UNIT 16 SETTLEMENT OF INTERNATIONAL TRADE DISPUTES

Structure

16.0 OBJECTIVES

After studying this Unit you should be able to :

- describe the scope for international trade disputes
- explain the different methods for settlement of international trade disputes
- discuss the role of ICC in the matter of settling international trade disputes
- describe the major issues involved in the process of resolving international trade disputes
- explain the relevant Indian law (The Arbitration and Conciliation Act, 1996) applicable for international commercial arbitration and conciliation.

16.1 INTRODUCTION

You have learnt that the parties to international trade transactions legalise and regularise their transactions through contracts. The contract, as mentioned earlier, creates legally binding and enforceable obligations between the parties. These obligations and various other aspects negotiated between the parties are stipulated in the contract as terms or conditions subject to which the parties discharge their obligations and perform or execute the contract. When the contract is drawn up, it has to be seen that the contract is comprehensive in both structure and contents. The structure comprises the various provisions including a provision or clause for settlement of trade disputes that are to be incorporated in the contract document, which should be as comprehensive or exhaustive as possible.

The structure and content vary from contract to contract depending upon the product and what is negotiated and agreed upon by the parties. Many trade and business organisations have also evolved some standardised contract forms containing certain minimum provisions which do not appear to be comprehensive in both structure and contents. Sometimes there may not be a formal or a standardised contract between the parties and a contract has

to be constructed for them from the letters, telexes and other documents. The scope of disputes or differences are therefore, more particularly when the contract is either constructed for the parties or when the parties use a standardised contract form. Sometimes, despite a formal contract being apparently comprehensive there is still a potential scope for disputes. Disputes, whether apparent or potential do and are likely or bound to arise in course of international trade transactions requiring their settlement. In this unit, you will learn the scope for trade disputes, the different methods existing for settlement of international trade disputes, the major issues or problems involved in the settlement of international trade disputes and an overview of the Indian Arbitration and Conciliation Act 1996 relevant for international commercial arbitration and conciliation.

16.2 AREAS OF INTERNATIONAL TRADE DISPUTES

Broadly, the commercial disputes mostly arise on account of various omissions and commissions by the parties to the contract which make it difficult for them to perform their contract i.e. they become unable to fulfil their obligations created under the commercial contracts. The areas of disputes appear to be vast and varied. Here, however, let us highlight some of the most important areas where disputes do or are likely to arise between the parties.

i) Disputes arise when the contracting parties do not fulfil their contractual obligations resulting in a breach of contract (actual or anticipatory).

ii) When time is considered as the essence of the contract but goods are not supplied within the stipulated time.

iii) When the promisor expresses difficulty of performance due to some uncontemplated events, delays etc. although he has undertaken an absolute obligation to perform the contract.

iv) When the promisor pleads commercial impossibility like rising price of raw materials, freight hike etc. making exports unprofitable.

v) When the promisor pleads his inability to perform his obligations due to failure of a third person on whom the promisor relied for supply of goods.

vi) When the promisor faces some unusual circumstances like strikes or lock-outs of his factory and it becomes difficult for him to meet his commitment.

vii) When the overseas buyer wants to avoid the contractual obligations because the market for the goods has dried up and there are no demand or he finds it difficult to locate buyers for the goods ordered.

viii) When the overseas buyer refuses to pay or delays payment of goods.

ix) When goods, as promised, not supplied according to description or when goods supplied though correspond to the sample but does not correspond to the description which is the essence of the contract.

x) When goods supplied are not fit for the purpose required and mentioned by the buyer and the buyer relied on the skill and judgement of the seller for the goods and it is the seller's (exporter's) business to deal in such goods.

xi) Dispute arises when goods supplied are not of merchantable quality i.e. goods do not have use value or exchange value.

xii) Disputes may also arise due to passing of property in goods (ownership), passing of risk and on account of title to goods.

xiii) Disputes between the contracting parties arise not only due to breach of conditions express or implied but also due to breach of implied warranties when buyer's quiet possession is disturbed by a person having a superior title to goods or the goods have been sold subject to some charge without the knowledge of the buyer or goods are dangerous in nature and the buyer has not been given any warning for use etc.

xiv) Some times disputes may also be occasioned due to misinterpretation of a particular clause in the contract.

xv) Disputes may also arise due to not complying with the stipulations on shipment, including partshipment, transshipment, packing, labelling, marking etc.

