NORTHERN INDIA REGIONAL COUNCIL

is organizing

Seminar

on

“Arbitration in India – The Way Ahead….”

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Background Material
**ARBITRATION IN INDIA-THE WAY AHEAD**

**Arbitration**, a form of **alternative dispute resolution** (ADR), is a technique for the resolution of disputes outside the **courts**. The parties to a dispute refer it to *arbitration* by one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), and agree to be bound by the arbitration decision (the "award"). A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts.

Arbitration is often used for the resolution of **commercial** disputes, particularly in the context of **international commercial transactions**. In certain countries such as the United States, arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration can be either voluntary or mandatory (although mandatory arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur) and can be either binding or **non-binding**. Non-binding arbitration is similar to mediation in that a decision can not be imposed on the parties. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable. By one definition arbitration is binding and so non-binding arbitration is technically not arbitration.

Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding. There are limited rights of review and appeal of arbitration awards. Arbitration is not the same as:

- **judicial proceedings**, although in some jurisdictions, court proceedings are sometimes referred as arbitrations
- **alternative dispute resolution** (ADR)
- **expert determination**
- **mediation**
Advantages of Arbitration

Parties often seek to resolve disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

- In contrast to litigation, where one cannot "choose the judge", arbitration allows the parties to choose their own tribunal. This is especially useful when the subject matter of the dispute is highly technical: arbitrators with an appropriate degree of expertise (for example, quantity surveying expertise, in the case of a construction dispute, or expertise in commercial property law, in the case of a real estate dispute) can be chosen.
- Arbitration is often faster than litigation in court.
- Arbitration can be cheaper and more flexible for businesses.
- Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential:
- In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied.
- Because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court verdicts.
- In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability.

Disadvantages of Arbitration

- Arbitration may be subject to pressures from powerful law firms representing the stronger and wealthier party.
- Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.
- If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case.
In some arbitration agreements, the parties are required to pay for the arbitrators, which adds an additional layer of legal cost that can be prohibitive, especially in small consumer disputes.

In some arbitration agreements and systems, the recovery of attorneys' fees is unavailable, making it difficult or impossible for consumers or employees to get legal representation; however, most arbitration codes and agreements provide for the same relief that could be granted in court.

If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee.

There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.

Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.

In some legal systems, arbitral awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect.

Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavorable ruling.

Rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law.

Discovery may be more limited in arbitration or entirely nonexistent.

The potential to generate billings by attorneys may be less than pursuing the dispute through trial.

Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award.

Although grounds for attacking an arbitration award in court are limited, efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place.
Law relating to Arbitration

Arbitration

Section 2(1) (a) of the Arbitration & Conciliation Act, defines the term “arbitration” as to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitrator

The term “arbitrator” is not defined in the Arbitration and Conciliation Act. But “arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference. The arbitrator must be absolutely disinterested and impartial. He is an extra-judicial tribunal whose decision is binding on the parties.

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. If the arbitrator has an interest in the subject matter of reference well-known to the parties before they sign the submission, the award is good notwithstanding his own interest. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. The parties may appoint whomsoever they please to arbitrate on their dispute. Usually the parties themselves appoint the arbitrator or arbitrators. In certain cases, the Court can appoint an arbitrator or umpire. The parties to an arbitration agreement may agree that any reference thereunder shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.
Arbitral Award

As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much details of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

1. An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value (as applicable at the place of making the award) and in writing. An oral decision is not an award under the law.
2. The award is to be signed by the members of the arbitral tribunal. However, the signature of majority of the members of the tribunal is sufficient if the reason for any omitted signature is stated.
3. The making of an award is a rational process which is accentuated by recording the reasons. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
   (a) Where the arbitration agreement expressly provides that no reasons are to be given, or
   (b) Where the award has been made under Section 30 of the Act i.e. where the parties settled the dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms.

The formulation of reasons is a powerful discipline and it may lead the arbitrator to change his initial view on the matter. Recording of reasons involves, analysis of the dispute to reach a logical conclusion. Award can be divided into four parts i.e. general, findings of fact, submissions of the parties and conclusions of the tribunal. The tribunal should explain its view of the evidence and reasons of its conclusions. The preamble of the award may contain reference to the arbitration agreement, constitution of the tribunal, procedure adopted by the tribunal etc. and the second part of the award may contain points at issue, argument for the claimant, argument for the respondent and findings of the tribunal. The points at issue may be divided into two heads i.e. issue of fact and issue of law.
4. The award should be dated i.e. the date of making of the award should be mentioned in the award.
5. Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral tribunal is under obligation to state the
place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.

6. The arbitral tribunal may include in the sum for which award is made, interest upto the date of award and also a direction regarding future interest.

7. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.

8. After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

**Arbitral Tribunal**

“Arbitral tribunal” means a sole arbitrator or a panel of arbitrators.[Section 2(1)(d)].

**Court**

“Court” means the Principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court or any Court of Small Causes.[Section 2(1)(e)]

**International Commercial Arbitration**

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

(i) an individual who is a national of, or habitual resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country. [Section 2(1)(f)]

**Legal Representative**

The definition of “legal representative” given under Section 2(1)(g) has been taken verbatim from the definition in Section 2(11) of the Code of Civil Procedure.

The following are the persons who are legal representatives:

(a) A person who in law represents the estate of a deceased person.

(b) A person who intermeddles with the estate of the deceased.
(c) A person on whom the estate of a deceased person devolves on the death of the party acting in a representative’s capacity.

The following persons are generally included in the list of legal representatives.
(i) Executors and administrators properly appointed.
(ii) Person who has taken on himself duties and responsibilities which belong to the executor or administrator though only in respect of a part of the estate.
(iii) Heirs-at-law whether they take succession or by survivorship.
(iv) Revisioners when the action has been brought by or against the widow representing her husband’s estate.
(v) Universal legatee.

The following are the illustrations of those who do not come within the meaning of legal representative, so far as the Act is concerned:
(i) An assignee from a deceased zamindar or to whom the holding reverts on the death of a tenant.
(ii) A trespasser or a person who claims adversely the estate of the deceased.
(iii) A new trustee appointed or elected on the death of the deceased trustee.

**Arbitration Agreement**

“Arbitration agreement” means an agreement referred to in Section 7 [Section 2(1)(b)]. Under Section 7, the “Arbitration agreement” has been defined to mean an agreement by parties to submit the arbitration or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. Sub-section (2) says that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Sub-section (3) specifically states that an arbitration agreement shall be in writing. Sub-section (4) spells out that an arbitration agreement is in writing if it is contained in
(a) a document signed by the parties, or
(b) an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement, or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Thus, arbitration agreement stands on the same footing as any other agreement. It is binding
upon the parties unless it is influenced by fraud or coercion or undue influence, etc. As per Section 7, one of the essential ingredients of an arbitration agreement is that such an agreement should be in writing. An oral arbitration agreement is not recognised as an arbitration agreement according to this Section.

Sub-section (5) states that 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.

Sub-section (3) only requires that an agreement by the parties should be in writing. It is not necessary that the words arbitration, arbitrator or arbitration agreement should appear in the arbitration clause so long as the parties have valid agreement to allow the matter of dispute to be decided by persons of their own choice.

Under the present law, certain disputes such as matrimonial disputes, criminal prosecutions, questions relating to guardianship about the validity of a will, etc. are treated as not suitable for arbitration. Subject to this qualification Section 7(1) of the Act makes it permissible to enter into an arbitration agreement “in respect of a defined legal relationship, whether contractual or not”. It expressly recognizes that the arbitrator will have such a power to commence or continue the arbitral proceedings though the objecting party can obtain a ruling of the court at the appropriate time.

The Supreme Court in Hindustan Petroleum Corporation Ltd. v. M/s Pink City Midway Petroleum, AIR 2003 SC 2881 has held that the jurisdiction of Civil Court is barred after an application under Section 8 of the Act is made for arbitration.

In Mahesh Kumar v. Rajasthan State Road Corporation, AIR 2006 Raj 56, the Rajasthan High Court has held that mere existence of arbitration clause in agreement does not bar jurisdiction of Civil Court automatically. The objection of a party to the jurisdiction of the arbitrator must be raised not later than the submission of its first statement of defence on the substance of the dispute [Section 8(1) and 8(3)].

Precaution to be taken while drafting an Arbitration Agreement

The Arbitration Agreement should be drafted with proper care. Considerable stress has been laid under the act on party’s autonomy. In most of the sections it is presumed that unless specific stress has been mentioned under the Arbitration Agreement to various issues, the Arbitral tribunal would inherit the power to decide on the same. All the provisions are subject
to the agreement between the parties besides a few which are mandatory in the Act. The parties may settle on the number of arbitrators, rules of procedures, the venue of Arbitration, the language of the Arbitration proceedings, the procedure for appointing arbitrators, procedure for challenging the Arbitrator etc.

For instance, if the parties do not determine the place of Arbitration, the Arbitral Tribunal may decide upon the same. The same applies to the language and other procedures. It is always advised that the legal advice be obtained at the initial stage of drafting an agreement in order to avoid any differences at a later stage.

The scope and the subject matter of reference should be mentioned precisely in the Arbitration Agreement. It should preferably specify the language of the proceedings as well as the venue, and the modes of service of notice or other communication.

