भारतीय कम्पनी सचिव संस्थान
THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT

PROFESSIONAL PROGRAMME

(Syllabus 2022)

for

December, 2026 Examination

(Containing updates from 1st June, 2025 to 31st May, 2026)

ARBITRATION, MEDIATION & CONCILIATION

GROUP 2

ELECTIVE PAPER 7.1

Index

Important Notes:

1. New Criminal Laws

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively. Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws

2. New Income-tax Act

Though, Income-tax Act, 1961 (old Income-tax Act) has been repealed by virtue of Income-tax Act, 2025 (New Income-tax Act), this study material still contains the provisions of old Income-tax Act for the sake of uniformity and relevancy for CS examination.

The provision of Income-tax Act, 2025 and Income-tax Rules, 2026 as amended by the Finance Act, 2026 shall be applicable from the CS June 2027 examination onwards.

Students appearing in Examination shall note the following:

Students appearing in December, 2026 Examination should also update themselves on all the relevant Notifications, Circulars, Clarifications, Orders etc. issued by MCA, SEBI, RBI & Central Government upto May, 2026.

The students are advised to acquaint themselves with the subject specific updates published by the Institute.

This supplement is to be read with the AMC study material (Syllabus 2022) updated up to May, 2025.

Lesson 1: Arbitration: Introduction, Agreements and its Institutions

1. Glencore International AG v. M/s. Shree Ganesh Metals and another decided by Supreme Court on 25th August, 2025

In this case the Supreme Court observed that the non-signing of an arbitration agreement is no bar to refer the dispute to arbitration, if the parties have otherwise consented to arbitration.

This appeal was against the Delhi High Court's decision which declined reference to arbitration merely because Respondent No.1 didn't sign the arbitration agreement.

The Court relied on the case of *Govind Rubber Limited vs. Louis Dreyfus Commodities Asia Private Limited 2015 SC* , wherein this Court observed that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it."On reading the provisions it can safely be concluded that an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4)(c) provides that there can be an arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at ad idem, then the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, signature is not a formal requirement under Section 7(4) (b) or 7(4)(c) or under Section 7(5) of the Act."

"It is clear that for construing an arbitration agreement, the intention of the parties must be looked into. The materials on record which have been discussed hereinabove make it very clear that the appellant was prima facie acting pursuant to the sale contract issued by the respondent. So, it is not very material whether it was signed by the second respondent or not."

The Court also relied on *Caravel Shipping Services Private Limited vs. Premier Sea Foods Exim Private Limited 2019 SC,* in which it had affirmed and reiterated the legal position laid down in *Jugal Kishore Rameshwardas vs. Goolbai Hormusji 1955 SC* to the effect that an arbitration agreement needs to be in writing though it need not be signed. Noting the fact that the requirement of the arbitration agreement being in writing has been continued in Section 7(3) of the Act of 1996, it was observed that Section 7(4) only added that an arbitration agreement could be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4) but that did not mean that, in all cases, an arbitration agreement needs to be signed. It was held that the only pre-requisite is that it should be in writing, as pointed out in Section 7(3). This legal principle would hold good equally for an arbitration agreement covered by Sections 44 and 45 of the Act of 1996.

In the present case, the court held that , since the Respondent No.1 consented to the contractual terms via email, the High Court's refusal to refer to an arbitration on the ground of non-signing of the arbitration agreement cannot be sustained. Accordingly, the Court allowed the appeal, and the case was restored to the file of the High Court to be referred to an arbitration by the High Court in accordance with law.

For details:
https://api.sci.gov.in/supremecourt/2019/41844/41844_2019_13_1501_63666_Judgement_25-Aug-2025.pdf

2. M/s Alchemist Hospitals Ltd. v. M/s ICT Health Technology Services India Pvt. Ltd. decided by Supreme Court on 6th November, 2025

In this case, the Apex Court has held that the mere use of the word "arbitration" is not sufficient to treat the clause as a valid arbitration agreement Section 7 of the Arbitration and Conciliation Act, 1996, when the corresponding mandatory intent to refer the disputes to arbitration and the consequent intent to be bound by the decision of the arbitral tribunal is missing. The A&C Act acknowledges the existence of an arbitration agreement based on its substance rather than its form. Regardless of the formal structure, effect has to be given to an arbitration agreement in essence. Arbitration being the creature of a contract, the ad idem intention of the parties is paramount to determine whether there exists a valid arbitration agreement.

3. ICSI INTERNATIONAL ADR CENTRE

With the intent to facilitate Arbitration and Mediation at National and International level, the Institute of Company Secretaries of India (ICSI) established its first ICSI International ADR Centre at Noida (U.P.). Hon'ble Mr. Justice P. Sathasivam, former Chief Justice of India and former Governor of Kerala inaugurated the ICSI International ADR Centre at ICSI House, C-36, Institutional Area, Sector - 62, Noida (U.P.) on 29th of February, 2024.

The ICSI International ADR Centre at 7th Floor, ICSI House, C-36, Institutional Area, Sector 62, Noida – 201309, is a state-of-the-art facility with world-class infrastructure, advance Video Conferencing facility, top notch administrative facilities, etc.

The Objective of the ICSI International ADR Centre is to promote Alternate Dispute Resolution (ADR) methods including Mediation and Arbitration to assist and educate all sections of Society, Individuals, Corporates, Firms, Institutions and Establishments (Local or International).

4. History of Arbitration in India

Introduction

Business dealings between individuals often lead to misunderstandings and conflicting views. These misunderstandings and conflicts call for timely and efficient resolution. Litigation is the prominent system for the resolution of disputes; however, arbitration is also emerging as an effective alternative for dispute resolution. Under the arbitration process, an impartial arbitrator adjudicates on the substance of the dispute.

Arbitration has its origins in ancient times, with references dating back to the reign of King Solomon. In India as well, the concept has been in existence for a long time. It was prevalent even during the British rule. Prior to the enactment of the Arbitration and Conciliation Act, 1996, arbitration in India was governed by the Indian Arbitration Act, 1899 and subsequently by the Arbitration Act, 1940.

The arbitration framework in the country is presently governed by the Arbitration and Conciliation Act, 1996, which has been enacted in based on the UNCITRAL Model Law. This Act has also been amended in 2015, 2019 and 2021. As the arbitration process offers a relatively expeditious means of dispute resolution, it is often regarded as an effective alternative to traditional methods. At the same time, arbitration also has certain inherent limitations that need to be examined objectively.

In this study material, students will get the detailed understanding of Arbitration as a dispute resolution system.

History of Arbitration Law in India

Regulation of the conduct of arbitration has a long history in India. The first direct law on the subject of arbitration was the Indian Arbitration Act, 1899; but its application was limited to the Presidency towns of Calcutta, Bombay and Madras. This was followed by the Code of CiviL Procedure, 1908 where the Second Schedule was completely devoted to arbitration.

The first major consolidated legislation to govern the conduct of arbitrations across the country was the Arbitration Act, 1940 which was based on the (English) Arbitration Act, 1934. The Act repealed the Arbitration Act, 1899 and the relevant provisions in the Code of Civil Procedure, 1908, including the Second Schedule thereof. The 1940 Act however, did not deal with enforcement of foreign awards, and for which purpose, the legislature had passed the Arbitration (Protocol and Convention) Act, 1937 to deal with Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 to deal with New York Convention Awards. The working of the 1940 Act, which dealt with domestic arbitrations, was far from satisfactory. The arbitral regime at that point of time was premised largely on a mistrust of the arbitral process, and the same was the subject of much adverse comment by the courts.

The Supreme Court in *F.C.I.* v. *Joginderpal Mohinderpal, (1989) 2 SCC 347*, at para 7 observed –

"We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done."

Several other cases adversely commented upon the working of the 1940 Act. The anguish of the Supreme Court is evident from the observations of D.A. Desai J. in *Guru Nanak Foundation* v *Rattan Singh, (1981) 4 SCC 634*:

"Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under that Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal Forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Court been clothed with 'legalese' of unforeseeable complexity."

The working of the 1940 Act was also the subject of the 210th Report of the Public Accounts Committee of the Fifth Lok Sabha. The Law Commission of India also examined the working of the 1940 Act in its 76th Report.

The problem became more acute and pronounced after the liberalisation of the economy in 1991. Foreign investors required a stable business environment, transparent and robust legal system with a strong commitment to the rule of law, based on a predictable and efficient system of resolution of disputes. Thus, alternative systems like arbitration were seen as a prerequisite to attract and sustain foreign investment.

