

# **ARBITRATION IN INDIA AN OUTLOOK**



# **INTRODUCTION:-**



## **MEANING OF ARBITRATION:-**

**Arbitration is a flexible and consensual process for resolving business disputes in a binding and enforceable manner, wherein parties refer their dispute to a neutral third party (“the arbitrator”) for settlement without resorting to court action.**



- i. In India, the rapid globalization of the economy and increase in competition has led to an increase in commercial disputes. Already overburdened courts, and further slow adjudication of commercial disputes has worsened the economic environment and therefore, alternative dispute resolution mechanisms, including arbitration, have become more crucial for businesses operating in India.**
  
- ii. The Arbitration & Conciliation Act was enacted in 1996 with the aim and the objective to give effect to the UNCITRAL Model Law as adopted by the United Nations Commission on International Trade Law.**



- iii. The Arbitration And Conciliation (Amendment) Act, 2015 notified by Government on 1<sup>st</sup> January, 2016 (applicable w.e.f. 23.10.2015) introduced very important changes for settlement of commercial disputes in swift and transparent manner.**
  
- iv. The arbitration act, various regulations made thereunder and the procedural rules laid down by High Courts in India helped in establishing an effective and expeditious dispute resolution framework.**



- v. India is a signatory to the New York Convention, 1958; and Geneva Convention 1927, which makes it possible to enforce foreign awards in India as well as enforceability of Indian awards in foreign countries.**
- vi. The Arbitration Act covers both domestic and international arbitrations (i.e. where at least one party is an Indian), as well as mediation and conciliation.**

## **OBJECTIVES OF THE ARBITRATION ACT:-**

- i. To provide fair, efficient and capable procedure for settlement of commercial disputes;**
- ii. To deal with international and domestic commercial arbitrations and conciliation and mediation;**
- iii. To explicitly provide the roles and responsibilities of the arbitrator;**
- iv. To provide freedom to the parties to define the procedures for arbitral proceedings;**
- v. To minimize the supervisory role of the courts;**
- vi. To encourage settlement of commercial disputes at any stage of arbitration proceedings and any time thereafter;**
- vii. To provide execution of the award in the same manner as a decree of court is executed; and**
- viii. To provide mechanisms for enforceability of foreign awards in India.**

## **STRUCTURE OF THE ARBITRATION ACT:-**



The Arbitration Act is divided into four parts, and, the Act also contain seven schedules, as are given under:

- A. Part I -** Deals with arbitration in India (Section 2 to 43);
- B. Part II -** Deals with Enforcement of Certain Foreign Awards (Section 44 to 60);
- A. Part III -** Deals with Conciliation (Section 61 to 81); and
- B. Part IV -** Deals with Supplementary Provisions(Section 82 to 86).

### **SCHEDULES:**

**First Schedule** - Convention of the recognition and enforcement of foreign arbitral awards.

**Second Schedule**-Protocol of Arbitration Clauses.

**Third Schedule**-Convention of the execution of foreign arbitral awards.



**Fourth Schedule -** A model fee structure for the arbitral tribunal.

**Fifth Schedule-** Provide grounds for justifiable doubts as to independence or impartiality of arbitrators.

**Sixth Schedule-** Disclosure by Arbitrator about his past or present relationship with the parties.

**Seventh Schedule-** Categories defining relationship, wherein an arbitrator having any relationship with the parties, counsel or subject matter shall not be eligible for appointment as an arbitrator.



## **APPLICABILITY OF THE ACT:-**

- i. This act is applicable in whole of India except state of Jammu and Kashmir, where Part-I, Part-III and Part-IV is applicable to International Commercial Arbitration and International Commercial Mediation only.**
- ii. The Arbitration Act came into force with effect from 22.8.1996.**
- iii. In *Bhatia International Vs Bulk Trading S.A. 2004 (2) SCC 105*, Supreme Court of India held that Part I of the Act shall be applicable to all domestic and International Commercial Arbitrations. The Part-I shall be compulsorily applicable if arbitration is held in India and for International Commercial Arbitration, the Part-I shall be applicable unless parties by an agreement exclude part or whole of the provisions provided therein.**

iv. However constitutional bench of Supreme Court of India in *'Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Service Inc, Civil Appeal No. 7019 of 2005.'* reversed its earlier rulings and held as:

