ARBITRATION & CONCILIATION ACT AND MEDIATION

"The established courts are too remote, too legalistic, too expensive and too supine and slow".

Pawan Agarwal
Chartered Accountant

INTRODUCTION

Indian legal system is known for its delays and disparities. It is a known fact that our courts are over-burdened with the pending cases and it is almost impossible to provide quick and efficient relief to the aggrieved parties. Therefore, to meet the situation, nowadays, the Alternative Dispute Resolution (ADR) mechanism is used all over the world which is more effective, faster and less expensive.

Under ADR mechanism, there are basically four methods:-—

(a) Negotiation

(b) Mediation

(c) Conciliation

(d) Arbitration

While the first two methods are not recognised by law, the methods of conciliation and arbitration are quasi-judicial methods to resolve a dispute with minimum court intervention. The same is now recognised by the Arbitration and Conciliation Act, 1996 (Act 26 of 1996). The courts have always assisted in proper conduct of the arbitration proceedings and enforcement of arbitration awards.

Amendment Act of 2015

The salient features of the amendment Act has been highlighted in italics and bold.

The Government of India, understanding the urgent requirement of amending Arbitration and Conciliation Act, 1996, brought in the amendments by way of an Ordinance, Arbitration & Conciliation (Amendment) Ordinance that came into effect from 23rd October, 2015. In late December, 2015, the Parliament of India passed the Arbitration and Conciliation (Amendment) Act, 2015 ("The Amending Act"). The Amending Act is identical to the Ordinance except that the Amendment Act clarifies about the applicability of the Amending Act to the pending arbitration proceedings, whereas the Ordinance was silent about it

DEFINITION

Section 2 (1)(a) of the Act defines "Arbitration means any arbitration whether or not administered by permanent arbitral institution."

ARBITRATION can be defined as a method by which parties to a dispute get the dispute settled through the intervention of a third independent person. Parties can also settle their disputes through a permanent arbitral Institutions like, Indian Council of Arbitration, Chamber of Commerce, etc.

Halsbury has defined Arbitration as follows:—

"Arbitration is the reference of dispute between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.

Types of Arbitration

1. Domestic Arbitration

2. International Arbitration.

3. *Ad hoc* Arbitration.

4. Institutional Arbitration.

5. Statutory Arbitration.

ARBITRATION AGREEMENT

Section 7(1) of the Act mentions that 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.

An arbitration agreement should be in writing and signed by both the parties. It need not be in a particular form. However, the intention to refer to arbitration must be established. Arbitration can be agreed by way of exchange of letter, telex, telegram fax, etc.

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

An Arbitration Agreement is a contract and it must satisfy all the essential elements of a contract. As per the Contract Act, 1872, an agreement between two parties which is enforceable by law is a contract.

The Amendment Act of 2015 provides one more mode of making arbitration agreement through electronic communication.

DISPUTES EXCLUDED FROM ARBITRATION

Generally speaking all disputes of a civil nature can be referred to Arbitration e.g. breach of a contract, question of assignment or right to hold premises etc. However, certain disputes where the law has given jurisdiction to determine certain matters to specified tribunal only cannot be referred to arbitration.

An illustrative list of such matters is given below:—

- Testamentary matters involving questions about validity of a will.
- Disputes relating to appointment of a guardian
- Disputes pertaining to criminal proceedings
- Disputes relating to Charitable Trusts
- Winding up of a company
- Matters of divorce or restitution of conjugal rights
- Lunacy proceedings
- Disputes arising from an illegal contract
- Insolvency matters, such as adjudication of a person as an insolvent
- Matters falling within the preview of the M.R.T.P. Act

WHAT DISPUTES CAN BE REFERRED TO ARBITRATION

Generally speaking, all disputes of a civil nature or quasi-civil nature which can be decided by a civil court can be referred to arbitration. Thus disputes relating to property, right to hold an office, compensation for non-fulfillment of a clause in a contract, disputes in a partnership etc. can be referred to arbitration. 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.

