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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A STUDY ON THE TYPES OF ARBITRATION IN THE INDIAN LEGAL FRAMEWORK

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Abstract:

Alternative Dispute Resolution (ADR) provides an alternate route to dispute resolution, as contradicted to traditional litigations. Arbitration is one mode of it. It is an easier and faster way to settle differences of opinion or contentions between parties. Arbitration serves as a widely acceptable tool to pacify disputes mainly in commercial sectors and social matters. Disagreements or breach in contractual relations are impressively determined through this courteous technique. Advantages of arbitration are manifold. It reduces possibility of interventions by Courts and facilitates swift disposal of issues. It is a cordial mode of disagreement resolution. Moreover, it is less expensive than other traditional actions. Moreover it comprehensively ensures a fair and just process through appointing impartial arbitrators. Arbitration is accepted worldwide as a popular mode of alternative dispute resolution mechanism. India's espousal of this concept dates back to 1899 when the earliest statute for arbitration was enacted. With time the law for arbitration has evolved, particularly so following the UNCITRAL Model Law of the United Nations. The Arbitration and Conciliation Act, 1996² is the Principal Act that governs the matters of arbitration and conciliation in India. It has gone through changes to include new developments and to make the law more effective. It endorses various types of arbitration in India, namely, domestic arbitration, international commercial arbitration, ad hoc arbitration, institutional arbitration, fast track arbitration and statutory arbitration. This paper is aimed at studying the various facets of the types of arbitration followed in India with special reference to the Indian legal framework in that respect.

Keywords: Alternate Dispute Resolution, arbitration, commercial, dispute, social, UNCITRAL.

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² The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

Introduction:

Arbitration is one of the several modes of Alternative Dispute Resolution (ADR). Black's Law Dictionary defines arbitration as a method of resolving disputes which includes two parties and a neutral third party whose decision is binding on both parties. It is a quick and an amicable method of dispute resolution, as contradicted to the traditional and lengthy process of litigation. It saves time and cost of the parties involved. There are many modes of ADR, like arbitration, conciliation, mediation, negotiation and judicial settlements inclusive of Lok Adalats. However, arbitration is one popular mode of ADR practised by parties in dispute. India is no exception to it. In India, arbitration is adopted across all sectors, mostly in commercial sectors and social life, as an affordable and convenient way for dispute resolution. Many advocates proposed using ADR as an adjunct to federal and state court systems³.

The first legislation to govern arbitration in India was the Indian Arbitration Act, 1899. This statute applied only in the Presidency towns of Madras, Bombay and Calcutta. Provisions on arbitration were included in the Second Schedule of the Code of Civil Procedure, 1908⁴. Following these, Arbitration Act, 1940⁵ was created as a complete law on arbitration. The Arbitration Act, 1940 was majorly based on The English Arbitration Act, 1934. The Arbitration Act, 1940 contained provisions for only domestic arbitration. The Arbitration (Protocol and Convention) Act, 1937⁶ and the Foreign Awards (Recognition and Enforcement) Act, 1961⁷ addressed the matter of implementing foreign awards and these laws were brought into effect to honour the Geneva Protocol and Convention.⁸ Afterwards, the United Nations adopted the 1985⁹ Model Law on International Arbitration, which was designed by the United Nations Commission on International Trade Law (UNCITRAL). It was framed in order to bring uniformity for the Member Countries in matters of arbitration. The Arbitration and Conciliation Act, 1996¹⁰ was passed by the Indian Parliament in accordance with the UNCITRAL Model Law. This Act is now the governing statute for ADR in India and Arbitration and the various facets of it are provided for in this particular Act. After enactment of the Act in 1996, it has

³ Harry T. Edwards, "Alternate Dispute Resolution: Panacea or Anathema?" 99 *Harvard Law Review* 672 (1986).

⁴ The Code of Civil Procedure, 1908 (Act 5 of 1908).

⁵ The Arbitration Act, 1940 (Act 10 of 1940).

