

# ARBITRATION

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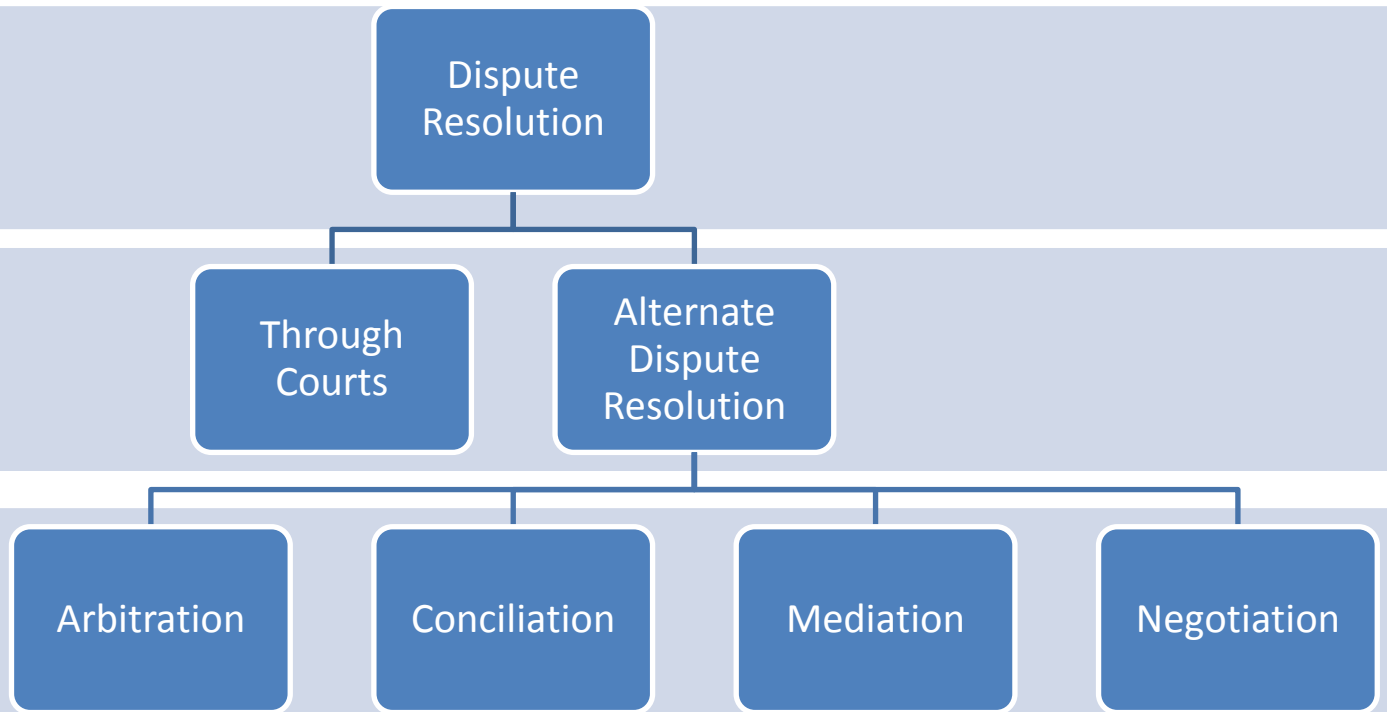
# Arbitration – The Dispute Settling Mechanism in vogue



*When will mankind be convinced and agree to settle their difficulties by arbitration?*

*- Benjamin Franklin*





<b>Tenure of Pendency</b>	<b>Civil Cases</b>	<b>Criminal Cases</b>	<b>Total</b>
<b>Cases Pending over 10 years</b>	<b><u>667425</u></b>	<b><u>1663830</u></b>	<b><u>2331255</u></b>
<b>Cases Pending (Between 5 to 10 years)</b>	<b><u>1216927</u></b>	<b><u>2813096</u></b>	<b><u>4030023</u></b>
<b>Cases Pending (Between 2 to 5 years)</b>	<b><u>2294239</u></b>	<b><u>4447650</u></b>	<b><u>6741889</u></b>
<b>Cases Pending less than 2 years</b>	<b><u>3418704</u></b>	<b><u>6579871</u></b>	<b><u>9998575</u></b>
<b>Total Pending Cases</b>	<b><u>7597289</u></b>	<b><u>15504446</u></b>	<b><u>23101735</u></b>

**DATA** as on 22/12/2016 on National Judicial Data Grid (NJDG)

# The Existence of Arbitration

- Arbitration is the backbone of society.
- Arbitration in our everyday lives - at home the parents play arbitrators between children, at school the teachers play arbitrators between students, at office the boss plays arbitrator between employees
- Arbitration has been prevalent in India even through Vedic times - Upanishads – the Hindu religious texts.
- Panchayats - classic example of arbitration at the grass-root level.

