act for the time being in force in India.

Fast track arbitration

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

2. Mediation:

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

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

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

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

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

3. Conciliation:

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

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

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

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

4. Negotiation:

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

Essentials of Negotiation are:

1. It is a communication process;
2. It resolves conflicts;
3. It is a voluntary exercise;
4. It is a non-binding process;
5. Parties retain control over outcome and procedure;
6. There is a possibility of achieving wide ranging solutions, and of maximizing joint gains.

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

5. Lok Adalats:

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

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

Legal Services Authorities Act, 1987:

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

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

Honorable Delhi High court has given a landmark decision highlighting the significance of Lok Adalat movement in the case of *Abdul Hasan and National*

Legal Services Authority v. Delhi Vidyut Board and Others. The court passed the order giving directions for setting up of permanent Lok Adalats.

SUGGESTIONS FOR IMPROVING MECHANISMS

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

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

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

1. Awareness: It can be brought about by holding seminars, workshops, etc. ADR literacy program has to be done for mass awareness and awareness camp should be to change the mindset of all concerned disputants, the lawyers and judges.
2. Acceptance: In this regard training of the ADR practitioners should be made by some University together with other institutions. Extensive training would also be necessary to be imparted to those who intend to act as a facilitator, mediators, and conciliators. Imparting of training should be made a part of continuing education on different facets of ADR so far as judicial officers and judges are concerned.
3. Implementation: For this purpose, judicial officers must be trained to identify cases which would be suitable for taking recourse to a particular form of ADR.

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

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

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

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

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

CONCLUSION

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly

has acquired good popularity among the public and this has really given rise to a new force to ADR and this will no doubt reduce the pendency in law Courts. There is an urgent need for justice dispensation through ADR mechanisms.

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

FORMAL AND INFORMAL ADVANTAGES AND DISADVANTAGES OF ADR

Advantages of ADR

Alternative dispute resolution (ADR) procedures have several advantages:

- Reduced time in dispute- It takes less time to reach a final decision.
- Reduced costs in relating to the dispute resolution- It requires less money i.e. it is cheap.
- Flexibility-Parties have more flexibility in choosing what rules will be applied to the dispute. They have the freedom to do so.
- Produce good results- settlement rates of up to 85 percent.
- Improved satisfaction with the outcome or manner in which the dispute is resolved among disputants.
- Increased compliance with agreed solutions.
- *A single procedure*[4]– Parties can agree to resolve in a single procedure a dispute involving intellectual property.

- *Party autonomy*- Because of its private nature, ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.
- *Neutrality*– ADR is neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation.
- *Confidentiality*- ADR proceedings are private. Thereby, the parties can agree to keep the actions confidential. This allows them to focus on the merits of the dispute without concern about its public impact.
- *Finality of Awards*- Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.
- *Enforceability of Awards*- The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders.
- Preserves relationship- Helps people cooperate instead of creating one winner or one loser.

Disadvantages of ADR

Some disadvantages of alternative dispute resolution are:

- It can be used as a stalling tactic.
- Parties are not compelled to continue negotiations or mediation.
- Does not produce legal precedents.
- Exclusion of pertinent parties weakens final agreement.
- Parties may have limited bargaining power. Parties do not have much of a say.
- Little or no check on power imbalances between parties.
- May not protect parties' legal rights. The rights of the parties may not be protected by alternative dispute resolution.
- **Your case might not be a good fit**[5]**–** Alternative dispute resolutions resolve only issues of money or civil disputes. Alternative dispute resolution proceedings will not result in injunctive orders. They cannot result in an order requiring one of the parties to do or cease doing a particular affirmative act.
- **There are limits to the discovery process–** You should also be aware that you are generally preceding without the protections offered parties in litigation, such as those rules governing discovery. Courts generally allow a great deal of latitude in the discovery process, which you will not have in an alternative dispute resolution.
- There is no guaranteed resolution. With the exception of arbitration, alternative dispute resolution processes do not always lead to a resolution.
- Arbitration decisions are final. With few exceptions, the decision of a neutral arbitrator cannot be appealed. Decisions of a court, on the other hand, usually can be appealed to a higher court.
- Participation could be perceived as weakness. While the option of making the proceeding confidential addresses some of this concern, some parties still want to go to court "just on principle."
- **The case might not be a good fit-**Alternative dispute resolutions generally resolve only issues of money or civil disputes.

- **There are limits to the discovery process**-One should also be aware that he is generally proceeding without the protections offered parties in litigation, such as those rules governing discovery.

Conclusion

Through this topic I got to learn a new term called alternative dispute resolution (ADR). I have tried to provide as much details as possible regarding my topic. I found out what alternative dispute resolution means, how many types of ADR are there, what are the advantages and disadvantages of ADR. I have also provided some examples and tried to relate Alternative Dispute Resolution with respect to Bangladesh. Litigation should be the last resort and utilized only if the ADR procedures fail. It is essential, however, that all of the parties involved in the claim or dispute approach ADR with an open mind and a willingness to compromise if it is to have any chance of success. Mediation is mostly used. Arbitration is very useful when it comes to handling family matters.

Need for Domestic Arbitration

Domestic Arbitration takes place in India when the arbitration proceedings, the subject matter of the contract and the merits of the dispute are all governed by Indian Law, or when the cause of action for the dispute arises wholly in India or where the parties are otherwise subject to Indian jurisdiction. In the domestic arbitration, the cause of action for the dispute should have arisen wholly in India or the parties are otherwise subject to Indian jurisdiction. Domestic arbitration is an attractive option for the settlement of disputes.

In a domestic arbitration:

1) The arbitration takes place in India
2) The subject matter of contract is in India

3) The merits of the dispute are governed by the Indian Law.
4) The procedure of arbitration is also governed by the Indian Law.

In the Indian Arbitration and Conciliation (Amendment) Bill 2003, the definition of the term domestic arbitration was given as:

'Domestic Arbitration' means an arbitration relating to a dispute arising out of legal relationship whether contractual or not, where none of the parties is:

i) An in individual who is a nationality 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) 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 Where the place of arbitration is in India and shall be deemed to include international arbitration and international commercial arbitration where the place of arbitration is in India.

There are conflicting views of the Courts in India about applicability of Part I in respect of International Commercial Arbitration where seat of arbitration is not in India. In a case before the Delhi High Court, Dominant Offset Pvt. Ltd. v. Adamouske Strojirny AS, the petitioners entered into two agreements with a foreign concern for technology transfer and for purchase of certain machines. The agreement carried an arbitration clause which provided that the place of arbitration would be London and the arbitration tribunal would be International Chamber of Commerce in Paris. The parties having developed a dispute, a petition was filed in the High Court of Delhi with a prayer for reference to arbitration in terms of the Arbitration Clause for enforcement of the agreement. The Court extensively studied the provisions of the Act so as to see whether it was a matter coming under Part I of the Act. The Court held that Part I of the Act

applies to International Commercial arbitration conducted outside India. The Court opined that Section 2(2) which states that "Part I shall apply where the place of arbitration is in India" is "an inclusive definition and does not exclude the applicability of Part I to those arbitrations which are not being held in India". The Court also held that the application under Section 11 for the appointment of arbitrators could be treated as a petition under section 8 for reference of the parties to arbitration. This decision was followed in Olex Focas Pvt. Ltd. Vs. Skodaexport Company Ltd. In this case the High Court allowed relief under Section 9 (interim measure by Court) and ruled –

"A careful reading and scrutiny of the provisions of 1996 Act leads to the clear conclusion that sub-section (2) of Section 2 is an inclusive definition and it does not exclude the applicability of Part I to this arbitration which is not being held in India. The other clauses of Section 2 clarify the position beyond any doubt that this Court in an appropriate case can grant interim relief or interim injunction." However, Court added that courts should be extremely cautious in granting interim relief in cases where the venue of arbitration is outside India and both parties are foreigners.

The Calcutta High Court in East Coast Shipping v. MJ Scrap took a different view and held that Part I of the Act would apply only to arbitrations where the place of arbitration is in India. In a subsequent decision of Division Bench of the Delhi High Court in Marriott International Inc v. Ansal Hotels Ltd., Delhi High Court endorsed the view expressed by the Calcutta High Court. The Division Bench referred the another decision reported as Kitechnology N.V. v. Union Gmbh Plastmaschinen in which the Single Judge of Delhi High Court held that where none of the parties to the agreement was an Indian and the agreement was to be covered by German Law which provided arbitration to be held at Frankfurt, Section 9 of the Act will have no applicability and the Court will have no jurisdiction to pass an interim order in that matter.

International Arbitration

International Arbitration can take place either within India or outside India in cases where there are ingredients of foreign origin relating to the parties or the subject matter of the dispute. The law applicable to the conduct of the arbitration and the merits of the dispute may be Indian Law or foreign law, depending on the contract in this regard, and the rules of conflict of laws. The most significant contribution of 1996 Act is the categorical definition of international commercial arbitration. Clause(f) of sub-section (1) of section 2 of the 1996 Act defines international commercial arbitration as arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:

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

b) A corporate body which is incorporated in any country other than India

c) A company or an association or a body of individuals whose central management and control is exercised in any country other than India

d) The government of foreign country.

Thus it is clear from the above discussion that international arbitration can take place in India in accordance with the same procedure as domestic arbitration. Arbitration becomes ‘international’ when at least one of the parties involved is resident or domiciled outside India or the subject matter of the dispute is abroad. In International arbitration the law applicable may be the Indian Law or a foreign

law, depending on the terms of contract in this regard and the rules of conflict of laws.

Meaning of international

The international or domestic character of commercial arbitration may result in the application of a different set of rules. Several legal systems have special rules for domestic and international arbitration. The prominent examples for such nations are Australia, Bermuda, Canada and also in the US where the Federal Arbitration Act only applies to international and interstate arbitration. Other system opts for a unified regulation such as France England etc. It has been suggested that the introduction of an International Commercial Act in the US would make clear that the protective review standards appropriate for domestic disputes would not affect cross-border arbitration. It would also clarify the relationship between federal and state arbitration law. What makes arbitration an international one? What are the criteria employed for such a classification? The international or domestic character of commercial arbitration is not to be confused with the domestic or foreign character of awards for which different regime for their enforcement exists.

Scope of the term International

Any arbitration matter between parties to the arbitration agreement shall be called an international commercial arbitration if:

(1) The matter relates to dispute

(2) Such disputes have arisen out of legal relationship

(3) Such legal relationships may or may not be contractual

(4) The disputes should be those which are considered commercial under the law in force in India and

5) Where at least one of the parties is;

(i) That which habitually resides abroad, whether a national of that country or not; or

(ii) A body corporate which is incorporated abroad
(iii) A company or an association or a body of person whose central management and control is exercised abroad; or

iv) The government of a foreign country.

It is for the arbitrators to determine whether an international commercial arbitration agreement exists or not. Disputed question of fact cannot be agitated in a writ petition.

Criteria For Establishing 'International' Character

There are three ways of establishing the international character of arbitration. An arbitration may be international because;
(a) Its subject matter or its procedure or its organization is international or
(b) The parties involved are connected with different jurisdiction; or
(c) There is combination of both

A) The objective criterion:

Dispute with foreign element or of international character.

The objective criterion focuses on the subject matter of the dispute and the international or national character of the underlying transaction. Hence the

international commercial interest or the cross border element of the underlying contract, or the fact that the dispute is referred to a genuinely international arbitration institution, such as the ICC, the LCIA or ICSID would be sufficient for the arbitration to qualify as international. The objective criterion is found most simply in French Law. Article 1492 of the French Code of Civil Procedure reads

Arbitration is international if it implicates international commercial interest. An almost verbatim approach is found in Portuguese law. There is a significant body of French case law relating to the concept of international transaction. The most prominent among them are Renault v. V 2000, Murgue Seigle v. Coflexip, Chantiers Modernes v. CMGC and Aranella v. Italo-Equadoriana. The French Courts have taken a liberal approach in order to delimit the purely economic definition of international arbitration; arbitration is international if it results from a dispute involving the economies of more than one country. It was emphasised by the Paris Court of Appeal that;

'The international nature of arbitration must be determined according to the economic reality of the process during which it arises. In this respect all that is required is that the economic transaction should entail a transfer of goods, services or funds across national boundaries, while the nationality of the parties, the law applicable to the contract or the arbitration, and the place of arbitration are irrelevant. The approach of the French Courts has been consistent and has effectively promoted international commercial arbitration. The Romanian Code Of Civil Procedure takes a more classical conflict of laws approach in Article 369. Accordingly an arbitration taking place in Romania shall be considered international if it has arisen out of a private law relation having a foreign element.

B) The subjective criterion:

Diversity of nationality/place of business of the parties.

According to the subjective criterion the focus is on the different nationality or domicile or place of business of the parties to the arbitration agreement. It follows that parties, individuals or companies should come from different jurisdiction. The subjective criterion was employed by previous English Arbitration Law; England Arbitration Act 1975 section 1(4)(a)(b) and Arbitration Act 1979 section 3(7)(a)(b). The 1996 Arbitration Act included a provision (section 85) which distinguished between domestic and international arbitration but it was not brought into effect. It is currently applied in Article 176(1) of the Swiss Private International law. The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. The subjective criterion may significantly restrict the scope of international arbitration. An illustration of potential pitfall can be seen in the example of a distributorship agreement. Two companies from the same country enter into a distributorship agreement according to which, one of them receives world-wide distributorship rights of the other companies products. Disputes arising out of such an agreement would be domestic under Swiss law if both companies have their seat in Switzerland. In contrast such a dispute is international under French Law.

