Advanced Contracts, Tendering and Public Procurement
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Arbitration Clauses in Government Contracts

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Hello, everyone. Welcome to another session on advanced contracts. In today's session, we will be looking into Arbitration Clauses in Government Contracts. We will begin by having a brief understanding of the arbitration process in India. We will then proceed to understand how arbitration clauses are drafted in government contracts.

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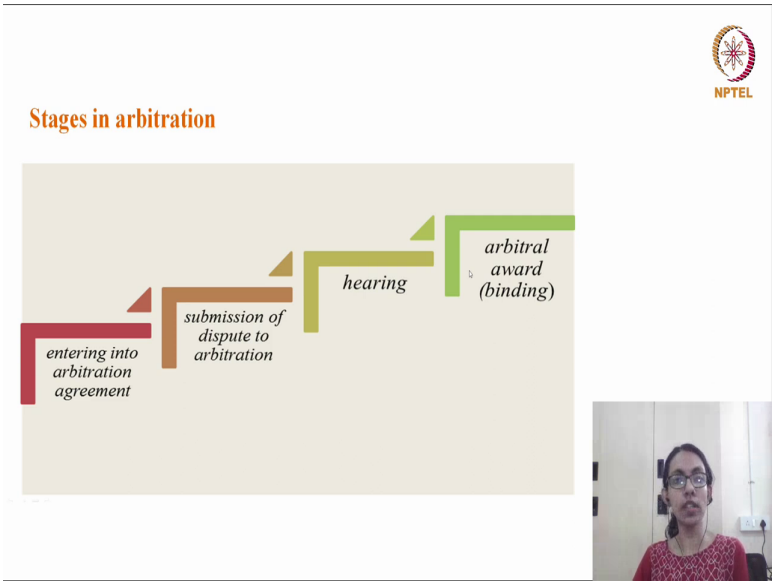
Stages in Arbitration



First, let us look into how the arbitration process is conducted in India. So, as you might know, arbitration is an alternative dispute resolution mechanism, wherein parties agree to have their dispute resolved to a neutral third party. This neutral third party called the arbitrator is chosen by the parties themselves.

So, the first stage in an arbitration process would be the parties entering into an arbitration agreement. And then, through this arbitration agreement, they submit their dispute to be resolved through arbitration. Thereafter, there is a hearing before the arbitrator, and finally, the arbitrator pronounces the award which is called the arbitral award. It is pertinent to note that this arbitral award is legally binding and is enforceable through the courts, like any other ordinary judgment that is pronounced by the courts.

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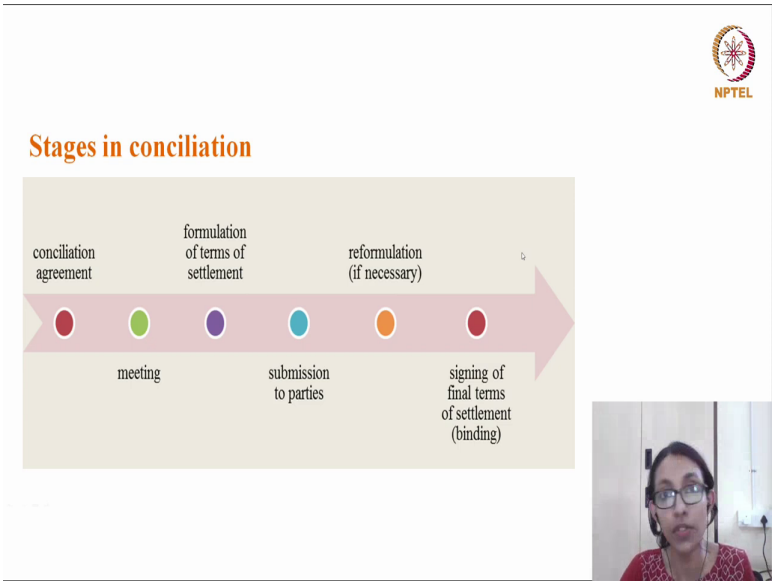
Stages in Conciliation



We also have conciliation, which is another alternative dispute resolution mechanism involving a neutral third party, who helps the parties to arrive at a settlement. The neutral third party in this case is called the conciliator. Like arbitration, the parties enter into an agreement called a conciliation agreement, and the conciliator can meet the parties either individually or together. Once the meeting with the conciliator is over, the conciliator formulates the terms of settlement and submits it to the parties.

The parties can ponder upon it and decide whether they want to adhere to these terms of the settlement. If they are not satisfied with it, they can request a reformulation of the terms of settlement to the consultant. So, as such the conciliator's report alone would not be binding on the parties. However, once they sign the final terms of the settlement, based on the conciliator's report, then it will become binding like an arbitral award.

So, now that we have looked into arbitration and conciliation, how do these two forms of alternative dispute resolution mechanisms differ from each other, and what are the points in which they diverge.

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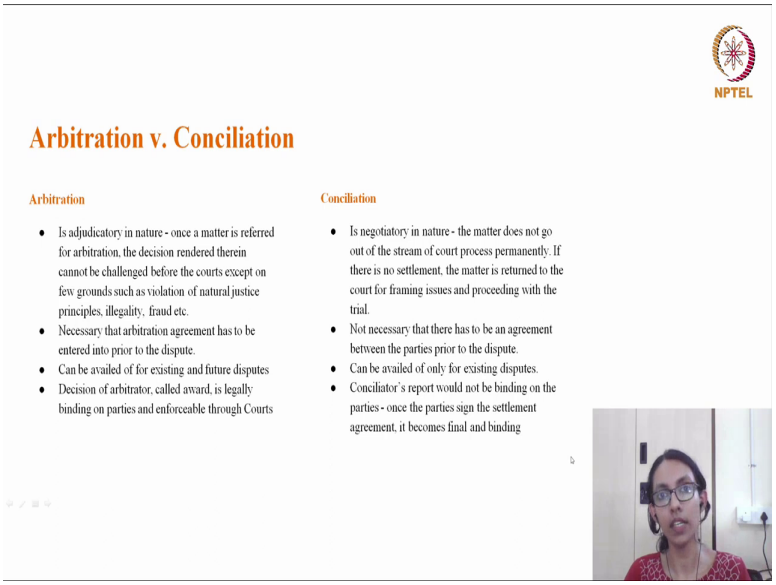
Arbitration v. Conciliation



The main difference between arbitration and conciliation lies in the nature of dispute resolution that has been followed in both of these mechanisms. In arbitration, it is adjudicatory in nature. So, once a matter is referred by the parties for arbitration, then the final settlement that is arrived at is much like a formal judgment of the court. So, it can be challenged only on very few selected grounds that are laid down in the Arbitration and Conciliation Act, such as violation of natural justice principles, fraud, violation of public policy, etc.

Conciliation, on the other hand, is negotiated in nature. So, even if the parties fail to arrive at a settlement amongst themselves, the matter automatically goes back to the court for final resolution. Secondly, when it comes to arbitration, it is very crucial that the parties enter into an agreement with each other before the dispute commences. So, once the arbitration agreement is in existence, then only the dispute can be referred for, being resolved through arbitration.

However, on conciliation, it is not necessary that there has to be an agreement before the dispute arises. There has to be a conciliation agreement between the parties. However, these agreements can be entered into even after the dispute has commenced. So, even if the litigation or arbitration is already underway, you can opt for conciliation, even though it is impendence.

Now, coming to arbitration, it can be availed, both for existing as well as future disputes. However, conciliation can be availed only for existing disputes. Then the decision of the

arbitrator, as we saw earlier, is automatically binding on the parties and is enforceable through the courts. Conciliator's report, on the other hand, could not be per se binding. It becomes binding and legally enforceable only when the parties sign the final settlement agreement.

