VOLUME 4 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

ADR

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It is a method where parties try to resolve their disputes privately in front of a third-person expert. The decision is binding on the parties like the decision of the court. It includes methods like arbitration, mediation, conciliation and negotiation.

Suggested Amendments to the Arbitration and Conciliation Act, 1996

-Section 30 of the Act provides for encouragement of settlement of dispute before the arbitral tribunal and sub-section (4) thereof provides that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute. Section 35 of the Act gives finality to an arbitral award and states that it shall be final and binding on the parties and persons claiming under them respectively. Section 36 of the Act provides that the arbitral award shall be enforced under the Code of Civil Procedure, 1908 (V of 1908) in the same manner as if it were a decree of the Court after the time for making an application to set aside the award under Section 34 has expired, or such application having been made, it has been refused. It thus appears that Section 36 is applicable to all arbitral awards, particularly those which are rendered by the arbitration tribunal on merits. It appears that arbitral awards on agreed terms need not be exposed to any possibility of an application to set aside the arbitration award under Section 34. -Part III of the Act contains the provisions relating to conciliation. In view of the fact that conciliation and mediation are generally interchangeable (Bryan A. Garner, A Dictionary of Modern Legal Usage, P. 5554, 2nd Edition, 1995 and also Black's Law Dictionary, 7th Edition, Pages 96 and 284), it will be necessary to make the provisions of Part III of the Act application to mediation also.

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Accordingly, it is suggested as under :-

In Section 61 of the Act, the existing sub-section (2) may be renumbered as **sub-section (3) and the following may be added as sub-section (2) :-**

"(2) In this part, conciliation shall include mediation and all references to "conciliation", "conciliation proceedings" and "conciliator/s" shall include references to "mediation", "mediation proceedings" and "mediator/s" respectively."

In Section 62 of the Act, the following shall be added as sub-section (5) :-

"74. Status and effect of settlement agreement:-

(1) Where the conciliation proceedings have commenced without intervention of the Court, the settlement agreement shall be enforced under the Code of Civil Procedure, 1908 (V of 1908) (hereinafter referred to as 'the Code') in the same manner as if it were a decree of the Court.

(2) Where the conciliation proceedings have commenced with the intervention of the Court, the settlement agreement shall, within fifteen days of the date of signing the agreement, be produced before the Court by the conciliator or by any of the parties to the suit which is pending before the Court. Upon such production, the Court shall pass a decree in terms of the settlement agreement within fifteen days from the date of such production. Provided that where any of the parties to the suit is a minor or a person to whom the provisions of Order XXXII of the Code apply, the Court shall not pass a decree in terms of the settlement agreement without ensuring compliance with the provisions of sub-rule (2) of Rule 1 of Order XXIII of the Code. Provided further that where the suit in question is a representative suit, the Court shall not pass a decree in terms of the settlement agreement without ensuring compliance with the provisions of sub-rule (2) of Rule 3 of Order XXIII of the Code."

Conciliation Proceedings under the Indian

Arbitration Conciliation Act of 1996 and CPC

—An Overview

It may be remembered that the UNCITRAL Model Law on arbitration and Rules on Conciliation were both made in the context of growing international trade and commercial relations against the back-drop of liberalization, privatization and globalization. UNCITRAL

Rules on Conciliation of 1980 adopted by the General Assembly of the United Nations stated at the very outset that the General Assembly recognized "the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations" and that adoption of uniform conciliation rules by "countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations." However, the Indian Arbitration and Conciliation Act in substantially adopting the UNCITRAL Model Law and Rules on international commercial arbitration and conciliation, has also covered "the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation." (Preamble). Parts I, II and III of the Act dealt respectively with arbitration, enforcement of foreign awards and conciliation. As with arbitration so with conciliation, the Act covered both domestic and international disputes but international arbitration was confined only to disputes of "commercial" nature because of the reservations made by India to the relevant international conventions on international arbitration (See S. 2, Cl. (1)(f) , S. 44, S.53) and the same reservation was extended to international conciliation also, though there were no applicable international conventions on conciliation (See S. 1,Cl. (1). In fact, it was for the first time in the history of Indian legislation that a comprehensive legislation was made on the subject of conciliation.