# Introduction to Arbitration

- Arbitration is the process of settling legal disputes privately and confidentially outside the public court system.
- The advantages are that parties can decide the location and the language used for the hearings as well as picking the arbitrators they prefer.
- Quicker and cheaper than traditional litigation
- The decisions are handed down privately by the arbitration panel and the awards are enforceable

# Introduction to Arbitration

- Form of an ADR Mechanism
- Alternate to Court Room settlement
- Parties [***Claimant & Respondent***] submit their dispute to Neutral third party [***Arbitrator/s***] for its resolution.
- Arbitrator based on Principles of Equity and Natural Justice passes an order [***Arbitral Award***] which is binding on both the parties.
- Governed By Arbitration and Conciliation Act, 1996.



# Benefits of Arbitration

Privacy

Informality

Choice of decision maker

Flexibility

Efficiency

Finality

Internationality

Timeliness

# Types of Arbitration

Ad-hoc Arbitration

Institutional Arbitration

Statutory Arbitration

Domestic or International Arbitration

Foreign Arbitration

# Arbitral Disputes

- Any type of disagreement can be arbitrated, including:
- Contract disputes involving businesses and consumers
- Domain name disputes
- Employment claims
- Real estate and Construction issues
- Torts
- Civil Rights matters, etc.

# Non Arbitral Disputes

- Insolvency matters e.g. adjudication of a person or an insolvent
- Matrimonial causes (except matters pertaining to settlement)
- Testamentary matters e.g. validity of a will
- Suit under S. 92 of the code of Civil Procedure, 1908
- Appointment of guardian of a minor or lunatic
- Industrial disputes
- Criminal proceedings
- Relating to charities or charitable trusts
- Pertaining to dissolution or winding up of a Companies

# History of Legislature on Arbitration

- Reference of Arbitration in Bengal Regulation 1 of 1772 .
- S. 312 to 317 of the CPC, 1859.
- Arbitration Act, 1899
- S.89, S.104(1)(a) to (f) and Sch.II of the CPC,1908.
- Arbitration Act 1940
- The Arbitration (Protocol and Convention) Act 1937
- Foreign Awards (Recognition and Enforcement) Act 1961
- The Arbitration and Conciliation Act, 1996 [
- Introduction of S.89 and Rules 1A to 1C to Order X in CPC 1908
- Arbitration and Conciliation (Amendment) Act, 2015 w.e.f. 23<sup>th</sup> October, 2015

# Arbitration & Conciliation Act, 1996

## ***Objective***

Consolidation of law relating to:

- Domestic Arbitration
- International Arbitration
- Enforcement of foreign arbitral awards

## ***Adoption of***

- United Nations Commission on International Trade Law (UNCITRAL)
- UNCITRAL Conciliation Rules in 1980.

# Structure of the Act

- The amended Act contains:
  - A preamble
  - 86 sections
  - 7 Schedules.
- The Act is divided into four parts as follows
  - Part I: Arbitration [S.2- S. 43 divided into 10 Chapters ]
  - Part II: Enforcement of certain foreign awards [in 2 Ch.]
    - CHAPTER I: NEW YORK CONVENTION AWARDS [S 44- S 52]
    - CHAPTER II: GENEVA CONVENTION AWARDS [S 53 – S 60]
  - Part III: Conciliation [S 61 – S 81]
  - Part IV: Supplementary provisions [S 82 – S 86]

# Highlights of 2015 Amendments

- Def of 'Court' u/s 2(e): to mean Civil Court or higher court in case of domestic Arb. & HC in case of International Arb.
- Applicability of Part I: Certain provisions of Part I of the Act such as interim relief (S. 9), court assistance in taking evidence (S. 27) and appeal to interim relief order u/s 9 (S. 37) shall also apply to International Commercial Arbitration, subject to an agreement to the contrary between the parties to the dispute.
- An Arbitration agreement in the form of electronic means shall also be treated as in writing. [S.7]



