



# THE ARBITRATION AND CONCILIATION ACT, 1996



## LEARNING OUTCOMES

At the end of this Chapter, you will be able to have an overview of following related concepts in relation to arbitration and conciliation:

- Meaning of the process of arbitration, different types of arbitration, and its difference with litigation;
- Arbitration agreement with basic characteristics and features and conditions for its enforcement.
- Arbitral tribunal and its constitution
- Basic requirements for an appointment of an arbitrator/arbitral tribunal, its removal and a replacement
- Meaning of Conciliation, basic characteristics of the process of Conciliation and role of Conciliators
- Know of the commencement process of Conciliation proceedings.



## 1. INTRODUCTION

The Arbitration and Conciliation Act, 1996 is an Act enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

The said Act extends to the whole of India, except that Parts, I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation. The expression “international commercial conciliation” shall have the same meaning as the expression “international commercial arbitration” in clause (f) of sub-section (1) of section 2, subject to the modification that for the word “arbitration” occurring therein, the word “conciliation” shall be substituted.

The Act came into enforcement on 22<sup>nd</sup> of August, 1996 vide Notification G.S.R. 375(E), dated 22<sup>nd</sup> August, 1996 by Central Government.

**Need for the establishment of a unified legal framework:** According to the Preamble of the Act the General Assembly of the United Nations has recommended that all countries shall give due consideration to the UNCITRAL Model Law on International Commercial Arbitration, and the UNCITRAL Conciliation Rules in 1980; in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

The General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation; Said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

The law respecting arbitration and conciliation have been constituted taking into account the aforesaid Model Law and Rules.

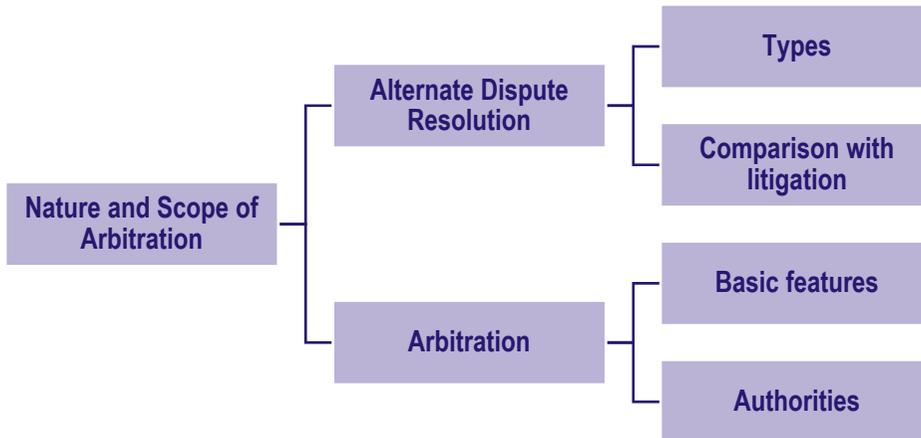
**Structure of the Act:** The Arbitration and Conciliation Act is divided into 4 Parts, Containing 86 Sections along with seven schedules. Part I contains ten chapters which deals with the Arbitration, Part II contains two chapters which deals with the enforcement of certain foreign awards, Part III deals with the conciliation AND Part IV deals with the Supplementary provisions.

In the study material we shall be covering general provisions related to Arbitration, Arbitration agreement, Arbitral Tribunal and the commencement of Conciliation proceedings.



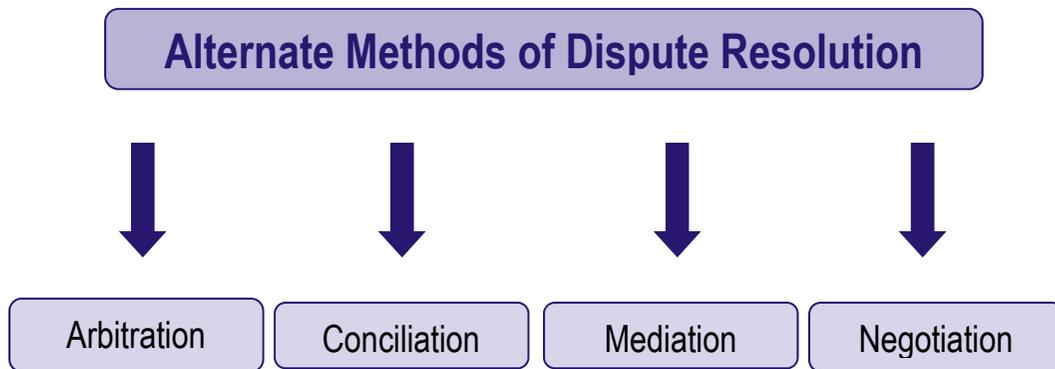
## 2. ARBITRATION – GENERAL PROVISIONS

Alternate methods of Dispute Resolution (ADR) were evolved to address some of major shortcomings of the court based adjudication system. One of the more utilised methods of ADR is arbitration.



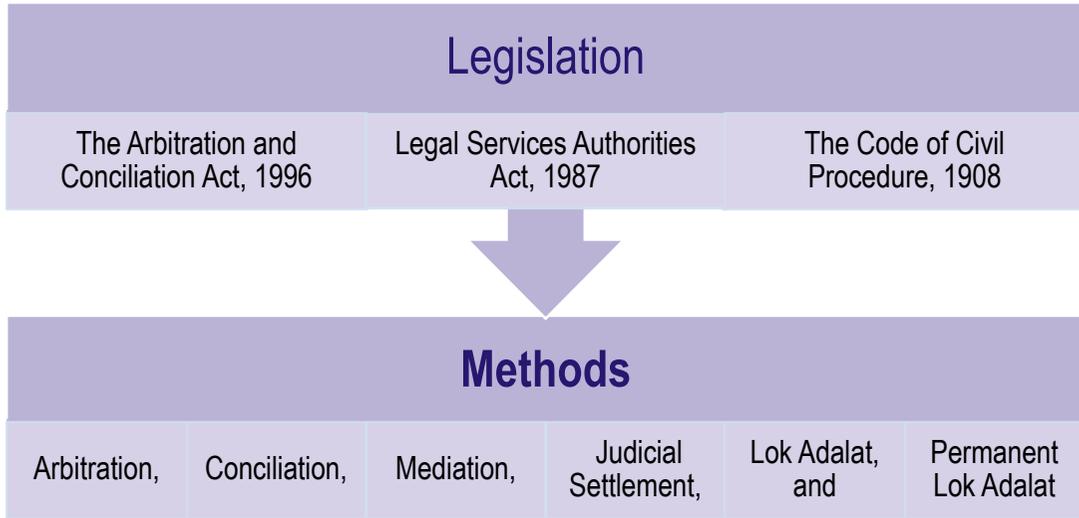
### Alternate methods of dispute resolution

Alternate methods of dispute resolution (ADR) are used to resolve disputes outside the ordinary court system. In other words, these methods are an alternative to litigation. Two of the most common methods of ADR are arbitration and mediation. Other methods include conciliation, negotiation, case evaluation, neutral fact finding, ombudsperson, etc. All the methods differ from each other.



ADR methods enjoy significant advantages such as lower costs, greater flexibility of process, higher confidentiality, greater likelihood of settlement, choice of forum, choice of solutions. However these methods also suffer from few disadvantages, for example, requirement of cooperative behaviour of both parties, power imbalance between parties, lacks the possibility of interim measures, difficulty in enforcement of final outcome, to name a few.

**Primary legislation dealing with alternate methods of dispute resolution:** In India the primary legislations dealing with alternate methods of dispute resolution are -



### Arbitration

One of the popular methods of alternate dispute resolution is arbitration. It could be understood as a method of dispute resolution involving one or more neutral third person selected by the disputing parties and whose decision is binding.<sup>1</sup> Thus arbitration has few defining features:

- (a) It is a method of adjudication of disputes;
- (b) by a neutral third person(s) selected by the parties; and
- (c) who renders a final and binding decision

### Relevant terms (Section 2)

**“Arbitration”** defined by the Arbitration and Conciliation Act, 1996 in section 2. According to which “arbitration” means any arbitration whether or not administered by permanent arbitral institution.

**“Arbitral tribunal”** means a sole arbitrator or a panel of arbitrators;

**“Arbitral award”** includes an interim award;

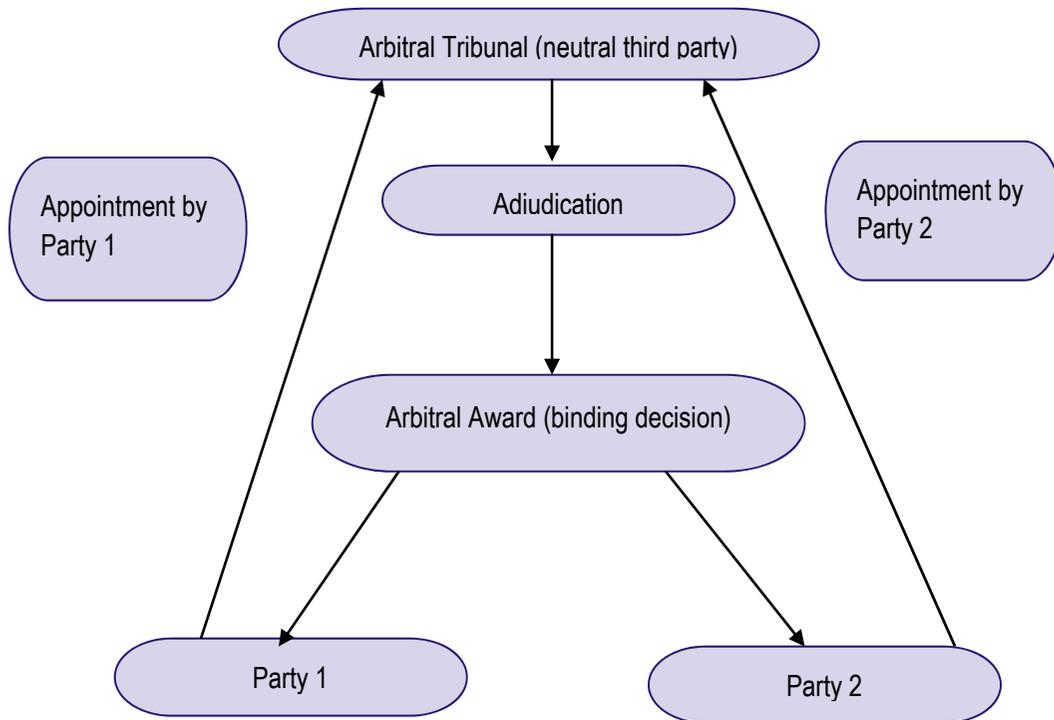
**“International commercial arbitration”** means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- an individual who is a national of, or habitually resident in, any country other than India; or
- a body corporate which is incorporated in any country other than India; or
- an association or a body of individuals whose central management and control is exercised in any country other than India; or
- the Government of a foreign country;

<sup>1</sup> Black’s law dictionary, 8th edition, Thomson West, 2004.

