

Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation

All India Bar Examination Preparatory Materials
By Dr. Aman Hingorani

Introduction

Article 39A of the Constitution directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and in particular, to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Supreme Court has recognized the “right to speedy trial” as being implicit in Article 21 of the Constitution. (*Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360).

To give effect to the said mandate, Parliament has recognized various alternative dispute resolution (**ADR**) mechanisms like arbitration, conciliation, mediation and Lok Adalats to strengthen the judicial system.

Section 89 of the Code of Civil Procedure, 1908 (**the Code**) expressly provides for settlement of disputes through ADR.

Section 89 (1) of the Code provides that where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation.

Section 89 (2) of the Code provides that where a dispute has been so referred

- for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (**the 1996 Act**) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
- to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Section 20 (1) of the Legal Services Authorities Act 1987 (**the 1987 Act**) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.
- for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all other provisions of the 1987 Act shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act.
- for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Order X Rule 1 A of the Code further provides that after recording the admissions and denial, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as may be opted by the parties. Order X Rule 1B of the Code provides for the fixing of the date of appearance before the conciliatory forum or authority, while Order X Rule 1C contemplates the referral of the matter back to the Court consequent to the failure of efforts of conciliation.

The Code contemplates recourse to ADR in several other circumstances. Order XXXII-A, which pertains to suits relating to matters concerning the family, imposes a duty on the Court to assist the parties, where it is possible to do so consistently with the nature and circumstances of the case, in arriving at a settlement in respect of their dispute and empowers it to secure the assistance of a welfare expert for such purpose. Similarly, Order XXVII Rule 5 (B) mandates that in every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

Model Civil Procedure Alternative Dispute Resolution Rules

The 1996 Act and the 1987 Act do not contemplate a situation where the Court asks the parties to choose one of the ADR mechanism, namely, arbitration, conciliation or through Lok Adalat. These Acts, thus, are applicable only from the stage after reference is made under Section 89 of the Code. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

In view of right to speedy trial being implicit in Article 21 of the Constitution and in order to provide fair, speedy and inexpensive justice to the litigating public, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Alternative Dispute Resolution and Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353)

The model Alternative Dispute Resolution Rules framed by the Law Commission lay down the procedure for directing parties to opt for alternative modes of settlement. The Court is mandated to give guidance as it deems fit to the parties, by drawing their attention to the relevant factors which the parties will have to take into account, before exercising their option as to the particular mode of settlement. The Rules provide for the procedure for reference by the Court to the different modes of settlement, as also the procedure for the referral back to the Court and appearance before the Court upon failure to settle disputes by ADR mechanisms. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

It is permissible for the High Courts to frame rules under Part X of the Code covering the manner in which the option to one of the ADRs can be made. The rules so framed by the High Courts are to supplement the rules framed under the Family Court Act, 1984. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

Arbitration

Arbitration is an adjudicatory process in which the parties present their disputes to a neutral third party (arbitrator) for a decision. While the arbitrator has greater flexibility than a Judge in terms of procedure and rules of evidence, the arbitration process is akin to the litigation process.

A valid arbitration must be preceded by an arbitration agreement which should be valid as per the Indian Contract Act, 1872. The parties to an agreement must have the capacity to enter into a contract in terms of Sections 11 and 12 of the said Act.

Apart from statutory requirement of a written agreement, existing or future disputes and an intention to refer them to arbitration (Section 7, 1996 Act), other attributes which must be present for an agreement to be considered an arbitration agreement are

- the arbitration agreement must contemplate that the decision of the arbitral tribunal will be binding on the parties to the agreement.

- the jurisdiction of the arbitral tribunal to decide the rights of the parties must derive either from the consent of the parties or from an order of the Court or from the statute, the terms of which make it clear that the process is to be arbitration.
- the agreement must contemplate that substantive rights of the parties will be determined by the arbitral tribunal.
- the arbitral tribunal must determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.
- the agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable in law.
- the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when the reference is made to the tribunal.
- the agreement should contemplate that the tribunal will receive evidence from both sides and hear their contentions or atleast give the parties an opportunity to put them forward.

(*K. K. Modi v K. N. Modi*, AIR 1998 SC 1297, *Bharat Bhushan Bansal v U.P. Small Industries Corporation*, AIR 1999 SC 899, *U.P Rajkiya Nirgam Ltd. V Indure (P) Ltd.*, AIR 1996 SC 1373).

It is possible to spell out an arbitration agreement in a contract by correspondence with the Government. (*P.B. Ray v Union of India*, AIR 1973 SC 908). But even such contract by correspondence with the Government has to be entered into by the officer duly authorized to enter into contract on behalf of the Government under Article 299 of the Constitution. A contract by a person not so authorized is void. (*State of Punjab v Om Prakash*, AIR 1988 SC 2149).

Arbitration and Expert Determination

Expert determination is the referral of a dispute to an independent third party to use his expertise to resolve the dispute. Such determination is helpful for determining valuation, intellectual property or accounting disputes. The expert is not required to give reasons for his determination. However, the determination of an expert is not enforceable like an arbitral award. Nor it can be challenged in a court of law.

To hold that an agreement contemplates arbitration and not expert determination, the Courts have laid emphasis on

- existence of a “formulated dispute” as against an intention to avoid future disputes.
- the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submission made by the parties before it.
- the decision is intended to bind the parties.

(*K. K. Modi v K. N. Modi*, AIR 1998 SC 1297).

Nomenclature used by the parties may not be conclusive. One has to examine the true intent and purpose of agreement. The terminology “arbitrator” or “arbitration” is persuasive but not always conclusive.