# Highlights of 2015 Amendments

- Unless the judicial authority finds that prima facie no valid arbitration agreement exists, said judicial authority shall refer to the parties to the Arbitration [S 8]
- Arbitral proceedings to commence within 90 days from the date of Interim Order if any [S 9]
- Arbitrator to be appointed by HC/SC (if party fails).
- On application, court to appoint arbitrator within 60 days of from the date of service of notice on the opposite party.[S 11]
- Disclosure ensuring neutrality by person who is approached for appointment as arbitrator [S 12]

# Highlights of 2015 Amendments

- On termination of mandate of an arbitrator, he is to be substituted by another arbitrator.[S 14]
- Arbitral tribunal empowered to grant all kinds of interim awards during or after proceeding but before award is enforced and such interim measures shall be enforced as an order of the Court. [S 17]
- The respondent may also submit a counterclaim or a set-off, if within the scope of the arbitration agreement. [S 23]
- The Arbitral tribunal to hold oral hearing on the day-to-day basis and not to grant adjournments without sufficient cause.[S 24]

# Highlights of 2015 Amendments

- Right of the respondent to file the statement of defence to be forfeited, if not filed in time [S. 25]
- Award to be made after considering the terms of the contract and trade usages [S 28]
- Tribunal to pass the award within 12 months [extendable to further 6 months]. Entitled to additional fees if award made within 6 months. If the award is not made within specified/extended time, the mandate of the arbitrator to terminate unless the time is extended by the court. [S. 29A]
- Provision for fast track procedure for redresal within 6 months without oral hearing. [S 29B]

# Highlights of 2015 Amendments

- Sum payable under award to carry 2% higher rate of interest than the current rate if payment delayed [S 31]
- Explanation added to what would be considered conflict with *public policy of India*. [ S. 34 (2)(b)]
- Domestic arbitration can be challenged on ground of patent illegality [S 34 (2A)]
- Award to be set aside only after issuing prior notice to the other party.[ S 34 (5)]
- Award to be set aside only within 1 year [34 (6)]
- Award not unenforceable on mere filing of application for setting aside an award unless the court grants an order of stay. [S 36]

# Arbitration Agreement [S.7 & S 2(b)]

- Must be in writing though form is not specified
- Can be a clause in 'contract agreement' or a separate agreement
- It can be gathered from several documents or from correspondence consisting of a number of letters, fax messages, telegrams or telex messages.
- Preferably must contain details of
  - scope and the subject matter of the reference
  - 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.

# Who can enter into Arbitration Agreement?

- Every person who is Competent to contract
- Minors and lunatics through their natural or legal guardians.
- A Recognised Agent on behalf of his principal.
- HUF through the Karta.
- Advocate/solicitor on behalf of his client
- Trustees on behalf of Trusts.
- An executive or administrator in matters related to management or Administration of estate.
- Legatees may refer disputes relating to division of a estate to Arbitration.

# ARBITRAL TRIBUNAL [S. 10 &S.11]

- Panel of one or more arbitrators
- Parties are free to determine any *odd* number of arbitrators
- In case of three arbitrators, each party shall appoint one arbitrator. These two appointed arbitrators shall then, appoint a third arbitrator,
- In case parties fail to agree to any sole arbitrator or arbitrators fails to appoint 3<sup>rd</sup> arbitrator, HC / SC or anyone designated by them may appoint.
- Ground that can cast doubt on independence of arbitrator are stated in Sch. 5 & relationship with parties or subject of dispute that can make person ineligible to be appointed as arbitrators are in Sch 7.

# Duties of Arbitrator

- No qualifications are prescribed.
- Parties may agree at certain qualification/ experience requirement in their arbitration agreement.
- Must be impartial and independent;
- Must adhere to the rules of natural justice;
- Must possess good knowledge of the law and practice of arbitration;
- Must at fairly, in good faith, without bias, and in a judicial temper;
- Must not be a judge in one's own cause;



# Duties of Arbitrator

- Must give each party the opportunity of adequately stating their case;
- Must disclose to the parties any relevant documents which are looked at;
- Must make the award within 12 months [6 months in case of fast track ].[ S. 29A & B]
- Disclose in writing [format in Sch. Sixth] the existence of interest in parties or subject of dispute [S. 12] and engagements that would effect the ability to devote sufficient time to complete proceeding within 12 months.