“Party” means a party to an arbitration agreement.

### Process of arbitration



### Basic Features of Arbitration

- (a) **Arbitration agreement** - no arbitration can happen without the consent of the parties. The consent is contained within an arbitration agreement. This agreement clearly specifies the desire of the parties to arbitrate their dispute. In other words they clearly note that in the event of a dispute between them they would not go to the court, instead they will proceed to arbitrate their dispute. This agreement takes the form of a binding contract.
- (b) **Arbitrator** - also known as the arbitral tribunal is similar to a judge of the court. The arbitrator decides the disputes between the parties. Just like the judge an arbitrator is also required to be completely neutral, impartial and not favour any party. Because the parties can choose the arbitrators, it inspires confidence in the arbitrators, the process and the decisions taken by the arbitrators. If however the arbitrators who are not independent then they could be removed by the court.
- (c) **Seat of arbitration** - means the legal system which would supervise the arbitration to ensure that mandatory legal requirements are complied with. The courts of the seat would provide assistance through supportive measures. **For example** if India is the seat then Indian laws would apply and Indian courts would have the authority to provide supportive assistance such as issuance of interim measures, etc. It would also be the court which would hear challenges against the arbitral award.

- (d) **Party autonomy and procedure** - arbitration also gives the parties the choice of applicable law especially if the arbitration is an international commercial arbitration. Additionally there is enormous flexibility to choose the type and kind of procedure that the parties want to adopt for the arbitration. These rules will deal with many things including what kind of hearing should be there for instance only written statements or oral arguments, etc.
- (e) **Finality of outcome** - usually there is no appeal against an arbitral award. An arbitral award can only be set aside on very few grounds such as invalid arbitration agreement, parties' incapacity, independence and impartiality of an arbitrator, unfair procedure, etc.
- (f) **Confidentiality** – an important feature of arbitration is that whatever that happens in arbitration remains private. It is only known to the parties and the arbitrators. All of them are prohibited with sharing with third parties who are not involved in arbitration, any document or information that is received during the course of arbitration. This is done to ensure that parties feel free to share all information during arbitration so that a proper solution can be arrived at.
- (g) **Arbitral Awards** – an award is a decision by the arbitrator on the dispute that was submitted to it for adjudication.
- (h) **Enforcement of arbitral awards** - it is much simpler to enforce an arbitral award in foreign nations than a judgment rendered by a court. Such enforcement happens under an international treaty.

#### Distinction between Arbitration and Litigation

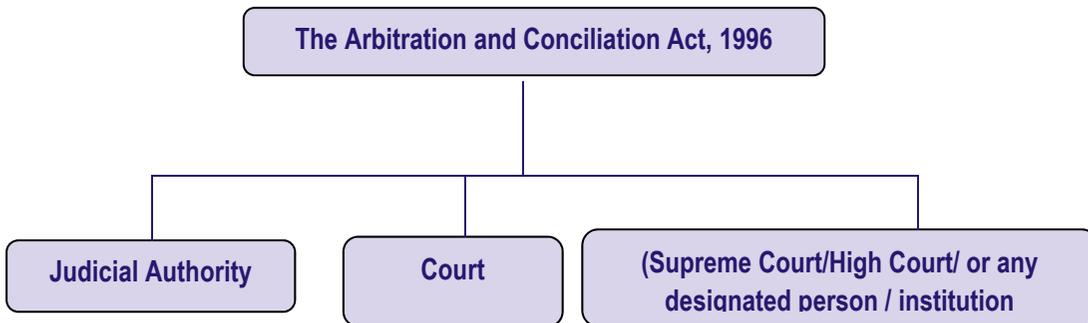
Litigation	Arbitration
Takes place in court	The place of arbitration is chosen by the parties.
A judge is assigned by the court. The litigants have no say on who will judge their disputes.	The arbitrator(s) is selected by the parties. Parties therefore are able to choose people with the appropriate expertise, educational qualifications, trade experience, etc., as arbitrators.
The procedure followed by the court is fixed and determined by the Rules of the court. In India it would be governed by the Code of Civil procedure and rules applicable to the particular court.	The parties have adequate flexibility to choose the procedures that would apply to their arbitration. They could either construct such procedures or adopt procedures of an arbitral institution.
The proceedings are generally open to public. In other words there is very little privacy and confidentiality.	Confidentiality is one of the most important characteristic of arbitration. In other words apart from the parties (including their lawyers) no other person is permitted to participate in the arbitral proceedings.

Court decisions are subject to numerous appeals.	Arbitral awards can be challenged on very limited grounds.
It is often difficult to enforce judgments of court of one country in a foreign country.	Enforcing an arbitral award in foreign nations is much easier and is governed by international treaties such as The Recognition and Enforcement of Foreign Arbitral Awards, 1958.

In India arbitration is governed by the Arbitration and Conciliation Act, 1996 (A&C Act, 1996) read with the Indian Contract Act, 1872. The two Acts together provide the legal framework governing and regulating arbitration in India. The A&C Act, 1996 is based on the UNCITRAL Model Law 1986,<sup>2</sup> and was recently amended vide the Arbitration and Conciliation (Amendment) Act, 2015.

### Authorities under Act

Under the Arbitration and Conciliation Act 1996 there are three different authorities who are given different powers, functions, and duties to perform under the Act.



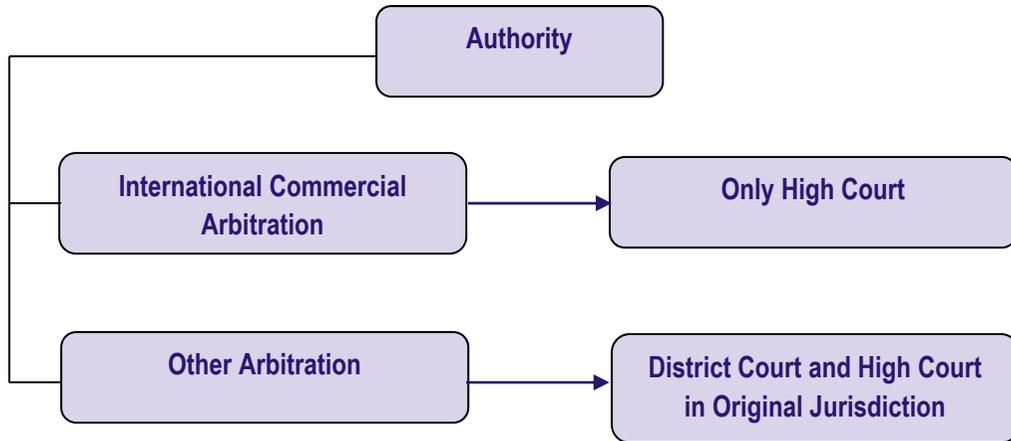
- (a) **Judicial authority** – the term judicial authority is not defined in Act. The Supreme Court in *SBP v. Patel Engineering*<sup>3</sup> observed “A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum.” Therefore it is a concept wider than courts as ordinarily understood and would include special tribunals and quasi judicial authorities. The functions performed would include reference to arbitration. Every court would be a judicial authority, but every judicial authority would not be a court.
- (b) **Court [Section 2(1)(e)]** – There are two understandings of Court – Pre amendment and post 2015 amendment. Prior to the amendment, the term was held to be District Court and High Court exercising original jurisdiction and not other courts. This was confirmed in *Fountain Head Developers v Maria Arcangela Sequeria*.<sup>4</sup>

<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration (1985)

<sup>3</sup> (2005) 8 SCC 618 in para 19.

<sup>4</sup> AIR 2007 Bom 149

Post Amendment the understanding is now dependent on the type of arbitration – for international commercial arbitration the court would only be the High Court, and for all other arbitration it would be the District Court and High Court exercising original jurisdiction.



The Court performs many important functions. It is the primary judicial organ in respect of a particular arbitration in other words, it performs the Supervisory function as regards that arbitration. This supervisory function would include granting of interim measures, challenge to an arbitral tribunal, review of an award, and enforcement of awards, etc.

- (c) **Supreme or High Court or any person or institution designated by such court (Section 11)** – Supreme Court and High court are entrusted with a specific task that of appointment of arbitrators upon request of a party. The Supreme Court would be the authority for appointing an arbitrator in case of international commercial arbitration, while High Court would be the authority for appointing an arbitrator in case of domestic arbitrator. The Act also authorizes any person or institution so designated by the Supreme and High Court to appoint the arbitrators.

### Arbitration Agreement

Since arbitration is a private method of resolving dispute as opposed to litigation in a court system. At the heart of an arbitration lies an arbitration agreement.



## Arbitration agreement: Definition and General Principles

### Definition

Arbitration is a private method of dispute resolution. Under the Indian law every individual has the right to approach the court for resolution of his/her dispute that may involve infringement of right(s) vested upon that individual. This protection is so stringent that it cannot be contracted away. The Indian Contract Act, 1872 however notes an exception in favour of arbitration.<sup>5</sup>

Arbitration cannot happen without the parties consenting to submit their dispute to arbitration. Consent of the parties therefore is the most fundamental requirement for an arbitration to happen. The document which notes this consent is referred to as the arbitration agreement. In other words an arbitration agreement records the consent of the parties that in the event of a dispute between them that matter instead of being taken to court, will be submitted for resolution to arbitration. Arbitration agreement therefore is necessary to start arbitration.<sup>6</sup>

In India arbitration agreement is governed by the Arbitration and Conciliation Act, 1996 in particular sections 2(1)(b) and 7.

**Section 2(1)(b)** - In this Part, unless the context otherwise requires "arbitration agreement" means an agreement referred to in section 7.

**Section 7** Arbitration Agreement -

- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them 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 including communication through electronic means which provide a record of the agreement; or
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

<sup>5</sup> Section 28, Indian Contract Act 1872 "

<sup>6</sup> *SN Prasad, Hitek Industries (Bihar) Ltd v. Monnet Finance Ltd* (2011) 1 SC 320.

The purpose of an arbitration agreement is to submit disputes to arbitration and the law defines an arbitration agreement on the basis of whether existing or future disputes would be submitted to arbitration. Thus the two basic types of arbitration agreement are:

- (a) **Arbitration clause** - a clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.
- (b) **Submission agreement** - an agreement to refer disputes that already exist to arbitration. Such an agreement is entered into after the disputes have arisen.