C) The Modern Combined Criterion:

The Model Law Approach and other National Legal Systems.

A third approach combines both the subjective and objective criteria. The new tendency towards a combined criterion can be found in the Model Law.

According to Art 1(3) arbitration is international if:

a) The parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different states; or

b) One of the following places is situated outside the state in which the parties have their place of business:

i) The place of arbitration if determined in , or pursuant to, the arbitration agreement

ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The Model Law creates a flexible and effective system for the determination of international character of arbitration. Its approach consists of alternative criteria and also includes a conflict of laws rule for the connection of legal entities with a particular legal system. Article 1(3) (c) has been criticised as too broad as it allows the parties to a dispute to internationalise it without apparent reason or any foreign link. Accordingly some countries like Hungary and Canada when adopting the Model Law omitted this final case of internationality. Other countries like Tunisia added as a default criterion the French approach. While yet other countries such as Hong Kong offer the parties to arbitration the option of submitting their dispute to domestic or international arbitration law.

Another successful merger of the subjective with the objective criteria can be found in the 1994 reform of Article 832 Italian Code of Civil Procedure. Accordingly if at the date of signing the arbitration clause or submission to arbitration at least one of the parties has its domicile or principal place of business abroad or if a substantial part of the obligations arising out of the relationship to which the dispute refers must be performed abroad.

Section 202 US Federal Arbitration Act gives the definition of the arbitration agreement or arbitration award falling under the New York Convention. While the nationality test is used for the purpose of the New York Convention, the case law of the US Supreme Court introduces objective criteria. The cohabitation functions effectively.

Foreign Arbitration

A foreign arbitration is an arbitration conducted in a place outside India, and the resulting award is sought to be enforced as a foreign award.

Ad hoc Arbitration

Ad hoc arbitration is arbitration agreed to and arranged by the parties themselves without recourse to any institution. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or with the concurrence of the parties. It can be domestic, international or foreign arbitration. In case of disagreement on the appointment of an arbitrator under ad hoc arbitration cases, section 11 of the 1996 Act empowers the chief justice of the High Court or Chief Justice of the Supreme Court as the case may be to appoint arbitrators. A scheme made by the Chief Justice may designate a person by name or ex-officio or an institution which specialises the field of arbitration. This new provision has really given recognition to the role of arbitral institutions in India.

Institutional Arbitration

Institutional arbitration is arbitration conducted under the rules laid down by an established arbitration organisation. Such rules are meant to supplement provisions of arbitration act in matters of procedure and other details the Act permit. They may provide for domestic arbitration or for international arbitration or for both, and the disputes dealt with may be general or specific in character. In India there are a number of commercial organisations which provide a formal and institutional base to commercial arbitration and con conciliation. There are several merchant associations which provide for in house arbitration facilities between the members of such associations and their customers. In all such cases, the purchase bills generally require the purchasers and sellers to refer their disputes in respect of purchase or the mode of payment or recovery thereof to the sole arbitration of the association concerned, whose decision is final and binding on the parties. Stock exchanges in India also provide for in-house arbitration for resolution of disputes between the members and others. The Board of Directors of each stock exchange constitutes the appellate authority for hearing appeals from the award of the arbitral tribunal. There is an increasing trend for use of this in-house facility by members of such institutions. In the international field many commercial transactions and economic cooperation agreements between and foreign parties provide for the settlement of dispute by means of arbitration either on an ad-hoc basis or an institutional basis.

Nationality of Arbitration; International Arbitration in International Convention.

European Convention

Only the European Convention attempts a definition of an international arbitration when it is setting out its scope of application. In Art 1(1) (a) it states;

1. This Convention shall apply:

a) To arbitration agreements concluded for the purpose of settling dispute arising from international trade between physical or legal person having, when concluded the agreement, their habitual place of residence or their seat in different Contracting States.

Both the subjective and the objective criteria are present. They are to be applied cumulatively. Unfortunately the first criterion may prevent some arbitration which is international from falling within the scope of the Conventions.

New York Convention

The New York Convention confines its application to foreign awards, but makes no attempt to provide a definition of international arbitration. The rapid development of international commercial arbitration has forced national legal systems not only to tolerate international commercial arbitration, but also provide for favourable, legal regimes within which it can flourish. It has been rightly suggested that in 1980s and the 1990s we have experienced a period of competition amongst legislators and judiciary; they all tried to attract more international arbitrations.

The two main effects of this competition were the modernisation and liberalisation of arbitration regimes and the transfer of the favourable treatment of international arbitration into domestic level. This was also reflected in the new trend of unified regulation of international and domestic arbitration. The Dutch legislator opted for a unified system with the argument what is good for international arbitration is also good for domestic arbitration. The same approach to a single arbitration was taken in Sweden, Germany and other countries. In

England although different systems were anticipated in the Arbitration Act, the domestic rules were not put into effect. The modern unified arbitration system minimise the importance of distinction of the national and international arbitration. An undisputed significant role towards unification and internationalization of international commercial arbitration is ascribed to the success of Model Law.

Model Law And The Term International

Divergent views were expressed as to the appropriateness of relating sub paragraph (b) (1). Less than one view the provision should be deleted for essentially two reasons. One reason was that there was no justification to qualify a purely domestic relationship as international simply because a foreign place of arbitration was chosen. Party autonomy was unacceptable here since it would enable parties to evade mandatory provisions of law, including those providing for exclusive court jurisdiction, except where recognition or enforcement of the foreign award was later sought in that State. The other reason was that the provision arbitration agreement but also the case where it was determined only later, pursuant to the agreement, for example by an arbitral institution or arbitral tribunal. It was felt that the later case created uncertainty as to what was the applicable law and as to the availability of the court services before the place of arbitration was determined. Under another view only the latter reason was convincing and therefore sub-paragraph (b)(1) should be maintained without the words “or pursuant to”.

The prevailing view was to retain the entire provision of sub paragraph (b)(1). It was noted that the provision only addressed the question of internationality, i.e., whether the (Model) Law for international cases or the same State’s law for domestic cases applied. It was thought that the principle of party autonomy should extend to that question. The Commission in adopting that view, was agreed,

however that the concern relating to non-arbitrability, which had also been raised in a more general sense and should be met by a clarifying statement in a separate paragraph of article 1 along the following lines: 'This Law does not affect any other law of this State which provides that a certain dispute or subject matter is not capable of settlement of arbitration'.

As regards subparagraphs (b) (ii) and (c), the Commission was agreed that their respective scope was not easily determined in a clear manner. In particular, sub paragraph (c) was regarded as unworkable due to its vague ambit. While there was some support in maintaining the provision, though possibly in some modified form, the Commission after deliberation, decided to delete the subparagraph(c).

However in order to balance the reduction in scope due to that deliberation, it was proposed to add on opting-in provision, either only to sub paragraph (b)(ii) or as a replacement for sub paragraph (c). It was thought that such a provision provided for a more precise test than the one set forth in paragraph sub paragraph (c). In response to that proposal a concern was expressed that such a subjective criterion would enable parties to freely to label as international a purely domestic case. Others, however, considered that any such concern was outweighed by the advantages of a system that provided certainty to the parties that their transaction would be recognized as international, a characterization that should properly fall within the scope of party autonomy. In response to that consideration the view was expressed that it was inconceivable that any State which deemed it necessary to retain a special law for domestic cases would want to allow parties to evade that system.

Differences Between International And Domestic Arbitration

A domestic arbitration is one where the following two ingredients are present: 1) Both the parties to the arbitration agreements are the nationals or residents of the same country.

2) The agreement provides for arbitration in the country of the parties to the arbitration agreement.

The arbitration agreement will be considered as international arbitration agreement where one of the parties is a foreigner, not with standing the fact that the arbitration is to take place in a particular country as highlighted in the case of Gas Authority of India Ltd. v. SPIF CAPAG. The New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce, even though such an agreement does not lead to a foreign award.

A contract was entered into between an Indian and a foreign party. On disputes arising between them, arbitration proceedings were commenced in India and both the parties preferred claims and counter claims before the arbitral tribunal. The parties also agreed that they will govern by the law of India. An award passed under the said arbitral proceedings was held to be a domestic award made under part 1 of the Act as emphasised in the case of Nirma Ltd v. Lurgi Energie Und Entsorgung GMBH. The definition of the term international commercial arbitration is given in section 2 (1)(f) of the Act. The definition makes no distinction whatsoever between international commercial arbitrations which take place in India and internal commercial arbitration which take place outside India as mentioned in the case of Bhatia International v. Bulk Trading SA. In Bhatia International the question was whether an application filed under Section 9 of the Act in the Court of the third Additional District Judge, Indore by the foreign party against the appellant praying for interim injunction restraining the appellant from alienating transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable. The Additional District Judge held that the application was maintainable, which view was affirmed by the High Court. The Supreme Court, reaffirming the decision of the High Court, held that an application for interim measure could be made to the

courts of India, whether or not the arbitration takes place in India or abroad. The Court went on to hold that "the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to 'foreign awards'. The opening words of Sections 45 and 54, which are in Part II, read 'notwithstanding anything contained in Part I'. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II". Supreme Court referred to similar provision in UNCITRAL Model law. Article 1(2) of the UNCITRAL Model Law reads as follows:
"(2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."

Supreme Court highlighted the word 'only' and observed as follows:
"Thus Article 1(2) of the UNCITRAL Model Law uses the word "only" to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of that State. Significantly, in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in Section 2(2) indicates that this subsection is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of Part I do not apply to arbitrations which take place outside India

Applicability of Part 1 Of The Act

Section 2(2) provides that Part 1 will apply where the place of arbitration is in India. It does not provide where place of arbitration is not in India. It does not provide that Part 1 will 'only' apply where the place of arbitration is in India. It is, therefore, clear that Part 1 would apply to arbitrations which take place in India but does not provide that provisions of Part 1 will not apply to arbitrations which take place out of India. By omitting to provide that Part 1 will not apply to

international commercial arbitration which take place outside India the effect would be that Part 1 would also apply to international commercial arbitration held out of India. Thus in respect of arbitrations which takes place outside India even the non derivable provisions of Part 1 can be excluded. Such an agreement may be expressed or implied.

Where an international commercial arbitration is held in India the provisions of Part 1 will compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part 1. In case of International commercial arbitration held outside India, provisions of Part 1 will apply unless the parties by agreement, expressed or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provisions in Part 1 which is contrary to or excluded by that law or rules will not apply in the latter case. The Supreme Court observed that if the part I of the Act is not made applicable to arbitration held outside India it would have serious consequences such as (a) amount to holding that the Legislature has left a lacunae in the said Act. There would be lacunae as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention. It would mean that there is no law, in India, governing such arbitrations; (b) leaves a party remediless in as much as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India.

Thus a party may not be able to get any interim relief at all.

The Supreme Court made certain observations in respect of International commercial arbitration which take place in a non-convention country. The Court observed that international commercial arbitration may be held in a non-convention country. Part II only applies to arbitrations which take place in a

convention country. The Supreme Court referred to the definition of international commercial arbitration which is defined in Section 2(f) of the Act and held that the definition makes no distinction between international commercial arbitration which takes place in India or those take place outside India. The Supreme Court also observed that Sections 44 and 53 define foreign award as being award covered by arbitrations under the New York Convention and the Geneva Convention respectively. Special provisions for enforcement of these foreign awards are made in Part II of the Act. To the extent part II provides a separate definition of an arbitral award and separate provision for enforcement of foreign awards, the provision in Part I dealing with these aspects will not apply to such foreign awards.

The court finally concluded that "the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derivable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules, will not apply".

Merely because the parties have stated that venue of arbitration shall be Hong Kong, it does not follow that laws in force in Hong Kong. Where the Arbitration clause states that 'The 1996 Act' will apply and this act would govern the appointment of arbitrator, the reference of disputes and the entire process and procedure of arbitration from the state of appointment of arbitrator till the award is made and executed/given effect to.

Conclusion

The Govt of India recognising the need for reform in the law relating to arbitration decided to act on the basis of the basis of the UNCITRAL Model Law on International Commercial Arbitration and the ICC Rules for Conciliation and Arbitration by enacting a new law based on the Model Law which was designed for universal application. The law enacted in India in1996 based on the UNCITRAL Model Law provides for the resolution of domestic disputes also. A significant feature of the new Indian Law is that the role of courts therein is even more limited than that envisaged under the Model law. It is significant that the Model Law on which it is based was envisaged in the context of international commercial arbitration but the new Indian Law treats the Model as equally appropriate for domestic arbitration. This scheme eliminates a dichotomy in the new Indian Law between the law applicable to domestic arbitration and that applicable to international commercial arbitration.