Illustration : Two groups of a family arrived at a MoU for resolving the disputes and differences amongst them. The relevant clause of this memorandum purported to prevent any further disputes between the two groups, in connection with division of assets in agreed

proportions, after their valuation by a named body and under a scheme of division by another named body. It further intended to clear any other difficulties which may arise in implementation of the agreement by leaving it to the decision of the Chairman of the Financial Corporation, who was entitled to nominate another person for deciding another question. The clause did not contemplate any judicial determination or recording of evidence. It was held to be a case of expert determination and not arbitration, even though the parties in correspondence used the word 'arbitration'. (*K. K. Modi v K. N. Modi*, AIR 1998 SC 1297).

Institutional Arbitration

The contract between the parties often contains an arbitration clause which designates an institution to administer and conduct the arbitration process under pre-established set of rules. Examples of such institutions are the Court of Arbitration of International Chambers of Commerce, London Court of International Arbitration and American Arbitration Association. Should the administrative costs of the institution, which may be substantial, be not a factor, the institutional approach is generally preferred. The advantages of institutional arbitration to those who can afford it are

- availability of pre-established and well tried rules and procedures which assure that arbitration will get off the ground.
- availability of administrative and technical assistance.
- availability of a list of qualified and experienced arbitrators.
- appointment of arbitrators by the institution should the parties request it.
- physical facilities and support services for arbitrations.
- assistance in encouraging reluctant parties to proceed with arbitration and
- final review and perspective of a valid award ensuring easier recognition and enforcement.
- operational benefits of the parties rarely disputing proper notice.
- availability of panel of arbitrators to fall back on if appointment is challenged or the arbitrator resigns or is replaced.
- The primary disadvantages of institutional arbitration are that it is slow and rigid.
- administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy.
- the institution's bureaucracy may lead to added costs and delays.

Ad-hoc Arbitration

Ad hoc arbitration is a proceeding constructed by the parties themselves (and not a stranger or institution) with rules created solely for that specific case. The parties make their own arrangement with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where arbitration will be held, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration.

If the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, suitable, cost effective and faster than an institutional arbitration proceeding.

However, the disadvantages of ad hoc arbitration are

- there is high party control which entails the need of party cooperation right upto the end since there are no pre established set of rules.
- the parties run risk of drafting inoperative arbitral clauses. Clauses are often drafted in great detail and which are rarely workable and are susceptible to different interpretations, leading to litigation.
- the arbitral award itself may be rendered unenforceable if wrong procedure is prescribed and followed
- it suffers from lack administrative supervision to schedule hearings, fees, engagement of translators etc. It is also attendant with lack of facilities and infrastructure.

Ad hoc arbitration need not be entirely divorced from institutional arbitration. Parties can choose choosing applicability of rules of an institution to conduct arbitration without giving function to institution. Conversely, the parties can designate an institution to administer the arbitration proceeding but excluding applicability of part of its rules. The parties can simply require an institution to only appoint the arbitrator for them. While parties in ad hoc arbitration adopt own set of rules, it is always open to them to adopt the rules of an arbitral institution adapted to their case or of Model Law of UNCITRAL.

Statutory Arbitration

There are a large number of Central and State Acts, which specifically provide for arbitration in respect of disputes arising on matters covered by those enactments. Instances of such enactments are the Electricity Act, 1910 and Electricity (Supply) Act, 1948. In view of the position that such an arbitration would also governed by the 1996 Act, the provision for statutory arbitration is deemed to be arbitration agreement (*Grid Corporation of Orissa v Indian Change Chrome Ltd.*, AIR 1998 Ori 101).

Fast Track Arbitration/Documents only Arbitration

Should the parties agree that no oral hearings shall be held, the arbitral tribunal could fast track the arbitration process by making the award only on the basis of documents.

Arbitration under the 1996 Act

The 1996 Act repeals the earlier law on arbitration contained in the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

The 1996 Act seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. However, the said Model Law and Rules do not become part of the Act so as to become an aid to construe the provisions of the Act. (*Union of India v East Coast Boat Builders and Engineers Ltd.*, AIR 1999 Del 44).

The 1996 Act is a long leap in the direction of ADR. The decided cases under the Arbitration Act, 1940 have to be applied with caution for determining the issues arising for decision under the

1996 Act (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155.) Interpretation of the provisions of the 1996 Act should be independent and without reference to the principles underlying the Arbitration Act, 1940 (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Under the Arbitration Act, 1940, there was a procedure for filing and making an award a rule of Court i.e. a decree, after the making of the award and prior to its execution. Since the object of the 1996 Act is to provide speedy and alternative solution to the dispute, the said procedure is eliminated in the 1996 Act. Even for enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the Court or decree and the other to take up execution thereafter. The Court enforcing the foreign award can deal with the entire matter in one proceeding. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, AIR 2001 SC 2293).

Commencement of 1996 Act

Though the 1996 Act received the Presidential assent on 16 August 1996, but it, being a continuation of the Arbitration and Conciliation Ordinance, is deemed to have been effective from 25 January 1996 i.e. the date when the first Ordinance was brought in force. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, AIR 2001 SC 2293). Therefore, the provisions of the Arbitration Act, 1940, will continue to apply to the arbitral proceedings commenced before 25 January 1996. (*Shetty's Construction Co. (P) Ltd. v Konkan Railway Construction*, (1998) 5 SCC 599).

Section 85 (2) (a) of the 1996 Act further provides that notwithstanding the repeal of the Arbitration Act, 1940, its provisions shall continue to apply in relation to arbitration proceedings which commenced prior to the coming into force of the 1996 Act on 25 January 1996, unless otherwise agreed by the parties. Section 21 gives the parties an option to fix another date for commencement of the arbitral proceedings. Therefore, if the parties to the arbitration had agreed that the arbitral proceedings should commence from a day post 25 January 1996, the provisions of the 1996 Act will apply.

In cases where arbitral proceedings had commenced before coming into force of the 1996 Act and are pending before the arbitrator, it is open to the parties to agree that the 1996 Act will be applicable to such arbitral proceedings. (*Thyssen Stahlunion GmbH v Steel Authority of India*, (1999) SCC 334).