**Procedure for appointment of Arbitrator**

Section 11 of the Act deals with the appointment of arbitrators. According to this Section, parties can agree to any procedure for appointment of arbitrators. But provisions have been made to ensure timely appointments as under:

(a) The parties may agree to a procedure of appointment of arbitrators. Otherwise the following procedure shall apply:

(i) Arbitrator could be of any nationality. [Section 11(1)]

(ii) In case of arbitration with three arbitrators, each party shall appoint its own arbitrator, and the two appointed arbitrators shall appoint a third arbitrator, who shall be the presiding arbitrator [Section 11(3)].

(iii) If, within 30 days, the parties fail to appoint their arbitrators, or the two appointed arbitrators fail to agree on the third arbitrator, the arbitrator shall be appointed by the Chief Justice or any person or institution designated by him at the request of a party. [Section 11(4)]

(iv) Similar procedure is also applicable for appointment of a sole arbitrator. If parties fail to agree on the appointment of a sole arbitrator within 30 days, the appointment shall be done by the Chief Justice or a person/institution designated by him.

(b) Similar procedure also applies, when the procedure agreed by the parties is not acted upon in time. [Section 11(6)]
(c) Decision on appointment of arbitrators by the Chief Justice or persons/ institution designated by him, is final [Section 11(7)].

(d) Chief Justice or the persons/Institution designated by him would have due regard to qualifications of arbitrators agreed between the parties, and considerations likely to secure an independent and impartial arbitrator. [Section 11(8)]

(e) In case of appointment of a sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or a person/Institution designated by him, may appoint a person of a nationality, other than that of the parties, where the parties are of different nationalities. [Section 11(9)]

(f) The Chief Justice can make any Scheme, he considers appropriate for appointment of arbitrators under Sub-section (4), (5) or (6).

In a case original agreement was given a go-by and a new procedure for appointment of arbitrator was agreed upon by the parties. However, respondent failed to appoint an arbitrator according to new method also. Calcutta High Court held that the other party can very well approach the court for appointment of an arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 (Manoranjan Mandal and others v. Union of India and others, AIR 1999 Cal. 117).

It has been held by the Supreme Court in M/s S.B. P. & Co. v. M/s Patel Engg. Ltd., AIR 2006 SC 450 that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power. The power under Section 11(6) of the Act in its entirety could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court. Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the Scheme of the Act.

The mode of appointment of arbitrator may not always work very smoothly in actual practice. But this may provide further opportunities for the organisations like Indian Council of Arbitration, International Centre for Alternate Dispute Resolution etc. Under the Act, an arbitrator before accepting his appointment is required to disclose to the parties in writing about such matters which may create doubts about his impartiality or independence. Where such doubts exist, his appointment can be challenged. Similarly, where the arbitrator does not possess the required or the agreed qualification for the appointment, his appointment can be challenged as per Sections 12 and 13 of the Act.
Number of arbitrators
Section 10 of the Act provides that, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. If they fail to determine the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.

There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus, the validity of an arbitration agreement would not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of the machinery provision for the working of the arbitration agreement. It is therefore clear that an arbitration agreement specifying an even number of arbitrators could not be a ground to render the arbitration agreement invalid under the Act (MMTC Ltd. v. Sterlite Industries (India) Ltd., (1996) 8 Scale 305).

Grounds for challenge
The appointment of arbitrators made under Section 11 of the Act, can be challenged on the grounds as specified in Section 12 of the Act. For that purpose, Section 13 contains the procedure. According to Section 12 of the Act when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Some examples of such circumstances may be blood relationship or pecuniary relationship with either party to the dispute. Moreover, an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay, disclose to the parties in writing any circumstances referred to above unless they have already been informed of them by him. An arbitrator may be challenged by a party only if (1) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (2) he does not possess the qualifications agreed to by the parties. Sub-section 4 of Section 12 makes it clear that a challenge is also permitted, if a party becomes aware of these grounds after an appointment is made.

Challenge procedure
Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Sub-Section (4) states that if a challenge under any
procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

Sub-section (2) provides that failing any agreement referred to in Sub-section (1) of Section 13, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge unless the arbitrator challenged under subsection (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under Sub-section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

**Failure or impossibility to act as an arbitrator**

As per Section 14(1), the mandate of an arbitrator shall terminate, if he becomes *de jure or de facto* unable to perform his functions, or fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate.

Further, if there is a controversy about an arbitrator’s inability to function or occurrence of undue delay, a party may seek intervention of the Court under Section 14(2). However, withdrawal by the arbitrator on its own or by agreement between the parties does not constitute acceptance of the grounds of challenge.