In order to address these problems, the earlier regime was sought to be replaced by the Arbitration and Conciliation Bill, 1995 which was introduced in Parliament. Since the requisite legislative sanction could not be accorded to the 1995 Bill, the President of India promulgated the Arbitration and Conciliation Ordinance, 1996 on the same lines as the 1995 Bill. Interestingly, the Ordinance had to be promulgated twice because the Parliament could not enact the law in the required time period. Finally, the Parliament passed the Bill in terms of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") which received the assent of the President of India on 16.08.1996 and came into force on 22.08.1996. However, it was made applicable to cases where the arbitral proceedings commenced as of 25.01.1996. The 1996 Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The 1996 Act repealed all three earlier laws (the 1937 Act, the 1940 Act and the 1967 Act as set out above) and applied to

(i) domestic arbitrations;
(ii) enforcement of foreign awards; and

(iii) conciliations.

Although the UNCITRAL Model Law was intended to provide a model law to deal with international commercial arbitrations; in the 1996 Act, the UNCITRAL Model Law provisions, with some minor modifications, are made applicable to both domestic and international commercial arbitrations.

The Act is based on the UNCITRAL Model Law (a set of 36 Articles) which was drafted to govern all international arbitrations by a working group of the United Nations and finally adopted by the U.N. Commission on International Trade Law (UNCITRAL) on June 21st, 1985. The Resolution of the UN General Assembly envisages that all countries should give due consideration to the Model Law, in view of the desirability of uniformity of the law on arbitral procedures and the specific needs of international commercial practice. This is also duly reflected in the Preamble of the Act of 1996 saying that: "it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law…".

The decision of the Supreme Court in *Konkan Railway Corpn. Ltd.* v. *M/S. Mehul Construction Co. judgement* dated 21/08/2000 summarizes the evolution of the Arbitration & Conciliation Act 1996 and the main provisions of the Act as under:

..........“At the outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the foreign awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then number of countries have given recognition to that Model in their respective legislative system. With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on Arbitration in the country that had been enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL model and, therefore, in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the court when there is a suit pending, have been removed. The importance of transnational commercial arbitration has been recognised and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the

new law unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, in as much as the award itself is made executable as a decree and it will no longer be necessary to apply to the court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a court. When United Nations established the Commission on International Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when UNCITRAL Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting UNCITRAL Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process."...................... .

Institutional Arbitration in India

Ad hoc arbitration is arbitration agreed to and arranged by the parties themselves without recourse to an arbitral institution. In ad hoc arbitration, if the parties are not able to agree as to who will be the arbitrator or one of the parties is reluctant to co-operate in appointing the arbitrator, the other party will have to invoke section11 of the Arbitration and Conciliation Act 1996 where under the Chief Justice of a High Court or the Supreme Court or their designate will appoint the arbitrator. In case of domestic arbitration, it will be the Chief Justice of a High Court or his designate. In case of international commercial arbitration, it will be the Chief Justice of India or his designate. In ad hoc arbitration, the fee of the arbitrator will have to be agreed to by the parties and the arbitrator. The present Indian experience is that the fee of the arbitrator is quite high in ad hoc arbitration.

Institutional arbitration is an arbitration administered by an arbitral institution. The parties may incorporate in the contract an arbitration clause for referring dispute between them for resolution to a particular institution. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration.

The following advantages accrue in the case of institutional arbitration in comparison with ad hoc arbitration:

• In *ad hoc* arbitration, procedures will have to be agreed to by the parties and the arbitrator. This needs co-operation between the parties. When a dispute is in existence, it is difficult to expect such cooperation. In institutional arbitration, the rules are already there. There is no need to worry about formulating rules or spending time on making rules.
• In *ad hoc* arbitration, infrastructure facilities for conducting arbitration is a problem, so there is temptation to hire facilities of expensive hotels. In the process, arbitration costs increase. Getting trained staff is difficult. Library facilities are another problem. In institutional arbitration, the arbitral institution will have infrastructure facilities for conduct of arbitration; they will have trained secretarial and administrative staff. There will also be library facilities. There will be professionalism in conducting arbitration. The costs of arbitration are also less in institutional arbitration.
• In institutional arbitration, the institution will maintain a panel of arbitrators along with their profiles. The parties can choose from the panel. It also provides for specialized arbitrators. While in ad hoc arbitration, these advantages are not available.
• In institutional arbitration, many arbitral institutions have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, it is scrutinized by the experienced panel. So the possibility of the court setting aside the award is minimum. This facility is not available in ad hoc arbitration. Hence, there is higher risk of court interference.

• In institutional arbitration, the arbitrator's fee is fixed by the arbitral institution. The parties know beforehand what the cost of arbitration will be. In ad hoc arbitration, the arbitrator's fee is negotiated and agreed to. The Indian experience shows that it is quite expensive.
• In institutional arbitration, the arbitrators are governed by the rules of the institution and they may be removed from the panelfor not conducting the arbitration properly, whereas in ad
hoc arbitration, there is no such fear.
• In case, for any reason, the arbitrator becomes incapable of continuing as arbitrator in institutional arbitration, it will not take much time to find substitutes. When a substitute is found, the procedure for arbitration remains the same. The proceedings can continue from where they were stopped, whereas these facilities are not available in ad hoc arbitration.

In institutional arbitration, as the secretarial and administrative staff is subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the secretarial staff.

The objective of the alternative dispute resolution process through arbitration mechansim is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. Favouring institutional arbitration to save arbitration from the arbitration cost, the Supreme Court in the *Union of India* v. *M/S. Singh Builders Syndicate* observed:

"When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge/s. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non serving persons as Arbitrator/s.

There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is unnable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held.

Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as Arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their 'range' having regard to the stakes involved. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement".

In Union of India v. M/S. Singh Builders Syndicate (Civil Appellate Jurisdiction, Civil Appeal No. 3632 OF 2007, February 26, 2009) Supreme Court observed in Para 8 that:.

" The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise power under section 11 of the Act, can step in and pass appropriate orders".........

Arbitration may be conducted ad hoc or under institutional procedures and rules.

When parties choose to proceed with ad hoc arbitration, the parties have the choice of drafting their own rules and procedures which fit the needs of their dispute.

Institutional arbitration, on the other hand, is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of such institution.

Essentially, the contours and the procedures of the arbitral proceedings are determined by the institution designated by the parties. Such institutions may also provide qualified arbitrators empanelled with the institution. Further, assistance is also usually available from the secretariat and professional staff of the institution.

As a result of the structured procedure and administrative support provided by institutional arbitration, it provides distinct advantages, which are unavailable to parties opting for ad hoc arbitration.

Institutional arbitration *refers to the administration of arbitration by an institution in accordance with its rules of procedure. The institution provides support for the conduct of the arbitration in the form of appointment of arbitrators, case management services including oversight of the arbitral process, venues for holding hearings, etc. It differs from ad hoc arbitration in that several aspects of the arbitral proceedings such as appointment of arbitrators, conduct of the arbitral proceedings, scrutiny of awards, etc. may be determined by the arbitral institution (Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India July 2017, Chairman Justice B. N. Srikrishna, Retired Judge, Supreme Court of India)*

The success of the arbitral institutions such as the ICC Court, the LCIA, the HKIAC, the SIAC and the Arbitration Institute of the Stockholm Chambers of Commerce (“SCC”) reveals certain commonalities:

(a) sufficient support from governments;
(b) backing from the business and / or legal communities;
(c) location in a jurisdiction which has an arbitration-friendly legislative framework and judiciary;
(d) extrinsic advantages such as geographical location or expertise; and
(e) intrinsic advantages such as party-friendly rules, an experienced and skilled panel of arbitrators, governance structure , infrastructure, cost etc.
(Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India July 2017,Chairman,Justice B. N. Srikrishna, Retired Judge, Supreme Court of India)

One of the foremost reasons why parties choose a particular arbitral institution is the arbitration rules that apply as a result of such choice. Therefore, arbitral institutions that provide rules that are clear, efficient, and flexible to accommodate parties’ needs and expectations tend to be favoured.

[Elvira Gadelshina, ‘What plays the key role in the success of an arbitration institution?’, Financier Worldwide (2013)

However, other factors such as quality of arbitrator appointments, case administration services, reputation, neutrality, quality of the legal system where the arbitral institution is located, and pricing policy (both administrative charges of the institution and fees of the arbitrators) are considered by the parties when selecting an arbitral institution.

