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RESOLUTION OF DISPUTES BY ARBITRATION & CONCILIATION

Today we are exploring the possibilities of Alternate Dispute Resolution in consonance with the Arbitration and Conciliation Methods. Time and again the business community has suffered a great set back due to fear of involving themselves in litigation which in India is a serpentine Course. Many of the businessmen want to avoid the financial disasters they have faced because of the fear of litigation.

However, off late the pace of the business is declined, in smaller towns for the obvious reasons of possible entangle in the serpentine litigation.

That to avoid this situation the businessmen either avoid doing business with parties having suspicious integrity or have to take recourse, of the unscrupulous elements or are either required to, established ***HIGH CONNECTIONs*** for recoveries, which further needs involvement of businessmen in unwanted situation. Both the alternatives are detrimental to the society, as well as the individual businessmen.

If we peep back to the history of Indian arbitration, we will find that the Indian Arbitration Act 1940 was found to be outmoded. That commercial Community had been insisting upon revamping the arbitration law, at par with the international standards/platform United Nation Commission on international trade law, (UNCITRAL) had adopted UNCITRAL model law on international commercial arbitration in 1985 and the United Nation had recommended the use of the same. In pursuance of the same the Indian parliament had also enacted the Arbitration and Conciliation Act 1996 in the republic of India and it come into force on 25th June 1996.

Supreme Court Of India, had made a remark about the Arbitration act 1940, as reported in AIR 1982 SC 2204,

"The way in which the Arbitration Proceedings are litigated without exception, the legal philosophers weep and lawyers laugh".

But now the situation is drastically changed by the enactment of 1996 which provides minimal court interference in the Arbitration Proceedings.

Turning back to the main issue the basic fabric of the Arbitration Act lies in

"Judgment by domestic forum, by a judge (Arbitrator) selected by the parties".

This practically means that in case of a dispute, it is to be resolved by the person, who acts as an Arbitrator, who is appointed by the choice of the party, so the party can not object to the

a) The capability of the Arbitrator
b) Integrity of the Arbitrator
c) Bias of the Arbitrator
d) Acumen of the Arbitrator
e) Challenge to the Arbitrator's decision on any other count which is at most of the time the challenge for the sake of challenge.

Therefore the judgment by the Arbitrator is binding on both the parties, except in case of a highly technical issue, such as the judgment is in conflict with public policy of India, dispute is not capable of settlement by Arbitration and others which will deal in next course.

The judgment of the Arbitrator, if not challenged and set aside,(on the narrow technicalities) , the award itself becomes a decree of the court , which is as such, is capable of execution and can directly be levied for execution.

This was a fabric of the Arbitration Act and it is fundamental. Now we would go deeper on following main points which would give insight of the Act.

a) **What is Arbitration agreement and how it is constituted.**
b) **Who can be Arbitrator and how they are appointed.**
c) **Procedure and conduct of arbitral proceedings for Arbitrator and jurisdiction of arbitrator.**
d) **What is an award?**
e) **Interim measures by the courts.**
f) **How the award can be challenged and how the award becomes binding on the parties.**
g) **Execution / enforcement of the Award.**

What is an Arbitration Agreement and How it is constituted.

By common parlance we all know, what is an agreement? An extension of the same by including the Arbitration clause would become an Arbitration agreement.

Section 7 of the Act defines what an Arbitration Agreement is.

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-

i) **A document signed by the parties,**
ii) **An exchange of letter, telex, telegrams or other means of telecommunication which provide a record of the agreement or**
iii) **An exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the others**

(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.

Bare perusal clearly demonstrates that, it is very easy to constitute the Arbitration agreement and sans technicality.

As per Section 8, even if, dispute is pending before Civil Court, parties can request

the court, to conciliate the dispute by Arbitration, but this has to be done before filing any statement on substance of the dispute.