– Reasons of Arbitration and conciliation Bill, 1995 stated:-

" Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India….Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve asa mode for legislation on domestic arbitration and conciliation".

The Act dealt with the enforcement of foreign awards in Part III only in relation to States which were parties to the New York Convention on the Recognition and Enforcement of Foreign Awards of 1958 (Part III, Chapter I and Schedule I), and the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927 (Part III, Chapter II and Schedules II and III). India made reservations to those instruments on the grounds of reciprocity and for confining the disputes to matters of commercial nature.

Consequently, the Act did not deal with international arbitration or with international conciliation in general in relation to States that were not parties to the Geneva or New York Conventions. Arbitral awards given in the States that are not parties to those Conventions are treated as non-Convention awards, but even the awards made in States that are parties to the Conventions but are not covered by the reciprocity reservation might fall outside the purview of Part II. In fact the Act defines only "international commercial arbitration" in S. 2(1) (f) and applies the same definition mutatis mutandis to international commercial conciliation under S1 (2), 'Explanation' and the Act does not define or deal with international arbitration or international conciliation, as such. As the provisions of Part I of the Act apply "where the place of arbitration in India" (S. 2(2), it cannot obviously be taken to mean that the part would apply to conciliation, domestic or international, even if the venue of conciliation is in India. As Part I contains some important definitions of the terms like "court" etc, some ambiguity is created because of its non-application to conciliation.

UNCITRAL dealt with arbitration and conciliation five years apart and in two separate documents, and the integration of these two into the 1996 Act might create problems of Interpretation.

CONSULTATION PAPER ON ADR AND MEDIATION RULES

In the judgment of the Supreme Court of India in Salem Bar Association vs. Union of India, the Supreme Court has requested this committee to prepare draft model rules for Alternative Disputes Resolution (ADR) and also draft rules for mediation under section 89(2)(d) of the Code of Civil Procedure, 1908. Pursuant to the said judgment, we have prepared the following set of draft rules. They are in two parts – the first part consisting of the procedure to be followed by the parties and the Court in the matter of choosing the particular method of ADR.

The second part consists of draft rules of mediation under section 89(2)(d) of the Code of Civil Procedure, 1908. (Draft) Alternative Dispute Resolution and Mediation Rules, 2003. In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of section 89 of the said Code.

RELAVANCE OF CASE MANAGEMENT AND ADR

-BACKLOG OF CASES

Cases pending before Civil/Usual Forums:-

There are three crore civil cases pending in various courts in the Country. There are 2.5 Crore cases in lower Courts, 50 lakh cases in High Courts and 17,000 cases in the Supreme Court.1 At least 80 cases were pending a decision or hearing for the past 20 years in the Supreme Court. In addition, over five lakh cases, involving criminal and civil laws, were pending in different High Courts for over 10 years. Moreover, over eight lakh cases were awaiting disposal by the Country's Subordinate Courts in 32 States and Union Territories.

POSITION OF INDIAN JUDICIARY

The popular belief is that law courts are the main reason for the huge backlog of cases. But, scientific study done by Law Commission of India as explained by His Lordship Justice S P Baruacha, Chief Justice of India (as he then was) reveals the contrary, which is as follows: The expenditure on judiciary in terms of GNP is only 0.2 per cent and, of this, half is recovered by the State Governments through court fees and fines. The expenditure in other countries is 4 percent on the average...As a result of the neglect of the judiciary by the Governments, the judge-population ratio is one of the lowest in the world. The Law Commission, in its 127th report made in 1988, had recommended that the ratio should be immediately raised from the then 10.5 judges per million people to at least 50 judges per million within five years. It has further recommended that by 2000, the country should command at least 107 judges per million. But the present ratio is 12 or 13 judges per million. This ratio evokes disbelief among judges of other countries. The ratio 12 years ago was about 41 in Australia, 75 in Canada, 51 in England and 107 in the US. The reason why we do not have more judges across the board is that the state governments are simply not willing to provide the finances required. In one of the cases pending in the Supreme Court, the Petitioner has sought an increase in the strength of the judges all over the country. Each and every State in the country has stated in reply that it has no more money for the Judiciary. Recently, the High Court of Madras has treated the letter sent by its Registry to the Tamilnadu Government for filling up vacant position of judges in the Subordinate Judiciary and the reply in the negative received from the State Government quoting lack of budgetary allocation as a writ petition.