[Elvira Gadelshina, ‘What plays the key role in the success of an arbitration institution?’, Financier Worldwide (2013)

With a view to promote institutional arbitration and to make India a hub of international arbitration, a High Level Committee headed by Mr. Justice B. N. Srikrishna, former Judge, Supreme Court of India was constituted, inter alia, to identify the roadblocks in the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape and prepare a roadmap for making India a robust centre for international and domestic arbitration.

The Committee, inter alia, recommended for establishment of a new institution to be called the ‘New Delhi International Arbitration Centre’ for better management of arbitration in the country and to declare it as an institution of national importance. The objects of the New Delhi International Arbitration Centre to bring targeted reforms to develop it as a flagship institution for domestic and international arbitration and to conduct arbitration in a professional manner in most costeffective way.

In view of the above, Parliament enacted the New Delhi International Arbitration Centre Act, 2019 to provide for the establishment and incorporation of the New Delhi International Arbitration Centre for the purpose of creating an independent and autonomous regime for institutionalised arbitration and for acquisition and transfer of the undertakings of the International Centre for Alternative Dispute Resolution and to vest such undertakings in the New Delhi International Arbitration Centre for the better management of arbitration so as to make it a hub for institutional arbitration and to declare the New Delhi International Arbitration Centre to be an institution of national importance and for matters connected therewith or incidental thereto.

5. Amendment made to Arbitration and Conciliation Act, 1996

Arbitration and Conciliation Act, 1996 has been amended by:
(i) The Arbitration and Conciliation (Amendment) Act, 2015
(ii) The Arbitration and Conciliation (Amendment) Act, 2019
(iii) The Arbitration and Conciliation (Amendment) Act, 2021

(i) The Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment Act)

The Law Commission examined and submitted its 246th Report on “Amendments to the Arbitration and Conciliation Act, 1996” in August, 2014 and recommended various amendments in the Act. The amendments were to facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, Honourable President promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015. In furtherance to this, The Arbitration and Conciliation (Amendment) Act, 2015 was passed.

The amendments under this Act aimed at:

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;
(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;
(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;
(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;
(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;
(vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;
(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;
(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;
(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

Few major amendments are discussed hereunder:

At the Outset, 2015 Amendment Act has revised the definition of Court under section 2(1)(e) of the Act. Prior to the amendment, thee relevant court for all arbitration matters were principal civil court or high court with original jurisdiction. However, after the amendment, the court for International Arbitration is the High Court empowered.

Further, the amendment also provided that sections 9 (Interim measures, etc., by Court), 27 (Court assistance in taking evidence) and clause (a) of sub-section (1) and sub-section (3) of section 37 (Appeals to the court) shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

This amendment also strengthened the powers of the court by making an amendment to section 8 of the Act and allowed a party to seek court assistance where the original arbitration agreement or its certified copy is not in its possession.

Section 9 was amended to enable where a court grants interim protection before the commencement of arbitration, the arbitral proceedings must be initiated within ninety days or within such time as the court may permit. Also, once the arbitral tribunal is constituted, the court will ordinarily not entertain further interim applications unless the remedy before the tribunal is found to be inefficacious.

Amendment were also made to section 34 which is relating to Application for setting aside arbitral award. Now, an application under section 34 shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. And, an application under section 34 shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice is served upon the other party.

Further, the Amendment added two important explanation to section 34(2) relating to Public Policy of India. These explanations are as follows:
Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

This amendment also inserted two important sections relating to timely disposal of the Arbitration matters. It added section 29 A and Section 29B. However section 29A was further amended by Arbitration and Conciliation (Amendment) Act, 2019. These section as on date are as follows:

29A. Time limit for arbitral award.—

(1)The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:
Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.
(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.
(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:
Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.
Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:
Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.
(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.
(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.
(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.
(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.
(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

29B. Fast track procedure.

(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).
(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):—

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;
(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;
(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.
(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
(5) If the award is not made within the period specified in sub-section (4), the provisions of subsections (3) to (9) of section 29A shall apply to the proceedings.
(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

The amendment inserted Section 31A in the Arbitration and Conciliation Act, 1996 to provide a clear framework for awarding costs in arbitration and arbitration-related proceedings, empowering the court or arbitral tribunal to determine liability for costs in a fair and reasoned manner. Section 31A is reproduced hereunder:

Introduction of the regime for the costs
31A. Regime for costs.—
(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908 (5 of 1908), shall have the discretion to determine—
(a) whether costs are payable by one party to another;
(b) the amount of such costs; and
(c) when such costs are to be paid.
Explanation.—For the purpose of this sub-section, “costs” means reasonable costs relating to—
(i) the fees and expenses of the arbitrators, Courts and witnesses;
(ii) legal fees and expenses;
(iii) any administration fees of the institution supervising the arbitration; and
(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.
(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—
(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.
(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—
(a) the conduct of all the parties;
(b) whether a party has succeeded partly in the case;
(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and
(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.
(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—
(a) a proportion of another party’s costs;
(b) a stated amount in respect of another party’s costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date.
(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.
The Arbitration and Conciliation (Amendment) Act, 2015 marked a significant reform aimed at strengthening India’s arbitration regime in line with global best practices. By clarifying jurisdiction, expanding court support in

international arbitration, prescribing strict timelines, promoting neutrality of arbitrators, and introducing fast-track procedures and a cost regime, the amendment sought to ensure efficiency, certainty, and expeditious resolution of disputes.

(ii) The Arbitration and Conciliation (Amendment) Act, 2019

The promotion of the institutional arbitration in India by strengthening Indian arbitral institutions was critical to the dispute resolution through arbitration. Though arbitral institutions were working in India, they have not been preferred by parties, who have leaned in favour of adhoc arbitration or arbitral institutions located abroad. Therefore, in order to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape and also to prepare a road map for making India a robust centre for institutional arbitration both domestic and international, the Central Government constituted a High Level Committee under the Chairmanship of Justice B. N. Srikrishna, Former Judge of the Supreme Court of India.

The High Level Committee submitted its Report on 30th July, 2017. With a view to strengthen institutional arbitration in the country, the said Committee, inter alia, recommended for the establishment of an independent body for grading of arbitral institutions and accreditation of arbitrators, etc. The Committee has also recommended certain amendments to the said Act to minimise the need to approach the Courts for appointment of arbitrators. After examination of the said recommendations with a view to make India a hub of institutional arbitration for both domestic and international arbitration, it was decided to amend the Arbitration and Conciliation Act, 1996.

The salient features of the Arbitration and Conciliation (Amendment) Act, 2019, inter alia, were:—
(i) to amend section 11 of the Act relating to "Appointment of Arbitrators" so as to change the present system of appointment of arbitrators by the Supreme Court or High Court, to a system where the arbitrators shall be appointed by the "arbitral institutions" designated by the Supreme Court or High Court;
(ii) in case where no graded arbitral institutions are available, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institutions;
(iii) to insert a new Part IA to the Act for the establishment and incorporation of an independent body namely, the Arbitration Council of India for the purpose of grading of arbitral institutions and accreditation of arbitrators, etc.
(iv) to amend section 23 of the Act relating to "Statement of claim and defence" so as to provide that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator receives the notice of appointment;
(v) to provide that the arbitrator, the arbitral institutions and the parties shall maintain confidentiality of information relating to arbitral proceedings and also protect the arbitrator or arbitrators from any suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings; and
(vi) to clarify that section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, is applicable only to the arbitral proceedings which commenced on or after 23rd October, 2015 and to such court proceedings which emanate from such arbitral proceedings.

In conclusion, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted in response to the recommendations of the High-Level Committee chaired by Justice B. N. Srikrishna to address challenges affecting institutional arbitration in India. By shifting the appointment of arbitrators to designated arbitral institutions, providing for their grading and accreditation through an independent body, prescribing procedural timelines, and ensuring confidentiality, the amendment sought to strengthen domestic arbitral institutions.

(iii) The Arbitration and Conciliation (Amendment) Act, 2021

In order to address certain issues in securing contracts or arbitral awards, a need was felt to ensure that all the stakeholder parties get an opportunity to seek unconditional stay of enforcement of arbitral awards, where the underlying arbitration agreement or contract or making of the arbitral award is induced by fraud or corruption.
Also to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country, it was also felt necessary to omit the Eighth Schedule of the Act.

However, as Parliament was not in session and immediate steps were required to make further amendments in the Act, the Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated by Honourable President on 4th November, 2020.

Further, the Arbitration and Conciliation (Amendment) Act, 2021 was passed to replace the aforesaid Ordinance, and inter alia, providing for the following, namely:—
(i) to grant unconditional stay of enforcement of arbitral awards, where the underlying arbitration agreement, contracts or arbitral award is induced by fraud or corruption;
(ii) to omit Eighth Schedule of the Act which laid down the qualifications, experience and norms for accreditation of arbitrators; and
(iii) to specify by regulations the qualifications, experience and norms for accreditation of arbitrators and the said amendment is consequential in nature.

