

# A PRACTICAL GUIDE ON THE CONCEPT AND PRACTICE OF ARBITRATION

## TABLE OF CONTENTS

| S.No | Title   | Page No |
|------|---|---------|
| 1.0  | <a href="#">Introduction</a>  | 3       |
| 2.0  | <a href="#">Concept of Arbitration</a>  | 7       |
| 3.0  | <a href="#">History of Arbitration</a>  | 9       |
| 4.0  | <a href="#">Indian Scenario</a>   | 10      |
| 5.0  | <a href="#">Types of Arbitration</a>  | 13      |
| 6.0  | <a href="#">International Commercial Arbitration</a>                                      | 14      |
| 7.0  | <a href="#">Arbitration Agreement</a>   | 15      |
| 8.0  | <a href="#">Arbitration tribunal</a>  | 21      |
| 9.0  | <a href="#">Duties and responsibilities of an Arbitrator</a>                              | 22      |
| 10.0 | <a href="#">Removal of an arbitrator</a>  | 23      |
| 11.0 | <a href="#">Procedure for arbitration</a>   | 24      |
| 12.0 | <a href="#">Making of arbitral award</a>  | 27      |
| 13.0 | <a href="#">Appeals</a>   | 33      |
| 14.0 | <a href="#">Fees for Arbitration</a>  | 35      |
| 15.0 | <a href="#">Recognition &amp; Enforcement of Arbitral awards</a>                          | 35      |
| 16.0 | <a href="#">Practical hints for Arbitrators</a>   | 38      |
| 17.0 | <a href="#">Role of Chartered Accountants in Arbitration</a>                              | 40      |
| 18.0 | <a href="#">Useful Links</a>  | 43      |
| 19.0 | Specimen Documentation  |         |
|      | 1. <a href="#">Specimen Letter to other party requesting appointment of an Arbitrator</a> | 45      |
|      | 2. <a href="#">Notice of Appointment of Arbitrator</a>                                    | 46      |



|     |   |    |
|-----|---|----|
| 3.  | <a href="#"><u>Notice by Arbitrator</u></a>   | 47 |
| 4.  | <a href="#"><u>Specimen disclosure by arbitrator as per Section 12</u></a>                      | 47 |
| 5.  | <a href="#"><u>Notice to Appoint Substitute Arbitrator</u></a>                                  | 48 |
| 6.  | <a href="#"><u>Notice of Intention to proceed Ex-parte after failure to attend hearing.</u></a> | 49 |
| 7.  | <a href="#"><u>Specimen Agreement of reference to a common arbitrator</u></a>                   | 49 |
| 8.  | <a href="#"><u>Form of agreement to refer the dispute to sole arbitrator</u></a>                | 52 |
| 9.  | <a href="#"><u>Agreement to refer dispute to one arbitrator</u></a>                             | 53 |
| 10. | <a href="#"><u>Agreement for reference to two arbitrators</u></a>                               | 55 |
| 11. | <a href="#"><u>Appointment of sole arbitrator on default of other party</u></a>                 | 57 |
| 12. | <a href="#"><u>Arbitration agreement between three partners</u></a>                             | 58 |
| 13. | <a href="#"><u>Agreement of reference between members of HUF</u></a>                            | 61 |
| 14. | <a href="#"><u>Form of agreement for reference to three arbitrators</u></a>                     | 63 |
| 15. | <a href="#"><u>Form of arbitration clause in an agreement</u></a>                               | 66 |
| 16. | <a href="#"><u>Notice by arbitrator for commencement of arbitration</u></a>                     | 67 |
| 17. | <a href="#"><u>Notice to arbitrator by parties for Arbitration</u></a>                          |    |
| 18. | <a href="#"><u>Notice of revocation to arbitrator</u></a>                                       | 67 |
|     |   | 68 |
| 19. | <a href="#"><u>Award made on reference by court</u></a>   | 69 |



|  |   |    |
|--|---|----|
|  | 20. <a href="#">Award by an arbitral tribunal</a> | 70 |
|--|---|----|

## 1.0 INTRODUCTION

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 empowered 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.

## 2.0 CONCEPT OF ARBITRATION

**The dictionary meaning of Arbitration is** “The process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision”. Arbitration is one of the four forms of alternate dispute resolution – the other three being Negotiation, Mediation and Conciliation



### **Need for arbitration**

The overburdened courts and judiciary system of our country is a proof of the quantum of disputes and differences in business dealings. As on Dec 2007, over three million cases were pending in India's 21 high courts, and an astounding 26.3 million cases were pending in subordinate courts across the country. Meanwhile, the Supreme Court of India had a total of 39,780 civil and criminal pending cases at the end of last year.