- Part I of the Arbitration Act shall be applicable only to arbitrations taking place in India irrespective of whether such arbitrations takes place between Indian parties or between the Indian and Foreign Parties (“Domestic Awards”).
- Part I of the Arbitration Act shall not be applicable to arbitrations seated outside India irrespective of whether parties chose to apply the Indian Arbitration Act or not (“Foreign Awards”). Unless otherwise agreed by the Parties, the provisions relating to interim measures under Sec 9, seeking court assistance in taking evidence under Sec 27 and appeals from orders under Sec37 shall be applicable to the arbitral proceedings even seated outside India.
- The law of the seat or place of the arbitration shall govern the arbitration proceedings.
- These findings of the Hon’ble Supreme Court are applicable only to arbitration agreements executed after 6<sup>th</sup> September 2012.

## **DEFINITION-ARBITRATION AGREEMENT:-**



**“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 otherwise [Sec. 7(1)].**

## **ESSENTIAL ELEMENTS OF ARBITRATION AGREEMENT:**

- i. Arbitration Agreement must be in writing.**
- ii. Arbitration Agreement may take in the form of an arbitration clause in a contract or may also be in the form of a separate agreement.**
- iii. Reference in a written contract of a document containing an arbitration clause shall constitute an arbitration agreement.**
- iv. There is no specific form of an arbitration agreement, the words used therein should express an intention of the parties to refer the disputes to an arbitral tribunal for adjudication and a willingness to be bound by the decision of that arbitral tribunal.**
- v. The arbitration agreement has element of separability i.e. the arbitration clause is separable from other clauses of an agreement and constitutes an agreement by itself.**

- vi. An arbitration clause will survive even after the Agreement in which it is referred has come to an end.**
- vii. Any decision of arbitral tribunal holding that the Agreement is null and void will not result in the invalidity of the arbitration clause contained in the Agreement, provided referred clause constitutes a valid arbitration agreement.**
- viii. An arbitration agreement shall be deemed to be in writing, if it is provided in:**
- **A document signed by the parties;**
  - **An exchange of letters, telex, telegrams or other means of telecommunication including electronic means providing a record of an agreement; or**
  - **An exchange of submissions showing existence of agreement and alleged by one party and not denied by the other party.**

## **SUBJECT MATTERS OF ARBITRATION:**

- i. Any commercial matter arising out or relates to a contract can be referred to the arbitration.**
- ii. Arbitration Act does not specifically exclude any category of disputes, however if the court finds that the subject matter of the dispute is not capable of settlement by arbitration, the court shall set aside the award. Further no arbitration proceeding could be initiated if subject matter is contrary to Indian public policy.**
- iii. As per the public policy, the matrimonial matters, criminal proceedings, insolvency and winding up matters, anti-competition matters, guardianship matters; testamentary matters; and eviction or tenancy matters are non-arbitrable subject matters.**

## **BENEFITS OF THE ARBITRATION:**



- i. Swift settlement of dispute without interference of judicial courts;**
- ii. Enable the parties to decide the rules and procedures of arbitral proceedings;**
- iii. Empowers the parties to appoint arbitrator(s) of their choice;**
- iv. Provide liberty to the parties to decide the language and seat of arbitration;**
- v. Cost effective settlement of commercial disputes;**
- vi. Effective enforcement of arbitral award as if a decree of the court;  
and**
- vii. Informal proceedings provide better comfort to the parties.**

## **CONSTITUTION OF THE ARBITRAL TRIBUNAL-**

- i. The parties to an arbitration agreement are free to determine the number of arbitrators; however arbitrators can not be appointed in even number to form the arbitral tribunal. If parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of one arbitrator ( Sec 10).**
- ii. A person of any nationality can be appointed as an arbitrator, unless otherwise agreed between/among the parties ( Sec11.1).**
- iii. The parties can determine the procedure for appointment of arbitrator(s) and if the parties fail to agree on the procedure, then each party shall nominate one arbitrator and the two appointed arbitrators shall then appoint the third arbitrator, who will act as presiding arbitrator of the arbitral tribunal ( Sec 11.2 & 11.3).**



