# Concept and Practice of Arbitration Law (Including the Principles of Other Alternative Dispute Resolution Methods)

## *PREFACE*

Alternative Dispute Resolution is believed to be superior to litigation. First, ADR is comparatively faster and less expensive. Second, it is based on a more direct participation by the disputants, rather than being administered by lawyers, judges, and the state. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached.

This guide provides an analysis of different modes of dispute resolution mechanism available along with their scope and applicability. This guide also provides an insight into the process of arbitration with practical hints for arbitration along with the specimen arbitration agreements, notices, specimen arbitral awards. This guide helps you learn strategies and innovative approaches for resolving your cases. This guide explains the procedures available to compel —or avoid— arbitration; it discusses the factors to consider in choosing to arbitrate or mediate, and in selecting the arbitrator or mediator for your case. You'll better understand your role as an advocate in mediation, as well as get valuable information on equitable remedies in arbitration.

This guide outlines the general principles of arbitration, the different types of arbitration and the advantages it has over other kinds of conflict resolution processes. Arbitration is one of the major types of ADR. I have made an attempt to provide a clear and reliable statement of the law and concepts central to ADR (arbitration, negotiation, mediation and other processes). I have also attempted to cover the law of arbitration thoroughly thus rendering the book extremely useful for all those who interested in ADR. The chapters on negotiation and mediation treat the subjects from the perspectives of theory, practice and legal doctrine. This guide helps you decide the perfect alternative dispute resolution method for your case or client. The explanation given helps you evaluate each

technique of ADR and successfully apply them to your case, based on your needs.

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**Annexure**

## 1. Introduction

A dispute arises as soon as a person is born and this carries on throughout his life. A small child has dispute with his parents with regards to his choice of food he eats, games he plays. Dispute can arise between parties where they have a common interest in a thing but they have a difference of opinion on the method of fulfilling that interest. The Oxford Dictionary defines the term 'Dispute' as an argument or a disagreement between two people, groups or countries. Disputes are natural and bound to arise where there are relationships and where there are persons having an independent opinion or thought. This dispute can take many forms depending on the parties to the dispute and the matter in dispute.

Dispute, in its background has a common interest on which parties have taken or have a difference of opinion or approach. It is this common interest which gives birth to the methods for mitigating the disputes.

## 2. What is alternative dispute resolution?

Disputes and differences in business dealings are common. The overburdened courts and judicial system of our country are proof of the same. But a dispute must be resolved. Unresolved disputes in business hinder the smooth flow and future growth not only of domestic trade but also of international trade. A dispute is normally resolved by way of litigation or through Alternative Dispute Resolution (ADR) mechanism. In litigation a dispute is referred to a court of Law. Litigation is expensive, time consuming and full of complexities.

Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, negotiation, and conciliation. The above four methods of redressal and resolution of a dispute are collectively called Alternative Dispute Resolution as these are usually considered to be alternative to litigation. The number of cases to be resolved is piling up at the courts in a maddening way. Besides, the constant rise

in the costs of litigation coupled with time delays continues to plague the litigants. As a result of all this, the reliance on ADR methods is on the rise.

The two most common forms of ADR are arbitration and mediation. Arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence. Either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third to comprise a panel. Arbitration hearings usually last only a few hours and the opinions are not public record. Arbitration has long been used in labor, construction, and securities regulation, but is now gaining popularity in other business disputes.

In litigation a dispute is referred to a court of Law. Litigation is expensive, time consuming and full of complexities. ADR is a system whereby disputants resolve their disputes with minimum outside help. The ADR procedure consists of four basic methods of dealing with disputes which are:—

1. Negotiation
2. Mediation
3. Conciliation
4. Arbitration

**NEGOTIATION**: Negotiation is the process where interested parties resolve disputes, agree upon courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes which serve their mutual interests. Negotiation is usually regarded as a form of alternative dispute resolution. The first step in negotiation is to determine whether the situation is in fact a negotiation. The essential qualities of negotiation are: the existence of two parties who share an important objective but have some significant difference(s). The purpose of the negotiating conference is to compromise the difference(s). The outcome of the negotiating conference may be a compromise satisfactory to both the sides, or a standoff (failure to reach a satisfactory compromise) or a standoff with an agreement to try again at a later time. Negotiation differs from

"influencing" and "group decision making.”. In negotiation the disputing parties resolve their differences out of court by entering into negotiation themselves. No lawyers or outsiders are generally involved. There are no hard and fast rules, no technicalities and complicated procedure. However, if a dispute cannot be resolved through negotiations, one can try mediation.

**MEDIATION**: In mediation generally a third party is involved who acts as a facilitator. In a typical mediation, there is always a win-win situation. However, the settlement reached through mediation is non-binding. Mediation comprises of an act of bringing two states, sides or parties in a dispute closer together towards an agreement through alternative dispute resolution (ADR). It is a dialogue in which a (generally) neutral third party, the mediator, using appropriate techniques, assists two or more parties to help them negotiate an agreement, with concrete effects, on a matter of common interest. More generally speaking, the term "mediation" covers any activity in which an impartial third party (often a professional) facilitates an agreement on any matter in the common interest of the parties involved.

Mediation applies to different fields, with some common peculiar elements and some differences for each of its specialties. The main fields of mediation include commerce, legal disputes and diplomacy, but forms of mediation appear in other fields as well.

**CONCILIATION**: Conciliation is now recognised by the Arbitration and Conciliation Act, 1996. In Conciliation, the disputing parties resolve their disputes with the help of one or more conciliators. The settlement agreement reached by the parties and authenticated by the conciliator is binding upon the parties

**ARBITRATION**: Arbitration is the settlement of a dispute by the decision not of a court of law but of one or more persons called arbitrators which is executable as a decree of the court.

**ADR PROCESS:** STRAULS Institute of dispute resolution of Pepperdine University has summarised the process of ADR as mentioned below:—

| NEGOTIATION | MEDIATION | CONCILIATION | ARBITRATION |
|---|---|---|---|
| Voluntary | Usually Voluntary | Usually Voluntary | Either voluntary or by reference of court |
| If there is agreement it is enforceable as a contract | If there is agreement it is enforceable as a contract | If there is agreement it is enforceable as a contract | If there is agreement it is enforceable as a contract |
| No third party involvement | Neutral selected by parties | Neutral selected by parties | Neutral selected by parties |
| Formalities established by parties | Formalities established by parties and neutral | Formalities established by parties and neutral | Formalities established by parties and neutral |
| Usually unrestricted party representation | Presentation limited by agreed rules | Presentation limited by agreed rules with power to neutral to give his/her opinion on the rules | Presentation limited by agreed rules however arbitrator is emopowered to give a decision on rules if warranted |
| Parties control process and outcome | Parties control process and outcome | Parties control process and outcome | Parties control process and outcome |
| Private | Private | Usually Private | Usually Private |

**OTHER METHODS:** It may not be out of place to mention that in practice, a combination of ADR methods is used.

The mechanism of ADR is evolving and new experiments are constantly being carried out by various arbitral organisations all over the world. In its various forms ADR is becoming popular and considered as a co-operative problem solving system.

The President of American Arbitration Association Mr. Robert Coulson has observed that: —

> "Litigation has not kept up with modern, fast moving society..... There have been revolutionary changes in the business practices since the basic court structure was adopted from English common law.... Compared to modern business, civil courts have changed very little.... Alternative dispute resolution gives the lawyers an opportunity to use new processes, encourages problem-solving attitude and an openness to compromise...."

**3. Usage of ADR in India**

The usage of alternative dispute resolution is not new in the Indian society. Its usage has been prevalent for long and can be traced back to the early years of civilization where the Village Panchayat system delved quick, easy and affordable justice. The system of settlement of disputes existed in India since time immemorial. There existed a system of Arbitration in the form of a Panchayat functioning under different names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. These were community groups headed by representatives of the community functioning at the village level for resolution of disputes .It was the easiest, cheapest and quickest system of resolution of disputes and differences.

The legislative usage of arbitration can be traced back to Bengal Regulation 1 of 1772 provided for Resolution of dispute through arbitration. The succeeding

Regulation i.e., Bengal Regulation 1781 contained a provision which is interesting to read:-

"The judge do recommend and so far as he can without compulsion prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties ... No award of any arbitrator be set aside, except upon full proof, made by oath of two creditable witnesses that the arbitrators had been guilty of gross corruption or partially, in the course of which they had made their award."

Then followed the Bombay Regulation 1 of 1779 and the Madras Regulation 1 of 1802 which inter-alia provided for reference to and resolution of disputes through arbitration. Arbitration became a part of legislation in India with the advent of Code of Civil Procedure, 1859. Section 312 to 317 of the Code related to arbitration. These provisions contemplated 2 types of arbitration viz.,

1) Arbitration by the intervention of the court in a pending suit and

2) Arbitration without the intervention of the court.

The third type which gained ground in India is "Statutory Arbitrations" which means that the statute itself provides for arbitration.

**Examples**: India Electricity Act, 1910 and A.P Co. operative Societies Act. 1964

The Indian Contract Act, which came into force from the year 1872 permitted settlement of contractual disputes by arbitration u/s 28. Arbitration, as a dispute resolution procedure was recognized as early as 1879 and found its place in the Codes of Civil Procedure Code1879, 1882 and 1908. When the Arbitration Act was enacted in the year 1940, the provision for arbitration made in Section 89 of the Code of Civil Procedure, 1908 was repealed.

The Code of Civil Procedure enacted in the year 1908 contained Sec.89, Sec.104 (1) (a) to (f) and Schedule II dealing with arbitration. This provision inter-alia enabled the parties to the civil suit to seek reference of disputes for arbitration and empowered the courts to refer the dispute for arbitration, have control over arbitral proceedings and adjudicate on the validity of awards.

The Arbitration Act, 1940 however repealed these provisions of CPC and instead re-produced them with slight changes. The 1940 Act contained provisions similar to the old Act qua the reference of disputes for arbitration. The policy of liberalisation in the field of industry and commerce by the Government of India impelled the Government to follow UNCITRAL Model Law in bringing out the new enactment called The Arbitration and Conciliation Act, 1996 which repealed the 1940 Act. The Civil Procedure Code Amendment Act, 1999 was passed by Parliament on 20-12-1999. It has introduced two pivotal provisions regarding arbitration in section 89 and Rules 1A to 1C of Order X. These provisions make it incumbent upon the courts where it appears that there exists an element of settlement to call upon the parties at their option to agree for one or the other Alternative Methods of Dispute Resolution viz., Arbitration, Conciliation, and Judicial Settlement including settlement through Lok Adalat or Mediation.

However, the Arbitration Act of 1940 and the judicial decisions of various High Courts, privy councils and the Supreme Court governed arbitration in India till the Arbitration & Conciliation Act, 1996 was enacted. It was widely felt that the 1940 Act, which contained the general Law of Arbitration, had become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration proposed amendments to this Act to make it more responsive to contemporary requirements. It was also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both the domestic and international commercial disputes remains out of tune with such reforms. Like, arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There was, however, no general law on the subject in India till early 1996.

The Act, of 1996 came into force with effect from 25th January 1996. The Act of 1996 was enacted to update the Law of Arbitration in India on the lines of the Uncitral model Law on International Commercial Arbitration. The 1996 Act

contains 86 sections besides the preamble and three Schedules. The Act is divided into four parts.

Part I — contains general provisions on arbitration.

Part II — deals with enforcement of certain foreign awards.

Part III — deals with conciliation and.

Part IV — contains some supplementary provisions.

The three schedules reproduce the texts of Geneva Convention on the execution of Foreign Arbitral Awards, 1927, the Geneva Protocol on Arbitration Clause, 1923 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. The main objectives of the Arbitration & Conciliation Bill, 1996 are as under:—

1. To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

2. To make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

3. To provide that the arbitral tribunal gives reasons for its arbitral award;

4. To ensure that the arbitral tribunal remains within the limits of its jurisdiction;

5. To minimise the supervisory role of court in the arbitral process;

6. To permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

7. To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

8. To provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

9. To provide that, for the purpose of enforcement of foreign awards, every arbitral ward made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

The concept of mediation got legislative recognition for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are “charged with the duty of **mediating** in and promoting the settlement of industrial disputes”. Complete machinery for conciliation proceedings is provided under the Act. The conciliators appointed under the Act and the services provided by them are part and parcel of the same administrative machinery provided under the Act.

**4. What is conciliation?**

Conciliation is an alternative dispute resolution (ADR) process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties needs, takes feelings into account and reframes representations.

‘Conciliation’ means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they relate to conciliation, and in particular, in exercise of his powers under sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Conciliation proceedings and the functions of a 'Conciliator' are covered by Part III of the 1996 Act. Section 62 of the said Act deals with reference to 'Conciliation' by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. Section 89 of CPC says that once a reference is made to a 'conciliator', the 1996 Act would apply. The 1996 Act is based on the UNCITRAL Rules for conciliation.

Under section 65 of the 1996 Act, the 'conciliator' may request each party to submit to him a brief written statement describing the "general nature of the dispute and the points at issue". He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Sub-section (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Subsection (4) is important and permits the 'conciliator' to make proposals for a settlement. It states as follows:

"Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore."

Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Sec. 73, states that the conciliator can formulate

terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to 'reformulate the terms' after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

"Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations."

The above provisions in the 1996 Act make it clear that the 'Conciliator' under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make "proposals for a settlement" and "formulate the terms of a possible settlement" or "reformulate the terms". This is indeed the UNCITRAL concept.

**5. What is Arbitration?**

Arbitration is a method whereby parties can resolve their disputes privately. It is known as an alternative dispute resolution mechanism. Instead of filing a case in a court, parties can refer their case to an arbitral tribunal, which is the forum where arbitration proceedings are conducted. The arbitral tribunal will consider the questions over which the parties are in conflict and will arrive at a decision. This decision is known as an 'award'.

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. At its core, arbitration is a form of dispute resolution. Arbitration is the private, judicial determination of a dispute, by an independent third party. An arbitration hearing may involve the use of an individual arbitrator

or a tribunal. A tribunal may consist of any number of arbitrators though our legal systems insist on an odd number for obvious reasons of wishing to avoid a tie. One and three are the most common numbers of arbitrators. The disputing parties hand over their power to decide the dispute to the arbitrator(s). Arbitration is an alternative to court action (litigation), and its decisions are final and binding
Its principal characteristics of arbitration can be summarized as :

- ***Consensus among the parties***

Arbitration can only take place if both parties have agreed to it. In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract. An existing dispute can be referred to arbitration by means of a submission agreement between the parties. In contrast to mediation, a party cannot unilaterally withdraw from arbitration.

- ***Choice of arbitrator(s) with the parties***

Under the Arbitration and Conciliation Act, 1996 the parties can select a sole arbitrator together. If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the presiding arbitrator. Alternatively, the Chief Justice or any person under him or his designate can suggest potential arbitrators.

- ***Arbitration is neutral***

In addition to their selection of neutrals, parties are able to choose such important elements as the language and venue of the arbitration. This allows them to ensure that neither of the parties enjoys an undue or unfair advantage over each other. In case of international disputes the parties are independent to choose elements such as the applicable law, language and venue of the arbitration which further ensures that no party enjoys a home court advantage.