This has been revealed by official figures emerging from the home ministry's department of justice, under a Right to Information Act application placed by a citizen

Arbitration, by its very nature, is meant to be an alternative to courts and a speedier remedy for dispute resolution. Almost all disputes-Commercial, Civil, Labour and Family disputes can be settled through arbitration. Arbitration process has been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property rights, and personal injury and product liabilities

### **Advantages of Arbitration**

- i. Privacy - An arbitration hearing is a private meeting
- ii. Informality - The adversary elements of an open court hearing are less evident in the less formal atmosphere of arbitration.
- iii. Choice of decision maker -The parties can choose a technical person as arbitrator, so technical evidence will be readily understood.
- iv. Convenience - The hearings can be arranged at times and places to suit all.
- v. Flexibility - The Rules and procedures can be segmented, streamlined or simplified.
- vi. Efficiency - Arbitration can be heard sooner than the court. Preparation should be less onerous, and the hearing should be shorter faster and economical.



- vii. Finality - There is generally no right of appeal, although the court has limited powers to set aside or remit an award.
- viii. Internationality - Arbitration is internationally accepted, and awards can be enforced in most countries.
- ix. Neutrality
- x. 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.

### **What Disputes Can Not Be Referred To Arbitration?**

Section 2(3) of the Act provides that :- This part shall not affect any other law for the time being in force by virtue of which certain disputes may not 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 specific jurisdiction to specified courts or tribunals only, they cannot be decided through the mechanism of Arbitration.

The following matters in general practice, are not arbitrarble.

- 1) Insolvency matters e.g. adjudication of a person or 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
- 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 Companies



- 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 Rents, Hotels and Lodging House Rates Control Acts, 1947
- 13) Any dispute, which is subject to an arbitration agreement, may be determined by arbitration unless the agreement is contrary to public policy or unless, under any other law, such a dispute is not capable of determination by arbitration.

The above, however, is not an exhaustive list.

### **3.0 HISTORY OF ARBITRATION**

Records from ancient Egypt attest to its use especially with high priests and their interaction with the public. Arbitration was popular both in ancient Greece and in Rome

The first law on arbitration under English law was the Arbitration Act 1697 but arbitration was already common when it was passed. The first recorded judicial decision relating to arbitration was in England in 1610. The noted Elizabethan English legal scholar Sir Edward Coke refers to an earlier decision dating from the reign of Edward IV (which ended in 1483). The early arbitrations at common law had the disadvantage that either party to the dispute could withdraw the arbitrator's mandate right up until the delivery of the award if things appeared to be going against them (this was rectified in the 1697 Act).

The Jay Treaty of 1794 between Britain and the United States sent unresolved issues regarding debts and boundaries to arbitration, which took 7 years and proved successful.

In the first part of the twentieth century, many countries (France and the United States being good examples) began to pass laws sanctioning and even promoting the use of private adjudication as an alternative to what was perceived to be inefficient court systems.



As trade grew, so did the practice of arbitration, eventually leading to the creation of a variant now known as international arbitration, as a means for resolving disputes under international commercial contracts. In modern times, arbitration also occurs online, in what is commonly referred to as Online Dispute Resolution, or ODR. Typically, ODR proceedings occur following the filing of a claim online, with the proceedings taking place over the internet, and judgment rendered on the basis of documentation presented.

#### **4.0 INDIAN SCENARIO**

In India arbitration has undergone a phenomenon metamorphosis. It has grown from the stage of village elders sitting under a banyan tree and resolving disputes to the stage of gaining statutory recognition. East India Company was mainly responsible for this evolution. To start with the Bengal Regulation 1 of 1772 provided for Resolution of dispute through arbitration. This was followed by Bombay Regulation 1 of 1779 and Madras Regulation 1 of 1802 which inter-alia provided for reference to and resolution of disputes through arbitrations.

