

# Arbitration – The new normal for Dispute Resolution

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- **Alternative dispute resolution (ADR) – range of dispute settlement methods without resorting to court. These methods usually involve a third party, who helps parties in settling the disputes. In many cases, ADR methods are used alongside the litigation process as well through court authorisation.**
- **Examples – Arbitration, Mediation, Conciliation, Negotiation etc.**
- **flexible, cost-efficient, time-effective, direct participation, minimising divisiveness**
- **Arbitration has, over the years, become a preferred form of dispute resolution in commercial matters where timely adjudication is of paramount importance.**

- **Halsbury** - An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.
- **Blacks Law** - The submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement.
- **Arbitration Act, 1940, UNCITRAL Model Law on Commercial Arbitration, Section 89 of the Code of Civil Procedure, 1908, Arbitration & Conciliation Act, 1996, Arbitration & Conciliation (Amendment) Act, 2015 & Arbitration & Conciliation (Amendment) Act, 2019 .**

- **Faster than litigation, Flexible, Private Process, Cost-Effective, Selection of Arbitrators, Simplified rules of evidence & Procedure, Encouragement to settlement – Consent Award**
- **Code consolidating the law relating to Domestic Arbitrations, International Commercial Arbitration, Enforcement of Foreign Awards, Conciliation.**
- **Based on UNCITRAL Model Law on International Commercial Arbitration, 1985 & UNCITRAL Conciliation Rules, 1980**
- **J&K Reorganisation Act, 2019 – Part I, III & IV shall extend to Jammu & Kashmir so far as they relate to International Commercial Arbitration**
- **Arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872**

- Defined to mean an agreement referred to in section 7
- Written Agreement - An arbitration agreement is considered to be in writing, if it is:
  - Signed by the parties and is in the nature of a document;
  - It can also be an exchange of letters, telex, telegrams or other means of telecommunication the essential feature is that it should provide a record of the agreement; or
  - An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not defined by another.
- Electronic means - 2015 Amendment
- Intention - Intention of the parties is of extreme importance and forms the crux of the agreement.
- Binding – Parties shall have clear intention to consider the arbitration award as binding on the Parties
- Reference in a Contract

- **Vijay Kr Shrama V. Raghunandan Sharma** - An arbitration agreement must be in writing and signed by parties but affixing a seal is not a requirement. If an agreement, contained is an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of agreement then said agreement is in writing.
- **Great Offshore Ltd V. Ivanian Offshore Engineering and Construction Co.** - Reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if contract is in writing and reference is such as to make that arbitration clause part of contract
- **Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.** – adopted group of Companies Doctrine & the concept of person claiming through or under a party to arbitration agreement - the agreements were part of a composite transaction which emanated from the principal agreement, which contained the arbitration clause and hence, even non-signatory parties could be referred to arbitration.

- Bihar State Mineral Development Corporation v. Encon BUILDERS (Pvt Ltd) the Hon'ble Supreme Court held the following essential elements of the arbitration agreement:
  - There must be a present or future difference in connection with some contemplated affair.
  - There must be the intention of parties to settle such difference by a private tribunal
  - The parties must agree in writing to bound by the decision of such tribunal
  - The parties must ad idem.

- A and B enter into a contract wherein the arbitration clause reads as under:

*“If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine.”*

- When a dispute arises between the parties, B files an application for appointment of an arbitrator pursuant to which an order is passed appointing a sole arbitrator.
- Aggrieved by the order above, A files an appeal challenging the said order contending that it is not a valid arbitration clause/ agreement and therefore, the said order appointing the arbitrator is liable to be set aside.
- Is the contention of A correct?