16.3 METHODS OF SETTLEMENT OF INTERNATIONAL TRADE DISPUTES

As mentioned earlier, most commercial contracts are duly honoured and performed according to agreed terms without any difficulty. Disputes or differences as and when they arise are resolved or are required to be resolved amicably by discussion in view of the high cost, long time and inconvenience involved in settling the disputes by other methods. When the amicable method to resolve the dispute fails, the parties, obviously, resort to an outside individual or tribunal or court to settle the matter. There are therefore, three principal methods of resolving international trade disputes : litigation, arbitration and conciliation. Litigation and arbitration are considered more traditional methods compared to conciliation and other amicable methods of settlement of commercial disputes.

Litigation : Litigation is a method by which the parties resort to a court established by law. The litigation is initiated and completed according to the rules of the court which exist to ensure the proper conduct of the litigation. The court adjudicates only on the basis of issues which the parties present to it and upon the evidence which the parties choose to adduce. Litigation however, is costly, time consuming and most inconvenient. It creates bitterness and adversely affects the long term commercial interests of the parties.

Arbitration : Arbitration is a written agreement to submit present or future disputes or differences to arbitration whether arbitrator is appointed or not. Arbitration is the voluntary submission of disputes not to a court but to a sole arbitrator or an arbitral tribunal chosen by the parties or designated by a third party who is nominated by the contracting parties to make such appointment. Arbitration is a quasi judicial proceeding and an out of court settlement of the commercial disputes. It has gained greater popularity because of certain advantages over court litigation.

16.3.1 Arbitration vs. Litigation

It will be worthwhile to mention here that arbitration and litigation are two traditional and well recognised methods for settlement of commercial disputes. The fact that parties resort to arbitration or litigation does not necessarily mean that their commercial relationship has been adversely affected or they are hostile to each other. The business men world over, despite disputes, continue to trade with each other and live with each other to their mutual advantage.

In view of the growing complexities of international business, the businessmen intend and try their best to avoid disputes. But whenever some disputes or differences arise, the issues are left to be decided by a judge or an arbitrator mainly because they are preoccupied, unable to agree and are content to have their differences/disputes settled by an outsider. They desire to abide by the decision of the court or abitrator without affecting their good commercial relationship. Many commercial disputes are settled not by litigation but by arbitration. It is said that the lawyers prefer litigation while the business men prefer arbitration and their preferences for arbitration predominates in international contracts.

In this context we would like to briefly point out the merits and demerits of court litigation and arbitration.

Limitations of Court Litigation

The limitations of court litigation are as follows.

i) Court proceedings are slow and time consuming besides being very formal.

ii) The judge, expert or eminent in the field of law may not be expected to have the same expertise in the lines of international trade and business.

iii) The time and dates of hearing in a court of law may not be convenient to the parties.

iv) Court proceedings and judgements being open to public no business secrecy can be maintained.

v) Litigation may result in bitterness and breach of commercial relationship between the parties.

vi) Litigation is costly and additionally more difficult in a foreign court.

vii) International trade laws and procedures are rather complicated and the party litigating has to get acquainted with these laws.

Advantages of Arbitration

In view of the limitations of court litigation, the arbitration is preferred by businessmen mostly for its advantages which can be stated as follows:

i) Arbitration proceedings can be commenced and completed within a specified time limit depending on the nature of the dispute. Arbitration is therefore, quicker than litigation.

ii) The costs and expenses of arbitration are less compared to court litigation.

iii) Arbitration promotes goodwill and better trade relations between the parties.

iv) In arbitration, the parties can avail of the services of experts who are experienced and more knowledgeable which is not possible in a court litigation.

v) Arbitration ensures privacy and secrecy as the proceedings are private and the award given by the arbitrators is also not published.

vi) The arbitration proceedings are less formal and more flexible than litigation.