# Removal of Arbitrator

- The parties are free to agree on a procedure for challenging an arbitrator.
- Any party can challenge an arbitrator within 15 days of his either becoming aware of the constitution of the arbitral tribunal.
- If the other party agrees to the challenge, then the arbitrator stands removed from his office.
- The arbitrator may also resign himself.
- Otherwise the arbitral tribunal shall continue with arbitration and make award and the aggrieved party can make an application to the court for setting aside the award.
- The arbitrator can be removed with the agreement of both parties for want of independence or lack of requisite qualifications or if he is otherwise unable to perform his functions or delays with arbitration

# Replacement of Arbitrator

- Where an arbitrator is removed or his mandate terminates, a new arbitrator shall be appointed.
- Where an arbitrator is substituted any previous hearing may be repeated at the discretion of the new arbitral tribunal or any order or ruling of the previous tribunal shall not become automatically invalid, unless there is an agreement to the contrary between the parties.

# Procedure of Arbitration

- No uniform or notified rules for Arbitration
- Proceeding not bound by Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 . [S 19]
- The parties are free to agree on the place of arbitration [S. 20]
- The parties have freedom to decide the language of proceedings [S 22]
- Claimant to file statement of claims in period agreed.
- Respondent to file his defense in response
- Respondent may also submit a counter claim or plead a set-off. He may add Rejoinder

# Procedure of Arbitration

- Parties may amend and supplement their claim or defense
- Both parties to give closing address
- If the claimant fails to submit the statement of his claims, the arbitral tribunal shall terminate the proceedings.
- On failure to submit his statement of defense, tribunal to make award on basis of evidence available or treat as forfeiture of right to file the defence.
- Tribunal to hold oral hearings for presentation of evidence or for oral arguments on day to day basis.
- Adjournments to be discouraged and should not be granted unless sufficient cause is given. Tribunal may impose exemplary costs on the party seeking adjournment without any sufficient cause.

# Arbitral Award

- Arbitrator has authority to issue interim, partial and final awards.
- An award is binding on both parties.
- Award appealable in HC on limited grounds
- Award to be made in accordance to the substantive law for the time being in force in India in case of domestic arbitration
- In international arbitration tribunal shall decide the dispute in accordance with the rules of law designated by the parties
- Failing any designation by parties, Tribunal shall apply the rules of law it considers to be appropriate

# Arbitral Award

- Award to be made by majority of all its members unless the parties have agreed otherwise
- Award to be made within 12 months/ 6 months in case of fast track
- Tribunal may encourage the parties to settle their dispute at any times during the arbitration proceedings.
- The award shall be made in writing and shall be signed by arbitrators or majority of them.
- Award should be a speaking award
- Award should state date & place of award

# Arbitral Award

- Each party should be given a signed copy of award
- Interest may be awarded for period of arbitration.
- In case of monetary award interest at rate 2% higher than normal rate should be given for delayed payment.



# Cost of Award

- The costs of an arbitration proceeding to be fixed by the arbitral tribunal
- Cost to include reasonable costs of:
  - the fees and expenses of the arbitrators, Courts and witnesses;
  - legal fees and expenses;
  - any administration fees of the institution supervising the arbitration;
  - Any other expenses in connection with the award.

# IMPORTANT CASES

- ***Bhatia International v. Bulk Trading S.A. (2002)***

SC stated that *Part I of the Act, basically, gives effect to the UNCITRAL Model Law* thereby empowering the Indian courts to enforce arbitral awards pronounced outside its territorial borders, especially since *Section 2(2) of the Act (that defines the scope of Part I, and in doing so, says – “This Part shall apply where the place of arbitration is in India.”)* does not use the term “only”.

- Contrary view in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012)***

SC stated that the absence of the word “only” in Section 2(2) of the Act was not intended to imply that it would also apply to proceedings that were not seated within India.

- ***Conflict now resolved*** Amendment in 2015 inserted S. 2(2) envisages that Part-I shall apply where the place of arbitration is in India and that provisions of S. 9, 27, 37(1) (a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India unless parties to the arbitration agreement have agreed to the contrary

# International Commercial Arbitration (ICA)

- International trade and commerce has accompanying disputes because of
  - cultural differences
  - unfamiliar policies
  - differing traditions
  - use of foreign legal systems
- These can have important commercial consequences.
- ICA is one of the several forms of dispute resolution for International Commercial Agreements

# International Commercial Arbitration (ICA)

- ICA is subject to different laws:
- The law governing the arbitration agreement
- The law governing the arbitral tribunal and its proceedings (lex arbitri - procedural law)
- The law governing the substance of the dispute
- The law governing recognition and enforcement of the award

