

ARBITRATION: LAW & PRACTISE

Presentation to

Institute of Company Secretaries
Pune Chapter

At the:

Annual Regional PCS Conference 2019

14 June 2019



khare legal chambers
advocates



What is Arbitration

Arbitration is a mechanism for the settlement of disputes.

Arbitration is an Alternate Dispute Resolution (ADR) Mechanism.

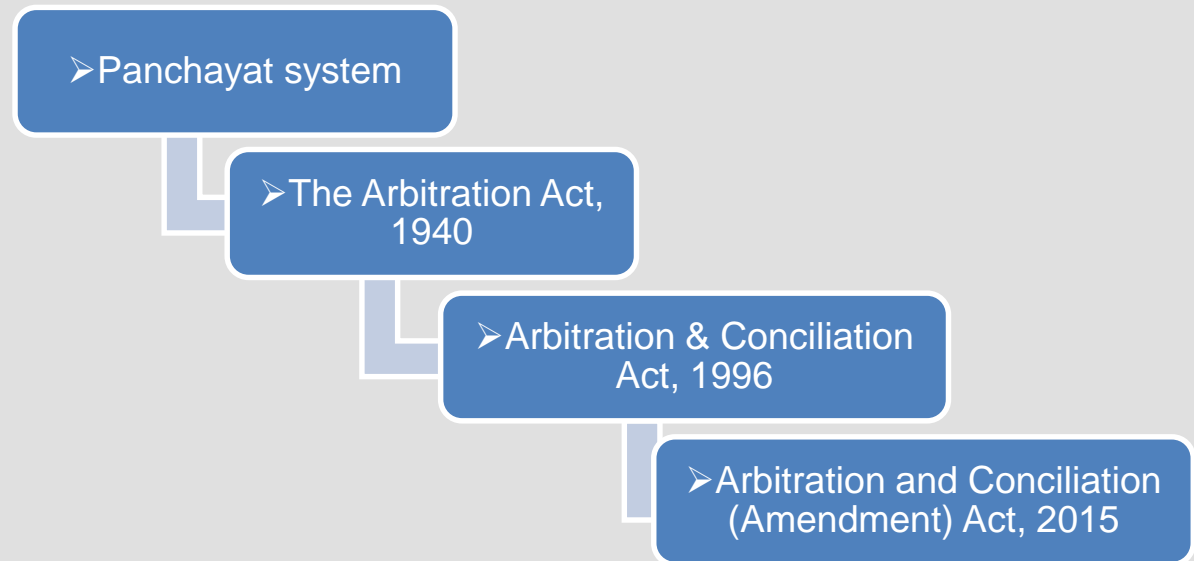
Arbitration is based on consent.

Arbitration is a private procedure.

Arbitration leads to a final and binding determination of the rights and obligations of the parties



Evolution



WHEN CAN YOU ARBITRATE

Anyone can agree to arbitrate a disagreement or legal issue, but the key word is "agree".

Simply because one of the parties in a dispute desires to enter into arbitration does not take away another party's right to go to court. But when there is an arbitration agreement the dispute is compulsorily referred to arbitration.

Arbitration only comes about when two parties agree to it, either before or after a legal dispute comes up.

For this reason, agreements to arbitrate disputes are typically found somewhere in a written contract agreed to by both parties.

Disputes that are non-arbitrable include:

1. Disputes relating to rights and liabilities which arise out of criminal offences;
2. Matrimonial disputes (relating to divorce, judicial separation, restitution of conjugal rights and child custody);
3. Guardianship matters;
4. Insolvency and winding-up matters; etc.



Arbitration Conciliation Mediation- Difference

Arbitration	Conciliation	Mediation
<p>In case of Arbitration the person resolving the dispute is known as an Arbitrator.</p> <p>An arbitrator is a neutral person chosen to resolve the dispute outside the court.</p> <p>An Arbitrator passes an award by adjudicating the dispute.</p> <p>Arbitration and Conciliation Act, 1996 is Applicable</p>	<p>In case of Conciliation, a person resolving the Dispute is known as Conciliator.</p> <p>A conciliator is a person one who assists the parties in an impartial manner to reach a peaceful settlement of disputes.</p> <p>A Conciliator may make suggestion to the parties to reach a settlement.</p> <p>Arbitration and Conciliation Act, 1996 is Applicable</p>	<p>In case of Mediation the person resolving the dispute is known as a Mediator.</p> <p>A Mediator does not impose his views on the parties.</p> <p>A Mediator facilitates the peaceful settlement of dispute by being a neutral party.</p> <p>No legislation is applicable</p>

Amendments to the Arbitration Act

Section 7 - Arbitration agreement must be in writing.

Section 8 - Judicial authority to refer parties to arbitration if the dispute is the subject of an arbitration agreement.

Section 10 - Number of arbitrators.

Section 12 - Disclosure by arbitrators

Section 16 - Tribunal's competence to decide on its own jurisdiction.

Section 17 – Interim relief by the Tribunal

Section 18 – Equal treatment and full opportunity to present cases.

Section 21 - Notice for the commencement of arbitration proceedings.

Amendments to the Arbitration Act (Cont.)