16.3.2 Types of Commercial Arbitration

Arbitration may be institutional or adhoc depending upon what the parties agree and provide in the arbitration agreement. When the parties agree to refer and entrust the dispute to a specific institution to arbitrate, it is called an institutional/administered arbitration. The institution/organisation having its own framework of rules, procedures and facilities provides the required administrative and supervisory services for conducting arbitration including appointment of arbitrators making of awards etc. There are arbitral institutions/organisations functioning at national, regional and international levels. You have, at national level, the Indian Council of Arbitration, at New Delhi and you have, International Chamber of Commerce (ICC), Paris which functions at international level as an arbitral organisation. You have also the London Court of International Arbitration which operates as an arbitral body at both national and international levels. Arbitral organisations are existing in many countries to facilitate institutional arbitration of trade disputes. Some of these arbitral organisations also make use of United Nations Commission on International Trade Law (UNCITRAL) arbitration rules for conducting arbitration proceedings.

In Ad-hoc arbitration, the parties themselves agree on the arbitration procedure to be adopted without any supervision by an institution/organisation. The parties also prescribe the mode of appointment of arbitrators who on appointment control and conduct the proceedings within the limits of law.

16.3.3 Arbitration Clause or Agreement

Arbitration, as defined earlier, is a written agreement between the parties either separately entered into or evidenced from the arbitration clause in the contract. Such an agreement

can be reached before or after the dispute has arisen. The parties should ensure that the arbitration agreement or clause is valid and precautions should also be taken to incorporate required provisions in the agreement or the clause. Standard clauses available from the arbitral institutions or professional organisations are normally used by the parties. The standard provisions required to be incorporated in the arbitration clause or agreement include appointment of arbitrators, venue, time and cost of arbitration, governing law, arbitral rules, language of arbitration proceedings, award etc.

16.3.4 Alternative Dispute Resolution (ADR) and Conciliation

ADR mechanism for dispute resolution includes face to face negotiations through conciliation, mediation, mutual negotiations etc. ADR mechanism is designed to provide amicable, quick, informal and nontraditional method for resolution of commercial disputes compared to arbitration and litigation which are the formal and traditional methods. ADR which took roots in USA, has been gaining increasing popularity, recognition and use almost all over the world. ADR is based on the principle—"Prevention is better than cure" aiming at prevention of disputes. As a cost and time saving method, ADR is emerging fast and getting popular.

Conciliation is a process by which a third party at the instance of the contracting parties seeks to bring the parties together in an amicable compromise without having any powers of decision. Conciliation, as one of the mechanisms of Alternative Dispute Resolution (ADR) for amicable, quick and informal resolution of commercial disputes, is receiving wider recognition and attention by the business community and the arbitral organisations. In view of this, the arbitral organisation like International Chamber of Commerce, Paris, has formulated special rules for conciliation along with arbitration. The Government of India has replaced the old Arbitration Act 1940 by enacting the Indian Arbitration and Conciliation Act 1996 providing a special chapter in part III on conciliation.

Check Your Progress A

1. What is Arbitration?

.....

.....

.....

.....

2. What do you mean by Alternative Dispute Resolution?

.....

.....

.....

.....

3. What is Conciliation?

.....

.....

.....

.....

4. Enumerate three advantages of Arbitration.

.....

.....

.....

.....

5. State whether following statements are true or false:

   i) Disputes arise when the contracting parties do not fulfil their contractual obligations.

   ii) Litigation is less time consuming and convenient process of settlement of international trade disputes.

   iii) The arbitration proceedings are less formal and more flexible than litigation.

   iv) Alternative Dispute Resolution is an informal method for resolution of commercial disputes.

   v) International trade laws and procedures are very simple for settlement of international trade disputes.