- **Clearly spell out the arbitration as mode of resolution**
- **Number of Arbitrators/ Composition of Arbitral Tribunal**
- **Arbitration Award to be final and binding**
- **Governing law, Seat of the Arbitration & jurisdiction**
- **Language of the Arbitration**
- **Mode of appointment of Arbitrator**
- **Ensure that the Contract is duly stamped**
- **Dispute shall be arbitrable**
- **Mediation preceding Arbitration**

- **Model Arbitration Clauses of certain arbitration institutions-**

## **Standard ICC Arbitration Clause**

- **All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.**

## **Cotton Association of India Standard Arbitration Clause**

- **“Any dispute or difference whatsoever arising between the parties out of this contract shall be settled by arbitration in accordance with the By-laws and Rules of Arbitration of Cotton Association of India. The award made in pursuance thereof shall be binding on the parties.”**

## **ICA Domestic Commercial Arbitration Clause**

- **“Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Domestic Commercial Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.”**

- There are certain disputes which by their nature cannot be subject matter of arbitration.
- Arbitration is a creature of Contract. Generally disputes relating to rights in personam are considered to be arbitrable and disputes pertaining to right in rem are non-arbitrable and are required to be adjudicated by a court of law.
- Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd. & Ors , A. Ayyasamy vs A. Paramasivam & Ors
- Criminal offenses of a public nature, disputes arising out of illegal agreements and disputes relating to status such as divorce, cannot be referred to arbitration. Following categories of disputes are treated as non-arbitrable:
  1. Patent, trademark and copyright;
  2. Anti-trust/ competition laws;
  3. Insolvency/winding up;
  4. Bribery/corruption;
  5. Fraud;
  6. Criminal matters

In *Ambuja Neotia Holdings Pvt Ltd v. Planet M Rental Ltd* disputes between parties pertain to space licensed by petitioner to respondent. Petitioners requested for appointment of arbitrator and was objected by respondent on ground that claim was incapable of being arbitrable and that there was no arbitration agreement between parties pertaining to tenancy is governed by the provisions of any Rent Control Act which confers exclusive jurisdiction on any civil court or like forum to adjudicate the matters covered thereby, the parties cannot contract out of such statute and agree to have their disputes resolved in a private forum.

In *Steel Authority of India Ltd. v. SKS Ispat and Power Ltd.* (Bombay High Court) - The defendants filed a notice of motion under Section 8 of the Arbitration Act praying to refer the matter for arbitration in an action for infringement and passing off. The Bombay High Court dismissed the Application under Section 8 on the ground that the suit was for the infringement and passing off and arise out of rights to a trademark and the remedies in connection therewith which are matters in rem.

- Section 18-
- Notwithstanding anything contained in any other law, any party to a dispute shall have the remedy to make a reference to the Micro and Small Enterprises Facilitation Council with regards to any amount due under Section 17, on the receipt of which the Council shall either conduct its conciliation on its own or seek assistance of any alternate institution or centre for the same (Sections 65 – 81 of A&C Act, 1996 shall apply).
- If such conciliation fails, the Council shall either itself take up the matter for Arbitration or refer it to any institution or centre providing the same.
- In such a case, the Council or the institution or center, as the case may be, shall have jurisdiction and the reference shall be decided within 90 days from the date of such reference.
- The defaulter shall be liable to pay compound interest with monthly rest to the MSME supplier at three times the bank rate notified by the RBI

- Section 19-
- Where an application is made for setting aside the decree, award or order, the same shall not be entertained unless the Appellant (not being a supplier) has deposited with the Court 75% of the amount in terms of the decree, award or order, whatever the case may be.
- The Court shall also, if and however it deems fit and necessary, pending the disposal of the application made as above, order that such percentage of the amount deposited shall be paid to the supplier.
- The Hon'ble Delhi High Court in AVR Enterprises versus Union of India has held that the provisions of Section 19 clearly spell out that the same shall be applicable only either to the Council itself or any institution or center providing alternate dispute resolution services to which a reference is made by the Council. Therefore, it is settled that no deposit shall be required to be made in cases of private arbitrations

# Power of Judicial Authority to refer Parties to Arbitration 1/3

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- Section 5 & Section 8 – Not derogatory in Nature.
- Minimizes intervention of Court. Use of word Judicial authority instead of the word Court
- *N. Radhakrishnan v. Maestro Engineers, Swiss Timing v. Organizing Committee, Commonwealth Games 2010, A. Ayyaswamy v. A. Paramasivam, Chloro Control & Amendment*
- *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* has laid down the essentials to be seen by the Court before referring the parties to arbitration, which are as follows:
  - **whether there is an arbitration agreement between the parties;**
  - **whether all the parties to the suit are parties to the arbitration agreement;**
  - **whether the disputes which are the subject matter of the dispute fall within the scope of the arbitration agreement;**
  - **whether defendants had applied under this section before submitting his first statement on the substance of the dispute; and**
  - **whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.**