It is considered that the procedure for challenge to the appointment of an arbitrator need not be a matter of agreement by parties. The procedure in Section 13 should apply in all cases.

**Duties and Responsibilities of an Arbitrator**

Any person can be appointed as an arbitrator. No qualifications are prescribed. It is fundamental that an arbitrator act fairly. The Arbitration Act requires the arbitrator to be impartial and independent, and adhere to the rules of natural justice during the procedure and in making the award. It is important for the person appointed to have a good knowledge of the law and practice of arbitration.

**Ethics Applicable To Arbitrators**
The rules of natural justice are legal principles to be followed by any person or body charged with adjudicating disputes or the rights of others. The Rules are:

1. to act fairly, in good faith, without bias, and in a judicial temper;

2. to give each party the opportunity of adequately stating their case, and correcting any relevant statement prejudicial to their case, and to not hear one side behind the back of the other;

3. to not be a judge in one's own cause (so that an arbitrator must declare any interest in the dispute);

4. to disclose to the parties any relevant documents which are looked at (by the arbitrator).

**Substitution of Arbitrator**

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitratorshall terminate—

(a) where he withdraws from office for any reasons; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to such appointment being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal [Section 15].

**Place and commencement of arbitration**

As per Section 20 of the Act, the parties are free to agree on the place of arbitration and if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal,
having regard to the circumstances of the case, including the convenience of the parties. Section 20(3) introduces an option by providing that the arbitrator/tribunal may, unless otherwise agreed by the parties, may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property. Section 31(4) makes it mandatory for the arbitral tribunal to state in the arbitral award the date and the place of arbitration as determined in accordance with Section 20 and the award is then deemed to have been made at that place. Part-II of the Act deals with foreign awards and is applicable to those awards made outside the territory of India. Hence, place of arbitration has far reaching effect in terms of law applicable to arbitration and also enforcement of the arbitral award in international commercial arbitration. Place of arbitration in arbitration other than international commercial arbitration i.e. in domestic arbitration, does not pose any problem. Parties may agree on the place of arbitration anywhere in India. But in international commercial arbitration, place of arbitration has legal implications in terms of law applicable to arbitration. In domestic arbitration, the arbitral tribunal has to decide the dispute in accordance with the Indian law, but in international commercial arbitration, parties have been given freedom to designate law applicable to the substance of the dispute and the arbitral tribunal may apply the rules of law agreed by the parties.

Section 21 stating that the arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. No time limit has been prescribed under the Act. However, where the arbitrator is guilty of undue delay, his proceedings can be put to a stop as per Section 14(1) of the Act.

Language of arbitration

Section 22 gives freedom to parties to agree upon the language or languages to be used in the arbitral proceedings. The arbitral tribunal, subject to agreement of parties, has power to determine the language or languages to be used in the arbitral proceedings. Generally, the language of arbitration is English. It being the international language, the same is agreed in most of the arbitrations by the parties and the arbitral tribunal. The arbitral tribunal may ask for translation of documentary evidence into the or languages agreed upon by the parties or determined by the arbitral tribunal.

Arbitration procedure
Sections 23 to 27 stipulate the procedure to be followed in arbitration proceedings. It gives a comprehensive guidance regarding the procedure such as filing of a claim, submission of difference, amendment of claim/defences etc. Sections 23 and 24 of the Act set out the stages of arbitration proceedings in an orderly manner. Section 23 of the Act provides that:

1. Within the period of time agreed upon by the parties as determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

2. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

3. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it. Section 18 lays down two obligations on the arbitral tribunal i.e. to treat the party with equality and to give full opportunity to each party to present his case. Section 18 which is one of the most significant sections, constitute a fundamental principle which is applicable to entire proceedings. The principle of equality and full opportunity to present the case should be observed by the parties also, when laying down any rules of procedure. An agreed procedure which violates the fundamental principle of equality and granting of an opportunity of being heard is null and void and an award passed in violation of this principle can be set aside. Section 34(2) provides that an award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law from which parties cannot derogate, or, failing such agreement, was not in accordance with law. Hence, an agreement cannot be in conflict with a mandatory provision of the law. If procedure agreed by the parties violates the fundamental principles, it cannot be enforced by the arbitral tribunal. The principle enshrined in Section 18 should be observed during the entire arbitral proceedings. The principle does not entitle a party to adopt delaying tactics to obstruct the proceedings. The general principle is, however, subject to other provisions contained in Sections 23, 24 and 25, wherein the right can be curtailed or limited by the parties or by the arbitral tribunal in certain cases. The parties may agree that arbitration be conducted on the basis of documents only under Section 23(1). Hence, Section 18 is influenced by Sections 23, 24 and 25 and at the same time Section 18 must also influence these Sections. The arbitral tribunal has to maintain a balance for smooth conduct of
the proceedings and has to make the parties feel that the arbitral tribunal is giving them full opportunity to present documents, witnesses and arguments. The parties are entitled to legal representation by the person of their choice and if disallowed, it could be violation of the principle of giving a full opportunity of presenting the case.