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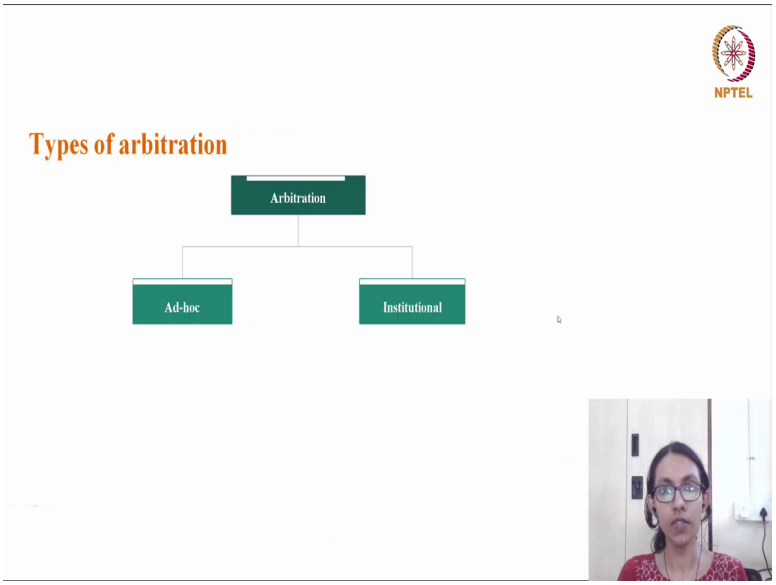
Types of Arbitration



Arbitration itself can be of two kinds, ad-hoc and institutional.

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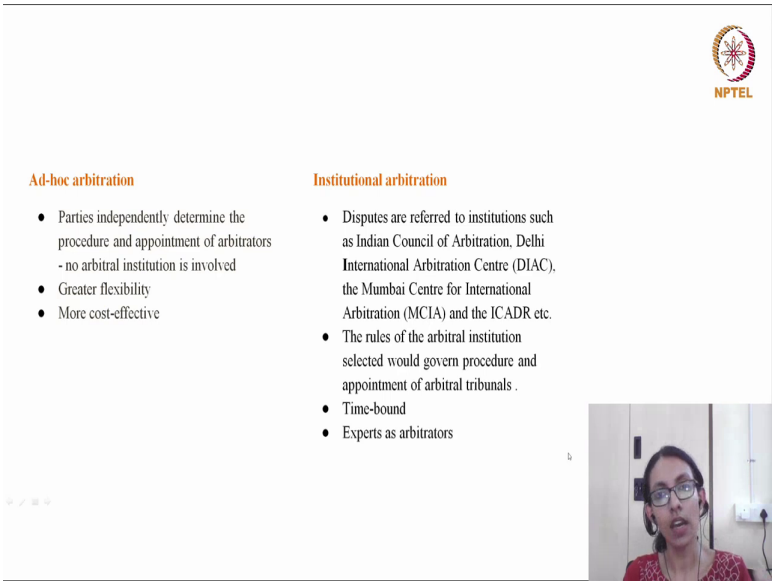

In ad-hoc arbitration the parties themselves determine the procedure that is to be followed, the number of arbitrators who have to be appointed, the manner in which the arbitrators are to be

appointed etc. And since the procedure, as well as the appointment, is determined by the parties themselves, there is greater flexibility in ad-hoc arbitration, and it is more cost-effective as compared to institutional arbitration.

In institutional arbitration, the disputes are referred to institutions such as the Indian Council of Arbitration or the Delhi International Arbitration Center, or Mumbai Center for International Arbitration, etc. And the rules of the arbitral institution would govern the procedure that is to be followed and the manner in which the arbitrators are to be selected, etc.

So, since there are well-defined rules that have been laid down, institutional arbitration is more likely to be time-bound when compared to ad-hoc arbitration. And in institutional arbitration, the rules may have provisions for appointing experts as arbitrators. But since it involves a lot of administrative and legal expenses, it can be quite expensive when compared to ad-hoc arbitration.

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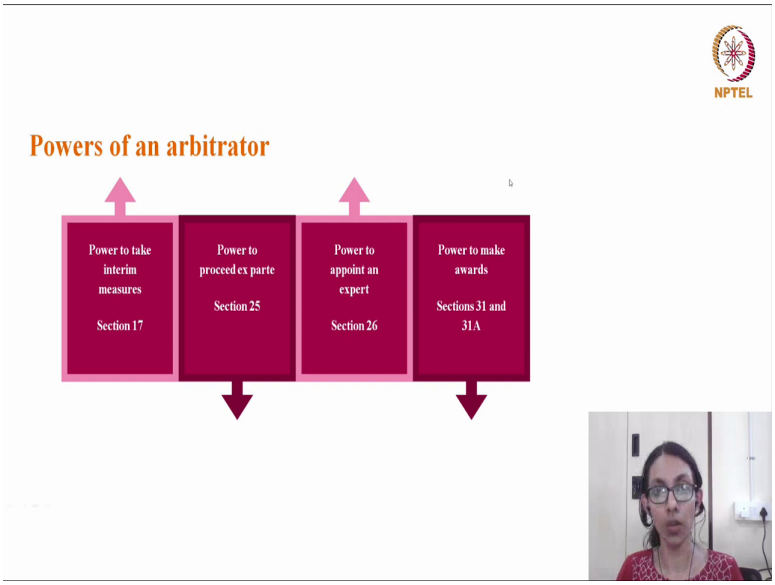
Powers of an Arbitrator



Now, we would be looking into the powers of an arbitral tribunal under the Arbitration and Conciliation Act. Firstly, an arbitrator has the power to order interim measures under Section 17. So, this section stipulates that if either of the parties makes an application in this regard, then the arbitral tribunal or the arbitrator has the power to order interim measures, such as the appointment of a guardian.

If there is a party who is a minor or who is of unsound mind, then the arbitral tribunal can order the preservation or sale of the goods or property that are the subject matter of the dispute. It can make orders that are necessary for securing the amount that is in dispute. It can make similar orders for the appointment of a receiver. So, these interim orders that are pronounced by an arbitral tribunal are enforceable just like the interim orders that are passed by ordinary courts. So, it can be enforced under the Code of Civil Procedure.

Now, the second power of an arbitral tribunal is the power to proceed ex parte. This has been mentioned under Section 25. So, this power is exercisable when one of the parties to the arbitration fails to turn up or does not provide sufficient evidence before the arbitral tribunal. In such cases, if it is a party who has failed to show up, then the arbitral tribunal can make an award in the absence of that party, or if there has been no proper furnishing of evidence, then the arbitral tribunal can proceed with the evidence that is presented before it. So, this is referred to as the power to proceed ex parte.

Now, under Section 26, the arbitral tribunal has the power to appoint experts for rendering an opinion on specific issues that it refers to such experts. It is just like taking an expert opinion. Perhaps the most important power of an arbitral tribunal is the power to make awards. This can be seen under Sections 31 and 31A of the Arbitration and Conciliation Act.

So, the power to make awards includes the power to make an interim award before terms in the final award. And it also includes the power to impose costs, the costs that are involved in the arbitrary proceedings, such as the fees of the arbitrator, the expenses incurred in producing the witnesses, then other legal and administrative expenses and the arbitral tribunal has the power to determine the amount of costs that will have to be paid and which of the parties has to pay it, in what manner it has to be paid, etc.

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Appeal from an Arbitral Award

There are very few grounds on which an appeal can be preferred from an arbitral award once it has been pronounced. And these grounds have been laid down under Section 34 of the Arbitration and Conciliation Act. If at all an appeal has to be preferred, it has to be on any one of these grounds then only the courts will consider setting aside an arbitral award.

So, subsection 1 of Section 34 lays down seven grounds on which an arbitral award can be challenged before the ordinary courts. The first ground is that if the party to an arbitration is under some incapacity, say that person is a minor or that person was of an unsound mind, etc. If that party has some incapacity, then it can be challenged on that ground. The second round is that the arbitration agreement that has been entered into between the parties themselves is invalid under the law.