# Power of Judicial Authority to refer Parties to Arbitration 2/3

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- The role of the Court while hearing an application under Section 8, if the criteria are fulfilled, is to refer the parties to arbitration and not get into the merits of the matter. When the existence of an arbitration agreement is proved, the question whether the arbitration agreement is attracted to the facts of a given case is a question which has to be decided not by the civil court but by the arbitrator himself.
- Remedy against an order u/s 8
  - Neither Appealable nor revision lies. Writ petition under Article 227 have been entertained. In case of High Court exercising jurisdiction under Original Jurisdiction, SLP to Hon'ble Apex Court.
  - Punjab & Haryana HC – Monica Electricals Ltd. v. R.V. A. Associates held that neither an appeal nor a revision application would lie against an order referring the parties to the Arbitration.
  - Section 37 (2015 Amendment)



# Power of Judicial Authority to refer Parties to Arbitration 3/3

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- B and C are group companies of A. B and C enter into separate agreements which form a part of a principal agreement entered into separately by A. The agreement in which A is a party contains arbitration clause but the agreements of B and C do not. At the time of dispute resolution, B and C, claiming under A, refer the matter to arbitration under the arbitration clause contained in A's agreement.
- Can B and C legally do so?

- Section 9 by the Court & Section 17 by the Arbitral Tribunal
- As per the amended Section 9, if the Court passes an interim order before the commencement of arbitral proceedings, the arbitral proceedings must commence within 90 days from the making of such an order, or within a time specified by the Court. Section 17 was amended to give more power to Arbitrators.
- An application under section 9 can be filed in a court as defined in Section 2(1)(e) of the Act that can either be a District Court or a High Court having 'original jurisdiction', which would have the jurisdiction to decide the subject matter of the arbitration as if the same were the subject matter of a civil suit.
- An appeal from an order granting or refusing to grant any such interim measure under Section 9 can be made under Section 37(1) of the Act. Similarly, an appeal against an order passed by the Arbitral Tribunal under Section 17 can be made under Section 37(2) of the Act.
- The aim is to give interim relief pending final adjudication of the dispute.

- In the case of *Bhatia International v. Bulk Trading S.A. and Another*, it was held that Part I of the 1996 Act will apply even to arbitrations seated outside India unless it was expressly or impliedly excluded. In a similar vein, the Supreme Court gave the judgment in *Venture Global Engineering v Satyam Computer Services Ltd.*
- This issue was thereafter, settled in *Bharat Aluminium and Co. v. Kaiser Aluminium and Co.*, in which the Supreme Court held that Part I of the Act does not apply to Part II of the Act. As per the judgement in *BALCO*, the Courts in India could not entertain interim applications under Section 9 of the Act in foreign seated arbitrations which were governed by Part II of the Act.
- The Arbitration and Conciliation (Amendment) Act, 2015 introduced a proviso to Section 2(2) which provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitrations. Thus, Section 9 applications can be filed in cases which are governed by part II of the Act.

- In the case of *VLS Finance Limited versus BMS IT Institute Pvt. Ltd.*, the court held that the Order 38, rule 5 of CPC has to be borne in mind while deciding an application under Section 9(ii)(b) of the Act.
- In **Raman Tech & Process Engg. Co v. Solanki Traders** the Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that –
  - before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant.
  - This would mean that the court should be satisfied the plaintiff has a prima facie case.
  - If the Court is not satisfied about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5CPC.
  - It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed.
  - Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

- **Arbitration Clause**
- **Section 11- Power to the High Court & Supreme Court; Stamping of Arbitration Agreement**
- **Arbitration Council of India – Draft Rules were made available for comments until 14th March 2020**
- **Qualifications for the Arbitrator – Schedule V & Schedule VII (Red, Orange & Green List concept of IBA Council )**
- **Disclosure under Schedule VI, Model Fee under Schedule IV & Qualifications under Schedule VIII**
- **Bombay HC in Sawarmal Gadodia V/S Tata Capital Financial Services Limited and Others. – 1) Arbitrator is bound to disclose exact number of ongoing arbitrations 2) Arbitrator is bound to make the necessary disclosure in the event of him having been appointed as an Arbitrator on two or more occasions by one of the parties, or an affiliate of one of parties, within the past three years, against Item 4 of his Disclosure in the form set out in the Sixth Schedule namely, "circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality**