⁶ The Arbitration (Protocol and Convention) Act, 1937 (Act 30 of 1937).

⁷ The Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45 of 1961).

⁸ The [Geneva Convention on the Execution of Foreign Arbitral Awards of 1927](#).

⁹ The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration, 1985.

¹⁰ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

been amended in 2015¹¹, 2019¹² and 2021¹³ to incorporate significant developments in the Principal Act so that it covers most relevant aspects of ADR and can match the standards of International ADR mechanisms.

Types of Arbitration:

An issue is sent to the arbitration tribunal when parties to a dispute elect to submit their case for arbitration. Arbitration involves a quasi-judicial process and the tribunal's decision becomes binding on the parties to the dispute. In this context the rule of competence-competence is worth mentioning. It is one fundamental rule of modern arbitration and it signifies the ability of an arbitral tribunal to rule and investigate its own jurisdiction¹⁴.

The different types of arbitration are discussed as follows:

- (a) Domestic Arbitration:** The Arbitration and Conciliation Act, 1996¹⁵ has not provided a precise definition for domestic arbitration. Nonetheless, according to Section 2(2) of the Act, parties may choose to resolve their disputes through arbitration. This provision applies only inside India. Part I of the Act applies when the place of arbitration is India. Furthermore, Section 2(7) of the Act provides that when an arbitral award is made under Part I of the Act, it shall be regarded as a domestic award. Therefore, an arbitration will be referred to as 'domestic arbitration' if it is taking place in India and its award will be called 'domestic award'.

Various aspects of domestic arbitration in India:

- Appointment of Arbitrators: Under the Act, the parties to a dispute have complete freedom for agreeing upon a procedure that would appoint an arbitrator or arbitrators¹⁶. However, if the parties fail to reach such agreement, then as per Section 11(3) of the Act, when the arbitration is with three arbitrators, each party shall appoint an arbitrator and the two arbitrators shall appoint a third arbitrator. The power of the presiding arbitrator will be exercised by the third arbitrator. But if this procedure fails then the Supreme Court or High Court, as the case may be, or any person or institution designated by such Court shall make the appointment,

¹¹ The Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016).

¹² The Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019).

¹³ The Arbitration and Conciliation (Amendment) Act, 2021 (Act 3 of 2021).

¹⁴ Neil Modi, "The Rule of Competence-Competence: A Historical & Comparative Analysis Between English-Indian Law", 26 *Willamette Journal of International Law and Dispute Resolution* 75 (2019)

¹⁵ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

¹⁶ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s.11

under section 11(4). Similarly, when the arbitration will be with a sole arbitrator and the parties to the dispute fail to agree on the process of appointment, the Supreme Court or even the High Court or an organisation or a person as the Court designates, shall make the appointment, under section 11(5). Court interventions in arbitration proceedings are somehow regular in Indian system of law. So it is to be noted that an arbitrator must possess superior litigation skills¹⁷.

The exercise of power to appoint arbitrator by the Supreme Court or a High Court shall be regarded to be judicial in nature. A Seven Judge Bench of the Supreme Court in the case of *SBP & Co. v. Patel Engineering Ltd.*¹⁸ upheld this view by a 6:1 majority, i.e., appointing an arbitrator by the Supreme Court or High Court under Section 11 of the Act will be deemed to be a judicial function but not an administrative function.

- Judicial developments of domestic arbitration: The Arbitration and Conciliation Act, 1996 was framed in line with the UNCITRAL Model Rules. Rule 34 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 provides for setting aside of an arbitral award when it is in conflict with public policy of the State. Grounds for setting aside of arbitral award when it is in conflict with public policy is discussed under Section 34 of The Arbitration and Conciliation Act, 1996. It was observed by the Supreme Court in *Gherulal Parakh v. Mahadeodas Maiya*¹⁹ that it would be wise to avoid finding new leaders of public policy in the interest of social stability. In the case of *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*²⁰, the Supreme Court had a view that principles of public policy must be made subject to modification and expansion, depending upon the occasion.