Thirdly, if no proper notice is given to one party about the appointment of the arbitrator, then that party can prefer a challenge of the arbitral award before the courts. The fourth ground is that the arbitral award that is pronounced by the arbitrator contains matters, which is beyond the scope of what was submitted to the tribunal. The fifth ground is that the composition of the arbitral tribunal or the arbitral procedure that was followed in the proceeding it is different from what was envisaged by the parties under the arbitration agreement.

Then the sixth ground is that the subject matter of the arbitration, the subject matter of the dispute in itself is incapable of being settled by arbitration. We will be looking into such subject matters which are non-arbitrable in subsequent slides. And the last ground is that the arbitral award is in conflict with the public policy of India. So, the statute itself lays down three grounds on which it can be said to be conflicting public policy of India.

The first is if there is any fraud or corruption, the second is if it contravenes any fundamental policy of Indian law, and the third is if it conflicts with the most basic notions of morality or justice. If any of these three conditions are met, then it can be said that the arbitral award is in conflict with the public policy and it can be challenged on that ground.

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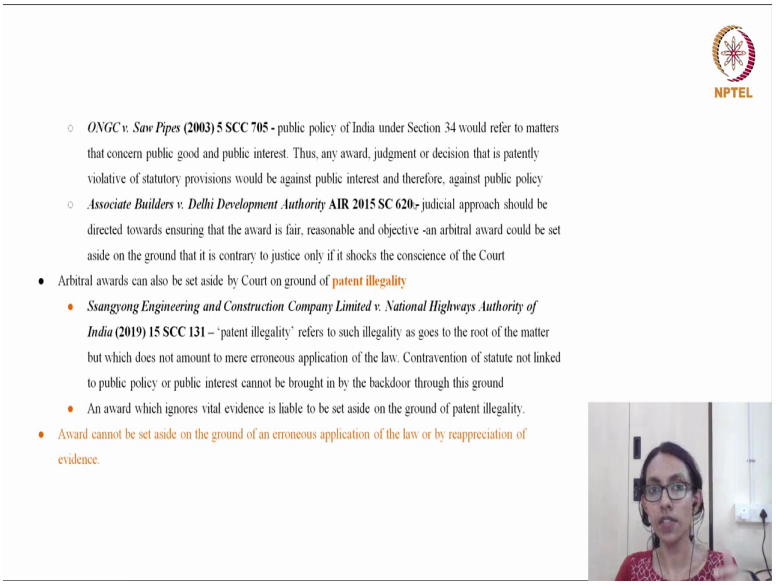

The grounds public policy of India under Section 34 has been interpreted by the Supreme Court in a significant number of judgments. In ONGC v. Saw Pipes, for instance, the Supreme Court has categorically laid out that the public policy of India under Section 34 would refer to matters that concern the public good and public interest.

So, the court itself gave an illustration as to what would amount to a matter involving public interest. Say, if any award or a judgment contravenes or fails to take into account any statutory provision that is enforced, then that would be against the public interest. And consequently, it would also be against public policy. And an arbitral award if rendered on these lines can be challenged before the courts.

Secondly, in Associate Builders v. Delhi Development Authority, the Supreme Court has stated that the arbitral award if it has to be challenged before the courts has to be so unfair and so unreasonable that it should be in a position to shock the conscience of the court. Now, apart from these seven grounds that have been laid down under Section 34, clause 1, there is an additional ground that has been mentioned under subsection 2A of Section 34, which is the ground of patent illegality.

So, arbitral awards can also be set aside by the court if there is a patent illegality on the face of the award. In Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India, the Supreme Court clearly laid down that, patent illegality refers to such illegality which goes to the root of the matter. However, this is to be distinguished from a mere error in the application of law to the facts of the case. It is a grave error which goes to the root of the matter that makes an illegality a patent illegality.

Now, merely because a particular act of a party does not fall within any of the other grounds mentioned under Section 34, the other party cannot bring it under patent illegality. Now, the Supreme Court and various High Courts themselves have laid down what can amount to patent illegality. So, to give you two examples, if perhaps the arbitral tribunal awards, an interest on the damages and the interest that is so awarded is high and very exorbitant, then that would come within the ambit of a patent illegality.

Then if the damages that are awarded by an arbitral tribunal that is based on some conjecture and not on the basis of any reasonable quantifications, then that may amount to patent legality and that can be challenged before the courts. So, these are the specific circumstances under which the arbitral award can be challenged before the courts in India.

And Section 34 clearly specifies that a party cannot approach the courts by saying that there was some error in the application of the law by the arbitral tribunal, or that if the court were to take a look into the evidence once more, it would reach a different conclusion etc. So, an erroneous application of law or a representation of evidence is not a ground for challenging arbitral awards before courts.

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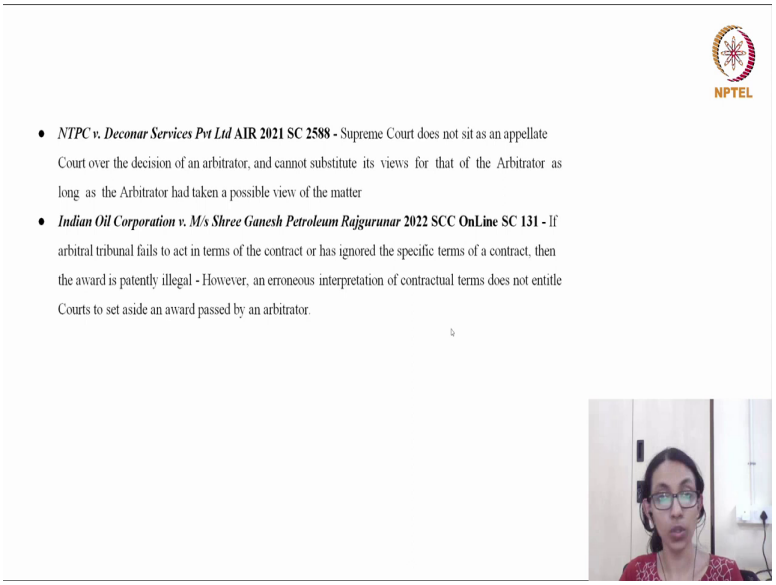

In two recent decisions, the Supreme Court has clarified the scope of the finality of an arbitral award and the situations in which the Supreme Court can intervene with the decision of an arbitration tribunal. So, in NTPC v. Deconar Services, as well as its decision in Indian Oil Corporation v. Shree Ganesh Petroleum, the Supreme Court has clearly stated that it is not an appellate authority from the decision of an arbitrator. It can intervene only in certain specified situations that are laid down in Section 34.

Moreover, as long as the arbitrator has taken reasoning or has arrived at a conclusion that is a possible one, then the court will not intervene. However, if the arbitral tribunal has, say, for instance, failed to adhere to the terms of the contract or has ignored the specific terms of a contract, then the award rendered is amenable to a challenge on the ground of patent illegality.

However, the sole fact that a different point of view could have been taken by the arbitrator or an alternative interpretation could have been preferred by the arbitrator will not be a ground for challenging an arbitral award before the courts, before the ordinary courts in India.