CIVIL PROCEDURE CODE AND ADR:

INTRODUCTION:

The philosophy of Alternate Dispute Resolution was well-stated by Abraham Lincoln: **"*Discourage litigation, persuade your neighbors to compromise whenever you can".*** In the reality litigation does not always lead to a satisfactory result. It is expensive in terms of time and money and also inconvenient and failing in terms of obtaining justice. The alternative dispute resolution enables change in the mental approach of the parties as the main object behind this system is to avoid multiplicity of litigation to save valuable time, money and also permits parties to amicably come to a settlement. This paper will focus on the Provisions relating ADR to CPC and their mechanism and also the validity of those provisions it concludes by stating the Problems or weakness

facing in introducing the ADR in the CPC along with recommendations to those problems

PROVISIONS RELATING ADR TO CPC (Amendment) Act, 1999

The Code of Civil Procedure is a procedural law related to the administration of civil proceedings in India. The Code has been amended from time to time by various Acts of Central and State Legislatures. With a view to keep the commitment given to the people of India, speedy disposal of cases may take place within the fixed time frame and with a view to implement the report of Justice V.S. Malimath .In the Law Minister's Conference held in New Delhi, on 30th June and 1st July, 1997, the working paper on the proposed amendments to the Code of Civil Procedure, 1908 was discussed with a view to implement the recommendations of Justice Malimath Committee, 129th Report of the Law Commission of India a it is proposed to introduce a Bill for the amendments of Code of Civil Procedure, 1908 keeping in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice may not be delayed. After the discussion CPC (AMENDMENT) ACT,1999 was implemented

S.89 Settlement of disputes outside the Court:

S.89 – states that if a court finds that there are certain elements of settlement in the dispute which may be acceptable to the parties, then it can formulate the terms of settlement and give them to the parties for their observations and after getting the consent from the parties it can refer the dispute for (i) arbitration, (ii) conciliation, (iii) judicial settlement (through Lok Adalat) or (iv) mediation

Section 89 along-with rules 1A, 1B and 1C of Order X of First schedule have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution

“1A. Direction of the Court to opt for any one mode of alternative dispute resolution. —After recording the admissions and denials, the court shall direct the parties to suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.”

“**1B. Appearance before the conciliatory forum or authority**. – where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.”

“**1C. Appearance before the Court consequent to the failure of efforts of conciliation**.- Where a suit is referred under rule 1A and the forum or authority to whom the matter has been referred is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.”

The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-Section (1) refers to the different mediums for alternate resolution and sub-section (2) refers to various Acts in relation to the mentioned alternate resolutions

ADR MECHANISM AVAILABLE UNDER SEC 89

Denial of justice through delay is the biggest mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system of the country .So in 1996, the Indian Legislature accepted the fact that in order to lessen the burden on the courts, there should be a more efficient justice delivery system in the form of arbitration, mediation and conciliation as an Alternative Dispute Resolution (ADR) options in appropriate civil and

commercial matters. Thus, Parliament enacted Arbitration and Conciliation Act, 1996. Part 1 of this act formalizes the process of arbitration and Part III formalizes the process of conciliation. Part II is about enforcement of foreign awards under New York and Geneva conventions

ARBITRATION:

Arbitration, a form of alternative dispute resolution (ADR), is a way to resolve disputes outside the courts. The dispute will be decided by one or more persons. Arbitration is often used for the resolution of commercial disputes. Even prior to incorporation of Section 89 in the Code of Civil Procedure, 1908. The parties to litigation, with mutual consent, could take recourse to arbitration as a mode of resolution of their dispute which was subjudice before a court of law in terms of the ***Arbitration and Conciliation Act, 1996*** itself. The ***Arbitration and Conciliation Act, 1996*** however, did not contemplate a situation as in Section 89 CPC where the Court asks the parties to choose any ADR mechanism. Even though section 89 CPC mandates courts to refer pending suits to any of the several ADR processes mentioned therein, there cannot be a reference to arbitration even under section 89 CPC, unless there is a mutual consent of all parties, for such reference

The Supreme Court further observed that if there is a disputed arbitration agreement between the parties then, section 8 and 11 of arbitration and Conciliation Act might help the parties to go for arbitration and there is no requirement of section 89 referral.

CONCILATION:

Conciliation is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences. Section 89 states

that if the dispute is been referred to Conciliation then, the provisions relating to conciliation shall be governed by the Arbitration and Conciliation Act. Supreme Court held that If the court decides to refer the dispute to Conciliation then, the consent of the parties is necessary. Law Commission has differed this view. And stated that if the court decides to refer the dispute to conciliation then, consent of all parties is not necessary.

MEDIATION:

Mediation is another mode of alternate dispute resolution in which a mediator, a neutral person or third party who is impartial to both the parties, trained in the process of mediation, works with the parties to a dispute, to bring them to a mutually acceptable agreement. In **Salem Advocate Bar Association Case**, the apex court approved the model mediation rules and asked the High Courts to frame such rules for their respective jurisdiction. Hence, we propose the following clause for mediation referral- "If the court decides to refer the dispute to mediation then, it may refer to a person or an institution including court-annexed mediation and procedure of such mediation shall be governed by mediation rules of such institution or respective High Court mediation rules." Law Commission of India in its 238th report on the amendment of section 89 of CPC has recommended a similar clause. Mediation is not recommended, where the is a question of law or offences involving moral turpitude and fraud.

LOK ADALAT:

"While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach". It roughly means "People's court". India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalat's is an improvement on

that and is based on Gandhian principles. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences. There is no court fee and no rigid procedural requirement which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.

ANOMALIES OF SEC 89 of CPC:

Deliberation on Section 89, CPC was initiated in ***Salem Advocate Bar Association v. Union of India*.** The constitutional validity of the section 89 of CPC was upheld and the intent behind its inclusion was lauded. Criticism was muted as S. 89 was a recent insertion at the time. It was opined that the section had not been very effective as its modalities or qualities were yet to be determined. So, a committee was set up to draft model rules, and the apex court recommended the adoption of these rules by the various High Courts so as to give effect to section 89(2)(d), CPC. In the subsequent decision of ***Salem Advocate Bar Association v. Union of India*** the apex court purposively reinterpreted S. 89, CPC to reduce anomalies. For instance, the words shall and may in S. 89, CPC and Rules IA-IC, Order X, CPC were read harmoniously and it was determined that may was intended to refer to only the reformulation of terms of a potential settlement by the court. The section mandates formulation of settlement at the pleading's stages. However, this is not feasible since, firstly, there would not have been adequate application of mind of the judge at the pleadings stage, and, secondly, determining terms of settlement is the domain of the ADR forum. So, a plain reading of the section creates the futile situation wherein courts are expected to do the ADR forums job before referring a matter to it

The subsequent decision in ***Afcons Infrastructure Ltd v. Cherian Varkey Construction Co (P) Ltd, ["Afcons case"].*** is the most recent landmark judgement on the issue. The wording of the Section 73(1) of the Arbitration and

Conciliation Act is borrowed under this section defeating the objective with which the section was revived as was observed by the Court in the *Afcons* case.

The terms "***shall formulate the terms of settlement***" specified under Section 89 (1) of the Code, imposes a heavy and unnecessary burden on the courts. It is a redundant process which further burdens the court and strikes at the foundation of the ADR system. The right manner of interpretation of the Section 89 would be if it is read with Order X Rule 1-A where the Court may only direct the parties to refer to ADR forums and no need to formulate terms of settlement arises.

CONCLUSION:

Section 89 is an important part of the Code of Civil Procedure and is an effective method to resolve dispute between parties where there is scope for the same. The section is right in its spirit as the objective has been to reduce the burden of the court. However, as has been highlighted in the entire paper, the Section suffers from many anomalies, which have reduced its efficiency and act as a hindrance in delivering justice to the people. Apart from the legal aspect of the inefficiency of the provision, another major reason for section failing to fulfil its purpose is the lack of legal knowledge among the people. Rather than going for Alternate means which are much cheaper and less time consuming, citizens continue to go for trial hoping to secure a larger award from the Court some are concerned that ADR programs will divert citizens from the traditional, community-based dispute resolution systems. To modernize the ADR in the Civil Procedure Code the mentioned loopholes should be removed. Hence, the provision under Section 89 is right in its essence but its purpose is defeated due to legal intricacies, draftsmen's error and lack of awareness among individuals.

UNIT – II – ARBITRATION

Salient features of Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 improves upon the previous laws regarding arbitration in India namely the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.Further, the new statute also covers conciliation which had not been provided for earlier. The Act also derives authority from the UNCITRAL Model law on International Commercial Arbitration and the UNCITRAL rules on conciliation. The Model law on International Commercial Arbitration was framed after taking into consideration provisions regarding arbitration under various legal systems. Thus, it is possible to incorporate the model law into the legal system of practically every nation. The Act of 1996 aims at consolidating the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and rules regarding conciliation.

The main objectives of the Act are as follows:

- To ensure that rules are laid down for international as well as domestic arbitration and conciliation.
- To ensure that arbitration proceedings are just, fair and effective.
- To ensure that the arbitral tribunal gives reasons for its award given.
- To ensure that the arbitral tribunal acts within its jurisdiction.
- To permit the arbitral tribunal to use methods such as mediation and conciliation during the procedure of arbitration.
- To minimise the supervisory role of courts
- To ensure that an arbitral award is enforceable as a decree of the court.

- To ensure that the result of conciliation proceedings may be treated as arbitral awards on agreed terms.
- To treat awards given in a foreign country to which any one of the two international conventions apply as followed by India as being a foreign arbitral award.

The Following are the important salient features of Arbitration:

The Arbitration and Conciliation Act of 1996 is a significant leap forward in the field of Alternative Dispute Resolution (ADR) mechanism. The act provides for a speedy and friendly resolution of disputes which is very much needed taking into consideration the delays and expense in the process of court litigation. Earlier there were different laws relating to arbitration, and the 1996 act is a consolidated version of all such laws.

Following are some of the key features of the Arbitration and Conciliation Act, 1996

1. The 1996 Arbitration and Conciliation Act provide the procedure not only for domestic arbitration but also include International commercial arbitration. The 1996 Act is a law that relate to the enforcement of foreign Arbitration awards and ensures for a greater autonomy in the process of arbitration and puts a limit on the intervention of the judiciary.
2. As the name suggests (Arbitration and Conciliation Act), the Act deals with two areas or type of proceedings i.e. Arbitration proceedings and conciliation proceedings. There is a clear difference that is maintained in the 1996 Act between the proceedings of Arbitration and Conciliation. The provisions that relate to the process of Arbitration are contained in Part I which includes Chapters I to IX, while the provisions that relate to the process of Conciliation are dealt in Part III that includes section 61 to 81.

3. The Arbitration and Conciliation Act of 1996 integrates the Arbitration Act of 1940, the Arbitration (Protocol and Convention) Act,1937 and the foreign Awards Act , 1961.

The 1996 Act consolidates and puts together all the three different enactments. Though the three Acts have been consolidated the provisions regarding each of the acts have been kept distinct within the 1996 Act.

4. The 1996 Act excludes the application of the provisions relating to section 5 of the limitation Act regarding the delay in filing the objections.

5. The 1996 Arbitration and conciliation Act introduced some changes of which the following are worth taking note.

(i) Resolution of the dispute in an impartial, fair and just manner without any delay or big expenses.

(ii)Autonomy of the party is the paramount consideration.

(iii) The Arbitral tribunal has a duty to act fairly.

6. An important element of the new Arbitration Act of 1996, following the UNCITRAL Model Law and in step with other modern arbitration laws is the principle of 'party autonomy' that runs through the entire fabric of the Act. The concept of party autonomy makes the central theme of the 1996 Arbitration Act. The expressions used in the Act - 'unless otherwise agreed by the parties', 'with the agreement of parties', `if the parties in dispute have expressly authorized' etc., strengthens the idea of party autonomy.
7. Another significant feature of the Arbitration and Conciliation Act of 1996 is that the intervention of the court in the proceedings has been minimised

8. The Arbitration Act of 1996 does not prescribe any time-bound procedure for making of an arbitral award.
9. The Arbitration Act of 1996 does not provide for an opportunity for a second appeal. This unique provision reflects the legislature's intention that they wish to have a speedy process so that there is no waste of time.

The Arbitration and Conciliation Act takes into consideration all the essential ingredients necessary foe providing an easy and unambiguous procedure for dispute resolution.

MEANING OF ARBITRATION:

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

- The concept of arbitration means resolution of disputes between the parties at the earliest point of time without getting into the procedural technicalities associated with the functioning of a civil court.
- The dictionary meaning of Arbitration is "***hearing and determining a dispute between the parties by a person or persons chosen by the parties***".
- In an English judgement named ***Collins v. Collins, 1858 28 LJ Ch 184: 53 ER 916*** the court gave a wide definition to the concept of Arbitration which reads as follows:" ***An arbitration is a reference to the decisions of one or more persons either with or without an umpire, a particular matter in difference between the parties***". It was further observed by the court that proceedings are structured for dispute resolution wherein executives of the parties to the dispute meets in presence of a neutral advisor and on hearing both the sides and considering the facts and merits of the dispute, an attempt is made for voluntary settlement.
- Arbitration can be a voluntary one i.e., agreed between the parties or it can be ordered by the court.

- Unlike litigation, arbitration proceeding takes place out of the court and the arbitrator's decision is final and the courts rarely re-examine it.
- But Arbitration is considered as an important Alternative Dispute Resolution mechanism and is been encouraged in India due to the high pendency of cases in the courts.

General principles of arbitration

Following are the general principles of the arbitration:

- Arbitration is Consensual: Arbitration is a mutual process that requires the consent of both parties. Arbitration can only be initiated, if parties have agreed to initiate it. Parties can insert any arbitration clause if it is relevant utilizing a submission agreement between parties. The parties are also not allowed to unilaterally withdraw from the arbitration.
- Arbitration is Neutral: Arbitration is a neutral process hence it provides equal opportunity to the parties such as; Arbitrator, Arbitration Panel, applicable law, language, and venue of the arbitration. This also ensures that no parties should enjoy the home-court advantage.
- Arbitration is a confidential procedure: The arbitration rule specifically protects the confidentiality of the matter. The arbitration process provides privacy and restricts unnecessary controversies regarding the case and parties. Any disclosure made during the procedure may result in decisions and awards. In some circumstances, the parties are allowed to restrict the access of trade secrets and other confidential information submitted to the arbitration tribunal.
- The parties choose the arbitrator: Each party has the right to choose their arbitrator to whom they think will fit to handle their case. If the parties have

chosen a three-member arbitration tribunal, then each party appoints one of the arbitrators. Then the two selected arbitration shall agree on the presiding arbitrator. The center can also suggest the potential arbitrator with relevant expertise or may directly appoint members of the arbitration tribunal.

