

## LL.B. (THREE YEARS DEGREE COURSE) (THIRD YEAR) (5<sup>th</sup> SEMESTER)

### ALTERNATIVE DISPUTE RESOLUTION

#### UNIT-I

<u>Syllabus</u>	<ul style="list-style-type: none"><li>i. Concept, Need and Development, Advantages</li><li>ii. Arbitration and Conciliation Act, 1906: Object, Development and Salient features</li><li>iii. Arbitration: Definition, Sources, Kinds, Scope and Differences to Court</li><li>iv. Arbitration Agreement, Composition of Arbitral Tribunal</li></ul>
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Lecture 1: ADR: Concept, Need and Development, Advantages

#### Previous year Questions

Q. 1. Merits/advantages of ADR (Short Question 2012, 2015, 2018)

#### NOTES

- MEANING AND CONCEPT

- The process by which disputes between the parties are settled or brought to an amicable result **without the intervention of Judicial Institution** known as Alternative Dispute Resolution (ADR).
- It **substitutes the conventional methods** of resolving disputes.
- It **generally uses a third party** is use to settle the disputes between the transacting parties.
- It is mainly used in **civil matters, transactional matters, trade matters, civil matters, commercial matters, industrial matters, family matters, contractual matters**, etc.
- CONSTITUTION AND ADR:
  - Founded on FRs under **Article 14 and 21**.
  - Motive is to honour **Preamble**.
  - Strives to achieve equal justice and free legal aid under **Article 39-A** (DPSP).
- TYPES OF ADR:

- **Arbitration**
- **Conciliation**
- **Mediation**
- **Negotiation**
- **Lok Adalat**

- **NEED OF ADR**

- Prevalence of **pendency of cases in judiciary**/backlog of cases at various levels of judiciary in India.
- To **reduce burden of courts**.
- **Small matters add further burden** of courts.

- **ADVANTAGES OF ADR**

- Less time consuming
- Cost effective
- Free from technicalities of courts- More informal in nature
- Maintains confidentiality
- Parties can disclose true facts without fear of punishment
- Parties have option to choose experts and professionals to decide the dispute
- Preserves best interest of all parties
- Helps in restoring relationships, peace and cooperation between parties
- Parties choose what procedural and domestic rules will be applied to their dispute

## ASSIGNMENT

1. Alternative Dispute Resolution allows judicial intervention. True/False
  
2. Which of the following is a form of ADR? :
  - a) Litigation
  - b) Mediation
  
3. The settlement agreed to by the parties in conciliation is \_\_\_\_\_ and \_\_\_\_\_
  - a) Not final and not binding
  - b) Final and binding
  
4. Is mediation more time consuming and expensive than court room litigation? Yes/No
  
5. What are the merits of ADR over court proceedings?

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**Lecture 2:** Arbitration and Conciliation Act, 1906: Object, Development and Salient features

#### **Previous Year Questions:**

**Q.1 What are the scope and salient features of Arbitration and Conciliation Act, 1996?  
[Long Question- 2012, 2014, 2017, 2021]**

**Q.2 Does Arbitration and Conciliation Act, 1996, as compared to its preceding Act, discourage the court intervention in the arbitration proceeding? [Long Question- 2012]**

**Q. 4 Role of UNCITRAL in shaping modern law of arbitration [Short Question- 2012]**

**Q. 5 Salient features of Arbitration and Conciliation (Amendment) Act, 2019 [Short Question- 2019]**

#### **NOTES:**

#### **Object:**

- Consolidate and amend laws relating to **domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards**
- Define laws relating to **conciliation**

#### **Development:**

- Indian arbitration law is based on English Law.
- Three acts were governing arbitration- **The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937; The Foreign Awards (Recognition and Enforcement) Act, 1961**
- A comprehensive uniform **Model Arbitration Law** at international level was adopted by **United Nations Commission on International Trade Law (UNCITRAL)** in **1985**. All states were obligated to adopt this model law. In pursuance to this Model and recommendations of **76<sup>th</sup> Report of Law Commission of India 1978**, came in India: **The Arbitration and Conciliation Act, 1996**