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

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

APPOINTMENT OF ARBITRATORS

Though any person can be appointed as an arbitrator, generally impartial and independent persons in whom parties repose confidence are to be selected and appointed as arbitrators. Generally, Chartered Accountants, engineers, retired judges, advocates and other professionals are preferred. Parties are free to determine the number of arbitrators, provided that such number shall not be an even number. If the Arbitration Agreement is silent in this respect, the arbitral Tribunal shall consist of a sole arbitrator. In cases, where three arbitrators are to be appointed, each party will appoint one arbitrator and the two appointed arbitrators will jointly appoint a third arbitrator, who will be the presiding arbitrator. In certain cases of failure to appoint the arbitrators, the Chief Justice of the High Court or his designate has been given power to appoint the arbitrator u/s. 11(6) of the Arbitration and Conciliation Act, 1996.

The Amendment Act provides that the arbitrator shall be appointed by the court not by chief justice or his designate. The court while appointing arbitrator shall examine only existence of arbitration agreement (and not merits of the case). The court shall appoint such arbitrators, as far as possible, within the period of two months.

DISCLOSURE BY ARBITRATOR

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

Now, fifth schedule to the Act specifies detailed ground on which independence and impartiality of Arbitrator can be challenged. The arbitrator has to give a declaration to this effect in prescribed format as provided in schedule six.

JURISDICTION OF ARBITRATORS

The Act of 1996 empowers vide its section 16 the arbitrators to rule on their own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose:—

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

(b) A decision by the arbitral tribunal that the contract is null and void will not entail *ipso jure* the invalidity of the arbitration clause.

CHALLENGING THE APPOINTMENT OF AN ARBITRATOR

The appointment of an arbitrator may be challenged under section 13 of this act only if

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

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

An arbitrator has to disclose his interest in writing as discussed above.

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

Fees payable to Arbitrator:-

The model fees payable to Arbitrator have been specified in Fourth Schedule inserted to Arbitration and Conciliation Act, 1996. The fee varies between Rs. 45000 to Rs. 30 lakhs depending on the sum in dispute.

STATEMENT OF CLAIMS AND DEFENCES

Within the agreed period or the period determined by the Tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought and the respondent shall state his defence in respect of those particulars. The parties should submit the documents they rely in support of their claim or defence.

CONDUCT OF ARBITRAL PROCEEDINGS

The arbitral Tribunal has to decide whether to hold oral hearings for the presentation of evidence or whether the proceedings shall be conducted on the basis of the documents and other materials. At the request of a party, the Tribunal shall hold oral hearings. The parties shall be given advance notice of any hearing and any meeting of Tribunal for inspection of documents, goods and other property. The Civil Procedure Code and the Indian Evidence Act are not in terms applicable to the arbitration proceedings. Therefore, the arbitrators are free to reach to the conclusions in their own way based on the material before them. The only restriction on them is that they should not violate the rules of natural justice.

The Arbitrators may consult or appoint experts (unless otherwise agreed by the parties) to submit their report on the subject matter of the dispute.

PLACE / COMMENCEMENT OF ARBITRATION PROCEEDINGS

Arbitration proceeding can be held at any place agreed to between the parties or if there is no agreement between the parties the place of arbitration may be decided by the arbitral Tribunal. The commencement of arbitration is the date on which a request to refer the dispute to arbitration is received by the respondent.

ARBITRAL AWARD

The award shall be in writing and the reasons on the basis of which award was passed, shall be recorded unless the parties agree otherwise. The award shall be drawn on a Rs. 500/- stamp paper. It shall be dated and signed by the arbitrators. The sum awarded may include the interest which the claimant is entitled. It shall also provide for the costs and it shall mention the party liable to pay the costs. A signed copy of the award shall be delivered to each party.

The Act also empowers the arbitrator to make an interim arbitral award on any matter with respect to which he may make a final award.

The parties are free to settle the matter any time during the arbitration proceedings. The arbitrator, if satisfied about the impartiality of the settlement, has to make the award in term of the settlement arrived at by the parties.