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. [India Electricity Act, 1910 and A.P Co. operative Societies Act. 1964 are examples in this regard]

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



Code 1879, 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 reproduced 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 as follows.

| Part/ Chapter no | Title   | Section Nos |
|------------------|---|-------------|
| <b>Part I</b>    | <b>Arbitration</b>                                      |             |
| Chapter I        | General provisions                                      | 2-6         |
| Chapter II       | Arbitration agreement                                   | 7-9         |
| Chapter III      | Composition of Arbitral tribunal                        | 10-15       |
| Chapter IV       | Jurisdiction of arbitral tribunals                      | 16-17       |
| Chapter V        | Conduct of arbitral proceedings                         | 18-27       |
| Chapter VI       | Making of arbitral award and termination of Proceedings | 28-33       |
| Chapter VII      | Recourse against arbitral award                         | 34          |
| Chapter VIII     | Finality and enforcement of arbitral awards             | 35-36       |
| Chapter IX       | Appeals   | 37          |
| Chapter X        | Miscellaneous   | 38-43       |
| <b>Part II</b>   | <b>Enforcement of certain foreign awards</b>            |             |
| Chapter I        | New York convention                                     | 44-52       |



|                 |                                 |       |
|-----------------|---------------------------------|-------|
|                 | awards                          |       |
| Chapter II      | Geneva Convention Awards        | 53-60 |
| <b>Part III</b> | <b>Conciliation</b>             | 61-81 |
| <b>Part IV</b>  | <b>Supplementary provisions</b> | 82-86 |

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.

## **5.0 TYPES OF ARBITRATION**

### **A) 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 may be 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 settlement of dispute is a public sector mechanism and arbitration is a private sector alternative to the same.

#### **B) 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. 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.

## **6.0 INTERNATIONAL COMMERCIAL ARBITRATION**

Section 2(1)(f) of the Act, defines “International commercial arbitration” means 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-

- (i) An individual who is a national of, or habitually resident in, any country other than India; or
- (ii) A body corporate which is incorporated in any country other than India; or



- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv). The Government of a foreign country;

## **7.0 ARBITRATION AGREEMENT**

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

**Sec 7 of the Act is reproduced below**

### **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 in respect of a defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be 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 provide 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) There 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 **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**.

### **Who Can Enter Into An Arbitration Agreement?**

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 partnership etc. can be referred to arbitration. Even the disputes between an insolvent and his creditors can be referred to arbitration by the official receiver or the official assignee with the leave of the court. Thus disputes arising in respect of defined legal relationship, whether contractual or not, can be referred to Arbitration.

- 1) Every person who is **Competent to contract** can enter into an Arbitration Agreement.
- 2) **Minors and lunatics** can enter into an Arbitration Agreement **through their natural or legal guardians**.
- 3) A **recognised Agent** can enter into an Arbitration Agreement on behalf of his principal.
- 4) Disputes about joint family property can be referred to Arbitration by the **karta**.
- 5) **Advocate/solicitor** can enter in an Arbitration Agreement on behalf of his client
- 6) **Trustees** can refer a dispute to Arbitration.
- 7) An **executive or administrator** can refer the matters related to management or Administration of estate to Arbitration.
- 8) **Legatees** may refer disputes relating to division of a estate to Arbitration.

### **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."

## **8.0 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. In case there is no provision as to number of arbitrators in the arbitration agreement, the reference will be to a sole arbitrator as per Section 10(2).

If the parties fail to agree upon the name of a sole arbitrator, the appointment shall be made by the chief justice or his designate. (Section 11)

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 the presiding arbitrator.

If a party fails appointment shall be made by the chief justice. (Section 11)

Two appointed arbitrators fail to appoint the third arbitrator, the appointment shall be made by the chief justice or his designate.

The chief justice or his designate will take into account the followings before appointing an arbitrator : - (section 11(8))



- 1) An qualification required of the arbitrator by the agreement of the parties ; and
- 2) Other consideration as are likely to secure the appointment of an independent and impartial arbitrator.
- 3) 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. (Section 11(9))

## **9.0 DUTIES AND RESPONSIBILITIES OF AN ARBITRATOR**

Any person can be appointed as an arbitrator. No qualifications are prescribed. It is fundamental that an arbitrator act fairly. The Arbitration Act requires the arbitrator to be impartial and independent, and adhere to the rules of natural justice during the procedure and in making the award. It is important for the person appointed to have a good knowledge of the law and practice of arbitration.

### **Ethics Applicable To Arbitrators**

The rules of natural justice are legal principles to be followed by any person or body charged with adjudicating disputes or the rights of others. The Rules are:

- to act fairly, in good faith, without bias, and in a judicial temper
- to give each party the opportunity of adequately stating their case, and correcting any relevant statement prejudicial to their case, and to not hear one side behind the back of the other
- to not be a judge in one's own cause (so that an arbitrator must declare any interest in the dispute)
- to disclose to the parties any relevant documents which are looked at (by the arbitrator).