**Example:** In 2014, Company A, an automobile manufacturer entered into a joint venture agreement (JVA) with Company B the largest manufacturer of tyres for supply of all terrain tyres for its latest car. Both the companies are registered under the Companies Act 2013.

**Scenario I** - The JVA carries the following clause “Clause 56.1. All disputes shall be arbitrated in Mumbai.” This would be an arbitration clause. It is contained in the principal contract (JVA) and no disputes have arisen till yet. It concerns future disputes that may arise.

**Scenario II** - The JVA does not have any clause relating to arbitration. Disputes arose between the parties concerning quality of tires in 2016. To resolve this dispute, parties entered into an agreement that noted “That all disputes including quality of tires supplied by Company B to Company A shall be submitted to arbitration. The parties hereby agree to abide by the decision of the arbitrator. ” Such an agreement that is made after the disputes have arisen would be called a submission agreement.

### General Principles

1. **Arbitration agreement** is an agreement enforceable under the law. In other words it is a contract, and has to fulfill all requirements of a valid contract.
2. **Consent (consensus ad idem):** parties have to clearly consent to arbitration. Words utilized by the parties should clearly indicate that all parties want to proceed to arbitration. Thus if words used are uncertain or ambiguous, then there can be no consensus ad idem, and in turn there can be no arbitration agreement.<sup>7</sup>

Section 29 of the Indian Contract Act, 1872 clearly notes that ‘agreements, meanings of which is not certain or capable of being made certain are void’

3. **Ouster of jurisdiction:** It is vital to understand that once the parties have agreed to arbitrate their matter neither of the parties can unilaterally proceed to court to litigate that matter. Any party attempting to do that would be referred to arbitration, if the other party so requests.<sup>8</sup>
4. **Doctrine of separability:** the doctrine provides that an arbitration agreement even though

<sup>7</sup> *Dresser Rand SA v Bindal AgroChem Ltd* (2006) 1 SCC 751.

<sup>8</sup> Section 8, Arbitration and Conciliation Act, 1996.

contained in a contract is a separate agreement from the contract itself. In other words an arbitration agreement is an agreement independent of the main contract. It is done to ensure that the agreement to arbitrate would not be rendered invalid merely because the principal contract was invalid.<sup>9</sup> This is a legal fiction.

5. **Competency to rule on its jurisdiction:** The arbitral tribunal has the capacity to rule on its own jurisdiction even if involves a question of validity of the main contract. This allows the arbitral tribunal to determine the validity of the main contract without contradicting its own jurisdiction.

### Requirements of a valid arbitration agreement

Requirements of an arbitration agreement can be gathered from two sources:

- statutory provisions, and
  - decide case law.
1. **Writing** - unlike the possibility of an oral contract, arbitration agreement are required to be mandatorily in writing. There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement.

**Example:** C owns a shop in Chandni Chowk dealing in readymade clothes. D is a supplier of clothes to C. They have been doing business for many years. No separate written contract exists between them. However for each consignment D issues an individual invoice to C on the basis of which payment is made. Each invoice contains the following note “All disputes pertaining to this transaction if any will be subject to the Arbitration Rules & Regulations of Bharat Merchant Chamber”. This is an arbitration agreement in writing.

**Example:** Vikram wants to start a Sweet and Confectionary Shop and contacts Ahuja Confectioners & Bakers for supply of cakes. The entire communication between the parties took place over email. One of the emails received by Vikram from Ahuja Bakers had, among other terms of service, the following condition “any disputes regarding quality or delivery shall be submitted to arbitration conducted under the aegis of Indian Confectionary Manufacturers Association. Please place your order if the above terms and conditions are agreeable to you.” Vikram placed an order. The contract stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.

2. **Clarity of consent:** the intention to go to arbitration must be clear in other words there must be *consensus ad idem*. Utilization of vague words cannot be considered to be adequate. The intention has to be gathered from the wordings of the agreement. The words used should

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<sup>9</sup> In the Arbitration and Conciliation Act, 1996, the doctrine of separability and competence-competence are noted in Section 16. The two doctrines were affirmed by the constitution bench of the Supreme Court of India in *SBP & Co v Patel Engineering Ltd* (AIR 2006 SC 450).

disclose a determination and obligation on the part of parties to go to arbitration and not merely contemplate the possibility of going for arbitration. If it is only a possibility then it is not an arbitration agreement.<sup>10</sup>

**Example:** The parties had a contract with a clause "(16) that if during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine." This would not be an arbitration agreement, because of the need for parties to further agree whether or not to go for arbitration. The underlined portion clearly highlights the need for further agreement between the parties.

3. **Defined Legal relationship** - this term has been borrowed from the UNCITRAL Model Law. The statute does not define this term. The important idea here is that any dispute that arises from a legal relationship can be submitted to arbitration unless it is expressly or impliedly barred by a Statute.<sup>11</sup> Thus disputes concerning illegal activities cannot be submitted to arbitration.
4. **Final and binding award:** Parties to the arbitration agreement must agree that the determination of their substantive rights by a neutral third person acting as the arbitral tribunal would be final and binding upon them.

**Example:** 'Any other questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the Contractor to do so, given written notice of his decision to the contractor. Chief Engineer's decision final.' Is this a valid arbitration agreement?

**Answer:** Since in the given case Chief Engineer is not a neutral party and has a Control over the work specified in the contract, so this is not a valid arbitration agreement.

5. **Specific words:** the mere use of words like 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement. Usage of such words is not a necessary requirement.<sup>12</sup>
6. **Dispute:** there must be a present or a future dispute/difference in connection with some contemplated affairs that is proposed to be submitted to arbitration.
7. **Arbitrability:** the disputes submitted/ proposed to be submitted to arbitration must be

<sup>10</sup> *Jagdish Chander v Ramesh Chander* (2007) 5 SCC 719.

<sup>11</sup> Arbitration and Conciliation Act 1996, Section 2(3) - This Part shall not affect any other Law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

<sup>12</sup>For relevant provision refer section 7(5) of the Arbitration and Conciliation Act 1996.

arbitrable.<sup>13</sup> In other words that law must permit arbitration in that matter. There are certain disputes that the law retains exclusively for the court, and the same cannot be submitted for arbitration. The rationale is that given the nature of disputes, the courts are the only appropriate forum for adjudicating the matter.<sup>14</sup>

**For example** criminal offences, matrimonial disputes, guardianship matters, testamentary matters, mortgage suit for sale of a mortgaged property, etc. cannot be arbitrated.

8. **Signature:** is only required when the arbitration agreement is contained in a contract i.e. in one set of documents. However no signature is required if the arbitration agreement is contained in correspondence or exchange of pleadings.

### Arbitration agreement through reference

The Arbitration and Conciliation Act, 1996 envisages a possibility of an arbitration agreement coming into being through incorporation. In other words, parties to an agreement could agree to arbitrate by referring to another contract containing an arbitration agreement. The requirement is that the reference must leave no doubt in the mind of the reader that the parties indeed wanted to incorporate the arbitration agreement into the agreement between them.<sup>15</sup>

**Example:** In *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn Ltd* 2006 (2) ArbLR 435 (SC), the respondent had placed an order of purchase of various quantities of phosphoric acid from the petitioner. The purchase order noted that the terms and conditions were to be as per the Fertilizer Association of India (FAI) Terms and Conditions for Sale and Purchase of Phosphoric Acid. Clause 15 of the terms provided for settlement of disputes by arbitration.

Is this a valid reference for an arbitration agreement to come into existence?

**Answer:** Yes. It was held by the Supreme Court of India that for a reference to constitute an arbitration agreement the contract should be writing and reference should be such as to make that arbitration clause a part of the contract. Both the conditions were held to be fulfilled in the present instance.

### Termination of an arbitration agreement

Just the way parties can enter into an arbitration agreement, they can also terminate an arbitration agreement. Thus an arbitration agreement could be put to an end by:

1. **Mutual consent:** like any contract, the parties involved can jointly agree to put an end to a particular arbitration agreement.

<sup>13</sup> Section 34(2)(b)(i) Arbitration and Conciliation Act 1996 - 'An arbitral award may be set aside by the Court only if (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.'

<sup>14</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd* AIR 2011 SC 2507.

<sup>15</sup> Section 7(5) Arbitration and Conciliation Act 1996, and *MR Engineers & Contractors Pvt Ltd v. Som Dutt Builders Ltd* (2009) 7 SCC 696.

2. **Termination of principal contract:** an arbitration agreement always operates in relation to a principal contract. If the principal contract is terminated through discharge or novation, the arbitration agreement terminates with the contract. However if the principal contract is breached, then the arbitration agreement survives because of the operation of the doctrine of separability.

**Example:** Raj Air-Conditioning services (RACS) and Voltas Limited entered into a service agreement whereby RACS would provide annual maintenance services for all voltas commercial air conditioners in the NCR region. The contract provided that in the event of a dispute between the parties, the matter would be submitted to arbitration.

**Scenario 1:** At the end of the third year, the Service Agreement was not renewed. The contract terminates, and along with it the arbitration agreement.

**Scenario 2:** At the end of the second year, the two parties enter into a new contract, which replaces the existing service agreement between the parties. The new contract does not have an arbitration agreement. The arbitration agreement contained in the superseded service agreement does not survive.

**Scenario 3:** Voltas raises a dispute with RACS as regards quality of services provided and terminates the agreement. Here, owing to separability doctrine, the arbitration agreement survives to allow parties to arbitrate their dispute.

