UNIT – III

ARBITRATION, CONCILIATION & ADR SYSTEM

ALTERNATIVE DISPUTES RESOLUTION (ADR) SYSTEM

Alternative Dispute Resolution (ADR) refers to methods used to resolve disputes outside the traditional courtroom system. It offers parties a more flexible, cost-effective, and time-efficient way to settle conflicts. The main forms of ADR include:
Negotiation – A voluntary process where parties attempt to resolve their dispute directly without third-party involvement.
Mediation – Involves a neutral third party (mediator) who helps the disputing parties reach a mutually acceptable agreement.
Arbitration – A process where a neutral third party (arbitrator) hears both sides and makes a binding decision.
Conciliation – Similar to mediation, but the conciliator may play a more active role in suggesting solutions.

ADR is widely used in civil, commercial, family, and labour disputes. It helps reduce the burden on courts and promotes amicable settlements. Many legal systems now encourage or even mandate ADR before allowing litigation to proceed.

ARBITRATION

MEANING:

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

The neutral third renders the decision in the form of an '**arbitration award**'. An arbitration award is legally binding on both sides and enforceable in local courts, unless all parties stipulate that the arbitration process and decision are non-binding.

Scope

The scope of arbitration refers to the range of disputes or issues that can be submitted to arbitration under an agreement or applicable law. It defines what matters an arbitral tribunal has the authority to decide.

Cases Commonly Referred to Arbitration

These typically involve private commercial matters where parties have agreed to arbitrate:

1. **Commercial Disputes**
    - Breach of contract
    - Supply and purchase agreements
    - Distribution agreements
    - Franchise disputes
    - Joint venture disagreements
2. **Construction and Infrastructure**
    - Delays, defects, or non-performance under construction contracts
    - Claims under FIDIC contracts (common in international construction)
3. **Real Estate and Property Disputes**
    - Disputes under lease or tenancy agreements (if permitted)
    - Construction defects or delays in handover
4. **Banking and Finance**
    - Loan agreements (with arbitration clauses)
    - Disputes under financing or investment contracts
5. **Insurance and Reinsurance**
    - Policy interpretation or claim disputes
6. **Employment Disputes (in limited cases)**
    - Senior executive contract (especially in international contexts)

Note: Not always arbitrable in some jurisdictions

7. **Intellectual Property (IP) Disputes**

- Licensing agreements
- Technology transfer agreements • Trademark co-existence agreements.

ARBITRATION TYPES

Different forms of arbitration can be broadly categorised based on jurisdiction and procedural approaches. Let us explore each type in detail.

Types of Arbitration Based on Jurisdiction

Domestic Arbitration

Domestic arbitration occurs when both parties involved in the dispute are Indian, and the arbitration proceedings take place in India. While the Arbitration and Conciliation Act, 1996, does not explicitly define domestic arbitration, it is implicitly governed by Section 2(2). Key characteristics include:

- The proceedings are conducted within Indian territory.
- Indian procedural and substantive laws apply.
- Parties agree to resolve disputes arising within India.

Domestic arbitration is commonly used for resolving disputes in business contracts, employment agreements, and property disputes within India.

International Arbitration

International arbitration involves disputes that transcend national boundaries. This type of arbitration occurs outside the domestic territory due to:

- A contractual clause specifying arbitration in a foreign country.
- Foreign elements in the dispute, such as parties from different nations or transactions conducted internationally.

The applicable law—Indian or foreign—depends on the circumstances leading to the arbitration. International arbitration provides flexibility for parties to choose a neutral venue and governing laws, making it ideal for cross-border transactions and multinational agreements.

International Commercial Arbitration (ICA)

According to Section 2(1)(f) of the Arbitration and Conciliation Act, international commercial arbitration arises from a dispute involving a commercial contract where at least one party is:

- A foreign national or entity.
- Residing or headquartered in a foreign country.
- Managed by foreign individuals. **Under Indian law, ICA applies**

when:

- The arbitration takes place in India.
- At least one party is a foreign entity.

Types of Arbitration Based on Procedures and Rules Ad-Hoc Arbitration

Ad-hoc arbitration is the most common form of arbitration in India. It is characterised by its flexibility and cost-effectiveness. In this method:

- Parties mutually agree to resolve disputes without institutional involvement.
- Rules and procedures are decided by the parties themselves.
- Arbitration is tailored to the specific needs of the case.