- ***Arbitration is a confidential procedure***

The decision of the arbitral tribunal is final and easy to enforce. Section 2(1) of the Act, defines Arbitration to mean any Arbitration whether or not administered by a permanent arbitral institution. The above definition has been given to clarify that the Arbitration contemplated by the Act — embraces all arbitrations whether

or not administered by permanent arbitral institutions like Indian Council of Arbitration, Indian Merchants Chamber, International Chamber of Commerce etc.
Arbitration is the settlement of a dispute by the decision not of a court of law but of one or more persons called arbitrators. Halsbury has defined Arbitration as follows: —

"Arbitration is the reference of dispute 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. (Halsbury Laws of England, Fourth Edition Vol. II)

From the above it will appear that Arbitration is a mode of resolving disputes without the intervention of the court. However, in practice, a court may have to intervene at various stages of arbitration. The Act ensures that the court's interference is minimum. Section 5 of the Act provides that no judicial authority shall intervene except where so provided in part I of the Act. Part I deals with the law relating to domestic arbitration.

**Ad hoc Arbitration**

An arbitration proceeding conducted without recourse to an institution is commonly known as "Ad hoc Arbitration". Thus Ad hoc Arbitration is an arbitration agreement between the parties and arranged by the parties themselves. The proceedings in Ad hoc Arbitration are conducted by the arbitrators as per the agreement between the parties or with concurrence of the parties.

An Ad Hoc Arbitration maybe: —

1. Domestic Arbitration
2. International Arbitration
3. Foreign Arbitration

**1. Domestic Arbitration**

Domestic Arbitration is that arbitration which takes place in India.

**2. International Arbitration**

International Arbitration is arbitration where at least one of the parties is an individual national of or habitually resident in a country other than India or a body corporate incorporated outside India or a company or an Association or a Body of Individuals whose central management and control is exercised from out of India or by a Government of a Foreign Country.

**3. Foreign Arbitration**

Foreign Arbitration is an arbitration conducted in a place outside India.

Thus, it maybe noted that the Act broadly classifies arbitration according to the place of Arbitration. International Commercial Arbitration, if conducted in India will be known as Domestic Arbitration.

The above provision is discussed in detail at appropriate places in this book.

In short, the judicial statement of dispute is a public sector mechanism and arbitration is a private sector alternative to the same.

**6. Institutional Arbitration**

There are number of national and international organisations set up with the main object of settling commercial disputes by way of Arbitration and other Alternative Dispute Resolution mechanism. A detailed list of such organisations in India is given in Annexure “B”. However, this list is not an exhaustive list.

These organisations lay down rules for the conduct of arbitration. These rules, however, cannot override the Act. These organisations handle the arbitration cases of the parties and provide valuable services like administrative assistance, consultancy and recommending names of arbitrators from the panel maintained by them. Since these organisations have experience and proper infrastructure to conduct the arbitral proceedings, it is quite often beneficial to parties to avail of their services.

Arbitral Institutions claim that ad hoc arbitrations suffer from a number of problems which cause inordinate delays and high costs in actual practice. Since, the arbitral institutions have advantage of well developed arbitration machinery, organisational set up and a comprehensive set of rules and procedures, it saves parties from avoidable delay, expenses and uncertainty.

However, it is quite common in our country for members of a particular organisation take help of the arbitration machinery of that very organisation.
Needless to say in Ad hoc arbitration, the disputant parties themselves have to arrange for venue of meetings, secretarial services and other administrative measures.

**7. Advantages of arbitration over litigation**

Arbitration carries a number of advantages over usual method of dispute resolution of redressal through a court of Law. Courts in India are already burdened with the pending litigation before it which naturally increases the time frame for the disposal of a dispute before a court.

1. Arbitration promises privacy. In a civil court, the proceedings are held in public which may embarrass the parties, especially during cross-examination.
2. Arbitration provides liberty to choose an arbitrator, who can be a specialist in the subject matter of the dispute. Arbitrators who are sector specialists can resolve the dispute fairly and expeditiously as they are well versed with the usage and practices prevailing in the trade or industry.
3. The venue of arbitration can be a place convenient to both the parties. It need not be a formal platform. A simple office cabin is enough. Likewise the parties can choose a language of their choice.
4. Even the rules governing arbitration proceedings can be defined mutually by both the parties. For example, the parties may decide that there should not be any oral hearing.
5. A court case is a costly affair. The claimant has to pay advocates, court fees, process fees and other incidental expenses. In arbitration, the expenses

are less and many times the parties themselves argue their cases. Arbitration involves few procedural steps and no court fees.

6. Arbitration is faster and can be expedited. A court has to follow a systematic procedure, which takes an abnormally long time to dispose off a case. It is a known fact that millions of unresolved cases are pending before the courts.

7. A judicial settlement is a complicated procedure. A court has to follow the procedure laid down in the Code of Civil Procedure, 1908 and the Rules of the Indian Evidence Act. In arbitration, the procedure is simple and informal. An arbitrator has to follow the principles of natural justice. The Arbitration and Conciliation Act, 1996 specifically states that the Arbitral Tribunal shall not be bound by The Code of Civil Procedure, 1908 and The Indian Evidence Act, 1872.

8. Section 34 of the Act provides very limited grounds upon which a court may set aside an award. The Act has also given the status of a decree for the award by arbitrators. The award of the arbitrators is final and generally no appeal lies against the award. While in a regular civil suit there maybe an appeal and an appeal against an appeal.

9. In arbitration, the dispute can be resolved without inflicting stress and emotional burden on the parties which is a common feature in court proceedings.

10. In a large number of cases, 'Arbitration' facilitates the maintenance of continued relationship between the parties even after the settlement.

## 8. Definitions

Some of the important definitions provided in the Act are-

**Arbitral Award**

Arbitral Award means an award given by the Arbitrator in an arbitral proceeding and Section 2(1)(c) mentions that "Arbitral Award" includes an interim award. Since the arbitrators are empowered to give an interim award, all the provisions which are applicable to arbitral award will be equally applicable to an interim award also.

An award is nothing but a decision of the arbitrators in writing duly signed by them.

**Arbitral Tribunal**

Sec 2(1)(d) defines the term Arbitral Tribunal to mean a sole arbitrator or a panel of arbitrators. The number of arbitrators is mutually decided by the parties. However, the Arbitral Tribunal must consist of an uneven number of arbitrators e.g. one, three or five arbitrators.

**International Commercial Arbitration**

Section 2(1)(f) of the Act, defines "International Commercial Arbitration" to mean an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:—

1. An individual who is a national of, or habitually resident in, any country other than India; or
2. A body corporate which is incorporated in any country other than India; or
3. A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
4. The Government of a foreign country.

**Domestic Award**

Section 2(7) provides that an arbitral award made under part I (which deals with law relating to domestic arbitration) shall be considered as domestic award. The term domestic award is distinguished from the term 'Foreign award' which is dealt with in part II of the Act. If the place of arbitration is in India, it is considered a domestic award. Even in International Commercial Arbitration if held in India, the resulting award will be considered as "domestic award". Though, in an International commercial arbitration both the parties may be foreigners, still the award will be a domestic award, if the place of arbitration is in India.

**Foreign Award**

An award made in an arbitration proceeding conducted in a place outside India, is known as Foreign Award. Part II of the Act deals with the enforcement of certain foreign awards.

**9. Arbitration Agreement**

As per section 2(b), an “Arbitration agreement” means an agreement referred to in section 7 of the Act. Section 7 defines “Arbitration agreement” as follows.

**Section 7: Arbitration Agreement**

1. In this part “Arbitration Agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them out of a defined legal relationship, whether contractual or not.
2. An Arbitration Agreement maybe in the form of an arbitration clause in a contract or in the form of a separate agreement.
3. An Arbitration Agreement shall be in writing.
4. An Arbitration Agreement is in writing if it is contained in —
   a. A document signed by the parties
   b. An exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement; or
   c. An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Though the above definition of the Arbitration Agreement looks simple and self-explanatory, it is necessary to understand the same properly. An Arbitration Agreement is the very foundation on which the whole arbitration procedure rests. If there is no valid Arbitration Agreement, there can’t be a valid arbitration.

An Arbitration Agreement need not be in a particular form. What is important is that there should be an intention of the parties to refer the dispute to Arbitration.

An Arbitration Agreement is a contract and it must satisfy all the essential elements of a contract. As per the Contract Act, 1872, an agreement between two parties which is enforceable by law is a contract. Section 11 of the Contract Act provides that all agreements are contract if they are:—

1) made by the **“Free Consent”** of parties competent to contract
2) for a **Lawful Consideration** and with Lawful objects, and

3) are not expressly declared to be void.

*(Emphasis supplied*)

**Free Consent:** Means consent not caused by coercion, undue influence, fraud, misrepresentation or mistake.

**Competent to contract:** Every person is competent to contract who is of the age of majority and of sound mind and not disqualified from contracting by any law.

**Lawful consideration:** It should not defeat the provision of any law, and lawful objects: involve injury to other person or property, be immoral or opposed to public policy.

**Who can enter into an Arbitration Agreement**

1. Every person who is competent to contract can enter into an Arbitration Agreement.
2. In the case of a partnership firm, a partner may enter into an Arbitration Agreement on behalf of the partnership. However, a partner must be authorised in writing by the other partners or the deed of the partnership should provide so.
3. The director or officer of a company can enter into an Arbitration Agreement on behalf of the company. This is however subject to the provision contained in the MoA and AoA of the company.
4. Central and State Government can enter into an Arbitration Agreement subject to fulfillment of constitutional requirements.
5. Public sector undertakings can enter into an Arbitration Agreement like any other party.
6. Minors and lunatics can enter into an Arbitration Agreement through their natural or legal guardians.
7. A recognised agent can enter into an Arbitration Agreement on behalf of his principal.
8. Disputes about joint family property can be referred to Arbitration by the *karta* of such family.
9. An advocate or solicitor can enter into an Arbitration Agreement on behalf of his client if he is specifically authorised by the client.

10. Trustees can refer a dispute to Arbitration if authorised by the Trust Deed. If the deed is silent on this point, the Trust Act permits two or more trustees acting together to refer disputes to Arbitration.

11. An executive or administrator can refer the matters related to management or administration of estate to Arbitration.

12. Legatees may refer disputes relating to division of an estate to Arbitration. Legatee means a person to whom a Legacy is given or a person to whom a legacy is bequeathed by the last will of the testator.

**Precaution to be taken while Drafting an Arbitration Agreement**

Proper care should be taken while drafting an Arbitration Agreement. The Act lays considerable stress on party autonomy. It gives a presumption in most of the sections that unless a specific mention is made under the Arbitration Agreement to various issues, the Arbitral tribunal would have the power to decide on the same. Thus, except a few provisions which are mandatory in the Act, almost all the provisions are subject to the agreement between the parties. The parties may determine the number of arbitrators, the procedure for appointing arbitrators, rules of procedures, the venue of Arbitration, the language of the Arbitration proceedings, procedure for challenging an Arbitrator etc.

For example, if the place of Arbitration is not determined by the parties, then the Arbitral Tribunal may decide upon the same. So is the case with the language and other procedures.

It is advisable to obtain legal advice at the initial stage of drafting an agreement to avoid any differences later on.

The Arbitration Agreement should precisely mention the scope and the subject matter of the reference. It should preferably specify the venue and the language of the proceedings and the modes of service of notice or other communication.

Recently, the Apex court, in the case of ***K. K. Modi vs. K. M. Modi and Others (1998 Arb. W.L.J. 174***) while deciding on what constitutes an Arbitration

Agreement, has extensively quoted from: “Commercial Arbitration” by Mustill & Boyd. (2nd edition page 30). The authors mention that:—

“Among the attributes which must be present for an agreement to be considered as arbitration agreement are:

1. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.
2. That the jurisdiction of the tribunal to decide the rights of parties must be derived either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration.
3. The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal.
4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness to both sides.
5. That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
6. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal”.

In the above case, the question before the Supreme Court was whether the following clause in a MoU constitutes an Arbitration Agreement:

“Implementation will be done in consultation with the financial institutions. For all disputes, clarification etc. in respect of implementation of this agreement, the same shall be referred to the chairman or his nominees whose decision will be final and binding on both the groups.”

The Supreme Court after examining a host of court decisions and authorities on Arbitration ruled that the same is not an Arbitration Agreement but an arrangement to avoid dispute between the members of the family. The Apex court also said that the decision of the chairman is not an Arbitration award but

an opinion of an expert. The test which an Arbitration Agreement must satisfy is whether the intention of the parties is to avoid disputes or to resolve disputes. Only in the latter case, there will be a valid Arbitration Agreement. The intention of the parties has to be found out by reading the terms broadly and clearly without being circumscribed. If there is an agreement to refer an issue to an expert, the same will not constitute an Arbitration Agreement.

**Model Arbitration Clause**

**a) Arbitration Clause in a Hire Purchase Agreement of a Finance Company**

"All disputes, differences and/or claims, arising out of this hire purchase agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of Arbitration & Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the Managing Director of the owner. The award given by such an arbitrator shall be final and binding on all the parties to this agreement.

It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred doing or being unable to act for any reason, the Managing Director of the owner, at the time of such death of the arbitrator or his inability to act as arbitrator, shall appoint another person to sit as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

**b) Arbitration Clause in a Partnership Deed**

In the event of any dispute or difference arising between the parties hereto or their representatives, in any way concerning or relating to the business of the firm, it shall be referred to arbitration and every such reference shall be deemed to be an arbitration within the meaning of Arbitration & Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The award of the arbitration shall be binding on all the parties.

**c) Arbitration Clause in a Partnership Deed of a Professional Firm of Chartered Accountants**

All disputes, differences and questions, whatsoever which shall arise either during the continuation of the partnership or after the termination thereof between the parties or their respective representatives shall be referred to arbitration of a sole arbitrator as per the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification thereof.

The venue of arbitration shall be Mumbai and only a senior Chartered Accountant of repute empanelled with Indian Council of Arbitration will be appointed as an arbitrator who will give his award within 3 months.

**d) Arbitration Clause in a Joint Venture Agreement**

All disputes and differences which may hereafter arise between the parties hereto in connection with this agreement or in connection with the interpretation of any of the terms and conditions herein contained and/or connection with the rights and obligations of the parties hereto under this agreement, shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The place of arbitration shall be at Mumbai and the same shall be subject to the jurisdiction of the Court at Mumbai.

**E) Arbitration Clause in a Tenancy Agreement**

Any dispute or difference that may arise out of the interpretation of these presents, shall be referred to the arbitration of Mr. ..... and the arbitration shall be under the provision of Arbitration & Conciliation Act, 1996. The arbitrators shall have summary powers.

All disputes and differences which may hereafter arise between the parties hereto in connection with this agreement or in connection with the interpretation of any of the terms and conditions herein contained and/or connection with the rights and obligations of the parties hereto under this agreement, shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The place of Arbitration shall be Mumbai and the same shall be subject to the jurisdiction of the court at Mumbai.

**f) Arbitration Clause in a MoU for Purchase of a Flat**

In the event of there being any dispute or difference between the parties hereto as to any clause or provision of this Memorandum of Understanding or as to the interpretation thereof or as to any account or valuation or as to the rights, liabilities, act or omission of any part hereto arising under or by virtue of these presents or otherwise in any way relating to this Memorandum of Understanding such dispute or difference shall be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory enactment or modification thereof the time being in force. The arbitrators shall be entitled to give interim relief/orders. The award given by the arbitrators shall be final and binding on the parties hereto.

**g) Arbitration Clauses in Article of Association of Company**

Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators or assignees on the other hand touching of true intent or construction or the instance or consequences of these presents or of the statutes or touching anything then or transfer done executed or omitted or of the statutes or touching any breach or alleged breach of these presents or any claim on account of any such breach or alleged breach or otherwise relating to the premises or to these presents or to any statutes affecting the company or to any of the affairs of the company, every such difference shall be referred to the decision of a single arbitrator in case parties agree upon the arbitrator, otherwise to two arbitrators (one to be appointed by each party to the difference) or to their umpire in accordance with the provisions of the Arbitration & Conciliation Act, 1996, or any statutory modification thereof in force for the time being.