This amendment has amended Section 36(relating to enforcement of Awards), Section 43J(relating to Norms for accreditation of arbitrators) and Omitted Eight Schedule.

6. MODES OF DISPUTE RESOLUTION

All dispute resolution processes (traditional and alternative) have been divided into three primary categories: negotiation, mediation and adjudication. Adjudication can be further divided into:

(a) litigation
(b) arbitration and
(c) final determination.

This effectively amounts to a sub-division of adjudication into its constituent parts.

The primary dispute resolution processes, which are not limited to ADR but include both traditional and alternative procedures, are as follows:

Negotiation is the way in which individuals communicate with one another in order to arrange their affairs in commerce and everyday life, establishing areas of agreement and reconciling areas of disagreement. Negotiation has been defined as “the process we use to satisfy our needs when someone else controls what we want.” Most disagreements are dealt with in one way or the other by negotiation between the principals themselves; relatively few involve legal intercession. Negotiation tends often to be a practical skill learnt pragmatically by personal experience. There are, however, various theories of negotiation, as well as many different individual styles and approaches.

Adjudication, as a generic term, is a dispute resolution process in which a neutral has and exercises the authority to hear the respective positions submitted by the disputants and to make a decision on their dispute which will be binding on them.

Litigation, the process is administered through the Courts and the neutral adjudicator is a judge, district judge, or other official appointed by the Court to undertake this function.

Arbitration, is the means by which parties to the dispute get the same settled through the intervention of a third person, but without having recourse to the court of law. The neutral third party (called the arbitrator) renders a just and equitable decision after a hearing at which both the parties have an opportunity to be heard.

Administrative or statutory tribunals, the adjudication follows certain specific statutory requirements, such as establishing rent levels, compensation awards, social security benefits or a range of other matters through tribunals and appeal tribunals.

Expert Determination, the parties appoint an expert to consider their issues and to make a binding decision or appraisal without necessarily having to conduct an enquiry following adjudicatory rules.

Private judging, the Court refers the case to a referee chosen by the parties to decide some or all of the issues, or to establish any specific facts.

Mediation is a process by which disputing parties use the assistance of a neutral third party to act as a mediator-a facilitating intermediary who has no authority to make any binding decisions, but uses procedures, techniques and skills to help the parties to resolve their dispute by negotiated agreement without adjudication.

Conciliation is a term used interchangeably with mediation, and sometimes used to distinguish between one of these processes involving a more pro-active mediator role, and the other involving a more facilitative mediator role; but there is no consistency in such usage. Mediation and conciliation bring about harmony and resolve conflicts keeping intact cordial relationship between the parties.

In all the commercial transactions, secrecy of the trade and terms of contract in business is of paramount importance. Persons involved in the business, do not like that their trade secrets and ups and downs in their business are made known to their adversaries or competitors. In any dispute, between two business persons, if taken to court of law, it not only involves lot of time in settlement, but also trade secret gets leaked out. To overcome this problem, it is needless to emphasise the importance of settlement of their dispute through the domestic forum of arbitration. Still better option would be to settle the disputes through mediation or conciliation.

The Arbitration and Conciliation Act, 1996 recognises the consensus reached by the mediator or conciliator as in the case of an award by the Arbitrator.

Hybrid Processes each of the primary processes can be used in its own right without adaptation. In addition, by drawing elements from the primary processes and tailoring them, an ADR professional can devise a permutation of procedures and approaches which fit all the nuances of the parties' needs and circumstances without being constrained by prescribed rules. For example, it may be appropriate for ADR professional to have informal discussions with the parties, arrange for certain facts, or technical questions to be investigated, and then allow each of them to present their respective cases informally to one another before resuming further attempts at settlement. This and any other permutation of requirements can be met by devising a sequence of procedures specifically designed for that dispute and those parties.

Certain common combinations of usage of the primary processes have been developed and known as hybrid processes, which include:

Mini-trial can be seen as a form of evaluative mediation, or an abbreviated non binding arbitration, followed by negotiation and/ or mediation.

Med-arb involves commencing with mediation, and if this does not result in the dispute being resolved, continuing with a binding arbitration.

Neutral fact-finding Expert involves an investigation by a neutral expert into certain specific issues of fact, technicality and/or law, and thereafter, if required, a mediatory role, and eventually participation in an adjudicatory process, if required.

Early neutral evaluation requires a neutral evaluator to meet parties at an early stage of a case in order to make a confidential assessment of the dispute, partly to help them to narrow and define the issues, and partly to promote efforts to arrive at a settlement.

Court-annexed arbitration, requires statutory introduction into the Court system, and which, depending upon the model adopted, may be binding or initially non- binding, and may or may not provide for a rehearing by a judge under certain circumstances. The Code of Civil Procedure (Amendment) Act, 1999 provides for Court annexed ADR processes.

Mediation and hybrid process generally provide a framework of informal procedures in which a neutral assists the disputing parties with information gathering, clarifying and narrowing issues, facilitating dialogue, negotiation, smoothing out personal conflicts, identifying options, testing the reality of views, risk assessment, impasse resolution and in some cases non-binding evaluation as an aid to reaching agreement.

7. AMENDMENT ON THE QUALIFICATIONS OF ARBITRATORS

The Arbitration and Conciliation (Amendment) Act, 2019 inserted Section 43J into the Arbitration and Conciliation Act, 1996 to prescribe the qualifications, experience, and accreditation norms for arbitrators. It provides that the qualifications, experience and norms for accreditation of arbitrators shall be such as specified in the Eighth Schedule. However, the Central Government may, after consultation with the Council, by notification in the Official Gazette, amend the Eighth Schedule and thereupon, the Eighth Schedule shall be deemed to have been amended accordingly.

Moreover, this provision was amended even before it could be brought into force. The Arbitration and Conciliation (Amendment) Act, 2021 substituted Section 43J of the Arbitration and Conciliation Act, 1996 and omitted the Eighth Schedule from the Act. As a result, the statutory framework prescribing specific qualifications and experience criteria for arbitrators, as contained in the Eighth Schedule, was removed. Now, the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations by the Arbitration Council of India.

8. GENERAL PRINCIPLES IN AN ARBITRATION AGREEMENT

Arbitration agreement is *sine qua non* for commencement of arbitral proceedings. The Courts[1], while appointing the arbitrator would observe whether there exists any arbitration agreement between the parties. Therefore, arbitration agreement assumes significance and every word that goes into the construction of arbitration agreement signifies the intention of parties to resolve the disputes through arbitral proceedings. The arbitration agreement should be drafted in an objective and impartial manner. The success and failure of the party in invoking arbitration proceedings depends upon how well the "*arbitration clause"* in the agreement was drafted.

The Indian Arbitration and Conciliation Act,1996 is broadly based on UNCITRAL Model Law[2] and the Article 7 of the chapter II of UNCITRAL Model Law defines the arbitration agreement as follows:

(1) "Arbitration agreement" is 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement, or in an exchange of statement of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

On reading of UNCITRAL Model Law definition, it is clearly understood that the "arbitration agreement" in Arbitration and Conciliation Act, 1996 is based on UNCITRAL Model Law of arbitration.

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[1] *Court means Supreme Court in case of appointment of Arbitrator in International Commercial Arbitration and High Court in case of Domestic Arbitration.*

[2] *UNCITRAL stands for United Nations Commission for International Trade Laws, 1985. It is a Model Law on International Commercial Arbitration.*

Metamorphosis of arbitration agreement

The definition of the "arbitration agreement" has been undergoing changes since the enactment of first Arbitration Act, 1940 due to changing needs of the trade and commerce and also technology in the country. In other words, Jurisprudence on definition of "arbitration agreement" has been growing since enactment of Arbitration and Conciliation Act, 1996. In the Arbitration Act, 1940 the definition of the agreement was as follows:

Section 2. Definitions.- (1) In this Act, unless the context otherwise requires,-
(b) "arbitration agreement" means an agreement referred to in Section 7.

The Arbitration and Conciliation Act, 1996 replaced some words with new words to make it more arbitration friendly in view of ongoing globalization of economy in late 1990's. The changes that came into arbitration agreement are as follows:

The word *"differences"* which played a key role in Arbitration Act, 1940 has been substituted by the word "*disputes"* under the Arbitration and Conciliation Act, 1996. Similarly, the expression "*present or future differences*" in Arbitration Act, 1940 have been substituted in the Arbitration and Conciliation Act, 1996 by the expression "*all or certain disputes between the parties having a defined legal relationship, whether contractual or not"*.