16.4 ROLE OF ICC IN ARBITRATION AND CONCILIATION

Settlement is a desirable solution for business disputes of international character. The International Chamber of Commerce, Paris, is a highly successful and most popular global organization/institution. It has clear framework of rules and procedures, which provides the required facilities and the administrative and supervisory services for settlement of disputes through arbitration and conciliation. The ICC system combines the security and the safeguards of institutional arbitration with the flexibility of ad-hoc arbitration. The ICC system consists of a Court of Arbitration and a permanent Secretariat which supervises each arbitration and conciliation, together with a comprehensive set of rules for guiding the procedure. The Court has the power to ensure application of ICC rules for arbitration and conciliation. The Court of Arbitration is headed by a Chairman assisted by eight Vice Chairmen, a Secretary General and one or several Technical Advisors selected by the Council of ICC. The Court meets once in a month. The Court of Arbitration does not itself settle disputes. It appoints and confirms the appointments of arbitrators and conciliators who conduct the arbitration or conciliation based on the Terms of Reference drawn up from the documents and in the presence of the parties. The arbitration and conciliation proceedings are initiated at the request of the party wishing to have recourse to arbitration or conciliation and completed within a specified time limit. The court also fixes the place of arbitration unless the parties have agreed otherwise. The arbitral proceedings are conducted according to the rules formulated and procedures laid down by ICC. The arbitral award which is given or made at the place of arbitration shall be final and binding and the parties shall be deemed to have undertaken to carry out the resulting award.

The parties having referred a dispute for arbitration or conciliation enjoy complete freedom on some important matters like choice of arbitrators, or conciliators, applicable law, venue of arbitration or conciliation etc. It is worthwhile to mention that the parties are free to determine the applicable law but in the absence of any such indication by the parties the arbitrator shall apply the law designated as the proper law by the conflict of rule which he deems appropriate. The arbitrator or conciliator normally assumes the powers of an amicable compositor if the parties are agreed to give him such powers. In all cases the arbitrator or conciliator shall take into account the provisions of the contract and the relevant trade usages. ICC arbitration or conciliation can take place any where in the world and there are no restrictions on the type of business dispute that can be submitted to ICC arbitration or conciliation.

16.5 MAJOR ISSUES IN SETTLEMENT OF INTERNATIONAL TRADE DISPUTES

You have learnt that the export sales transaction is international in character as it involves movement of goods from exporter's country (or exporter's legal regime) to importer's country (or importer's legal regime). The performance of the export contract may also involve contact with other country(ies) and connections with the legal regime of other countries. Parties involved in international trade transactions are exposed to various risks including the legal risks and problems associated with dealings with a foreigner. When disputes or differences arise and the parties initiate litigation or arbitration questions relating to the substantive law applicable to the contract, jurisdiction for litigation and enforcement of awards and the applicable Procedural law do arise. With a view to eliminating or avoiding or reducing the legal risks and problems, it is essential to resolve the major issues like applicable law, (or the proper law), Place of jurisdiction, applicable procedural law etc. relevant for settlement of trade disputes. Let us now discuss these major issues.

Applicable Substantive Law

As already stated and explained in Unit 15, in the absence of universally acceptable and applicable international trade law to govern international business contracts, the contractual obligations of the parties are governed by national law(s) or legal system. Most national legal systems permit the parties to an export transaction or contract to choose the law which will govern their contractual relationship and disputes. The "principle of party autonomy" allows the parties to select the law which is most appropriate to their contract. The chosen law may be the exporter's country or importer's country or that of a third (may be a neutral) country law. The chosen law, as already mentioned is subject to certain limitations like it should be bonafide and legal etc. In the absence of a choice of law clause in the contract and in case the intention of the parties regarding applicable law cannot be ascertained, the conflict of laws principles are applied to determine the applicable law. In this process, the law of the country with which the transaction is most closely connected was identified as the applicable law. Ultimately the closely connecting factor was found to be the place of intended performance of the contract which was later refined to the principal place of business of the exporter whose performance is the characteristic of the contract. Based on this, the exporter's country law was determined as the applicable or proper law of the contract.

Most aspects of the contractual disputes are governed by the proper law of the contract. In view of this the specific law applicable needs to be provided in the contract including in the arbitration agreement or arbitration clause to avoid or reduce the potential impact of the legal problems that may arise.

