

ARBITRATION AND CONCILIATION ACT, 1996: AN OVERVIEW

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I. INTRODUCTION

It was recognised that with the globalisation of our economy, the economic reforms may not become fully effective if the law dealing with settlement of domestic as well as of international commercial disputes remains out of tune with such reforms. With a view to amend arbitration laws the Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration proposed amendments to the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recommendation and Enforcement) Act, 1961 to make them more responsive to contemporary requirements.

It was also recognised that in addition to arbitration, conciliation was also getting increasingly worldwide recognition as an instrument for settlement of commercial disputes. In India, conciliation was not recognised as an instrument for settlement of commercial disputes. In Industrial disputes a conciliation officer was required to enter into conciliation proceedings whenever any industrial dispute arose in compliance with the statutory requirements as contemplated in the Industrial Disputes Act, 1947.

The Arbitration and Conciliation Ordinance, 1996 was thus promulgated by the President to meet these acute needs of the business community for prompt settlement of disputes. The Ordinance had to be re-promulgated on two more occasions as the Parliament failed to pass the Bill within the stipulated period. Recently the Arbitration and Conciliation Act (hereinafter referred to as the 'Act') has been passed and received the assent of the President of India on 16th August, 1996. The Act has been brought into effect from 27th January, 1996 the day the Ordinance was first promulgated.

The Act has been divided into four parts. Part I relates to arbitration in India. Part II relates to enforcement of foreign awards under the New York and Geneva Conventions. Part III applies to conciliation and Part IV contains certain supplementary provisions empowering the High Court to make Rules regarding arbitration which are consistent with the Act. The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 are repealed.¹

II. AIM AND OBJECTIVES OF THE ACT

The Act has the primary function of comprehensively catering to international and commercial arbitration and conciliation along with domestic arbitration and conciliation by an arbitral procedure, which is fair, efficient and capable of meeting the needs of specific arbitration by a reasoned arbitral award within the limits of the jurisdiction of the Arbitral Tribunal. It is also hoped that the supervisory role of the Courts would be minimised in the arbitral process. The Arbitral Tribunal being free to use meditation, conciliation, or other procedures during the arbitration proceedings to encourage settlement of disputes. The Act also aims at making the award capable of enforcement in the same manner as a decree of the Court.

Conciliation is now recognised as a means of settlement of disputes both domestic and international. The settlement agreement arrived at by the parties by conciliation is accorded the same status as the arbitral award and can be enforced as a decree of a Court under the Code of Civil Procedure, 1908.

As far as foreign awards are concerned, every arbitral award made by a country to which one of the two international conventions, *i.e.*, New York Convention or Geneva Convention, relating to foreign arbitral awards applies, will be treated as a foreign award.

The Act has also sought to make the arbitration law and conciliation law to be similar to the recommendations and model law as adopted by the United Nations Commission of International Trade Law (UNCITRAL).

III. ARBITRATION

A. Arbitration Agreement

An arbitration agreement is defined in Section 7 of the Act to mean "agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a definite legal relationship, whether contractual or not". Sub-section (2) of Section 7 further provides that the agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) prescribes that the said agreement is deemed to be in writing if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams and other means of telecommunications which provide a record of the agreement or by an exchange of statement of claim and defence in which the existence of agreement is alleged by one party and not denied by the other.

The Arbitration Act, 1940 defined arbitration agreement to mean, "a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not".

No specific words are required to constitute an arbitration agreement. Courts have given decisions on the interpretation of the clauses contained in an agreement determining whether the clause amounted to an arbitration clause or not. In the case of *Peer Mohammed Safi v. Cantonment Board*,² the High Court has held that a settlement between workers and the management regarding revision of pay cannot be treated as an arbitration agreement merely because a clause in the memorandum of settlement provided that if any question arises about the interpretation or implementation of the terms of settlement or in cases of arrear or discrepancy, the matter is to be referred to specified person.