In short, not only should justice be done but it should be seen to be done. The courts are careful to guard the right of citizens to have their disputes settled with proper regard to the principles of natural justice.

### **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. This is applicable throughout the arbitral proceedings and any time after his appointment such situation arise, he must disclose the same in writing to the parties.

An arbitrator is never the representative of either party, even if appointed by one of them.

### **10.0 REMOVAL OF AN ARBITRATOR [Section 12(3)]**

The appointment of an arbitrator may be challenged only if

- a) Circumstances exist that gives rise to justifiable doubts as to his independence or impartiality or
- b) He does not possess the qualification agreed to by the parties

The act provides that a party may challenge an arbitrator appointment by him also. But this can be done for those reasons of which he become aware after the appointment has been made.

### **Challenge Procedure-Section 13(3)**

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 into the following: -

- i) The challenged arbitrator may withdraw from the 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 can not be granted.

### **Failure or Impossibility to Act --Section 14**

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 terminate 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** may be appointed {Section 15}. The same is done by the following the same procedure as followed while appointing the arbitrator who has been substituted.

## **11.0 PROCEDURE OF ARBITRATION**

### **(1) Equal Treatment Of Parties -- {Section 18}**

“The parties shall be treated with equality and each party shall be given a full opportunity to present his case.” [ Section 18 ]. This section imposes two-fold duty on the arbitral tribunal.

- i. The arbitral tribunal shall give equal treatment to the parties to the reference.
- ii. The arbitral tribunal shall give to each party to the reference full opportunity to present its case.

The section lays down the basic principles of natural justice.

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

**(2) Rules of Procedure {Section 19}**

- a) No uniform rules.
- b) The code of civil procedure, 1908 or the Indian Evidence Act, 1872 is not applicable in arbitration proceedings.
- c) Disputant’s parties may mutually agree to conduct the proceedings in the manner they consider appropriate. Where Institutional arbitration are applicable. Generally, the rules of an institution are based on the provisions of Act.

**(3) Venue {Section 20}**- The parties are free to agree on the place of arbitration

**(4) Language** -{Section 22}The parties have freedom to decide the language of proceedings

**(5) Statement Of Claims & Defense {Section 23}**

Party who makes the claim is called claimant; party against whom the claim is made is called a Respondent. Claimant has to file a statement of claims within the period agreed. Claimant shall also state the facts and enclose the relevant documents. The copy of statement of claim is given to each member of arbitral tribunal as to the respondent. Respondent on receiving the statement of claim shall file his defence in response the particulars submitted by the Claimant.



Upon receiving the reply, the claimant may add something further called Rejoinder which this process does not go on and on because tribunal may refuse to give permission to file such a submission may allow the parties to amend supplement claim or defence course of Arbitration proceedings Finally the respondent gives a closing address and then the claimant gives a closing address.

**(6) Failure To Submit Claims**{Section 25(a)}

If the claimant fails to submit the statement of his claims, the arbitral tribunal shall terminate the proceedings.

**(7) Failure To Submit Defense**{Section 25(b)}

If the respondent fails to submit his statement of defence, the following situation will emerge: -

- a) The arbitral tribunal shall continue the proceedings and the award will be made on the material and the evidence available before the tribunal, and
- b) The tribunal will not treat the failure itself as an admission of the allegation made by the claimants.

**(8) Failure To Appear** {Section 25(c)}

If a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

**(9) Hearing By The Tribunal**{Section 24}

Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for or a argument, or whether the proceedings shall be conducted on the basis of documents and other materials

**(10) Who Shall Represent?**



Parties to the dispute can appear or they may engage an advocate or counsel.

**(11) Appointment Of Experts {Section 26}**

Tribunal may appoint expert(s) on specific issues. Experts may be required to appear before the tribunal to explain their finding and answer question of the parties.

**(12) Waiver Of Right To Object-{Section 4}**

If a party knows that any provision of Act or 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.

**12.0 MAKING OF ARBITRAL AWARD {Section 28}**

The document that gives and explains the decision(s) of an arbitrator is called an award. An award is binding on both parties. An arbitrator has authority to issue interim, partial and final awards. Having issued a final award, the arbitrator has no further duty or authority upon the arbitration, except for the right to correct any minor slips.