**h) Arbitration Clause Recommended by American Arbitration Association**

"Any controversy or claim arising out of or relating to this contract shall be determined by arbitration under the International Arbitration Rules of the American Arbitration Association. “The parties may wish to consider adding:

i) The number of arbitrators shall be ..... (one or three)

ii) The place of arbitration shall be ..... (city and/or country)

iii) The language of arbitration shall be .....

**I) The Arbitration Clause Recommended by the Indian Council of Arbitration**

"All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."

**10. Receipt of Communication**

Section 3 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the Act) contains the provisions in respect of service of notice or receipt of communication by the disputant parties. The Act creates a deeming fiction as to receipt of written communications. However, the parties are free to agree on a particular procedure for receipt of written communication. If they fail to agree on any procedure, the presumptions contained in section 3 would apply.

Section 3(I)(a) of the Act provides that any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address.

Section 3(I)(b) further provides that if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

In a judgment of Bombay High Court in the case of ***S. M. Kejriwal vs. Goenka (1998) (5 )LJ - 289*** the court has examined a similar issue. In the instant case, the notice for appearance before the tribunal was returned by the postal department with the remark that addressee has left. The tribunal, however, went

ahead with the proceedings and passed an ex-*parte* order based on the materials available with it. The award was also sent by registered A/D and the same was returned by the postal department with the remark that the party could not be intimated.

The question is:

a) Whether there is compliance of section 3 insofar as notice is concerned?

b) Whether it is mandatory to serve the signed copy of the award on the parties by the Tribunal?

As far as the first issue is concerned the court observed that: —

"The summons sent under regd. A/D was returned back with an endorsement that the petitioner had left the address. In other words that is not the address of the petitioner. In these circumstances there was non-compliance of sec. 3 insofar as notice is concerned.

"Section 34 contains the provisions for setting aside an award. One of the requirements of sec. 34 is that if a party who made the application was not given prior notice of the proceedings, then that constitutes a ground for the court to set aside the award. From the record itself it is seen that the petitioner, was not served with the summons and consequently the award is liable to be set aside."

Regarding the second issue, after the judgment in the case of ***Sevaram Laxmidas Sachdev vs. National Insurance Co. and Another (1993) Mar. L.J. 1544*** the court observed that :—

"It is a duty cast on the Arbitral Tribunal to serve the signed copy of the award on the parties who were parties to the award. Even if the expression used is construed in its ordinary literal meaning the intention is clear that it is mandatory and cannot be dispensed with.

Of course, this is subject to sec. 3 of the Act. If the address with the tribunal is one of the addresses as shown under section 3; then if service is effected at the said address, it will be in due compliance of the requirement of serving notice of the award on the party concerned"

It is therefore, necessary that utmost care is taken by the arbitral tribunal to ensure proper receipt of communication by the parties. If the communication is not delivered as required by sec. 3 (1)(a) which provides for notices to be sent to the addressees last known place of business, habitual residence or mailing address, what constitutes reasonable enquiry depends on the fact of a particular case. Since the same question may arise in future, a proper recording of the enquiry is advisable. It may be in the form of a report of a person who is assigned the job of making an enquiry.

The Act requires that such communication should be made through registered letters or by any other means which provide a record of the attempt to deliver it. It is submitted that courier, fax, telex etc. will be valid mode of communication as they provide a record of the attempt to deliver. However, as a matter of abundant precaution, fax, telex etc. should be followed by a regd. A/D which could be by way of speed post also if there is urgency.

It is advisable that proper care be taken at the time of drafting the arbitration agreement to avoid confusion and controversy later on. In commercial agreements, which contain a clause, a clarification in respect of mode of service of notice and other communication should be preferred. When the arbitration is through national or international arbitral bodies, the rules of such bodies would be applicable.

**11. Disputes which can be referred to arbitration**

Generally speaking, all disputes of a civil nature or quasi-civil nature, which can be decided by a civil court, can be referred to arbitration. Thus disputes relating to property, right to hold an office, compensation for non-fulfillment of a clause in a contract, disputes in a partnership etc. can be referred to arbitration. Thus disputes arising in respect of defined legal relationship, whether contractual or not, can be referred to Arbitration.

It is necessary that there is a defined legal relationship between persons, companies, association of persons, body of individuals etc. created or permitted by law, before a reference can be made to arbitration.

However, the relationship may not be a contractual one. A dispute may arise out of quasi contracts; .e.g., the division of family property. The same may be validly referred to Arbitration.

**12. Disputes which cannot be referred to arbitration**

Section 2(3) of the Act provides that: — This part shall not affect another law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

Thus if a matter is governed by any other law which excludes reference to Arbitration, this Act will not apply. Since in those cases, the law has given precise jurisdiction to specified courts or tribunals only, those cases cannot be decided through the mechanism of Arbitration. The following matters in general practice, are not arbitrable.

1. Insolvency matters; e.g., adjudication of a person as an insolvent
2. Matrimonial causes (except matters pertaining to settlement of terms of separation or divorce)
3. Testamentary matters; e.g., validity of a will
4. Pertaining to suit under section 92 of the Code of Civil Procedure, 1908
5. Pertaining to proceedings for appointment of guardian of a minor or lunatic person
6. Pertaining to industrial disputes
7. Pertaining to criminal proceedings [excepting matters relating to compoundable offences]
8. Relating to charities or charitable trusts
9. Pertaining to dissolution or winding up of a company incorporated and registered under the provisions of the Companies Act, 1956 (**Haryana Telecom Ltd. vs. Sterlite Ind. Ltd.) 1999 (4) L.J. (S.C.) 389**.
10. Relating to claim for recovery of octroi duty

11. Pertaining to title to immovable property in a foreign country.

12. Relating to possession of leased premises governed by the provisions of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947.

However, the above is not an exhaustive list.

In ***Haryana Telecom Limited vs Sterlite Industries (I) Limited,*** it was decided that the power to order winding up of the company is contained under the Companies Act, 1956 and conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company.

**13. Interim Measures of protection**

Sec 9 of The Arbitration and Conciliation Act, 1996 contains provisions concerning the Court granting an interim measure of protection to the parties to a dispute under arbitration.

According to Sec 9 “A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) For the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) For an interim measure or protection in respect of any of the following matters, namely:-

(a) The preservation, interim custody or sale of any goods that are the subject-matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter

upon any land or building in the possession of any party or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

Thus it can be seen that the court may grant an interim relief to the party to a dispute under arbitration on an application being made by any of the parties any time before and during the arbitral proceedings or after making of the arbitral award but before it is enforced under Sec 36 of the Act.

The court will generally take into account the following considerations before granting interim relief under Sec 9 of the Act.

1) The party applying for interim relief must establish a *prima facie* case
2) The balance of convenience should be in its favour
3) The party will suffer irreparable loss or injury if the interim measure is denied to it.
4) The exercise of discretion has to be in a beneficial manner depending upon the circumstances of each case.

[***Newage Fincorp (India) Ltd. vs Asian Corp Securities Ltd***]

Also a recent judgment in the case of ***Firm Ashok Traders vs G. D. Saluja*** decided by a Two member bench of the Supreme Court on 9th January 2004 held that :-

1) An application under Sec 9 is neither a suit nor an application for enforcing the right arising from a contract.
2) Only a party to an arbitration agreement is qualified to make an application under Sec 9 of the Act.

3) When an application u/s 9 is filed before the commencement of arbitral proceedings, the applicant must be able to satisfy the court that the arbitral proceedings are positively going to commence within a reasonable time. There should be proximity between the application and the arbitral proceedings.

The Bombay High Court in ***Nimbus Television and Sports vs D G Doordarshan*** opined that if the interim relief prayed under section 9 would amount to granting final relief frustrating the arbitration proceedings such relief cannot be granted.

The Bombay High Court in ***Anil Construction vs Vidarbha Irrigation Dev. Corp.*** held that the benefit of Sec 9 cannot be availed of by the party that has no intention to appoint the arbitral tribunal. The Provision cannot be availed by a party restraining the other party from approaching the arbitral Tribunal.

The Delhi High Court in ***Arun Kumar vs Vikram Kapoor*** has held that an application for the interim relief should not be granted by the courts when a similar application is pending before the Arbitral Tribunal. This decision is based on an English Court's decision in ***Channel Tunnel Group Ltd. vs Balfour Beatty Construction Ltd.*** which observed as follows: -

"It is a cardinal rule that if the property invokes preliminary alternative remedy before the Arbitral Tribunal, it is debarred from invoking the jurisdiction of the court under Sec 9 of the Act. Ordinarily if the arbitrator is seized of the matter the interim relief should not be entertained and the parties should be advised to approach the arbitrator for interim relief unless and until the nature of relief intended to be sought falls outside the jurisdiction of the arbitrator or beyond the terms of the agreement or reference of disputes. Otherwise the very object of adjudication of disputes by arbitration would stand frustrated. A party should always be discouraged from knocking on the door of the court particularly when the arbitrator is seized of all the relevant or ancillary disputes."

The system of dual agency for providing interim relief is clearly a lacuna in the Act of 1996 and the duality must be set right. The entire power to grant interim measures of protection must be given to the Arbitral Tribunal since they are seized of the subject matter under dispute. Only when a party does not get an interim relief from the Arbitral Tribunal, should it be allowed to knock on the doors of the Court. This is well within the objective of the Act to minimise the intervention of the court in arbitral proceedings.

**14. Judicial Intervention in Arbitration**

One of the objectives of enacting the Arbitration and Conciliation Act, 1996 is "to minimise the supervisory role of court in the arbitral process." And section 5 of the Act has been enacted to give effect to this objective. The concept of Arbitration through intervention of court which was found in the Arbitration Act of 1940 is given a go by. Now the court can intervene only after the award is made and that too on limited grounds as mentioned in section 34 of the Act.

Section 5 of the Act contemplates that no court shall intervene except where so provided in part I even if there are provisions in any other law in force. As mentioned earlier part I deals with domestic Arbitration. In the earlier law of 1940, it was easier to take stay from the court on various grounds like misconduct of arbitrators, presence of bias, non-existence of the Arbitration Agreement etc. The provisions of the new Act are, therefore, a welcome feature. Under the new Act, the intervention of the court is possible on the following grounds:

S-8 : Power to refer matters to arbitration
S-9 : Interim measures of protection before or during arbitral proceedings
S-11 : Appointment of arbitrator in certain events
S-14 : Termination of the mandate of an arbitrator
S-27 : Assistance in taking evidence
S-34 : Setting aside an award
S-36 : Enforcement of an award by way of decree

S-37 : Appeal from certain orders of a court

S-41 : Reference of a dispute to arbitration in insolvency proceedings.

**Power of the court to refer the matters to arbitration**

Section 8 of the Act deals with the power of the courts to refer matters to Arbitration, where there is an Arbitration Agreement. Section 8(1) provides that the Court shall refer the matter to Arbitration if any of the disputing parties applies to the court to refer the matter to Arbitration. However, the party must apply not later than the submission of his first statement on the substance of the dispute before the court.

The Act also contains a special provision whereby even though an application (as mentioned above) has been made and the issue is pending before the court, an Arbitration may be commenced and arbitral award be made.

Thus it can be seen that the Act imposes mandatory duty on the court, to refer the parties to Arbitration. This is also indicated by the use of the word “shall” which means that it is the duty cast upon the court. While making an application to the court in this regard, the original arbitration agreement or a duly certified copy thereof must be enclosed with the application.

It is submitted that though we have used the word ‘court’ in the above paragraphs, the word used in the section is ‘judicial authority’ and not the court. However a judicial authority includes a court of law.

Clearly, there must be an application made to the court in writing stating that the party is invoking the arbitral clause by attaching the relevant documents and that the application was made prior to filing of written statement and more importantly the clause of arbitration must cover the entire subject matter of the suit. When no application to refer to arbitration is being made, the court cannot *suo moto* direct

the parties to arbitration by invoking the arbitral clause. (***Pamvi Consultancy Services Ltd. vs Global Syntex (Bhilwara) Ltd***.)

There was an agreement between petitioner and respondent for receiving the transmission of "Star Network" on payment of monthly subscription. There was an increase in monthly subscription by the respondent from time to time which was not accepted by the petitioner and objections were raised from time to time. The petitioner pleaded that it had a right to receive the airwaves without payment as a fundamental right. Dispute was referred to arbitration by the Chief Judge, City Civil Court. Revision petition against it was dismissed as the dispute was rightly referred to arbitration in view of the agreement entered into between the parties. As such it was held that the Chief Judge of City Civil Court was right in his decision to refer the matter to arbitration. (***Incable Net Services A.P. vs Star India Pvt Ltd.***)

**15. Composition of an Arbitral Tribunal**

Section 10(1) says that the parties are free to determine the number of arbitrators. This is, however, subject to the condition that such number shall not be an even number.

So, an Arbitration Agreement may provide for number of arbitrators which maybe one, three, five and so on. In practice, however, we find that in majority of the cases there are one or three arbitrators.

In case there is no provision as to number of arbitrators in the arbitration agreement, the reference will be to a sole arbitrator.

Section 10(2) provides that failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

In practice, number of arbitrators depends upon the size, complexity and other circumstances of the case.

For example, the Indian Council of Arbitration prefers to appoint a sole arbitrator where the dispute is for less than Rs.25 lakhs. In other cases, where the dispute is for more than Rs.25 lakhs, normally three arbitrators are appointed. However, this is subject to agreement of the parties.

The Act does not prescribe any qualifications for arbitrators. So, any person of repute may be appointed as an arbitrator. Many arbitral organisations maintain a panel of arbitrators drawn from various fields like business, legal, accounts, engineering etc. These organisations often prescribe qualifications for empanelment as an arbitrator. For example, The Indian Council of Arbitration has prescribed that a Chartered Accountant with minimum experience of fifteen years will only be considered for empanelment.

**16. Appointment of an arbitrator**

The parties have been given autonomy in the matter of appointment of the arbitrators. If there is no agreement between the parties the provision of the Act will prevail. Where a sole arbitrator is to be appointed, the parties may agree upon the name of an arbitrator. If the parties fail to agree upon the name of a sole arbitrator within 30 days of receipt of request from the other party to do so, the appointment shall be made by the Chief Justice or his designate.

In case of three arbitrators, each party shall appoint one arbitrator. These two appointed arbitrators shall then, appoint a third arbitrator who shall act as a presiding arbitrator. If a party fails to appoint an arbitrator within thirty days of receipt of request from the other party to do so, the appointment shall be made by the Chief Justice.

Likewise, if the two appointed arbitrators fail to appoint the third arbitrator within thirty days of receipt of request from the other party to do so, the appointment shall be made by the Chief Justice or his designate. It may be noted that, the Chief Justice may designate any person or institution for the purpose of appointment of arbitrators. The Chief Justice, however, will act only upon a request by a party to do so. The decision of the Chief Justice or his designate in this matter is final. The Chief Justice or his designate will take into account the following before appointing an arbitrator:-

1. Any qualification required of the arbitrator by the agreement of the parties; and
2. Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

***IN CASE OF INTERNATIONAL COMMERCIAL ARBITRATION, THE POWER TO APPOINT ARBITRATOR VESTS WITH THE CHIEF JUSTICE OF INDIA OR HIS DESIGNATE. THE CHIEF JUSTICE OF INDIA MAY APPOINT AN ARBITRATOR OF A NATIONALITY OTHER THAN NATIONALITIES OF THE PARTIES WHERE THE PARTIES BELONG TO DIFFERENT NATIONALITIES.***

Application for the appointment of an arbitrator requiring the Chief Justice to take necessary steps for appointment of an arbitrator, cannot not be filed unless a party has exhausted avenues available to it under the Arbitration Agreement and has failed in the process. (***Indiana Engineering Works vs Chairman, Coal India Ltd***.)

