

Chapter : 11

Law Relating to Arbitration, Mediation & Conciliation

Method of solving civil dispute
 Two or more parties
 with the help of arbitrator

Types

Ad hoc Arbitration: Here the number of arbitrators, mode of selection and how the arbitration will be conducted, may be decided by the parties. The procedural aspects should also be decided by the parties.

Domestic Arbitration: The disputes are subject to Indian laws and the cause of action is entirely based in India.

International Arbitration: Relating to disputes where at least one of the party is an individual who is a national or resident of other than India.

a body corporate, association or BOI or the government of foreign country.

Essential of Arbitral Process -

- 1 seat of Arbitration - parties are free to select any location

- 2 Venue of Arbitration - Venue, or location for the session of proceedings may be decided by the parties.
- 3 Arbitral Institutions - Parties may select.
- 4 Law - Parties by agreement choose any law
- 5 Language - Parties may also agree on the language of proceeding.
- 6 Number of arbitrators - Parties are free to determine but they should be in odd numbers.
- 7 Cost - The court or arbitral tribunal have the discretion to determine -
 - > whether cost are payable by one party to another
 - > the amount of such cost
 - > when such cost is to be paid.

Arbitrator

person appointing to determine disputes between two or more parties by their mutual consent.

Impartial and disinterested.
 Usually parties themselves appoint arbitrator
 Court can also appoint.
 may be arbitrator or panel of arbitrator

Arbitration Agreement

- > Agreement by parties to submit to arbitration all or certain disputes.
- > May be in the form of an arbitration clause or in the form of separate agreement.
- > Must be in writing
- > Refers to the dispute of present or future.
- > Agreement must be -
 - signed by parties Telex, telegram
 - exchange of letter
 - exchange of claim & defence.

Power of Court to Refer parties to Arbitration if there is an Arbitration Agreement -

Judicial authority may refer parties to arbitration.

If party applies to court before submitting the first statement.

App. accompanied by original agreement.

If original document or certified copy is not available then file copy of agreement and petition to court to call other party to produce documents.

Court must send disputes to arbitration unless there is a clear evidence of no valid arbitration agreement.

If no. of arbitration is not-mentioned in agreement than shall consist sole arbitrator

If procedure for appointment is not satisfied then, each party should appoint one arbitrator.

↳ two appointed arbitrators shall appoint one arbitrator who shall act as presiding arbitrator.

If parties fails to

Appoint an arbitrator within 30 days

two appointed arbitrators failed to appoint 3rd arbitrator in-30 days

Apply to arbitral institution designated by HC or S.C. (International commercial)

App. for appointment of arbitrator shall be disposed by HC & SC or Arbitral institution within 60 days from date of notice.

Before appointing an arbitrator shall seek a disclosure in writing and shall give due regard to -

any qualification required for the arbitrator and an independent and impartial arbitrator.

International Commercial Arbitrator -

Dispute between the parties amongst which 1 of the party is from foreign country or body corporate.

If failed to appoint arbitrator within 30 days then apply to Arbitral tribunal designated by S.C.

Arbitrator appointed by S.C. of any nationality.

Section: 12 Ground of challenge -

- Independent Does not possess qualification or ability
- Past or present relationship
- Interest in any of the parties
- Financial or business interest

Teevan Ku. Lohia v. Durga Dutt Lohia

It was held that reasonable apprehension of bias or likelihood of bias in mind of either party is a ground for termination of arbitration.

BCC Developers & Promoter, Ltd v. DMRC

It was held that if appointed arbitrator is ex-employee of one party, it will not make them ineligible for appointment.

Challenge Procedure ↴

Parties are free to agree on a procedure. Challenge within 15 days from becoming aware.

of any circumstances
with written statement of reason.
Application to arbitral tribunal along with reasons.

Failure or Impossibility to Act as an Arbitrator
(Section-14) (Imp)

Mandate shall terminate
By right or by law unable to perform its functions.
Falls to act without undue delay.
Withdrawn from office.
Pursuant to agreement of parties.