Either party can, within a reasonable time may seek to challenge an award in the High Court. However, the court will only interfere on limited grounds relating to the capacity of the parties, the validity or scope of the arbitration agreement, or unfairness or impropriety in the conduct of the proceedings. For domestic arbitrations, the court may also, unless otherwise agreed by the parties, consider an appeal on a question of law arising from the award. In this case, the court may confirm, vary, set aside the award, or refer it back to the arbitrator for reconsideration in the light of the court's opinion on the question of law.

Section 28 to 33 of the Act deals 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 the Arbitral Tribunal decides the dispute submitted to arbitration in accordance to the substantive law for the time being in force in India [sec 28 (1) (a)]

For example, dispute between the partners of a firm shall be resolved by application of the provision 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 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 good conscience' or as amiable compositeur' (as 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)]

#### **b) Decision Of The Arbitral Tribunal-{ Section 29 }**

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 be majority.



The parties or all the member of the arbitral tribunal may agree that the question of procedure in the arbitration proceedings may be decided by the presiding arbitrator.

**c) Settlement {Section 30}**

The arbitral tribunal may encourage the parties to settle their dispute at any times 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 {Section 31}**

- 1) The award shall be made in writing and shall be signed by 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 be reasoned one subject to the following exceptions:
  1. The parties have agreed that reasons are not to be given
  2. The award is the outcome of settlement and 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 arbitrators 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 may be 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.

### **Termination of Proceedings {Section 32} and Enforcement Of Award**

#### **e) Termination Of Proceedings {Section 32}**

This section 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 became 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.

#### **f) Additional Award {Section 33}**

A party with notice to the other party may request the arbitral tribunal to make an additional award as to claim 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 the receipt of the request provided it considers the request to be justified.

**g) Finality And Enforcement Of Awards {Section 35 & 36}**

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.

**Setting Aside of Arbitration Award {Section 34}**

Section 34 of the Arbitration and Conciliation Act, 1996 provides that a dissatisfied party may apply to the court for setting aside of Arbitration awards, subject to the condition as mentioned in Sections 34(2) and 34(3)

**Application for Setting Aside An Award**

A dissatisfied party may take recourse section 34 (1) and make an application to the court for setting aside the Arbitration 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 under Section 82 of the Act.

**Conditions for Setting Aside Award**

Section 34(2) of the Act provides that an Arbitral award may 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 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;
  - iv. The arbitral award deals with disputes 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. a party making the application furnishes proof that-
  - ii. the arbitration agreement is not 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.
  - 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 arbitration under the law for the time being in force, or

**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. One month's condonation can be allowed. There is no special form prescribed for making such an application

## **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)  
the Arbitrator

Signature of

### **13.0 APPEALS {Section 37)}**

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. A party may apply to the court for an interim measures 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. Section 16(2) and 16(3) contains the issues relating to jurisdiction of the arbitral tribunal.
- b) Granting or refusing to grant a interim measure under section 17.

### **SECOND APPEAL {Section 37(3)}**

The Act permits only one appeal. So, no second appeal can be preferred against an order passed in appeal. Nothing in this section shall affect or take away any right to appeal to the Supreme Court.



## **LIMITATIONS FOR APPEALS**

The time limit for filing appeal is governed by the Limitation Act, 1963. Accordingly, if the appeal lies to any other court, it would be thirty days from the date of the order. One month's condonation can be allowed

## **14.0 FEES FOR ARBITRATION**

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.”

## **15.0 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 may be 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 may be 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 issues 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.

## **16.0 PRACTICAL HINTS FOR ARBITRATORS**

### **What it takes to be a good arbitrator?**

1. A person of integrity
2. sound judgment
3. Ability to make decisions in a just, independent and deliberate manner
4. specialized knowledge
5. He or she must decide cases on the basis of the contractual agreement of the parties and the applicable procedure



## **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.

## **17.0 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.

## **18.0 USEFUL LINKS**

### **Arbitral organisations in India**

A) The International Centre for Alternative Disputes Resolution

<http://www.icadr.org/>

B) Indian Council of arbitration

<http://www.ficci.com/icanet/>

C) Indian Institute of Arbitration & Mediation

<http://www.arbitrationindia.com/>

.