Jurisdiction or the Forum

You have learnt that there is no international court of justice common to all nations where the parties can litigate their disputes. In the absence of an arbitration agreement, the plaintiff (the aggrieved party) will be obliged to take legal action against the defendant before the state courts. In this context, the forum question that arise is whether the courts in plaintiff's country or defendant's country are competent to hear the case. As a general rule, and unless the parties have expressly agreed upon the place of jurisdiction, only the courts at defendants' place of business are competent to hear and try the case. The plaintiff will normally have to sue in the court of the defendant which is in a foreign country where the defendant has assets. If the defendant does not have assets in his country, the plaintiff may sue in a third country where the defendant has assets. Although, inconvenient and costly the plaintiff has no other alternative and in the interest of the plaintiff, it is advantageous to file a suit in the court of a place or country where the defendant has assets.

As an alternative, a choice of Forum clause as agreed to by the parties may be provided in the contract incorporating the court of the country which will be competent to hear the case

and decide the dispute. But the proper forum for the execution proceeding (after judgement) will be the court of the place where the defendant has assets which is more advantageous for the plaintiff.

Venue of Arbitration

Regarding the venue for arbitration, the parties have the freedom to agree and incorporate in the contract or arbitration agreement or clause the country in which the arbitration has to be conducted and name the specific arbitral tribunal or institution which will arbitrate the dispute taking into account the cost, convenience etc. This depends on the negotiating ability of the parties. If the arbitration agreement or the arbitration clause in a contract is silent on the choice of venue for arbitration, the arbitration tribunal shall determine the venue or place of arbitration having regard to the circumstances of the case and the convenience of the parties.

Applicable Procedural Law

The governing or applicable law as discussed earlier relates to the substantive law, which, as we have seen, is selected by the parties to govern their contractual rights and duties including the disputes. In the absence of an express or implied choice, the law of the principal place of business of the exporter is the applicable substantive law or the proper law of the contract.

As far as the application of the procedural law is concerned, the proper law of the contract (or lex causae) does not apply. According to leading English authors like Dicey and Cheshire on the subject, procedural law is a matter for the lex fori (law of the Forum). In view of this, the applicable procedural law is the law of the country in which the arbitration proceedings are conducted or litigation initiated. The Supreme Court of India in a case between NTPC Vs Singer Company of USA observed that arbitration proceedings have to be conducted in accordance with the procedural law of the country in which the arbitration is held unless the parties have agreed otherwise. In view of this, the parties may provide in their contract the selected or agreed applicable procedural law. The chosen law will be the procedural law to govern the procedure for arbitration or litigation. But the procedural law choiced/selected should not be repugnant to the public policy and should not be contrary to the overriding and mandatory provisions of a law of the country where arbitration or litigation is held and the selection shall be bonafide and legal.

Recognition and Enforcement of Foréign Judgements and Arbitral Awards

If the defendant against whom a judgement has been rendered does not have assets which can be seized in the country of jurisdiction, it is essential to have the judgement recognised and enforced in the defendant's home country or in any third country where the defendant has assets. Foreign Judgements are not automatically enforced in another country, unless a bilateral or multilateral convention or agreement exists or national law permits enforcement on the basis of reciprocity. Any judgement given in the country of a party against the other party will have to be recognized and enforced in the country of that other party or in any third country where the other party has his assets. Otherwise, the whole litigation will be only a futile exercise.

The object of arbitration is to secure an enforceable award. In order to fulfil the objectives, the recognition and enforcement of awards assume importance. The arbitration may take place in any including exporter's or importer's country but the awards given or made by the arbitrator(s) has to be recognised and enforced according to some legal system to ensure justice and fair compensation to the aggrieved party and to complete the process of arbitration and the settlement of commercial disputes. Enforcement involves access to the machinery of the state in which enforcement proceedings are to be taken or some other state. This implies that the award should be recognised by the law of the concerned state where the award has to be enforced.