## Salient features

- The Arbitration and Conciliation Act, 1996 is based on **UNCITRAL Model Law on International Commercial Arbitration** and **UNCITRAL Conciliation Rules**.
- The Act is divided into: **4 Parts, 87 Sections and 8 Schedules**
- **A more comprehensive statute**- provides for domestic arbitration, international commercial arbitration and conciliation
- Makes existence of **Arbitration Agreement** mandatory- There can be no arbitration without Arbitration Agreement
- **Curtails courts intervention except in certain cases**- one of the aims of the Act is to restrict reliance and interference of courts
- **Abolishes Umpire system of arbitrators**- introduces the concept of appointment of odd number of arbitrators
- Makes compulsory for arbitrators to **give reasons for Arbitral Award**- Previous statute gave discretionary powers to arbitrators to give reasons for the award
- **Arbitral award treated at par with a decree of court**- it is enforceable as court decree
- Provides that **Award cannot be appealed** in court except under Section 34
- **Provides provisions for enforcement of foreign awards**- made under the New York Convention and Geneva Convention as contained in Part II
- Includes provisions related to **conciliation**- the act gives legal recognition to conciliation and makes the settlement agreement binding when signed by both the parties and conciliator.

## ASSIGNMENT

1. Does Arbitration and Conciliation Act, 1996 include Conciliation? True/False
2. Arbitration and Conciliation Act, 1996 promotes judicial intervention True/False
3. Arbitration and Conciliation Act, 1996 does not provide for enforcement of foreign awards. True/False
4. Why is UNCITRAL considered a pioneer in shaping modern day arbitration law?
  
5. Write 3 salient features of Arbitration and Conciliation Act, 1996.

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**Lecture 3:** Arbitration: Definition, Sources, Kinds, Scope and Differences to Court

#### **Previous Year Questions**

**Q.1 Meaning of Arbitration. What are different types of arbitration? What are its advantages?**

[Long Question, 2014, 2017, 2019, 2021]

**Q.3 Difference between arbitral tribunal and permanent court [Short Question 2014]**

Institutional arbitration [Short Question 2014]

Statutory Arbitration [Short Question 2017]

International Commercial Arbitration [Short Question 2017, 2018]

#### **NOTES:**

#### **Arbitration- Meaning, Scope and Sources**

Arbitration is outside the court settlement of a dispute by one or more (odd number) persons who are appointed as arbitrators by both the parties. According to **Section 2(1)(a)** of the Arbitration and Conciliation Act, 1996 "*Arbitration means any arbitration whether or not administered by permanent arbitral institution*".

Arbitration and Conciliation Act, 1996 does not make provisions for matters of inclusiveness within the purview of Arbitration nor does it enlist cases that would exclude from the focal point of Arbitration.

#### **Kinds of arbitration**

- **Domestic arbitration-** In domestic arbitration, both the parties must be Indians and the proceedings take place in India itself.
- **International arbitration-** International arbitration occurs outside the domestic territory.
- **International commercial arbitration-** It occurs where either one of the parties resides in a foreign country or is a foreign national/association/company.
- **Ad-hoc Arbitration-** Ad-hoc arbitration refers to when parties with mutual consent opt for arbitration to resolve the dispute without having any institutional proceedings.
- **Fast track Arbitration-** Fast-track arbitration is given a stipulated time period of six months.



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##### Lecture 4: Arbitration Agreement

##### Previous Year Questions

**Q. 1 What is Arbitration Agreement? What essentials are required to constitute such an Arbitration Agreement? Distinguish between “arbitration agreement” and “submission to arbitration”. [Short Question- 2014; Long Question- 2015, 2018, 2021]**

#### NOTES

##### Arbitration Agreement

- **Section 7** of Arbitration and Conciliation Act 1996 defines “arbitration agreement” as an agreement between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

##### Essentials of Arbitration Agreement

- **Written Agreement-** An arbitration agreement must be in writing. As per Section 7 of the Act, arbitration agreement is considered to be in writing, if it is contained in:
  1. A document signed by the parties;
  2. An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
  3. An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by another.
- **Intention-** The intention of the parties to refer their dispute to arbitration should be clearly evident from the arbitration agreement.
- **Signature-** An arbitration agreement needs to be signed by the parties.

##### Submission Agreements

- Submission agreements are agreements to arbitrate made after the dispute has arisen.

- It contains details of the dispute and the issues between the parties, and record that it is being referred to arbitration.
- It contains the same essential details as an arbitration clause, such as the legal seat and number of arbitrators.