- The decision of the arbitral tribunal is final and easy to enforce: The decision of the arbitral tribunal is final and known as Award. The decision of the arbitration tribunal must be final and binding on both parties. Arbitration awards can be easily enforced in other nations than court proceedings.

Classifications of arbitration

The two Acts together provide the legal framework governing arbitration in India. Stated as the Arbitration and Conciliation Act, 1996 read with the Indian Contract Act, 1872. Recently, Arbitration and Conciliation Act, 1996 has been amended vide the Arbitration and Conciliation (Amendment) Act, 2015.

Since the arbitrators have limited powers, they cannot act ultra – vires of their powers under the code. The act has established a higher authority to keep checks and balances on the practices of the arbitration. The arbitration clauses leading to the original type of jurisdiction are classified under two categories: Domestic Arbitration and International Commercial Arbitration.

The jurisdiction of International Commercial Arbitration was granted to the Supreme court. The code entails the Supreme Court to be designated the authority for appointing an arbitrator in cases of International Commercial Arbitration. Meanwhile, the jurisdiction of Domestic Arbitration was given in the hands of high courts. The code entails the High Court to be designated the authority for appointing an arbitrator in cases of Domestic Arbitration.

However, arbitration procedures can be varied to suit the needs of the parties. There are more specific types of Arbitration:

- **Commercial Arbitration** is the most common in solving a dispute between two commercial enterprises.
- **Judicial Arbitration** is not at all arbitration, but merely a court process that refers to itself as arbitration, which is usually the arbitration of a small claim.
- **Consumer Arbitration** deals with disputes between a consumer and a supplier of goods or services.
- **Labor Arbitration** involves the settlement of employment-related disputes and is divided into two main categories: Rights Arbitration and Interest Arbitration.

Meaning of arbitrator

'An arbitrator is the person who has been officially chosen to decide between two people or groups who do not agree'. In other words, an arbitrator can be defined as a person who acts as a neutral dispute resolution authority, in deciding the issues between the parties in a dispute. The arbitrator acts as a supreme authority in the process of arbitration and holds the same position as that of a judge. Hence, he is bound to follow the principles of natural justice, and act in a just way in providing justice to the parties.

Qualifications of an arbitrator

The Indian legislation does not specify the qualifications required to become an arbitrator. Under the Arbitration and Conciliation Act, the person can only be appointed as an arbitrator if he is not a minor and is of sound mind. The arbitrators in India are appointed by the arbitral institutions and associations, which includes a panel of experts who appoint arbitrators on their understanding.

Essential qualities that an arbitrator should possess

Arbitration is a process to settle disputes in the commercial arena. But the process cannot flourish if there are no arbitrators to resolve the issues between the parties. A person to be appointed as the arbitrator should retain some specialized skills and qualities to get that superior position and authority in the arbitral proceedings.

Let's take a look into some of the qualities that a person must possess –

Competency

Even though there has been no mention of the essential qualities and qualifications in the Arbitration and Conciliation Act,1996, the basic requirements that the person must possess to be appointed as an arbitrator are that he must have completed the age of majority i.e., he must be more than 18 years of age and should be of sound mind i.e, not a lunatic and has not been framed under any charges either of a criminal and a civil nature under the various provisions of law.

Experience

An arbitrator must have knowledge and experience over the matters in which he is asked to preside. A mediocre arbitrator can conduct normal arbitral proceedings but lacks adequacy when it comes to framing the issues or solving the disputes between the parties. The person must have excelling skills in examining the facts and pronouncing the judgment, following the due process of law which can only be attained and achieved with maturity and proficiency in life. Not only the judicial proceedings but the arbitral proceedings are also judged and determined on the facts and circumstances of the case. The facts of the cases can only be ascertained if the person to be appointed as an arbitrator has been well versed with the functioning of the systems, people, and the principles of law.

Professionalism

Not only the legal professionals, practitioners, and young lawyers but the arbitrators should also possess professional behaviour. He must keep in his mind that he is assisting and providing legal aid to the parties in the dispute and then come to a final and binding conclusion. They should be respectful, diplomatic, and professional in their work. He is not a judge, so does not have any inherent powers and his powers and efficacy are derived from respect, consistency, and diplomacy.

Task management

The person to be appointed as an arbitrator must avail attributes in managing the tasks and must possess leadership qualities. As the procedure of arbitration is lengthy and extensive, he should not lose his calm during the arbitral proceedings. The deprivation in his managing work can challenge his power as an arbitrator and he can even lose his position because of his unprofessionalism at the workplace and task management.

Legal educational expertise

It would be beneficial in the process of arbitration if a person to be elected as an arbitrator is from a legal background. The person must be well versed with the judicial laws of the land and must have credentials for the same. In the arbitral proceedings, they must justify and state the rationales for their respective decisions, as the decisions of the arbitrators can be challenged and reviewed by the judges. The selection of an arbitrator with formal legal education and legal experience with justiciable credentials will increase his likelihood of handling the complex questions in the dispute responsibly and ensuring justice to the parties

Drafting and writing skills

The legal practitioners and young lawyers are always advised to have adequate writing and drafting skills as they are the ones responsible for drafting the agreements, contracts, and legal petitions. In the same way, the arbitrator must have efficient and exemplary writing skills as it is his evident duty to make an award enforceable in the dispute. The documents sent to the disputing parties in the written form either an agreement, files, or even emails, and granting an award in the arbitral proceedings should be clear, consistent, and unambiguous.

Attending certified courses

The arbitrators can enhance their skills in arbitration by attending certified training and diploma courses that are initiated by the various dispute resolution organizations and forums such as the Chartered Institute of Arbitrators (Carib). The organizations offer distance learning diplomas in the reign of arbitration. The diplomas are organized to benefit those who want to represent themselves as arbitrators and could help the parties in the arbitration situation. Once the person has been certified for attending the diploma courses and training, he should take initiatives in building his career professionally and attend arbitral proceedings to get exposure to the processes of arbitration practically. The person can also opt for internships and can even assist the manager of the firm or can join as a legal staff.

Impartial and fair

The person appointed as an arbitrator or to be appointed as an arbitrator by the council should be independent. He should not have any kind of social, familial, and/or business relationships with the parties in the disputes as this could lead to biases. He should be neutral and must be impartial and fair. The person while

pronouncing the judgment in the form of an award should act on the principles of natural justice, equity, and rule of law.

Management skills

The person to be appointed as an arbitrator must have efficient communication skills. He should have an able and proper understanding of managing people involved in the proceedings. The management skills should also include the ability to stride the line between laxity and undue delay on the one hand and the dictatorial and unreasonable demands on the other hand. If the management skills are not exercised properly then the speedy justice and cost-effectiveness correlated with the arbitral proceedings cannot be comprehended.

Demonstration of communicative proficiency and judicial open-mindedness

Communication skills act as a primary tool in listening to the parties in dispute, synthesizing their respective positions, and obtaining satisfactory skills. They also have the right to put further arguments in their defence, pose questions, make decisions and articulate the problems persuasively adequately.

Managing the caseload

The person, if appointed as an arbitrator, should schedule matters to be solved in advance. This would help in providing speedy resolution of the cases and equitable justice to the parties. If the matters are scheduled in advance, it would reduce the caseload on the arbitrators, and prevent a further backlog of the cases.

Conclusion

An arbitrator holds a very eminent position in the arbitral proceedings, and the procedure is not similar to those of the court proceedings and the petitions and files are drafted in a very different way. The process of arbitration is gaining

momentum in this present world. Even though there have been legislations for arbitration, there are no adequate qualifications on how an arbitrator should be appointed.

The person should always be appointed as an arbitrator after the recognition of his skills and credentials. At the same time, it is also important that amendments should be made regarding the appointment of the arbitrator in the Arbitration and Conciliation Act,1996 and a new provision should be introduced stating the qualifications and all the sufficient details of an arbitrator, as he is the person who is at an eminent and a superior position to decide the case of arbitration.

ARBITRATION AGREEMENT AND ITS DRAFTING

Introduction

Arbitration agreements are often treated as "one-size-fits-all" precedents which are included in commercial contracts without much thought. This approach can be counterproductive and can result in increased time, cost and complexity to resolve disputes. A well-drafted arbitration agreement, taking into account the issues identified by this article, may serve to mitigate those risks.

Scope of the arbitration agreement

The scope sets out the types of disputes that can be referred to arbitration. A poorly drafted scope is a common source of disputes and may deprive the tribunal of jurisdiction over all or part of the dispute.

Three critical aspects to consider are:

- Language: Common phrases such as arising "out of", "under" or "in connection with" all have different meanings, some broader than others;

- Carve outs: Trying to carve out certain types of disputes often results in unforeseen consequences and should be avoided wherever possible; and
- Parties: The right parties need to be party to the arbitration agreement. This can be a problem where the contractual counterparty is a newly incorporated joint venture without assets or a state owned entity. The arbitration agreement should include the party against whom any award will be enforced.

Seat of the arbitration

The seat of arbitration determines the procedural law of the arbitration. Its importance cannot be overstated: amongst other things, it determines the availability of interim remedies and rights relating to the enforcement of the award. The seat of arbitration may be different to the venue of arbitration (where the arbitration will physically take place), and the governing law of the arbitration agreement.

Most parties opt for a 'neutral' jurisdiction as the seat but this should not be the only consideration. Arbitral laws differ between countries and have important consequences on the efficiency of the arbitration and enforceability of an award. Recognising this, CIArb has developed the London Principles, to assist parties in choosing a 'safe seat' for arbitrations.

Governing law of the arbitration agreement

The arbitration agreement is a contract in its own right. Consequently, the law governing the arbitration agreement (which determines the validity and scope of the arbitration agreement) can differ from the governing law of the substantive contract.

In international contracts, performance may be in one jurisdiction while the parties are located in others; the governing law of the contract may be that of one jurisdiction while the seat of the arbitration may be another jurisdiction still. The absence of an express governing law for the arbitration agreement can lead to lengthy disputes.

Despite this, arbitration agreements often fail to specify the governing law of the arbitration agreement. We strongly recommend doing so.

Choice of rules

One of the most important decisions when drafting an arbitration agreement is whether to adopt the rules of an established arbitral institution, such as the ICC or LCIA, to govern the arbitration procedure. The main benefits of doing so is that the institution, in return for a fee, plays a key role in administering the dispute and their rules offer a well-established and predictable procedure.

If the parties wish to refer their disputes to ad hoc (un-administered) arbitration, they should consider either setting out a bespoke process, adopting existing ad hoc procedural rules (such as the UNCITRAL rules) or incorporating the rules of an institution but making clear that those provisions in which the institution plays an administrative role and receives fees for doing so will not apply. If this is not agreed prior to entry into the transaction between the parties, such options will need to be agreed between the parties. Parties should also consider using an institution as an appointing authority.

Language

The arbitration clause should identify the language of the arbitration, especially where parties are from countries with different first languages.

This is an important choice as all submissions and evidence will be presented in the agreed language during the proceedings. Selecting the language that the parties most commonly use in their communications could save significant translation and interpretation costs.

Number and appointment of arbitrators

As a general rule, where disputes are likely to be high value and complex, it is usually advisable to specify that the tribunal will consist of three arbitrators. Whereas if the dispute is likely to be low value and uncomplicated it may be more appropriate and cost effective to provide for a sole arbitrator.

In multi-party disputes, where it is unworkable for each party to select an arbitrator, parties should agree on an appointment procedure. For example, parties can agree that appointments will be made by an appointing authority.

Specifying arbitrator characteristics

Arbitration allows parties to agree upon the characteristics and experience that arbitrators are to have.

Generally, being non-specific gives parties the flexibility to nominate the most appropriate arbitrators at the time the dispute arises. But if parties wish to stipulate qualifying criteria (for instance, particular industry-sector experience or nationality), there are a few drafting tips:

- The class of potential arbitrators should not be unduly narrow, as it potentially might render the arbitration agreement inoperable (for the same reason, parties should avoid naming specific individuals); and
- The chosen criteria do not unintentionally include or exclude a class of potential arbitrators.

It is good practice for the selected arbitrator to obtain written confirmation upon appointment that the contractual criteria (where specified) are considered fulfilled, in order to avoid any later enforcement issues.

Consolidation and joinder

Parties bound by multi-contract arrangements face the risk that, when disputes arise, different tribunals may be appointed to deal with multiple arbitrations in relation to the same or similar set of facts. This can lead to conflicting decisions and add costs and delays.

The key to dealing with multi-contract disputes effectively is to ensure that the arbitration agreement in each interrelated contract is consistent and that it expressly allows for consolidation (i.e. the merger of separate arbitrations arising out of the same or interrelated contracts into a single set of proceedings) and joinder (i.e. the addition of a third party to an existing arbitration).

Parties should bear in mind that institutional rules may contain specific requirements in relation to consolidation and joinder.