Domestic Arbitration

The expression “domestic arbitration” has not been defined in the 1996 Act. An arbitration held in India, the outcome of which is a domestic award under Part I of this Act, is a domestic arbitration (Sections 2(2) and 2(7)). Therefore, a domestic arbitration is one which takes place in India, wherein parties are Indians and the dispute is decided in accordance with substantive law of India (Section 28(1) (a)).

Part I of the 1996 Act

Part I restates the law and practice of arbitration in India, running chronologically through each stage of arbitration, from the arbitration agreement, the appointment of the arbitral tribunal, the conduct of the arbitration, the award to the recognition and enforcement of awards.

Once the parties have agreed to refer a dispute to arbitration, neither of them can unilaterally withdraw from the arbitral process. The arbitral tribunal shall make an award which shall be final and binding on the parties and persons claiming under them respectively (Section 35), and such

award unless set aside by a court of competent jurisdiction (Section 34), shall be enforceable under the Code, in the same manner as if it were a decree of the Court (Section 36).

Limited judicial intervention

Under the 1996 Act, there is no provision for reference to arbitration by intervention of the Court. Section 5 of the 1996 Act provides for limited role of judiciary in the matters of arbitration, which is in consonance with the object of the Act to encourage expeditious and less expensive resolution of disputes with minimum interference of the Court (*P. Anand Gajapathi Raj v P.V.G. Raju*, AIR 2000 SC 1886).

Arbitration Agreement

The existence of arbitration agreement is a condition precedent for the exercise of power to appoint an arbitrator under Section 11 of the 1996 Act. The issue of existence and validity of the “arbitration agreement” is altogether different from the substantive contract in which it is embedded. The arbitration agreement survives annulment of the main contract since it is separable from the other clauses of the contract. The arbitration clause constitutes an agreement by itself. (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155).

In cases where there is an arbitration clause, it is obligatory for the Court under the 1996 Act to refer the parties to arbitration in terms of their arbitration agreement (Section 8). However, the Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated by Section 8 of the Act.

Similarly, the Court is to refer the parties to arbitration under Section 8 of the 1996 Act only in respect to “a matter which is the subject matter of an arbitration agreement”. Where a suit is commenced “as to a matter” which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words “a matter” indicates that the entire subject matter of the suit should be subject to arbitration agreement. (*Sukanya Holdings Pvt. Ltd. V Jayesh H. Pandya*, (2003) 5 SCC 531).

Section 8 of the 1996 Act is attracted to only arbitrable disputes, which the arbitrator is competent or empowered to decide.

Illustration : The parties agreed to refer the question of winding up a company to arbitration. However, the power to order winding up of a company is conferred upon the company court by the Companies Act. As the arbitrator has no jurisdiction to wind up a company, the Court cannot make such a reference under Section 8. (*Haryana Telecom Ltd. v Sterlite Industries (India) Ltd.*, AIR 1999 SC 2354).

Illustration : The parties agreed to refer the question as to whether probate should be granted or not to arbitration. Since the judgement in the probate suit under the Indian Succession Act is a judgement *in rem*, such question cannot be referred to arbitration (*Chiranjilal Shrilal Goenka v Jasjit Singh*, (1993) 2 SCC 507).

The application under Section 8 of the 1996 Act can be filed in the same suit or as an independent application before the same Court.

Ordinarily the application under Section 8 of the 1996 Act has to be filed before filing of written statement in the concerned suit. But when the defendant even after filing the written statement applies for reference to arbitration and the plaintiff raises no objection, the Court can refer the dispute to arbitration. The arbitration agreement need not be in existence before the action is brought in Court, but can be brought into existence while the action is pending. Once the matter

is referred to arbitration, proceedings in civil suit stands disposed of. The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2 (e) of the Act, and not the Court to which an application under Section 8 is made. (*P. Anand Gajapathi Raju v P.V.G Raju* AIR 2000 SC 1886).

Where during the pendency of the proceedings before the Court, the parties enter into an agreement to proceed for arbitration, they would have to proceed in accordance with the provisions of the 1996 Act.

Illustration : The High Court, in exercise of its writ jurisdiction, has no power to refer the matter to an arbitrator and to pass a decree thereon on the award being submitted before it. (*T.N Electricity Board v Sumathi*, AIR 2000 SC 1603).

Interim measures by the Court

The Court is empowered by Section 9 of the 1996 Act to pass interim orders even before the commencement of the arbitration proceedings. Such interim orders can precede the issuance of notice invoking the arbitration clause. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565). The Court under Section 9 merely formulates interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155).

If an application under Section 9 of the 1996 Act for interim relief is made in the Court before issuing a notice under section 21 of the Act, the Court will first have to be satisfied that there is a valid arbitration agreement and that the applicant intends to take the dispute to arbitration. Once it is so satisfied, the Court will have jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances of the case warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings the Court, while exercising the jurisdiction under section 9, can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing arbitral proceedings. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Once the matter reaches arbitration, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of arbitration proceedings. The parties are permitted to approach the Court only under Section 37 or through Section 34 of the 1996 Act. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Composition of Arbitral Tribunal

The arbitral tribunal has been defined by Section 2 (d) of the 1996 Act to mean a sole arbitrator or a panel of arbitrators appointed in accordance with the provisions of Sections 10 and 11 of the Act. The number of arbitrators should not be an even number.

An arbitrator must be independent and impartial. A prospective arbitrator should disclose in writing to the parties any circumstances likely to give rise to justifiable doubts as to his independence or impartiality (Section 12(1), 1996 Act). The 1996 Act prescribes the procedure for challenging the arbitrator, terminating his mandate, and his replacement by a new arbitrator (Sections 13 to 15).

Arbitration under the 1996 Act is a matter of consent and the parties are generally free to structure their agreement as they see fit. The parties have been given maximum freedom not only to choose their arbitrators, but also to determine the number of arbitrators constituting the arbitral tribunal.