The Law Ministry recommended explanation II to Section 34 of the Act, and this somehow clears the air as to what would be in conflict with public policy. If an arbitral award is such that it is contrary to the fundamental policy of India, or interests of India, or is against justice or morality, it would be regarded to be in conflict with public policy.

Now it can be argued that since arbitration is a quasi-judicial and alternative dispute

¹⁷ Aditya Sondhi, "Arbitration in India- Some Myths Dispelled" 19 *Student Bar Review* 54 (2007)

¹⁸ (2005) 8 SCC 618.

¹⁹ AIR 1959 SC 781

²⁰ AIR 1986 SC 1571

resolution mechanism, intervention of the judiciary must be limited. But if situation demands, expansion of the powers of the judiciary to enable it to intervene in the process becomes appropriate. It helps in making the arbitration process transparent by providing more clarity into it.

- Interim measures: Like the UNCITRAL Model Rules, the Arbitration and Conciliation Act, 1996²¹ provides for interim measures under Sections 9 and 17. Power to grant interim measures in domestic arbitration is given to both Courts and arbitral tribunals. But this power must be exercised either before or during any arbitration proceeding, i.e. it must be before passing of an award.
- Provision for fixation of fees: There is no particular provision for fixation of fees in The Arbitration and Conciliation Act, 1996²². The Arbitral Tribunals have got the power to fix their own fees²³. Again arbitrators often demand exorbitant fees. It was observed by the Supreme Court in *Union of India v. Singh Builders Syndicate*²⁴, that in many instances the cost of arbitration has approached or even exceeded the amount involved in the dispute or the amount of the award.
- Arbitration Clause: An arbitration clause or arbitration agreement is a part of the main contract where the parties involved agree to settle present or future disputes between them through the mode of arbitration. An arbitration clause should be drafted in such a way that it clearly specifies the procedures of each stage and also the time frame of it²⁵. Any inconsistent provision for arbitration in any contract should be construed liberally to give effect to the chief intention of the parties concerned. In the case of *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan*²⁶, the Supreme Court construed a contradictory arbitration language in the agreement liberally and stated that the parties wished arbitration to be the only method of resolving their dispute.
- Challenge of the arbitral award: An arbitral award may be set aside by the Court on an application made by a party to the dispute on any of the reasons outlined in The Arbitration and Conciliation Act, 1996 under its Section 34. For setting aside an arbitral award, however, the Court must be consulted. Grounds for such setting

²¹ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

²² The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

²³ R. K. Watel, "Flaws in the Arbitration and Conciliation Act, 1996", (Oct-Dec) *Indian Council of Arbitration* 18 (2010)

²⁴ (2009) 4 SCC 523

²⁵ Lawrence R. Mills and Thomas J. Brewer, "ADR DRAFTING TIPS" 20 *GPSolo* 15 (2003)

²⁶ (1999) 5 SCC 651

aside of an arbitral award includes incapacity of a party, invalidity of the arbitration agreement, absence of proper notice of arbitrators' appointment or of the arbitral proceedings and the party's incapacity to make his case. The Court may set aside an arbitration award if it finds that the subject matter of dispute cannot be resolved by arbitration or that the arbitration award is in conflict with public policy of India.

- Appeal: Provisions for appealable orders of Courts are contained in Section 37 of The Arbitration and Conciliation Act, 1996²⁷. An appeal from an original decree may lie to the Court on grounds like refusal to refer parties to arbitration, refusal to grant interim relief measures or setting aside of an arbitral award. There shall be no second appeal but an appeal to the Supreme Court can be made by the parties.

(b) International Arbitration and International Commercial Arbitration:

One popular dispute resolution mechanism over the past few years in matters of international contracts and investments is international arbitration. International arbitration has been particularly useful in dealing with disputes relating to technology and intellectual property.