3. **Death of parties:** under the Indian law, an arbitration agreement is not discharged by the death of any party. It shall be enforceable by or against the legal representatives of the deceased.<sup>16</sup>

As per section 2 of the Act, "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

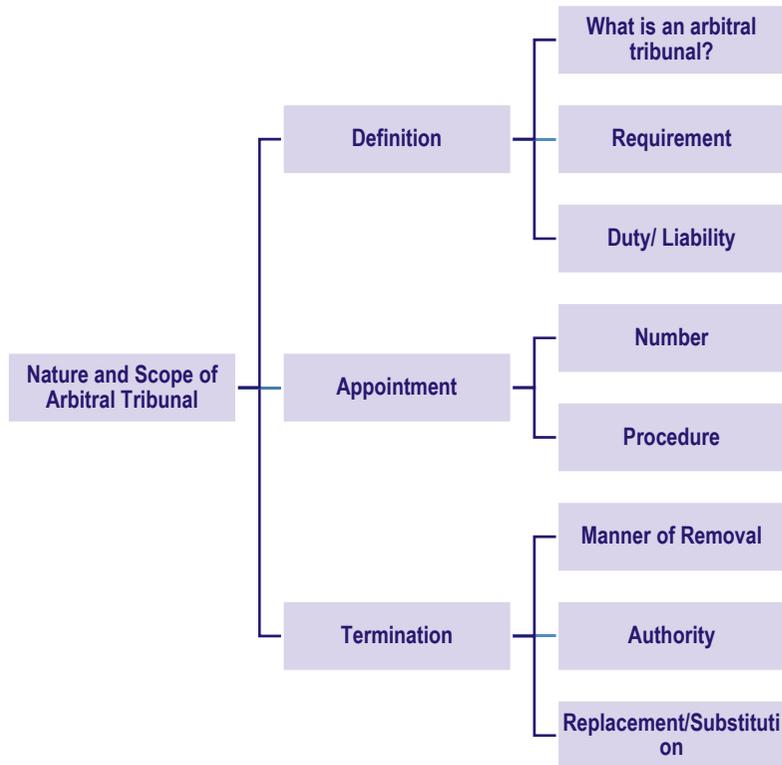
4. **Operation of Law:** an arbitration agreement can be extinguished by the operation of law by virtue of which any right of action is extinguished.



### 3. ARBITRAL TRIBUNAL

A unique feature of arbitration is the ability to have the dispute adjudicated by a neutral, fair, unbiased and competent adjudicator.

<sup>16</sup> Section 40, Arbitration and Conciliation Act, 1996.



### Arbitral Tribunal

An arbitrator(s) or arbitral tribunal performs the function of a judge, in other words an arbitrator adjudicates/judges the dispute between the parties.<sup>17</sup> The terms arbitrator(s) or arbitral tribunal are interchangeable and refers to the same person or group of persons. Thus there could be one (sole) arbitrator or more than one arbitrator. Both would be referred to as arbitral tribunal.

A unique feature of arbitration unlike court based adjudication is that the parties get to select their arbitrators or delegate to an institution (like ICC, FICCI, ICADR, etc.) the power to appoint on their behalf. This is considered to be a key advantage as the parties can choose the person who will adjudicate their dispute as compared a court based system where they have no control over the judge. The point that an arbitrator adjudicates the matter, is important to understand. In other words, an arbitrator does not simply express an opinion based on materials given to the arbitrator. In fact that would be expert evaluation. Rather the arbitrator works like a judge, before whom the parties present their dispute, submit evidences, produce witnesses and then the arbitrator applies the law to the problem and decides in a judicial manner. Therefore even through a private adjudicator, the function is performed to standards applicable to public functionaries like judges.

There are other important advantages to the ability of parties to choose their arbitrators. Parties have more confidence both in the arbitrators and their decisions. This is very important because

<sup>17</sup> But this does not make the arbitral tribunal a court.

unlike a court which has the ability to force parties to comply with its orders, success of arbitration depends on the cooperation of parties. Therefore the parties must trust the arbitrators to remain neutral and fair to all the parties involved in the arbitration. The quality of arbitrators would ultimately determine not only the overall quality of the arbitration process but also the outcome in the form of the arbitral awards.

In India, appointment and termination (removal) of arbitral tribunal is regulated by the Arbitration and Conciliation Act 1996. The law prescribes various provisions for different possibilities that might arise in appointing or removal of arbitrators. The different authorities which have the power for appointment and removal are the District Court (Court), High Court and Supreme Court of India.

### **Who can be an arbitrator?**

Any person capable of contracting, in theory can be an arbitrator. In our daily lives when we have a dispute with our family members or a neighbour, we take the dispute to an elder of the house or the society who decides the matter. The elder essentially acts as an arbitrator, and arbitrates the matter. Of course, arbitration as understood under law is a little more sophisticated than this setup, but it provides a basic idea of arbitration.

Since arbitration is a private arrangement, whereby when dispute arise it would be submitted to a private party instead of courts, the arbitrator can be anyone who is capable of contracting with the parties. Under the contract, a person agrees to act as arbitrator and adjudicate any disputes between the parties that is submitted to him by the parties.

### **Appointment of Arbitral Tribunal**

An important principle of arbitration is the principle of party autonomy. Party autonomy means the 'freedom to choose' whether it is the procedure, the venue, the seat or the arbitrators. The parties have the right to choose the persons who would act as arbitrators in their dispute. However this right to choose is not absolute but instead is subject to certain limits that are provided under the applicable law.

There are two aspects to appointment, namely number of arbitrators, and the actual procedure of appointment.

### **Number of Arbitrators**

The parties tend to have high level of freedom when deciding on the number of persons that can be chosen as arbitrators. There are many things that should be kept in mind at the time of appointment of arbitrators, for instance the fees of the arbitrators, complexity of the matter, time required for meetings, duration of sessions when oral arguments would be made, etc. A specific problem that arises when there is more than one arbitrator is the difficulty faced when coordinating the timings among the arbitrators. It becomes even more problematic as the number of arbitrators increase. At the same time there are advantages to having more than one arbitrator. More arbitrators results in greater discussions which can improve the quality of awards. It also brings greater expertise as arbitrators may be from different speciality and background.

**Example:** Party A and Party B entered into a contract for construction of apartments. The contract contained an arbitration agreement, whereby all disputes between the parties would be submitted for arbitration by an arbitral tribunal having three arbitrators. In such a situation, the arbitrators could all be from different discipline and having varying expertise. **For example** the arbitrators could be a lawyer, architect, interior designer, civil engineer, academic, government servant, etc. The parties therefore can choose almost anyone as arbitrator.

It is important to remember that even though a private process, arbitration and its outcome (arbitral award) require State support at different juncture but most importantly for enforcement. However the State will only extend its support for legal outcomes. Therefore it is important that the arbitrators are familiar with legal requirement especially under the Arbitration and Conciliation Act 1996 so as to ensure that the entire process and the outcome complies with all mandatory legal requirements.

The 1996 Act clearly provides that there can be any number of arbitrators so long as it is not even in number. In other words, parties can decide on any number of arbitrators so long as there are odd number of arbitrators. Ordinarily parties select one, but however if more than one is selected, it is usually three. The reason is obvious so that there can be a decision by majority. If there is even number of arbitrators, then there is a possibility that there might be a tie.

**Example:** If there are two arbitrators then it is possible that the two arbitrators may not agree, in which case there would be no decision.

**Section 10, Number of arbitrators.** – (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

However in a rather interesting decision in *Narayan Prasad Lohia v. Nikunj Kumar Lohia*<sup>18</sup> the Supreme Court held that even number of arbitrators is an acceptable possibility. Among the many reasons put forward, the court observed that it was possible that the two arbitrators may not disagree, in which case there would be consensus and no disagreement. Also it was not correct to permit parties to proceed with the arbitration and raise objection only when the decision goes against them. Thus after this decision, it seems that parties can choose 'even' number of arbitrators. However in practice this rarely happens.

### Procedure for appointment

Appointment procedure is also subject to party autonomy. In other words parties are given the freedom to make any procedure for appointing the arbitrators i.e. the parties can decide upon any procedure for choosing the arbitrators. It can be as simple as a toss of coin, or as complicated as they want.

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<sup>18</sup> AIR 2002 SC 1139

The most common procedures are:

- (a) The parties will jointly appoint.
- (b) Each party will appoint one and the two arbitrators would appoint the rest.
- (c) Appointment would be made by an unrelated person or institution, e.g. President of ICAI, President FICCI, etc.

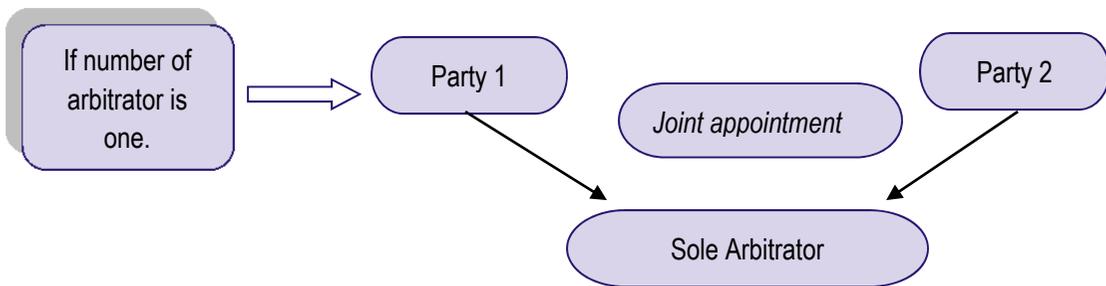
There may however be times when:

**Scenario I** - parties may not have decided upon an appointment procedure; or

**Scenario II** - parties may have decided upon a procedure and such a procedure requires further action, but a party / arbitrator / institution fails to act as required under the procedure.

To deal with both the scenarios the law, namely Section 11 of the Arbitration and Conciliation Act 1996,<sup>19</sup> provides alternate procedures.

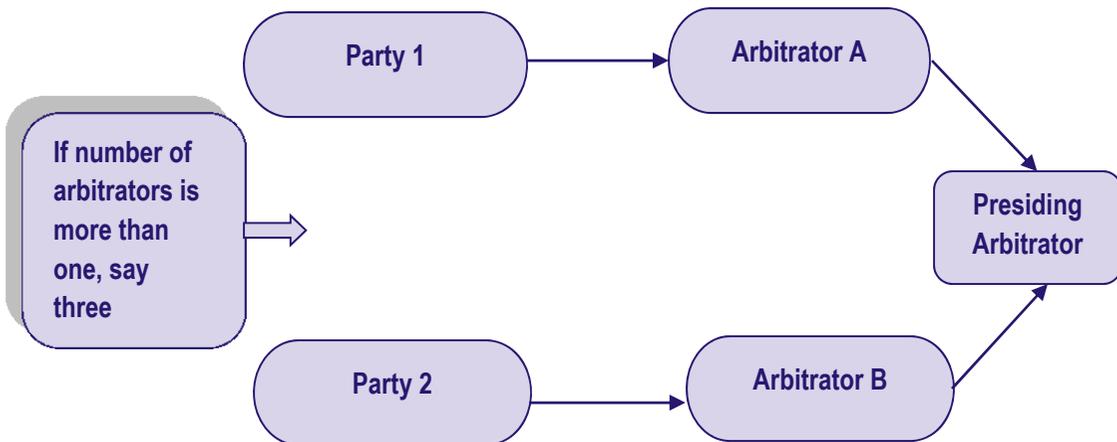
#### Scenario I



When an appointment is made jointly by both parties, both parties have to agree upon who the arbitrator would be. Usually one party writes to other party forwarding a list of names of potential arbitrators. If the other party approves one name from the list, then that individual would be the arbitrator. If not then the other party would propose new names to the first party. This would go on till both parties agree upon one name.