Multi-tiered clauses

Multi-tiered clauses provide gateways for attempts at a negotiated resolution, allowing disputes to be gradually escalated from negotiation to mediation or conciliation and finally to arbitration.

Despite many commercial parties seeing great benefit in ADR, multi-tiered clauses should be drafted with a recalcitrant party in mind. Often by the time the dispute resolution process is invoked, the parties have already tried to informally resolve the dispute without success. The disaffected party, often the putative respondent, may seek to frustrate the process by various means. The clause should

be drafted to ensure that there is a clear timetable and trigger points which can be progressed without the active participation of both parties.

Don’t overcomplicate it!

With so much to consider, it can be tempting to set out a detailed clause covering every conceivable possibility, but this can be counterproductive. It is impossible to predict every dispute that might arise. A proscriptive clause may not suit the dispute that actually eventuates or be so complicated that the parties cannot sensibly comply with it.

Instead, parties should focus on completing a thorough risk assessment of the arbitration agreement and broader dispute resolution clause at an early stage. Based on this assessment, the parties can focus on drafting an arbitration agreement that is most suited to those risks, and that is effective for any dispute that might arise. A simpler approach to drafting helps mitigate the risk of the unexpected.

APPOINTMENT OF ARBITRATOR:

Section 11 of the Arbitration and Conciliation Act, 1996 deals with the appointment of arbitrators. A person of any nationality may be appointed arbitrator unless the contrary intention is expressed by the parties. The parties are free to agree on a procedure for appointment of arbitrator or arbitrators. Where parties fail to appoint three arbitrators, each party shall appoint one arbitrator and

the two arbitrators shall appoint the third arbitrator. Hence, appointing three arbitrators is mandatory, with the third one being the presiding arbitrator.

Where a party fails to appoint an arbitrator in accordance with the third arbitrator with the within thirty days from the date of receipts of a request to do so from the other party or two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon a request of a party, by the Chief Justice of the High Court or any person or institution designated by him.

In the absence of any procedure to appoint a sole arbitrator, if the parties fail to agree on the arbitrator within 30 days from receipt on 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 of the High Court or any person or institution designated by him.

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 two appointed arbitrators fail to reach an agreement as required under that procedure, or
c. a person including an institution fails to perform any function as required under that procedure, a party may request the Chief Justice of the High Court or any person or institution designated by him to take the necessary measures in absence of an agreement for other means of securing the appointment.

The decision of the Chief Justice of the High Court or the person or the institution

designated by him in appointing an arbitrator shall be final. **In such appointment, two considerations are to be made:**

a. Required qualifications of the arbitrator as provided in the agreement of the parties, and
b. independent and impartial person as an arbitrator.

These are the circumstances under which the Chief Justice of a High Court can make an appointment.

In case of appointment of a sole or third arbitrator in international commercial arbitration, the appointing authority is the Chief Justice of India or a person or institution designated by him.

Important case laws:

In **Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss S. Gem Mfg. Co. Ltd**., it has been held that no retired High Court Judge can be appointed as an arbitrator by the court when the arbitration clause states categorically that the difference/dispute shall be referred to an arbitrator by the Chairman and Managing Director of IPDL who is the appellant in this case.

In **National Aluminium Co.Ltd v. Metalimpex Ltd.**, a Bangladeshi company failed to nominate its arbitrator in terms of the arbitration agreement on an application under S.11 of the Arbitration and Conciliation Act, 1996, the Chief Justice of India nominated an arbitrator to act on behalf of the Bangladeshi company.

Procedure for the appointment:

Section 11 only confers power on the High Court to appoint an arbitrator or presiding arbitrator only when the following conditions are fulfilled:

a. where there is a valid arbitration agreement;
b. the agreement contains for the appointment of one or more arbitrators;
c. the appointment of the arbitrator is to be made by mutual consent of all the parties to the dispute.
d. differences have arisen between the parties to the arbitration agreement; or between the appointed arbitrators;
e. the differences are on the appointment or appointments of arbitrators.

Appointment of a third arbitrator by the court in case of disagreement between two arbitrators:

In **ICICI Ltd. v. East Coast Boat Builders & Engineers Ltd.**, two arbitrators were appointed by respective parties, but they did not agree on the name of the third arbitrator. The petitioner made an application for appointment of the third arbitrator by the court under s.11 of the Act. The court accepted the prayer and appointed the third arbitrator.

Lack of jurisdiction to appoint the arbitrator:

In **Kanagarani Durairaj v. Dwaragan**, it was held that:
in absence of a delegation of power by the Chief Justice of High Court under s.11 of the Act, the City Civil Court has no jurisdiction to appoint an arbitrator under s.11 of the court.

The disagreement between arbitrators:

If there is any disagreement between the arbitrators, there is no award and the jurisdiction of the presiding arbitrator can be invoked. In the absence of any contrary provision in the arbitration agreement, the presiding arbitrator can adjudicate the whole case if the arbitrators disagree on any particular point, as held in **Probodh v. Union of India**.

Appointment of Presiding Officer (Umpire)

The question for the appointment of Presiding Officer arises only when there is a conflict of opinion between an even number of arbitrators. Appointment of the third arbitrator may be made in any one of the two following cases:

a. By the parties themselves at the time of submission, and
b. by the arbitrators.

Appointment of the sole arbitrator:

Where a sole arbitrator is appointed, it must be notified to the other side, otherwise, his appointment cannot be considered valid.

Appointment of presiding arbitrator:

As soon as the arbitrators accept their appointments and communicate with each other the reference, they are presumed to have entered upon the reference. When one of the arbitrators refuses to act or concur on the appointment of a third arbitrator, there is a disagreement and in such as case, the Chief Justice of the High Court is competent to make the appointment of the presiding arbitrator.

Conclusion:

The arbitrator should be chosen carefully because of his special knowledge of the

subject matter which is in dispute. He should be able to keep the atmosphere clear at the tribunal and must be free from forensic eloquence and to see that the evidence in the manner customary in the court of law and equity. He must give attention to the facts in dispute placed before him and his decision should be practical and impartial and in the best interest of justice, good conscience, and equity

ARBITRATION AWARD

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 arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(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 agreed 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 proceedings and the arbitral award.

Making of arbitral award and termination of proceedings

Rules applicable to substance of dispute—

1. Where the place of arbitration is situate in India,—

    a. in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
    b. in international commercial arbitration,—

        i. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
        ii. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
        iii. failing any designation of the law under sub-clause (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

2. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Decision making by panel of arbitrators—

4. Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.
5. Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Settlement—

6. It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
7. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
8. An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
9. An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Form and contents of arbitral award—

10. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
11. For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.
12. 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 agreed terms under section 30.

13. 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.
14. After the arbitral award is made, a signed copy shall be delivered to each party.
15. 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.
16.

    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.

17. 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—

- the fees and expenses of the arbitrators and witnesses,
- legal fees and expenses,
- any administration fees of the institution supervising the arbitration, and
- any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

Termination of proceedings—

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

a. the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
b. the parties agree on the termination of the proceedings, or
c. the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

Correction and interpretation of award; additional award—

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

  a. 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.

- If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

- The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.
- Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
- If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
- The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).
- Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

UNIT – III - CONCILIATION

MEANING OF CONCILIATION

Definition of conciliation

The term conciliation is not defined in the Act. However, simply put conciliation 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. Like arbitration, the Act covers both domestic and international disputes in the context of conciliation. International conciliation is confined only to disputes of "commercial" nature. As per the Act, the definition of international commercial conciliation is exactly similar to that of international commercial arbitration.2 Accordingly, the Act defines international commercial conciliation as conciliation proceedings relating to a dispute between two or more parties where at least one of them is a foreign party.3 The foreign party may be (1) an individual who is foreign national, (2) a company incorporated outside India, or (3) the government of a foreign country.

Conciliation under the Civil Procedure Code,1908 ("CPC")

A 1999 amendment to the CPC enabled the courts to refer pending cases to arbitration, conciliation and mediation to facilitate early and amicable resolution of disputes.10 Before the amendment of the CPC, the Act did not contain any provision for reference by courts to arbitration or conciliation in the absence of the agreement between the parties to that effect. However, pursuant to the insertion of section 89 in the CPC, a court can refer the case to arbitration, conciliation, judicial settlement11 or mediation, "where it appears to the court that there exist elements of a settlement which may be acceptable to the parties."

Section 89 of the CPC empowers the court to formulate the terms of the settlement and give them to the parties for their observation and after receiving the observations, reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement or mediation. Once a court refers a case to conciliation, the provisions shall not apply and the parties shall be bound by the provisions of the Act. This allows the parties to terminate the conciliation proceedings in accordance with section 76 of the Act,12 even if the dispute has not been resolved, thereby rendering the entire dispute resolution process futile.

Kinds of Conciliation

1. Voluntary Conciliation- In this method parties can voluntarily participate in the process of conciliation for resolving their dispute.
2. Compulsory Conciliation- If parties do not want to take the opportunity of voluntary conciliation then they can go for compulsory conciliation. In this method, if the parties do not want to meet the other party to resolve the dispute then the process is said to be compulsory. This method is commonly used in labour cases.

In **compulsory arbitration**, the parties involved are required to go through the third party to settle their dispute. If an arbitration clause is included in a contract, and if the contract itself is valid, the parties must abide by the clause. Arbitration may also be ordered by a court as a means to prevent a situation from going to trial, and the parties must comply or face possible sanctions.

Another possibility is **voluntary arbitration.** In this instance, the sides involved agree on their own to use an outside party, like an arbitration attorney, to help settle their differences. No contract or law requires this action, yet deciding to use arbitration can save money, time and maybe even good will. In business

relationships, all of these are important. If the matter is personal, such as in a divorce proceeding, voluntary arbitration can be equally valuable.

Whether you are mandated by a contract or court, or you choose **voluntary arbitratio**n, educating yourself beforehand will help you be prepared for the process. You can read about arbitration on this site, and use the resources here to find an arbitration attorney in your area who specializes in your area of concern.

Conciliator

Conciliator is the third party who is involved in settling the dispute of the parties. Generally, there is one conciliator for the settlement but there can be more than one conciliator, if the parties have requested for the same. If there is more than one conciliator then they will act jointly in the matter. Section 64 deals with the appointment of conciliator which states that if there is more than one conciliator then the third conciliator will act as the Presiding Conciliator.

Conciliator - Appointment and qualifications

Conciliator can be appointed by the parties themselves of their own choice with consensus i.e. both should agree upon the appointment of the conciliator. IDRC has a Panel of Conciliators with rich experience in varied fields.

The parties follow any of the following methods.

(a) The parties themselves may name a conciliator or conciliators from IDRC Panel.
(b) Each party may appoint one conciliator from IDRC Panel & may mutually agree on the third conciliator.
(c) The parties may enlist the assistance of a suitable institution ie IDRC in connection with the appointment of conciliators.

In the case of family court, or labour court etc, before referring the matter to the court it is compulsory to consult with the councillor i.e. conciliator, who are appointed by the government for making settlement between the parties before the trial & on the report of the councillor only, matter is put forth for trial.

Here, Conciliator should not be of a specific qualification, but he should also not be ignorant of the subject matter. He can be a expert person of the subject matter of dispute for e.g. if there is a dispute regarding construction cost of a building in that case a person can be a civil engineer, who has the knowledge of building construction. The important thing, which cannot be ignored, is that conciliation is not the person who will decide the matter; rather he is a person who assists the parties to arrive at amicable settlement, where the decision is of the parties themselves.

Role of conciliator: The primary role of the conciliator is to assist the parties in an
independent and impartial manner and enable them to reach an amicable settlement of
disputes, unlike an arbitrator who has an adjudicatory function. In achieving this role,
the A&C Act provides for the following duties of the Conciliator:
a. To be guided by principles of objectivity, fairness and justice, giving consideration
to the rights and obligations of the parties, the usages of the trade concerned, circumstances surrounding the dispute, including any previous business practices between the parties.
b. To conduct the proceedings in the manner it considers appropriate, and take into
account the circumstances of the case, wishes of the parties, including any request by a party to hear oral statements, and the need for a speedy settlement of the

dispute.

c. To make proposals for a settlement of the dispute at any stage of proceedings.

vii. Not bound by CPC or Evidence Act: The conciliator is not bound by Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

viii. Disclosure of information and confidentiality: The conciliator shall disclose the substance of any factual information concerning the dispute received from a party to other party. However, if any information is given subject to a specific condition that it be kept confidential, then the conciliator cannot disclose it to the other party. Conciliator and the parties have to keep all the matters relating to the conciliation proceedings confidential, and the confidentiality extends to the settlement agreement except for the purpose of its implementation and enforcement.

ix. Restriction to resort to arbitral or judicial proceedings during conciliation: During conciliation proceedings, the parties cannot initiate any arbitral or judicial proceedings in respect of a dispute that is the subject matter of such proceedings except if in the opinion of that party such proceedings are necessary for preserving its rights.

x. Restriction on introduction of evidence in other proceedings: The parties to a conciliation proceeding cannot rely on or introduce as evidence in arbitral or judicial proceedings, irrespective of the fact as to whether such proceedings relate to the dispute that is the subject of the conciliation proceedings, the following: (a) views

expressed or suggestions made by a party in respect of a possible settlement of the dispute; (b) admissions made by a party in the course of the conciliation proceedings; (c) proposals made by the conciliator; and (d) the fact that the other party had indicated its willingness to accept a proposal for settlement made by the conciliator.

xi. Termination of conciliation proceedings: Conciliation proceedings can be terminated by either signing of the settlement agreement or written declaration of the conciliator after consultation with the parties to the effect that further efforts at conciliation are no longer justified or written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated or written declaration of a party to the other party and the conciliator, if appointed to the effect that the conciliation proceedings are terminated. It terminates on the date of entering into such settlement agreement or the date of declaration, as the case may be.
xii. Authentication of settlement agreement: A successful conciliation proceeding culminates in a settlement agreement signed by the parties. The conciliator authenticates the settlement agreement and furnishes a copy to each party. It is only the agreement that has been arrived at in conformity with the manner stipulated, form envisaged and duly authenticated in accordance with the Section 73 of the A&C

Act, that can be assigned the status of a "settlement agreement".

xiii. Costs and deposits: The costs of conciliation includes fee and expenses of the conciliator and the witnesses, any expert advice requested by the conciliator with consent of the parties, any assistance provided in accordance with the A&C Act and any other expenses in relation to the proceedings. The costs of conciliation proceedings are borne equally by the parties unless the settlement agreement provides otherwise, and all other expenses incurred by a party are borne by that party. The conciliator fixes the conciliation costs and gives written notice to the parties on termination of the proceedings. The conciliator may also direct each party to deposit an equal amount as an advance for the costs which it expects will be incurred.