Normally and logically the arbitral awards(like a court judgement) should be recognised and enforced in the defendant's home country or any third country in which he has some assets which can be seized. Foreign arbitral awards can be enforced provided the defendants' home country or the third country has a law which will recognise the award and permit enforcement on the basis of reciprocity. If the award is not recognized and enforced due to lack of such a law or lack of reciprocity the whole exercise becomes useless. With a view to avoiding such problems and contingencies and to facilitate recognition and enforcement of foreign arbitral awards at the international level the two conventions namely, the Geneva Convention 1927 and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (in short New York Convention) came to the rescue of the parties. The New York Convention, which is gaining popularity has been ratified by 40 countries. Gradually most countries are becoming members or signatories to this convention. The member countries have been led to enact implementing law(s) to give effect to the conventions and to ensure recognition and enforcement of foreign arbitral awards. It is therefore, easier for countries who are signatories or members of 1927 Geneva Convention or 1958 New York Convention to get their awards recognised and enforced in the member countries.

In cases where foreign arbitral awards to be recognised and enforced in a country which is not a signatory or member to either of the above conventions, the position seems to be little difficult. In such cases the precedents or case laws have to be referred to or on the basis of the arbitral award a suit can be filed in the defendant's country court for a judgement subject to the procedural and limitation laws.

Law for Enforcement of Foreign Awards in India

India, which is party to 1927 Geneva and 1958 New York Conventions enacted required implementing legislations in 1937 and 1961 for giving effect to these two conventions. The 1937 and 1961 Acts have been replaced by the Arbitration and Conciliation Act 1996 which has been made applicable to foreign awards made in countries as notified and to be notified by the Government of India from time to time in the Official Gazette. The award, on an application is recognised and filed in court having jurisdiction. The court pronounces a judgement after which a decree follows to initiate the enforcement Proceedings.

Enforcement of Indian Awards in Foreign Countries

Arbitral Awards made in India are enforceable in the same manner in foreign countries which are parties to any of these international conventions relating to enforcement of foreign awards according to the provisions of these conventions and the implementing law(s) enacted for giving effect to these conventions.

16.6 OVERVIEW OF INDIAN ARBITRATION AND CONCILIATION ACT 1996 RELEVANT FOR INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

Arbitration and Conciliation Act 1996

Arbitration proceedings in India is regulated by the latest arbitration law contained in the Arbitration and conciliation Act 1996 which is the relevant Indian law for international commercial arbitration and conciliation. This new Act has replaced the previous Arbitration Act 1940, the Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961. The new Act also contains a chapter on Conciliation which was not there in the 1940 Act.

The objective of the new law is to make the Indian law more acceptable to international including Indian business community and other concerned with it. For the purpose the new

law has repeated, codified, classified and modified certain provisions of the old law and has added certain new provisions.

The fresh law is based on the Model Law for Arbitration Prepared by the United Nations International Commission on Trade Law (UNCITRAL) whose provisions have been adopted by several countries interested in a unified legal framework for a fair and efficient settlement of business disputes. With this end in view, India enacted the present law to bring it to the international standards and to ensure an unified legal framework and to promote and facilitate international commercial arbitration in India.

The new Arbitration and Conciliation Act 1996 (No 26 of 1996) which contains 86 sections in parts I to IV came into force on 25th day of January 1996. The law contained in the four parts is broadly structured as follows.

a) Structure of the New Law on Arbitration and Conciliation

Part I	(Secs 2 to 43)	Arbitration — General Provisions
Part II	(Secs 44 to 60)	Enforcement of certain Foreign Awards (New York and Geneva Convention Awards)
Part III	(Secs 61 to 81)	Conciliation
Part IV	(Secs 82 to 86)	Supplementary Provisions.

b) Important Features of the New Law on Arbitration and Conciliation

We will like to highlight some of the important features of the new arbitration law in the following paragraphs.

1) **Conciliation (Secs 61 to 81) :** The new law has accorded due recognition to conciliation by adopting it in the title itself and including the same in a special chapter under part III of this Act. This appears to be an important step taken for popularising and promoting ADR which is a cost and time saving mechanism for settlement of commercial disputes.

2) **Unified Legal Framework :** The Act seeks to establish a unified legal framework of international standards to ensure fair and efficient settlement of disputes.

3) **Arbitration Agreement (Secs 2 and 7) :** The new Arbitration Act applies to any written agreement between the parties including exchange of letters, telex etc. to submit present or future disputes or differences to arbitration whether the arbitrator is named there in or not. This Act therefore, covers both executory agreements to submit a dispute to arbitration and actual submission after the dispute has arisen by virtue of a written agreement.