In 1899 the Permanent Court of Arbitration (PCA) was established in Hague. The boom in overseas investments by technology corporations has led them to spend considerable amount of money and time to craft their arbitration clauses minutely. This has become necessary to protect their proprietary rights and confidentiality. There are many key factors that are important to frame concrete arbitration clause in an international arbitration. The key factors are the law that govern the substance of the dispute, role played by arbitrators and their appointment procedure, the institution of arbitration, the seat of arbitration, confidentiality clause and availability of flexibility in the process of arbitration.

Corporations are forced to rely heavily on arbitration in order to reduce the hassles of litigation and to explore expansion exposure more efficiently across the world. Resolution of cross-border disputes through international arbitration is preferred by the parties as it allows them to avoid the troubles and procedures of local courts.

Foreign arbitration and domestic arbitration function under fairly distinct norms. The non-country specific standards of ethical conduct of parties to dispute characterises this kind of arbitration.

²⁷ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

International Commercial Arbitration is covered under The Arbitration and Conciliation Act, 1996²⁸, Section 2(1)(f). According to Section 2(1)(f) of the Act, “international commercial arbitration” involves the mode of arbitration in disputes that arise out of any commercial legal relationship and one of the parties to the dispute, either natural or artificial person, is a non-Indian. International trade usages, international treaties and various national laws are some of the laws that regulate international commercial arbitration²⁹. In international commercial arbitration, the concept of institutional arbitration is relevant. It is an arbitration that is administered by an institution which is agreed upon by the parties concerned and in accordance with the institution’s rules.

Vital aspects of international commercial arbitration are:

- Forums for International Arbitrations: Among the popular international arbitral forums available for Indians are the ICC (International Chamber of Commerce), SIAC (Singapore International Arbitration Centre), LCIA (London Court of International Arbitration), ICDR (International Centre for Dispute Resolution). The American Arbitration Association’s (AAA) international wing is called the ICDR. AAA is the largest arbitration institution in the world³⁰.
- Arbitration Clause: Arbitration clause is a vital part of a contract that stipulates the cost of a dispute, type of arbitration to be adopted, number of arbitrators to be appointed, language to be followed, the governing law and the seat of arbitration.
- Seat of Arbitration: It is the location chosen by the parties as a legal place to conduct arbitration. Later on the procedural framework for the arbitration is laid down. Generally the arbitration clause contains it. The words “venue” and “seat” of arbitration denote slightly different meanings. “Venue” simply implies the physical place of the arbitration. But “seat” also involves the legal jurisdiction that governs the arbitration proceeding. In *Enercon (India) Ltd. & ors. v. Enercon GmbH & Anr*³¹, the Supreme Court observed that the “venue” of arbitration means the geographical location of arbitration selected according to the convenience of the parties in dispute. But “seat” of arbitration decides the appropriate jurisdiction.

²⁸ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

²⁹ Al-Baharna and Hussain M., “International Commercial Arbitration in a Changing World”, 9 *Arab Law Quarterly* 144 (1994).

³⁰ About ICDR-AAA, available at: <https://www.icdr.org> (last visited on March 24, 2024)

³¹ (2014) 5 SCC 1

- Commencement: Provisions for date of commencement are contained in the institution rules in case of institutional arbitration. It is usually the date when the institution receives a request for arbitration.
- Awards: Provisions for foreign awards are contained in Part II of The Arbitration and Conciliation Act, 1996³². It is the award in an international commercial arbitration under the Act and an application for its enforcement and execution is to be made once the appeal period is over.
- Interim Relief: On an application made by a party to the dispute, the Court has power to grant interim relief under Section 9 of The Arbitration and Conciliation Act, 1996³³. Interim relief measures include granting an interim injunction, appointing a receiver etc. An application for interim relief measures can be made before or during an arbitral proceeding. It can even be made after making of the arbitral award but before enforcement of the award. In *Bhatia International v. Bulk Trading SA*³⁴, the arbitration hearing was executed in Paris in line with the International Chamber of Commerce's (ICC) norms. An injunction application was filed under Section 9 of The Arbitration and Conciliation Act, 1996 for preventing any transfer or creation of any third party rights over the property. The Supreme Court held that Part I of The Arbitration and Conciliation Act, 1996, that provides interim remedies under section 9 would apply even if the place of arbitration is located outside India.
- Cost: Costs in international arbitration include tribunal or institutional charges besides additional legal fees and expenditures.
- Seat is outside India: Seat for international arbitration will be outside India if the arbitration clause specifies so.
- Challenge and Appeal provisions: The provisions that govern challenge and appeals in International Arbitration are similar to those followed in the case of a domestic arbitration.