Where the provision contained in the agreement read, 'In the event of dispute the decision of Superintending Engineer of the circle shall be final,' the Calcutta High Court has held that though the express word or arbitration was not appearing in the aforesaid clause, even then the expression embodied in provision amounts to an arbitration clause which could be enforced.³ The Superintending Engineer obviously could enter into the dispute only when it was referred to him and while deciding the dispute he had to act judicially and decide the dispute after hearing both the parties and by inducing material for support. The Supreme Court while interpreting clause in the contract which provided that except otherwise specified in the contract, the decision of the Superintending Engineer for the time being should be final, conclusive and binding on all the parties to the contract upon all questions relating to the specification *etc.* such clause does not constitute an arbitration agreement.⁴

Even where the clause has provided that the decision of a particular person will be final and binding upon the contractors, the Courts have held that the clause did not constitute an arbitration agreement.⁵

Where the arbitration agreement gives an option or liberty to only one of the parties to the agreement to refer present or future differences to arbitration, it is not an arbitration agreement for the party having the option may or may not take advantage of the arbitration clause because in order to constitute arbitration agreement there must be an unqualified or unconditional agreement to submit present or future differences to arbitration.⁶

The Arbitration Act, 1940 did not prescribe the form of wording or manner in which the arbitration agreement is to be made between parties. The Act has improved upon the situation to the extent that it has specified the possibility of a separate arbitration agreement or an arbitration agreement constituted by exchange of letters, telegrams, faxes or such other means but it has left open the entire question of the wordings to be used to constitute an arbitration agreement.

The wordings of the definition of arbitration agreement gave rise to considerable litigation regarding the interpretation of the term 'arbitration agreement,' its acceptance, construction, dispute, form of writing and signature. It was not required that an arbitration agreement be signed by the parties. However, it was essential that the arbitration agreement should be in writing and should convey the intention of the parties to refer disputes to any particular person. Where the dispute clause in the contract merely mentions the word 'contractor' and 'arbitration', the agreement has been held not to show intention of the parties to refer dispute to any particular person. It has been held by the Court that such an agreement cannot be said to confer power on a person for adjudication and hence, the clause cannot be held to contain an arbitration agreement.⁷

There was also considerable litigation regarding the fact whether a particular clause amounted to submission to arbitration or not. It is not envisaged at present whether such litigation would come to an end by adopting the present form of the definition of arbitration agreement.

B. International Commercial Arbitration

The Act defines 'international commercial arbitration' to mean an arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties whether an individual, body corporate, or a company is having business or residing abroad and in case of Government, the Government is of a foreign country.⁸

C. Mode of Communication

The mode of all communication between parties has been changed. Order-5 of the Code of Civil Procedure prescribes the rules for issue and service of summons. Rule 10 of Order 5 provides that for service to be effective the summons must be delivered or a copy tendered to the recipient. The summons or copy thereof be signed by the judge or such officer as he appoints in this behalf and sealed with the seal of the Court. The service is to be effected by delivery of a copy of the summon to the defendant personally or to an agent or someone on his behalf and by obtaining signature of the person to whom the said copy is delivered to an acknowledgment of service endorsed on the original summon.⁹

Under Rule 12 of Order 5 of the Code of Civil Procedure, service shall be made on the defendant in person where practicable, unless he has an agent empowered to accept service, in which case, service on such agent shall be sufficient. Similarly, under the other Rules, *i.e.* 13, 14, 15 and 16, service is effective only when the person or the agent actually receives the summons and

the person affixes his signature on the copy of the summon acknowledging service of the summon.

Overriding all the provisions of the Code of Civil Procedure, a new section viz. Section 3 has been enacted in the Act where it would be sufficient to send to the addressee at his last known place of business, habitual business or mailing address, a registered letter effecting necessary communication. It is also possible to effect service of the written communication by any other means where a record of the attempt of delivery is possible. Thus, couriers, speed posts, a personal messengers who maintain records could also be used for the purpose of effecting service on the party. Such means are still not recognised by the Code of Civil Procedure. Whereas such means have been recognised for effecting communication between parties under the Act by virtue of Section 3. Section 3(3) specifically provides that this section does not apply to written communication in respect of proceedings of any judicial authority.

D. Composition and Jurisdiction of Arbitral Tribunal

The number of arbitrators to determine the dispute has been left to the parties, the limitation being that an even number of arbitrators shall not be appointed. In case the number of arbitrators are not determined, the Arbitral Tribunal shall consist of a sole arbitrator. The arbitrator may be of any nationality and the parties are free to agree on the procedure for appointing the arbitrator or arbitrators.

Under the Arbitration Act, 1940, Section 3 provided that the provisions contained in the First Schedule of the Act shall be applicable to a reference for arbitration. Conditions regarding number of arbitrators, appointment of arbitrators, time for making award, the appointment of umpire and such other provisions were made in the said schedule.