There is no right to challenge an award if the composition of the arbitration tribunal or arbitration procedure is in accordance with the agreement of the parties even though such composition or procedure is contrary to Part I of the 1996 Act. Again, the award cannot be challenged if such composition or procedure is contrary to the agreement between the parties but in accordance with the provisions of the 1996 Act. If there is no agreement between the parties about such composition of the arbitral tribunal or arbitration procedure, the award can be challenged on the ground that the composition or procedure was contrary to the provisions of the Act. (*Narayan Prasad Lohia v Nikunj Kumar Lohia*, (2002) 3 SCC 572).

Where the agreement between the parties provides for appointment of two arbitrators, that by itself does not render the agreement as being invalid. Both the arbitrators so appointed should appoint a third arbitrator to act as the presiding officer (Section 11 (3), 1996 Act). Where the parties have participated without objection in an arbitration by an arbitral tribunal comprising two or even number of arbitrators, it is not open to a party to challenge a common award by such tribunal on the ground that the number of arbitrators should not have been even. The parties are deemed to have waived such right under Section 4 of the 1996 Act. (*Narayan Prasad Lohia v Nikunj Kumar Lohia*, (2002) 3 SCC 572).

The determination of the number of arbitrators and appointment of arbitrators are two different and independent functions. The number of arbitrators, in the first instance is determined by the parties, and in default, the arbitral tribunal shall consist of a sole arbitrator. However, the appointment of an arbitrator should be in accordance with the agreement of the parties, or in default, in accordance with the mechanism provided under Section 11 of the 1996 Act.

The power of the Chief Justice under Section 11 of the 1996 Act to appoint the arbitral tribunal is a judicial power. Since adjudication is involved in constituting an arbitral tribunal, it is a judicial order. The Chief Justice or the person designated by him is bound to decide

- whether he has jurisdiction.
- whether there is an arbitration agreement.
- whether the applicant is a party to the arbitration agreement.
- whether the conditions for exercise of power have been fulfilled.
- if the arbitrator is to be appointed, the fitness of the person to be appointed.

(*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

The process, being adjudicatory in nature, restricts the power of the Chief Justice to designate, by excluding non judicial institution or non judicial authority from performing such function. The Chief Justice of India can, therefore, delegate such power only to another Judge of the Supreme Court, while the Chief Justice of a High Court can delegate such power only to another Judge of the High Court. It is impermissible to delegate such power to the District Judge. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Notice must be issued to the non applicant to given him an opportunity to be heard before appointing an arbitrator under Section 11 of the 1996 Act. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

No appeal lies against the decision of the Chief Justice of India or his designate while entertaining an application under Section 11 (6) of the 1996 Act, and such decision is final. However, it is open to a party to challenge the decision of the Chief Justice of a High Court or his designate by way of Article 136 of the Constitution. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Where an application for appointment of arbitrator is made under Section 11(2) of the 1996 Act in an international commercial arbitration and the opposite party takes the plea that there was no mandatory provision for referring the dispute to arbitration, the Chief Justice of India has the power to decide whether the agreement postulates resolution of dispute by arbitration. If the agreement uses the word 'may' and gives liberty to the party either to file a suit or to go for arbitration at its choice, the Supreme Court should not exercise jurisdiction to appoint an arbitrator under Section 11 (2) of the Act (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC 1379). Where the arbitrator is to be appointed, the Supreme Court can use its discretion in making an appointment after considering the convenience of the parties. (*Dolphin International Ltd. v Ronark Enterprises Inc.*, (1998) 5 SCC 724).

Jurisdiction of Arbitral Tribunal

The arbitral tribunal is invested with the power to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. For that purpose, the arbitration clause shall be treated as an agreement independent of the other terms of the agreement even though it is part of the said agreement. So, it is clear that even if the arbitral tribunal decides that the agreement is null and void, it shall not entail *ipso jure* the invalidity of the arbitration clause. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

Objections to jurisdiction of the arbitral tribunal must be raised before the arbitral tribunal. If the arbitral tribunal accepts the plea of want of jurisdiction, it will not proceed further with the arbitration on merits and the arbitral proceedings shall be terminated under Section 32 (2) (c) of the 1996 Act. Such decision, however is appealable (Section 37 (2) (a)). In case the tribunal rejects the plea of jurisdiction, it will continue with the arbitral proceedings and make an arbitral award, which can be challenged by the aggrieved party under Section 34 (2) of the 1996 Act. The Court has no power to adjudicate upon the question of the want of jurisdiction of an arbitral tribunal.

Section 16 of the 1996 Act, however, does not take away the power of Chief Justice in a proceeding under Section 11 to decide as to whether there is a valid arbitration agreement or not, before deciding whether the dispute should be referred to the arbitrator for arbitration. (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC1379).

The arbitral tribunal, during the arbitral proceedings, can order interim measure for the protection of the subject matter of the dispute and also provides for appropriate security in respect of such a measure under Section 17 of the 1996 Act. Such an order for interim measures is appealable under Section 37 (2) of the Act.

The power of interim measure conferred on the arbitral tribunal under Section 17 of the 1996 Act is a limited one. The tribunal is not a Court of law and its orders are not judicial orders. The tribunal cannot issue any direction which would go beyond the reference or the arbitration agreement. The interim order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. No power has been conferred on the arbitral tribunal under this section to enforce its order nor does it provide for judicial enforcement thereof. (*M.D Army Welfare Housing Organization v Sumangal Services (P) Ltd.*, AIR 2004 SC 1344).

Conduct of Arbitral Proceedings

Sections 18 to 27 of the 1996 Act lay down various rules dealing with arbitral procedure. Section 19 establishes procedural autonomy by recognizing parties' freedom to lay down the rules of procedure, subject to the fundamental requirements of Section 18 of equal treatment of parties. Section 20 gives right to the parties to agree on the place of arbitration.