The Arbitration can be contained in -

a) **The partnership deed,**
b) **Agreement to sale,**
c) **The Bill,**
d) **The independent agreement wherein the formal Questions of dispute between the parties are framed & agreed to be decided by arbitrator**
e) **The lease,**
f) **Any contract which has been reduced in writing.**

Who can be Arbitrator and how they are appointed.

a) The parties are free to appoint anybody as an Arbitrator by their mutual consent.
b) The parties can appoint the person mutually and the said person can decide the issue by arbitration
c) The parties can agree upon the procedure for appointment of the Arbitrator i.e. parties may exchange list of proposed arbitrator who can mutually decide the arbitrator.
d) Parties can approach the court for seeking the appointment of the Arbitrator,
e) Any person who is conversant with the basics of the commercial transaction involved in the dispute can be made arbitrator.

Preferably the persons, technocrats, experts in the respective fields should be appointed as Arbitrator as they have complete knowledge of the technicalities involving in the issues of disputes.

PROCEDURE AND CONDUCT FOR ARBITRAL PROCEEDINGS FOR ARBITRATOR AND JURISDICTION OF ARBITRATOR.

a) Arbitrators enjoy the jurisdiction conferred upon them by the parties. Thus the parties can enlarge or narrow down the jurisdiction of the Arbitrator by formulating issues of dispute, which they want to get decided from the Arbitrator, making it convenient for the parties, as well as the arbitrator to focus on the issues of dispute.

b) Arbitrator is free to adopt any procedure for conducting proceedings. The arbitrator can decide the venue, time as per the convenience of the parties. The Arbitrator is not bound by any procedure as the courts are bound; however the convenience of the parties and arbitrator is a relevant factor.

c) Arbitrator is not bound by any technicalities and is free to adopt his own procedure which is not in contravention with public policy of India and is to follow the rules of natural justice.

WHAT IS AN AWARD

The award is a formal expression of adjudication of the dispute by the arbitrator.

To put it in simple words, it is the decision of the Arbitrator, on the issue of dispute brought by the parties before him. The Arbitrator can be specifically directed by the parties,

a) Either to give a reasoned award or

b) To give the award without any reasons.

This award is equivalent to the orders of the court [after a period of Challenge {90 days} has expired] and if challenge is made subject to decision of challenge.

INTERIM MEASURES BY THE COURT UNDER SECTION 9.

Pending Arbitration proceedings or even prior to commencement of Arbitration proceedings the court can issue certain directions, which are in aid of resolution of the dispute and to prevent justice being frustrated.

HOW THE AWARD CAN BE CHALLENGED AND HOW THE AWARD BECOMES BINDING ON THE PARTIES.

The award can be challenged by filing the objections to the award before the court only on the ground which are given in chapter 7 Section 34 of the Act which are reproduced below:-

SECTION 34

APPLICATION FOR SETTING ASIDE AWARD

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub section (2) and Sub section (3)

(2) An arbitral award may be set aside by the court only if-

a) The party making the application furnishes proof that —

i) A party was under some incapacity or

ii) The arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law for the time being in force or;

iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case or

iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award, which contains decisions on matters not submitted to arbitration may be set aside or

v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part, from which the parties cannot derogate, or failing such agreement, was not in accordance with this part or

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 or

ii) The arbitral award is in conflict with the public policy of India.

Explanation:- Without prejudice to the generality of sub clause (ii) of clause (b) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

Provided that, if the court is satisfied that, the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub section (1) the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it, in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

That the party who feels aggrieved by an award, if files an objection under section 34 within limitation then, till the decision of the objection under section 34 the award remains suspended, however it becomes enforceable upon decision of the objection taken in section 34. In case no objection is filed under section 34 the award can directly be enforced as if it is decision of the court.

ENFORCEMENT OF THE AWARD

That after the objection is decided or if objection are not filed than after 90 days the award can be directly executed as a decree of the court without any further interference of the court.

Sec.9. Interim measures, etc. by Court - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court :-

(i) For the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) For an interim measure of protection in respect of any of the following matters, namely :-

(a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the Court to be just and convenient,

And the Court shall have the same power for making orders as it has for the purpose of, and

in relation to, any proceedings before it."