A period of 30 days has been given to a party from the receipt of request to appoint an arbitrator and the arbitrators have been given a period of 30 days from the date of their appointment to appoint a third arbitrator named as Presiding Arbitrator (earlier referred to as Umpire) for completing arbitration. In case the parties fail to appoint the arbitrator, the Chief Justice of the High Court within whose territory the parties propose to settle their dispute shall have the power to appoint an arbitrator or Presiding Arbitrator as the case may be. Where the matter concerns international commercial arbitration, the words 'Chief Justice' shall mean the Chief Justice of India.

A positive feature of the Act is that the arbitrators have been given an opportunity to disclose in writing any circumstances likely to give rise to justifiable doubts to independence or inability of arbitrators.¹⁰ The arbitrator has also been burdened with the duty of informing the parties in writing

of aforementioned circumstances unless they are already aware of the circumstances.

The additional important feature is with respect to the qualification of the arbitrator. Earlier no qualifications were prescribed for appointment as an arbitrator. Under Section 12(3)(b), an arbitrator may be challenged if he does not possess the qualifications agreed to by the parties. An analogous provision does not exist in the Arbitration Act, 1940 and it may be considered to be a redeeming feature, as a number of disputes which arise between the parties are of a technical nature whether relating to science, technology or other similar special fields of knowledge and the rival contention can be appreciated and adjudicated upon only by the person who is well versed in such matters.

The parties have been prescribed the freedom of challenging the appointment of an arbitrator unless some new reason comes within their knowledge of which they were not aware of at the time of appointment of the arbitrator. The parties have been given freedom to agree to a procedure for challenging the arbitrator under Section 13 of the Act. A limitation of 15 days has been laid down since the parties become aware of the constitution of the Arbitral Tribunal for challenging the arbitrator. In case the parties fail to do so, no challenge can be made on a subsequent date.

In case the arbitrator fails to perform the function or becomes *de jure* or *de facto* unable to perform his function or for other reasons fails to act without undue delay and he withdraws from his office or the parties agree to the termination of his mandate, a new arbitrator may be appointed to arbitrate upon the matter.

The Arbitration Act, 1940 did not confer on the arbitrator any power to determine whether the arbitrator had the authority to arbitrate upon a dispute or not. In fact there is catena of decisions which lay down that once the jurisdiction of the arbitration is challenged an arbitrator has no authority to decide whether he has the jurisdiction or not.

In such an eventuality, the parties are left with no option other than to refer the matter to the Court for appropriate decision on the matter. Section 16 of the Act confers on the Arbitral Tribunal an authority to rule on its own jurisdiction with respect to the existence or validity of the Arbitration Agreement.

Under the Arbitration Act, 1940, in case the arbitration clause was contained in an agreement which was null and void, the arbitration agreement is also rendered null and void. Under Section 16(1)(b) whether the contract is null and void and is so determined by the Arbitral Tribunal, such a decision shall not render *ipso facto* the arbitration clause invalid.

In case a party is desirous of challenging the jurisdiction of Arbitral Tribunal, the challenge shall be raised not later than the submission of the statement of defence. This provision has also set at rest partly the controversy regarding the agreement when stay may be obtained from Civil Courts to restrain the Court from proceeding with the civil dispute where a party is seeking resolution of the dispute through arbitration.

Where it appears that the Arbitral Tribunal is acting in excess of the scope of its authority, a plea to this effect shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings thereafter it shall be deemed to be a belated plea, deemed to have been waived, and shall not be entertained at any subsequent stage unless a justified plea is raised in this context.

It is only during the course of further litigation that the extent of the words of 'delay justified' and can be appreciated in their fullest ramification. The expression 'sufficient cause' contained in Section 5 of the Limitation Act may provide some guide lines in the matter. While construing the words 'sufficient cause' the courts have been rather liberal. If similar meaning is given to the words 'delay justified', it may open up a new area of litigation and become a cause for intervention of the Courts.

E. Conduct of Arbitral Proceedings

(i) Language of Arbitration

The parties have been given freedom to agree upon the language or languages to be used in arbitral proceedings. In case the parties fail to agree, the Arbitral Tribunal shall determine the language to be used in the arbitral proceedings and such language shall be used for any written statement by a party, in hearing, the arbitral award, decision or other communication by the Arbitral Tribunal. The Arbitral Tribunal has the discretion to order that documentary evidence shall be accompanied by a translation into the language agreed by the parties or determined by the Arbitral Tribunal.