Section 24 of the Act deals with Hearings and Written Proceedings. There is no restriction upon the parties to agree for holding oral hearings for presentation of evidence and for oral arguments or, alternatively, for conducting the proceedings on the basis of documents. Otherwise the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials, provided that arbitral tribunal shall hold hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties agreed that no oral hearings shall be held.

Sub-section 2 of Section 24 requires that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property. Further Section 24 provides that all documents/statements/other information received from one party must be communicated to the other parties.

**Statements of claims and defence**

Within the period of time agreed upon by the parties or determined by the tribunal, the claimant has to state the facts in supporting his claim, the points at issue and the relief or remedy sought. Similarly, the respondent shall also state his defence in respect of these particulars.

**Submission of documents**

Sub-section (2) of Section 23 provides that the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence which they will submit later on.

**Amendments**

Parties may amend or supplement these statements during the proceedings, unless:
(1) Parties have agreed otherwise, or
(2) Arbitral tribunal considers it inappropriate to allow the amendment or supplement, due to delay in making it.

**Determination of rules of arbitral procedure**

According to Section 19(1) the arbitral tribunal is neither bound by the Code of Civil Procedure 1908, nor by the Indian Evidence Act, 1872. The Code of Civil Procedure is the Code of Civil Judicature and provides rules relating to suits, place of suing, summons and discovery, judgement and decree, interest, costs etc.

The Evidence Act makes the law relating to evidence and applies to all judicial proceedings in or before the Court but not to proceedings before any arbitral tribunal. The arbitral tribunal is not bound to follow the procedure as followed by a Court. However, the arbitral tribunal is to observe fundamental principles envisaged under the Code of Civil Procedure and the Evidence Act. The procedure adopted by the arbitral tribunal should be according to the principles of natural justice.

Section 19(2) provides that subject to provisions of the Part I, the parties are free to agree on a procedure to be followed by the arbitral tribunal in conducting its proceedings. Rules of permanent arbitral Institutions usually deal with procedural matters in detail and are generally well tested in practice and are revised after consultation with experts to take into account fresh development in the law and practice of arbitration. Parties generally incorporate arbitration rules of a particular institution by reference to the same in the agreement.

The arbitral tribunal does not have any discretion where any such rule has been provided for in the Agreement itself. The arbitral tribunal may conduct the proceedings in the manner it considers appropriate, but such power is subject to two exceptions mentioned below:

1. The arbitral tribunal cannot conduct the proceedings in a manner which is in violation of the mandatory provisions of the law.
2. The arbitral tribunal cannot conduct proceedings in a manner which is in violation of the procedure agreed by the parties, if any. Where parties have agreed on the procedure to be followed by the arbitral tribunal in conducting its proceedings the arbitral is bound to follow that procedure.

There is no mandatory provision in the Act as to how to determine the admissibility, relevance, materiality and weight of evidence. The parties may agree on the rules relating to this important aspect of the matter.
However, if there are no agreed rules by the parties, the arbitral tribunal has power to
determine the admissibility, relevance, materiality and weight of any evidence and make
decision in the manner it considers appropriate. Section 19 recognizes the freedom of the
parties to lay down as to how to conduct the proceedings subject to agreement of the parties.
Freedom to lay down rules of procedure is, subject to following restrictions (mandatory
provisions) laid down by law:
(1) Submission of a statement of a claim and defence under Section 23.
(2) The parties should be given sufficient advance notice of any hearing and of any meeting
of the arbitral tribunal for purposes of inspection of documents, goods or other property under
Section 24(2).
(3) All statements, documents or other information supplied to or applications made to the
arbitral tribunal by one party should be communicated to the other party and any expert
report or evidentiary document on which arbitral tribunal may rely in making its decision
should be communicated to the parties, as per Section 24(3).
(4) The arbitral tribunal, or a party with the approval of the arbitral tribunal, is allowed to
request the Court in taking evidence under Section 27.
(5) An award in agreed terms must state that it is an award and should be in accordance with
Section 30.
(6) An arbitral award must be in writing an signed by the majority of all the members of the
arbitral tribunal as per Section 31(1).
(7) The arbitral award must state its date and place of arbitration under Section 31(4).
(8) A copy of the award duly signed by the arbitral tribunal should be delivered to each party
under Section 31(5).
(9) The arbitral proceedings are terminated by the final arbitral award or by an order of the
arbitral award under Section 32(2).
(10) The arbitral tribunal has power to correct any computation errors, any clerical or
typographical errors or any other errors of a similar nature and to give interpretation of a
specific point or part of the award under Section 33. Judges are bound by the Code of Civil
Procedure and also by the Rules of the Court while conducting proceedings in the Court.
There is no corresponding arbitration procedure and rules. Permanent arbitral institutions have
their own sets of arbitration rules, but those rules do not regulate the procedure in detail.
The arbitral tribunal is the master for the procedure of Arbitration, subject, of course, to
restrictions imposed by law, agreement of parties and natural matter for a quick and cheap
resolution of disputes.
**Power to terminate/continue the proceedings**