- Section 12(5) has been inserted vide the 2015 Amendment whereby the neutrality of the arbitrators was given utmost importance. Section 12(5) also stated that a person having “relationship” as specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator.
- Schedule V & Schedule VII
- A party may apply to the Court under Section 14 of the ACA, 1996 which will then decide on the termination of the mandate of the arbitrator. Typically the only contested questions which may arise before the Court under Section 14 of the ACA, 1996 concern whether such person falls within any of the categories mentioned in the Seventh Schedule or whether there is a waiver in writing, subsequent to disputes having arisen between the parties.
- Parties can agree on challenge procedure. If not agreed, then challenge shall be made within 15 days of becoming aware of constitution of arbitral tribunal or
- Order to be challenged in Section 34

- A and B enter into a contract wherein they have agreed for dispute resolution through arbitration. Pursuantly, when the dispute arises, it is referred to arbitration. Accordingly, one Mr. C is appointed as the Sole Arbitrator. As a matter of fact, Mr. C has 60 percent share in one of the group companies of A. The same fact was disclosed by Mr. C at the time of his appointment to both the Parties.
- Thereafter, when the pleadings were completed, at the time of hearing, B takes an objection that since Mr. C has a 60% share in one of A's group companies, he cannot adjudicate upon the case as this would amount to him having a bias over the matter.
- Would this objection by B be valid?

- **Section 34 of the Arbitration Act**
- **Within 3 months of receipt of Arbitration Award. Court had power to entertain the Application within further 30 days but not thereafter**

## *Grounds for Challenging the Arbitral Award :*

- The parties to the agreement are under some incapacity;
- The arbitration agreement is invalid;
- The party challenging the award was unable to present its case;
- The award contains decisions on matters beyond the scope of terms of the submission to arbitration;
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;
- The subject matter of dispute cannot be settled by arbitration under Indian law; or
- The enforcement of the award would be contrary to Indian public policy.



- Appellant to issue prior notice to the Award Holder and affidavit to accompany.
- Bombay High Court – Global Aviation Services Pvt. Ltd. v. Airport Authority of India Ltd. – held directory & not mandatory. Supreme Court in The State of Bihar & Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti upheld.
- SMS Ltd. v. Konkan Railway Corporation Ltd., O.M.P. (COMM) 279/2017- The award was set aside as the formula applied for grant of claim for machinery, manpower and overhead is perverse. While doing so, the Delhi High Court relied on the decision of the Supreme Court in Associate Builders v DDA (2015) 3 SCC 49 and Ssangyong Engineering and Construction v National Highways Authority of India, 2019(3) ARBLR 152 (SC), to hold that the finding of the arbitral tribunal can be interfered with under Section 34 of the Act, if such finding are contract or perverse and the tribunal has not adopted a judicial approach.
- Anilkumar Jinabhai Patel (D) v. Pravinchandra Jinabhai Patel - Limitation period under Section 34(3) of the Act would start only from the date of signed copy of the award was delivered to the party making the application for setting aside the award. Combined interpretation of Section 34(3) and Section 31(5) of the Act.

**Ssangyong Engineering and Construction v. National Highways Authority of India, 2019(3) ARBLR 152 (SC) - While dealing with patent illegality, Court would not interfere with award merely because arbitrator adopted one of the many possible interpretations simply because court prefers another one to it. Further, any unilateral change in terms of contract by the arbitrator is violative of the most basic notions of justice under Section 34 of the Act.**

**Cinevistaas Limited v Prasar Bharati, 2019 SCC Online Del 7071 - A final adjudication of claim by an order of the tribunal would constitute an 'interim award' and be open to challenge under Section 34 of the Act.**

**Appeals under Section 37**

- Section 36
- Enforceable as a decree of competent civil court
- Jurisdiction
- Enforced in accordance with provisions of Civil Procedure Code, 1908
- Mere filing of S. 34 shall not operate as a stay of the award
- 2015 Amendment Applicability - *Hindustan Construction Company Ltd. v. Union of India.*

# Thank you

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