Substitution of Arbitrator (Section-15) exam!

Substitution of arbitrator shall be appointed according to the rule of such appointment.

Any hearing previously held may be repeated.
(Unless otherwise agreed by the parties)

Any interim award shall not be invalid.

An arbitration clause forms a part of contract shall be treated as an independent agreement.
A decision by the arbitral tribunal which makes the contract null and void shall not make the invalidity of the arbitration clause.

Interim measures ordered by Arbitral Tribunal

for appointment of guardian for minor
preservation interim custody for goods of sale
Securing the amount in dispute.

Detention, inspection, preservation of property
Appointment of receiver

Any order issued by arbitral tribunal under this section shall be deemed to be the order of the court and enforceable under CPC.

Statement of claim & defence -

The claimant shall state the facts supporting his claim the points at issue and respondent shall state his defence in respect of the claims.

The statement of claim & defence must be completed within 6 months from the date arbitrator received notice in writing of their appointment.

Hearing and oral proceeds of arbitral tribunal has discretion to decide whether to hold oral hearing or whether proceeding can be conducted on the basis of documents. But if parties decide otherwise, arbitral tribunal shall follow the same.

Arbitral Award. (IMP)

Arbitral award includes an interim award.

Arbitral award must be in writing and on stamp paper.

Should be signed by majority of members and ~~also~~ contain reasons. However 2 exceptions

→ arbitration agrees no reason to be given.

→ parties settled the dispute

Award be dated, place of arbitration, include the sum, arbitration cost and delivered to each party.

- o Imp Court may make order that evidence be provided to arbitral tribunal and person refusing to give evidence shall be subjected to penalty and punishment by order of court.

Time limit for Award

In case of Satappoji Pallonji & Co. Pvt Ltd v. Jindal Thermal power Ltd. it was held that amended section 29(A) shall have retrospective effect with respect to pending arbitration suit as on date of amendment.

Ordinary, shall be completed within 12 months from date of completion of pleadings. extension of maximum 6 months.

International Commercial Arbitration, Completed within 12 months from the date of completion of pleadings.

Fast-track procedure - made within 6 months from the date of arbitral tribunal enters upon.

Settlement

Arbitrator during proceedings encourage settlement.

If parties settle then proceeding shall terminate and settlement will given in the form of award, no need to give reason in this case.

Regime of cost -

Unsuccessful party pay cost to successful party.

Costs meaning -

Fee & expenses of arbitrator

Legal fees and expenses

Administration fees for institution

Expenses incurred in connection with proceeding.

Arbitrator shall disclose the amount of cost, when such cost is to be paid.

Termination of proceedings

Terminated by final arbitral award

Order of arbitrator - reason

claimant withdrew his claim

Parties agree on termination

Continuation of process is impossible
Termination of process result in termination of arbitration.

Correction, Interpretation and additional award

Any party within 30 days from receipt of arbitral award request arbitrator to correct any clerical or typographical error.
Request arbitrator to provide interpretation.
Provide interpretation within 30 days.

Party can request arbitrator to pass additional award within 30 days
Provide additional award within 60 days
may extend time if required.

Application for Setting Aside Arbitral Award-

Party can apply to court within 3 months from receiving arbitral award to set aside
Extension of maximum 30 days.
Court may pass order of setting aside if party prove -

It was under some incapacity
Arbitration agreement is invalid
Not given proper notice of appointment
Decision beyond scope of arbitration
Composition is not as per agreement

Court may pass such order when -
 matter is not capable of settle by arbitrator
 Award against public policy -
 Award is in conflict with public policy only
 if -

Award was induced by fraud or corruption
 is in contravention with fundamental policy of
 Indian law.

It is in conflict with morality or justice

Enforcement ↵

Time of making app. for setting aside is expired
 award enforced like decree of court.

App. to set aside is filed shall not make award
 unenforceable unless stay order passed by court
 may pass order subject to condition.