**Example:** When a joint appointment was required, Party 1 sent the following names to Party 2 - Sunil, Peter, Meenakshi, Iqbal, and Anil. None of them was acceptable to Party 2, which sent the following names to Party 1 –Akram, Shameek, Sebastian, Aarti, Debasish. From this list, Party 1 was agreeable for Shameek and informed Party 2. In this case Shameek would be the arbitrator and would be considered to be jointly appointed.

<sup>19</sup> Also important to the appointment is 'The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996' vide Supreme Court of India Notification dated 29<sup>th</sup> January 1996, published in the Gazette of India, Extra., Pt III, Sec.1, dated 16<sup>th</sup> May 1996.



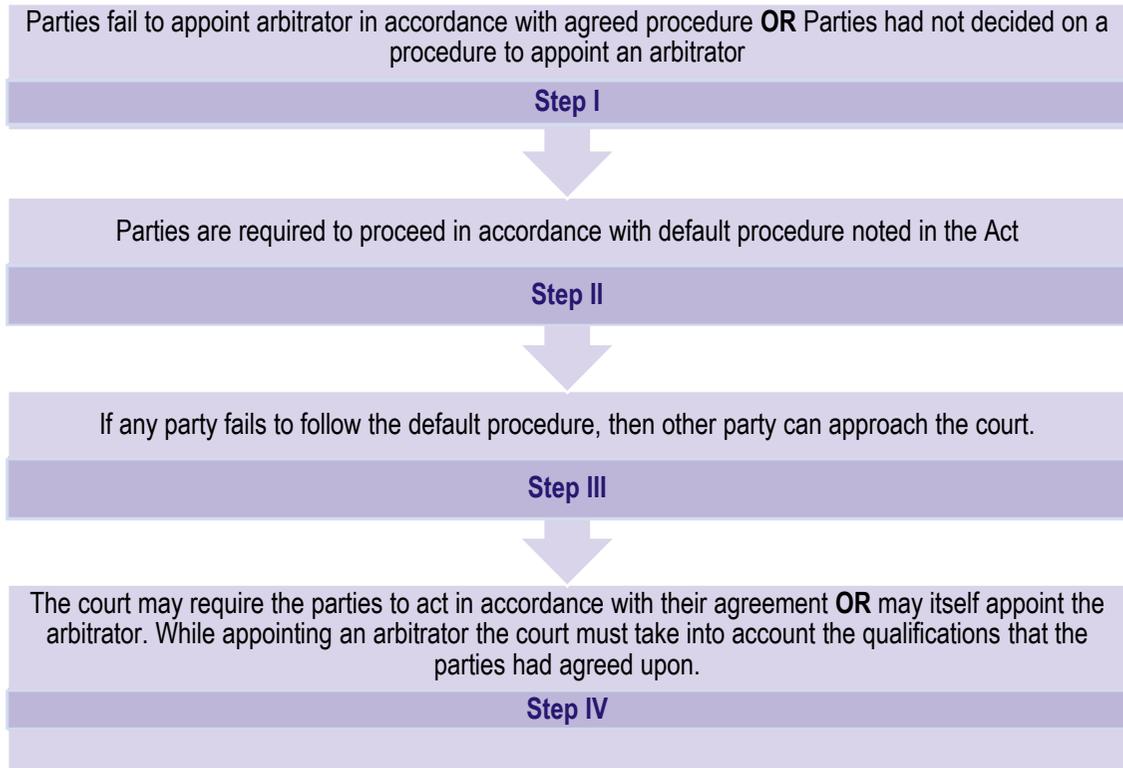
**Example:** When three arbitrators were to be appointed, Party 1 selected Sunil as their arbitrator, while Party 2 selected Iqbal as their arbitrator. The two arbitrators then jointly discussed the following names Shameek, Peter and Meenakshi out of which they selected Meenakshi as the third (presiding) arbitrator. Similarly where 5 arbitrators are to be appointed, every party will appoint two arbitrators and the four arbitrators will together appoint the presiding arbitrator.

### Scenario II

There is also the possibility that although the parties had selected a procedure to appoint an arbitrator, a party, person or institution may not do what is required of them under the procedure. **For example** if according to the agreed procedure the appointment of the arbitrator(s) was to be made by the ICADR (The International Centre for Alternative Dispute Resolution) president, but such an appointment was not made, such a situation would fall under scenario II.

In such situations the parties would have to approach the authorities designated under the Arbitration and Conciliation Act 1996 for appointment of arbitrators. The designated authority is either the Supreme Court of India (for international commercial arbitration) or the High Court (for domestic arbitration). The law prescribes a detailed procedure for appointment of arbitrators, but what is important is that even when the court steps in it firstly requires parties to take action, and if that does not happen, only in the last instance it does step in to appoint arbitrators. A constitutional bench of the Supreme Court of India in *SBP & Co. v. Patel Engineering Ltd.*,<sup>20</sup> had observed that once the appointment had been made by the appointing authority, it could not be challenged before the arbitral tribunal or any other court.

<sup>20</sup> AIR 2006 SC 450. It is important to note that this case was rendered before the 2015 amendment to the Arbitration and Conciliation Act 1996. The appointing authority then were the Chief Justice (or Designate) of the Supreme Court of India for International Commercial Arbitration, and High Court for domestic arbitration.



### Requirements of an arbitral tribunal

An arbitrator has to meet the following requirements:

- (a) **The arbitrator could be of any nationality** – the arbitrator could be of any nationality. There is no requirement that the arbitrator should be of the nationality of one of the parties. This is relevant in international commercial arbitration, when the parties are from different countries. In such a situation an arbitrator who belongs to the nationality of one of the parties may be considered as biased. At the same time merely because the arbitrator is of the nationality of one of the parties, it would not automatically amount to presence of bias.
- (b) **Capable of contracting** – The arbitrator should be capable of contracting. This is because arbitration is a private arrangement and requires consent of all involved i.e. parties and arbitrators. There is a contractual relation between the arbitrator and the parties, whereby the arbitrator renders a service of adjudication to parties for remuneration. Therefore all requirements of a contract as noted in the Indian Contract Act 1872 required to be fulfilled.
- (c) **Lack of Bias** - An arbitrator should remain neutral, unbiased and should not favour any party in arbitration. In other words an arbitral tribunal should not be biased instead should remain at all times remain independent and impartial.

**Section 12: Grounds for challenge.** – (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

- a. such as existence either direct or indirect of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- b. which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

**Bias** could take many forms, pecuniary bias, personal bias, bias as to subject matter, policy bias, etc. The Supreme Court of India in *Ranjit Thakur v. Union of India*,<sup>21</sup> held that the test of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and the matter was likely to be disposed in a particular way.

**Independence** – is presence of certain relationship between the arbitrator and a party such as previous employment, creditor, etc.

**Impartiality** – is the state of mind of the arbitrator i.e. by his / her behaviour the arbitrator gives an impression that they are favouring one party over the other. It can be understood as a pre-conceived notion to decide a case or an issue in a particular manner.

**Example:** Anil, who is a Chartered Accountant with his own independent practice, is the arbitrator in an arbitration between Tata Tea Inc., and Suzuki Ltd.

**Situation I** - Prior to starting his practice, Anil had worked for five years with Tata Tea Inc. In this situation the law would deem Anil to be lacking independence.

**Situation II** – During the proceedings before the arbitral tribunal, Anil would allow Tata Tea to take many liberties, for instance taking as much time for making oral arguments, cross examining the witnesses, for submitting documents, etc. Also the proceedings were adjourned (postponed) whenever so requested by Tata Tea. When Suzuki Motors wanted to take extra time they were not allowed. In few instances when they were permitted, they are asked to pay heavy cost to Tata Tea for delaying the proceedings. This would be a case where the arbitral tribunal clearly favours and is partial towards Tata Tea, and therefore lacks impartiality.

This requirement of previous employment does not operate in equal measure when the party involved is the Government. In such instances there is no automatic doubt where the arbitrator is a government employee and one of the party to the arbitration is the State.

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<sup>21</sup> (1987) 4 SCC 611

At the end, it must be understood that even though there might be previous connection between the arbitrator and one of the parties, or the persons previous behaviour might have raised doubts as to their impartiality, it does not prevent parties from appointing that person as the arbitrator. In other words, parties have full autonomy to waive any of the objectionable grounds and make the appointment. However, once appointed the party that made/agreed to the appointment cannot raise a challenge on that very same ground, but they can raise a challenge on a new ground.

**Example:** Party A knew that Vikas had been an employee of Party B, yet goes ahead and appoints or agrees to the appointment of Vikas as arbitrator. Party A cannot later challenge Vikas on the ground that he had been an employee of Party B. It can however challenge him on other grounds, which had not been disclosed by Vikas.

This is so because the parties have all right to choose their arbitrator and the right to waive concerns. The law requires that all objectionable issues be brought to the notice of parties so that they can make an informed choice. Once such a choice has been made, the law respects and enforces that.

**Some instances** which would give rise to doubts as to presence of bias:

- arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party,
- the arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties
- the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties
- a close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties
- the arbitrator is a legal representative of an entity that is a party in the arbitration
- the arbitrator has a significant financial interest in one of the parties or the outcome of the case
- the arbitrator has previous involvement in the case

#### **Duties and liabilities of arbitrator**

An arbitrator once appointed is subject to certain duties. These duties emerge from combined reading of statute law and case laws.

- a. **Conduct the arbitral proceedings without delay** – it is necessary that the arbitrator conducts the proceeding as expeditiously as possible. One of the advantages of arbitration is that there is a dedicated arbitrator to decide the matter. Longer proceedings would mean more cost to parties and delay in resolution. This does not mean that arbitrator should conduct the proceedings arbitrarily just to finish faster. He has to ensure that all legal requirements are met, and unnecessary delay is avoided.