Under the Arbitration and Conciliation Act, 1996 the Courts would examine whether there was a "*defined legal relationship"*[3] between the parties and a non- contractual dispute[4] also comes under the purview of arbitration agreement, if it is sufficiently closely connected with a contractual dispute which is covered by the agreement to arbitrate. Further, Government through the enactment of Arbitration and Conciliation (Amendment) Act, 2015 inserted additional text namely "*including communication through electronic means"* under sub-section (b) of Section 7 on arbitration agreement. Therefore, any agreement entered into through emails, is also valid and it is subject to its testimony under Section 65 B of the Indian Evidence Act, 1872. The Union Government brought in these changes in arbitration agreement to place Indian Arbitration and Conciliation Act, 1996 in line with UNCITRAL Model Law, and making India conducive to international commercial arbitration environment.

Principles of Arbitration Agreement

The Supreme Court has laid down the principles of arbitration agreement in *Jagdish Chander v. Ramesh Chander and ors*[5] case, summarizing from earlier principles postulated in *K.K. Modi v. K.N. Modi and Ors*[6],*Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd,* and *Bihar State Mineral Development Corpn. And Ors. v. Encon Builders (I) (P) Ltd*[7].

What constitutes the arbitration agreement

The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal (arbitration) for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement.

It is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement, if there is a specific and direct expression of intent to have the disputes settled by arbitration.

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[3] *Legal relations means rights and obligations of the parties. eg. Partnership agreement.*
[4] *Non-contractual relationships arising out of statutory relationships eg. Bye-laws of National Stock Exchange Ltd framed under Securities Contracts(Regulation Act) 1956: Case Law: Viraj Holdings*
Vs.Motilal Oswal Securities Pvt. Ltd. and Ors. (27.06.2002 - BOMHC)
[5] *(2007) 5 SCC 719.*
[6] *(1998) 3 SCC 573.*
[7] *(2003) 7 SCC 418.*

There is no specific form of an arbitration agreement, but the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration.

Essential elements of the arbitration agreement

It is suffice to constitute the arbitration agreement, if it contains the following elements.

(a) The agreement should be in writing.

(b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal (arbitration).

(c) The private tribunal (arbitration) should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it.

(d) The parties should have agreed that the decision of the private tribunal (arbitration) in respect of the disputes will be binding on them.

(e) The agreement should contain all attributes or all elements of an arbitration agreement and it is not necessary that the words "arbitration" or "arbitrator" or "Arbitral Tribunal" to be used with reference to the process of settlement of disputes.

Supreme Court in K.K. Modi v K. N. Modi (1998)3 SCC 573 had laid down the following attributes of an Arbitration Agreement.

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

Validity of an arbitration agreement

An arbitration agreement is not considered as valid:

i. If an agreement requires or permits an authority[8] to decide a claim or dispute without hearing, or

ii. requires the authority to act in the interests of only one of the parties, or

iii. provides that the decision of the authority will not be final and binding on the parties, or

iv. that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief.

v. such matters come under "excepted" category of arbitration.

In other words, the aggrieved party has an alternative remedy before invoking the arbitration.

vi. Further, if arbitration clause states there is mere a possibility of the parties agreeing to arbitration in future, as against from *an obligation to refer disputes*to arbitration.

Excepted matter

Excepted matters are those that do not come under the purview of arbitration agreement. An arbitrator does not have jurisdiction to decide on "Excepted matter". These types of excepted matters usually come in the Government departments namely Railways, Public Works Department, where a designated authority would adjudicate the dispute.

[8] *State of UP v. Tipper Chand (1980) 2 SCC 341*

A lot of litigation goes upto the Supreme Court level to decide the matter "whether the arbitration clause" was an "excepted matter or not".

The criteria to decide whether it is excepted matter or not is to observe the arbitration clause relating to settlement of disputes, and containing words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement.

The mere use of the word "arbitration" or "arbitrator" in a clause will not make it a reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement.

Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

Writing an arbitration clause in arbitration agreement.

The Supreme Court held In *State of Orissa and Ors v. Damodar Das*[9] that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration **is expressly or impliedly** spelt out from the clause.

It is an arbitration agreement, if the clause provides that in the event of disputes arising between the parties, **the disputes shall be referred to arbitration**.

Besides the above, the following additional points to be contained in an effective arbitration clause.

- **a). Seat of Arbitration[10]**. The parties can choose any place as seat of arbitration. Seat of arbitration means application of substantial law of the country to adjudicate the dispute.
- **b). Venue of Arbitration[11].** The parties can choose any "Venue" i.e. place for holding the meetings of arbitral proceedings.
- **c). Arbitral Institution.** The parties to specify choosing a particular arbitral institution to administer arbitration and rules of such arbitral institution will apply in adjudication of the disputes.
- **d). Law.** The parties have liberty to choose to application of any law of their own choice to adjudicate the dispute.
- **e). Language.**The parties to specify the language of the arbitral proceedings.
- **f). No. of Arbitrators.** The parties should specify number of arbitrator/s. Parties can choose any one as arbitrator, and if they choose a panel of arbitrators, in that case the two arbitrators should choose a presiding arbitrator.

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[9] *(1996) 2 SCC 216*

[10] *The Constitutional bench in Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552, has overruled earlier decisions pronounced on seat of arbitration in Bhatia International v Bulk Trading S.A, (2002)4 SCC 105 and also Venture Global Engineering v Satyam Computers Services and Ors. (2008) 4 SCC 190. Now as per BALCO decision, Part I of the Act applies only when the arbitration is held in India and it would not apply to arbitration held outside the India.*

[11] *The Supreme Court in Videocon Industries v Union of India (2011) 6 SCC 161- laid down fine distinction between the venue of arbitration and the place of arbitration. Sub-sections(1) and (2) of Section 20 deal with the place of arbitration, while sub- section (3) pertains to venue of arbitration. The word "place" and "seat" resembles one and the same in its juridical meaning.*

Arbitration Agreement and Indian Contract Act, 1872

An arbitration agreement must be made in consonance with the provisions of the Indian Contract Act, 1872 which is a substantive law of the country and any agreement which is against the provisions of the Indian Contract Act, 1872 is deemed to be against public policy and do not stand in the eye of law.

Provisions of Section 2 of the Indian Contract Act, 1872 relevant to the arbitration agreement are as follows:

a. an agreement not enforceable by law is said to be void.
b. an agreement enforceable by law is a contract
c. an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.
d. a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Legal Status of Arbitration Agreement made through Electronic means

Introduction: Arbitration and Conciliation (Amendment) Act, 2015 had effected changes in sub-clause (b) of sub-section 4 by inclusion of words: "***including communication through electronic means***[12]***"*** in keeping pace with advancement in technology. The words "*electronic communication"* means any communication that the parties make by means of data messages. Data message, means information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, and telecopy.

Laws relating to electronic records:

Information Technology (I.T) Act, 2000, Indian Evidence Act, 1872 and Code of Civil Procedure, 1908 are the main laws relating to admissibility of electronic records.

Information Technology: (i) It provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, usually referred to, as "electronic commerce".

The contents of the arbitration agreement are defined in only five sub-sections under Section 7 of the Arbitration and Conciliation Act, 1996 but they have wider meaning on its interpretations due to various judicial pronouncements. The basic ingredients of the "arbitration agreement" are summarised in five principles: First, the arbitration agreement should be in writing. Second, it (arbitration agreement) should contain reference to resolving the present or future disputes arising out of the agreement. Third, it should reflect the intention of the parties to submit to arbitration in case of disputes. Fourth, it should contain *dispute resolution mechanism* which should be of judicial inquiry in nature but not of expert determination and the last, it should be stamped to withstand in the Court of Law while seeking relief under various provisions of the Arbitration and Conciliation Act, 1996 and put in nutshell, the above ingredients constitute a valid "arbitration agreement".

9. ARB-MED-ARB CLAUSE: CONNECTING THE DOTS BETWEEN ARBITRATION AND MEDIATION

Dispute resolution forums have shown a preference for the "Arb–Med–Arb" process. This mechanism involves the commencement of arbitral proceedings, a subsequent attempt at settlement through mediation, and the continuation of arbitration proceedings.

To institutionalise the "Arb–Med–Arb" approach, the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) have jointly established the SIAC–SIMC Arb–Med–Arb Protocol, commonly referred to as the AMA Protocol.