An order under Sec 11(6) being administrative in nature, a writ petition would be maintainable against such an order. (***Ashi (P) Limited vs Union of India (Western Railway***))

**17. Jurisdiction of an arbitral tribunal**

Section 16 of the Act gives authority to the Arbitral Tribunal to decide on its jurisdiction. This section is important and of practical use in arbitration proceedings.

The Supreme Court in the case of ***The New India Civil Erectors (P) Ltd. vs. Oil & Natural Gas Corporation (1997) 5 C.C. (Reports)*** observed that

"It is axiomatic that the arbitrator being a creature of the agreement must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of agreement."

However, if two parties mutually enter into an agreement and a dispute arises; whether there is an agreement or not, the same can be validly referred to Arbitration.

Section 16(1) provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose:—

(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) A decision by the arbitral tribunal that the contact is null and void shall not entail *ispo jure* the invalidity of the arbitration clause.

It is common in arbitration proceedings that the respondent raises a plea that certain matters are beyond the jurisdiction of the arbitrators. This is done sometimes on genuine and valid grounds but quite often to buy time and delay proceedings. Therefore, the legislature has rightly given power to arbitrators to decide on their own jurisdiction.

The jurisdiction issues may be raised on many grounds; e.g.,

(1) There is no valid arbitration agreement between the parties

(2) The point at issue is not covered by the agreement and hence is beyond the scope of the arbitral tribunal.

(3) The issue is pertaining to an event after the expiry of the terms of the contract.

(4) There is no dispute or differences between the parties as all the claims have been settled.

(5) The contract itself is invalid.

Now, the Act specifically provides that, the Arbitral Tribunal may rule on its own jurisdiction. So, when any objection or plea is raised regarding the jurisdiction of the tribunal, the tribunal will give its own decision. Of course, the decision is given after hearing both the parties. The tribunal may either accept the plea or reject it. If it accepts the plea, the other party has a right to appeal in a competent Court in terms of section 34.

If it rejects the plea then it will continue with the Arbitration proceedings and make an award. The aggrieved party in the case may apply to the court only after the arbitration proceedings are over and an award is made. Section 16(6) provides that such party may make an application for setting aside such an arbitral award is accordance with section 34. It will be advisable to carefully go through various decisions of the High Courts and the Supreme Court on matter of jurisdiction or scope of the Arbitral Tribunal.

We give here a brief summary of a few judgments for the benefit of readers:—

1. If there is no dispute, there cannot be any arbitration. If a party accepts his liability but is unable to pay, the same cannot be referred to arbitration as there is no dispute. (***Savitridevi J. Ringshia vs. Muncipal Corp. of Greater Bombay, 1993 Mah L.J. 1243***).

2. In a landmark decision of **Union of India vs. D. N. Revri & Co. AIR 1976 SC 2257**, the Apex Court observed that :—

"It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction that are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation."

3. In **P. K. Ramaiah & Co. vs. NTPC (1994) Suppl. (3) SCC, 126**, the court observed that:-
"Where voluntary and unconditional written acceptance of payment in full and final settlement of the contract has been given and subsequent claim for further amounts in respect of the same construction work was made, it was held that there did not exist an arbitrable dispute."

4. Making of award by an arbitrator without going into the preliminary issue is not wrong or arbitrary. [**Gujarat Water Supply and Sewerage Board vs. Unique Erectors Gujarat (P) Ltd. AIR 1989 SC 973**]

5. Existence of a dispute of difference is essential condition for arbitrator's jurisdiction. Failure to pay the amount is not necessarily a difference or dispute and more fact that a party could not or did not pay does not in itself amount to a dispute unless party who chooses not to pay raises a point of controversy in that behalf.

6. Arbitrators have all the powers like the court has in deciding the issues in a suit [**Jugal Kishore vs. Vijayendra AIR 1993 SC 864]**

7. An unregistered firm may refer a matter to arbitration. (***Rampadevi* vs. *B. N. Puri*, ATR 1976 All 19**)

However, no help can be sought from the court by such a firm. A party can, however, register the firm and then apply to court if any help is needed from the court during the Arbitration Proceedings.

**TIME LIMIT FOR RAISING OBJECTION**

A plea that the Arbitral Tribunal does not have jurisdiction is to be raised before submission of the statement of defence. A party cannot be precluded from raising such a plea only because it has appointed or participated in the appointment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority can be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. However, the Arbitral Tribunal can admit a later plea if it considers that the delay is justified [sub-sections (2), (3) and (4) of section 16]

**18. Duties and responsibilities of arbitrators**

The Arbitrator should give the parties to the reference a fair opportunity to remain present before the Arbitral Tribunal either in person or through their authorised representative and to produce evidence before it to their respective claims. An Arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or by way of a document. An Arbitrator must be independent and unbiased and have no interest in the subject matter of the dispute. He also must not have any financial or other interest in the outcome of the award or with any of the parties to the dispute.

Arbitration is a private tribunal for redressal of disputes. The public, therefore, may not be admitted if admission is objected to by either party or the arbitral tribunal. However, various persons who may appear are the parties themselves, all persons claiming through them respectively, and parties interested for, or attending on behalf of, the parties to the reference. Parties are entitled to have persons to attend to assist them in presenting their case before the arbitral tribunal.

**DISCLOSURE BY ARBITRATOR**

Section 12 provides that the arbitrator before accepting his appointment shall disclose in writing to the parties such matters as are likely to give rise to justifiable doubts about his independence or impartiality. The same holds good throughout the arbitral proceedings and if at any time after his appointment such situations arise, he must disclose the same in writing to the parties.

**19. Removal of an Arbitrator**

The appointment of an arbitrator maybe challenged only if

a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality or

b) He does not possess the qualification agreed to by the parties.

An arbitrator has to disclose his interest in writing as discussed in chapter 16; i.e., "Duties and Responsibilities of an Arbitrator"

The Act provides that a party may challenge an arbitrator whom he himself had appointed. But this can be done only for those reasons which he becomes aware of after the appointment had been made.

**Challenge Procedure**

A party may challenge an arbitrator in terms of sec. 13 of the Act. This he must do within 15 days of the constitution of the Arbitral Tribunal or becoming aware of the grounds for challenge as mentioned earlier. The reason for the challenge should be sent to the Arbitral Tribunal in writing. The challenge may result in the following: –

i) The challenged arbitrator may withdraw from office.

ii) The other party may agree on the challenge and terminate the appointment of the arbitrator.

iii) In case, events mentioned above in (I) and (II) do not happen the Arbitral Tribunal may decide upon the challenge.

If the challenge is not accepted, the Arbitral Tribunal shall continue the Arbitration proceedings and make an award.

The aggrieved party may make an application for setting aside the award in terms of sec. 34. It may so happen that, an arbitrator was disqualified at the time of reference, but this fact was known to the party at that point of time. In such cases, leave to revoke authority of such an arbitrator cannot be granted. However, he will be disqualified to continue as an arbitrator, if he is in fraudulent collusion with the opposite party or is indebted to one of the parties.

**Failure or Impossibility to Act**

The mandate of an arbitrator shall terminate if:–

a) He becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

b) He withdraws from his office or the parties agree to the termination of his mandate.

If a controversy remains concerning any of the grounds referred to in clause (a) above, a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

When the authority of an arbitrator is terminated, a substitute arbitrator maybe appointed. This done by following the same procedure as followed while appointing the arbitrator who has been substituted.

**20. Fees of an Arbitrator**

Section 31 (8) of the Act provides that unless otherwise agreed by the parties the cost of arbitration shall be fixed by the Arbitral Tribunal. Explanation to section 31 provides that cost includes

1) The fees and expenses of the arbitrator and witnesses.
2) Legal fees and expenses.
3) Administration fees.
4) Any other expenses incurred in connection with the arbitral proceedings and the arbitral award."

In practice, an arbitrator decides his fees in consultation with the parties and makes a record of the same in the minutes of the proceedings itself with the knowledge of both the parties. Along with fees a record can also be made of incidental expenses like site visit that may involve extra expenditure.

Of late, it has been the experience of many that arbitration is becoming an expensive affair and a "rich man's field". Arbitrators charge exorbitant fees. Counsels have to be paid and other infrastructure costs take a high toll. The objective of Arbitration is to provide justice which is cheap, speedy and free from complexity. If arbitration becomes as costly as the litigation, the very purpose of arbitration will be defeated.

However, institutions like The International Centre for Alternative Dispute Resolution (ICADR) and Indian Council of Arbitration etc. have taken a lead in this direction. We reproduce below the scale of fees recommended by the ICADR.

| | *Amount in Dispute (in rupees)* | *Amount of Fee for one arbitrator (in rupees)* |
|---|---|---|
| i) | Where the total amount in dispute does not exceed 5,00,000 | 10,000 |
| | | |
| ii) | Where the total amount in dispute exceeds 5,00,000 but does not exceed 10,00,000 | 10,000 plus 1 per cent of the amount which the total in dispute exceeds, 5,00,000 |
| | | |
| iii) | Where the total amount in dispute exceeds 10,00,000 but does not exceed 25,00,000 | 15,000 plus 0.5 per cent of the amount by which the total amount in dispute exceeds 10,00,000. |
| | | |
| iv) | Where the total amount in dispute exceeds 25,00,000 but does not exceed 50,00,000 | 22,500 plus 0.25 per cent of the amount by which the total amount in dispute exceeds 25,00,000 |
| | | |
| v) | Where the total amount in dispute amount exceeds 50,00,000 | 28,750 plus 0.125 per cent of the amount by which the total amount in dispute exceeds 50,00,000 subject to the maximum of 1,00,000 |

***Note:*** Where the dispute cannot be expressed in terms of money, the Arbitral Tribunal shall determine the amount of fee in each case.

**21. Procedure for Arbitration**

In the succeeding paragraphs, we have enumerated the provisions relating to the conduct of Arbitration Proceedings. These provisions must be kept in mind by the parties, counsels and arbitrators.

**(1) Equal Treatment of Parties**

Section 18 of the Act read as follows:–

"The parties shall be treated with equality and each party shall be given a full opportunity to present his case."

This section embodying the principle that "justice should not only be done but should appear to have been done." imposes two-fold duty on the Arbitral Tribunal.

1. The Arbitral Tribunal shall give equal treatment to the parties to the reference.
2. The Arbitral Tribunal shall give each party to the reference full opportunity to present its case.

The section lays down the basic principles of natural justice. The rules of natural justice, as drawn from a host of court decisions can be briefly summarised as follows:–

a) An Arbitrator must not receive information from one party which is not disclosed to the other party.

b) The refusal by Arbitrator to give adjournment for one day as the counsel was busy in another arbitration case was held to violate the principles of natural justice.

c) When a matter is remanded to the arbitrators for reconsideration, the parties are entitled to "personal hearing".

d) Examination of one party or witness in the absence of the opposite party is often fatal to the award.

e) Unless expressly authorised by the parties, an arbitrator cannot decide on the basis of private or secret enquiries.

f) A point blank refusal by the arbitrator to record oral evidence was held against the Law of natural justice.

g) And lastly to quote from Russell:

"The principles of universal justice require that the person who is prejudiced by the evidence ought to be present to hear it, taken to suggest cross-examination of himself and to be able to find evidence, if he can, that shall meet and answer it."

**(2) Rules of Procedure**

It must be noted that there are no uniform rules for conduct of arbitration proceedings as is the case with proceedings in a court of law. The code of civil procedure, 1908 or the Indian Evidence Act, 1872 is not applicable in arbitration proceedings. The disputing parties may mutually agree to conduct the proceedings in the manner they consider appropriate.

In case of institutional arbitration, the rules of the institution for conduct of Arbitral proceedings are applicable. Generally, the rules of an institution are based on the provisions of the Act. Thus, neither the parties by their agreement nor the arbitral institutions through their rules, can override the express provisions of Part-I of the Act.

**(3) Statement of Claims & Defence**

In arbitration proceedings, the party who makes the claim is called claimant and the party against whom the claim is made is called a Respondent. The claimant is required to file a statement of claims within the period agreed upon by the parties or determined by the tribunal.

A statement of claims is nothing but details of one's allegations, claims, cause of action and the prayers. The claimant shall also state the facts and enclose the relevant documents in support of his claim. A copy of statement of claim is given to each member of the Arbitral Tribunal as well as to the respondent.

The respondent on receiving the statement of claim shall file his defence in response to the particulars submitted by the claimant. Upon receiving the reply, the claimant may further add something to his earlier submission. This could be stated in a document called Rejoinder. Upon receiving the rejoinder, the respondent may also make further submissions defending his position on the Rejoinder. But this process does not go on and on because the tribunal may refuse to give permission to file such a submission. The tribunal may allow the

parties to amend or supplement their claim or defence during the course of Arbitration proceedings unless otherwise agreed by the parties.

It maybe noted that a reference to claim also applies to a counter claim and a reference to a defence also applies to a defence to that counter claim.

**(4) Failure to Submit Claims**

If the claimant fails to submit the statement of his claims, the Arbitral Tribunal shall terminate the proceedings. Then the reference stands dismissed. Obviously, when no claim is filed, there can be no Arbitration proceedings.

**(5) Failure to Submit Defence**

If the respondent fails to submit his statement of defence, the following situations will emerge: —

a) The Arbitral Tribunal shall continue the proceedings and the award will be made on the documents, materials and other evidence available before the tribunal, and

b) The tribunal will not treat the failure itself as an admission of the allegations made by the claimants.

**(6) Failure to Appear**

Clause (c) of section 25 empowers the tribunal to continue the proceedings and to give the award where a party:—

a) Fails to appear at an oral hearing and / or

b) Fails to produce documentary evidence.

The Arbitral Tribunal may pass an ex-*parte* order, when a party by its conduct shows no intention to appear before it or absents itself in order to defeat the reference. It is advisable that before proceeding ex-*parte*, the tribunal should convey its intention to do so in clear terms. It must make sure that the

respondent is given notice regarding the place, date and time of hearing (See the model notice at the end of this chapter).

**(7) Hearings by the Tribunal**

The parties may agree between themselves whether to hold an oral hearing or not. In many cases, the arbitration agreement itself provides that the proceedings should be conducted on the basis of the documents and the materials available with the Tribunal.

However, in the absence of such agreement, the Arbitral Tribunal shall decide whether to hold oral hearings or not.

**(8) Who shall represent**

Parties to the dispute can appear before the Arbitral Tribunal in person or they may engage an advocate or counsel. Whether to engage a counsel or not, depends on the merits of the case and the background of the parties. However, in cases involving large amounts, the party will normally prefer to take the services of a counsel. Thus an advocate or even a professional like Chartered Accountant can validly represent the case of his client.

**(9) Witnesses and Evidence**

It is common in Arbitration proceedings that witnesses are examined or cross-examined by the parties. Witnesses can be examined on oath or without oath. It may be noted that the Arbitrators have no power to summon witnesses other than the parties. However, they can take the assistance of the court to summon the witnesses. The Arbitrators have the power to determine the admissibility, relevance, materiality and weight of any evidence.

**(10) Place & Language**

The parties have been given freedom of decide on the place of the Arbitration and language to be used in the Arbitration Proceedings. If there is no agreement

between the parties, the tribunal will decide on the same. The Arbitral Tribunal will take into consideration the circumstances of the case and the convenience of the parties while determining the place of Arbitration.

