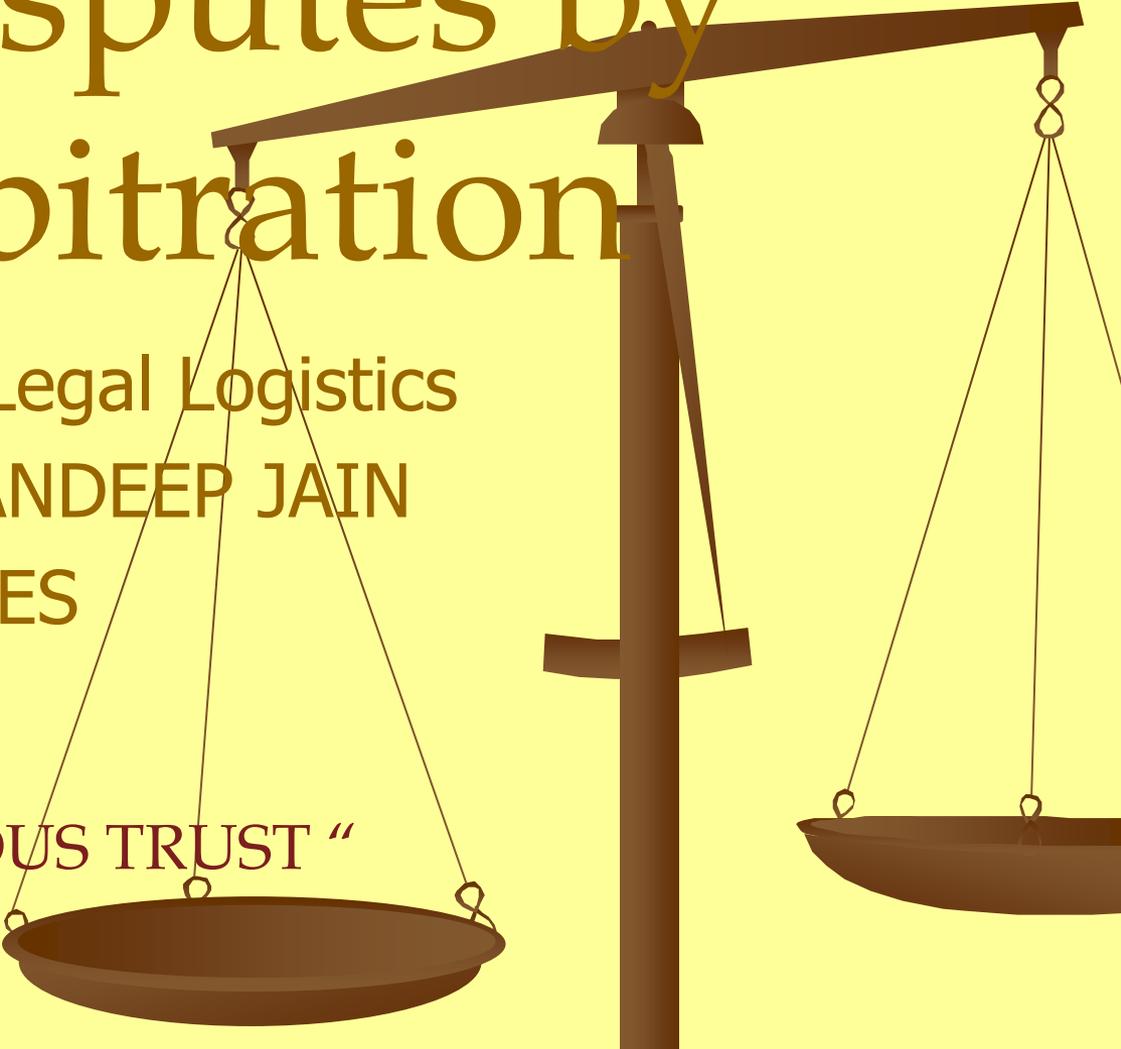


Seminar on Resolution of disputes by Arbitration



Presented By Law & Legal Logistics

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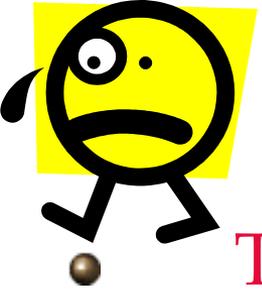
“VYADESHWAR RELIGIOUS TRUST “

- **Today we have gathered here for 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 of the Court. Many of the fellow businessmen present here must have flashed back in their memories about the various financial disasters they have faced because of the fear of litigation.**



Balaghat had been buzzing with business activities since prior to Independence and had many times been equated with big cities for its glorious business acumen and tremendous capabilities and efficiency of the traders. However, off late the pace of the business has declined, for the obvious reasons of possible entangle in the serpentine litigation.

- That, if I am not wrong at least 5-10% of the revenue of the businessmen of Balaghat remains unrecoverable because of the aforesaid problem. That taking an overall turnover of Balaghat town to be approximately 500 corers, the revenue which remains un recovered would be 25-30 corers. The figures are amazing and can set up at least ten industries a year.



That many business men are not interested to go to the court of law for the fear of loosing their commercial time. Many people stay away from legal proceedings only due to fear of waste of time al-thougah their claims are genuine.

- Many of the businessmen from Balaghat are also exporting commodities and they are finding it difficult to recover the amount of exported commodities. The present Act would be very helpful for them also.