- b. **Remain at all times impartial i.e. treat both parties equally** – as noted above this is a crucial requirement. Impartiality maintains the sanctity and integrity of the process and the outcome. A biased outcome is no outcome, and would not be acceptable under law (**Section 18**).
- c. **Keep all matters concerning arbitration confidential** – a highlight of arbitration is that whatever happens in arbitration remains in arbitration. Confidentiality allows the parties to fully explore all aspects of the dispute so as to arrive at a more acceptable solution. This requirement of confidentiality extends to all including the arbitral tribunal, who is under a duty to not divulge any information that comes to their knowledge during the process the arbitration.
- d. **Deliberation** – Arbitral tribunal should properly discuss all issues before issuing a decision or award. The award should be a reasoned award (Section 31). In other words, the arbitrators should discuss the matter with each other thoroughly and through a majority render the award. (Section 29)
- e. **Avoid unilateral communication with one party** – This is necessary to ensure that no allegation of bias can be made against the arbitrator.
- f. **Ensure all documents and communication received from one party is communicated to the other party** – the arbitral tribunal should ensure that all parties have copies of all communication and documents received from any party. This will ensure that all parties have the maximum opportunity to present its case.
- g. **Ensure that the award and all other decisions comply with legal requirements** – unless the award complies with all the legal requirements the award would not be enforced. This would render the entire process futile.
- h. **Ensure that he/she himself at all times comply with legal requirements associated with arbitrator** – This is of utmost importance, since non-compliance would mean that continuance of a person as arbitrator is liable to be challenged. One such requirement is that of duty to disclose grounds which may lead to an apprehension of bias.

#### **Termination, Removal and substitution of arbitral tribunal**

There is a possibility that the arbitrator that has been chosen by the parties or appointment made by the court may for different reasons become unsuitable. In such instances an arbitrator has to be removed and replaced by another arbitrator. There are clear processes for doing so. Removal of arbitrator may come about **in four instances-**

##### **a. When the arbitrator leaves voluntarily**

It is possible that the arbitrator for reasons which he may or may not disclose to the parties, decides to no longer act as the arbitrator. It is important to remember that being a private consent based arrangement an individual cannot be forced against their will to act or continue acting as an arbitrator.

**b. When all parties involved in the arbitration agree that the arbitrator should be removed**

At times all the parties involved may decide to no longer continue with a particular arbitrator. This could be for many reasons including that the parties realise that the arbitrator does not have the particular expertise they had desired. **For example** a person was appointed as arbitrator for his expertise as a civil engineer. However the parties during the arbitration found out that his experience was inadequate in construction projects involving large dams. The parties could through a unanimous decision, decide to have another person as arbitrator.

**c. Operation of law**

- **Arbitrator unable to continue** - assume for an instance where the arbitrator falls ill and is unable to, for a very long period of time, conduct any proceedings. Similarly there could be other issues, the arbitrator became busy with other matters, his own business or simply lost interest in the matter. These are factual inability. There may also be a possibility that law no longer permits the person to remain as an arbitrator. If any of the above happens, it would lead to long delays in arbitration which in turn would increase the expenses related to arbitration. Therefore in such situations, the law steps in and automatically terminates the arbitrators. If confusion remains as to whether arbitrator has indeed been terminated, then any party could proceed to the court which finally decides on the question of termination (**Section 14**).

- **When the arbitration process ends.**

The mandate of the arbitrator ends when the arbitration process ends. The process can end in multiple ways, for instance when final award has been made (**Section 32**), failure to make the award within 12 months (**Section 29A**) or when the parties decide to no longer continue with arbitration (**Section 25**).

**d. When the court decides that the arbitrator should be removed.**

In addition to all of the above, there may be a possibility, where none of the above is present **for example** the arbitrator is working without delay, parties are satisfied with their performance, etc., but still a party feels that the arbitrator should not continue, then it could, for reasons of bias approach the court to remove the arbitrator (**Sections 12 and 13**).

**Before whom is the challenge to be raised?**

It must be clearly understood that the first challenge must be raised before the arbitral tribunal itself. Only after that could the challenge be raised in front of the District Court (for domestic arbitration) and High Court (for international commercial arbitration). This is a very similar setup when compared to judiciary, where challenge against the judge is in the first instance heard by the judge himself and later by a higher court.



### Once an arbitrator has been terminated, then what?

In such instances the law provides that a new arbitrator could be appointed keeping in mind the original method of appointment. If however that fails, then the parties are free to approach the Supreme Court of India (in international commercial arbitration) or High Court (for domestic arbitration) for appointment.

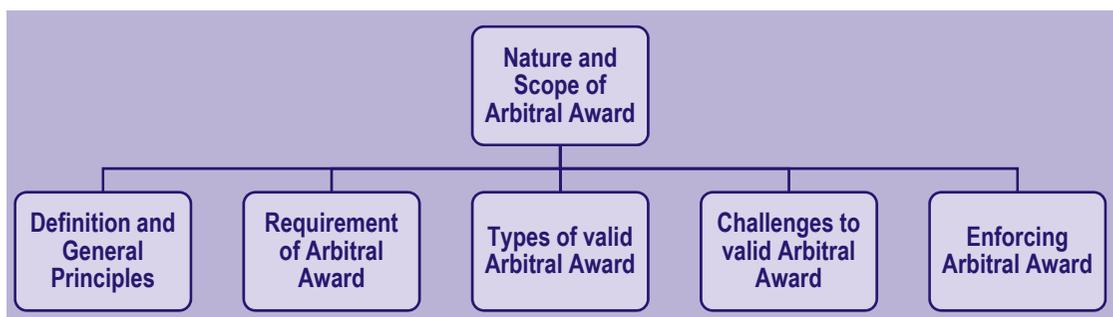
**Example:** Rahul was member of a three person arbitral tribunal to adjudicate a dispute between Dell Inc., Microsoft and Intel Corporation. Rahul was appointed by Microsoft. He had on an earlier occasion been associated as a software consultant with Microsoft. When the arbitration proceedings were ongoing on two occasions Rahul privately met with Microsoft lawyers and failed to inform either the other arbitrators or parties about the meeting or the contents of the meeting. It was also observed that Rahul adopted an unduly harsh attitude towards representatives of Dell and Intel, all the while remaining extremely friendly with Microsoft representatives and lawyers.

**Here in this case,** Rahul can be challenged on grounds of bias. His previous association and actions during the proceedings clearly point to his tendency to favour Microsoft above other parties.

**Assume that Rahul was removed.** A new arbitrator had to be appointed. In such a situation the original method, i.e. Microsoft making the appointment, would apply again. If however Microsoft fails to make an appointment, the other parties can approach the court to fill the vacancy.

## 4. ARBITRAL AWARD

An award is a conclusive determination as to the questions, issues or disputes that are put forward before the arbitral tribunal. The arbitral tribunal is constituted to hear the complete dispute between the parties, give reasonable opportunity to all parties to present their case and then based on the evidence submitted and applicable law deliver a final decision on the matter.



### Definition

An arbitral award is similar to a judgment given by a court of law. In other words, an arbitral award is given by the arbitral tribunal as a decision on various issues in a matter which the parties had placed before the arbitral tribunal. The Arbitration and Conciliation Act 1996, does not clearly define the idea of an arbitral award.<sup>22</sup> However the concept of an award could also be understood as a final determination of a particular issue or claim that had been submitted for arbitration. It represents a resolution of dispute between the parties.

### General Principles

- (a) **Who can challenge** – only a party to the arbitration agreement can challenge an arbitral award. A person who is not a party to the arbitration cannot raise a challenge against an arbitral award.
- (b) **Authority** – an award can only be challenged before a court, which would include a district court and a High Court exercising original jurisdiction (for awards from domestic arbitration) and High Court (for awards from international commercial arbitration).
- (c) **Timeline** – timeline refers to by when a challenge against arbitral award can be raised. The law notes an initial time period of three months from when the award is received by party, with a maximum extension of thirty more days by the court. In *Consolidated Engineering Enterprises v Principal Secretary (Irrigation Department)* 2008 (7) SCC 169.

**Example:** The award was rendered on 1st January 2017. Therefore the award can be challenged by 31st March. This date could be extended by another 30 days on application to the court i.e. till 30th April 2017. There can be no further extensions.

- (d) **Automatic stay** –According to the Act, there is no automatic stay on the enforcement. A party has to specifically request for a stay, and the court at the time of granting stay can impose conditions. (Section 36(2)&(3))

### Types of arbitral award

Under the law there four types of award, namely:



**Final Award** – an award that is made in accordance with the requirements of the law (including signature, reason and delivery), and finally adjudicates on the issues submitted to arbitration, would be a final award.

<sup>22</sup> Section 2(1)(c) - 'arbitral award' includes an interim award.

**Interim Award** – there can be two types of interim awards, one which remains in force till the final award is rendered, and another is final as regards the matters it deals with. The latter is referred to as interim, because when it was rendered there were still other pending issues.

**Settlement Award** – during the arbitration process, the parties may choose to settle the matter instead of having it adjudicated by the arbitrator. In such a situation the arbitrator could assist the parties in arriving at the settlement. If a settlement is arrived at, and the arbitrator has no objection with it, then terms of the settlement could be made part of an award. This is referred to as a settlement award. **(Section 30)**

**Additional Award** – when a final award has been rendered, but it is later found out that certain claims that had been submitted to the arbitral tribunal were not resolved/adjudicated, the parties can request the arbitral tribunal to make an additional award covering the issues that had been left out. Such a request must be made within 30 days from the date of receipt of the final award. **[Section 33(4)]**

**Example:** Nagpur Metro Rail Corporation (NMRC) entered into a long term concession agreement with Nagpur Airport Metro Express Private Limited (NAMEPL) a subsidiary of Reliance Infrastructure to develop and operate the airport express metro project which included bringing in rolling stock. NAMEPL was to run the metro services for 30 years. This agreement was entered into in 2008 and was terminated in 2012. The main disagreements were – (a) failure to fix civil structure defects, b) misrepresentation as to viability of the project including expected passenger, c) failure to transfer outstanding amounts, and d) failure to acquire land hampering development of further lines. All these according to NAMEPL led to delays in turn contributing to cost escalations. The matter was submitted to a three member arbitral tribunal for adjudication.

**Scenario I** – The arbitral tribunal gives an award dealing with all the four disagreements. It is one comprehensive award with reasons for all conclusions. This would be a final award as it conclusively deals with all the questions submitted to arbitration. There is nothing further left to be adjudicated.

**Scenario II** – The arbitral tribunal renders an award (Award no.1) which deals only with disagreements (a), (b) and (c). The arbitrators inform the parties that they will render another award dealing with disagreement (d). Award no.1 is an interim award.

**Scenario III** – The arbitral tribunal gave an award and informed the parties that this was the final award. However when the parties examined it they realised that the award only dealt with disagreement (a), (c) and (d). They bring it to the notice of the arbitral tribunal which gives another award dealing with disagreement (b). This latter award is an additional award.

**Scenario IV** – While the arbitral proceedings were going on the lawyers of both parties met for long discussions. They later informed the arbitral tribunal that the parties had settled the matter on all disagreements. They submitted the settlement agreement to the arbitral tribunal with the request that it be incorporated into an arbitral award. The arbitral tribunal after scrutinizing the agreement gave an award in which they included all the terms of the agreement. This would be a settlement award.