## **MANNER OF APPOINTMENT OF ARBITRATORS [ S.11 ]**



**i. The arbitrator(s) shall be appointed by the parties, and, however where:**

- One party fails to appoint arbitrator within 30 days from the date of request so made by other party; or**
- if two appointed arbitrators fail to agree on third arbitrator within 30 days from the date of their appointments; or**
- If a party fails to act as required under the agreed procedure; or**
- Any person or institution failed to perform the duty entrusted.**

**then appointment of arbitrator(s), on the request of party(s), shall be made by Chief Justice of the Supreme Court or the High Courts, as the case may be, or any person or institution designated by him.**



- ii. The Supreme Court or the High Courts, while appointing the arbitrator, shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.**
- iii. The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator with respect to his relationship with parties or any interest in the subject matter.**
- iv. In the matters of international commercial arbitrations, the Supreme Court or any person or institution designated by him shall be competent to consider and appoint arbitrator.**

## **DUTIES AND RESPONSIBILITIES OF ARBITRATOR[ S.18]**



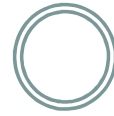
- i. The arbitrator(s) shall:**
  - Perform his/their functions with honesty and utmost impartially.**
  - Adhere to the principles of natural justice.**
  - Provide equal opportunities to the parties to present their case and give proper notices of hearings to the parties.**
- ii. Arbitral Tribunal shall base its conclusion upon the materials submitted before it by the parties and must not act on personal knowledge or information.**
- iii. The arbitrators must act jointly and all must present at every meeting, however, the parties can agree to dispense with the regular attendance of all the arbitrators at certain meetings, except where the arbitral tribunal is examining a party or witness. It would amount to misconduct on the part of arbitrator(s) to examine a party or witness in the absence of the other arbitrator(s).**

## **PROFESSIONAL FEE OF AN ARBITRATOR [ Sec 11(14)]:**



- **There was no regulated fee structure for arbitrators in the arbitral proceedings until the enactment of Amendment Act of 2015, presently Fourth Schedule of the Act provides a model fee structure. Further Section 11(14) of the Act empowers the High Court to frame fee structure on the basis of Fourth Schedule. The proposed fee structure is not applicable for international commercial arbitrations and in other arbitrations where fee is determined as per the rules of the Institutions.**
- **The London Court of International Arbitration (“LCIA”), apart from registration charges, levy arbitration fee on hourly rate basis. Similarly International Chamber of Commerce (“ICC”) charges, apart from filing fee, the Arbitration fee fixed by the Secretary General of ICC.**

## **JURISDICTION OF THE ARBITRAL TRIBUNAL[ Sec.16 & 17)**



- i. An arbitral tribunal is competent to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreements.**
- ii. If the arbitral tribunal decides that it has jurisdiction, then it shall proceed with the arbitral proceedings and make an award however award so passed shall be subject to challenge under section 34 of the Act.**
- iii. The arbitral tribunal may also pass interim orders during arbitral proceedings or any time after making the award but before the same is enforced and powers of tribunal are similar to the court.**

## **CONDUCT OF ARBITRAL PROCEEDINGS [ Sec. 19- 25]**



### **1. SEAT OF ARBITRATION ( SEC.20):**

The seat of arbitration can be mutually decided by the parties, and, if the parties fail to reach an agreement, the arbitral tribunal shall determine the seat of arbitration keeping in view the circumstances of the particular dispute and the convenience of the parties.

### **2. LANGUAGE OF ARBITRATION ( SEC.22):**

The parties are free to agree upon the language or languages to be used in the arbitral proceedings. Parties failing to reach an agreement, the arbitral tribunal will determine the language of the arbitral proceedings.



### **3. COMMENCEMENT OF ARBITRAL PROCEEDINGS ( SEC 21):**

- i. The arbitration act provides freedom to the parties to agree on the date of commencement of arbitral proceedings. If parties have not decided the date of commencement of arbitral proceedings, the proceedings will be deemed to have commenced on the date on which the respondent received the request for referral of the dispute to the arbitration.**
  
- ii. The request should clearly indicate that the claimant seeks to submit the dispute to the arbitration. A request is deemed to have been received, if it has been delivered to the respondent personally, or at place of business, habitual residence or mailing address or, alternatively, the respondent's last known place of business, habitual residence or mailing address.( Sec.3)**



#### **4. PROCEDURE FOR ARBITRAL PROCEEDINGS ( SEC 19):**

The parties can mutually determine the manners and the procedures for conducting the arbitral proceedings or agree on the standard rules of an arbitral institution, with or without modifications. If parties failed to agree on manners and the procedures for conducting the arbitral proceedings, the arbitral tribunal shall be competent to conduct the proceedings in a manner it considers appropriate.