Appealable Orders ↵

An appeal shall lie from the following order -
 ↵/s 8

- Refusing to refer the parties to arbitration
- granting or refusing to grant any measure ↵/s 9
- Setting aside or refusing to set aside ↵/s 34.

Appeal shall also lie to a court from an
 order of arbitral tribunal.

No second appeal shall lie from an
 order passed in appeal under this section.

Section shall not affect any right to
 appeal to the S.C

Deposit

Arbitration may fix amount to deposit which is expected to be involved.

Payable by both parties equally.

One party fails to pay other party shall pay.

Both party failed then arbitrator may terminate proceeding.

Matters cannot be referred to Arbitration-

Matter relating to divorce

Testamentary such as will

Insolvency matter

Related to public charity

Related to guardianship of minor

Lunacy proceeding

Criminal nature.

Matter which can be referred to Arbitration-

Determination of damage in case of Breach of contract

Issue of validity of marriage

Time barred claim

Matter related to right to office.

Arbitration Council of India (ACT)

Established by Govt as body corporate.

Head office at Delhi

Composition of council.

A chairperson, to be appointed by the CBI in consultation with the CJI, who was the Judge of S.C or Chief Justice of H.C or Judge of H.C.

Member to be nominated by the CBI who has knowledge and experience in institutional arbitration.

Member to be appointed by CBI in consultation with the chairperson is experienced in academic & research and teaching.

Secretary from Department of Legal Affairs & ministry of law and justice and one secretary from department of expenditure, ministry of finance.

One part-time member appointed by CBI - representative of Body of commerce & industry.

CEO - member, secretary

Term:- Chairperson and member of the council shall hold office for 3 years.

Member shall hold office upto age of 67 years.

Chairperson for 70 years.

The salaries, allowances and conditions may be prescribed by the Central Government.

Resignation of member Accordingly -

Chairman or other member may resign by giving notice in writing.

They shall continue the office until permitted by law or until the expiry of 3 months from date of such notice.

until a person duly appointed as his successor enters or until the expiry of his term, which is earlier

Conditions for Enforcement of Foreign Award. (IMP learn from book!)

CEO of council shall be responsible for day to day administration of council, disqualification, appointment and other terms shall be prescribed by Cr.

Fast track Procedures

The parties to an arbitration may at any time, at any stage either before or at the time of appointment of arbitral tribunal agree in writing to resolve their dispute by fast track procedure.

It shall consist a sole arbitrator which shall be chosen by the parties

Award shall be made within a period of 6 months from the date of reference

Arbitral tribunal shall decide the dispute on the basis of written pleadings. An oral hearing may be made only if all parties make request for it.

Section- 13

Parties can agree on a procedure for challenging an arbitrator, if there is no agreed procedure then party can challenge within 15 days after becoming aware of such circumstances.

In case of *Krolo Controls (I) Pvt. Ltd v. Severn* the trend water purification Inc. court held principle of kompetenz kompetenz, this means arbitrator has authority to determine their own jurisdiction. So they can decide whether they have power to hear and decide a particular dispute.

However court retains the right to review arbitrators jurisdiction at later stage during enforcement or set aside.

Conciliation ^u

- Conciliation means settling of disputes without litigations.
- Informal processes conciliator try to bring dispute to agreement.
- Does by improving communication and providing better solution, negotiating settlement.
- Successful only if parties agree to re-adjust

Commencement of Conciliation Processing ^u

Party initiating shall send notice to another party

Conciliation will commence only when party accept invitation in writing.

If party reject the invitation, conciliation proceeding will not take effect.

If did not get reply in 30 days, it will be deemed rejected.

Role of conciliator ↴

Provide assistance in an independent and impartial manner to reach at settlement of their disputes.

Make proposals for settlement of dispute.

May invite parties either individually or together for oral or written communication, place will be decided by parties.

Settlement agreement ↴

Conciliator send settlement agreement to both the parties

Parties send observation and conciliator make reformulation of settlement in agreement.

Parties reach settlement, after signing it becomes binding on both the parties.