Fast-Track Arbitration

Fast-track arbitration was introduced by the Arbitration and Conciliation (Amendment) Act, 2015, to address delays and inefficiencies in traditional arbitration processes. Key features include:

- **Time-Bound Resolution**: The arbitrator must deliver the final award within six months of the dispute being referred.
- **Sole Arbitrator**: Parties appoint a single arbitrator with mutual consent.
- **Simplified Procedures**: Relies primarily on written submissions; oral hearings are conducted only when necessary.

Fast-track arbitration is governed by **Section 29B** of the Act and is particularly effective for commercial and trade disputes requiring speedy resolution.

Institutional Arbitration

Institutional arbitration involves resolving disputes through established arbitral institutions, which provide procedural frameworks and panels of experienced arbitrators.

- Pre-defined rules ensure consistency and efficiency.
- Expertise of arbitrators leads to better outcomes.
- Administrative support reduces delays.

COMPARISON OF 1940 AND 1996 LAWS

Under 1940 law heavy reliance was placed on the courts to ensure that arbitration proceedings are conducted in a particular manner. Under 1996 Law heavy reliance on the arbitral tribunal to ensure proceedings may continue without placing unnecessary reliance on the overburdened judiciary. Apart from this few more differences are as follows.

Features	1940 Act	1996 Act
Scope	Primarily dealt with domestic arbitration proceedings	It covers domestic arbitration, international arbitration, and the enforcement of foreign awards, aligning India with international standards.
Focus and Intent	It introduced structured processes for arbitration but faced criticism for its limitations.	A law based on the UNCITRAL Model Law, creating a unified legal framework for arbitration and conciliation.
Party Autonomy	Imposed numerous regulations and did not offer much procedural freedom to the parties.	Emphasizes party autonomy, giving them greater freedom to control the arbitration procedure.
Judicial Intervention	The court played a central role. Allowed wide judicial discretion and extensive	Aims to limit judicial interference, empowering the arbitral tribunal to manage the proceedings

	court Oversight in arbitration proceedings.	with greater autonomy and reducing reliance on courts.
Role of Arbitrators	Arbitrators were strictly adjudicators of disputes.	Recognized arbitrators as potential conciliators, allowing them to encourage settlement through conciliation or mediation during the proceedings.
Awards	Did not mandate reasons for an award unless parties agreed.	Requires the arbitral tribunal to give reasons for its award, minimizing judicial interpretation and clarifying the decision-making process.
Appointment of arbitrators	In case of disputes, Parties had to approach the civil court	In case of parties appointed arbitrator fails to do within a specified period the chief Justice of the high court appoints arbitrators
Conciliators	Did not recognize arbitrators as conciliators	Recognized arbitrators as conciliators.

A UNCITRAL MODEL LAW

It is a non-binding legislative text created by the **"UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW"** on 21st June 1985.

A UNCITRAL model law provides a template for national governments to adopt into their own laws, standard zing rules for areas of international trade like arbitration, e-commerce and mediation.

These model laws aim to modernize and Harmonize national legislation, which promotes global trade and investment by creating consistent, predictable Legal frameworks for businesses operating across borders. A Model Law is not binding by itself but is designed to be adopted (with or without modifications) by individual countries into their national legislation.

Key Features of UNCITRAL Model Law

1. **Scope**: Applies to international commercial arbitration.

2. **Party Autonomy:** Parties are free to choose the arbitration rules, place, language, and procedure.

3. **Minimal Court Intervention:** Courts have limited powers and cannot interfere except where specified.

4. **Enforceability**: Awards under this law are binding and enforceable like a court decree.

5. **Equality and Fair Hearing:** Both parties must be treated equally and given a full opportunity to present their case.

6. **Arbitration Agreement:** Must be in writing (can include electronic communication).

7. **Composition of Arbitral Tribunal:** Parties are free to decide the number and method of appointing arbitrators.

8. **Interim Measures:** Arbitral tribunal can order interim reliefs (added in 2006 amendment).

Adopted in: Over 80 countries, including key jurisdictions like Singapore, India, Canada, Australia, and Germany.

EXPERT DETERMINATION :

"**Expert determination**" is a form of **alternative dispute resolution (ADR)** in which a **neutral third party (the "expert")**—with expertise in the subject matter—**makes a binding or non-binding decision** on a specific issue, usually technical or specialized in nature.

- It is a **contractual mechanism** often used to resolve disputes or valuation issues that involve technical expertise (e.g., accounting, engineering, IT, intellectual property).

- The parties **agree in advance** (often in a contract clause) that an expert will decide a matter if a dispute arises.
- **Appointment**: An expert is appointed, either mutually or through a nominating body (e.g., RICS, ICAEW).
- **Procedure**: The expert reviews submissions, conducts inquiries, and often doesn't hold hearings.
- **Decision**: The expert issues a determination, which is binding (if agreed beforehand).