(ii) Procedure

As a matter of course, the arbitrators had been following the Code of Civil Procedure in the matter of procedure regarding the disputes before them. Section 23 of the Act has clarified the procedure to be followed in respect of statement of claims and defence submitted by the parties.

Unlike the Arbitration Act, 1940, no time limit has been prescribed for completing the arbitral proceedings. Under the Arbitration Act, 1940, the arbitral proceedings were to be concluded within four months from the date of entering into the arbitration. No such limit has been prescribed under the

present Act. As a consequence, there is no need for seeking extension of time to conclude arbitration or consent of the parties for allowing the arbitrator time to conclude the arbitral proceedings.

The Arbitral Tribunal has been conferred with the authority to decide whether to hold oral hearings for the presentation of the evidence or oral arguments or whether the proceedings shall be conducted on the basis of documents and other materials.¹¹

The Arbitral Tribunal shall hold oral hearings unless agreed to the contrary by the parties. Oral hearings shall be held only after an advance notice has been given and the parties have opportunity of inspection of documents, goods or other property. All statements, documents or other information or application made to the Arbitral Tribunal shall be communicated to the other party.

In case a party fails to communicate its statement of claim, the Arbitral Tribunal shall terminate the proceedings. In case the defending party fails to communicate its statement of defence, the Arbitral Tribunal has to continue with the proceedings without treating the failure as an admission of the allegation by the claimant. The position is similar where the parties fail to appear at an adjourned hearing or fails to produce documentary evidence.¹²

(iii) Assistance of Experts

The Arbitral Tribunal has also been conferred with the authority to appoint an expert on specific issues to be determined by it and may require a party to give an expert, appointed by it, any relevant information or to provide access to any relevant documents, goods or other property for his inspection. The expert may also be requested to participate in an oral hearing where such necessity is felt.¹³

(iv) Evidence

Regarding evidence, a totally new procedure has been provided. The Arbitral Tribunal or a party may seek the assistance of the Court in taking evidence. The Court may execute the request by ordering that the witness or expert provide evidence to the Arbitral Tribunal directly. No power has been conferred on the Arbitral Tribunal to summon witnesses or to issue process. For this purpose, for taking evidence the Arbitral Tribunal or a party with the approval of Arbitral Tribunal may apply to the Court for assistance in taking evidence.¹⁴

F. Making of Arbitral Award

(i) Substantive Law

The substantive law to be applied to the dispute under arbitration in the case of international commercial arbitration shall be in accordance with the law

designated by the parties and in other cases according to the substantive law for the time being in force in India. If the parties to international commercial arbitration fail to agree among themselves regarding applicability of the substantive law, the Arbitral Tribunal has the authority to apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute and the Arbitral Tribunal may decide *ex aequo et bono* or as *amiable compositeur* only if the parties expressly authorise the Arbitral Tribunal to decide on this basis. It is the bonded duty of the Arbitral Tribunal to take into account the usages of trade applicable to the transaction. Where the number of arbitrators is more than one, the decision shall be taken by the majority.¹⁵

(ii) Arbitral Award

The Arbitral Tribunal has been conferred with the authority to encourage settlement of disputes with the agreement of parties and to this end it may use mediation, conciliation or other procedures at anytime during the arbitral proceedings to encourage settlement. Where the settlement is arrived during the course of arbitral proceedings, the arbitral award shall be made on agreed terms having the same status as an arbitration award on the substance of the dispute within the agreement.¹⁶

The arbitral award shall be made in writing, signed by the members of Arbitral Tribunal or in any case by the majority members and shall state the reasons for making the award unless the parties have specifically requested that no reason be given or the award is in terms of a settlement arrived at between the parties. The award shall also state the date and place of arbitration. A copy of the said award duly signed shall be delivered to each party. The Arbitral Tribunal also has the authority to make an interim award on any matter with respect to which it may make a final arbitral award. The Arbitral Tribunal shall also determine the costs to be paid by the respective parties as well as the amount and the manner in which the cost shall be paid including fees and expenses of the arbitrator and witnesses, legal fee and expenses, administrative fee and similar other expenses.¹⁷ On the making of the arbitral award the arbitral proceedings shall be terminated and an order to this effect shall be made by the Arbitral Tribunal.¹⁸