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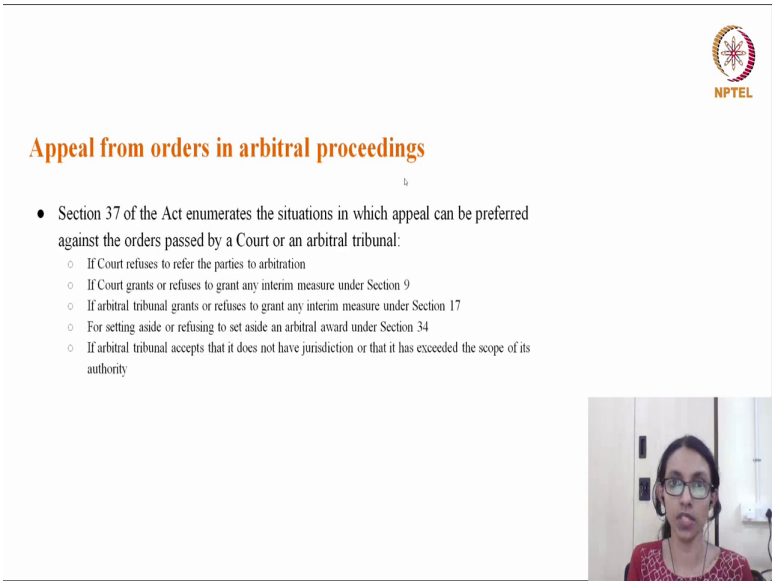
Appeal from orders in arbitral proceedings



Appeals can also be preferred from the orders that are passed during the course of arbitrary proceedings. So, certain orders may be passed by ordinary courts, and certain orders may be passed by arbitral tribunals. With respect to these, Section 37 of the Act enumerates the situations where an appeal can be preferred before the ordinary court. So, if the court refuses to refer the parties to arbitration or if the court refuses to grant any interim measure under Section 9, then an appeal can be preferred against that order before the appellate court.

Similarly, if the arbitral tribunal refuses to grant an interim measure or there is a dispute with respect to the interim measure that has been granted under Section 17, then an appeal can be preferred before an ordinary court with respect to this. An appeal can also be preferred against an order passed by an arbitral tribunal with respect to the setting aside or refusing to set aside of an arbitral award under Section 34.

Lastly, if an arbitral tribunal accepts that it does not have jurisdiction or that it exceeded the scope of its jurisdiction that was conferred on it by virtue of the arbitration agreement, an appeal can be preferred against this order before the ordinary court.

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Scope of the Remedies under Arbitration

Now, that we have looked into the nuances involved in arbitration, let us also try to understand the scope of the remedies that are granted under arbitral proceedings. Essentially, we will be trying to look at how the remedies and release that are granted under arbitral proceedings are fair when compared to the remedies that are granted by ordinary courts in ordinary adjudicatory proceedings.

Firstly, what needs to be borne in mind is that an arbitral award once pronounced by an arbitral tribunal is enforceable on its own, it need not be separately validated by the high courts or the Supreme Court. Secondly, an arbitral award is binding only on the parties to a particular arbitration agreement. It is not binding on third parties.

The third aspect that needs to be borne in mind is that an arbitrator is strictly bound by the terms of the arbitration agreement. The procedure that has to be followed the manner in which things are to be done all of that is strictly to be done according to the terms of the arbitration agreement. He cannot go beyond the scope of the arbitration agreement.

Fourthly, the interim orders that are passed by an arbitral tribunal are at par with the interim orders that are passed by an ordinary court. So, it is as legally binding and as legally enforceable as an ordinary interim relief that is passed by the High Courts or the Supreme Court.

Lastly, the arbitrators at present can determine whether or not a party to a dispute is entitled to punitive damages if the provision for that regard is specifically provided in the arbitration agreement. The scope of granting of punitive damages by ordinary courts is yet in dispute. However, as far as arbitrary proceedings are concerned by judgment of the Delhi High Court has established that an arbitrator can award punitive damages if the arbitration agreement has a particular clause mandating that.

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Challenges while drafting arbitration clauses

Before moving into the topic of the drafting of arbitration clauses, it is useful to understand some of the challenges that are associated with the drafting of arbitration clauses. Firstly, a situation can emerge when the parties to an arbitration agreement cannot agree on the appointment of an arbitrator, or the parties may have nominated their arbitrators but there might be a deadlock with regard to the appointment of the third arbitrator. In such situations, the commonly followed procedure is that the Supreme Court or the High Courts intervene, and they may either appoint a person to be the arbitrator or they may refer the matter to an arbitral institution.

Another common challenge that is associated with arbitration clauses is the issue of seat versus place of arbitration. Now, this is more clearly observed with respect to International Commercial Arbitration which is where one of the parties to an arbitration agreement is a foreign entity. In such situations, it is very common for the parties to use phrases like seat, place and venue of

arbitration. However, each of these may not mean the same thing. They cannot be used interchangeably, even though it is usually used like that.

So, in such situations, after a long series of judgments, the Supreme Court has categorically laid down in Mankastu Impex v. Airvisual Limited that the mere usage of a place of arbitration or seat of arbitration or venue of arbitration cannot clearly indicate where is the place of arbitration that is intended by the parties. That has to be inferred by looking into the other terms of the contract and the intention of the parties while they entered into the agreement.

So, the seat of the arbitration, that is the place where the arbitration will finally take place, that has to be looked into by referring to the other terms of the contract as well. So, if a perusal of the other terms of the contract as well as the intention of the parties revealed that a particular place is the place where the parties intended as the final resolution of the dispute, then that would be the seat of arbitration.

Another aspect that needs to be borne in mind is that there are certain aspects that are non-arbitrable. That is, they cannot be settled by virtue of arbitration. The Supreme Court has laid down the list of aspects that cannot be settled by virtue of arbitration in a case called Vidya Drolia v. Durga Trading Corporation.

In this case, the court enumerated that matters regarding the sovereign functions of a state or matters having a public interest element or matters with respect to actions in rem or matters that have the potential to infringe on a third party's rights or matters that have been specifically excluded from the purview of arbitration by any particular statute all of these non-arbitral, non-arbitrable matters, and they cannot be resolved by virtue of arbitration proceedings.

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Arbitation Clause in Government Contracts

Now, let us look into how arbitration clauses are drafted in government contracts. So, government departments usually publish a document called General Conditions of Contracts. And in this document, there would be clauses stipulating how the arbitration of disputes is to be conducted. And in a typical government contract, the arbitration clause may contain any of the following stipulations. For instance, it may contain a stipulation that certain matters would be non-arbitrable. In government contracts, it would be referred to as excepted matters.

Secondly, there may be a stipulation that the parties to the contract will have to first exhaust the dispute settlement mechanism involving the government officer before they proceed to formal arbitration. Thirdly, there may be a stipulation that disputes involving a monetary value of a certain extent will be resolved by a sole arbitrator and disputes exceeding that monetary value will be referred to a panel of arbitrators.

What is to be borne in mind is that, even if it is a sole arbitrator or a panel of arbitrators, they would be chosen from the panel comprising of government offices. Let us see some practical examples in order to understand this better.

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These are the general conditions for contract and construction works that have been published by the Central Public Works Department in the year 2020. Let us look into the arbitration clause that has been formulated in these general conditions for a contract. So, firstly, it can be seen that there is a stipulation in this arbitration clause that the parties to the dispute have to first approach a Disputes Redressal Committee, and only after 30 days have elapsed from the decision of this Disputes Redressal Committee that parties can opt for arbitration.

Secondly, it clearly states that for disputes involving rupees 20 crore or less than that, there will be a sole arbitrator and this sole arbitrator will be appointed by the Chief Engineer or Additional Director General or Special Director General in this department. And if the dispute involves more than 20 crores, then there will be a panel of three arbitrators. Each party would get an opportunity to appoint one arbitrator and the two arbitrators who have been nominated like that would appoint the third arbitrator.

However, the conditions for the contract also clearly stipulate that all the arbitrators have to be experienced in handling public works engineering contracts, and should have worked with the government at the level of chief engineer or above.