**(11) Difference between a Civil Court and an Arbitration Room**

Arbitral organisations like Indian Council of Arbitration have the necessary facilities to conduct the Arbitration Proceedings. These facilities include:–

1. Arbitration Room
2. Secretarial facilities
3. Computers
4. Reference Library
5. Transaction facilities etc.

However, the arbitration room need not look like a courtroom. The surroundings in an Arbitration room is normally informal. In practice, a small conference room or sometimes a room in a hotel is used as Arbitration room. There are no witness boxes. Even counsels are not required to appear in black and white as we find in a court.

The Arbitration room is not open to public like we find in a court. This saves a party or a witness from the embarrassment that they face during a cross-examination in an open court. Likewise, an arbitrator has limited powers unlike a judge, who has varied powers under the civil procedure code.

**(12) Appointment of Experts**

The Tribunal may appoint expert(s) to report to it on specific issues. Such issues should be those that are to be decided by the Tribunal. However, the parties by their agreement may provide that no such experts can be appointed by the Tribunal. In case, the expert(s) are appointed by the Tribunal, the parties shall co-operate with the expert(s) in providing information or produce documents or

inspect goods and properties. The experts maybe required to appear before the Tribunal to explain their findings and answer questions of the parties.

**(13) Waiver of Right to Object**

Section 4 of the Act contains the provisions under which the right of a party to object to arbitration shall be deemed to have been waived. If a party knows that any provisions of the Act or the Arbitration Agreement has not been complied with and yet participates in the arbitration proceedings without stating his objections, he shall be deemed to have waived his right to so object. In practice it happens that a losing party raises all kinds of objections after the arbitral proceedings are over. This section puts restrictions on such unhealthy practices.

**22. Making of Arbitral Award and Termination of Proceedings**

Sections 28 to 33 of the Act deal with the award by arbitrators and termination of proceedings. Salient features of the same are discussed herewith.

**a) Rules Applicable to substance of Dispute**

Generally speaking, the Arbitral Tribunal decides the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India [section 28(1) (a)]. For example, dispute between the partners of a firm shall be resolved by application of the provisions of the Indian Partnership Act. However, in case of International commercial arbitration, the parties have been allowed autonomy to designate the rule of law. Where the parties fail to designate any law, the Arbitral Tribunal is to apply the law as considered appropriate in the circumstances of dispute. Section 28(1) (b) lays down that in international commercial arbitration. –

1. The Arbitral Tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.
2. Any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

3. Failing any designation of the law under clause (a) by the parties, the Arbitral Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

The parties to the arbitration can authorise the Arbitral Tribunal to decide '*ex aequo et bono*'; i.e., 'based on equity and goods conscience' or as 'amiable compositeur' (as a friendly compromiser); *i.e.*, without applying strict legal rules of interpretation as to the obligation of the parties whether contractual or otherwise [section 28(2)].

In all cases the Arbitral Tribunal is to decide in accordance with the terms of the contract by taking into account the usage of the trade applicable to the transaction [section 28(3)].

Usage of the trade means customs or habitual practice prevalent in a business or deal. The custom prevalent in any trade is quite relevant in interpreting the provisions of any agreement. The growing practice of appointing Arbitrator from the field of a particular trade is, therefore, a healthy sign.

**b) Decision of the Arbitral Tribunal**

As mentioned earlier, the parties are free to determine the number of arbitrators provided that such a number shall not be an even number so, there can be one or three arbitrators. In very few cases, we find more than three arbitrators. The decision of the Arbitral Tribunal is required to be made by majority of all its members unless the parties have agreed otherwise. For example, the parties may decide that the decision should be unanimous and not by majority. The parties or all the members of the Arbitral Tribunal may agree that the question of procedure in the arbitration proceedings maybe decided by the presiding arbitrator.

**c) Settlement**

The Arbitral Tribunal may encourage the parties to settle their disputes at any time during the arbitration proceedings. The Tribunal can take initiative and find out whether there is an element of settlement, and for this purpose it may use mediation, conciliation and other procedures. If a settlement is reached, the same may be incorporated in an arbitral award and signed by the arbitrators. However, this can be done only if requested by the parties and not objected to by the Arbitral Tribunal. An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute. In another words, an arbitral award out of settlement can also be enforced as a decree of the court.

**d) Forms and Contents of Arbitral Award (Sec. 31)**

1. The award shall be made in writing and shall be signed by the arbitrators.
2. Where there is more than one arbitrator, the signature of majority of the arbitrators shall be sufficient. However, in such cases, the reason for any omitted signature must be stated.
3. The award shall contain reasons, subject to the following exceptions:
   (i) The parties have agreed that reasons are not to be given
   (ii) The award is the outcome of settlement and is on agreed terms as mentioned in section 30.
3. The award shall state its date and the place of arbitration.
4. A signed copy of the award shall be delivered to each party.
5. The arbitration may make an interim award. In practice, a request for interim award by a party is entertained by arbitrators, when there are numerous subject matters in the same dispute and each one of them is separate and distinct from the other.
6. The arbitrators have power to award interest for the whole or part of the period between the date on which cause of action arose and the date on which the award is made.

However, the parties can by their agreement take away the power of the arbitrators to award interest. The rate of interest maybe such as may be considered reasonable by the arbitrators. However, the rate of interest, for the period from the date of award to the date of payment, shall be 18% p.a. unless the arbitrators decide otherwise.

**e) Costs of Arbitration**

a. Unless otherwise agreed by the parties, the costs of arbitration shall be fixed by the Arbitral Tribunal.

The Arbitral Tribunal shall specify:

i) the party entitled to costs

ii) the party who shall pay the costs

iii) the amount of costs or method of determining that amount, and

iv) the manner in which the costs shall be paid.

The cost will include the following :–

i) the fees and expenses of the arbitrators and witnesses

ii) legal fees and expenses

iii) any administration fees of the institution supervising the arbitration, and

iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

**f) Termination of Proceedings**

Section 32 of the Act contains the provisions regarding conditions and procedure for termination of arbitral proceedings. The same is summarised in the following paragraphs.

1. The arbitration proceeding is terminated as soon as the final arbitral award is made by the arbitrators.

2. The proceedings stand terminated by an order of the Arbitral Tribunal where:–

a. The claimant withdraws his claims

b. Both the parties agree on the termination of the proceedings

c. The Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

However, within 30 days of the receipt of the arbitral award, any of the parties may move the Arbitral Tribunal for correction of any computation errors, any clerical or typographical error. The party may also require the Tribunal to give interpretation of any specific point or part of the award. The Tribunal may correct the error and give interpretation after notice to the other party.

**g) Additional Award**

A party with notice to the other party may request the Arbitral Tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award. The party can do so within 30 days from the receipt of the award unless the Tribunal extends the time. The Arbitral Tribunal shall make the additional award within sixty days of receipt of the request provided it considers the requests to be justified.

**h) Finality and Enforcement of Awards**

An arbitral award is considered final and binding on both the parties. However, an unsatisfied party has the right to make an application to the court for setting aside the order. Therefore, in real sense, an arbitral award shall be considered final only after the time limit to apply for setting it aside has elapsed. In case, a party has made such application, the award will not be final and binding till the application is refused by the court.

Once the award becomes final as mentioned above, it shall be enforced as if it were a decree of the court. Thus it can be noted that an additional award is automatically converted into a court judgment for its enforcement. It should be remembered that the hassles of implementing a decree is always there. But then, so is the case with any other decree of a court also.

## 23. Setting Aside of Arbitration Awards

To err is human. An award by an arbitrator is also likely to be faulty sometimes. So, there is a need to avoid such award from being enforced. The provision to avoid enforcing such an award is contained in Section 34 of the Arbitration and Conciliation Act, 1996. Section 34 of the Arbitration and Conciliation Act, 1996 provides that a dissatisfied party may apply to the court for setting aside the Arbitral Award that are marred by some errors as spelt out in this section. Of course, this is subject to the conditions as mentioned in sections 34(2) and 34(3).

### Application for setting aside an award

A dissatisfied party may take recourse in section 34(1) and make an application to the court for setting aside the Arbitral award. There is no special form of drafting required for an application to the court. However, the High Courts may lay down procedures to be complied with.

### Conditions for setting aside award

Section 34(2) of the Act provides that an Arbitral award maybe set aside by the court only if —

(a) the party making the application furnishes proof that —

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

***Explanations*** : Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

Thus sub-section (2) covers so many fields which will prevent any biased awards. This is in tune with section 18 of the Act which requires fairness and equity. It maybe noted that provisions of the Code of Civil Procedure, 1908 and The Indian Evidence Act, 1872 are not applicable to Arbitration under the Arbitration and Conciliation Act, 1996. So, an award will not be set aside merely because the arbitrators did not follow legal rules in hearing and deciding the case unless they were required to do so by a submission or by statute to follow such rules.

Recently the Supreme Court observed that a mere mistake in recording minutes of one of the dates cannot be a ground for setting aside the award – (***Construction India vs. Secretary Works Department, Government of Orissa*** **AIR 1998 SC 717**).

The court cannot sit over the reasonableness of the award in appeal and should refrain from reassessing the material and evidence–**State of UP vs. Ram Nath International Construction (P) Ltd. AIR 1996 SC 782**.

The proviso to section 34(2) (a) (iv) incorporates the doctrine of severability. Thus, the judge can set aside only that part which is, in his opinion, invalid, while allowing the remaining part to stand. (**Union of India vs. Jain Associates [1994] 4 SCC 655**)

Sub-section (2)(b)(ii) allows that an award maybe set aside, if it is in conflict with the public policy of India, which is for all practical purposes a vague and ambiguous term. It is to be widely construed to include both the substantive as well as procedural aspects. Thus, both the rationale of the award as well as the procedural formalities should be just and fair towards the public policy in India.

**Time limit for making an application for setting aside award:—**

Section 34(3) lays down that the maximum permissible period for an application to set aside the award is a period of three months. This section provides, thus a sort of a limitation on the applicant. Wanchoo, J. in Madan Lal's case laid down as follows:

“It maybe conceded that there is no special form prescribed for making such an application and in an appropriate case an objection to an award in the nature of a written statement maybe treated as such an application, if it is within the period of limitation.”

Thus section 34 is the only option that an application is to be made to set aside the award. The Legislature has been clear and systematic by providing just one simple unambiguous provision for this purpose. Another good commendable feature of the section is the simplicity provided by forcing no formality on the form of the application.

**24. Appeals**

Section 37 of the Act contains provisions regarding appeals against certain orders. There are limited grounds on which an appeal shall lie to the appellate court. The same has been summarised in the following paragraphs.

1. As mentioned in chapter12, a party may apply to the court for an interim measure of protection in respect of certain matters. (Section 9)

An appeal can be preferred against granting or refusing to grant any such measures by the court (sec. 37(1)(a))

2. Likewise, an appeal shall lie against setting aside or refusing to set aside an arbitral award.

It is obvious that, in both the above cases, the appeal is against the order of a court.

The Act also provides that, certain orders of the Arbitral Tribunal are appealable. In the following cases, the order of an Arbitral Tribunal can be challenged in appeal:–

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16. Sections 16(2) and 16(3) contain the issues relating to jurisdiction of the Arbitral Tribunal.

(b) granting or refusing to grant an interim measure under section 17.

It must be noted carefully that, in case the Arbitral Tribunal refuses the plea of a party that "the tribunal has no jurisdiction," the same is not subject to appeal. In such cases, the only option left to the party will be to make an application for setting aside the award in terms of section 34.

**Second Appeal**

The Act permits only one appeal. So, no Second Appeal can be preferred against an order passed in appeal. However, the right to appeal to Supreme Court is always there. It has been laid by the Apex Court that an appeal to the Supreme Court is not Second Appeal. (**Union of India vs. Mahindra Supply Co.**) (AIR 1962, SC 256)

**Limitations for Appeals**

The time limit for filing appeal is governed by the Limitation Act, 1963. Accordingly, if the appeal lies to the High court, the limitation would be ninety days and if it lies to any other court, it would be thirty days from the date of the order.

## 25. Recognition & Enforcement of Foreign Awards

With the opening of the economy and the world becoming a global village, there will be more and more joint ventures, collaborations and commercial transactions between parties of two or more countries. Different countries have different legal systems. Some contracts may be governed by laws of more than one country and their application may involve a complicated procedure. But in International Arbitration, the parties can provide a procedure and law which maybe acceptable to both of them.

In International Commercial Arbitration the following three things are important:–

i) Proper Law

ii) Arbitral Procedure

iii) Enforcement of awards.

The parties are free to designate the rules of law as applicable to the substance of dispute. Generally, the parties are reluctant to refer the dispute to the national court of one of the parties. This maybe because of any of the following reasons:–

1. The party may apprehend biased judgment and nationalistic sentiments from the national court of the other party.

2. The parties may have the natural desire to have the dispute resolved outside the countries of the parties.

3. The parties may have the desire to be governed by a law which is neutral to the contracting parties.

Arbitration enables parties from two different countries to avoid submitting disputes to the national court of either of the parties. It gives an ample choice of

arbitrators thereby eliminating the fear of biased judgments or nationalistic sentiments.

Geneva and London are considered as arbitration friendly venues but they maybe very expensive. The Indian party should insist for a venue of arbitration in India only. In case the foreign counterpart insists on a neutral venue, then Colombo or Dhaka can be preferred which are comparatively cheaper and nearby.

**Law Governing Arbitration Agreement**

Normally, the proper law of the Arbitration Agreement is the same as the proper law of contract. This law applies to issue such as consent of parties, validity, interpretation and scope of the arbitration agreement etc.

**Law Governing the Arbitration Procedure**

Unless otherwise agreed by the parties, the Arbitration proceedings are conducted in accordance with the law of the country in which the arbitration is held.

**Enforcement of Foreign Award**

International Commercial arbitrations transcend national boundaries and usually have a foreign element. One of the problems faced in such arbitration is related to the recognition and enforcement of arbitral awards. The award is made in one country and the same has to be enforced in the courts of another country. Each country may have a different set of laws. This deficiency was sought to be removed through various international conventions particularly Geneva Convention (1927) and New York Convention (1958).

Part II of the Act contains two chapters. Chapter I deals with New York Convention awards and Chapter II deals with Geneva Convention awards. It has been observed by the Apex court in Renusagar Power Co. vs. G. E. C. (1994) 81

company cases 171, that the New York Convention is an improvement on the Geneva Convention in the sense that it provides for a similar and effective method of obtaining recognition and enforcement of foreign arbitral awards and between the states which are parties to both the conventions, the New York Convention replace Geneva Convention.

**New York Convention**

India is party to the New York Convention as well as the Geneva Convention. India has made two reservations while ratifying the convention which are as follows:

1) That it would apply to the convention for the recognition and enforcement of an award only if it was made in the territory of another contracting state.

2) It would apply the convention only to differences arising out of legal relationships which are considered "Commercial under Indian Law."

**Global Recognition of New York Convention**

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been accepted and signed by almost all important countries in the world. Hence an arbitral award is enforceable against a party to the arbitration agreement in any territory of any contracting state. An award made at London, maybe a purely domestic award in U.K., can be enforced anywhere in India. Similarly an award made at New Delhi, a purely domestic award in India, can be enforced against the party at New York or London or anywhere in a country which is a signatory to the convention. Challenging the foreign award is subject to law of the territory where it has been made.

It may be noted that The New York Convention supersedes the Geneva Convention i.e. If a country is both under the Geneva Convention and in the New York Convention the award must be enforced under the New York Convention since the New York Convention supersedes Geneva Convention.