G. Recourse Against Arbitral Award

There is no appeal against an arbitral award. However, a party who is aggrieved with an arbitral award may take recourse by going to a Court against the said award on the grounds *inter-alia* that the party was under some incapacity or that the arbitration agreement is not valid under law to which the party is subjected to or that the party was not given proper notice of the appointment of arbitrator or of the proceedings and that the arbitral award deals with a dispute not contemplated by or not valid within the terms of submission

to arbitration. The arbitral award may also be impugned on the ground that it contains decision on matters beyond the scope of submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not so submitted to arbitration may be set aside. The party may also successfully impugn the arbitral award on the composition of the Arbitral Tribunal or the arbitral procedure, the composition or the procedure being in violation of the agreement among the parties.¹⁹

Where the Court finds that the subject matter of dispute is not capable of settlement by arbitration or that the arbitral award is in conflict with the public policy of India, the Court is vested with the power to set aside the arbitral award. An award is deemed to be in conflict to the public policy of India if the making of award was induced or affected by fraud or corruption or is in violation of Section 75 or Section 81.

The application for setting aside an arbitral award must be made before three months have elapsed from the date on which the party making application has received the arbitral award or within three months from the date on which the application of the party before the Arbitral Tribunal had been disposed of. In case the party is in a position to establish sufficient cause, the Court may entertain the application within a period of 30 days after the expiry of 3 months and no application for setting aside the arbitral award can be made thereafter. While deciding the matter, the Court may give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to take such action which will eliminate the ground for setting aside the arbitral award.²⁰

H. Finality And Enforcement of Arbitral Award

The arbitral award is final and binding between the parties and other persons claiming under them. Where the time of making the application to set aside the arbitration award under Section 34 has expired or such application has been made and the application is refused, the award may be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. Section 36 of the Act makes a clear departure from the Arbitration Act, 1940 in as much as under the later the parties had to make an application to the Court to make the award a rule of the Court and only thereafter the ruling could be executed. The Act has done away with this procedure. This will result in saving of time of the litigants in execution of the arbitral award. In fact the arbitral award has now been given a similar status as any other decree of the Court and it may be enforced in accordance with Order XXII of the Code of Civil Procedure.

I. Miscellaneous Comments

The Arbitral Tribunal has been vested with the powers to call upon the parties to make payments or deposits towards advance for cost or such other purposes. In addition, the Arbitral Tribunal has been conferred a lien on the arbitral award for any unpaid costs of arbitration and the Arbitral Tribunal may refuse to deliver the award except on payment of cost demanded by it. The Court may also assist the Arbitral Tribunal in this matter by directing the applicant to effect payment in the Court and only thereafter the Arbitral Tribunal may be directed to submit the arbitral award before the Court.²¹ The arbitration agreement shall not be discharged on the death of the parties and the mandate of an arbitrator shall not be terminated on the death of any party by whom he was appointed.²²

The provisions of the Limitation Act, 1963 have also been made applicable to arbitral proceedings by virtue of Section 43 of the Act.

IV. NEW YORK CONVENTION AWARDS AND GENEVA CONVENTION AWARDS

Chapters 1 and 2 of Part II of the Act relate to awards made under the New York Convention and the Geneva Convention respectively. The enforcement of a foreign award may be refused if the applicant furnishes evidence before the Court that the agreement which was entered into between the parties was invalid or that the party was suffering from some incapacity or that the party did not receive proper notice of the appointment of the arbitrator or arbitral proceedings or was otherwise unable to present its case. The other provisions relating to enforcement of foreign award are similar to that of the domestic award and there is no difference so far as enforcement of award is concerned.

V. CONCILIATION

Part III of the Act fills a need for another method of settlement of disputes among parties which have been accorded similar status as an arbitral award *i.e.* conciliation. Any dispute arising out of legal relationship whether contractual or not may be referred for conciliation by the parties. The party initiating the conciliation is required to send a written invitation to the other party to take recourse to conciliation and identify the subject of the dispute. The conciliation proceedings commence only when the parties accept in writing invitation to conciliate.²³ In case the other party rejects the invitation, there will be no conciliation or in case the inviting party does not receive a reply within 30 days from the despatch of the invitation or within such other period of time as specified in the invitation, it may elect to treat this as rejection of invitation to conciliate and if it so elects, it shall inform in writing the other party accordingly.