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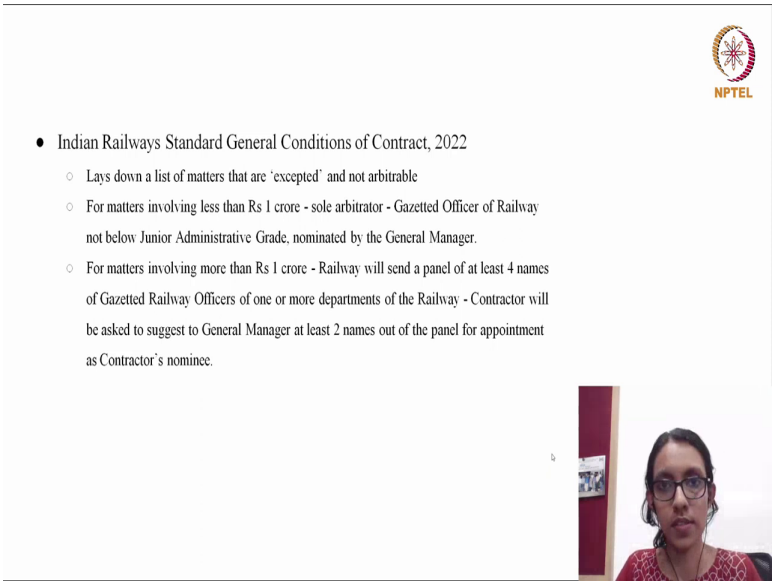

Similarly, these are the general conditions of the contract that have been published by the Indian Railways for the year 2022. If we look at the arbitration clause in the general conditions of the contract, we can find that there is a list of matters that are excepted matters, which means that arbitration cannot be preferred in these areas.

Secondly, the conditions of the contract also stipulate that if the matter involves less than rupees 1 crore, then there would be a sole arbitrator, who will be appointed by the General Manager. This sole arbitrator would usually be a gazetted officer of the railway, who is not below the rank of junior administrative grade. And if they matter, in dispute involving more than rupees 1 crore, then the railway will send a panel of four names of gazetted railway officers.

And out of these four names, the contractor can nominate two names and out of these two people, one person would be chosen as the arbitrator representing the contract. The remaining members of the panel will be appointed by the General Manager, who will also be government employees.

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After looking into the arbitration clauses that have been drafted in government contracts, do you think there is a legal issue involved in the way in which these clauses have been drafted? Do you think it can be challenged before the courts, if so on what ground?

As we saw, regardless of whether it is a sole arbitrator or whether it is a panel of arbitrators, it comprises persons who have served in the government departments. So, naturally, the person who enters into a contract with the government, who is the contractor, will feel that the arbitrator would be biased against him, or that the arbitrator, because he is a government employee, would be likely to favor the government, while resolving the dispute in arbitration.

Precisely on this ground which is called 'apprehension of bias on the part of the arbitrator', there have been numerous challenges to arbitration clauses that have been drafted in government contracts before the courts. In the subsequent slides, we will be looking into how the judiciary has responded to these challenges.

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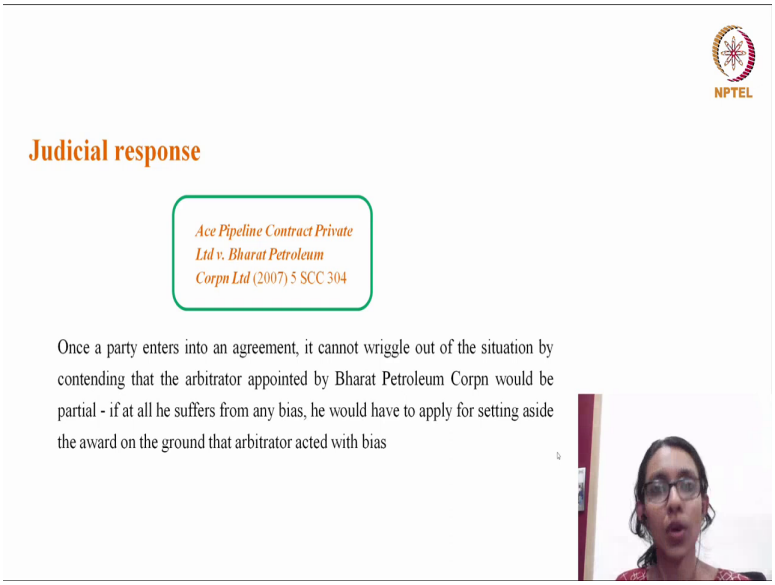
Judicial Response



One of the earliest cases where the Supreme Court decided on the matter of bias on the part of the arbitrator was Ace Pipeline Contract Private Limited v. Bharat Petroleum Corporation. In this case, the arbitration clause that was entered into between the parties stated that in the event of a dispute, the matter would be settled by arbitration and that the arbitration would be conducted by a sole arbitrator. And this sole arbitrator would be the Director of the Marketing Division of Bharat Petroleum Corporation.

So, Ace Pipeline Contract challenged this arbitration clause before the Supreme Court. And the Supreme Court stated that, once the parties have entered into an arbitration agreement with full knowledge and with entire information as to who the arbitrator would be and the manner in which he is to be appointed, then the opposite party cannot challenge the appointment of the arbitrator.

So, in this case, the court clearly stated that, if the Ace Pipeline Contract had an apprehension of bias, they would have to apply for setting aside the arbitral award, and that they cannot challenge the appointment of the arbitrator per se, as they had agreed to it with full knowledge before entering into an arbitration agreement.

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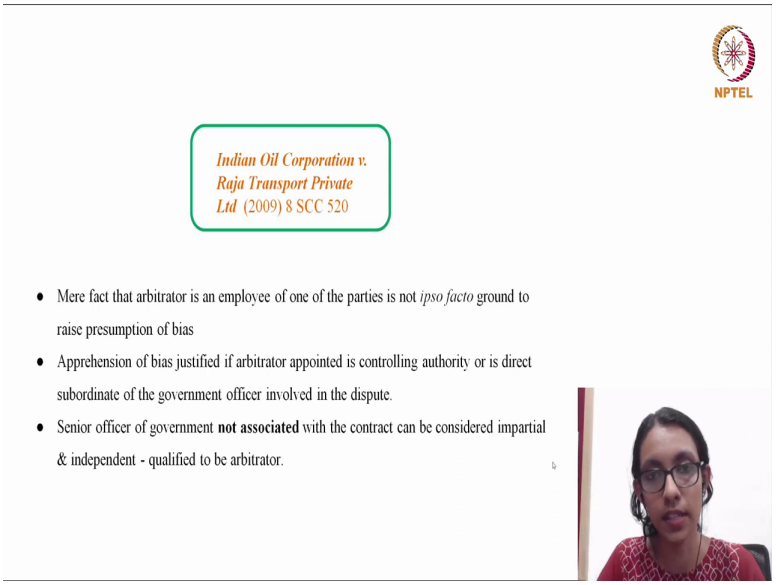

In Indian Oil Corporation v. Raja Transport Private Limited also we find a very similar arbitration clause. In this case also the arbitration clause stated that, in the event of a dispute, the matter would be resolved by a sole arbitrator, who will be the Director of the Marketing Division of Indian Oil Corporation. When this was challenged before the Supreme Court, the Supreme Court stated that merely because the arbitrator is an employee of the government cannot lead to a presumption of bias on the part of the arbitrator.

However, there can be an apprehension of bias if the arbitrator who is appointed stands in such a relationship that he is a controlling authority or on the contrary he is subordinate to the government officer who is involved in the dispute. So, in such cases, because of the nature of the relationship, there can be an apprehension of bias. In the ordinary case, there cannot be such a presumption of bias.

Moreover, it was also stated that as long as the arbitrator who is appointed is a senior officer of the government, who has no association with the contract,he can be set to be an impartial and independent arbitrator, and such cases can be permitted.