STAGES IN CONCILIATION:

Part 3 of the Arbitration and Conciliation act, 1996 speaks about Conciliation. According to Wharton's Law Lexicon, conciliation is a non-adjudicatory alternative dispute resolution process which is governed by the conditions of the Arbitration and Conciliation act, 1996 (26 of 1996).

Step 1: Commencement of conciliation proceedings.

Section 62 of the act talks about the commencement of the proceedings. In order for the conciliation proceedings either one of the parties should send a written invitation to the other party. Only if the other party accepts the invitation they shall go ahead with the conciliation proceedings. If the party does not get a reply

even after 30 days of sending the invitation, it shall be considered that the invitation is not accepted.

Step 2: Appointment of conciliators

After the parties have agreed for the conciliation proceedings, the next step is to appoint an arbitrator. Section 64 talks about the appointment of arbitrators. If the parties agree they can appoint a sole conciliator. If the parties agree upon appointing two conciliators, each party shall appoint one conciliator each. In case the parties agree upon three conciliator, each party shall appoint one conciliator each and the parties together may agree upon a third conciliator, who shall be the presiding conciliator.

Step 3: Submission of written statement to the conciliator

The conciliator may request each of the parties to provide with a written statement about the facts relating to the case in hand. It is necessary for both the parties to submit a written statement to the conciliator. Along with the conciliator, the parties are also requested to send the written statement to each other.

Step 4: Conduct of the conciliation proceedings

Sections 67(3) and 69(1) talks about the conduct of conciliation proceedings. The conciliator may decide to talk to the parties through written or oral communication. He may also decide to meet the parties together or separately. He may conduct the proceedings which seem to be suitable to the case in hand.

Step 5: Administration assistance

Section 68 of the act talks about the administrative assistance. The parties or the conciliator may seek administrative assistance from an institution or a person if

required. In order for seeking for administrative assistance, the consent of the parties are required.

CONCILIATION UNDER INDUSTRIAL DISPUTES ACT, 1947

Section 4 of Industrial Disputes Act, 1947 authorizes the appropriate government to engage such number of persons as may be deemed necessary by notification in the Official Gazette as conciliation officers, for discharging the responsibility of mediating in and promoting the settlement of industrial disputes.

Section 12 of Industrial Disputes Act, 1947 provides duties of conciliation officers.

The conciliation officers do not have the authority to impose upon the parties a solution of or to dispute.

The contract shall clearly draft by setting out the conciliation process not limited to as below:

- Scope and applicability
- Panel of Conciliators
- Appointment and Number of Conciliators
- Commencement of Conciliation proceedings
- Procedure to be followed by the Conciliation officers
- Role of the Conciliation officers
- Venue for Conciliation Proceedings
- Time Frame

- Remuneration & Cost
- Settlement Agreement
- Termination of Conciliation proceedings

The Conciliation proceedings are concluded in the following manner:

- Where conciliation ended in settlement – the date on which settlement is signed by the parties to the disputes *or*
- Where conciliation ended in failure, the date on which the appropriate Govt receives the failure report of a conciliation officer. *or*
- When a reference is made to a Labour Court/Industrial Tribunal during the pendency of conciliation proceedings.

In the case of non settlement or failure of conciliation, copies of failure report under Section 12 (A) of Industrial Disputes Act 1947 are required to be sent to the parties to the dispute.

If the party raising the dispute fails to turn-up without reasonable cause, the case may be closed under intimation to it. If the opposite party fails to turn-up, in spite of having been given reasonable no. of opportunities, an adverse inference may be drawn, and the case is proceeded with on ex-parte basis

Conciliation under Family Courts Act – The need for alternative dispute resolution is increasing day by day. Due to alternative dispute resolution, many major disputes were resolved in a very short time and at a low cost. And that is why alternative dispute resolution can be used in a very good way even in a family dispute.

The Conciliation method in alternative dispute resolution will be very useful for resolving family disputes. India has the Family Courts Act, 1984 through which

we can resolve our Family Disputes properly and satisfactorily using Conciliation.

Family courts try to resolve the dispute through conciliation and settlement. The Family Courts Act contains VI chapters deals in 23 sections. Section 9 contains the duty of the family court to make efforts for settlement.

The objective of the Family courts Act, 1984

The Family Courts Act, in this act the act no. 66 of 1984 is provided for the establishment of the family courts to raise or promote conciliation and certain speedy affairs and for those matters related therewith. Family Courts Act has created a clear process through which we can resolve our family disputes.

Duty of Family Court to make efforts for settlement

1)In every suit or proceeding effort shall be made by the family court in the first instance, Where it is possible to do to assist and persuade parties to arrive at a settlement, with the nature and circumstances of the case In relation to the subject matter of a suit or proceeding and for this purpose a family court may be subject For any rule made by the High Court, such procedure must be followed as it may see fit.

2)In family court, if any suit or proceeding at any stage appears then if there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceedings for such a period.

Section 14 of the Hindu Marriage Act, 1955 also provides for endeavouring conciliation between parties before having recourse to legal proceedings for dissolution of marriage. Courts are restricted to entertain petition for divorce unless a year has elapsed from the date of their marriage. This provision acts as a

deterrent for initiating divorce proceedings during the first year of marriage so as to give a scope of settlement or reconciliation between the parties.

Sections 34 (2) and 34 (3) of the Special Marriage Act are identical to Sections 23 (2) and 23 (3) of the Hindu Marriage Act. Even though the marriage contracted under the Special Marriage Act does not have the same sacramental sanctity as marriage solemnized under the Hindu Marriage Act, the Indian Parliament in its wisdom has retained the provisions for reconciliation of marriages in the same terms in the Special Marriage Act as they exist in the Hindu Marriage Act. The said provisions of the Special Marriage Act also lay down a duty upon the courts to endeavour conciliation between the parties before granting them relief in divorce cases.

Section 28 of the Special Marriage Act provides that when the divorce is initiated by mutual consent of parties, then the relief can be granted by the courts only after expiry of 6 months. The idea behind this is to give an opportunity to the parties to reconcile.

NEGOTIATION:

Negotiation may be defined as any form of direct or indirect communication through which parties who have conflicting interests discuss the form of any action which they might take together to manage and ultimately resolve the dispute between them. Negotiations may be used to resolve an existing problem or to lay the groundwork for a future relationship between two or more parties. It must be noted that there is no compulsion for either of the parties to participate in the process of negotiation. The parties have the free will to either accept or reject the decisions that come out of the process of negotiation. There is no restriction in the number of parties that can participate in the process of negotiation. They can vary from two individuals to the process involving dozens of parties. Unlike arbitration and mediation, the outcome of a negotiation is reached by parties together without resorting to a neutral third party. The process is flexible and informal also ensures confidentiality at the choice of the parties.

In terms of procedure, negotiations is probably the most flexible form of dispute resolution process because it involves only those individuals or parties who are interested in the matter. They shape the process of negotiation as per their own needs and at their own convenience. The chances of reaching a mutually acceptable agreement is high in this process since the acceptance by all the parties is ensured. Since the process of negation uses the interests-based approach instead of the generally used positional-based approach, it provides a greater possibility of a successful outcome. As mentioned above, there is no compulsion for either of the parties to participate in the process which makes negotiation a voluntary process. Once an agreement is reached between the parties, negotiation may also enhance the relations between them. Apart from all of this, opting for negotiation over litigation may also reduce the number of delays and turn out to be less expensive as well.

However, negotiation has some disadvantages as well. Though negotiation provides a greater possibility of a successful outcome, if the parties are unequal the those in a weaker position may be placed at a disadvantageous position. The parties may terminate the process whenever they wish to during the proceedings, this may cause a huge loss of time and money invested in the process. Negotiation does not ensure the good faith and trustworthiness of either of the parties. It must also be mentioned that some issues may not be amenable to negotiation.

Despite all its disadvantages, negotiation is still on a rise as a medium for resolving disputes. It is definitely a much more time and money saving process the litigation. It is high time that the process of negotiation be used globally as a means for resolving disputes after working on its disadvantages.

The 5 Negotiation Styles are:

1. Competitive

Competitive personalities are results-driven. They are focussed and assertive in their communication and often aggressive. Competitive negotiators are strategic thinkers therefore have very little time for pleasantries.

2. Collaborative

Collaborative negotiators are open and honest, and understand the concerns and interests of the other party. They like to find creative solutions to make sure both parties are satisfied.

3. Compromising

A compromising negotiator’s main concern is doing what is fair for both parties and finding middle ground. They would rather compromise on your own outcome to satisfy the other party.

4. Avoiding

Avoiding personalities really dislike negotiations! They may try to avoid situations that may result in conflict as they find them intimidating and stressful by staying behind the scenes of a negotiation.

5. Accommodating

Accommodating negotiators spend a great deal of time building and maintaining relationships with the other party. They are highly sensitive to the emotions, relationships and body language within the negotiation situation.

APPROACHES OF NEGOTITION

Distributive Negotiation or Win-Lose Approach

This is also called competitive, zero sum, or claiming value approach. This approach is based on the premise that one person can win only at the expense of the other. It has the following characteristics:

(i) One side 'wins' and one side 'loses'.

(ii) There are fixed resources to be divided so that the more one gets, the less the other gets.
(iii) One person's interests oppose the other's.

(iv) The dominant concern in this type of bargaining is usually to maximize one's own interests.
(v) The dominant strategies in this mode include manipulation, forcing and withholding information.

Strategy to be used: In this mode, one seeks to gain advantage through concealing information, misleading or using manipulative actions. Of course, these methods

have serious potential for negative consequences. Yet even in this type of negotiation, both sides must feel that at the end the outcome was the best that they could achieve and that it is worth accepting and supporting.

The basic techniques open to the negotiator in this kind of approach are the following:

- Influence the other person's belief in what is possible.
- Learn as much as possible about the other person's position especially with regard to resistance points.
- Try to convince the other to change his/her mind about their ability to achieve their own goals.
- Promote your own objectives as desirable, necessary, ethical, or even inevitable.

Lose-Lose Approach

This negotiation approach is adopted when one negotiating partner feels that his own interests are threatened and he does all he can to ensure that the outcome of the negotiation is not suitable to the interests of the other party as well. In the bargain, both the parties end up being the loser. This type of situation arises when the negotiating partners ignore one another's needs and the need to hurt each other outweighs the need to find some kind of an acceptable solution. This is the most undesirable type of outcome and hence this negotiation approach is best avoided.

Compromise Approach

This approach provides an outcome which is some improvement over the lose-lose strategy outcome. To avoid a lose-lose situation, both parties give up a part of what they had originally sought and settle for something less than that. A

compromise is the best way out when it is impossible for both parties to convince each other or when the disputed resources are limited.

Integrative Negotiation or Win-Win Approach

This negotiation approach is also called as collaborative or creating value approach. It is superior to all negotiation approaches. It results in both the parties feeling that they are achieving what they wanted. It results in satisfaction to both the parties. It has the following characteristics.

(i) There are a sufficient amount of resources to be divided and both sides can 'win'

(ii) The dominant concern here is to maximize joint outcomes.

(iii) The dominant strategies include cooperation, sharing information, and mutual problem-solving. This type is also called 'creating value' since the goal here is to have both sides leave the negotiating feeling they had greater value than before.

Since the integrative approach is most desirable, some of the guidelines to integrative bargaining are listed below:

- Orient yourself towards a win-win approach. Your attitude while going into negotiation plays a huge role in the outcome.
- Plan and have a concrete strategy. Be clear on what is important to you and why it is important.
- Know your Best Alternative to a Negotiated Alternative (BATNA).
- Separate people from the problem.
- Focus on interests, not positions; consider the other party's situation.
- Create options for mutual gain.
- Generate a variety of possibilities before deciding what to do.

- Aim for an outcome based on some objective standard.
- Pay a lot of attention to the flow of negotiation.
- Take the intangibles into account, communicate carefully.
- Use active listening skills, rephrase and ask questions and then ask some more

PHASES OF NEGOTIATION:

There are around seven recognised phases of negotiation, these are

1. Planning and fact-finding phase
2. Opening phase
3. Discussion phase
4. Proposal phase
5. Bargaining phase
6. Closing phase
7. After Decision phase

(1) Planning and fact-finding phase: This initial phase includes finding of facts and information related to the other party and fact. It involves identification of matters and issues that could be raised during the process of negotiation. The issues and matters that are recognised shall be prioritized for both the parties. This process also helps in estimation of other side's priorities. The needs of the other side should be contemplated upon. The space and zone for an agreement that is possible must be established like , The agreement that is wanted by both the parties in favourable circumstances, the agreement that could be acceptable to both the parties or maybe a point from where no longer negotiation shall be continued.