Scope

- Valuation of assets or shares
- Pricing adjustments in M&A deals
- Construction disputes over technical standards
- IP licensing terms
- Accounting disputes, e.g., earn-out clauses
- IT and software issues requiring deep technical knowledge.

Key Benefits

- Faster and cheaper than litigation or arbitration
- Confidential
- Expert has domain-specific knowledge
- Less adversarial

“Any dispute arising in connection with the calculation of the purchase price shall be referred to an independent expert appointed by agreement between the parties. The expert’s decision shall be final and binding on the parties.”

EXTENT OF JUDICIAL INTERVENTION :

Judicial intervention in arbitration refers to the extent and circumstances under which courts can interfere in the arbitration. While arbitration is designed to be a private, autonomous, and efficient alternative to court litigation, courts may still play a supportive or supervisory role in certain situations.

1. **Legal Framework**
   The extent of judicial intervention is typically governed by national arbitration laws and international conventions.
   Key legal instruments includes
- UNCITRAL model law

- New York convention on the recognition & enforcement of foreign arbitral awards.
- National laws.

2. **Situations where judicial intervention is allowed**
   Courts may intervene in arbitration under limited & well defined circumstances, such as

- **Before arbitration :**

- Appointment of arbitrators :If parties fail to appoint arbitrators as per agreement, courts can step in.
- Determination of Arbitrability:Courts may decide whether a dispute is arbitrable (e.g., criminal matters, family disputes are usually not arbitrable).
- Validity of Arbitration Agreement: Courts may examine if a valid arbitration agreement exists when one party challenges it.

- **During Arbitration Proceedings:**
  - Interim Measures: Courts may grant interim relief (e.g., injunctions, protection of assets)
  - Assistance in Evidence Collection: Courts can assist in gathering evidence if arbitral tribunal lacks power or needs judicial help.
- **Post-Award Stage**
  - Challenge to the Award (Setting Aside): A party may challenge the award on limited grounds:

a. Fraud or corruption
b. Violation of public policy
c. Incapacity of a party
d. Invalid arbitration agreement
e. Lack of proper notice or inability to present the case
f. Award dealing with matters beyond the scope of submission
g. Enforcement of Award:Courts play a role in enforcing both domestic and foreign awards.
h. For foreign awards: limited grounds to refuse enforcement (as per New York Convention).

3. **Judicial Attitude Over Time**
   - Courts globally have moved from an interventionist approach to a pro-arbitration stance.

Judicial intervention in arbitration is limited but essential to uphold the rule of law, ensure fairness, and protect parties' rights. The goal is to support rather than supplant arbitration, maintaining its integrity and autonomy.

International Commercial Arbitration :

International Commercial Arbitration is a private method of dispute resolution where parties from different countries agree to resolve their commercial disputes outside of traditional court systems, through arbitration. It is commonly used in cross-border business transactions due to its neutrality, flexibility, and global enforceability.

Definition

International Commercial Arbitration refers to arbitration involving:

- **Parties from different countries**, and
- A **commercial dispute**, typically arising from international contracts (e.g., trade, investment, construction, shipping, etc.).
- It is governed by the **arbitration agreement** between the parties and can be **institutional** (administered by an arbitration institution) or **ad hoc** (handled independently by the parties).

Key Features

a) **Neutrality**

Parties can choose a neutral venue, arbitrators, and applicable law.

It helps avoid perceived bias from local courts.

b) **Party Autonomy**

Parties have the freedom to decide:

- How the arbitration is conducted.
- The number and choice of arbitrators.
- Language and location of the proceedings.

c) **Confidentiality**

Arbitration proceedings are generally private and confidential, unlike court trials.

d) **Flexibility**

Less formal than court procedures.

Timelines and procedures can be customized by the parties.

e) **Enforceability**

Arbitral awards are enforceable in over 170 countries under the New York Convention (1958), making it much easier to enforce than court judgments.

Process of International Arbitration

Arbitration Agreement

Usually a clause in a contract where parties agree to arbitrate future disputes.

Initiation of Arbitration

One party files a request for arbitration with an institution or directly (in ad hoc arbitration).

Constitution of Tribunal

Arbitrators are appointed (usually one or three).

Hearings and Proceedings

- Parties present evidence, witnesses, and legal arguments.
- Arbitral Award
- A binding decision is made by the tribunal, enforceable internationally.