# Notable International Agreements

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The UNCITRAL Model Law (providing a model for a national law of arbitration)
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

# UNCITRAL & Arbitration

- United Nations Commission on International Trade Law (UNCITRAL) established by the United Nations General Assembly is the core legal body of the United Nations System in the field of International Trade Law.
- UNCITRAL Model Law on International Commercial Arbitration (1985)
- UNCITRAL Model Law on International Commercial Conciliation (2002)
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)
- UNCITRAL Arbitration Rules
- UNCITRAL Conciliation Rules (1980)

# UNCITRAL & Arbitration

- UNCITRAL Model Law is designed to assist States in reforming/modernizing their laws on arbitral procedure so as to take into account the particular features and needs of ICA
- It reflects worldwide consensus on key aspects of international arbitration practice
- It covers all stages of the arbitral process
  - arbitration agreement
  - composition and jurisdiction of the arbitral tribunal
  - extent of court intervention
  - recognition and enforcement of the arbitral award

# Arbitration Institutes in India

- Indian Council of Arbitration <http://icaindia.co.in/>
- Indian Institute of Arbitration & Mediation <http://www.arbitrationindia.org/>
- Federation of Indian Chambers of Commerce and Industry (FICCI) <http://ficci.in/>
- International Centre for Alternative Dispute Resolution (ICADR) <http://icadr.nic.in>
- Bengal Chamber of Commerce and Industry, <http://www.bengalchamber.com/>
- Indian Chamber of Commerce <https://www.indianchamber.org/>



# International Arbitration Institutes

- International Chamber of Commerce  
<http://www.iccwbo.org/>
- London Court of International Arbitration  
<http://www.lcia.org/>
- International Centre For Dispute Resolution  
<https://www.icdr.org>
- London Maritime Arbitration Association  
<http://www.lmaa.london/>
- International Centre for Settlement of Investments Disputes <https://icsid.worldbank.org>
- World Intellectual Property Organization  
<http://www.wipo.int/>

# International Arbitration Institutes

- International Mediation Institute  
<https://imimediation.org/>
- American Arbitration Association International  
<https://www.adr.org/>
- Australian Centre for International Commercial Arbitration <https://acica.org.au/>
- The Institute of Arbitrators & Mediators Australia  
<https://www.iama.org.au/>
- Arbitration Institute of the Stockholm Chamber of Commerce <http://www.sccinstitute.com/>
- Singapore International Arbitration Centre  
<http://www.siac.org.sg/>

# Evolving Opportunities

- Goods and Services Tax (GST)
- Certification under Real Estate (Regulation and Development) Act, 2016
- Appearing before Real Estate Authorities under the Act
- Indian Accounting Standards (Ind AS) convergence
- Ind AS training and research activities
- Alternate Dispute Resolution
- Electronic Commerce

# Evolving Opportunities

- Internal Financial Control Services
- Management Accounting Services
- Strategic Financial Management Services
- Internal Audit and Internal Assurance Work Services
- Financial Planning and Wealth Management Services
- Valuation Services

# Evolving Opportunities

- Corporate Governance
- Competition Laws
- Consumer Protection Laws
- Intellectual Property Rights (IPR) Laws
- Anti –Money Laundering Laws
- Labour Laws
- Environmental Laws
- Insurance Laws
- Insolvency Laws

# Evolving Opportunities

- Export/Import Consultancy
- Business Process Outsourcing
- Foreign Direct Investment & NRI Services
- Corporate Laws
- Business Startup Service
- NGOs, Societies and Trusts
- Consultancy to Government Projects
- Performance Measurement

# Evolving Opportunities

- Securitization Laws
- Securities Laws
- Laws relating to Charity
- Logistics & Transportation of Goods
- Information Technology and Cyber Laws
- Right to Information laws
- Legal Documentation under Private Equity
- International Trade
- International Tax
- Transfer Pricing Certification and Litigation

# KNOWLEDGE EARNER & CONTRIBUTOR

- Learn As You Earn
- KPO in Research
- See your name in print
- Co-authorship
- If you have the fire to Write - we are willing to
  - contribute time and effort
  - knowledge back up
  - help you get your book published
- If you have the fire to Speak - we are willing to provide a public platform



THANK YOU

grazie merci spasiba kam ouen gratzias manana mahalo cheers toda gracias grassie thank you danki  
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