4) **Applicable Law :** The new law has introduced the notion of International Commercial Arbitration. In this context the parties have been given the freedom to choose the applicable substantive law and in the absence of a choice the arbitrator will decide the applicable law by applying the rules of law he considers appropriate taking into account all circumstances surrounding the dispute.

5) **Appointment of Arbitrators (Secs 10 to 15) :** The 1996 Act has given wide freedom to the parties for appointment of arbitrator and to determine the number of arbitrators which should be an odd number. In case the parties do not determine the number, the arbitral tribunal shall consist of a sole arbitrator. The new law has introduced a procedure for challenging an arbitrator on the grounds of justifiable doubts regarding arbitrator's independence or impartiality and the arbitrator's qualifications.

6) **Validity of the Arbitration Clause (Sec 16) :** The New law clarifies and specifies that an arbitration clause forming a part of the contract shall be treated as an agreement independent of the other terms of the contract and the arbitration clause will not be invalid if the contract is decided to be null and void.

7) **Powers of the Arbitrator (Sec. 16) :** The new law has given express powers to the arbitrator(s) to give rulings on matters of jurisdictions and objections relating to the existence or validity of arbitration agreement.

8) **Conduct of Arbitration and the Procedure (Secs. 18–27) :** The arbitral tribunal has also been given wide powers for conducting the arbitration proceeding and deal with venue, language, pleadings, oral and written hearings, court assistance in taking evidence etc. In the matter of conduct of the proceedings arbitration tribunal shall not be bound by the Civil Procedure Code 1908 and Indian Evidence Act 1872. The parties have been given wide freedom to agree on the procedure to be followed by the arbitral tribunal. In the absence of such an agreement, the arbitral tribunal shall conduct the proceedings in the manners it considers appropriate. The arbitral proceedings shall according to the new law, commence on the date on which request for arbitration is received by the respondent and shall be completed within a reasonable time.

9) **Award (Secs. 28-36) :** The law has made detailed provisions relating to making, setting aside and enforcement of awards. According to the new law an award need not be got confirmed by the court and can be enforced in the same manner a decree of the court is enforced. The law also empowers the arbitrator to correct, interpret and make an additional award in certain cases.

10) **Venue of Arbitration (Sec 20) :** The parties are free to agree on the venue or place of arbitration. If the parties have not agreed the place of arbitration shall be determined by the arbitral tribunal having regard to the convenience of the parties and the circumstances of the case.

11) **Judicial Intervention (Secs 8, 9, 11, 13, 27, 34 and 37) :** Section 5 of the new Arbitration Act 1996 has ensured minimal judicial intervention in arbitration proceedings with a view to quicken the process of disposal of disputes. In the old law 28 out of 48 Section dealt with intervention in arbitration proceeding by a court of law. The new law has confined such intervention to 7 sections only (Secs 8, 9, 11 (3)(6), 13(3), 27, 34 and 37). As such the intervention by a court of law has been drastically reduced from 60 per cent to 10 per cent. The courts are envisaged now to play only a supervisory role to ensure fairness and impartiality. Intervention of the court is envisaged only in cases of fraud or invalid arbitration agreement or contravention of the rules of natural justice or action in case of jurisdiction where the court can quash the award leaving the parties free to start arbitration proceeding afresh. Even the supervisory role of the courts have also been kept at a minimal level to avoid protracted litigation.

12) **Enforcement of Foreign Awards (Secs 44-60) :** The Arbitration and Conciliation Act 1996 which replaced the old Act of 1937 and 1961 on enforcement of foreign awards has in Secs 49 and 58 provided that where court is satisfied, the foreign awards (1927 Geneva Convention and 1958 New York Convention awards) are deemed to be a decree of the court and enforceable in India subject to the conditions specified in Secs. 48 and 57 of the new 1996 Act.

Check Your Progress B

1. What is Applicable Substantive Law?

.....

.....

.....

.....

2. What do you mean by procedural law?

.....

.....

.....

.....