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[12] *Shakti Bhog Foods Ltd v Kola Shipping ltd (2009) 2 SCC 134*

The salient elements governing the AMA Protocol may be outlined as follows:
1. In accordance with the "Arb–Med–Arb" clause, or based on any subsequent agreement between the parties, arbitral proceedings are initiated under the applicable arbitration rules.
2. Once the parties have exchanged their initial arbitration pleadings, namely the Notice of Arbitration and the Response, the arbitration process is stayed.
3. Thereafter, the documents submitted by the parties is transmitted by SIAC to SIMC for the purpose of conducting the mediation proceedings.
4. If mediation fails to settle the dispute, arbitration is revived to address the essential aspects of the dispute.

10. SEAT OF ARBITRATION

The parties to an Arbitration agreement shall do well to avoid controversies at a later stage leading to disputes for settlement through Courts, if they specify in express language, the "Seat of Arbitration" in the arbitration clause instead of merely mentioning the "Place of Arbitration".

It is relevant to reiterate that the "Seat of Arbitration" confirms (i) the Court which has jurisdiction over the arbitral proceedings between the parties to the agreement and (ii) the governing laws of the State to which the Court belongs. Hence, the Court for interim measures shall be the Court as per the "Seat of Arbitration".

When an application for interim relief is made to a Court under Section 9 of the Arbitration and Conciliation Act, 1996 all subsequent applications for relief in the matter of the same dispute has to be filed in the same Court in which the application for interim measures has been filed under Section 9 of the Arbitration and Conciliation Act, 1996.

It is worth mentioning that as per the provisions of clause (b) of sub-Section (1) of Section 37 of the Arbitration and Conciliation Act 1996, an order of refusal to grant any interim measures under Section 9 can be appealed against in the Court authorised by law to hear appeals from original decrees of the Court passing the Order.

Seat of Arbitration for Interim Relief

The term 'Court' has been defined in Section 2(1)(e) of the Arbitration and Conciliation Act, 1996. For the purposes of fixing the seat of arbitration where the same has not been clearly stated in the agreement, the Court would have to determine the territory that will have the closest and most intimate connection with the arbitration, where the substantive law of the contract is Indian law; law governing the arbitration is Indian Arbitration Law; Curial Law is that of India; Patents Law is that of India; IPLA is to be acted upon in India; enforcement of the award is to be done under the Indian Law; Joint Venture Agreement between the parties is to be acted upon in India; relevant assets are in India.[13]

It can be concluded by stating that the "Seat of arbitration" defines the forum which assists in determination of the two important aspects, namely (i) the governing law and (ii) the Court that has the powers of adjudication in the matter of the concerned arbitration proceedings of the parties to the arbitration agreement.

11. Who can be an Arbitrator?

A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

The following qualifications may be preferred by the parties depending upon the circumstances of the matter:
i. He can be a judge; ii. He can be an advocate; or iii. He can be a Company Secretary; or iv. He can be a Chartered Accountant; or v. He can be a CMA; vi. He can be a maritime expert; vii. He can be an executive; or viii. He can be an engineer; or ix. He can be a businessman; x. He can be other Professional.
Some arbitral institutions which conducts international arbitration, have included foreigners for being arbitrators. This was to enable the foreign parties to appoint arbitrators of other nationalities whom they consider more appropriate.

[13] *Enercon (India) Ltd. and Ors. v. Enercon GMBH and Ors. (2014) 5 SCC 1*

Lesson 3: Arbitration Procedure, Appointment of an Arbitrator and Other Aspects

1. APPLICABILITY OF PROVISIONS RELATING TO ARBITRATION COUNCIL OF INDIA (OCTOBER 13, 2023)

The Central Government has appointed 12th day of October, 2023 as the date on which the provisions of section 10 of the Arbitration and Conciliation (Amendment) Act, 2019 (said Act) has come into force.

Section 10 of the said Act has inserted Part IA containing sections 43A to 43M to the Arbitration and Conciliation Act, 1996, which are relating to the Arbitration Council of India.

Details of Change

Part IA has come into force w.e.f. 12th day of October, 2023.
For details: *https://egazette.gov.in/WriteReadData/2023/249358.pdf*
https://legalaffairs.gov.in/sites/default/files/arbitration-and-conciliation%28amendment%29-act-2019.pdf

2. Kamal Gupta & Anr. v. M/s L. R Builders Pvt. Ltd. & Anr. decided by Supreme Court on 13th August, 2025.

Issues

Two questions arose for consideration in these appeals were,

(a) Whether it is permissible for a non-signatory to remain present in arbitration proceedings?
(b) After appointment of an arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996, whether it is permissible for the Court to issue any further ancillary directions concerning the arbitration proceedings that have commenced?

Judgement

Hon'ble Supreme Court , in this case, held that non-signatories to an arbitration agreement cannot attend arbitration hearing proceedings, as permitting a stranger to do so would result in a breach of confidentially in arbitral proceedings. The Court further added that when the arbitration proceedings can take place only between parties to an arbitration agreement and Section 35 of the Act does not make the arbitral award to be passed binding on non-signatories to such agreement, the Arbitration Act does not confer any legal right upon a non-party to remain present in arbitration proceedings between signatories.

The Court has thus re-affirmed the confidentiality mandate under Section 42A of the Arbitration and Conciliation Act, 1996. According to section 42A of the Act, the arbitrator, the arbitral institution and the parties to the arbitration agreement have to maintain confidentiality of all arbitral proceedings. The legislative intent behind maintaining confidentiality of information is quite clear. Permitting a stranger to the arbitration proceedings to remain present and observe the said proceedings would result in breach of the provisions of Section 42A of the Act.

Further, the Supreme Court held that once an arbitrator is appointed under a Section 11 application (under the Arbitration and Conciliation Act, 1996), the referring Court becomes *functus officio* and cannot pass any further ancillary directions concerning the arbitration proceedings.
For details:

https://api.sci.gov.in/supremecourt/2025/7529/7529_2025_7_1501_63207_Judgement_13-Aug-2025.pdf

3. M/s Bharat Udyog Ltd. (Formerly known as M/s Jai Hind Contractors Pvt. Ltd.) versus Ambernath Municipal Council decided by Supreme Court on 26th March, 2026

Participation in Arbitral Proceedings does not confer Jurisdiction to Arbitral Tribunal

Facts

This special leave petition arises out of the final judgment and order passed by the High Court of Judicature at Bombay in exercise of jurisdiction under Section 39 of the Arbitration Act, 1940.

By the said order, the High Court allowed the appeal filed by the respondent no. 1, Ambernath Municipal Council (hereinafter ‘Municipal Council’) and quashed and set aside the award as well as the judgment of the Civil Court.

Decision

The Apex court inter alia has held that there is neither an arbitration agreement between the parties nor an informed consent of the Municipal Council for resolution of the dispute through arbitration. We have therefore upheld the decision of the High Court and dismissed the special leave petition.

Further, the Supreme Court also opined that Participation does not confer Jurisdiction. There is no estoppel against the Municipal Council for the reason that it had initially participated in the arbitral proceedings. This is for the reason that they were forced into arbitration without consent and contract. At the same time, they challenged the award on jurisdictional grounds before the Civil Court as well as the High Court.

For details: https://api.sci.gov.in/supremecourt/2016/37371/37371_2016_6_1501_69613_Judgement_24-Mar-2026.pdf

4. *Home Care Retail Marts Pvt. Ltd. V. Haresh N. Sanghavi decided by Supreme Court on 24th April, 2026*
An unsuccessful party in arbitration, may invoke Section 9 of the Arbitration and Conciliation Act, 1996 at the post-award stage

Facts of the Case

The substantial question of law that arises for consideration in the present batch of appeals was whether a petition under Section 9 of the Arbitration and Conciliation Act, 1996 at the post-award stage, by a party that has lost in the arbitral proceedings and has no enforceable award in its favour, is maintainable in law.

Decision

The Apex Court was of the considered view that the object and purpose of Section 9 of the Act is to ensure that parties retain the right to approach the Court for interim measures until the judicial process has reached its culmination.

The Honourable Supreme Court has held that any party to an arbitration agreement, including an unsuccessful party in arbitration, may invoke Section 9 of the Act at the post-award stage. However, the Courts would be well advised to exercise care, caution and circumspection while dealing with a Section 9 application filed by an unsuccessful party in arbitration.