The arbitral tribunal is not bound by the procedure set out by Code. It is for the parties to agree on a procedure and if the parties are silent, then the arbitrator has to prescribe the procedure. However, the procedure so prescribed should be in consonance with the principles of natural justice. The doctrine of natural justice pervades the procedural law of arbitration as its observance is the pragmatic requirement of fair play in action.

Arbitral award

The award-making process necessarily minimizes the derogable provisions of the 1996 Act and is mainly concerned with the role of the arbitrator in connection with making of the award (Sections 28 to 33). Section 28 pertains to the determination of the rules applicable to the substance of the disputes. Section 29 provides the decision-making procedure within the tribunal. Section 30 relates to settlement of a dispute by the parties themselves and states that with the agreement of the parties, the arbitration tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement. Section 31 refers to the form and contents of arbitral award. Unlike the 1940 Act, the arbitral award has to state reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30. Section 32 pertains to the determination of the arbitral proceedings, while Section 33 relates to the corrections and interpretation of an award as also to making of additional awards.

Recourse against arbitral award

Section 34 of the 1996 Act provides for recourse against the arbitral award. The limited grounds for setting aside an arbitral award are

- incapacity of party.
- invalidity of agreement.
- absence of proper notice to the party.
- award beyond scope of reference.
- illegality in the composition of arbitral tribunal or in arbitral procedure.
- dispute being non arbitrable.
- award being In conflict with public policy.

Section 34 of 1996 Act is based on Article 34 of the UNCITRAL Model law. The scope for setting aside the award under the 1996 Act is far less than that under Sections 30 or 33 of the Arbitration Act, 1940. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

The arbitrator is the final arbiter of a dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate the facts. (*Sudershan Trading Co. v Government of Kerala*, AIR 1989 SC 890).

The arbitrator is the sole judge of the quality and quantity of evidence and it will not be for the Court to re-appreciate the evidence before the arbitrator, even if there is a possibility that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the arbitrator (*M.C.D. v Jagan Nath Ashok Kumar*, (1987) 4 SCC 497). Similarly, if a question of law is referred to the arbitrator and he gives a conclusion, it is not open to challenge the award on the ground than an alternative view of the law is possible (*Alopi Parshad & Sons Ltd v Union of India*, (1960) 2 SCR 793).

The power of the arbitral tribunal to make an award is different from its power to issue procedural orders and directions in the course of the arbitration proceedings. Such orders and directions are not awards and hence are not open to challenge under Section 34 of the 1996 Act, though they may provide basis for setting aside or remission of the award. For instance, questions concerning the jurisdiction of the arbitral tribunal or the choice of the applicable substantive law are determinable by arbitral process resulting in an award. On the other hand, questions relating to the admissibility of evidence or the extent of discovery are procedural in nature and are determinable by making an order or giving a direction and not by an award.

In view of the principles of acquiescence and estoppel, it is not permissible for a party to challenge an arbitration clause after participating in arbitration proceeding.

Illustration: Where a party consented to arbitration by the arbitral tribunal as per the arbitration clause and participated in the arbitral proceedings, it cannot later take the plea that there was no arbitration clause (*Krishna Bhagya Jala Nigam Ltd. V G Hari's Chandra Reddy*, (2007) 2 SCC 720).

However, the principle of acquiescence is inapplicable where the arbitrator unilaterally enlarges his power to arbitrate and assumes jurisdiction on matters not before him.

Illustration : The parties, by express agreement, referred to arbitration only the claims for refund of the hire charges. The arbitrator, upon entering into the reference, enlarged its scope. Since the arbitrator continued to adjudicate on such enlarged dispute, despite objections, the parties were left with no option, but to participate in the proceedings. Such participation did not amount to acquiescence. Once appointed, the arbitrator has the duty to adjudicate only the matter brought before it by the parties. The award is liable to be set aside as the arbitrator had misdirected himself and committed legal misconduct. (*Union of India v M/s G. S. Atwal*, AIR 1996 SC 2965).

The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2(1)(e) of the 1996 Act and not the Court to which an application under Section 8 of the Act was made (*P. Anand Gajapathi Raju v P.V.G Raju*, AIR 2000 SC 1886)

Finality and enforcement of awards

Section 35 of the 1996 Act provides that subject to the provisions of Part I of the Act, an arbitral award shall become final and binding on the parties claiming under them respectively. The word 'final' with respect to an award, as used in this section, is not to be confused with the expression 'final award'. The word 'final' means that unless and until there is a successful challenge to the award, it is conclusive as to the issues with which it deals as between the parties to the reference and persons claiming under them. The award can, therefore, be enforced, even if there are other issues outstanding in the reference.

Section 36 of the 1996 Act renders an arbitral award enforceable in the same manner as if it were a decree, if no challenge is preferred against it within the time prescribed for making a challenge or, when upon a challenge being preferred, it has been dismissed. However, the fact that an arbitral award is enforceable as if it were a decree does not make the arbitral proceedings a suit.

The arbitral award becomes immediately enforceable without any further act of the Court once the time expires for challenging the award under Section 34 of the 1996 Act. If there were residential doubts on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favor of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act (*Union of India v Popular Constructions*, (2001) 8 SCC 470)

When the arbitration proceedings commenced before the 1996 Act came into force but award was made after the 1996 Act came into force, the award would be enforced under the provisions of Arbitration Act, 1940. (*Thyssen Stahlunion GmbH v Steel Authority of India*, (1999) SCC 334).

International Commercial Arbitration and Foreign Awards

An “international commercial arbitration” has been defined in Section 2(f) of the 1996 Act to mean an arbitration relating to disputes arising out of legal relationships considered commercial under the law in force in India and where atleast one of the parties is

- a foreign national or an individual habitually resident outside India
- a body corporate incorporated outside India
- a company or association of individuals whose central management and control is exercised by a country other than India
- the Government of a foreign country

The law applicable may be Indian law or foreign law depending upon the contract (Section 2(1)(f) and Section 28(1)(b)).