(c) **Ad hoc arbitration**: When the parties to arbitration plan their course of action without taking resort to any institution, it is called an ad hoc arbitration. Appointment of an ad hoc arbitrator takes place by an agreement between the parties in dispute. The

³² The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

³³ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

³⁴ (2002) 4 SCC 105

procedural aspects of such arbitration are taken care of by the parties themselves. The parties are also free to choose any pre-existing³⁵ set of rules for ad hoc arbitrations. For instance, the UNCITRAL has its UNCITRAL Arbitration Rules designed for resolving international commercial disputes.

- Advantages:

- (i) It is befitting for every type of claim and can be custom-made to fit the requirements of the parties concerned.
- (ii) It allows more confidentiality to the parties in dispute.
- (iii) It is more flexible in nature and the parties can frame their rules to suit their timelines.
- (iv) Parties often prefer this type of arbitration particularly when they think institutional arbitration might reduce their sovereignty, especially when public interest is involved in the matter.
- (v) Ad hoc arbitration is comparatively less expensive because payment of fees to an arbitration institution is not necessary.

- Disadvantages:

- (i) The choice of arbitrators often becomes questionable because their selections take place on the basis of the parties' trust upon them and not on their expertise or qualifications.
- (ii) Efficacy of an ad hoc arbitration entirely depends upon the extent of cooperation between the parties. Deliberate obstructions³⁶ by the parties during the process often prove to bring a negative impact on the arbitration.
- (iii) Laying the plan of arbitration requires skill and a lot of time. Lack of that proper skill or expertise might affect the quality of the arbitration.
- (iv) Refusal on part of either party to take timely action in such arbitration has the effect of delaying the process in its entirety.

(d) Institutional Arbitration: An institutional arbitration is conducted by a recognised arbitral institution according to the rules of that particular institution. This arbitral institution acts like a go-between for the parties in dispute. This method maintains a

³⁵ Gray. B. Born, *International Arbitration: Law and Practice* 56 (Wolters Kluwer, Netherlands, 2012)

³⁶ Margaret. L. Moses, *The Principles and Practice of International Commercial Arbitration* 10 (Cambridge University Press, Cambridge, 2008)

sense of uniformity, efficiency and neutrality in the process. An arbitral institution has their own set of rules of procedure for the entire process of any arbitration. These rules pertain to selection of arbitrators for each dispute, to ascertain the place of arbitration, resolve any challenges in any ongoing process, to fix the arbitrators' fees and furthermore, to look into the arbitral awards in order to be sure that they are enforceable. Each institution has its own staff and decision-making body³⁷.

Some important international commercial arbitration centres include:

- a) International Chamber of Commerce
 - b) American Arbitration Association and its international division, i.e., International Centre for Dispute Resolution
 - c) London Court of International Arbitration
 - d) Singapore International Arbitral Centre.
- Advantages:
 - (i) Arbitration institutions have their own rules and procedures which are pre-determined and ready for application. This saves the time and reduces the efforts of the parties in need of arbitration.
 - (ii) Enforcement of arbitral awards becomes easier if it has been passed by a well known arbitral institution.
 - (iii) These institutions have well trained and experienced staff. This helps in proper conduct of arbitration.
 - (iv) The panel of arbitrators in a reputed arbitration institution are specialised in numerous fields and this ensures appropriate conduct of procedure and efficient passing of awards.
 - (v) The rules of the institutions are nicely crafted and include provisions “concerning competence-competence, separability, provisional measures, disclosure, arbitrator impartiality, corrections and challenges to awards, replacements of arbitrators and costs”³⁸.
 - (vi) When an award is passed by a reputed institution then its credibility³⁹ is high and valuable.