### Requirements of an arbitral award

The Arbitration and Conciliation Act, 1996 prescribes certain requirements for an arbitral award. They can be categorized as necessary which means that the failure to adhere to these requirements would affect the validity of the award, and others which means failure to adhere to other requirements would have no effect on the validity of the award.

#### The necessary requirements are:

- (a) **Must be a decision by the majority** – all decisions, including an award, must be made through majority. An award must also be complete concerning all issues that are submitted to the arbitral tribunal for adjudication.
- (b) **Must be made in writing, signed and dated** – Section 31(1)(a) requires an award to be in writing and having the signature of majority of the members of the arbitral tribunal. It is not an award unless these two conditions are fulfilled. It is quite possible that a particular arbitrator may not agree with the contents of the award. Therefore the law only requires majority of the arbitrators to sign. The law however requires the award to note why the signature of an arbitrator was missing. Of equal importance is the date of the award which helps determining various timelines, for instance within how much time can an award be challenged before the court, etc.
- (c) **Must be reasoned** – a mandatory requirement for an award is that it should be reasoned. Failure to state reasons would make the award invalid. The arbitral tribunal is required to reach a decision; it also has to show why it reached a particular decision. Presence of reason would show that the arbitrator had applied their minds to the matter, taken into consideration all materials put before them and only then arrived at a decision. In other words, the decision would not be an arbitrary decision. The only exception is when the parties have agreed that no reasons need be given for the award.
- (d) **Must not be vague** – the arbitral award should be both certain and clearly note which party has to do what. In other words it must be clear about decision on each issue, what liabilities each party has and finally what relief has been awarded to parties. In other words it should not seem like a recommendation, must not be tentative, and must not leave a party with an option to either perform what is required or not. Vagueness should be avoided at all cost. Thus there should not be any doubt as to the content of the award.

**Example:** The award notes - "The Arbitral Tribunal finds that Sunil was required to deliver the goods to Anil at the rates which had been fixed in 2015 and not 2016. Owing to refusal to provide goods at the agreed rates, Anil was forced to find a different supplier. Anil, as a consequence suffered losses to the tune of 2 crores. Sunil's actions were clearly in violation of the agreement between them." It added the following lines:

**Scenario I** – Sunil should compensate Anil.

**Scenario II** - Sunil should pay Anil 2 crores, in two instalments.

**Scenario III** – Sunil should pay Anil 2 crores, within 2 weeks from the date of the award along with 10% interest. Failure to do so will attract additional 2% per day interest on the outstanding amount till the amount is finally paid. Payment should be done either through RTGS or through a demand draft.

**In this instance only Scenario III is clear enough.** Even Scenario II though seemingly clear, does not clearly specify by when it should be paid. Every award should clearly specify all these details.

- (e) **Should be capable of being performed** – the award should be capable of being performed. The award must be realistic in what it suggests, and should not ask parties to do something that is not possible or illegal. An unenforceable award would be set aside.
- (f) **Must not be illegal (against public policy)** - Under the law a particular award that is in violation of the public policy would be set aside. Public policy represents some of the most cherished and important principles and policies of the State. An award would be in violation of public policy if it is contrary to substantive provisions of law,

#### **Other requirements:**

**Delivery** – an award is ready to be delivered as soon as it is signed. An award that is signed should be delivered to the parties.

#### **Challenging an Award**

An arbitral award can be challenged on specific grounds only. These grounds are clearly noted in law. It is important to remember that a review is different from an appeal. In an appeal both questions relating to law and fact can be raised. However review can happen only on specific grounds and is not the same as an appeal. The grounds are noted under three different provisions of law:

#### **A. under Section 13 – challenge of bias against the arbitral tribunal**

The parties can challenge an arbitral tribunal on the ground that the arbitral tribunal is favouring or is biased in favour of one of the parties. Such a challenge should be first raised before the arbitral tribunal under Section 13. If the challenge is not accepted by the arbitral tribunal then the award rendered by that arbitral tribunal can be challenged.

#### **B. under Section 16 – overstepping of jurisdiction by the arbitral tribunal**

If during the arbitral tribunal one of the parties challenges the arbitral tribunal stating that the arbitral tribunal does not have jurisdiction. The arbitral tribunal will decide on this challenge. If however the arbitral tribunal does not agree with the parties, the arbitral tribunal will render the award. That award can later be challenged by the parties for review.

#### **C. under Section 34 – specific grounds for reviewing an award**

There are seven grounds which can be divided into two categories – those that have to be specifically raised by a party and those which the court can look at its own motion.

The first set of grounds includes:

- a. **Party is under some incapacity** – such an incapacity can be both contractual and personal incapacity, **example** that one of the party was a minor.
- b. **Invalid arbitration agreement** – if the arbitration agreement is invalid then there can be no arbitration. This is because arbitration agreement forms the basis for any arbitration as it contain the consent of the parties that in the event there is dispute between them, the parties would not go to the court instead would submit it to arbitration.
- c. **Party is not given proper notice about appointment of arbitrator or arbitral proceedings** – notice is crucial because it informs the parties as to the nature of the proceedings, and what is expected of each party. **For example** if the party is required to answer all allegations against it, then it should know that by the next date of hearing it is required to submit its response. Failure to provide adequate notice will have an adverse impact on the parties' ability to present its case.
- d. **The award deals with disputes not submitted to arbitration** – it is possible that the parties do not submit all questions that is in dispute between them to arbitration. The arbitral tribunal derives its authority from the agreement between the parties. So if the parties have not agreed, an arbitral tribunal does not have any authority to adjudicate a particular dispute between the parties.
- e. **Arbitral tribunal or procedure was not in accordance with necessary requirements under the law** – the law prescribes certain basic minimum requirements that all dispute resolution procedures must adhere to. One of the **simplest example** would be to treat both parties equally. An award that does adhere to such minimum requirement would be set aside.

**Second set of grounds which the court can look at its own motion, includes:**

- (a) the subject matter of the dispute is not capable of settlement by arbitration (arbitrability).
- (b) the award is in contravention of the public policy of India.

### **Consequence of challenge**

There are four major outcomes when an award is challenged before the court.

- (a) **Set aside** – the court reviewing the award could set aside an award on grounds noted above. Once an award has been set aside that award has no legal consequence. It is no longer an award and has no legal sanctity. It is nothing more than a document and has no legal value.
- (b) **Confirm** – the reviewing court also confirm the complete award. Confirming an award means that the court is of the opinion that there is nothing legally wrong with the award i.e. it fulfils all the requirements noted in law.
- (c) **Modify** – the court the power to modify the award so that it may not be set aside.

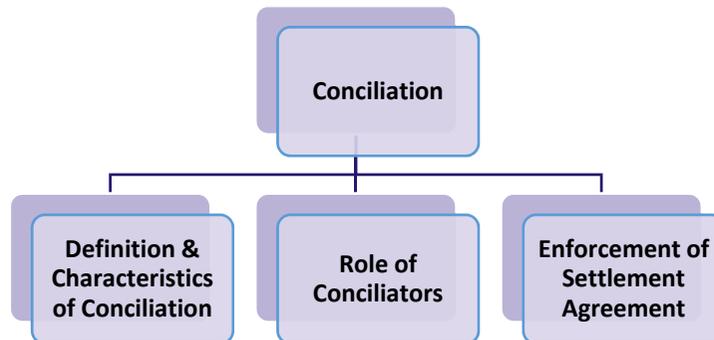
- (d) **Remit back to the arbitral tribunal** - the court may instead of setting aside the award, send the matter back to the arbitral tribunal to rectify some defect, which if not corrected would lead to setting aside of the award.

### Enforcement

Where the time for making an application to set aside an award has expired, or when such application was made but it was rejected then the award can be enforced. Enforcement of an arbitral award shall happen under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the court.. The award can be put for enforcement right after it has been rendered without waiting for challenge proceedings to conclude.

## 5. CONCILIATION

Arbitration is one of the many ADR methods utilised to resolve dispute outside of the court system. However Arbitration remains adversarial in nature. It mimics the court system, and therefore like a court adjudicates a matter. This however means that the parties remain as adversaries, with one party having won and the other losing the contest. This win-loss creates a feeling of bitterness, and often tends to destroy relations. In order to avoid these consequences of arbitration, other methods of ADR are adopted.



### Definition

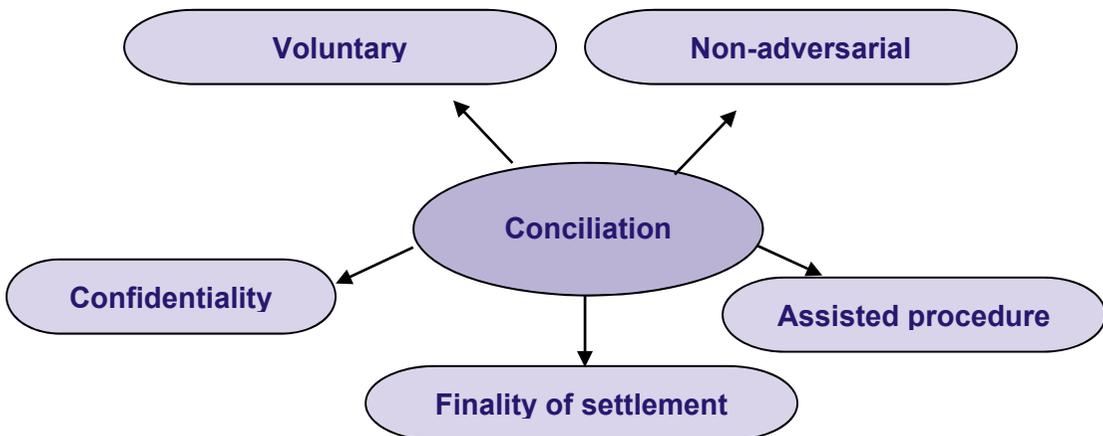
There is no single definition of Conciliation. It is an alternative method of dispute resolution. It can be understood as a process of getting the parties to come to an agreement about a common problem / dispute through confidential discussion and dialogue. In its operation it is very similar to mediation and like mediation it is voluntary, flexible and completely at parties initiative.