Section 25 of the Act provides that subject to agreement between the parties, where, without showing sufficient cause, the claimant fails to communicate his statement of claim within the agreed period, the arbitration proceedings shall be terminated by the arbitrator. Similarly, where the respondent fails to communicate his statement of defence within the predetermined period, the arbitrator shall continue the proceedings without treating such failure, in itself, as an admission of the claimant’s allegations. Further, when a party fails to appear at an oral hearing or to produce documentary evidence in support of its averment, the arbitrator can proceed and pronounce the award on the basis of evidence available before it. Thus, the general principles of ex parte proceedings will apply to arbitration proceedings also.

**Appointment of experts by Arbitral Tribunal**

Section 26(1) of the Act, provides for appointment of experts subject to agreement between the parties. Clause (b) of Sub-section (1) of the Section obligates the parties to provide the expert access to necessary information and documents. The provisions stipulated under Section 26(3) impose a duty on the expert to make available to the parties on their request the various documents etc. on which the expert has based his report.

**Decision by majority**

Section 29 of the Act provides for decision by majority where there is more than one arbitrator.

**Court assistance**

Provisions are also made under the Act relating to Court assistance in taking evidence. Section 27 of the Act provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence. For this purpose the application must specify the names and addresses of the parties and the arbitrators, general nature of the claim and the relief sought and the evidence to be obtained particularly (1) the name and address of any person to be heard as witness or expert witness and a statement of the subject matter of the testimony required; (2) the description of any document to be produced or property to be inspected. According to Sub-section (3), the Court may execute the request by ordering that the evidence be provided directly to the arbitral tribunal. Parties shall
be subject to the same disadvantage, punishments and penalties by order of the Court, as they would incur for the like offences in suits tried by the Court when persons fail to attend, or make a default, or refuse to give evidence or guilty of contempt of the tribunal during the conduct of the proceedings.

**Jurisdiction of Arbitral Tribunals**

The arbitral tribunal is empowered to rule its own jurisdiction including any objections in relation to existence and validity of the arbitration agreement. Section 16 of the Act relates to competence of arbitral tribunal to rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. For this purpose:

1. an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract; and
2. a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Section 16 also contains in its ambit pleas of non-jurisdiction or excess of authority. Subsection (2) of Section 16 provides that a plea can be raised not later than the submission of the statement of defence where the arbitral tribunal does not have jurisdiction. It is further provided that a party shall not be precluded from raising such a plea merely because he has appointment or participated in the appointment of an arbitrator. Likewise, Sub-section (3) of Section 16 provides that a plea that the arbitral tribunal is exceeding the scope of its authority, could be raised by the party during the arbitral proceedings, if the matter alleged, is beyond the scope of its authority. Sub-section (4) of Section 16 gives discretionary power to arbitral tribunal to admit a later plea. It provides that the tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3) admit a later plea if it considers the delay justified. The arbitral tribunal shall decide on a plea referred to it in Sub-section (2) or Sub-section (3) and where the tribunal takes a decision rejecting the plea, it shall continue with the arbitral proceedings and make an arbitral award. [Section 16(5)]

An application for setting aside the award may be made in the Court by a party aggrieved by such an arbitral award. The application should be made in accordance with Section 34 of the Act. If a contract is declared null or void, it does not mean that arbitration is not valid. In other words, under the Act, the clause or an arbitration agreement is to be treated as a clause or an agreement and independent from the other terms of the contract and therefore the validity of
the arbitration clause or arbitration agreement is not affected by themodification or recession, invalidity or revocation of the contract.

**Interim measures ordered by Arbitral Tribunal**

Interim measures are made in the interest of justice and the jurisdiction of the tribunal for interim measures is limited to the subject matter of dispute. Section 17 of the Act relates to interim measures ordered by the tribunal whereas Section 9 of the Act authorises a court to order interim measures. Section 17 provides that unless the parties have specifically agreed, the tribunal may order a party for taking any interim measure of protection as the tribunal may consider necessary in respect of subject matter of the dispute. For obtaining an order, an application must be made by a party. As per Sub-section (2) of Section 17 the tribunal may ask a party to provide appropriate security in connection with the protective measures ordered by it under subsection(1) of Section 17.