#### **5. ARBITRAL PROCEEDINGS ( SEC23)**

- i. The time frame for filing the statement of claim and defence can be agreed upon by the parties. Failing an agreement between the parties, the arbitral tribunal shall determine the deadline for submission of these documents.





- ii. All statements/ documents or other information supplied or application made to the arbitral tribunal by one party shall be communicated to the other party.**
- iii. Any expert report or document relied by arbitral tribunal in making its award or decision must also be communicated to the parties.**
- iv. The respondent's statement of defence is required to state the defences with respect to the claims and may include any counter-claim.**
- v. The parties are expected to submit relevant supporting documents with their statements or refer to relevant supporting documents and / or other evidences .**



- vi. The Respondent can submit its counter claim, if any, against the claimant, and, hence respondent is not required to initiate a separate arbitration proceedings.**
- vii. Any party may supplement and/or amend statement of claim or defence, however arbitral tribunal can reject a belated amendment or supplement on its discretion.**
- viii. The parties are free to determine the method of tendering evidences and / or oral arguments, in the absence of an agreement between the parties, the arbitral tribunal shall have discretion to decide whether oral hearings either for the presentation of the evidence or for oral arguments, or both should be allowed, or the arbitral proceedings should be conducted on the basis of documents and other materials available with the tribunal .**



- ix. The tribunal has the power to appoint one or more expert on specific issues to be determined by the arbitral tribunal, unless otherwise agreed by the parties ( Sec 26).**
- x. Arbitral Tribunal may seek assistance of court in the taking the evidence including the production of documents and the inspection of the property (Sec 27).**
- xi. If so authorised by the parties, the Arbitral tribunal shall encourage the parties to settle the dispute thorough alternative methods of dispute resolution during the arbitral proceedings such as mediation and conciliation(Sec 30) .**



## **6. DEFAULT BY ONE OF THE PARTY [SEC 25]:**

- i. where the claimant fails, without sufficient cause, to submit a statement of claim, the arbitral tribunal shall terminate the proceedings.**
- ii. If the respondent fails to submit, without sufficient cause, a statement of defence, the arbitral tribunal shall continue with the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have discretion to treat the right of the Respondent to submit statement of defence as forfeited; or**
- iii. where both parties fail to appear at oral hearing(s) or produce documentary evidences without sufficient cause, the arbitral tribunal has the discretion to continue the arbitral proceedings and make the award on the evidences available with it.**

## **TIME FRAME FOR ARBITRAL PROCEEDING ( S.29A )**

- i. Arbitral tribunal shall pass the award within 12 months from the date of reference, however this period may be extended by parties for maximum period of 6 months.**
- ii. If award is not passed within 12 months or within such extended period, the mandate of arbitrator shall get terminated unless extended by the court.**
- iii. The court may on sufficient cause extend the period and may impose other terms & conditions as may be necessary. The application for extension of time shall be disposed of by the court within 60 days from the date of service of notice.**
- iv. The court may substitute one or all the arbitrators, however substitution will not affect the arbitral proceedings and will commence from the already reached stage.**
- v. If award is passed within 6 months of reference, the Arbitral tribunal shall be entitled for additional fee as agreed by the parties.**

## **FAST TRACK ARBITRAL PROCEEDING (Sec. 29B)**



- i. The parties, either before or at the time of appointment of Arbitral Tribunal, may agree in writing to resolve their dispute in fast track mode.**
- ii. The sole arbitrator so appointed shall decide the dispute on the basis of:**
  - Written pleadings, documents and submissions filed by the parties WITHOUT ORAL HEARINGS.**
  - The oral hearings shall be held ONLY on the request of parties or where tribunal finds it necessary.**
- iii. Arbitral Tribunal may dispense with any technical formalities in order to decide the dispute expeditiously.**
- iv. The Award under fast track proceeding shall be passed within a period of 6 months from the date of reference to the Arbitral Tribunal.**