Send copy to parties

Has same effect as arbitration.

Termination ↴

Signing settlement agreement by both the parties

Written declaration for termination
written declaration by both the parties or by one party to another party.

Conciliator can't act as arbitrator & shall not be presented by parties as witness.

Section: 81 Party shall not relay or introduce as evidence in arbitral or judicial proceeding views or suggestions for settlement.

- 1) Views or suggestions for settlement.
- 2) Admission during conciliation proceeding
- 3) Conciliators proposal
- 4) Acceptance of settlement proposal.

Deposits: Conciliator may direct each party to deposit an equal amount as an advance for cost which he expects will be incurred.

If deposits are not paid in full by both parties within 30 days, conciliator may suspend the proceedings or may make declaration of termination of proceeding.

Mediation

Mediation shall be a process, whether referred by expression, pre-litigation, online, community mediation where by parties request a third person to referred as mediator to assist them in their attempt to reach an amicable settlement of a dispute.

Types of mediation ~

Court-Refereed mediation: The courts have mediation centres where cases are referred assigned to skilled and qualified mediators.

Statutory (Mandatory) mediation: Some disputes like labour and family laws, are required by law to go through the mediation procedure.

Private mediation: Qualified mediators offer their services on a private, fee for service basis to the court, can be used in connection with disputes pending in court.

Online mediation: Pre-litigation mediation may be conducted at any stage by the use of electronic form or computer networks.

mediation is quick and responsive, economical no extra cost, harmonious settlement, creating solutions and remedies, confidential & informal parties controlling the proceedings.

Mediation bill 2021

This bill was passed to promote and facilitate mediation, especially institutional mediation for resolution of disputes, commercial or otherwise.

Provide for a body for registration of mediators.

Encourage community mediation

To make online mediation as acceptable and cost effective process.

This bill when becomes Act shall apply where mediation is conducted in India and -

- all or both parties habitually reside or are incorporated or place of business in India.
- the mediation agreement provides that any dispute shall be resolved in accordance with provision of Act.
- There is an international mediation.
It shall not be applicable to Gov. bodies and agencies or any entities owned or controlled by such Government.

Mediation is applicable on-

- i Companies Act 2013
- ii Industrial disputes Act 1947
- iii Code of civil Procedure 1908
- iv Hindu Marriage Act 1955
- v Consumer Protection Act 2019

In case of Afcons Infrastructure Ltd v. Cherian wokey construction co. SC held that if parties do not agree to arbitration and conciliation court can consider lok adalat, mediation or judicial settlement.

Mediation rules by High court -

As per the rules mediation means process by which mediator appointed by the parties or by court mediates the disputes between them by applying provision of mediation rules -

→ Rule 4 Qualification of mediator or conciliator -

(i) Retired judges of SC, HC, district & Session judges, addition district or session judges.

(ii) Legal practitioners with 5 years experience

- (iii) Experts with at least 15 years standing
- (iv) Institutions which are expert in mediation

→ Rule - 5 Disqualification of mediator & conciliator ~

- (i) Adjudged insolvent
- (ii) Criminal charges involving moral turpitude if framed by criminal court and pending
- (iii) Convicted by criminal court involving moral turpitude.
- (iv) Disciplinary proceeding have been initiated.

Section - 47 Evidence ~

Party applying for enforcement of foreign award shall at time of application, produce before court -

- (a) Original award or indicated copy
- (b) original agreement or certified copy
- (c) other evidence as may be necessary

Arbitration v. Mediation ✓

- 1) Mediation is a neutral third party aims to assist the parties at a mutually agreeable solution. Arbitration is like litigation outside the court and whose award results like an order.
- 2) Mediation is more collaborative. Arbitration is more adversarial.
- 3) Process of mediation is informal whereas arbitration is formal.
- 4) Outcome of mediation is controlled by parties. In arbitration it is controlled by arbitrator.
- 5) In mediation dispute may or may not be solved. But in arbitration decision comes in favour of one party.