Section 28(3) – Applicability -Terms of the contract and trade customs

Section 28(1(a) – Domestic Arbitration - Substantive law in India.

Section 29(A) - Time limit - 12 months – Extension by Parties - 6 months.

Section 31 - Form and content of awards.

Section 34 – Grounds for challenge.

Foreign Award:

Sections 48 and 57 – Conditions for Enforcement.

Expression “Court” used in Sections 47 and 56 have been defined to mean only the High Court of competent jurisdiction.

Appeal & Enforcement of Domestic Award

90 days - Waiting Period - After the receipt of the award prior to applying for enforcement and execution.

During the intervening period, Award may be challenged - Section 34 - Grounds for challenge of an arbitral award.

After expiry of the aforesaid period, if a court finds the award to be enforceable, at the stage of execution, there can be no further challenge as to the validity of the arbitral award.

Enforcement of Foreign Awards

India recognises foreign awards under the New York Convention and the Geneva Convention.

Application to the High Court having jurisdiction and provide the original award or its certified copy.

A foreign award may not be enforced if

1. Parties to the agreement were under some incapacity under the law
2. The agreement was invalid
3. A fair trial was not conducted by the tribunal passing the award by failing to adhere to the principles of fair hearing or
4. Composition of the arbitral tribunal not according to the Agreement
5. Tribunal exceeded the Jurisdiction
6. The award is not binding as it under appeal to a higher authority.
7. The enforcement of the award is contrary to the public policy of India

Institutional Arbitration

A specialised institution intervenes and takes on the role of administering the arbitration process.

Its own set of rules and its own form of administration to assist in the process.

Eg; LCIA, ICC, DIFC, DIAC.

Advantages

Pre-established rules and procedures which ensure the arbitration proceedings begin in a timely manner.

Administrative assistance from the institution,

A list of qualified arbitrators to choose from;

An established format with a proven record.

The primary disadvantages of institutional arbitration are:

Considerable administrative fees for services and use of the facilities

Delays and additional costs - Bureaucracy from within the institution,

Unrealistic time frames

Ad Hoc Arbitration

Not administered by an institution such as the ICC, LCIA, DIAC or DIFC.

The parties will therefore have to determine all aspects of the arbitration themselves - the number of arbitrators, the applicable law and the procedure

Advantages of Ad Hoc arbitration

Cost effective - suited to smaller claims and less wealthy parties.

Less expensive- pay fees for the arbitrators, lawyers or representatives - rather than paying fees to an arbitration institution.

Flexibility, enabling the parties to decide the dispute resolution procedure themselves.

Disadvantages of Ad Hoc arbitration:

Time, Attention and Expense, to decide arbitrators, rules, procedure etc.

Venue and Seat of Arbitration

- Section 20 of the Arbitration Act - Place of Arbitration- Different meaning to “place”
- Relevance in an international arbitration to determine the jurisdiction of courts
- The reference to “place” in the above section have different meanings which have created the concepts of ‘Seat’ and ‘Venue’.
- Seat of Arbitration is understood as the Place whose laws are applicable to Arbitration Proceedings . There can be only one seat to an arbitration.
- Venue of Arbitration means the place at which the arbitration is conducted. There can be multiple venues to an arbitration
- Conclusion as to Seat or Venue -Reading of the arbitration clause.



Process

- Arbitration Agreement
- Choice of Arbitrator
- Choice of Law
- Seat of Arbitration
- Procedure
- Reference to Arbitration
- Interim Relief
- Extent of Judicial Intervention
- Appeal Against Orders
- Award
- Challenge to an Award
- Enforcement

How PCS' can contribute

- Corporate legal experts
- Exposed to various facets of law and the management
- Can formulate a better strategy in arbitral procedure
- Possess domain expertise and ethical values with a code of conduct
- Assist compliance required under ADR, Process Documentation, advising on procedural aspects etc.
- Acting as arbitrators, conciliators and mediators in resolution of business and commercial disputes;
- Representing clients before the ADR tribunals and assisting in reaching a win-win situations;
- Advising on conflict resolution and dispute management to save time, cost and cordial business relationship;
- Enhancing satisfaction level of parties by encouraging and helping them to find practical solutions to their disputes; and
- ADR advocacy to empower society, avoid litigation and reducing the burden of judiciary

How PCS' can contribute (Cont.)

ICSI – Make a body of Arbitrators consisting of CS'

Act as arbitrators – Society will benefit from knowledge and expertise

ICSI – Make representation to government to encourage appointment of CS'

Awareness to be created among society of about new role of CS



Questions



khare legal chambers
advocates

Khare Legal Chambers LLP

Mumbai

407, Level 4
EMCA House
289, Shahid Bhagat
Singh Marg
Ballard Estate
Mumbai 400 001
T: +91 22 2263
2240/1513

New Delhi

A – 5, Lajpat III
New Delhi 1100024
T: 2984 1260

Pune

D – 1, Sai Nagari
Kalyani Nagar
Pune 411 006
T: +91 20 4004 5802

Dubai

Level 12 Clover Bay
Tower
Business Bay
Dubai

info@kharelegalchambers.com
abhishek@kharelegalchambers.com
www.kharelegalchambers.com