## **FORM & CONTENT OF ARBITRAL AWARD ( S.31)**

- i. The arbitral award shall be in writing and signed by majority of the members of the arbitral tribunal. The award must provides the valid reasons for any omission arising on death of an arbitrator, physical incapacity of an arbitrator to sign, and an arbitrator's refusal to sign based on a dissenting position.**
- ii. Unless parties agreed otherwise, the arbitral tribunal must provide a reasoned award.**
- iii. The cost of arbitration proceedings shall be fixed by the Tribunal as per sec. 31A of the Act.**
- iv. The award shall state the location of the arbitration proceedings and the date on which the arbitral proceedings concluded.**
- v. Signed copies of the award should be delivered to each of the parties. The date of receipt of the award has relevance, inter alia, in connection with:**
  - Correction and interpretation of the award under Sec 33(2); —**
  - Making an additional award under Sec 33 (5);**
  - Filing an application for setting aside the award under Sec 34; and**
  - Enforcing the award under Section 36 of the Arbitration Act.**

## **TERMINATION OF ARBITRAL PROCEEDINGS ( S.32)**



**The Arbitral proceedings is terminated by passing of final arbitral award or by way of an order of the arbitral tribunal. The arbitral tribunal may also terminate the proceedings on:**

- Withdrawal of the claim by the claimant;**
- Execution of an Agreement between the parties to terminate the arbitral proceedings; and**
- Finding that the continuation of the proceedings is unnecessary or impossible.**



## **GROUNDS FOR SETTING ASIDE THE AWARD (S.34)**

**A domestic arbitral award may be set aside on the following grounds:**

- **A party was under some form of incapacity;**
- **Arbitration agreement is not valid under the governing laws;**
- **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 the case;**
- **The award deals with a dispute not contemplated by, or not falling within, the terms of the submission to the arbitration;**
- **The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the provisions of the Arbitration Act;**
- **The subject-matter of the dispute is not capable of settlement by arbitral proceedings;**



- **The award contains decisions on matters beyond the scope of the submission to arbitration; or**
- **The award is in conflict with the public policy of India.**
- **The award shall be in conflict with the public policy of India, only if,—**
  - a) **The making of the award was induced or affected by fraud or corruption; or**
  - b) **It is in contravention with the fundamental policy of Indian laws; or**
  - c) **It is in conflict with the most basic notions of morality or justice.**
- **The award shall NOT be set aside on the ground of an erroneous application of the law or by re-appreciation of evidences.**
- **The application for setting aside the award shall be disposed expeditiously, however not exceeding one year from the date of service of notice to other party.**

## **PROCEDURE FOR SETTING ASIDE AWARD (S.34)**



**An application may be made to the court having jurisdiction to set aside the arbitral award. Such application for setting aside the award shall be made within a period of 3 months from the date of passing of such award, or from the date on which that request had been disposed of by the tribunal. The court, if satisfied, has power to entertain the application for setting aside the award within a further period of 30 days, however this extended period can not be further extended by condoning the delay under Section 5 of Limitation Act, 1963.**

## **FINALITY OF THE AWARD (S.35)**



**The Arbitral Award passed by the arbitral tribunal shall be final and binding on :**

- a. The parties;**
- b. Persons claiming under them.**

## **ENFORCEABILITY (S.36)**

- i. If the time for making an application to set aside the award has expired or such application has been refused, the Arbitral Award shall be enforceable under the Code of Civil Procedure, 1908 as a decree of the court.**
- ii. The filing of application in court for stay of arbitral award does not affect its enforceability unless court grants the stay for operation of such award.**

## **Appeals (Sec.37)**



- i. The appeal shall lie from the following orders of the court:**
  - **Refusing to refer parties for arbitration under Sec.8;**
  - **Granting or refusing to grant any measures under Sec.9;**
  - **Setting aside or refusing to set aside an award by the court under section.34;**
  - **Accepting the plea of lack of its jurisdiction by the arbitral tribunal under section 16(2);**
  - **Accepting the plea of exceeding scope of authority by the arbitral tribunal under section 16(3); and**
  - **Granting or refusing to grant an interim measure under section 17.**
- ii. No second appeal can be made against an appellate order passed under Section 37 of the Arbitration Act, however, parties have the right to challenge the order passed under Section 37 by way of a “Special Leave Petition” under Article 136 of the Constitution of India.**

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