CONVINIENCE OF THE TRADERS, BUSINESSMEN BY ADOPTING THE ARBITRATION PROCEEDINGS

a) A judge (arbitrator) of the convenience of the parties can be selected

b) The venue of arbitration, timing can be decided as per convenience and the commercial value of the time of business can be utilized properly.

c) No court fees is involved for putting up the matter before the arbitrator

d) Arbitrator and parties can adopt the procedure convenient to them

e) No technicalities of proof of documents and other unnecessary technicalities can be avoided

f) The proceedings being very informal and reduce the bitterness between the parties.

g) That there is no necessity to appointing any Advocate for proceedings before the Arbitrator. Parties can very well put up their own case being domestic forum.

i) As per the scheme of the Act the intervention of the courts is minimized,

j) The grounds for challenge under section 34 are very narrow & limited. The parties can not object to the reasoning adopted by the Arbitrator.

k) The Award is not bad for absence of reasoning.

l) The finding of fact recorded by the arbitrator cannot be challenged in objection.

Thus the award can be set aside by the court only on the ground stated in Act.

That if we pick up the journals and reports you will find that the arbitration proceedings of the recent years have been finalized expeditiously even by the courts and the courts are also deciding the same expeditiously saving the time of the commercial transaction.

SOME IMPORTANT JUDGEMENTS OF THE INDIAN SUPREME COURT & HIGH COURTS WHICH MAY BE USEFUL TO UNDERSTAND THE SCHEME OF THE ACT.

AIR 2006 SUPREME COURT 401 "Rite Approach Group Ltd. v. M/s. Rosoboronexport"

Para 21. In view of the specific provision specifying the jurisdiction of the Court to decide the matter, this Court cannot assume the jurisdiction. Whenever there is a specific clause conferring jurisdiction on particular Court to decide the matter then it automatically ousts the jurisdiction of other Court. In this agreement, the jurisdiction has been conferred on the Chamber of Commerce and Trade of the Russian Federation as the authority before whom the dispute shall be resolved. In view of the specific arbitration clause conferring power on the Chamber of Commerce and Trade of the Russian Federation, it is that authority which alone will arbitrate the matter and the finding of that arbitral tribunal shall be final and obligatory for both the parties.

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AIR 2006 SUPREME COURT 3335 "B.S.N.L. v. Subash Chandra Kanchan"

If one party to arbitration agreement fails to appoint arbitrator then its right to appoint arbitrator gets forfeited.

Apart from failure on the part of the Managing Director of the Appellant to appoint an arbitrator within the specified time, the Appellant evidently waived their right under the arbitration agreement.

AIR 2004 SUPREME COURT 1344 "M. D., Army W.H.O. v. Sumangal Services Pvt. Ltd."

"It cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the Arbitrator under the 1996 Act is not required to be made a rule of Court; the same is enforceable on its own force. Even under Section 17 of 1996 Act, an interim order must relate to the protection of subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof."

Compulsory reference to arbitration in case there is an arbitration clause.

AIR 2000 SC 1886 AIR 2003 SUPREME COURT 2881 "H. P. Corpn. Ltd. v. M/s. Pinkcity Midway Petroleums"

Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is that if as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator.

AIR 1999 SUPREME COURT 565 "Sundaram Finance Ltd., M/s. v. M/s. NEPC India Ltd."

It is clear, therefore, that a party to an arbitration agreement can approach the Court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings. To that extent Section 9 of the 1996 Act is similar to Article 9 of the UNCITRAL Model Law.

AIR 2003 SUPREME COURT 2629 "Oil and Natural Gas Corpn. Ltd. v. SAW Pipes Ltd."

Therefore, in our view, the phrase 'public policy of India' used in S. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation @page-SC2644 of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy in Renusagar's case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to:-

AIR 1996 SC 860 : 1994 AIR SCW 252

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

AIR 2003 SUPREME COURT 3493 "Mysore Cements Ltd. v. Svedala Barmac Ltd."

(Even a compromise before an arbitrator shall have to be reduced in an award.)

However substantial compliance with the requirements of Section 73 when the parties have arrived at a Settlement Agreement is not enough to take up execution based on such a compromise or agreement. Even a compromise petition signed by both the parties and filed in the Court per se cannot be enforced resorting to execution proceedings unless such a compromise petition is accepted by the Court and the Court puts seal of approval for drawing a decree on the basis of compromise petition.

AIR 2005 BOMBAY 240 "Curzon Maritime Ltd. v. PEC Ltd."

(How by bill of lading also the arbitration agreement created),

Condition No. 1 of Conditions of Carriage reads as under:-

All terms and conditions, licenses and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause is herewith incorporated.