(2) Opening phase: An opportunity is provided in this phase to give a direction to the process of discussion which helps in gaining control over the discussion.

In this phase, simple language should be used and the questions asked by the parties must be answered carefully. Some important points to be remembered by the negotiator at this point are:

(a) Use polite language and take questions from the parties and answer them gently.

(b) The fact that reputation is matters to a great extent in many cultures must be remembered.

(c) Any such act or speech that might embarrass the other party must be avoided Criticism or use of strong language that might have an effect of humiliation on the other party must always be avoided.

(3) Discussion phase: In this phase both the parties are allowed to present their case with no interruption. It is important to ask questions so as to comprehend the interests of the other party. Listening to the other party is very pertinent at this stage.

(4) Proposal phase: This phase involves making of offers and proposals for a conclusion.

(5) Bargaining phase: The proposals and offers made by the other part must be perused and see if it is compatible. If not, options for making the proposal more effective for a mutual gain can be given. Common interest of the parties must be kept in mind.

(6) Closing phase: At this stage the decision or the conclusion that is reached must be summarized and explained to both the parties to avoid future disputes.

(7) After decision phase: Steps to strengthen the relationship must be taken. And efforts must be made to make the relationship better and respectful.

These were the phases of negotiation that cover the process from the beginning to the last. Each phase has a different theme and a negotiator must act accordingly. Each phase when carried out properly result in a successful negotiation.

Positional Bargaining

Positional bargaining is a negotiation strategy that involves holding on to a fixed idea, or position, of what you want and arguing for it and it alone, regardless of any underlying interests. The classic example of positional bargaining is the haggling that takes place between proprietor and customer over the price of an item. The customer has a maximum amount she will pay and the proprietor will only sell something over a certain minimum amount. Each side starts with an extreme position, which in this case is a monetary value, and proceeds from there to negotiate and make concessions. Eventually a compromise may be reached. For example, a man offers a vendor at the flea market $10 for a rug he has for sale. The vendor asks for $30, so the customer offers $15. The merchant then says he will accept $25, but the customer says the highest he will go is $20. The vendor agrees that $20 is acceptable and the sale is made at $20. So the customer pays $10 more than he originally wanted and the vendor receives $10 less.

Why is Positional Bargaining Important

Positional bargaining tends to be the first strategy people adopt when entering a negotiation. This is often problematic, because as the negotiation advances, the negotiators become more and more committed to their positions, continually restating and defending them. A strong commitment to defending a position usually leads to a lack of attention to both parties' underlying interests. Therefore, any agreement that is reached will "probably reflect a mechanical splitting of the

difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties."

Therefore, positional bargaining is often considered a less constructive and less efficient strategy for negotiation than integrative negotiation. Positional bargaining is less likely to result in a win-win outcome and may also result in bad feelings between the parties, possibly arising out of the adversarial, "you vs. me" approach or simply a result of one side not being truly satisfied with their end of the outcome. Positional bargaining is inefficient in terms of the number of decisions that must be made. The example above demonstrates the back-and-forth nature of positional bargaining. The more extreme the opening positions are, the longer it will take to reach a compromise.

The basic qualities which a negotiator should possess are:

1. Ability to analyze

2. Sense of humour

3. Knowledge

4. Persistence and persuasiveness

5. Skill

6. Calm, quiet and impersonal

7. Right attitude.

1. Ability to analyze:

He should have clear thinking and possess sound judgement to enable him to plan and consider various alternatives objectively. He must discern the statements of

others — those favouring his position, those opposing and those suggesting alternative solutions and should be able to use these statements to his advantage.

2. Sense of humour:

He must be tactful and possess a sense of humour. Obviously, one cannot win every point. He must, therefore, possess the ability to make a concession at the right moment and still display good humour even when losing a point.

3. Knowledge:

A good negotiator must have a good working knowledge of all primary functions of business like, economics, business law, engineering, finance, cost accounting etc. He should have studied in detail the methodology of contract and techniques of negotiation.

Prior to embarking on any negotiation, he must study and acquire detailed knowledge of the product he is buying, the manufacturing techniques, raw materials used, likely substitutes, breakdown of the cost and factors affecting price etc.

Though he will be assisted by various specialists in different fields, he must himself possess sufficient knowledge in each field, be a jack of all trades and must be able to play his part as a natural leader giving direction and purpose to his team.

4. Persistence and persuasiveness:

He must be tenacious and should be able to persist in his efforts to solve the problem to mutual satisfaction without causing offence. For this, he should acquire the art of persuasiveness and the knock of getting along in an agreement.

He should be an optimist and need not give up midway in disgust. He should be able to withstand adverse comments.

5. Skill:

He must be skillful in identifying issues in a negotiation and their relative importance, in planning strategy and tactics, in communicating, arguing and persuading. He must possess fluency of expression and a technique of his own to lead conferences.

6. Calm, quiet and impersonal:

In all situations he should remain calm & quiet but impersonal. These are difficult qualities to practise particularly in the heat of discussion during negotiation. He should be a good listener, allowing others to talk. Simultaneously, he himself should be a good talker.

7. Right attitude:

He should have studied psychology and must understand human relations and interaction of groups.

UNIT – V - MEDIATION

MEDIATION:

Mediation in India is a voluntary process where the disputing people decide to mutually find a solution to their legal problem by entering into a written contract and appointing a mediator. The decision-making powers remain with the disputing parties, with the mediator acting as a buffer to bring them to an understanding. The parties can hire ADR lawyers to represent them before the mediator and explain the situation in a professional way. The difference between arbitration and mediation are that arbitration is a more formal process than mediation. An arbitrator needs to be formally appointed either beforehand or at the time of need. A mediator can be anyone, of any designation, can be appointed formally or casually depends on the wish of the parties. The mediation law in India has been made user friendly and pretty flexible.

Mediation India are divided into two categories which are commonly followed:

1. Court referred Mediation:

The court may refer a pending case for mediation in India under Section 89 of the Code of Civil Procedure, 1908. This type of mediation is frequently used in Matrimonial disputes, particularly divorce cases.

2. Private Mediation:

In Private Mediation, qualified personnel works as mediators on a fixed-fee basis. Anyone from courts, to the general public, to corporates as well as the government sector, can appoint mediators to resolve their dispute through mediation.

Process of Mediation in India

In most cases, people voluntarily opt for mediation to mutually resolve their legal issue, making mediation in India a party-centric and neutral process. A third party i.e. a mediator is appointed who acts unbiasedly in directing the parties to amicably resolve their issues. Mediation employs structured communication and negotiation where people put their issues and solutions for them in front of each other with the help of a mediator. The person can be anyone the parties have chosen, or an ADR lawyer agreed on by the parties.

The mediator then helps them to reach a conclusion based on their agreed upon terms. As it is a voluntary process and the parties retain all the rights and powers, any party can withdraw from the process of mediation at any phase without stating a reason.

Mediation encourages the parties to participate in dispute resolution actively and directly whereby they explain the facts of their dispute, lay down options or ways to resolve the dispute and make a final decision by coming to a settlement. The mediation process in India follows all the general rules of evidence and, examination and cross-examination of witnesses. To know all the legal rights you have over the issue, you can discuss with your ADR lawyer how you can put up your demands and negotiate it with the other party.

One of the primary benefits of mediation in India is that it is a completely private method of dispute resolution. Only the disputing parties and the mediator are involved, making the affairs of the parties personal and private. The mediator is an impartial and independent third party, who helps the parties in finding their own solution. All statements made during the process of mediation in India cannot be disclosed in civil proceedings or any other place without the prior consent of all parties in writing.

In Mediation in India, the mediator works together with parties to facilitate the dispute resolution mediation process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement.

Process of Mediation in India is completely confidential as any information furnished by any party and a document prepared or submitted is inadmissible and sealed. Any admission made during mediation cannot be used in any other court case and any information provided to the mediator cannot be disclosed to the other party unless the other party specifically permits the mediator to do so. The mediator cannot be called as a witness to testify in any court case and cannot disclose any information related to the proceedings.

Mediation as an alternative dispute resolution process has been effectively used in matrimonial disputes and corporate affairs to find a prompt solution which is not only time-saving and cost-effective but also keeps the entire dispute resolution process private. The process of mediation in India is flexible as it works two-ways by helping disputing parties to mutually resolve their issue and reducing the burden of pending cases on the courts.

Effectiveness of Mediation:

At times, even the court referred mediation, as it is an easier and quicker process to get a resolution. Specially the divorce mediation in India is most common method of mediation. The mediation in divorce cases, property cases, family matters, help to keep the matter limited to the parties only, and does not bring it before public, and reach to a solution maintaining the peace.

QUALITIES OF A MEDIATOR:

Alertness

The mediator must be alert on several levels while mediating. He must concentrate on the information being provided by the source and be constantly evaluating the information for both value and veracity. Simultaneously, he must be alert not only to what the party says but also to how it is said and the accompanying body language to assess the party's truthfulness, degree of cooperation, and current mood. He needs to know when to give the party a break and when to press the party harder. In addition, the Mediator constantly must be alert to his environment to ensure his personal security and that of the parties.

Patience and Tact

The Mediator must have patience and tact in creating and maintaining rapport between himself and the party, thereby enhancing the success of the process. Displaying impatience may:

- Encourage a difficult party to think that if he remains unresponsive for a little longer, the process will end.
- Cause the party to lose respect for the Mediator, thereby reducing the Mediator's effectiveness.

Credibility

The Mediator must provide a clear, accurate, and professional product and an accurate assessment of his capabilities. He must be able to clearly articulate complex situations and concepts. The Mediator must also maintain credibility. He must present himself in a believable and consistent manner, and follow through on any promises made as well as never to promise what cannot be delivered.

Objectivity and Self-control

The Mediator must also be totally objective in evaluating the information obtained. The mediator must maintain an objective and dispassionate attitude regardless of the emotional reactions he may actually experience or simulate during a questioning session. Without objectivity, he may unconsciously distort the information acquired. He may also be unable to vary his questioning and approach techniques effectively. He must have exceptional self-control to avoid displays of genuine anger, irritation, sympathy, or weariness that may cause him to lose the initiative during questioning but be able to fake any of these emotions as necessary. He must not become emotionally involved with the party.

Adaptability

A Mediator must adapt to the many and varied personalities which he will encounter. He must also adapt to all types of locations, operational tempos, and operational environments. He should try to imagine himself in the party's position. By being adaptable, he can smoothly shift his questioning and approach techniques according to the operational environment and the personality of the party.

Perseverance

A tenacity of purpose can be the difference between a Mediator who is merely good and one who is superior. A Mediator who becomes easily discouraged by opposition, noncooperation, or other difficulties will not aggressively pursue the matter to a successful conclusion or exploit leads to other valuable information.

Appearance and Demeanor

The Mediator's personal appearance may greatly influence the conduct of any mediation and attitude of the party toward the Mediator. Usually an organized

and professional appearance will favorably influence the party. If the Mediator's manner reflects fairness, strength, and efficiency, the party may prove more cooperative and more receptive to questioning.

Initiative

Achieving and maintaining the initiative are essential to a successful questioning session just as the offensive is the key to success in combat operations. The Mediator must grasp the initiative and maintain it throughout all questioning phases. This does not mean he has to dominate the party physically; rather, it means that the Mediator knows his requirements and continues to direct the collection toward those requirements.

Essential Characteristics of Mediation:

CHARACTERISTICS OF MEDIATION:

The key feature of mediation is that it is controlled entirely by the parties themselves. They not only choose to enter into mediation, but they also retain control over the process throughout and they elect the terms of the settlement.

Mediation has a number of characteristics and benefits which distinguish it from other forms of dispute resolution:

Voluntary – unless specifically provided in an agreement, parties enter mediation voluntarily and can withdraw at any point during the process;

Private & Confidential – unless agreed by the parties, what is discussed during mediation remains private and confidential. Information cannot be shared and both parties will be required to sign a confidentiality agreement prior to the commencement of the mediation. Any information provided to the mediator in a

private meeting with one party will be kept confidential unless it is agreed that it can be shared with the other party;

Change of focus – mediation looks forward and end encourage parties to move on from the history and focus on the future;

User Friendly – Mediation is not and should not be treated as a quasi-judicial process. It has a number of distinct advantages over the court process:

- It is not imposed and takes place at a time and location agreed by the parties;
- It provides remedies for resolving disputes that may not be available by pursuing legal proceedings;
- It is informal and flexible allowing for a combination of joint and individual meetings;
- All parties participate and it is not coloured by "legal speak" or involve cross examination;
- It is quick to arrange and people focused;
- It allows parties to be open, provide their views and air strong feelings in a neutral setting directly to each other;
- Avoids unnecessary legal costs;
- Improves the channels of communication and understanding between the parties thus preserving relationships;
- It increases the chances of a mutually beneficial outcome for all parties;
- It does not require you to disclose everything;
- It is much less stressful than going to court.