Part I of the 1996 Act is to also apply to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. The definition of international commercial arbitration in Section 2(1)(f) of the 1996 Act makes no distinction between international commercial arbitration held in India or outside India. Part II of the 1996 Act only applies to arbitrations which takes place in a convention country. An international commercial arbitration may, however, be held in a non-convention country. The 1996 Act nowhere provides that the provisions of Part I are not to apply to international commercial arbitrations which take place in a non-convention country. The very object of the Act is to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitrations. (*Bhatia International v Bulk Tradings*, AIR 2002 SC1432).

Illustration : Even if in terms of the arbitration agreement, the arbitration proceedings between two foreign parties were being held under I.C.C Rules outside India, yet a party to the arbitration proceedings may seek an interim injunction under Section 9 of the Act against Oil and Natural Gas Commission, a Government Company, for restraining it making any payment to the opposite party till the arbitration proceedings pending between the parties is not concluded. Such injunction in respect of the properties within territory of India is maintainable. However, if the injunction is sought for properties outside the country, then such an application under Section 9 is not maintainable in Indian Court. (*Olex Focas Pty. Ltd. V Skodoeport Co. Ltd.*, AIR 2000 Del. 161).

Part II of the 1996 Act pertains to the enforcement of certain foreign awards and consists of two chapters. Chapter I relates with New York Convention Awards which are supplemented by the First Schedule to the 1996 Act. Chapter II refers with Geneva Convention Awards which is to be read with the Second and the Third Schedule of the Act.

The expression “foreign award” which means an arbitral award on differences between persons arising out of legal relationship considered as commercial under the law in India. An award is ‘foreign’ not merely because it is made on the territory of a foreign state but because it is made in such a territory on an arbitration agreement not governed by the law of India. (*NTPC v Singer Company*, AIR 1993 SC 998).

A foreign award given after the 1996 Act came into force can be enforced only under Part II of 1996 Act, there being no vested right to have the same enforced under the Foreign Awards

(Recognition and Enforcement) Act, 1961. It is relevant that arbitral proceedings had commenced in the foreign jurisdiction before the commencement of the 1996 Act. (*Thyssen Stahlunion GmbH v Steel Authority of India*, (1999) SCC 334).

Mediation

Mediation is a voluntary, disputant-centred, non binding, confidential and structured process controlled by a neutral and credible third party who uses special communication, negotiation and social skills to facilitate a binding negotiated settlement by the disputants themselves. The result of the mediation agreement is a settlement agreement, and not a decision.

The focus in mediation is on the future with the emphasis of building relationships, rather than fixing the blame for what has happened in the past. The purpose of mediation is not to judge guilt or innocence but to promote understanding, focus the parties on their interests, and encourage them to reach their own agreement. The ground rules of mediation include

- neutrality : the mediator should be neutral having no interest with the dispute or either party.
- self determination : mediation is based on the principle of the parties' self-determination, which means each party makes free and informed choices. The mediator is, therefore, responsible in the conduct of the process while the parties control the outcome.
- confidentiality : it is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them as well. Were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process. The mediator must state to the parties
- that he and the parties shall keep confidential all matters relating to the mediation proceedings, and that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for the purposes of its implementation and enforcement.
- that unless otherwise agreed by the parties, it would be legally impermissible for him to act as an arbitrator or a witness in any arbitral or judicial proceeding in respect of the dispute that is the subject of mediation proceedings and that the parties are not allowed to introduce such evidence – neither on facts (like the willingness of one party to accept certain proposals) nor on views, suggestions, admissions or proposals made during the mediation.
- that the only behavior that might be reported is the information about whether parties appeared at a scheduled mediation and whether or not they reached a solution.
- fair process : the process is just as important as the outcome. It is crucial that parties feel they are being treated fairly and their concerns are being heard.
- voluntary process : mediation is possible only with consent of parties, who get bound once they sign the settlement arrived at during mediation.

Pre-mediation preparation

The mediator often asks for a pre-mediation summary from the parties to familiarize himself with the dispute. The participants during mediation need not necessarily be only the actual disputants but all parties that could facilitate or block a settlement.

In preparing the case, it will be useful for the mediator and/or the parties to analyze the dispute. In doing so, the mediator must be conversant with the applicable law and practice, the perspective of both sides on the facts and the issues that are of most concern to either party.

Demeanor of the mediator

The mediator should try to establish his neutrality and control over the process by maintaining neutral body language; using neutral, plain and simple words; using words of mutuality that apply to all parties; having appropriate eye contact; using calm, moderate, business like and deliberative tone and having an attentive posture. Importance must be given to seating arrangement so as to ensure closeness, eye contact and audibility.

Opening Statement

The mediation commences with the opening statement by the mediator, which must be simple and in a language/ style adapted to the background of parties. In the opening statement, the mediator

- introduces himself, his standing, training and successful experience as a mediator.
- expresses his hope to bring about a settlement in the present case.
- asks the parties to introduce themselves.
- asks parties which language they would prefer to be addressed in and how they would like to be addressed.
- welcomes their lawyer.
- enquires about previous experience of parties and counsel in any mediation process.
- declares impartiality and neutrality, and describes the role of the mediator.
- addresses confidentiality and neutrality by using appropriate eye contact, words and body language.
- emphasizes on the non adversarial aspect of the process like the absence of recording of evidence or pronouncement of judgment or award or order.
- emphasizes the voluntary nature of process.
- informs that he can go beyond the pleadings and may cover other disputes.
- states the mediation process (i.e. gives a road map) and the possibility of having private sessions.
- explains procedure where there is settlement or no settlement.
- informs that Court fee is refunded on settlement.

The mediator manages any outbursts, handles administrative matters such as breaks or order of presentation, determines whether the parties are clear about what to do, gets confirmation that the parties want mediation and invites both parties to state their perspective. Either side can speak first, both having been given an assurance of equal opportunity.