**Procedure for Enforcement under the Conventions**

There is not much of a difference in the procedure for enforcement of foreign awards under the Geneva Convention and the New York convention. Any person interested in enforcing a foreign award may apply in writing to any court having jurisdiction over the subject matter of the award. In addition to filing of the award and the agreement on which it is based as required by the Convention, the Act requires that evidence as to the award being a foreign award has to be filed.

The competent court in which the award is to be filed is the court which will have jurisdiction over the subject matter of the award. The application will be admitted in the court as a suit. The court will direct notice to be given to the parties requiring them to show cause why the award should not be filed. The court on being satisfied that the foreign award is enforceable under the Act will pronounce judgment according to the award. Upon the judgment so pronounced, a decree will follow. No appeal will lie from such a decree except in so far as the decree is in excess of or not in accordance with the award.

**26. Role of Chartered Accountants in Arbitration**

A Chartered Accountant renders multifarious services to his clients. His wide exposure in taxation, accounting, projects, financial services, business planning, takeovers etc. help him to quickly grasp the background of a dispute or difference. Generally, whenever a dispute and/or difference arise between the two parties, they first consult their Chartered Accountant and do not rush to an Advocate. Day in and day out, a Chartered Accountant is engaged in resolving disputes of his clients though informally. He also possesses enough experience of drafting commercial agreements and is also actively involved in negotiation with government authorities and represents clients in a number of ways.

Arbitration and other methods of Alternate Dispute Resolution (ADR) offer a promising opportunity to a Chartered Accountant. He must look at ADR as a positive addition to the skills he can offer his client. He can be instrumental in

resolving complex disputes by utilizing his wide experience. The following are few of the areas where he can render his services.

**As an Arbitrator**

A Chartered Accountant is required to maintain a high degree of professional competence and technical standard. He is bound by the code of conduct framed by the Institute of Chartered Accountants of India. Section 2(2) of the Chartered Accountants' Act, 1949 read with Regulation 191 of the Chartered Accountants' Regulations, 1988 specifically provides that a Chartered Accountant in his professional capacity is allowed to act as an arbitrator.

Indian Council of Arbitration, a specialized arbitral body, sponsored by Government of India and certain apex business organisations, also recognise Chartered Accountants as arbitrators. The above organisation maintains a panel of arbitrators drawn from various fields. Clause III (b) of the "broad categories of qualification and experience for empanelment as an arbitrator indicate that Chartered Accountants are eligible for empanelment. Clause III (b) reads as follows:—

III(b) "Chartered Engineers, Chartered Accountants, Chartered Secretaries, Architects, basically Valuers or other technical consultants in any branch of engineering, accountancy etc. with at least 15 years' experience in government/private organisation or in professional practice, with adequate knowledge and experience in arbitration matters."

So, a Chartered Accountant having 15 years of professional experience is eligible for empanelment as an arbitrator. There are a large number of organisations, national as well as international, which maintain a panel of arbitrators. The job of an arbitrator is often challenging but satisfying.

**AS A Counsel for the client**

In recent times, there is a move all over the world to encourage professionals and experts like Chartered Accountants, Company Secretaries, Engineers etc. to play an active role in arbitral processes. The objective of arbitration is to provide expeditious, efficient and economic justice to the aggrieved parties as it is felt that too much legality defeats the very purpose of arbitration.

A Chartered Accountant can equip himself to enter into the field with considerable advantage. A Chartered Accountant normally represents the cases of his clients before various authorities including the Tribunals, Company Law Benches, SEBI, RBI etc. He can definitely specialize in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, commercial disputes, rights of properties, lease transactions etc. and represent his clients in Arbitration proceedings.

**As An EXPERT**

Under Sec 26(1) of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal may appoint expert/s to report on any specific issue to be determined by it. It may also require the parties to give the expert any relevant information, explanations, or to produce or provide access to any relevant documents, goods or other property for inspection. An expert may be examined and cross-examined by a party on request of a party and where an arbitral tribunal considers it necessary.

A CA can help the arbitral tribunal in the capacity of an expert in matters relating to accounts, commercial transactions, lease transactions etc where he has sufficient domain knowledge.

**As a conciliator**

Conciliation is a process by which the conciliator endeavours to bring the disputant parties to an agreement. A conciliator is generally an independent third party who mediates for the disputing parties in order to bring them to a mutually acceptable settlement. A mediator is normally taken to be a person of the

disputant's choice. The conciliator is instrumental in drawing up the terms of settlement in the shape of an agreement, consequent upon comprehensive discussions with the parties to the dispute. A CA in his day-to-day practice often helps his clients in settling their disputes through conciliation. CA's can serve as professional conciliators. With the acquisition of thorough knowledge on the process of mediation, negotiating skills and related techniques of conciliation a CA can act as a successful professional conciliator thereby adding to the array of services he provides.

**In other Capacity**

A Chartered Accountant can also advise the client whether a particular case is arbitrable or not. In case of arbitrable disputes, he can provide various services like, advising the clients on selection of arbitrator, initiating the arbitral proceedings, preparation of statement of claims or defence, pleadings etc. He can help in deciding which ADR process the client should choose. After enough experience in arbitration and other ADR methods, he can also play an important role in solving the pending disputes of his clients by identifying those cases that are suitable for resolution through ADR.

It will not be out of place to mention that the field of ADR is bound to grow by leaps and bound in times to come. Nani Palkhivala had once said "If I were appointed a dictator of this country, in the short period between my appointment and my assassination, I would promulgate a law making all commercial disputes compulsorily referable to arbitration."

The Code of Civil Procedure, 1908 has been recently amended and amendment Act of 1999 has recognised ADR as an effective tool for resolving disputes. The purpose of the amendment is to speed up the judicial process and get over the problem of backlog of civil cases. Now, at the inception itself, the court is required to scrutinize and assess whether the matter can be settled or be referred to arbitration and other ADR methods. This amendment will encourage

the process of ADR to a greater extent and professionals can expect lot of opportunities in this field. We quote here section 89(1) of the Code of Civil Procedure (Amendment) Act, 1999 which is quite relevant and self explanatory: —

**89. Settlement of disputes outside the court**

(1) Where it appears to the court that there exist elements of a settlement which maybe acceptable to the parties, the court shall formulate the terms of settlement and give it to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for —

1) Arbitration
2) Conciliation
3) Judicial settlement including settlement through Lok Adalat or
4) Mediation

**Where a dispute has been referred**

1) For arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provision of that Act;
2) To Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provision of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
3) For Judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
4) For Mediation, the court shall effect a compromise between the parties and shall follow such procedure as maybe prescribed.

## 27. Web-sites for reference

1. Indian Council for Arbitration
   http://www.ficci.com/icanet/
2. United Nations Commission on International Trade Law
   http://www.uncitral.org/
   http://www.iccwbo.org/court/english/intro_court/introduction.asp
3. http://www.wipo.int/portal/index.html.en
4. Permanent Court of **Arbitration** http://www.pca-cpa.org/
5. The Chartered **Institute** of Arbitrators http://www.arbitrators.org/

## Annexure

### A. Practical Hints for Arbitrators

1. Be firm but polite
2. Disclose your interest if any, at the beginning. For specimen of such declaration, see the Chapter on Duties and Responsibilities of Arbitrators.
3. You should be impartial.
4. Ensure that arbitrators are appointed as per Law and as per arbitration agreement.
5. As an arbitrator you are supposed to conduct the arbitration proceedings. Don't participate in the proceedings.
6. Arbitrator should perform his functions without undue delay and give equal opportunity to both the parties. He should follow the principles of natural justice.
7. Before accepting the appointment, ensure that you are able to carry out your job efficiently and with competence. You should be willing to devote time as per the need of the case.

8. Study the statement of claims, counter-claims, defence, rejoinders and other pleadings carefully. Prepare yourself.

9. Needless to say, an arbitrator must have good knowledge of Arbitration Act, Contract Act, Evidence Act, Limitation Act, and all other relevant Laws applicable in a particular case including regulatory requirements if any. It is advisable to keep a copy of above books/Acts ready in the Arbitration room.

10. It is advisable to record the proceedings of the hearing by way of minutes and get it signed by both the parties.

11. Give clear directions to the parties in the first/preliminary meeting regarding:–

a. Deadlines for submission of claims/defence etc.
b. Whether there will be oral hearings or not?
c. Examination of witnesses.
d. Admittance/denial of documents.
e. Whether advocates/counsels will represent the party?
f. Address at which parties would like to receive communication.
g. Arbitrators fees/cost of arbitration.
h. Any deposit required from the parties.
i. Venue/Language of arbitration.
j. Spot Inspection / Site Visit.

12. Unlike a court, an arbitrator should not immediately pass an ex-*parte* judgment.

13. If a heated argument ensues, control the counsels and the parties tactfully.

14. Always remember, as an arbitrator you are not a mediator. You have to decide the issue after hearing both the side in an independent, impartial and judicious manner.

15. An arbitrator must not act as an advocate or counsel of the party who has nominated him. He is holding the position of an independent judge.

16. During the Arbitration proceedings, many original documents are filed with the Tribunal. As an arbitrator, you must preserve these documents carefully.

As a matter of practice, these documents are returned to the parties after the award becomes final.

17. An arbitrator must also ensure confidentiality in all the dealings that happen in the arbitration room.

**B. Arbitral Organisations in India**

1. The International Centre for Alternative Disputes Resolution
   Address : Trikoot–11, 3rd Floor, Bhikaji Cama Place,
   R. K. Puram, New Delhi–110 066, India.

2. The Indian Council of Arbitration
   Address : Federation House, Tansen Marg,
   New Delhi–110 001.

3. The Indian Society of Arbitrators
   Address : B–92, Himalaya House, 23, Kasturba Gandhi Marg,
   New Delhi–110 001.

4. Patil Forum for Dispute Resolution
   Address : 'Saish', 120, National Society, Pune–411 007.

5. The Stock Exchange, Mumbai
   Address : Rotunda Building (1st Floor),
   Mumbai Samachar Marg, Mumbai–400 001.

6. The Arbitration Cell
   Address : National Stock Exchange of India Ltd.
   Trade World, Senapati Bapat Marg, Lower Parel, Mumbai–400 013.

7. National Securities Depository Ltd.,

Address : Trade World, 5th Floor, Kamla Mills Compound,
Senapati Bapat Marg, Lower Parel,
Mumbai – 400 013.

8. Bharat Merchants' Chamber
Address : Bharat Chamber Bhavan, 399, Kalbadevi Road,
Mumbai–400 002.

9. Hindustan Chamber of Commerce
Address : 342, Kalbadevi Road, Mumbai–400 002.

10. Bengal Chamber of Commerce & Industry
Address : Post Box No. 280, Royal Exchange, 6,
Netaji Subash Road, Kolkata–700 001.

11. East Indian Cotton Association Ltd.
Address : Cotton Exchange, Marwari Bazar, Mumbai–400 002.

12. Indian Merchants' Chamber
Address : Lalji Naranji Memorial Indian Merchants' Chamber
Bldg., 76, Veer Nariman Road, Churchgate, Mumbai–400 002.

13. Calicut Chamber of Commerce & Industry
Address : Beach Road, Calicut.

14. Cochin Chamber of Commerce & Industry
Address : Post Box No. 503, Bristow Road, Willingdon Island,
Kochi–689 003.

15. Hyderabad Kirana Merchants' Association
Address : 15-7-502, Begum Bazar, Hyderabad–500 012.

16. Punjab, Haryana & Delhi Chamber of Commerce & Industry
Address : PHD House, Opp. Asian Games Village,
New Delhi–110 016.

17. Southern India Chamber of Commerce and Industry,
Address : P. B. No. 1208, Indian Chamber Buildings,
Chennai–600 001.

18. Travancore Chamber of Commerce
Address : P. B. No. 200, Alleppey, Kerala

19. Tuticorin Chamber of Commerce & Industry
Address : South Beach Road, Tuticorin - 1

20. Bombay Chamber of Commerce & Industry
Address : MacKinnon Mackenzie Building, Ballard Estate,
Mumbai–400 038

21. Coimbatore Chamber of Commerce
Address : C/o. T. Stanes & Co. Ltd., 6/13-24,
Race Course Road, Coimbatore–641 018.

22. Goa Chamber of Commerce & Industry
Address : P. O. Box No. 59, Panaji, Goa

23. Cotton Textiles Export Promotion Council
Address : 9, Mathew Road, Mumbai–400 004.

24. Indian Chamber of Commerce

Address : India Exchange, India Exchange Place, Kolkata–700 001.

**C. Specimen Copy of the Minutes of the First Meeting of Arbitration**

In the Matter of Arbitration Between:
M/s. PQR PVT. LTD..... Claimants
Address:
And

M/s. EFG LTD. ..... Respondents
Address:

REG : Dispute on contract No. ..... dt. .....
Minutes of 1st Meeting held on ..... at ..... hrs. at .....
Present:
Claimants : 1. MR. A
2. MR. B
Respondents: 1. MR. C
2. MR. D

**A) Preamble**

1. According to the Arbitration & Conciliation Act, 1996, Shri ..... and Shri ..... were nominated as Arbitrators by Claimants and Respondents respectively. Appointed Shri ..... as Presiding Arbitrator.

2. The Arbitrators inquired whether there is still chance for settlement/conciliation of disputes between the parties. Both parties confirmed that they would like to proceed with arbitration.

Thereupon the Arbitrators issued the following directions to both the parties

**B) Directions**

1. The Claimants and Respondents shall inform in next 10 days the name(s) of their authorised representative/s who will represent them during the proceedings.

2. During the Arbitration, the addresses for communication will be as below.

**Claimants**

Name Address Tel. + Fax Residence
Office

**Respondents**

Name Address Tel. + Fax Residence
Office

3. The Arbitration clause in contract was read,

4. Upon request by the arbitrators, the parties narrated in brief the nature of dispute involved.

5. The following time table for submission of documents was agreed by the parties.

(a) Claimants shall submit their statement of claims within 15 days.

(b) The Respondents shall file their reply within 15 days of receiving the statement of claims.

(c) Rejoinder, if any, by claimants shall be submitted within 10 days from the receipt of the reply to the statement of claims.

6. Parties must ensure that all submissions carry page numbers marked serially starting from No. 001 onwards to save time during proceedings.

*For example*: Claimants shall commence with page No. C-001 onwards and continue page numbers for all their submissions. Similarly, the respondents shall start with page No. R-001 onwards for their submissions.

7. Denials, if any shall be done concurrently with their submissions.

8. Henceforth, both parties must address all their communication / correspondence / documents to the arbitrators and also to the other party making such specific endorsements on all communication.

9. WITNESS: If any party desires to examine a witness, they must do so before the oral arguments begin. The name and address of the witness should be made known to the other party and to the arbitrators at least a week in advance.

10. Minutes of every meeting will be typed and issued by the arbitrators at the end of the meeting for which a typist shall be arranged by the parties as directed by the arbitrator(s).

11. If any party has any reservations regarding the arbitrators appointed by the parties, they should do so within the next 10 days.

12. Fees of Arbitrators

The following fees etc. shall be payable by each party to each arbitrator:–

a) For study of documents Rs. ..... lump sum.

b) Sitting fees Rs. ..... per hour with minimum fee of Rs. ..... per meeting including those held independently by the arbitrators, fees for making Award- Rs..... lump sum.

c) All travel expenses and incidentals incurred by arbitrators shall be paid by parties as directed.

d) For any site visit, arbitrators shall issue directions later.

e) Pending award, all fees and expenses of the arbitrators and arbitration meetings shall be borne in equal proportion by the parties.

f) Each party shall pay each arbitrator an advance of Rs..... on or before..... This will be adjusted by the arbitrators in their final bill. No bill will be presented for the advance. The advance shall also be minimum fees of each arbitrator, which shall not be refunded, in case the arbitration comes to a halt for any reason whatsoever.

g) The place for Arbitration shall be Mumbai and venue and arrangements shall be made by both the parties and intimated to arbitrators.