A. Appointment of Conciliator

Unless the party agrees to the contrary one conciliator shall enter into the conciliation. In case of agreement two or three conciliators may also enter into conciliation. When the parties agree to take recourse to conciliation with one conciliator the parties may name the sole conciliator. Where the number of conciliators is three, each party may appoint one conciliator and both parties may agree upon the third conciliator who may act as the presiding conciliator.²⁴

The assistance of suitable institutions or persons may be sought for the appointment of conciliator if the parties feel the need to do so.²⁵

B. Role of Conciliator

When the conciliator is appointed, he may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party is also required to send a copy of such statement to the other party. Additional statement may also be made which may be supplemented by any documents or other evidence which the parties deem appropriate. Copies of all statements, documents or other evidence are to be given to the opposite party. The conciliator may request a party to submit to him additional information as he deems appropriate.²⁶ The conciliator has a free hand and is not bound by the provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

The conciliator has the role of assisting each of the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.²⁷ In doing so the conciliator shall be guided by principles of objectivity, fairness and justice, background of the parties, the usages of trade and the circumstances surrounding the dispute including any previous business practices between the parties. Even in conducting the proceedings the conciliator has the freedom to conduct them in any manner he considers appropriate including adherence to the wishes expressed by the parties and in case the parties so desire hearing oral statements. The paramount consideration is the need for speedy settlement of dispute.

The conciliator may at any stage make proposals for a settlement of the dispute which need not be in writing and need not be accompanied by a statement of the reasons thereof. However, the conciliator is not to take any information behind the back of the parties and when the conciliator receives factual information concerning the dispute from a party it is his duty to disclose the substance of the information to the other party to furnish them with an opportunity to present an explanation whenever considered appropriate. However, if a party furnishes information to the conciliator with a specific

request that such information be kept confidential the conciliator shall not disclose that information to the other party.²⁸

The party submitting to conciliation shall under good faith cooperate with the conciliator and shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.²⁹ The parties are also free on their own initiative or at the invitation of the conciliator to submit to the conciliator suggestion for the settlement of dispute.³⁰

C. Settlement Agreement

Where it appears that the parties may arrive at a certain agreement the conciliator may formulate the terms of possible settlement and submit to the parties for their observations. On receiving the said observations of the parties, reformulation of the terms may take place keeping in view the possibility of settlement in light of the observations made. Also the parties themselves may arrive at an agreement. They may draw up and sign a written agreement referred to as settlement agreement or the conciliator may be called upon to draw up or assist the parties in drawing up the settlement agreement. Once the parties sign the settlement agreement it shall be final and binding on the parties. The conciliator is required to authenticate the settlement agreement and furnish a copy of the settlement agreement to each of the parties.³¹ The settlement agreement on being drawn up and authenticated shall 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.³²

The parties to the conciliation proceedings shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings. But where in the opinion of the party, arbitral or judicial proceedings are necessary to preserve its rights, it may resort to those proceedings.³³ For example, when a matter is about to become barred by time under the provisions of the Limitation Act, 1963, the party may be left with no other option than to initiate judicial proceedings. A time barred matter cannot be the subject matter of a suit. Even when the party has been involved in other litigation, time shall not be extended for filing a fresh suit.

The conciliator has the duty of keeping confidential all matters relating to conciliation proceedings including settlement agreement except where disclosure is necessary for the purposes of implementation and enforcement.³⁴

The conciliator cannot act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is subject of conciliation proceedings. The conciliator cannot be presented by the parties as a witness in any arbitral or judicial proceedings by the parties.³⁵ Parties may, however, agree to the contrary if they so desire.

VI. CONCLUSION

Some of the areas of litigation have been reduced by the Act. A very significant step is that of equating the arbitral award and the settlement arrived at during conciliation proceedings with a decree of the Court. A better definition of an arbitration agreement has been provided. It would have been better had a standard arbitration clause incorporated in the Act. However, arbitration is a process which is a creature of the parties. It will become necessary to determine the intention of the parties before it may be determined whether a particular clause amounts to an arbitration agreement or not. The real test of the Act shall be when the parties begin the process of arbitration and conciliation under the provisions of the Act.

NOTES AND REFERENCES

- * Advocate and Lecturer, Law Centre-II, Faculty of Law, University of Delhi, Delhi.
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