Interim measures are temporary and provisional. They are operative till the dispute is resolved by an award to protect the interest of a party.

**Arbitral award**

Section 31 of the Act lays down the requirements as to form and contents of an arbitration award. An award must be a speaking order i.e. it must state the reasons, unless the parties have specifically agreed that reasons need not be given or the award is based on agreed terms. The award should state the reasons upon which it is based. In other words, unless (a) the parties have agreed that no reasons are to be given or (b) the award is an arbitral award on agreed terms under Section 30 of the Act, the award should state the reasons in support of determination of the liability/non-liability. The legislature has not accepted the ratio of Constitution Bench in the *Chokhamal Contractor’s case* (AIR 1990 SC 1426), that the award, being in the private law field, need not be a speaking award even where the award relates to the contract of private parties or between person and the Government or public sector undertakings (*Tamil Nadu Electricity Boardv. Bridge Tunnel Constructions & Others*, AIR 1997 SC 1376). Date and Place are to be mentioned in the award in accordance with Section 20 of the Act and the award should be deemed to have been made at that place.

Section 31(1) requires that the award shall be made in writing and shall be signed by the members of the arbitral tribunal. According to Sub-section (5) of Section 31 of the Act, a signed copy of the same is to be delivered to each party.
Interim award
The arbitral tribunal can make an interim award on any matter with respect to which it may make a final award (See also Section 2(1)(c) of the Act).

Award of interest
Section 31(7) of the Act provides as under:
(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum from the date of the award to the date of payment.

Finality of arbitral awards
Section 35 of the Act corresponds to the Article 35(1) of UNCITRAL Model Law. The Section 35 of the Act provides that subject to the provisions of Part-I of the Act the award shall be final and binding on the parties and persons claiming under it. In other words an arbitral award is final and binding on the parties and the persons claiming under the same, subject to time limit prescribed under Sections 33 and 34 of the Act.

Correction and interpretation of an award
Section 33 of the Act deals with the correction and interpretation of an award, or an additional award.
The award may be corrected by the arbitral tribunal within 30 days of the receipt of the award. For that purpose, a party, with notice to the other party, may request the tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award. If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. Sub-section (1) of Section 33 also provides that the parties may agree upon a period of time other than 30 days for the request.
If the tribunal finds that the request is reasonable, it shall make a correction or give an interpretation, within 30 days of the receipt of the request. However, the tribunal may extend
if necessary, the period of time within which it shall make a correction, give an interpretation of arbitral award under the provisions of Sub-section(6) of Section 33 of the Act. The interpretation shall be treated as part of the award. Likewise, the arbitral tribunal may also correct any errors, on its own within 30 days from the date of the award. That time cannot be extended by the tribunal.

**Additional award**
Sub-section (4) of Section 33 contains provisions for making additional award. It provides that unless otherwise agreed by the parties, a party with notice to the other party may request the tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award. Such request may be made within 30 days from the receipt of the arbitral award. If the arbitral tribunal considers the above request reasonable, the tribunal shall make the additional arbitral award within 60 days of the request. The time period of 60 days may be extended by the tribunal if necessary.

The provisions of Section 31 of the Act shall be applicable to a correction or an interpretation of the award or to an additional award.

**Enforcement of award**
Section 36 of the Act provides that if the time for making an application to set aside the award has expired or the application has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as it were a decree of the Court.

The parties can approach the Court for setting aside the Award. Section 2(e) specifically provides that "Court" means the principal Civil Court of original jurisdiction in a district, including High Court and excludes any Civil Court of grade inferior to such principal Civil Court or any Court of small causes.

An application may be made in accordance with Sub-section (2) and Sub-section (3) of Section 34 of the Act for setting aside an arbitral award.

Sub-section (2) of Section 34, stipulates the following grounds on which the award may be challenged before the Court:
(i) incapacity of a party;
(ii) invalidity of the arbitration agreement;
(iii) party applying was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
(iv) award not in accordance with the terms of submission to arbitration in regard to the dispute;
(v) arbitral tribunal not properly constituted or the arbitral procedure was not in accordance with the agreement of the parties;
(vi) subject matter of the dispute not capable of settlement by arbitration under the law for the time being in force;
(vii) award being in conflict with ‘the public policy of India’.

Explaination to Sub-section (2)(b) provides that an award would be in conflict with public policy if it is induced or affected by fraud or corruption or violates Section 75 or Section 81 of the Act relating to confidentiality and admissibility of evidence in other proceedings.