13. The dates for the next meeting will be announced on receipt of documents.

Sign of Arbitrator Sign of Presiding Arbitrator Sign of Arbitrator

Address &Tel. No. Address & Tel. No. Address & Tel.No.

(Minutes accepted and copy received)

**D. Select Books and Periodicals**


1. TP'S Arbitration & Conciliation Act, 1996
   (The Tax Publishers - C-163, Shastri Nagar, Jodhpur–342 003)
2. Law of Arbitration & ADR in India
   Justice Dr. B. P. Saraf
   Justice S. M. Jhunjhunuwala
   (Vidhi Publishing (P) Ltd., New Delhi.)
3. The Law of Arbitration and Conciliation
   By B. S. Patil
4. The New Arbitration &. Conciliation Law of India
   By G. K. Kwatra
   (Indian Council of Arbitration, New Delhi)
5. Principal and Digest of New Arbitration and Conciliation Law (1999 Edn.)
   By Malik S. B. & Mehra R. K.
6. Russell on Arbitration (Edn. 1997)
   By Sultan David, Kendall John and Judith Gill
7. Commentary on Arbitration and Conciliation Act, 1996
   (Edn. 1997)
   By H. C. Johari
8. Law of Arbitration & Conciliation: Practice and Procedure (1998 Edn.)
   By S. K. Chawla.
9. Basu on Law of Arbitration and Conciliation

Revised By P.K. Majumdar

10. Law Relating to Arbitration and Conciliation

By P.C. Markanda

## E. Update on Arbitration and Conciliation Bill 2003

The Arbitration and Conciliation (Amendment) Bill, 2003, which was introduced 22nd December 2003 by the then Law and Justice Minister, Government of India Sh.Arun Jaitely in Rajya Sabha was withdrawn by Shri Hans Raj Bhardwaj, Minister of Law and Justice on 12th May 2006.The Law and Justice ministry has prepared another amendment to the Arbitration and Conciliation Act which the Government plans to introduce shortly.

## F. Specimen Letter to other party requesting appointment of an Arbitrator

**Specimen Letter to other party requesting appointment of an Arbitrator**

To

M/s ----------

---

---

That in respect of the disputes and differences which have arisen between us under the agreement dated the ..... day of ..... 20 ..... I have this day appointed A, of ..... etc. to be the arbitrator on my behalf.

That I now call upon you within seven clear days after the service of this notice on you to appoint an arbitrator to act on your behalf in the matter of the said disputes and differences.

That in default of your so doing the said A will be appointed by me to act as sole arbitrator in the reference.

Thanking you,

Yours faithfully,

**G. Notice of Appointment of Arbitrator**

**Notice of Appointment of Arbitrator**

Date:

To

M/s ----------

---

---

As per agreement dated ..... made between you on the one part and myself on the other part, it was agreed that all disputes and differences concerning matters referred to in the said agreement shall be referred to arbitration.

Notice is hereby given that in pursuance of clause No. ..... of the said agreement, I have this day appointed "M" to be the arbitrator on my behalf to settle the disputes which have arisen between us, and you are hereby required within seven clear days after the service of this notice to appoint an arbitrator to act on your behalf in the matter of the said disputes and that on your failure, I will appoint the said "M" to act as the sole arbitrator.

Thanking you,

Yours faithfully,

**H. Notice by Arbitrator**

**Notice by Arbitrator**

Date:

To

M/s. ----------

---

---

Dear Sir,

I have been appointed as sole arbitrator pursuant to the arbitration clause in the agreement dated ..... I hereby inform you that I have been requested by Mr. ..... a party to the said agreement, to arbitrate in the said matter. I hereby fix ..... clock in the evening on the ..... day of 20..... the day of the first meeting at ..... for the purpose of commencing the arbitration proceeding giving directions and finalising the conduct of arbitral procedure, please note that you are required to attend the said hearing personally or through duly authorised representative or counsel.

Thanking you,

Yours faithfully,

Sd/-

(Arbitrator)

**I. Specimen disclosure by arbitrator as per Section 12**

**Specimen**

To

M/s. .....

.....

.....

Dear Sir,

***Ref:*** Your letter No. ..... dt. .....

in the matter of arbitration between ABC Ltd vs. XYZ

With reference to the above, I am pleased to give my consent to act as arbitrator.

To the best of my knowledge, there are no circumstances likely to give rise to justifiable doubts as to my independence or impartiality.

I shall also keep the parties informed if any such circumstances arise during the arbitral proceedings.

Thanking you,

Yours faithfully,

**J. Notice to Appoint Substitute Arbitrator**

**Notice to Appoint Substitute Arbitrator**

Date:

To

M/s ----------

---

---

Please take notice that Mr. ..... appointed by you as arbitrator under the agreement of reference dated ..... has refused to act. I hereby request you to appoint a substitute arbitrator within ..... days of the receipt of this letter. In default whereof, I shall proceed to appoint Mr. ..... to act as sole arbitrator in the reference.

Thanking you,

Yours faithfully,

**K. Notice of Intention to proceed Ex-parte after failure to attend hearing.**

**Notice of Intention to proceed *Ex-parte* after failure to attend hearing.**

To,

XYZ

Sub: **In the matter of Arbitration between ABC and yourselves**

I refer to my letter/directions dated _____, in which I had notified you that the hearing would take place at _____ AM/PM at _____ (place) ____. You did not appear before me in that hearing.

Consequently I had adjourned it to the same place and same time on ___(adjourned date)_____.

If you do not attend that hearing as well, it is my intention to proceed with the hearing without your presence.

Sd/-

(Sole Arbitrator)

**L. Model Arbitral Award**

**Model Arbitral Award**

Award of _____ (Sole Arbitrator)

Arbitration Case no: _____ (Where applicable)

**I Narrative Part**

In the above mentioned arbitration I hereby make the following award:

1. A Brief History of the case
2. Arbitration Clause as contained in the contract
3. Order of appointment as arbitrator
4. Claim – summary of
5. Defence – summary of
6. Issues in the award
7. Other things depending on the circumstances of the case.

**II Analytical Part** …….. (Critical Part as this is what makes the award speaking)

This part must basically contain issue-wise discussion based upon the claims and the defences as well as the rejoinders submitted, the evidence gathered and collected, the arguments in support of the decision taken and the decision or the conclusion.

**III Operative Part**

1. Damages or other amount etc as is awarded
2. Interest
3. Costs

Dated :_____( Date of the Award)
At :_____( Place of the Award)
Signature of the Arbitrator

**M. Draft Agreement of reference to a common arbitrator**

**AGREEMENT OF REFERENCE TO A COMMON ARBITRATOR**

THIS AGREEMENT is made at ... this ... day of ……. between Mr. A of …….. residing at ……..... hereinafter referred to as the Party of the First Part and Mr. B of ……... residing at ……. hereinafter referred to as the Party of the Second Part.

WHEREAS by an Agreement (Building contract) dated the ... day of ... entered into between the parties hereto the Party of the First Part entrusted the work of constructing a building on his plot of land situated at... to the Party of the Second Part on the terms and conditions therein mentioned.

AND WHEREAS the Party of the Second Part has commenced the construction of the building according to the plans sanctioned by the... Municipal Corporation and has completed the construction to the extent of the 1st floor level.

AND WHEREAS the Party of First Part has made certain payments to the Party of the Second Part on account but the Party of the Second Part is pressing for more payments which according to the Party of the First Part he is not bound to pay and, therefore the work has come to a standstill.

AND WHEREAS disputes have therefore arisen between the parties hereto regarding the interpretation of certain provisions of the said agreement and also regarding the quality of construction and delay in the work.

AND WHEREAS the said agreement provides that in the event of any dispute or difference arising between the parties the same shall be referred to arbitration of a common arbitrator if agreed upon or otherwise to two Arbitrators and the Arbitration shall be governed by the provisions of the Arbitration & Conciliation Act, 1996.

AND WHEREAS the parties have agreed to refer all the disputes regarding the said contract to Mr….. Architect, as common Arbitrator and have proposed to enter into this Agreement for reference of the disputes to the sole arbitration of the said Mr…….

NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:-

1. That the following points of dispute arising out of the said agreement dated... are hereby referred to the sole arbitration of the said Mr.... for his decision and award.

2. The points of dispute are:-

    a. Whether the Party of the Second Part has carried out the work according to the sanctioned plans and specifications.

b. Whether the Party of the Second Part has delayed the construction.
c. Whether the Party of the Second Part is overpaid for the work done up to now.
d. Whether Party of the First Part is bound to make any further payment over and above the payments made up to now for the work actually done.
e. All other claims of one party against the other party arising out of the said contract up to now.

1. The said Arbitrator shall allow the parties to file their respective claims and contentions and to file documents relied upon by them within such reasonable time as the Arbitrator may direct.

2. The said Arbitrator shall give hearing to the parties either personally or through their respective Advocates but the Arbitrator will not be bound to take any oral evidence including cross examination of any party or person.

3. The said Arbitrator shall make his Award within a period of four months from the date of service of a copy of this agreement on him by any of the parties hereto provided that, the Arbitrator will have power to extend the said period from time to time with the consent of both the parties.

4. The Arbitrator will not make any interim award.

5. The Arbitrator will have full power to award or not to award payment of such costs of and incidental to this arbitration by one party to the other as he may think fit.

6. Subject to the provisions of the Arbitration & Conciliation Act 1996 the award will he binding on the parties hereto.

7. The Arbitration shall subject to what is herein provided be governed by the provisions of the Arbitration Act.

IN WITNESS WHEREOF the parties have put their respective hands the day and year first hereinabove written.

SIGNED by the within named Mr. A ... in the presence of:

Signed by the within named Mr. B…. in the presence of:

**N. Form of agreement to refer the dispute to sole arbitrator**

**FORM OF AGREEMENT TO REFER THE DISPUTE TO ONE ARBITRATOR**

This deed of agreement made on this ____ day of _____, 2000, between:

1. Mr. RN, aged about __ years s/o Mr. PT, r/o _____, hereinafter called the 1st party.

2. Mr. KK, aged about __ years s/o Mr. PT, r/o _____, hereinafter called the 2nd party.

Whereas first and second parties have some dispute regarding management of the partnership business, being run by the parties. And whereas both the parties are agreed upon to refer the dispute to one arbitrator duly appointed by the both parties.

NOW THIS DEED OF AGREEMENT WITNESSES AS UNDER: -

1. That both the parties have agreed upon to appoint Mr. SB s/o Mr. KM r/o _____ as arbitrator.

2. That both the parties appoint Mr. SB as arbitrator.

3. That the arbitrator will go through the partnership deed and decide the dispute between the parties under the provision of the partnership deed.

4. That this deed shall be confined only up to the dispute of the management of the firm.

Witnesses:

1. Name……. Sd/-……..1st party

Address…….

…….

2. Name……. Sd/-……..2nd party

Address…….

……..

**O. Agreement to refer dispute to one arbitrator**

**AGREEMENT TO REFER DISPUTE TO ONE ARBITRATOR**

(USUAL FORM)

THIS AGREEMENT made on the …day of …BETWEEN AB, etc. AND CD, etc.

WHEREAS

1. AB has made the following claims against CD;
(1)…
(2)…
2. CD does not admit the said claims of AB.
3. Dispute have arisen between the parties hereto respecting these claims; and
4. The parties aforementioned agree to refer the said disputes to arbitration.
NOW IT IS AGREED BETWEEN THE PARTIES HERETO as follows:

1. All the matters in dispute relating to the claims of CD are referred to the final determination and award of OP as arbitrator.

2. For the purpose of final determination of the disputes aforesaid, the arbitrator may take such evidence and make such enquiries, as he deems proper. He may proceed ex-parte in case any party fails to attend before him after reasonable notice. However, he cannot embark upon any secret enquiries for this purpose behind the back of the parties.

3. The provisions of the Arbitration & Conciliation Act, 1996, so far as applicable and as are not consistent or repugnant to the purposes of this reference shall apply to this reference to arbitration.

4. Both the parties agree that they would co-operate and lead evidence before the arbitrator.

5. The parties hereto agree that this reference to arbitration would not be revoked by death of either party or for any cause.

6. The award of the arbitrator shall be binding on the parties, their heirs, executors and legal representatives.

7. The parties hereto agree that within one month of the passing of award, the said award shall be filed in the court and a decree obtained in the terms of the award.

8. The cost of this reference shall be in the discretion of the arbitrator.

IN WITNESS WHEREOF the parties hereto have signed this agreement on the day and year first written above.

…(Sd.) …(Sd.)
(AB) (CD)

**P. Agreement for reference to two arbitrators**

**AGREEMENT FOR REFERENCE TO TWO ARBITRATORS**

THIS AGREEMENT made on the…day of…BETWEEN AB, etc., of the one part AND CD, etc. of the other part.

WHEREAS the parties aforesaid have been carrying on the business as partners in the name and style of. …at…under a partnership deed dated…….;

AND WHEREAS each party has contributed to the capital of the partnership RS…and has been sharing the profit and loss of the partnership in equal shares;

AND WHEREAS the business in the partnership has been carried on for the last …years,

AND WHEREAS disputes and differences have arisen between the parties hereto rendering it impossible to carry on the business in the partnership; and

AND WHEREAS the parties have agreed to refer the following matters for the decision of two arbitrators, namely M/s……. AND……

1. The amount of profit and loss as per the books of account of the partnership;

2. The liability of the parties to pay the amounts on settlement of accounts; and

3. Fixation of the date on which the partnership shall be deemed to be dissolved.

NOW IT IS HEREBY AGREED as follows:

1. The arbitrators shall enter upon the reference and decide the aforesaid matters.

2. The arbitrators shall make their award within three months after entering upon the reference or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators by any writing signed by them may from time to time enlarge the time in making the award.

3. The aforesaid two arbitrators shall have the power to appoint an Umpire at any time of the period during which they have to make the award.

4. If the arbitrators agree among themselves then their unanimous decision shall make an award and will be binding on the parties. If the arbitrators do not agree, then the umpire shall make his award within one month, after the original or extended time appointed for making the award of the arbitrators has expired, or on before any later day to which the Umpire by any writing signed by him, may from time to time enlarge the time for making the award and in that case the decision of the Umpire shall be binding on the parties.

5. The arbitrators may proceed ex parte in case either party fails to appear after reasonable notice.

6. This agreement shall remain effective and enforceable against the legal representatives of either party in case of death.

7. The arbitrators may appoint an accountant for examining the account of the party if they think necessary and the remuneration of the accountant as determined by the arbitrators shall be the costs in the reference to be paid by the parties as the arbitrators may direct in their award.

8. In case the arbitrators award that any sum is due from one party to the other, then the party to whom the said sum is awarded may apply to the court for having a decree passed in terms of the award and may realise the amount in execution of the decree from the other party.

9. The provisions of the Indian Arbitration & Conciliation Act, 1996, shall apply to this reference.

10. The costs of this reference shall be at the discretion of the arbitrators.

IN WITNESS WHEREOF the parties hereto have signed this agreement on the day and year first written above.

…(Sd) …

(Sd.)