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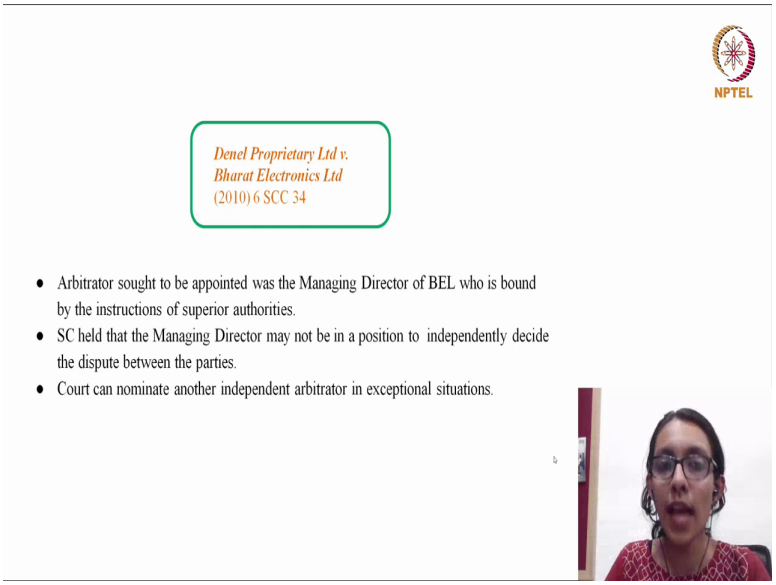

We can see a direct impact of the decision of the Supreme Court in Indian Oil Corporation in this case called Denel Proprietary Limited v. Bharat Electronics Limited. In this case, the Supreme Court held that the arbitrator being a Managing Director of Bharat Electronics Limited might not be in a position to be independent and impartial while resolving the dispute, because he is bound by the instruction of the superior authorities who are involved in the government department.

So, the Supreme Court laid down the ratio that in such cases in exceptional situations, the court can intervene and nominate the arbitrator, who is to resolve the disputes between a government entity and a private entity in government contracts.

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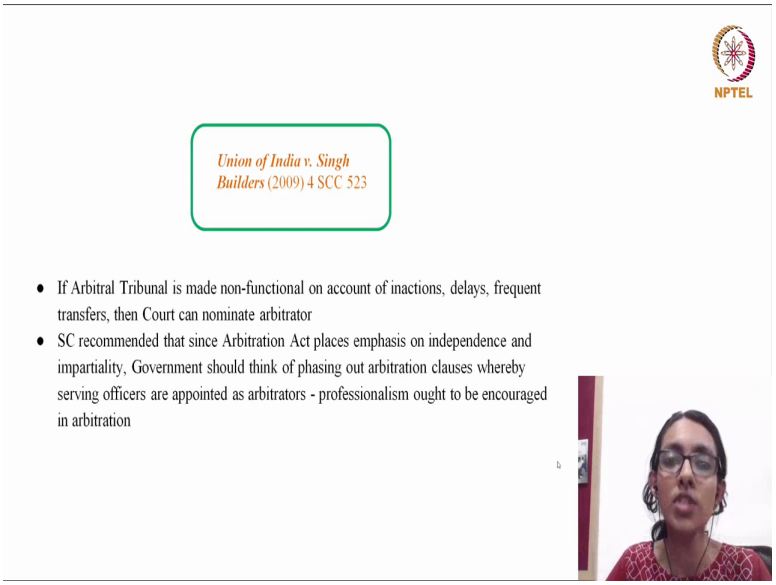

We all know that transfers are very common in government departments. So, what would happen if the arbitrator who is to resolve the disputes by constituting an arbitral tribunal has been transferred, and no other person has been appointed to fill in that vacancy? In such situations, the arbitral tribunal cannot be made redundant and the court will intervene in order to ensure that arbitrators are appointed and that the arbitrary proceedings are being conducted smoothly.

So, in cases of inaction or delay on the part of government entities in nominating an arbitrator, the courts will intervene and nominate the arbitrator who is to resolve the disputes. This has been held in the case of Union of India v. Singh Builders. This case is also significant for another reason, because the Supreme Court, in this case, made a very pertinent observation.

And it recommended that since the Arbitration Act places a lot of emphasis on the independence and impartiality of the arbitrator, the governments should think of doing away with this practice of nominating their own officers as the arbitrator and should come up with an alternate mechanism. The court gave an opinion that this would help in ushering in a lot of professionalism in the way in which arbitration is conducted in government disputes.

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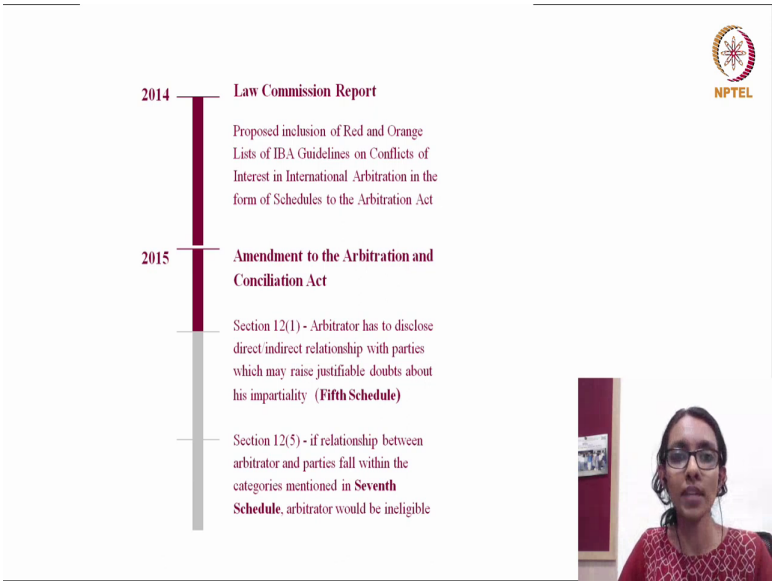

A very similar recommendation can also be found in the Law Commission's Report that came out in 2014. So, the International Bar Association has come up with certain guidelines on the conflicts of interest in international arbitration and these guidelines have something called the red and orange lists. These two lists enumerate the categories of the relationship between the arbitrators and the parties, which can raise the presumption of bias on the part of the arbitrator.

So, the Law Commission in its report in 2014 proposed the inclusion of something similar to the red and orange lists as scheduled to the Arbitration and Conciliation Act. And taking cue from this report in 2015 an amendment was made to the Arbitration and Conciliation Act. And according to this amendment, Section 12 Clause 1 states that the arbitrator has to disclose any direct or indirect relationship with the parties, which may raise justifiable doubts about his impartiality. And the kinds of relationships that will have the potential to raise such doubts about impartiality have been enumerated in Fifth Schedule to the Arbitration and Conciliation Act.

Similarly, there is also Section 12 Clause 5, which states that if the relationship between the arbitrator and the parties fall within any of the categories that have been specified in seventh schedule that would also make the arbitrator ineligible. The difference between the categories that have been enumerated in fifth schedule and seventh schedule is that the parties can choose to waive the categories of relationship that are enumerated in the Seventh Schedule. So, if they

choose to waive that, then even if the relationship falls within the ambit of Seventh Schedule that would not be the arbitrator ineligible to conduct the arbitral proceedings.