Stages and sessions of Mediation

Introduction is followed by

- problem understanding stage.
- needs and interests understanding stage.
- problem defining stage.
- issues identification stage.
- options identification stage.
- options evaluation stage.

These stages could be in joint session or private session (caucus)

In a joint session

- parties and respective counsels are present.
- parties are advised not to say anything that will upset the other parties and that any such information can be stated in private session.
- parties/counsels are allowed to speak without interruption.
- normally the party is asked to speak first, with the counsel supplementing with legal issues.
- any friend or relative of the parties are heard too.
- the mediator summarizes after hearing each party/counsel as to what he has understood.
- parties/counsels may add on any information.
- the mediator should accede to the request of parties who would like to talk.
- the mediator may seek clarifications.
- after hearing one side, the mediator listens to the other side.
- no interruptions are allowed as the decorum and dignity is to be maintained.

Where a party requests for a private caucus, the mediator should conclude the joint session before meeting in private. The private session with one party should be followed with private session with other party. The mediator should explain beforehand that a private session may take more time with one party.

The mediator should use private session

- to share private matters and information that cannot be discussed in joint sessions.
- to regain control when a party is getting out of hand.
- when the parties are near a deadlock or impasse.
- to allow the parties to vent their emotions in a productive manner.

- to expose unrealistic expectations.
- to shift from discussion to problem solving.
- to evoke options for settlement.
- to communicate offers and counter-offers.

The mediator should avoid private session

- when a party can be directly persuaded.
- a party can communicate a compelling position.

Mediation Techniques

Mediation is all about transforming conflicts. The mediator must take the sting out of the hostility between the parties. The mediator could use the technique of neutral reframing to rephrase an offensive or inflammatory statement of a party in an inoffensive manner by focusing on the positive need in that statement

Illustration ∴ Party : He is so dominating that he never talks to me, forcing me to keep everything bottled up.

Mediator : You would like to be heard

The mediator has thus not only converted the negative statement into a positive one, he has exposed the other party to the positive need (of being heard) underlying the statement. Other mediation techniques listed by commentators are

- summarizing : the mediator restates the essence of the statement of the party briefly, accurately and completely.
- acknowledgement : the mediator reflects back the statement of a party in a manner that recognizes that party's perspective.
- re-directing : the mediator shifts the focus of a party from one subject to another in order to focus on details or respond to a highly volatile statement by a party.
- deferring : the mediator postpones a response to a question by a party in order to follow an agenda or gather additional information or defuse a hostile situation.
- setting an agenda : the mediator establishes the order in which the issues, positions or claims are to be addressed.
- handling reactive devaluation : the mediator takes ownership of an information or statement of a party in order to pre-empt the other party from reacting negatively to such information or statement solely based on the source of the information.

The mediator should endeavor to shift from positions to interests by

- talking to the parties to uncover their long term interests, and in the process, discover interests common to the parties.
- using open questions to elicit more facts.

- inviting options again from the parties for settlement.
- putting all settlement options, no matter how ostensibly insignificant, on the table.
- examining each options one by one as any given option might just appeal to a party on deeper analysis.
- do reality check by comparing a pending offer with
- the best result a party can get in litigation (BATNA or best alternative to a negotiated agreement).
- the worst result a party can get in litigation (WATNA or worst alternative to a negotiated agreement).
- the most likely result a party can get in litigation (MLATNA or most likely alternative to a negotiated agreement).

Handling emotions

The mediator should be familiar with his own reaction when faced with emotions. Strategies to handle emotions include

- accepting some venting, though preferably in a private session.
- utilizing active listening to verify the sincerity of the emotions.
- identifying the source or reason for the emotion and addressing the cause, not the behavior .
- insisting that order be maintained.
- moving to an easier issue on the agenda.
- dealing with one issue at a time.
- inviting parties to disclose the emotional impact of the situation or express their feelings to one another.
- simply suggesting a recess.

Role of silence in mediation

Use of silence in mediation cannot be overemphasized. A mediator is required to understand the relevance of the pauses and silence of the parties during mediation. Sometimes an important piece of information is revealed after a period of silence.

Silence can be helpful to the speaker because it:

- allows the speaker to dictate the pace of the conversation.
- gives time for thinking before speaking.
- enables the speaker to choose whether or not to go on.
- Silence can be useful to the listener because

- demonstrates interest, respect and patience.
- gives an opportunity to observe the speaker and pick up non-verbal clues.

Use of Apology and Saving Face approach in mediation

Apology is to acknowledge and express regret for a fault without defense. The emphasis is on that the act done cannot be undone but it should not go unnoticed. Fear of losing face is also a powerful emotion to make parties stick to their positions or continue with litigation. The mediator should explore settlement options that give honorable “exit”.

Handling Impasse

The mediator could

- shift gears between private and joint sessions get the parties to do a reality check on how “foolproof” their case actually is.
- Have a private session with the counsel if he has given legally untenable advise to his client who is falsely assured that he is bound to win in litigation.
- warn the participants/ bring the parties together to acknowledge the situation.
- solicit any last ditch efforts.
- change atmosphere/use humor to relax atmosphere.
- revisit issues, or areas of agreement.
- proceed with preferably an easier issue.
- ask parties about cause of an impasse.
- ask parties to suggest options to overcome the deadlock.
- praise work and accomplishments of parties.
- try role-reversal.
- propose hypothetical solutions .
- suggest (or threaten) ending the mediation.
- suggest third party/ expert intervention.
- allow emotions to emerge.
- take a break.

Settlement agreement

The settlement agreement must be reduced in writing. It must

- comprise the statement about parties’ future relationship.
- describe responsibility of each party in implementing the settlement.
- be clear, concise, complete, concrete, realistic and workable.
- be balanced and should reflect each party is gaining something.
- be positive, without any blame assessment.

- contain non-judgmental language.