For details: https://api.sci.gov.in/supremecourt/2015/34891/34891_2015_14_1501_70498_Judgement_24-Apr-2026.pdf

1. HISTORY OF ARBITRATION IN INDIA (PROCEDURAL PERSPECTIVE)

Fact-finding is an important task of the tribunal, and nowhere in the arbitral procedure is the cultural contrast more vivid than in the presentation of evidence. The civil law culture tends to prefer contemporaneous documents or, at least, written statements by witnesses. Professionals usually do not assist in the preparation of these statements. On the other hand, the common law tradition favours oral testimony, where the decision maker can observe the demeanour of the witness.

The arbitration tribunals do not tend to follow strict rules of evidence found in common law countries. They also tend to favour documentary evidence. It is rare for a tribunal to exclude relevant evidence, although they may give it different weight, depending on its source. The burden of proof will generally be with the party alleging a particular fact.

The standard of proof is akin to the common law's civil standard of 'balance of probabilities' rather than the strict 'beyond reasonable doubt' used in criminal cases.

If we refer to section 19(1) of the Arbitration and Conciliation Act, 1996, we can see that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872[14]. However, it does not mean that the Arbitral Tribunals are not required to follow rule of Evidences and principle of natural justice. The present situation in this regard is clear from the decision in the following cases:

Hindustan Shipyard Limited vs Essar Oil Limited And Ors. on 29 September, 2004 (Andhra HC)

In this case, the Hon'ble Andhra Pradesh High Court relied on the Judgement of the Hon'ble High Court of Calcutta in the case of *Bengal Jute Mill Co. v. Lalchand* in which it was held that though the Arbitral Tribunal is not bound by technical and strict rules of evidence, the arbitrary tribunal must not disregard the public policy. It was also held:

"An arbitration proceedings is not governed by the Evidence Act. In an arbitration proceedings, however, the principles embodies in Sections 91 and 92 of the Evidence Act lay down the principles of natural justice, and the court in such a case of violation should come to the aid of the aggrieved party. In case the reference proceeds, and the Arbitrator gives effect to the principles embodied in Sections 91 and 92 and the decision is in favour of the party and then the point is agitated in court, then the court is bound to give effect to the principles of Sections 91 and 92 of the Evidence Act. Hence, in either view the court should not encourage the party in these circumstances by staying the suit".

So, the principles of natural justice as was given in section 91 and 92 of the Indian Evidence Act (Now, relevant provisions of Bharatiya Sakshya Adhiniyam) are important for Arbitration Proceedings.

Vinayak Vishnu Sahasrabudhe vs B.G. Gadre And Ors. on 11 March, 1958

In this case, the Hon'ble Bombay High Court has laid down that it is true that the Arbitration Act does not provide for the procedure to be followed by the arbitrators. Even so it is well settled that the arbitrators are bound to apply

[14] *It may be noted that Indian Evidence Act, 1872 has now been repealed by virtue of Bharatiya Sakshya Adhiniyam, 2023 (BSA). Therefore, the provisions of BSA prevails as on date.*

the principles of natural justice. One of those principles is that nothing prejudicial to a party shall be done behind its back or without notice to that part.

2. ADDUCING EVIDENCE UNDER SECTION 34 OF THE ARBITRATION ACT

Introduction

In commercial disputes, documentary evidence forms the primary basis of a claim and it is essential for the parties to the matter to establish the authenticity and reliability of documents.

As we know that the arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but this does not mean that they play no role during the Arbitration Proceedings. Arbitration Proceedings are *pari materia* to the proceedings under the Code of Civil Procedure. So, it will not be incorrect to say that the principle enshrined in the Civil Procedure Code and Bharatiya Sakshya Adhiniyam, 2023 can be applied by the arbitration Tribunal during the proceedings unless they inconsistent with the provisions of Arbitration and Conciliation Act, 1996.

In Arbitration Proceedings, parties generally relies on many documentary evidences and it is also important that these documents are proved by producing witness on affidavit. Therefore, it becomes important that Arbitrator should understand the law relating to filing evidence on Affidavit.

Provisions relating to filing of evidences on Affidavit

Under the principle of Bharatiya Sakshya Adhiniyam, 2023, the burden of proof for unadmitted facts rests squarely on the party asserting them.

Under rule 4(2) of order 11, the statement of admissions and denials shall set out explicitly, whether such party was admitting or denying:

(a) correctness of contents of a document;

(b) existence of a document;

(c) execution of a document;

(d) issuance or receipt of a document;

(e) custody of a document.

Further according to the Explanation, a statement of admission or denial of the existence of a document made in accordance with sub-rule (2)(b) shall include the admission or denial of the contents of a document.

Therefore, the evidence of affidavit are required to be prepared on the basis of admission and denial.

Also, Rule 4(3) of Order XI provides each party shall set out reasons for denying a document under any of the above grounds and bare and unsupported denials shall not be deemed to be denials of a document and proof of such documents may then be dispensed with at the discretion of the Court.

Arbitrator can *mutatis mutandis* consider that below mentioned principles for form and requirements of Affidavits:

(a) Affidavit should be confined to, and should follow the chronological sequence of, the dates and events that are relevant for proving any fact or any other matter dealt with;

(b) Where the court is of the view that an affidavit is a mere reproduction of the pleadings, or contains the legal grounds of any party's case, the court may, by order, strike out the affidavit or such parts of the affidavit, as it deems fit and proper;

(c) Each paragraph of an affidavit should, as far as possible, be confined to a distinct portion of the subject;

(d) An affidavit shall state—

> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information or belief.

(e) an affidavit should—

> (i) have the pages numbered consecutively as a separate document (or as one of several documents contained in a file);
>
> (ii) be divided into numbered paragraphs;
>
> (iii) have all numbers, including dates, expressed in figures; and
>
> (iv) if any of the documents referred to in the body of the affidavit are annexed to the affidavit or any other pleadings, give the annexures and page numbers of such documents that are relied upon.

The judgement of Hon'ble Supreme Court in *Fiza Developers & Inter-Trade P.Ltd vs Amci (I) P. Ltd. & Anr on 27 July, 2009* earlier gave a clear understanding on the cross-examination of the persons swearing to the affidavit.

In this case, it *inter alia* was laid down that applications under section 34 of the Act are summary proceedings with provision for objections by the defendant/respondent, followed by an opportunity to the applicant to `prove' the existence of any ground under section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the defendant/respondent to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The Court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under section 34 of the Act.

However, this position was changed by virtue of the Judgment of Hon'ble Supreme Court in *M/S Emkay Global Financial Services Ltd. vs Gindhar Sondhi on 20 August, 2018*.

In this case Fiza Developers (supra) was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Section 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross- examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties.

Further, in the case of *M/S. Canara Nidhi Limited vs M. Shashikala on 23 September, 2019*, the Hon'ble Supreme Court, laid emphasis on exceptional circumstance for granting opportunity to file affidavits and to cross-examine the witnesses.

3. DRAFTING AN AFFIDAVIT

Order 19 of Civil Procedure Code

Rule 1: Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

Rule 3(1): Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

Essential elements of an affidavit

- The affidavit should preferably present the relevant facts arranged in chronological order of dates and events to establish the matter in issue.
- Each paragraph should, as far as possible, be confined to a distinct portion of the subject.
- The affidavit should indicate which statements are based on personal knowledge and which are based on information or belief, along with the source of such information or belief.
- The statement should be made by a person competent in law (deponent).
- The contents should be relevant and directly connected with the facts of the case.
- It should be expressed in the first person.
- It must be signed and affirmed before a Magistrate or other authorised officer.
- The affidavit should be properly structured with consecutively numbered pages and paragraphs, dates expressed in figures, and relevant documents clearly annexed with reference to their annexure and page numbers.

Lesson 5: Preparation and Execution of Arbitral Award

1. Oil and Natural Gas Corporation Ltd. v. M/s G & T Beckfield Drilling Services Pvt. Ltd. decided by Supreme Court on 2nd September, 2025

In this case, the apex court clarified the scope of an arbitral tribunal's authority to grant interest during the pendency of proceedings.

The Court ruled that arbitrators retain their statutory power to award pendente lite interest unless the parties' agreement contains language that either explicitly or through necessary inference removes this authority. A provision simply stating that no interest shall accrue on delayed or disputed payments does not, standing alone, amount to such a restriction.

Examining Clause 18.1 of the contract in question, the Court found no express prohibition against pendente lite interest. The clause merely specified that the Corporation would not pay interest on delayed payments or contested amounts. Critically, it neither restricted the tribunal's authority to grant such interest nor declared that interest would be unavailable under all circumstances. The Court therefore concluded that Clause 18.1 left intact the tribunal's statutory discretion to award interest pending resolution of the dispute.