Code of Conduct of Mediators:

- Impartiality- it is important for the mediator to be unbiased. He cannot favour one particular party. He should hear both the sides and come up with a possible settlement which is agreed by both the parties.
- Conflict of interest- the parties should me no way related to the mediator. It might lead to conflict of interest.
- Principle of self-determination- self-determination is the right of the parties in mediation to make their own voluntary decision regarding the possible resolution. The mediator is to provide the parties with the solutions to the dispute in hand and assist them throughout the process.
- Confidentiality- the mediator should not be disclosing the information of the mediation to any third parties without the consent of the parties. He may disclose information about the mediation with a written consent of the parties.
- Quality of process- the mediator should make sure that the parties understand the mediation proceedings before the mediation starts. Mediators have an obligation to acquire and maintain professional skills and ability to uphold the quality of the mediation process.
- Agreement to Mediate- the mediator must come up with an agreement between both the parties and he must ensure that both the parties understand the terms and condition of the process. Confidentiality must be maintained while communication. The mediator has the right to terminate or suspend the process.
- Termination or suspension of mediation- mediator should come up with an agreement which is both impartial or there is no conflict of interest. He shall suspend or terminate the process upon the request of either one of the both parties. He may also suspend the process in case he finds out the either one of the parties are not acting in good faith.

ETHICAL ISSUES IN MEDIATION:

Ethical issues in mediation are typically associated with confidentiality and conflict of interest. However there are a broader range of challenges we face that involve a much wider range of actors. This paper will consider the role of those challenges and the application of those choices in mediation related to:

The actions of the mediator guided by Model Standards. The actions of the parties guided by community norms The mediation process guided by the ground rules The outcome guided by principled decision making

Ethics is the process of determining what one considers right and wrong actions. This may sound easy, but in reality it's a complicated task. Right and wrong are dictated by one's perspective and may vary according to culture, moral climate, and individual circumstance. What may be the right principle or action for one party may be absolutely wrong for another. To help navigate through this ambiguity, we need some guidelines for decision-making and action. Due to the large number of considerations involved in many decisions, ethical decision support systems have been developed to assist decision makers in considering the implications of various courses of action. They can help promote the integration of virtues and principles into the decision.

Mature ethical reasoning is generally defined by those who recognize the concerns of others, as opposed to those with less mature thinking, who focus only on themselves. This should sound familiar as the principles of transformative mediation. Practicing ethical reflection is a necessary framework for promoting maturity in ethical thinking. This framework involves using values and reciprocity. Values are beliefs (virtues) or standards (principles) and come into practice through virtue ethics and principle ethics. Reciprocity is balancing the needs of the parties. Ethical decision-making can be a profoundly simple skill that

can become a compass for guidance. Ethics should answer the questions: Who do I want to be (virtue ethics)? What shall I do (principle ethics)? And how does it affect others (reciprocity)? A unified paradigm could combine ethical theories into:

- the belief there are primary moral principles (objectivism)
- within a variety of individual actions that can be taken (subjectivism, pluralism)
- that are bounded by acceptable limits (relativism)
- based on universal virtues (universalism)
- shared by all people (relativism).

Principle Ethics

Principle ethics answers the question What shall I do?, and is seen through our actions and expressed in the quotes from Aristotle and Addams at the beginning of this article. Kitchener has identified five moral principles that are viewed as the cornerstone of most ethical guidelines. Ethical guidelines can not address all situations that we are forced to confront, however reviewing these ethical principles can help clarify the issues involved in a given situation. The five principles, autonomy, justice, beneficence, nonmaleficence, and fidelity, are each absolute truths in and of themselves. By exploring the dilemma in regards to these principles one may come to a better understanding of the conflicting issues.

1. Autonomy is the principle that addresses the concept of independence. The essence of this principle is allowing an individual the freedom of choice and action. There are two important considerations in autonomy: clashing values and incompetent parties.

2. Nonmaleficence is the concept of not causing harm to others. Often explained as "above all do no harm", it also reflects both the idea of not inflicting intentional harm, and not engaging in actions that risk harming others.

3. Beneficence reflects our responsibility to contribute to the welfare of each other. Simply stated it means to do good and to be proactive.

4. Justice does not mean treating all individuals the same, it means treating equals equally and unequal's unequally but in proportion to their relevant differences.

5. Fidelity involves the notions of loyalty, faithfulness, and honouring commitments. We must be able to trust each other and have faith in our relationship if growth is to occur.

Co-existence of Principles

Principles can only provide guidance. There are a myriad of situations that will never lend themselves to an easy formula, and the principles can only be used to trigger our conscience or guide our decisions. As well, there are many times when principles will collide with other principles.

When exploring an ethical dilemma, you need to examine the situation and see how each of the above principles may relate to that particular situation. At times this alone will clarify the issues enough that the means for resolving the dilemma will become obvious to you. In more complicated cases it is helpful to be able to work through the steps of an ethical decision making model, and to assess which of these moral principles may be in conflict. If two or more principles are in conflict you need to decide which is the guiding principle.

Virtues Ethics

Virtues ethics answers the question, Who shall I be? One of the chief characteristics of ethical action is the premise that there are universal virtues that can help guide our choices. Underlying every principle is a virtue. Trust is the most common virtue and may be the foundation for all of the others. For example, trust is a fundamental aspect of confidentiality. Virtue Ethics answers the question: Who shall I be? Livingvalues.net has identified 12 virtues and principles shared by everyone they have surveyed, over 2500 communities and cultures around the world. The Living values list of virtues and principles includes: Happiness, Honesty, Humility, Love, Respect, Responsibility (virtues), Cooperation, Freedom, Peace, Simplicity, Tolerance and Unity (principles). Virtues are the qualities of an individual, principles are the qualities of a community. All principles involve some sort of social exchange to be manifested. Once identified, these virtues and principles can then become the criteria for evaluating an ethical decision.

Ethics of the Mediator – Model Standards

Mediators are guided in their actions by the Model Standards developed by ACR, ABA and AAA. These principles are designed to help the mediator resolve practice related issues and should be used to clarify and define appropriate responses to most situations. The following is a comparison of ethical guidelines within specific professions. These written codes provide rules of conduct and standards of behaviour based on the principles of Professional Ethics. Even when not written into a code, principles of professional ethics are usually expected of people in a professional capacity.

Ethics of the Parties – Community Norms

Parties in mediation have been unable to resolve issues to their mutual satisfaction. They may have done things which would be outside of what they

consider acceptable behavior in their community. It is important to be aware of what the parties consider to be ethical behavior while keeping in mind our unified model of ethical guidelines. Personal ethics might also be called morality, since they reflect general expectations of any person in any society, acting in any capacity. One definition of culture says "culture is what every knows that everyone else knows." These are the principles we try to instill in our children, and expect of one another without needing to articulate the expectation or formalize it in any way.

Principles of Personal Ethics include:

- Concern for the well-being of others, doing good (beneficence)
- Respect for the autonomy of others (autonomy)
- Trustworthiness & honesty (fidelity)
- Willing compliance with the law, with the exception of civil disobedience (justice)
- Basic justice; being fair (fairness)
- Preventing harm (non-maleficence)

In looking to globalize the issues for the parties and look at the situation from the broadest possible perspective, parties might want to consider what acceptable behavior in other cultures and communities, as well as their own. They might also want to consider their role in promoting better actions among people, in not doing what is expected but in doing what is better than expected.

Ethics in the Process – Ground rules

Ethics in the process is defined and maintained through the ground rules. Ground rules define appropriate ways of interaction. Ground rules are applying our principles to our actions, and reflect an agreed upon interaction for the parties. Ground rules typically would include full disclosure, good faith, speak openly,

listen actively, respect one another, voluntary participation and confidentiality. As we have seen these principles are based on virtues such as trustworthiness, truthfulness, integrity and respect.

Ethics in the Outcome – Principled Decision Making

Ethics in the outcome is using virtues and principles to evaluate the available choices. This model can be used with any of the four ethical categories in this paper. It is a way to evaluate our options based on our values. How do we teach the skill of making positive choices? Mediation allows the parties the unique opportunity to work together to decide on a better future. Decision making criteria are the factors that differentiate one choice from another. They can include tangibles like time, people or money, questions like those listed below, virtues or principles mentioned above, or any combination. The criteria you choose will determine the quality of your action.

- Does it meet our values – virtues and principles?
- Does it improve the relationship of the parties?
- Would you be comfortable if your actions were publicized?
- Would you be comfortable if your family was observing you?
- Will it make you a better person?
- Would your decision withstand scrutiny?
- Does the decision show leadership through integrity, accountability and efficiency?
- Is your decision fair to yourself, family, colleagues, industry and community?

  Getting to Yes say that any method of negotiation may be fairly judged by four criteria: It should produce a **wise** agreement, it should be based on <="" b="">, it should be **efficient**, and it should **improve or at least not**

damage the relationship between the parties. (GTY, 4) Transformative Mediation says that a resolution should result in people not just being better off but better. In a world in which people remain the same, solved problems are quickly replaced by new ones (PM, 29).

Ethical Decision Making Model

1. Model Standards – reflect on the standards before and during the process and use the principles to guide your actions when uncertainty or confusion arises.

2. Community Norms – what is acceptable in the community of the parties and what is acceptable on a larger scale? What are the values that underlie those actions?

3. Ground Rules – work with the parties to devise a principled set of rules for their interaction. These rules should consider local and global norms as well as and reflect the foundation for a future agreement. The most durable rules are based on trust and honesty.

4. Principled Decision Making - Identify decision making criteria, virtues, principles and reciprocity, and consider the potential consequences of all options in relation to those criteria. Use the matrix below to help evaluate your choices. In addition to principles, use tangible criteria like time, money and resources as criteria.

In applying the test of autonomy, ask if parties are free to act outside of the control of the other. For justice, assess the fairness of the option. For resources, ask if the resources are available for this option. Finally, consider which options promote reciprocity. Are there obligations for both parties in this decision? Will this decision allow both parties to grow?

If the course of action you have selected seems to present new ethical issues, then you'll need to go back to the beginning and reevaluate each step of the process. Perhaps you have chosen the wrong option or you might have identified the problem incorrectly. The following matrix is one way to consider the principles in relation to the choices.

A through F represents options available to resolve the issue. In the matrix above, all options are rated according to whether they promote (+), are neutral (0) or detract (-) from the principle. In other words option A actually decreases the party's autonomy, is unjust, depletes resources and is not reciprocal. Likewise option F promotes all of the identified criteria. Until you have an option that is all pluses, you may not have found the best answer. There are many different ways to use this matrix to evaluate options, including assigning numerical values and allowing each party to assign the values.

5. Action - Take the action decided upon. Ethical action is the result of value based decision making. As Jane Addams says in the opening quote "Action is the sole medium of expression for ethics."

6. Reflection - Reflect on the results of your action. What was the plan? What was the effect or outcome? What virtues or principles were demonstrated? Reflect on past decisions and compare outcomes with the consequences that were anticipated at the time of the choice. This step can help reinforce the practice of principle-based decision-making. It is important to realize that different professions may implement different courses of action in the same situation. There is rarely one right answer to a complex ethical dilemma. However, if you follow a systematic model, you can be assured that you will be consistent and able to give a professional explanation for the chosen course of action.

I have been able to use this model several times. I used it with a division of a major pharmaceutical company with interesting results. I had been invited in to assist in implementing an employee empowerment program. As part of that program they were considering a decision making model. During my presentation I asked them to name two or three issues they were currently facing and to select one of those for discussion. We then generated options around that issue. Like many companies they had a corporate value statement and we selected the values from that statement for our criteria. We then filled in the matrix to evaluate our choices. The key is to find choices that address all of your values. The matrix always leads to an interesting discussion and in this case actually brought the corporate values statement to life.

MEDIATION IN INDIA:

Mediation is an age old process of dispute resolution practiced since Vedic period. It is a low cost, keeping the matters, especially family matters secret among three parties, two parties and the mediator. Moreover the solution is not imposed on any party, it is a solution that both the parties agreed to. It, thus gives an effective solution in a peaceful manner.

Alternate Dispute Resolution method of resolving the disputes is relatively new trend in India. The mediation process in India is not a newly invented procedure for dispute redressal, it is an age old process since Vedic period. It is beneficial for both the sides - the courts are being a bit less burdened with cases, and the parties are getting their issue resolved quickly with less hassles and in a smoother way. Thus, there has been made an important position for mediation in Indian Law.

The difference between taking a matter to litigation and taking it for mediation process, is that in litigation, there is a blame game and the blames are to be proved, depending that the Court shall give a solution; and in Indian mediation, the matter gets resolved through negotiation, where the solution is sought with the consent of the parties after considering the demands of both the sides.

The alternate dispute resolution India consist of following types of adr in India - arbitration, conciliation, negotiation and mediation. Mediation in India is the most popular method among all the three processes.

International Commercial Mediation

UNCITRAL recognized the value of conciliation or mediation, an interchangeable term used to adapt to the actual and practical use, as a method of amicably settling disputes arising in the context of international commercial relations and responded by adopting the UNCITRAL Conciliation Rules (1980), which offer an internationally harmonized set of procedural rules for the conduct of conciliation proceedings. Further, in the context of recognition of the increasing use of conciliation as a method for settling commercial disputes, the UNCITRAL Model Law on International Commercial Conciliation (2002) was initially developed and later amended by the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). It complements the United Nations Convention on International Settlement Agreements Resulting from Mediation, which opened for signature in Singapore on 7 August 2019. The Convention will further enhance the use of mediation and foster access to justice. Currently, UNCITRAL is working on updating the UNCITRAL Conciliation Rules (1980) and preparing notes on organizing mediation proceedings.