### Characteristics

- (a) **Voluntary** – the process of conciliation is voluntary which implies that all parties have to agree to have their disputes conciliated. Unless all the parties involved in the dispute agree, the matter cannot be conciliated. No party can be forced to conciliate matter or attend conciliation proceedings. If a party is forced, then the outcome of such conciliation would not

be binding on that party. Thus party autonomy and consent are an important aspect of conciliation. This was also held by the Supreme Court of India in the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, JT 2010 (7) SC 616

- (b) **Non Adversarial** – unlike arbitration or court based adjudication the parties don't compete against each other to prove themselves as correct and others as wrong. Parties don't behave as adversaries, who can only win by defeating the other party. Instead of focusing on win-lose, the attempt is to find a solution to the problem that best suits all the parties involved, in such a manner that no party is made worse off.
- (c) **Assisted procedure** – the conciliation proceedings can be crafted in a manner which most suits the parties' convenience. At all times to assist the parties in arriving at a solution the conciliator(s) are present. They, along with the parties, craft a procedure for sharing of information among the parties so as to reach an amicable settlement.
- (d) **Finality of settlement** – the outcome i.e. settlement as an end result of the conciliation process is final and binding between the parties.
- (e) **Confidentiality** – all aspects of the conciliation process are confidential. In other words, the conciliator(s) and the parties cannot disclose to persons not party to conciliation, any matter relating to the conciliation proceedings. Thus confidentiality primarily operates to cover the process and its participants. It prevents leak of information. However within the process information received by the conciliator from one party must be disclosed to the other party, unless the party giving the information has specifically requested that it be kept confidential. Even the agreement arrived at by the parties is covered under the broad spectrum of confidentiality. This is important because it assures the parties that any information they share would remain private and would not be used against them in an adversarial process.



### Conciliation in India

In India conciliation is governed by the Arbitration and Conciliation Act, 1996 and by Section 89 of the Code of Civil Procedure 1908. Any dispute arising out of a legal relationship, whether

contractual or not, can be conciliated. Thus only those disputes which are not prohibited by law from being conciliated can be submitted to conciliation. The law provides for number of conciliators, and provides for a process using which conciliation would be conducted.

- a. **Number of Conciliator** – the number of conciliators depends upon the parties, but with a maximum of three conciliators. In other words, number of conciliators can range from one to three. **(Section 63)**
- b. **Appointment of Conciliators** – conciliator appointments are subject to party consent, in other words, the conciliators are appointed by the parties. The law also permits parties to request an institution or some other person to recommend a conciliator. This allows parties to approach institutions that provide professional conciliation services, such as the ICADR. While appointment it must be ensured that independent and impartial conciliators are selected. **(Section 64)**
- c. **Procedure of Conciliation** – once the conciliators have been appointed both parties are required to submit their statements in writing, supply documents and other evidence to the conciliator. The conciliator then provides a copy of the statements, documents and other evidence of one party to the other party. The conciliator is then required to encourage and assist parties to engage in discussions based on the information to arrive at a settlement. **(Section 65)**
- d. **Bar on judicial or arbitral proceedings** - when the conciliation proceedings are ongoing parties cannot start arbitration proceedings or approach a court regarding the same dispute which is part of conciliation proceedings. The exception to this rule is that when it concerns preserving its right, the party can approach a court or initiate arbitration. **(Section 77)**

**Example:** Prakash and Rumi are business partners. Their partnership firm (Fruits & Flowers) are dealers in fresh fruits and exotic flowers. Their clientele include various high end hotels, marriage venues and other institutions in and around Delhi. They have standing orders from many for daily supply of flowers, both exotic and otherwise. One of their regular clients is Orion Decorators in Gurgaon, which specialises in flower decorations. Over the years it has built a name for itself in the business of flower decorations at marriage venues. Fruits & Flowers and Orion Decorators have had business dealings for many years.

In 2016 Fruits & Flowers was sold by Prakash and Rumi to Sanjay. One of the first things that Sanjay did after taking over was to drastically increase price for exotic flowers. One of the clients that was most hit was Orion Decorators, because they had already taken several orders based on previous pricings of Fruits & Flowers. The increased pricing meant that Orion Decorators would incur substantial loss. Being the peak of marriage season, Orion Decorators requested Fruits & Flowers to honour their long standing business relation and provide flowers at earlier prices. Sanjay refused outright but agreed to have the matter conciliated. The conciliation proceedings started next day. Sanjay however refused to provide flowers unless the higher rate was paid.

In this scenario what could Orion Decorators have done to ensure they continued to receive exotic flowers required by them to fulfil their orders?

Under Section 77 of the Arbitration and Conciliation Act 1996, even though approach to court is prohibited during the conciliation proceedings, as an exception a party could approach the court to protect its rights. Orion Decorators could approach the court for interim measures, whereby till the conclusion of conciliation proceedings it could request the court to direct Sanjay to continue providing flowers at the lower rate. The court would have the power to grant the requested measure of protection on such conditions as it deems appropriate.

### Conciliation versus Mediation

Even though mediation and conciliation have fundamentally the same philosophy and similar processes there are subtle differences between the two, namely:

Mediation	Conciliation
Mediator plays a facilitative role and attempts to guide the parties towards a solution. Thus the solution should come from the parties themselves.	The Conciliator plays a more proactive role. He acts a facilitator, evaluator and intervener. In other words, he can also along with the parties suggest solutions.
The outcome is an agreement between the parties.	The outcome is a settlement agreement.
The agreement reached by the parties is a contract enforceable by law.	The settlement agreement reached between the parties has the same status as an arbitral award on agreed terms. In other words it is executable as a decree of the civil court.
Mediation is governed by Section 89 of the Code of Civil Procedure, 1908.	Conciliation is governed by Part III of the Arbitration and Conciliation Act, 1996.
Mediation is governed by confidentiality. However confidentiality in mediation is often based on trust.	Conciliation is bound by confidentiality. Extent of confidentiality is defined by the law. Breach of confidentiality could be fatal to the entire process.
If the agreement is breached, the parties would have to proceed in the usual process adopted for breach of contract.	The settlement agreement is enforced as an arbitral award. Breach of the settlement agreement, would be the same as breach of an arbitral award. The Arbitration and Conciliation Act 1996 provides mechanisms for enforcing arbitral award and recourse in instances the award is not followed.

The Supreme Court of India in *Salem Advocate Bar Association v. UOI* AIR 2005 SC 3353 held that conciliation is a bigger concept than mediation, and the conciliator plays a much greater and more involved role than a mediator.

### Settlement Agreement

- a. **Initial steps** - attempt of conciliation is to resolve the dispute and arrive at a settlement. This settlement could be based on suggestions made by the Conciliator(s) [Section 67(4)], or the parties [Section 72]. When it appears to the conciliator that a settlement is possible, he should identify possible terms of settlement and submit them to the parties for their observations and suggestions. The parties may also make suggestions as to contents of the agreement.
- b. **Agreement** – if the parties reach a settlement, then it has to be written down as an agreement. This agreement is known as settlement agreement (at times it is also referred to as Memorandum of Conciliation). It can be made by the parties or by the Conciliator on behalf of the parties. However the conciliator is required to authenticate the agreement without which the agreement would have no legal sanctity. This was also upheld by the Supreme Court of India in *Mysore Cements Ltd. v. Svedala Barmac Ltd.*, (2003) 10 SCC 375.
- c. **Enforcement** - the settlement agreement has the same status as that of an arbitral award. An arbitral award is final and binding on the parties and persons claiming under them. The award can be challenged before a court, and once the time for challenge has lapsed, or if the challenge had been made but was unsuccessful, then it could be enforced under the Code of Civil Procedure 1908.

**Confidentiality** – The conciliation proceedings and its outcome are subject to stringent confidentiality requirements.

- a. Both the conciliator and the parties are required to keep all matter relating to the proceedings and the settlement agreement confidential. The only exception is when disclosure becomes necessary for purposes of implementation and enforcement of the settlement agreement.
- b. The Conciliator cannot act as an arbitrator or representative of any of the party in arbitral or judicial proceedings in respect of the dispute that was subject of conciliation proceedings.
- c. None of the views expressed, suggestions made, admissions by parties, or proposals made could be relied upon or introduced as evidence in arbitral or judicial proceedings, irrespective of whether or not those proceedings relate to dispute that was the subject of arbitral or judicial proceedings.

Breach of confidentiality would vitiate the arbitral or judicial proceedings they are attempted to be utilised in.

## TEST YOUR KNOWLEDGE

### Question 1

*In 2016, Company Amar, food processor manufacturing unit entered into a joint venture agreement with Company USHA, the largest manufacturer of Food processors for supply of parts of mixer & grinder for manufacturing its latest model. Both the companies are registered under the Companies Act 2013. Agreement carries the term that all disputes shall be arbitrated in Mumbai. State the type of arbitration agreement made between them.*

*What will happen if the agreement does not have any clause relating to arbitration? Disputes arose between them concerning quality of material supplied in 2017.*

### Answer

There are two basic types of arbitration agreement are:

- (a) **Arbitration clause** - a clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.
- (b) **Submission agreement** - an agreement to refer disputes that already exist to arbitration. Such an agreement is entered into after the disputes have arisen.

In first case, the agreement already carries the term that all disputes shall be arbitrated in Mumbai at the time of entering into joint venture agreement. This would be an arbitration clause as it is contained in the principal contract (JVA) and no disputes have arisen till yet. It concerns future disputes that may arise.

In the second case, the Principal contract (JVA) does not have any term relating to arbitration. Disputes arose between the parties concerning quality of supplied goods in 2017. To resolve this dispute, parties later entered into an agreement "That all disputes including quality of goods supplied by Company USHA to Company Amar shall be submitted to arbitration. The parties hereby agree to abide by the decision of the arbitrator." Such an agreement that is made after the disputes have arisen would be called a submission agreement.

### Question 2

*How important are the ideas of independence and impartiality in arbitration?*

- (a) *Is the arbitrator required to disclose anything to the parties?*
- (b) *Is membership of the same sports club as one of the parties problematic?*

### Answer

- (a) The arbitrator are under a duty of disclose any relations with parties or their lawyer that might give rise to justifiable doubts as to their independence and impartiality.

(b) Such an association is too remote to count as a relation that might lead to doubts of bias.

### Question 3

*Can an arbitrator resign on their own account? Do they have to give reasons for their resignation? Could an award be challenged on the ground that the arbitrator had resigned without giving any proper justifications?*

### Answer

An arbitrator can resign when they want, without giving reasons for their resignation. This action does not affect the validity either of the arbitration proceedings or the arbitral award.

### Question 4

*Mr. X wants to start a bakery and so he contacts Mr. Y Confectioners & Bakers for supply of cakes and biscuits. The communication between the parties were over email. On e-mail, there was a term of service between the parties containing that “any disputes regarding quality or delivery shall be submitted to arbitration conducted under the guidance of Indian Confectionary Manufacturers Association. Please place your order if the above terms and conditions are agreeable to you.” X placed an order. State the legal position as the validity of the arbitration agreement.*

### Answer

As per the arbitration and Conciliation Act, an agreement must be in writing. There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement. The communication over email of the term of services is a proper valid agreement and the same have been stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.