The settlement agreement can be drafted by the parties but it is preferable if it is drafted by the mediator. If mediator drafting the agreement, the mediator should orally recite the terms of the settlement, clarify the terms and confirm the terms before putting it down.

While drafting an agreement, the mediator should be specific and must avoid ambiguous words such as "reasonable", "soon", "frequent", "co-operative" or "practicable". He should state clearly "who" will do "what", "when", "where", "how", "how much" and for "how long".

The mediator should avoid legal jargon and use plain language, preferably the language of the parties. The parties to the agreement should sign each page, while the counsel should attest the signature of their client by signing on the last page. Once the settlement agreement is signed by the parties, the mediator should sign the agreement and furnish a copy of the same to each party.

Ending mediation

The mediator should pay special attention on a proper ending to the mediation process, which is the outcome of the efforts of the parties. If parties do not come to terms, the mediator should congratulate them for the progress made, with hope for settlement in future. There is no such thing as failed mediation. If parties come to terms, the mediator should congratulate parties. Mediation ends on the date of the settlement agreement.

Model Civil Procedure Mediation Rules 2003

While there is no comprehensive statute governing mediation in India, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

The Rules provide for the procedure for appointment of a mediator, the qualifications of the mediator and procedure for mediation. Rule 12 provides that the mediator is not bound by the Evidence Act 1872 and the Code, but shall be guided by principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute, Rule 16 describes the role of mediator and states that the mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them; he shall not impose any terms of settlement on the parties.

Rule 17 emphasises that the parties alone responsible for taking decision and that the mediator will not and cannot impose any settlement or give any warranty that the mediation will result in a settlement. The Rules have strict provisions with regard to the confidentiality of the mediation process. While Rule 11 enables the mediator to meet or communicate with each of the parties separately, Rule 20 restrains the mediator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential, and mandates the mediator and the parties to maintain full confidentiality in respect of the mediation process. The Rule 20 further requires the parties not to rely on or introduce the said information in any other proceedings as to

- views or admissions expressed by a party in the course of the mediation proceedings
- confidential documents, notes, drafts or information obtained during mediation
- proposals made or views expressed by the mediator

- the fact that a party had or had not indicated his willingness to accept a proposal for settlement.

Rule 21 limits the communication between the mediator and the Court to informing the Court about the failure of a party to attend and, with the consent of the parties, his assessment that the case is not suited for settlement through mediation or that the parties have settled their disputes.

Rule 24 provides for the reduction of the agreement between the parties into a written settlement agreement duly signed by the parties. The settlement agreement is to be forwarded to the Court by the mediator with a covering letter. The Court would pass the decree in terms of the settlement under Rule 25. Should the settlement dispose of only certain issues in the suit which are severable from the other issues, the Court may pass decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled. If the issues are not severable, the Court shall wait for the decision of the Court on the other issues which are not settled.

Rule 27 lays down ethical standards of a mediator, stating that he should

- follow and observe the Rules strictly and diligently.
- not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator.
- uphold the integrity and fairness of the mediation process.
- ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process.
- satisfy himself that he is qualified to undertake and complete the mediation in a professional manner.
- disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias.
- avoid, while communicating with the parties, any impropriety or appearance of impropriety.
- be faithful to the relationship of trust and confidentiality imposed in the office of mediator.
- conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law.
- recognize that the mediation is based on principles of self-determination by the parties and that the mediation process relies upon the ability of parties to reach a voluntary agreement.
- maintain the reasonable expectations of the parties as to confidentiality, refrain from promises or guarantees of results.

Conciliation

Conciliation is a term often used interchangeably with mediation. Some commentators view conciliation as a pro-active form of mediation, where the neutral third party takes a more active

role in exploring and making suggestions to the disputants how to resolve their disputes (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

The manner of conducting conciliation, the ground rules and ethical standards are similar to that of mediation.

The 1996 Act is the first comprehensive statute on conciliation in India. Part III of the 1996 Act adopts, with minor contextual variations, the UNICITRAL Conciliation Rules, 1980.

The 1996 Act provides the procedure for commencement of conciliation proceedings through invitation of one of the disputants (Section 62) and the submission of statements to conciliator describing the general nature of the dispute and the points at issue (Section 65). The conciliator is not bound by the Code or the Indian Evidence Act, 1872 (Section 66).

Role of Conciliator

Section 67 of the 1996 Act describes the role of conciliator as under

- the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
- the conciliator shall be guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
- the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
- the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons thereof.

Confidentiality is integral to the conciliation process. While Section 69 of the 1996 Act enables the conciliator to meet or communicate with each of the parties separately, Section 70 restrains the conciliator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential. Section 75 mandates that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Unless otherwise agreed by the parties, the conciliator is barred by the 1996 Act from acting as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings as also from being presented by the parties as a witness in any arbitral or judicial proceedings (Section 80).

Section 81 of the 1996 Act provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute.
- admissions made by the other party in the course of the conciliation proceedings.
- proposals made by the conciliator.
- the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Section 73 of 1996 Act mandates that the settlement agreement signed by the parties shall be final and binding on the parties and persons claiming under them respectively, which is to be authenticated by the conciliator. Section 74 confers the settlement agreement to have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 i.e. the status of a decree of a Court.

A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such agreement which has the status and effect of legal sanctity of an arbitral award under section 74 of the 1996 Act. (*Hareesh Dayaram Thakur v State of Maharashtra*, AIR 2000 SC 2281)

Conciliation under other statutes

Several statutes contain provisions for settlement of disputes by conciliation, like the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1948, the Family Courts Act, 1984 and the Gram Nyayalayas Act 2008. Section 20 of the 1987 deals with cognizance of cases by Lok Adalats and mandates that every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. The 1987 Act also provides for pre-litigation conciliation and settlement and lays down the procedure for reference of the matter to conciliation before the Permanent Lok Adalat which is to assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.