It thus clear that the arbitration clause quoted above contained in the character party is incorporated in the bill of lading. The bill of lading is a contract between the shipper and the owner. Perusal of the bill of lading at Exh. "C" shows that it has been issued on behalf of the owner of the vessel by the agent in favour of the shipper. Thus, on the face of it the bill of lading shows that it is an agreement between the shipper and owner of the vessel in relation to the carriage of the cargo. The bill of lading at Exh. C also shows that the shipper is Commodities Inter trade who were acting on account of the respondent.

Interim or other orders which do not amount to an Award or which do not terminate the proceedings, can not be challenged. The courts have stated as below,

AIR 2003 BOMBAY 296 "H. G. Bajaj v. Sharedeal Financial Consultants Pvt. Ltd."

The decision or order to be an award must result in final determination of the claim, part of the claim and/or counter-claim referred or submitted to arbitration and must normally meet the other requirements of S. 31 for which signing the award is mandatory. Only then can the Award be said to be either interim or final. All other orders or decisions would not fall within the expression award and consequently S. 34 would not be attracted.

AIR 2002 BOMBAY 289 "BASF Styrenics Pvt. Ltd. v. Offshore Industrial Construction Pvt. Ltd"

In our considered opinion, therefore, the scheme of the Act is clear, and it is that if the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction." Hence, such an order can be challenged only in the manner laid down in sub-sections (5) and (6) of S. 16, viz., after the arbitration proceedings are over and the award is made. If, on the other hand, it holds that it has no jurisdiction, an order can be challenged under sub-section (2) of Section 37 of the Act.

AIR 1999 BOMBAY 118 "United India Insurance Co. Ltd. v. M/s. Kumar Texturisers"

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When the court can intervene in the arbitration matter.

5. Under the Act of 1996 there are three Sections which basically confer power on the Court to intervene in the matter. The main Section is S. 34 of Act of 1996. In terms of sub-section (1) of S. 34 recourse to a Court against the arbitral award can be made by an application for setting aside such an Award in accordance with the sub-sec. (2) and sub-sec. (3) of S. 34. In other words a Court can interfere in setting aside the Award. An award in terms of S. 2(c) includes an interim award. Section 31(6) of the Act of 1996 provides that an arbitral tribunal in respect of a claim where it can pass an Award can also make an interim award in respect of that claim. The next section which confers a power on the Court to judicially intervene is S. 37(2). Section 37(2) of the Act of 1996 makes appeasable an order of the Arbitral Tribunal under sub-sec. (2) or sub-sec. (3) of S. 16 or granting or refusing to grant interim measure under S. 17. The court can intervene also on an application under S. 14(2) of the Act of 1996. In other words, a conjoint reading of S.5. Section 34, S. 37 and S. 14(2) of the Act of 1996 will show that the Court can intervene only in cases covered by S. 14. Section 34 and S.37.

AIR 2005 DELHI 76 "Chemical Sales Agencies, M/s. v. Naraini Newar"

Only in case of legal relationship between the parties the arbitrator can be appointed.

Before a judicial authority refers the parties to arbitration in terms of Section 8 of the said Act, it is the duty of the judicial authority to satisfy itself that the matter before it is the subject-matter of an arbitration agreement. The judicial authority must also be satisfied that the document which is held out to be an arbitration agreement is one which falls within the meaning ascribed to it under Section 7 of the said Act. As noted in P. Anand Gajapathi Raju (supra), where the pre-conditions stipulated in Section 8 are satisfied and the arbitration agreement satisfies the requirements of Section 7 of the said Act, it is, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. The agreement to submit disputes to arbitration must pertain to disputes between the parties in respect of a defined legal relationship.

AIR 2004 DELHI 376 "Societe Pepper Grenoble S. a. r. 1. v. Union of India"

One party to the agreement can be authorized to appoint an arbitrator. Such clause is valid & legal.

The whole case of the petitioner is proceeding on the basis that by one party having a right to nominate an Arbitrator, it is becoming a judge on in its own cause. The said assumption as rightly observed by the Arbitral Tribunal is wholly misplaced. The petitioner has also completely misconstrued the judgment of the Supreme Court in the case of Executive Engineer, Irrigation Division, Puri (supra).