3. What is Foreign Arbitral Award?

.....

.....

.....

.....

4. What is the objective of Arbitration and Conciliation Act, 1996?

.....

.....

.....

.....

5. State whether the following statements are true or false:

   i) The Court of Arbitration meets once in three months.

   ii) There is no international court of justice common to all nations where the parties can litigate their disputes.

   iii) In the absence of an express or implied choice, the law of the principle place of business of the importer is the applicable substantive law.

   iv) The new Arbitration and Conciliation Act, 1996, has ensured minimal judicial intervention in arbitration proceedings.

   v) According to the Arbitration and Conciliation Act, 1996, the parties are not free to agree on the venue or place of arbitration.

16.7 LET US SUM UP

In international business, disputes are varied in nature and arise mainly on account of omissions and commissions in the contract resulting in a breach of contract. Settlement of commercial disputes or differences as and when they arise, is a desirable solution. They are resolved or required to be resolved amicably by discussion in view of the high cost, time consuming process, inconvenience involved in settling the disputes by litigation or arbitration. When the amicable method of resolving the disputes fails the parties resort to an outside person, or tribunal or court to settle the disputes. There are, therefore, three principal methods of resolving international trade disputes namely conciliation, arbitration and litigation.

The arbitration or conciliation is normally initiated on the basis of a written agreement between the parties separately entered into or on the basis of a clause to that effect in the contract. Arbitration may be ad-hoc or institutional depending upon what the parties agree and provide in the contract. There are arbitral institutions/organisations functioning at national, regional and international levels. ICC Paris, for instance, functions at international level as the most successful and popular arbitral organisation. ICC having its own

framework of rules, procedures and facilities provides the required administrative and supervisory services for conducting arbitration.

The arbitration proceedings in India is regulated by the latest arbitration law contained in Arbitration and Conciliation Act 1996 which provides the required legal framework for international commercial arbitration and conciliation.

16.8 KEY WORDS

Litigation : A method of settling trade disputes by which the parties resort to a court established by law.

Arbitration : The voluntary submission of disputes not to a court but to a sole arbitrator or an arbitral tribunal chosen by the parties or designated by a third party who is nominated by the contracting parties to make such appointment.

Institutional Arbitration : When the parties agree to refer and entrust the dispute to a specific institution to arbitrate it is called an institutional or administered arbitration.

Ad hoc Arbitration : In adhoc arbitration the parties themselves agree on the arbitration procedure to be adopted without any supervision by an institution/organisation.

Conciliation : A process by which a third party at the instance of the contracting parties seeks to bring them (contracting parties) together in an amicable compromise without having any powers of decisions.

Applicable Law : Applicable law or governing law which refers to the substantive law is the proper law applicable to contractual disputes.

Procedural Law : The law applied for conducting arbitration proceedings including procedure, taking evidences etc.

16.9 ANSWERS TO CHECK YOUR PROGRESS

A 5 i) True; ii) False; iii) True; iv) True; v) False.

B 5 i) False; ii) True; iii) False; iv) True; v) False.

16.10 TERMINAL QUESTIONS

1. What are the traditional methods of settlement of international trade disputes? State their merits and demerits.
2. Explain the concept and different forms of Alternative Dispute Resolution (ADR).
3. Discuss the role of ICC on arbitration and conciliation.
4. Discuss the major issues involved in settlement of international trade disputes.
5. State the special features of the new law on arbitration and conciliation in India.

SOME USEFUL BOOKS

Anant K. Sundaram and J. Stewart Black, *The International Business Environment—Text and Cases*, Prentice-Hall of India (Recent Edition), New Delhi.

John D. Daniels and Lee H. Radebaugh, *International Business—Environment and Operations*, Addison Wesley (Recent Edition), New York.

Kapoor, N.D. *Mercantile Law*, Sultan Chand & Sons (Recent Edition), New Delhi.

Kuchhal M.C. *Mercantile Law*, Vikas Publishing House Pvt. Ltd., (Recent Edition), New Delhi.

Rugman and Hodgetts, *International Business—A Strategic Management Approach*, McGraw Hill, Inc. (Recent Edition), New York.

NOTES