### Important Case Laws

- **Layant N. Sheth vs. Gyaneshwar Apartment Co-operative Housing Society Ltd., [1999 (2) Arb. L.R. 115 (Bombay)]**- A mere claim by the petitioner that there was an understanding between the parties to enter into an arbitration agreement, without anything more, cannot bring into existence an arbitration agreement.
- **Rallia Ram vs. Union of India [AIR 1963 SC 1685]**- It is sufficient that the written agreement has been orally accepted by the parties or that one has signed and the other has accepted.
- **Nimet Resources INC and another Vs. Essar Stell Ltd. [AIR 2000 SC 3107]**- Arbitration agreement must be in writing. No prescribed form of agreement. An agreement by telex was held to be an agreement in writing.

### ASSIGNMENT

1. For disputes to be submitted to arbitration should Arbitration Agreement be in writing?  
Yes/No
2. In which of the following cases, Arbitration Agreement is considered to be in writing:
  - a. Arbitration document signed by the parties
  - b. Exchange of letters providing a record of Arbitration Agreement
3. How is “Submission Agreement” different “Arbitration Agreement”?
4. What is the meaning of Arbitration Agreement?
5. Write 3 essential elements of Arbitration Agreement.

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##### Lecture 5 Composition of Arbitral Tribunal

##### Previous Year Questions

##### **Q.1 Composition of arbitral tribunal**

**Rules governing appointment of arbitrator.**

**Is it necessary that 3<sup>rd</sup> arbitrator must be appointed by the two already appointed arbitrators?**

**Nationality and qualifications of appointment of arbitrators.**

**Legality of arbitral tribunals when consist by even number of arbitrators.**

**Whether appointment of own officials as arbitrator is justifiable as under the Act?**

**Grounds for challenging the appointment/authority of an arbitrator. Describe the procedure to be adopted for the same. [Long Question- 2012, 2014, 2015, 2018, 2019, 2021]**

##### **Q.2 Presiding Arbitrators [Short Question- 2015]**

**Difference between Permanent Court and Arbitral Tribunal [Short Question- 2018]**

**Legality of Arbitral Award given by even numbered Arbitral Tribunal [Short Question- 2019]**

#### NOTES

##### Composition of Arbitral Tribunal

Chapter-III of the Arbitration and Conciliation Act, 1996 talks about the composition of the arbitral tribunal. The provisions which are discussed in detail in Chapter-III are:

1. **The number of arbitrators (Section 10):** The number of arbitrators should be odd and not even.
2. **Their appointment (Section 11):** Appointments for international commercial arbitration are made by the institution designated by the Supreme Court. For domestic arbitration, appointments are made by the institution designated by the concerned High Court.

**Keshav Singh vs. Indian Engineering Corporation [AIR 1972 SC 1528]** - The process of appointment of an arbitrator is complete as soon as the appointment is made.

**Smt. Satya Kalias Chandra Sahu vs. M/s Vidarbh Distillers, Nagpur and others [AIR 1998 Bom 210]**- If the named persons refuse to act as arbitrators, the arbitration clause is not wiped out but only the authority or the named persons to act as arbitrators is exhausted.

- 3. Power of the Central Government to amend IV schedule (Section 11A)**
- 4. Grounds on which the appointment of the arbitrator can be challenged (Section 12):**
  - i. Where the circumstances exist that give rise to justifiable doubts as to arbitrators independence or impartiality
  - ii. The arbitrator does not possess the qualifications agreed to by the parties.
- 5. Procedure to challenge the appointment (Section 13):** The parties are free to determine but by agreement in this respect, the challenging procedure for an arbitrator. In absence of such agreement a party who shows his willingness to challenge an arbitrator, shall within 15 days after, becoming aware of the composition of the arbitral tribunal as after becoming aware of any circumstances referred.
- 6. Failure or impossibility on the part of the arbitrator to act (Section 14):** The mandate of arbitrator is terminated and he is substituted if:
  - i. He becomes unable to perform his functions or fails to act without undue delay
  - ii. He withdraws from his office or parties agree to terminate his mandate
- 7. Termination of the mandate and substitution of the arbitrator (Section 15):** In addition to Section 13 and 14, the mandate of arbitrator can also be terminated:
  - i. If he withdraws from office
  - ii. By agreement of the parties

### **Duties of Arbitrators**

- Perform their functions honestly and impartially.
- Provide equal opportunity to the parties to present their case without taking sides.
- Follow the principles of natural justice in dispensation of justice though arbitral proceedings.
- Interpreting and applying the rules and laws applicable to arbitration
- Declaring the arbitral award