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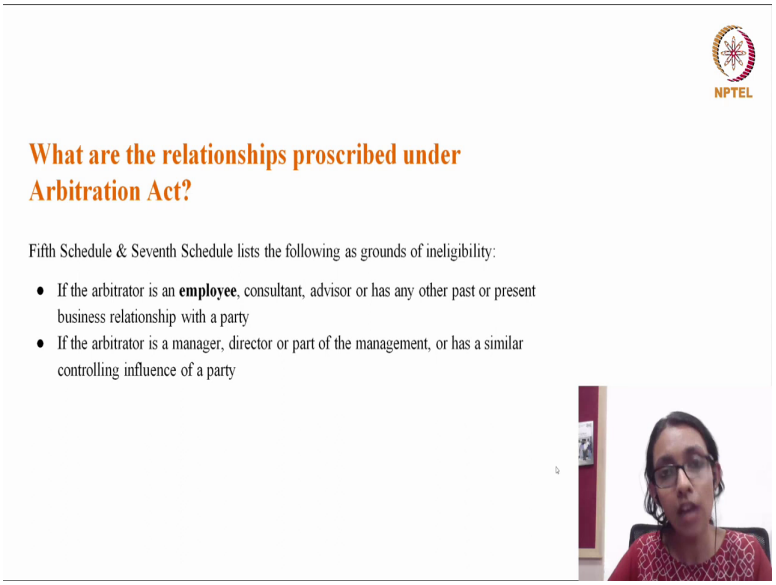
Proscribed Relationships under Arbitration Act



One of the grounds that can be found in both the Fifth Schedule as well as the Seventh Schedule is the arbitrator being an employee of one of the parties to the dispute. Another ground is the arbitrator being a Manager, Director or part of the management or having any other similar controlling influence over a party. These two grounds would make an arbitrator ineligible for conducting arbitral proceedings.

So, how has this important change which has been effected through the 2015 amendment fair for the government contracts, let us see.

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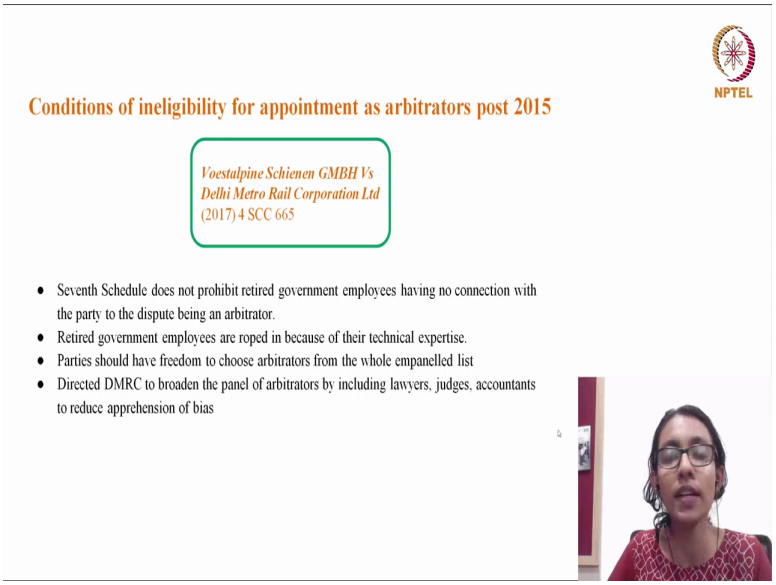
Conditions of ineligibility for appointment as arbitrators post 2015



In Voestalpine Schien GMBH v. Delhi Metro Rail Corporation, this precise issue of hiring retired government employees as arbitrators was challenged before the Supreme Court. However, the Supreme Court went on to rule that the seventh schedule only prohibits persons who are currently within the employment of any of the parties to the dispute from being appointed as arbitrators. It does not prohibit retired government employees who have no connection whatsoever with the party to the dispute from being roped in as arbitrators.

Moreover, the court also stated that it might be necessary to rope in retired government employees as arbitrators because of the rich technical expertise that they have which might be necessary for resolving the disputes that arise out of government contracts. At the same time, the court also issued a direction to the Delhi Metro Rail Corporation to consider appointing persons from diverse backgrounds such as lawyers, judges and accountants into the panel of arbitrators so that the opposite party's apprehension of bias can be reduced.

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In a 2019 decision called Government of Haryana PWD branch v. G.F. Toll Road, the Supreme Court extended this principle to Fifth Schedule as well. So, the court stated that the Fifth Schedule bars only current employees from being employed as arbitrators. It does not prohibit roping in a previous employee that is retired government servant as an arbitrator.

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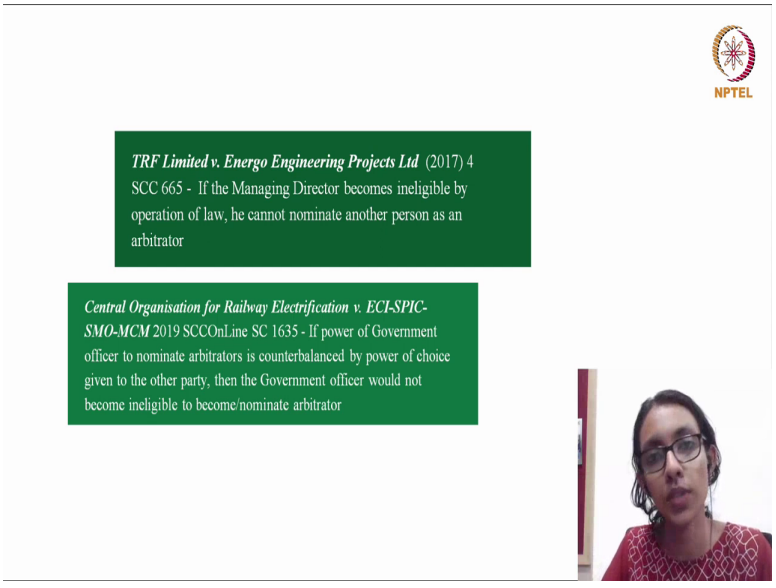

In some cases, the arbitration clauses would state that the government officer would become an arbitrator in the case of a dispute or that the government officer can nominate another person to become an arbitrator. However, if the government officer himself becomes ineligible to be

appointed as an arbitrator on account of any conflict with the Fifth Schedule or Seventh Schedule for instance, then his power to nominate another arbitrator would also stand desalt. This was laid down by the Supreme Court in TRF Limited v. Energo Engineering Projects. In this case, it was held that, if the Managing Director becomes ineligible because of conflict with any law, then he cannot nominate another person as an arbitrator.

Another interesting interpretation that was put forth by the Supreme Court was in this case called Central Organization for Railway Electrification v. ECI. So, in the case of railway contracts as you may recall the contractor gets the option to choose two names out of a panel of four arbitrators. And out of these two names which have been proposed by the contractor, the General Manager of the Railways selects one arbitrator. This person shall be the representative of the contractor. The remaining arbitrators in the panel shall be chosen by the government entity.

However, the Supreme Court in this case interpreted that as long as the contractor gets to choose two parties out of the names of four parties, which counterbalance the power that the government entity has in appointing the rest of the arbitrators in the tribunal. So, as long as the power of the government officer to nominate arbitrators is counterbalanced by an equal choice that is given to the contractor then there is no occasion for the arbitrator to become ineligible.

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In order to tackle the problem of apprehension of bias that arises out of government contracts, the States of Maharashtra and Karnataka have proposed an alternate strategy. These states have

recommended conducting arbitral proceedings through arbitral institutions whenever there is a dispute that arises out of government contracts.

This might be a better strategy because as we saw earlier, in institutional arbitration, there are clearly laid down procedures that are to be followed while conducting arbitral proceedings. It also has well-delineated rules with respect to the appointment of arbitrators. So, this will be a more helpful way of resolving disputes that arises out of government contracts. And it is a strategy that can be emulated.