³⁷ Gray. B. Born, *International Arbitration: Law and Practice* 56 (Wolters Kluwer, Netherlands, 2012)

³⁸ Gray. B. Born, *International Arbitration: Law and Practice* 57 (Wolters Kluwer, Netherlands, 2012)

³⁹ Margaret. L. Moses, *The Principles and Practice of International Commercial Arbitration* 9 (Cambridge University Press, Cambridge, 2008)

- Disadvantages:
 - (i) On certain occasions there can be delays in the process because there is an extra layer of protocol in institutional arbitration.
 - (ii) The cost of arbitration for the parties increases significantly due to the fees to be payable to the institution.

(e) Fast track arbitration: The International Chamber of Commerce initiated this idea of fast track arbitration and included it in Article 30 and Annexure V of its Rules. Section 29B of the Arbitration and Conciliation (Amendment) Act, 2015⁴⁰ pioneered the concept of fast track arbitration in India. The purpose of fast track arbitration is to make the arbitration process simpler and faster. In *Board of Control for Cricket in India v. Kochi Cricket Private Limited*⁴¹, the Supreme Court held that Section 29B of the said Act applies to arbitration proceedings that commenced following the Amendment Act of 2015. This procedure requires the parties to enter into a written agreement that they wish to resolve their dispute through fast track arbitration. They may also agree that their arbitral tribunal shall be composed of a single arbitrator. One major feature of fast track arbitration is that the arbitral tribunal has power to decide the dispute without oral hearings. Decision can be made solely on the basis of written pleadings and documents submitted by the parties concerned. However, an oral hearing in such a process can be held at the request of the parties if it is required to shed light on certain matters. For speedy disposal of the matter, the arbitral tribunal may go away with technical formalities in an oral hearing.

In fast track arbitration, the arbitral award is required to be made within six months from the date of commencement of the proceeding. Fixation of fees and the manner of payment to the arbitrator shall be according to agreement between the parties and the arbitrators.

(f) Statutory Arbitration: Arbitrations that are conducted as per the provisions contained in certain special Acts in matters of disputes contained in them are called statutory arbitration. Nearly twenty-four Central Acts are there in this regard in India. Provision

⁴⁰ The Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016)

⁴¹ (2018) 6 SCC 287

for statutory arbitration is contained in section 2(4) of The Arbitration and Conciliation Act, 1996⁴². Some Central Acts that provide for statutory arbitration are as follows:

- The Indian Railways Act, 1890⁴³
- The Land Acquisition Act, 1894⁴⁴
- The Industrial Disputes Act, 1947⁴⁵
- The National Highways Act, 1956⁴⁶
- The Micro, Small and Medium Enterprises Development Act, 2006⁴⁷.

Conclusion:

Arbitration is a plausible and successful mode of resolving dissension or conflict between parties. Taking recourse to alternative dispute resolution mechanism saves costs and time taken in litigation processes. The Arbitration and Conciliation Act, 1996⁴⁸ has been modified a few times after its enactment to keep pace with emerging demands and situations in this field. Citizens at large must resort to this peaceful mechanism of dispute resolution and to this end spreading awareness is need of the hour.

⁴² The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)

⁴³ The Indian Railways Act, 1890 (Act 9 of 1890)

⁴⁴ The Land Acquisition Act, 1894 (Act 1 of 1894)

⁴⁵ The Industrial Disputes Act, 1947 (Act 14 of 1947)

⁴⁶ The National Highways Act, 1956 (Act 48 of 1956)

⁴⁷ The Micro, Small and Medium Enterprises Development Act, 2006 (Act 27 of 2006)

⁴⁸ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)