APPLICATION FOR SETTING ASIDE AN AWARD

The party dissatisfied with the award may within three months of receiving a copy of the award, apply to the competent Court for setting aside the order on the grounds mentioned in Section 34 of the Act. The Court may grant 30 extra days in special circumstances but not beyond that. The Court cannot sit in appeal against the award and cannot interfere with the award on merits by re-appreciating the evidence. Appeal lies against the order passed by the court under Section 34 of the Act. The grounds for setting aside the awards can be summed up as follows :

(a) When the party was under some incapacity.

(b) When the arbitration agreement is not valid.

(c) When the party was unable to present the case and was not given proper notice.

(d) When the award is beyond the terms of reference.

(e) When the order is beyond the subject matter of the dispute.

(f) When composition of arbitral Tribunal was not constituted properly as per arbitration agreement.

(g) When the award is in conflict with the public policy.

Thus, one of the grounds for setting aside an arbitration award by a court is, if it finds that the award is in conflict with the public policy of India. The Act provided that this was a general phrase which could have several grounds. It

only stated that an award made by fraud or induced by corruption would be one of them. This gave an open field to the parties resolution to challenge the award, thereby delaying the dispute resolution process.

The ordinance has come out with an exhaustive and restrictive meaning of the term "conflict with the public policy of India" as a ground for challenging an award. Only where making of the award was induced or affected by fraud or corruption, or it is in contravention with the fundamental policy of Indian Law or is in conflict with the most basic notions of morality or justice, the award shall be treated as against the Public Policy of India.

ENFORCEMENT OF AWARD

The arbitral award unless it is set aside by the Court is final and binding on the parties and it can be enforced under the Civil Procedure Code in the same manner, as if it is decree of the Court. It is not necessary to file the award in the Court and obtain a decree as was necessary under the old Act; i.e., Arbitration Act, 1940.

There are statutory provisions as well as non-statutory provisions that encourage the mechanism of Arbitration, Mediation and Conciliation for resolving disputes of every nature commercial or otherwise.

STATUTORY PROVISIONS

The statutory provision includes the Indian Contract Act, 1872, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act 1987, and also new Sec. 89 of the Code of Civil Procedure, 1908 empowers the Court, seized of a dispute to refer it, where the elements of settlement exist which may be acceptable to the parties to

(i) Arbitration

(ii) Conciliation

(iii) Lok Adalat

(iv) Mediation

This provision is a very welcome step. It gives effect to the modern concept of harmonious working partnership between the Court and Arbitration. It has far reaching effect on reducing court litigation and giving more importance to Arbitration and Conciliation by adding speed and economy to settlement of disputes .

NON-STATUTORY PROVISIONS

Mediation, which is completely free will of the party, is the most effective mechanism to resolve disputes voluntarily. In many countries of the world especially in UK and USA, mediation is working as a very effective tool to settle any types of disputes. In California

94% of the disputes are resolved with the mechanism of Mediation. In India, various High courts and City Civil Courts have started implementing this mechanism of mediation as an effective tool to minimize pending cases. The Courts in India have started referring the matters to the trained mediators and appointed special judge to refer the matters for mediation. Case to case study in a phased manner has been made to refer the matter to the trained mediators. Various universities including Mumbai University have started post graduation courses in the field of ADR (Alternative Dispute Resolution). Some members of our Institute and the members of Bar Council have already completed the certificate course and they have been taken in the panel of City Civil Court and High Court. There are various institutions established to give training on the subject of Mediation. The experts from other countries like USA and Australia have been invited to train the mediators. ICAI has also taken initiative to conduct certificate course on arbitration. The institute also maintains a panel of arbitrators.

Keen interest taken by the Judges including Chief Justice of Mumbai H.C. has made the movement of ADR faster day by day and the day will come when at least 50% of the disputes will be resolved through the mechanism of ADR in India and we all members of our Institute should make ample effort to understand this subject and ultimately practice in the field of Arbitration and Mediation to share the economic and legal responsibilities of the nation.