(AB) (CD)

**Q. Appointment of sole arbitrator on default of other party**

**APPOINTMENT OF SOLE ARBITRATOR ON DEFAULT OF OTHER PARTY**

WHEREAS you had been appointed on ……..by me to act as an arbitrator under the agreement of reference dated…… (or the arbitration clause in deed, dated……..) on my behalf;

AND WHEREAS the other party viz……..had appointed Sri……as his arbitrator;

AND WHEREAS the other party has failed to appoint an arbitrator within 30 days from the receipt of request to do so from the other party;

NOW pursuant to the power conferred on me by virtue of the provisions of Arbitration & Conciliation Act, 1996, and upon request of the party, I hereby appoint you to act as the sole arbitrator in the matters in dispute referred to you for arbitration.

Dated……

(Sd.)…….

**R. Arbitration agreement between three partners**

**ARBITRATION AGREEMENT BETWEEN THREE PARTNERS**

THIS AGREEMENT made at ... this ... day of... between Mr. A of the One Part Mr. B of the Second Part and Mr. C of the Third Part.

WHEREAS the parties hereto have been carrying on business in partnership under a Deed of Partnership dated ... entered into by the parties hereto and in the name of M/s X Y Z & Co.

AND WHEREAS disputes and differences have arisen between the parties regarding the management of the business of the partnership accounts and the legality of certain transactions entered into.

AND WHEREAS one of the partners has given notice of dissolution of the partnership, the validity of which is disputed by the others.

AND WHEREAS each of the parties in terms of the arbitration clause contained in the said Deed of Partnership has appointed an arbitrator being Mr. D. Mr. E and Mr. F.

AND WHEREAS the parties have agreed to enter into a separate submission paper or Arbitration agreement in the manner following:

NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The parties hereto agree to refer to the said three Arbitrators M/s. D, E and F all their disputes and differences '*inter se*' touching the business of the said partnership, its properties and accounts and arising out of or in connection with the said Deed of Partnership and without prejudice to the generality of this clause, to decide the following questions:-

    a. To decide whether the notice of dissolution given by one partner Mr. A is valid if so, the date of dissolution and If not to decide whether the other parties are entitled to continue the said business without the said Mr. A and to decide the date of his retirement.

    b. In the event of the arbitrator holding that the partnership is dissolved, to divide and partition the moveable and immovable assets of the Firm among the parties according to their respective rights under the Deed of Partnership with power to the Arbitrator to

sell any part of the said assets for equitable distribution among the parties.

c. To take accounts of the partnership for the last three years that is from ... to ... and to ascertain the amount payable by one to the other or others if any.

d. To make provisions for payment of debts and liabilities of the Firm including Income-tax liabilities.

1. The Arbitrators shall direct the parties to file statements of their respective claims, legal submissions and reliefs claimed and each party to file his statement of defence in reply to the statements of claims of others.

2. The Arbitrators shall allow the parties to produce documents in support of their claims.

3. The Arbitrators shall direct the books of account and other papers of the Firm to be produced before them and arrange for their safe custody. The Arbitrators will have power to appoint a qualified accountant to inspect the accounts and to draw a balance sheet.

4. The Arbitrators shall allow the parties to be represented by their respective advocates.

5. The Arbitrators shall not be bound to take oral evidence but if any party or their witness is examined he will be allowed to be cross-examined.

6. If there is a difference of opinion between the Arbitrators during the Arbitration proceedings or in making the award the decision of the majority will prevail and be binding on the parties.

7. The Arbitrators shall be entitled to make one or more Interim Awards.

8. The Arbitrators shall make their award within four months from their entering upon the reference but can extend the said period from time to time with the consent of all the parties hereto, obtained in writing.

9. In the event of any party refusing to participate in the Arbitration proceedings or remaining absent without valid cause, the Arbitrator shall have power to proceed *ex-parte* against such party.

10. The costs of the Arbitration proceedings will be at the discretion of the Arbitrators.

11. The Arbitration, subject to what is herein provided shall be governed by the Arbitration & Conciliation Act, 1996.

IN WITNESS WHEREOF the parties hereto have put their hands the day and year first hereinabove written.

Signed and delivered by the
Within named Mr. A..... in the
presence of

Signed and delivered by the
within named Mr. B..... in the
presence of .....

Signed and delivered by the
within named Mr. C ..... in the

presence of

**S. Agreement of reference between members of huf**

**AGREEMENT OF REFERENCE BETWEEN MEMBERS OF HUF**

THIS AGREEMENT is made the day…of …BETWEEN Shri…of …AND Km… daughter of …AND Smt…widow of……..

WHEREAS the parties aforementioned are members of a joint Hindu family and posses joint-family property and business, and

WHEREAS differences have arisen between the said members as to the share and the rights of each member in the said property and business, and

WHEREAS the parties are not agreed as to which property should be allotted to each respective party, and

WHEREAS Shri…aforementioned claims to own certain properties as self-acquired alleging that the same is not divisible as amongst the other parties and

WHEREAS the parties have agreed to refer their disputes about the division of the joint-family properties and business to the sole arbitration of Shri…exercising the powers hereinafter mentioned;

NOW THIS AGREEMENT OF REFERENCE WITNESSES as follows:

1. That the arbitrator shall be entitled to ascertain the extent of value of the joint-family properties and shall determine the manner in which the business of the joint family shall be carried on hereafter and wound up and provide for the disposal of the goodwill of the business as he shall deem fit.

2. That the arbitrator shall have full power to divide and allot by lot or otherwise the joint-family properties amongst the parties aforementioned after determining the share of each such party and the extent and nature of the rights which belong to Smt…….aforementioned. The arbitrator shall also take into consideration the rights of the unmarried daughters of the parties aforementioned and shall make provisions for their education, up-bringing and marriage as the circumstances may require.

3. The arbitrator shall be entitled to award money compensation from one party to equalize the shares thereof. The arbitrators shall be entitled to cause any property or properties to be sole and to distribute the assets after payment of debts of the family in such manner as he shall deem fit. The arbitrator shall be entitled to take such evidence as he may deem necessary and to direct the delivery of title deeds or other documents from one party to the other in connection with the share allotted to such other party. He shall also be entitled to cause any of the joint-family property to be partitioned or divided by metres or bounds and to cause a structure to be built or demolished as he may think fit for the separate enjoyment of the share in immovable property allotted to each or any party.

4. Except for fraud or collusion, the award of the arbitrator shall not be set aside for any other judicial misconduct in the proceedings.

IN WITNESS WHEREOF the aforementioned parties have signed this deed in token of acceptance thereof.

Witness……. A……..….
…… B……..
…… C……
……..D……
…… E……

**T. Form of agreement for reference to three arbitrators**

**FORM OF AGREEMENT FOR REFERENCE TO THREE ARBITRATORS**

This deed of agreement made on this _____, 2000 between:

1. Shri PL, aged about ___ years s/o Shri SS r/o _____, Delhi, hereinafter called the 1st party.

2. Shri KL, aged about ___ years s/o Shri SS r/o _____, hereinafter called the 2nd party.

3. Shri CL, aged about ___ years s/o Shri SS r/o _____, hereinafter called the 3rd party.

Whereas the above parties are carrying on business of general merchandise in partnership under name and style M/s. _____, at _____ since _____, 2000.

And whereas share of profit or loss in the firm is : 1st party 50%, 2nd party 30% and 3rd party 20%.

And whereas all the three parties are active partners in the partnership business.

And whereas some disputes have arisen amongst the parties above named and it has become impossible to carry on business under partnership

And whereas the parties hereto have agreed to refer the matter to the arbitration mentioned here under :

i. Mr. PK s/o Mr. KP, r/o _____.

ii. Mr. PK s/o Mr. RP, r/o _____. and

iii. Mr. SK, s/o Mr. JN r/o _____.

NOW THIS AGREEMENT WITNESSES AS UNDER:

1. The arbitrators are entitled to decide and determine the following matter of disputes, which are referred to them for final determination and award.

a. To determine the position of assets and liabilities of the firm.

b. To prepare the list of sundry debtors and creditors

c. To divide the assets and liabilities according to the share of the parties.

I. That the arbitrators shall enter upon the reference with effect from _____ and shall deliver their award within 4 months.

II. That the award given by the arbitrators shall be final and binding on the arbitrators.

III. That the award of the arbitrators shall be final and binding on heirs, legal representatives and assignees of the parties in case of death of any of the party during the course of arbitration proceedings.

IV. That Mr. RN, the 1st arbitrator shall be the President of the arbitration tribunal who will arrange the sitting for arbitration proceedings.

V. In case of difference of opinion between the arbitrators, the decision of the majority shall be final.

VI. The arbitrators shall fix up the date of hearing and issue notices to the parties for appearance.

VII. That if the parties do not turn up on the date fixed for hearing, the arbitration will proceed *ex-parte*.

VIII. That this agreement shall be binding on the legal representatives, heirs, and assignees in case of death of any of the parties.

IX. If the arbitrators think it proper, they shall appoint an accountant for preparation and finalisation of accounts on fixed remuneration and shall include the remuneration in the cost of arbitration award.

X. If the arbitrators award that any sum is due against any party, then that party may file a suit in the proper Court and obtain a decree in terms of award and shall realize the same from the party against whom the sum is due.

XI. That save the matter provided in this deed, the provisions of the Indian Arbitration & Conciliation Act, 1996 shall apply to this reference.

XII. That it shall be the discretion of the arbitrators to fix the cost of reference.

The above named parties do hereby agree to all the terms and conditions stated above without any duress, or undue influence and after fully understanding the terms of this deed of arbitration, do hereby put our hands on this _____, 2000, in the presence of following witnesses:

1. Signature……. 1st party

Name… …….

Address……..

……

2. Signature……2nd party

Name……..

Address……..

……

3. Signature……. 3rd party

Name… …….

Address……..

……

**U. Form of arbitration clause in an agreement**

**FORM OF ARBITRATION CLAUSE IN AN AGREEMENT**

i. Every dispute, difference, or question which may at any time arise between the parties hereto or any person claiming under them, touching or arising out of or in respect of this agreement (deed) or the subject matter thereof shall be referred to the arbitration of XY, etc. or if he shall be unable or unwilling to act, to another arbitrator to be agreed upon between the parties or failing agreement to be nominated by……or, failing agreement to two arbitrators one to be appointed by each party to the difference (whether consisting of one or more than one person) and in case of difference of opinion between them to an umpire appointed by the said two arbitrators before entering on the reference and the decision of the arbitrator ( or such arbitrators, or umpire as the case may be) shall be final and binding on the parties.

OR

ii. In the event of any dispute, difference or question arising out of or in respect of this agreement or the commission of any breach of any terms thereof or of compensation payable thereof or in any manner whatsoever in connection with it, the same shall be referred to the Chamber of Commerce……. (or the Association of……..) for arbitration as provided in Rules framed by the said Chamber (or Association) for the purpose. The decision or award so given shall be binding on the parties hereto.

OR

iii. All disputes arising between the partners as to the interpretation, operation, or effect of any clause in this deed or any other difference arising between the partners, which cannot be mutually resolved, shall be referred to the arbitration of……failing him to any other arbitrator chosen by the partners in writing. The decision of such an arbitrator shall be binding on the partners.

**V. Notice by arbitrator for commencement of arbitration**

**NOTICE BY ARBITRATOR FOR COMMENCEMENT OF ARBITRATION**

WHEREAS I, have been appointed as sole arbitrator pursuant to the arbitration clause in the agreement dated……. (or by the agreement for reference dated……) and I have entered upon the said reference. I hereby appoint ……. O'clock in the evening of …… as the date of the first meeting at…….for the purpose of commencing the arbitration proceedings.

Please note that you are required to attend at the said meeting personally or through duly accredited representative or counsel in default whereof I shall proceed *ex-parte*.

Dated…….
(Sd)…….
(Sole Arbitrator)

**W. Notice to arbitrator by parties for Arbitration**

**NOTICE TO ARBITRATOR**

WHEREAS the parties to an agreement of reference (enclosed herewith) dated…….have referred their disputes and differences to your sole arbitration, WE, the aforesaid parties, hereby request you to please take up the arbitration and act, in accordance therewith.

AB……..
CD…….

**X. Notice of revocation to arbitrator**

**NOTICE OF REVOCATION TO ARBITRATOR**

To
……..
……..

Please take notice that I, the undersigned, have, by instrument dated…… revoked your authority to arbitrate in the matter originally referred to you for arbitration under the letter to appointment dated……..or agreement of reference dated……or deed dated……..

I hereby restrain you from acting in the said arbitration and direct you to return to me all the papers submitted to you by me in that behalf. You are hereby discharged under the said reference.

Dated…….

(Sd)……

**Y. Draft award made on reference by court**

**AWARD (MADE ON REFERENCE BY COURT)**

IN THE MATTER OF AN ARBITRATION between AB, etc. and CD, etc., WHEREAS in pursuance of an order of reference made by the court of ……and dated the……following matter in difference between AB and CD had been referred to me (us) for determination, namely……..

NOW I/ we having duly considered the matter referred to me (us) hereby make my (our) award as follows:

1. (We) award……..

(i)…….

(ii)……

…(Sd.)

**Z. Award by an arbitral tribunal**

**AWARD BY AN ARBITRAL TRIBUNAL**

THIS IS THE AWARD by the undersigned, made the ……..day of …….

WHEREAS by an agreement under the deed, dated……..and made between (contractor) of the one part and…….(owner of the property) of the other part (being an agreement by the said contractor) to construct certain works upon the land of the said (owner) in accordance with sanctioned plans and specifications contained therein it was agreed between the parties that if any dispute should arise in future between the parties thereto relating to or touching the said agreement or the interpretation thereof or in relation to the rights, duties or liabilities of either party there under, the same should be referred to two arbitrators and their umpire in accordance with the provisions of Arbitration & Conciliation Act, 1996.

AND WHEREAS disputes having arisen between the aforesaid parties relating to the said agreement the said (contractor) by writing dated…….nominated and appointed Shri……(one arbitrator)……of etc, and the said (owner) by writing dated……..nominated and appointed Shri……..(other arbitrator) …….of etc, to act as arbitrators and settle the said matters in dispute between the parties.

AND WHEREAS the said arbitrators respectively accepted the said appointments and took upon themselves to discharge the burden of the said reference and before starting the proceeding for the consideration of the disputed matter referred to them by writing under their hands dated…….appointed me the said Presiding Arbitrator in the said arbitration.

AND WHEREAS the said arbitrators duly extended the time for making the award until the ……..day of…….

AND WHEREAS the said arbitrators were unable to agree amongst themselves unanimously upon an award and under such circumstances gave me notice in writing dated…….and thereupon the disputes stood referred to me.

NOW BE IT KNOWN that, I, said Presiding Arbitrator, make my award on the following matter:

1. I find that the completion of the work although delayed for……..months beyond the agreed date on which it ought to have been completed such delay was caused partly by exceptionally bad weather and partly by lack of workmen caused by labour strikes and also their having taken up construction works under the Government and I find and award that the said (contractor) is not liable for any damage on that account.

2. I find that a part of the work executed by the said (contractor) was found to be defective in the following respects……..(defects set out) and I award that the said (owner) is entitled to Rs…….as damages on that account.

3. I find and award that after deducting the said sum of Rs……on account of the damages there is still due and owing to the said (contractor) in respect of the matters in dispute between the said parties to reference the sum of……..

4. I direct the said (owner) shall pay the said sum of Rs……..to the said (contractor) on or before the ……..day of……..

5. I award and direct that the cost of the said (contractor) relating to and incidental to this arbitration reference including the costs of the arbitrators and of this award which is Rs……..shall be borne and paid by the said (owner) or whatever may be the award as to costs.

…(Sd.)