### **International Arbitration Institutions**

A) International Federation of Commercial Arbitration Institutions [IFCAI]

B) United Nations Commission on International Trade Law

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html)



In 1976, the United Nations Commission on International Trade Law (UNCITRAL) promulgated rules for use in ad hoc international arbitrations. The rules are widely accepted. Some arbitration\_institutions have adopted the UNCITRAL Rules as their institutional rules and other institutions will administer arbitrations under the UNCITRAL Rules, if requested.

C) American Arbitration Association International Arbitration Rules

<http://www.adr.org/>

The AAA is a not-for-profit-organization with offices throughout the U.S. and in Dublin, Ireland. The AAA headquarters is in New York, New York. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR). The AAA's and ICDR's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA aims to move cases through arbitration or mediation in a fair and impartial manner until completion.

D) International Chamber of Commerce Rules of Conciliation and Arbitration

<http://www.iccwbo.org/>

The International Chamber of Commerce International Court of Arbitration's rules are widely recognized and can also be selected by parties for use in ad hoc arbitrations or in arbitrations conducted by other institutions.

E) Permanent Court of Arbitration

<http://www.pca-cpa.org>

PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference. The Conference was convened at the initiative of Czar Nicolas II of Russia "with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of



existing armaments." The most concrete achievement of the Conference was the establishment of the PCA: the first global mechanism for the settlement of disputes between states. The 1899 Convention was revised at the second Hague Peace Conference in 1907.

F) World Intellectual Property organization-393 panelists from 55 countries  
7 are Indian

<http://www.wipo.int/amc/en/domains/panel/panelists.html#80>

### **Regional Institutions**

A) Asia Pacific Regional Arbitration Group- <http://www.aprag.org/index.html>

B) **China International Economic and Trade Arbitration Commission**

<http://www.cietac.org.cn/index>

C) **Chicago International Dispute Resolution Association**

<http://www.cidra.org/>

D) **Hong Kong International Arbitration Centre**

[www.hkiac.org](http://www.hkiac.org)

E) **Vietnam International Arbitration Centre**

<http://english.viac.org.vn/>

## **19.0 SPECIMEN DOCUMENTATION**

### **1. 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,

## **2. 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,



### 3. 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)

### 4. 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,

## **5. 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,



## **6. 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)

## **7. Specimen 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 be 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

Signed by the within named

Mr.

A ... in the presence of:

Mr. B.... in the presence of:

### **8. Form of agreement to refer the dispute to sole arbitrator**

This deed of agreement made on this \_\_\_\_ day of \_\_\_\_\_, 2009, between:

1. Mr. RN, aged about \_\_ years s/o Mr. PT, r/o \_\_\_\_\_, hereinafter called the 1<sup>st</sup> party.
2. Mr. KK, aged about \_\_ years s/o Mr. PT, r/o \_\_\_\_\_, hereinafter called the 2<sup>nd</sup> 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/-.....1<sup>st</sup> party

Address.....

.....

2. Name..... Sd/-.....2nd party

Address.....

.....

### **9. Agreement to refer dispute to one arbitrator**

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.)

(AB)

...(Sd.)

(CD)



## **10. 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 or 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)

(AB)

...(Sd.)

(CD)

#### **11. 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.).....

## **12. 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

### **13. 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 possess 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.....



#### **14. Form of agreement for reference to three arbitrators**

This deed of agreement made on this \_\_\_\_\_, 2009 between:

1. Shri PL, aged about \_\_\_\_ years s/o Shri SS r/o \_\_\_\_\_, Delhi, hereinafter called the 1<sup>st</sup> party.
2. Shri KL, aged about \_\_\_\_ years s/o Shri SS r/o \_\_\_\_\_, hereinafter called the 2<sup>nd</sup> party.
3. Shri CL, aged about \_\_\_\_ years s/o Shri SS r/o \_\_\_\_\_, hereinafter called the 3<sup>rd</sup> 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 : 1<sup>st</sup> party 50%, 2<sup>nd</sup> party 30% and 3<sup>rd</sup> 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 1<sup>st</sup> 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 \_\_\_\_\_, 2009, in the presence of following witnesses:

1. Signature..... 1<sup>st</sup> party

Name... ..

Address.....

.....

2. Signature.....2<sup>nd</sup> party

Name.....

Address.....

.....

3. Signature..... 3<sup>rd</sup> party

Name... ..

Address.....

.....

## **15. 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.

#### **16. 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)

#### **17 Notice to arbitrator by parties for Arbitration**

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.....

#### **18. 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).....

#### **19. 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.)

## **20. 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.)