FRESH WORKLOAD

Every day around 1.5 lakh cases are filed in different Courts of the Country (i.e., roughly 5.48 crores per year). The existing number of judges across the country disposed of around 1.6 Crore cases an year.4 Thus, with less number of courts and increasing caseload, it is a mathematical certainty that Justice in time will be difficult to achieve. Therefore, the wiser option would be to deliberate about effective alternatives available within the limited resources. And certainly, Case Management and ADR is the only solution to this predicament and accordingly, it assumes solid relevance.

Important Case Laws:-

(1) Renusagar Power Co Ltd vs. General Electric, AIR 1985 SC 1156 the Supreme Court said that the object of this legislation was to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration. It was stated that ordinarily, as a rule, an arbitrator had no authority to clothe himself with power to decide the question of his own jurisdiction unless parties expressly conferred such a power on him. ' Further the Court held that the question as to the validity of the contract was also for the court to decide under Section 33 and not for the arbitrator. If there was no arbitration clause at the time of entry of the arbitrators on their duties,the whole proceedings would be without jurisdiction.

(2) Bhatia International v Bulk Trading SA, AIR 2002 SC 1432, The Supreme Court of India interpreted the scope of Part I of the Act to apply to arbitrations held outside India and in turn applied Section 9 in support of arbitrations seated outside India. The said Act does not say that its provisions will not apply to international commercial arbitrations which take place in a non-convention country. Part II of the Act only applies to arbitrations which take place in a convention country. The court held that where such arbitration is held in India the provisions of Part I would compulsorily apply. However, in cases of international commercial arbitrations held outside India, the provisions of Part I would apply unless the Parties by agreement, express or implied, excluded all or any of its provisions. In that case, the laws or rules chosen by the Parties would prevail. Any provision of Part I specifically excluded will not apply. The present judgment enabled the aggrieved parties in foreign arbitrations to apply for interim relief

in India.

(3) Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., [(2012) 9 SCC 552] In the landmark cases of Bhatia International and Venture Global Engineering, the Supreme Courthad held that Part I of the Arbitration and Conciliation Act, 1996 set out the procedures, award,interim relief and appeal provisions with respect to an arbitration award and held that it would apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The Supreme Court held that there is a clear distinction between Part I and Part II which apply to completely different fields and with no overlapping provisions. The Court in this case also drew a distinction between a 'seat' and 'venue'. The arbitration agreement designates a foreign country as the seat/place of the\arbitration and also selects the Act as the law governing the arbitration proceedings. The Court also clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. Therefore, it can be understood that Part I applies only to arbitrations having theirseat / place in India. The Court disagreed with the observations made in Bhatia International case and further observed on a logical construction of the Act, that the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. Therefore, the arbitral proceedings prior to the award contemplated under Section 36 can only relate to arbitrations which take place in India. The Court further held that in foreign related international commercial arbitration, no application for interim relief will be maintainable in India, either by arbitration or by filing a suit.

(4) J&K State Forest Conservation vs. Abdul Karim Wani, AIR 1989 SC 1498 The Supreme Court held that the interim measures can be granted to aid the arbitration proceedings and not to frustrate them. The court further held that in the guise of granting an interim measure, the Court cannot resolve the substance of the dispute – that task belongs to the arbitral tribunal and not the Court. The issues, in this case, were that how should an arbitration clause construed in a Contract and whether a dispute between parties can be referred to arbitration or not? The Supreme Court, in this case, held that the Court should refrain from expressing opinion on merits of the dispute. The Court should find out the intention of the parties, and that intention has to be found out by reading the terms broadly, clearly, without being circumscribed. It was

further held in this case that the jurisdiction of Court to make interim order is only 'for the purpose' of arbitration proceedings and a court should not to frustrate the same.

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