Section 34(3) of the Act prescribes the time limit for making an application for setting aside an arbitral award.
The application cannot 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. It is further provided that the period of three months could be extended to a maximum of 30 days by the Court but not thereafter if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period.

**Interim measures by the Court**

Section 9 of the Act relates to interim measures by the Court. These measures can be ordered by the Court on an application by a party before or during the arbitral proceedings or at any time before the enforcement of an award. It is based on Section 9 of the UNICITRAL Model Law on International Commercial Arbitration.

The intention of the legislators in incorporating Section 9 is quite explicit that the party before arbitral proceedings or at any time after making of the award but before its enforcement can apply to the Court for interim relief. In Ashok Chawla v. Rakesh Gupta, (1996) 2 Arb. L.J. 255, it has been held that in the absence of any prayer for substantive relief, the prayer for issuing any directions by way of interim measures cannot be entertained.

Section 9 contains various interim measures such as appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings or taking measures for
protection of assets, issue of interim injunctions or appointment of a receiver etc. In a case, petitioner-contractor entered into an agreement to execute work of building construction. The work could not be completed within time as stipulated in the agreement. Therefore, the petitioner sought injunction restraining respondents from getting construction work executed by other agency or contractors. Delhi High Court held that such building contract can not be specifically enforced by in favour of petitioner granting interim relief under Section 9 of the Act (See BSM Contractors Pvt. Ltd. v. Rajasthan State Bridge and Construction Corporation Ltd. and another, AIR 1999 Delhi 117). The order of the Court is appealable under Section 37 of the Act of 1996.

Appeals
Section 37 of the Act provides that an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:
(a) granting or refusing to grant any measures under Section 9;
(b) setting aside or refusing to set aside an arbitral award under Section 34.

An appeal may also lie against the decision of the arbitral tribunal (a) accepting the plea referred in Subsection(2) or Sub-section (3) of Section 16 or (b) under Section 17 of the Act relating to granting or refusing to grant any interim measures. [Section 37(2)]

Section 37(3) prohibits making of second appeal from an order passed in appeal under Section 37(1) and (2) of the Act but the right to appeal to the Supreme Court is always open to a party aggrieved. The Supreme Court may in its discretion grant special leave to appeal where the needs of justice demand an interference by the highest court of the land. The power conferred upon the Supreme Court is a residuary and extraordinary. However, it shall be exercised by the Court in accordance with the well-established judicial principles or the well established norms of procedure which have been recognised for long as precedents.

SAMPLE ARBITRATION CLAUSE

1. Arbitration Clause in a Hire Purchase Agreement of a Finance Company
All disputes, differences and/or claims, arising out of this hire purchase agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of Arbitration & Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the Managing Director of the owner. The award given by such an arbitrator shall be final and binding on all the parties to this agreement.

It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred doing or being unable to act for any reason, the Managing Director of the owner, at the time of such death of the arbitrator or his inability to act as arbitrator, shall appoint another person to sit as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

2. Arbitration Clause in a Joint Venture Agreement
All disputes and differences which may hereafter arise between the parties hereto in connection with this agreement or in connection with the interpretation of any of the terms and conditions herein contained and/or connection with the rights and obligations of the parties hereto under this agreement, shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The place of arbitration shall be at NewDelhi and the same shall be subject to the jurisdiction of the Court at New Delhi.

3. Arbitration Clauses in Article of Association of Company
Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators or assignees on the other hand touching of true intent or construction or the instance or consequences of these presents or of the statutes or touching anything then or transfer done executed or omitted or of the statutes or touching any breach or alleged breach of these presents or any claim on account of any such breach or alleged breach or otherwise relating to the premises or to these presents or to any statutes affecting the company or to any of the affairs of the company, every such difference shall be referred to the decision of a single arbitrator in case parties agree upon the arbitrator, otherwise to two arbitrators (one to be appointed by each party to the difference) or to their umpire in accordance with the provisions of the Arbitration & Conciliation Act, 1996, or any statutory modification thereof in force for the time being.
4. **Arbitration Clause in a Tenancy Agreement**

Any dispute or difference that may arise out of the interpretation of these presents shall be referred to the arbitration of Mr. ..................... and the arbitration shall be under the provision of Arbitration & Conciliation Act, 1996. The arbitrators shall have summary powers.

All disputes and differences which may hereafter arise between the parties hereto in connection with this agreement or in connection with the interpretation of any of the terms and conditions herein contained and/or connection with the rights and obligations of the parties hereto under this agreement, shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The place of Arbitration shall be New Delhi and the same shall be subject to the jurisdiction of the court at New Delhi.

**Disclaimer:** While due care has been taken in preparing the background material, NIRC-ICSI assumes no responsibility for any errors which despite of all precautions, may be found therein.