- That to avoid this businessmen either avoid doing business with parties with suspicious integrity or have to take recourse, of the unscrupulous elements or are either required to, established HIGH CONNECTIONs for recoveries, which further needs of involvement of business in a probable criminal prosecution. Both the alternatives are detrimental to the society as well as the individual businessmen which set up a wrong precedent.
- That there are few instances in the recent past wherein the fair and due payable amount amongst the businessmen itself could not be recovered and the settlements forced to be done at 30% of the total liability. This trend is deplorable so far as the economic viability is concerned.



- **The very priority to any businessmen or successful manager would be to recover revenues as quick and as hassle free as possible.**
- **Today we would have a brain storming session and explore the possibility of using the provisions of Indian Arbitration and Conciliation Act to avoid going to Courts of law and for the hassle free resolution of the dispute.**

- If we peep back to the history of arbitration we will find that the Arbitration Act 1940 was found to be outmoded and no foreign investment was forthcoming and the international community had been insisting upon revamping the arbitration law at par with the international platform and
- therefore 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 parliament had also enacted the Arbitration and Conciliation Act 1996 in the republic of India and it come into force on 25th June 1996.
- That it may not be a co-incidence that the international investment started trickling and later on was flowing speedily after this enactment and today in 2009 we can easily see the huge investment pouring in.

- However, the importance of this act had remained unknown to a large section of Indian traders and businessmen so also the common man, which would have been very useful to all of them, hence this humble attempt on my part to bring awareness, amongst the persons who can be benefited by this.
- To understand the scheme of this Act the fundamentals and the very philosophy of this act will have to be understood. Here I quote the judgment of the Apex Court reported in AIR 1982 SC 2204 wherein the Supreme Court had stated as follows:-



■ **“The way in which the Arbitration Proceedings are litigated without exception, the legal philosophers weep and lawyers laugh”.**

- This was spoken by their Lordship of Supreme Court about the Act of 1940 because of the length of litigation involved in an earlier Act. But now the situation is drastically changed by the enactment of 1996 Act 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 decision on any other count which is at most of the time is the challenge for the sake of challenge.

- **That 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, 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 an Arbitration 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 Extension of it by including the Arbitration clause would become an Arbitration agreement.

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

■ ARBITRATION AGREEMENT

■ (1) In this Act, “ 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 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.

HOW ARBITRATION AGREEMENT IS CONSTITUTED

- The Arbitration can be contained in -
 - a) The partnership deed,
 - b) Agreement to sale,
 - c) The Bill of sale, services rendered,
 - d) The independent agreement formulating Questions of dispute between the parties,
 - f) The lease , rent agreement,
 - g) Any contract / agreement which has been reduced in writing.
 - H)

■ Who can be Arbitrator and how they are appointed?

- The parties are free to **appoint anybody** as an Arbitrator by their mutual consent.
- The parties **can authorize / appoint any person** mutually and the **said person can decide the arbitrator** for those parties.
- The parties can **agree upon the procedure for appointment** of the Arbitrator i.e. parties may exchange list of proposed arbitrator & can mutually decide the arbitrator.
- **Parties can approach the High Court** for seeking the appointment of the Arbitrator
- 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 they have complete knowledge of the technicalities.
- For example auditor can be the preferred arbitrator in case of dispute of settlement of accounts. The Civil Engineer can be the Arbitrator in case of dispute of construction activities.
- The property dealer can be the arbitrator in case of dispute regarding trading in immoveable properties. The lawyer can be the arbitrator in issues which involve legal technicalities or partition of the properties amongst members of the family or settlement of dispute of the partner or any interpretation of the term in the agreement and the arbitrator can be decided on smaller line or can be consisting to a combination of the expert as above.



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

- a) Arbitrators enjoy the jurisdiction conferred upon them by the parties, 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.
- Either to give a reasoned award or
- 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**

- 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 .

How award can be challenged

- SECTION 34 provides the scheme for challenging the award.
- APPLICATION FOR SETTING ASIDE AWARD
- 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)



- 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;
- 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
- 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,

- the composition of the arbitral tribunal or the arbitral procedure was to in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties can not 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 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 then after 90 (+ 30 days grace period) {total 120 days }days the award can be directly executed as a decree of the court without any further interference of the court.

■ CONVENIENCE OF THE TRADERS, BUSINESS MAN BY ADOPTING THE ARBITRATION PROCEEDINGS

- A judge (arbitrator) of the convenience of the parties can be selected
- The **venue of arbitration, timing can be decided** as per convenience and the commercial value of the time of business can be utilized properly.
- **No court fees is involved** for putting up the matter before the arbitrator
- Arbitrator and parties can adopt the procedure convenient to them
- **No technicalities of proof of documents** and other unnecessary technicalities can be avoided



- The proceedings being very informal and reduce the bitterness between the parties.
- 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.
- Arbitrator is entitled to grant interest @up to than 18% per annum and the arbitrator can also grant compound interest, provided there is an agreement.
- As per the scheme of the Act the intervention of the courts is minimized,
- The grounds for challenge under section 34 are very narrow & limited. The parties can not object to the reasoning adopted by the Arbitrator.
- The Award is not bad for absence of reasoning.
- The finding of fact recorded by the arbitrator can not be challenged in objection.

- Thus the award can be set aside by the court only on the ground stated in Section S 34 only.
- 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 there is no provision & courts are also not interfering in interim orders passed by the arbitrators
- Every attempt is made for a final decision by the Arbitrator which may be challenged in S.34.

If you are having a query about this subject you can send us & we shall be very glad to respond the same. For your convenience we have query forms available here which may be used for raising the query on www.lawbapat.com or email us at

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Thank you

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