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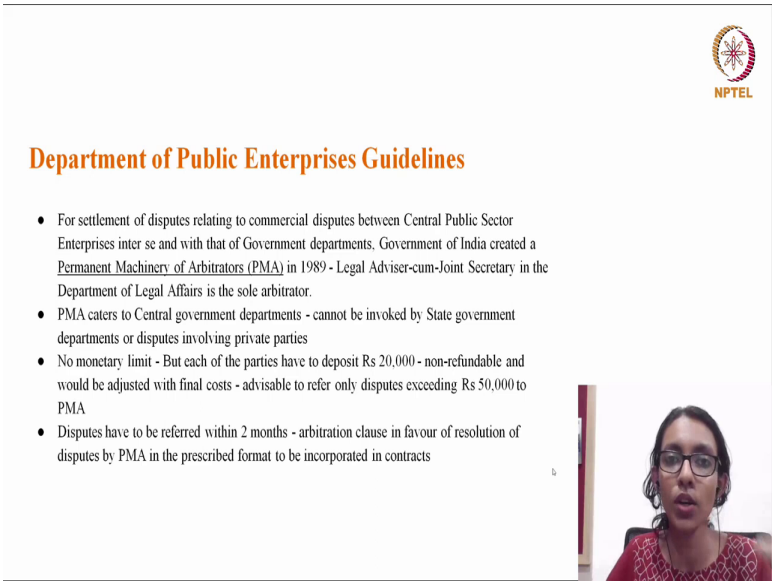
Department of Public Enterprises Guidelines



The Department of Public Enterprises has also come out with certain guidelines for resolving disputes that arise out of government contracts through arbitration. These guidelines are applicable only with respect to the commercial disputes that arise between different central public sector enterprises or between one central public sector enterprise and another central government department.

In certain cases, it can also be extended to disputes involving a central government department on the one hand and a state government department on the other hand. It cannot be extended to any other cases. And these guidelines have created a Permanent Machinery of Arbitrators (PMA). The Legal Adviser-cum-Joint Secretary of the Department of Legal Affairs would be the sole arbitrator in this machinery of arbitrators.

And this PMA stipulates that each of the parties has to deposit rupees 20,000 at the commencement of the arbitration. This will not be refunded. However, it will be adjusted towards the final cause that has to be bound by the parties. Although there is no strict monitory limit that has to be adhered to, it states that it is advisable only to refer disputes wherein rupees 50,000 or more is involved only those kinds of disputes need to be referred to the Permanent Machinery of Arbitrators.

And the guidelines stipulate that this dispute that has arisen under a government contract should be resolved within two months. It also recommends that an arbitration clause that is stipulated under the guidelines, an arbitration clause in the same format has to be included within the general conditions of contractor each government entity.

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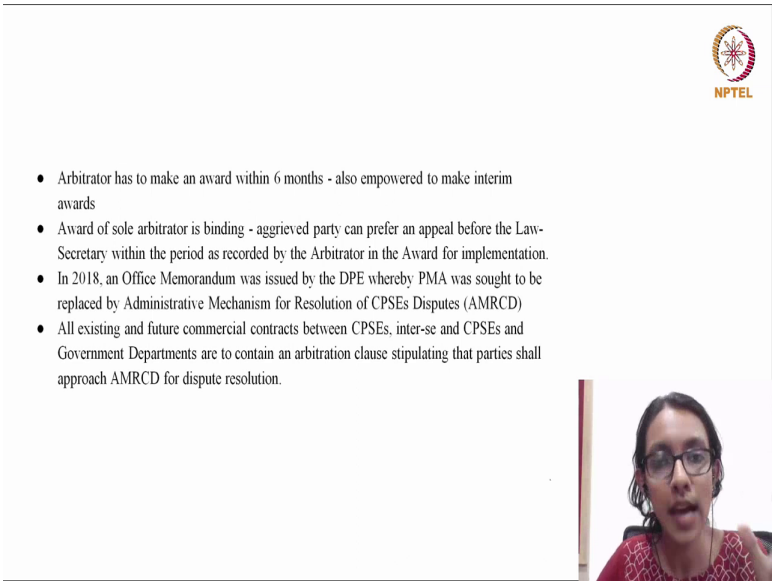

The time limit of six months has been prescribed under these guidelines before which the arbitrator has to make an award. And the award of an arbitrator is binding, if at all an appeal has to be made, it has to be preferred before the Law Secretary. In the year 2018, the Department of Public Enterprises issued an office memorandum which repealed this permanent machinery of arbitration. In the place of this permanent machinery, another mechanism was proposed. This is called the Administrative Mechanism for Resolution of Central Public Sector Enterprises Disputes or the AMRCD.

So, now, all the existing as well as future commercial disputes between central public sector enterprises and between central public sector enterprises and other government entities will have to be resolved through this administrative mechanism for resolution or CPSE disputes.

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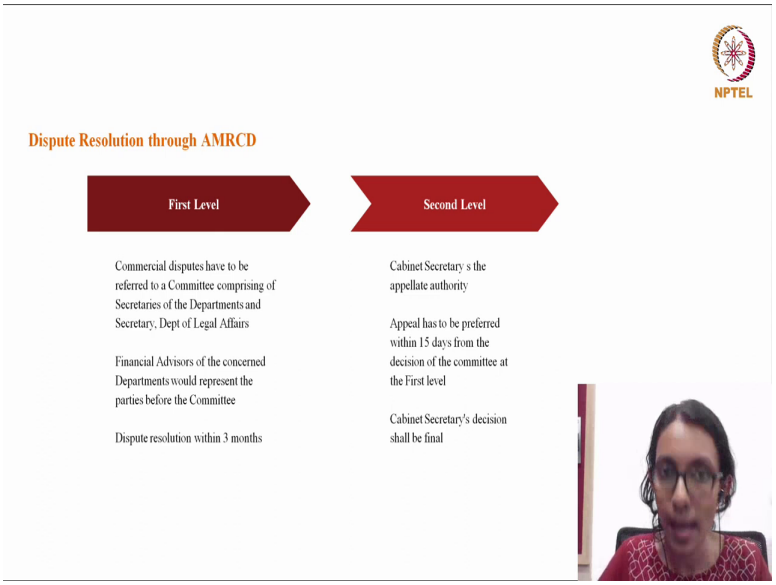
Dispute Resolution through AMRCD



The AMRCD envisages a two-step process for the resolution of disputes arising out of government contracts. At the first level, the commercial disputes will be referred to a committee. This committee would comprise the secretaries of the departments from which the dispute has arisen and the secretary of the department of legal affairs.

The financial advisors of the departments which are involved in the disputes would be representing the departments in the committee. And the first level of dispute resolution has to be completed within three months. If at all an appeal has to be preferred, it has to be preferred before the cabinet secretary who is the appellant authority. This is the second level.

And this appeal from the decision of the committee to the cabinet secretary has to be preferred within 15 days. And the cabinet secretary's decision which is the decision of the second level shall be final and binding for the parties.

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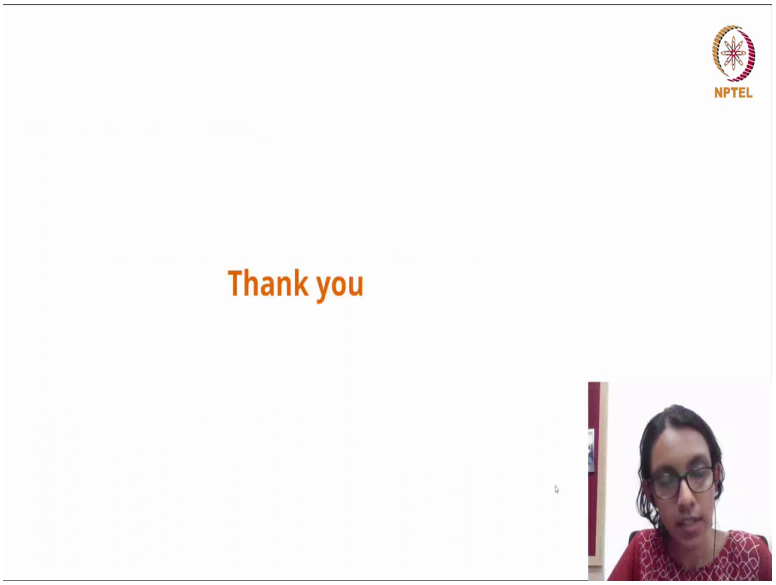

With that, we have come to an end of this session on advanced contracts. Thank you for listening.