For details:
https://api.sci.gov.in/supremecourt/2019/22623/22623_2019_13_1502_63893_Judgement_02-Sep-2025.pdf

Lesson 6: Challenge to Award and Appeals

1. M/s Lancor Holdings Limited v. Prem Kumar Menon & Ors. decided by Supreme Court on 31st October, 2025

Delay in the delivery of an arbitral award, by itself, is not sufficient to set aside the award

The Hon'ble Supreme Court in this case has held that delay in the delivery of an arbitral award, by itself, is not sufficient to set aside that award. However, each such case would have to be examined on its own individual facts to ascertain whether that delay had an adverse impact on the final decision of the arbitral tribunal, whereby that award would stand vitiated due to the lapses committed by the arbitral tribunal owing to such delay. It is only when the effect of the undue delay in the delivery of an arbitral award is explicit and adversely reflects on the findings therein, such delay and, more so, if it remains unexplained, can be construed to result in the award being in conflict with the public policy of India, thereby attracting Section 34(2)(b)(ii) of the Act of 1996 or Section 34(2A) thereof, as it may also be vitiated by patent illegality. Further, it would not be necessary for an aggrieved party to invoke the remedy under Section 14(2) of the Act of 1996 as a condition precedent to lay a challenge to that delayed and tainted award under Section 34 thereof.

The basis and public policy underlying the process of arbitration is that it is less time-consuming and results in speedier resolution of disputes between the parties, The Court hels that if that premise is not fulfilled by an unworkable arbitral award that does not resolve the disputes between the parties, on one hand, leaving them with no choice but to initiate a fresh round of arbitration/litigation but the arbitrator, in the meanwhile, also changed their positions, irrevocably altering the pre-existing balance between the parties prior to the arbitration, then such an arbitral award would not only be in conflict with the public policy of India but would also be patently illegal on the face of it. It would therefore be liable to be set aside under Section 34(2)(b)(ii) and/or Section 34(2A) of the Arbitration and Conciliation Act, 1996.

It was also held that where the conditions for exercise of power under Article 142 of the Constitution are satisfied, such jurisdiction may be justifiably exercised in accordance with the principles laid down in Gayatri Balasamy v. ISG Novasoft Technologies Limited, 2025 INSC 605.

For details:
https://api.sci.gov.in/supremecourt/2019/6448/6448_2019_11_1501_65336_Judgement_31-Oct-2025.pdf

2. **Addition in the Topic "Public Policy under Section 34"**

After the last line of topic Public Policy under Section 34, the following should also be read"

"However, it may be noted that Explanation 1 to section 34(2) states that for the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

> *(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*
>
> *(ii) it is in contravention with the fundamental policy of Indian law; or*
>
> *(iii) it is in conflict with the most basic notions of morality or justice.*

Further, Explanation 2 states that for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

3. ***Nagaraj V. Mylandla versus PI Opportunities Fund-I and others Etc. decided by Supreme Court on 25th March, 2026***

A party which has failed in its challenge to the arbitral award before the foreign seat court cannot seek to reopen factual issues before the enforcement court.

Facts of the Case

The dispute arose when a company failed to provide an exit to three foreign investors, leading the investors to initiate SIAC arbitration. The tribunal held the company and its promoters liable and awarded around ₹1,400 crore in damages. The award later challenged by the party(ies) and rejected by the Singapore High Court. A challenge was also made before the High Court of Madras and it was declared that the award is enforceable as a decree.

Decision

The Apex Court has said that in this scenario, we must necessarily bear in mind that though the grounds under Section 48 of the Arbitration Act would have to be applied independently, in the course of such an exercise by the enforcement court in India, a party which has failed in its challenge to the arbitral award before the seat court cannot seek to reopen factual issues that were argued on merits and settled by such court once again before the enforcement court.

It is not open to a party whose contentions on the merits of a particular issue on facts have been rejected by the seat court to seek review thereof by the enforcement court. Such a 'meritsbased' evaluation is beyond the scope of the enforcement court's jurisdiction under Section 48 of the Arbitration Act and would be barred by application of the doctrine of 'transnational issue estoppel'.

1. SURVEILLANCE ACTON BY BSE

Graded Surveillance Measures (GSM)

Securities and Exchange Board of India (SEBI) and Exchanges in order to enhance market integrity and safeguard interest of investors, have introduced Graded Surveillance Measures(GSM) wherein certain identified securities shall be subjected to enhanced monitoring and surveillance actions.

The main objective of these measures is to :

- alert and advice investors to be extra cautious while dealing in these securities and
- advice market participants to carry out necessary due diligence while dealing in these securities.

The updated GSM framework is provided below:

(i) The GSM stages for graded actions are as under:

Stage	Surveillance Actions
I	Applicable margin rate shall be 100% And price band of 5% or lower as applicable
II	Trade for trade with price band of 5% or lower as applicable and Additional Surveillance Deposit (ASD) of 50% of trade value to be deposited by the Buyers
III	Trade for trade with price band of 5% or lower as applicable and Trading permitted once a week (Every Monday/1st trading day of the week) And ASD (100% of trade value) to be deposited by the buyers
IV	Trade for trade with price band of 5% or lower as applicable and Trading permitted once a week (Every Monday/1st trading day of the week) And ASD (100% of trade value) to be deposited by the buyers with no upward movement.

(ii) Securities shortlisted under both the Criteria shall be placed in Stage 0 upon shortlisting and shall be monitored for Stage movement based on the framework.

(iii) The retention period of Additional Surveillance Deposit (ASD) shall be reduced to 1 month.

(iv) With respect to the listed shell companies which are presently under GSM Stage VI, the provisions of existing GSM framework shall continue to apply.

Additional Surveillance Measure (ASM)

Securities and Exchange Board of India (SEBI) and Exchanges in order to enhance market integrity and safeguard interest of investors, have been introducing various enhanced pre-emptive surveillance measures such as reduction in price band, periodic call auction and transfer of securities to Trade to Trade category, Graded Surveillance Measure, Additional Surveillance Measure Framework from time to time.

There are two types of ASM Framework

- Long Term ASM Framework
- Short Term ASM Framework

ASM framework is in conjunction with all other prevailing surveillance measures being imposed by the Exchanges from time to time and as may be applicable.

Further, it may also be noted that the shortlisting of securities under ASM is purely on account of market surveillance and it should not be construed as an adverse action against the concerned company.

2. [15]Standard Operating Procedures (SOP) for dispute resolution under the Stock Exchange arbitration mechanism for disputes between a Listed Company and/or Registrars to an Issue and Share Transfer Agents (RTAs) and its Shareholder(s)/Investor(s)

1. Applicability

1.1. The provisions of SOP shall be applicable to Listed Companies / RTAs offering services on behalf of listed companies. In case of claims or disputes arising between the shareholder(s)/ investor(s) of listed companies and the RTAs, the RTAs shall be subjected to the stock exchange arbitration mechanism. In all such instances, the listed company shall necessarily be added as a party.

1.2. The Arbitration Mechanism shall be initiated post exhausting all actions for resolution of complaints including those received through SCORES Portal. The Arbitration reference shall be filed with the Stock Exchange where the initial complaint has been addressed.

2. Maintenance of a Panel of Arbitrators and Code of Conduct for Arbitrators

2.1 The maintenance of Panel of Arbitrators and the Code of Conduct for Arbitrators shall be in line with the current norms being followed by the Stock Exchanges for arbitration mechanism.

3. Arbitration

3.1 The limitation period for filing an arbitration application shall be as prescribed under the law of limitation, i.e., The Limitation Act, 1963.

3.2 In case of arbitration matters involving a claim of up to Rs. 25 lakhs, a sole arbitrator shall be appointed and, if the value of the claim is more than Rs. 25 lakhs, a panel of three arbitrators shall be appointed.

3.3 The process of appointment of arbitrator(s) shall be completed by the stock exchange within 30 days from the date of receipt of complete application from the applicant.

3.4 Disputes pertaining to or emanating from investor service requests listed below may be considered for arbitration.

• transfer/transmission of shares,
• demat/remat,
• issue of duplicate shares,
• transposition of holders,
• investor entitlements like corporate benefits, dividend, bonus shares, rights entitlements,
• credit of securities in public issue,
• interest /coupon payments on securities and delay in processing/wrongful rejection of aforesaid investor service requests

4. Appellate Arbitration

4.1 Any party aggrieved by an arbitral award may file an appeal before the appellate panel of arbitrators of the stock exchange against such award within one month from the date of receipt of arbitral award by the aggrieved party.

4.2 The appellate panel shall consist of three arbitrators who shall be different from the one(s) who passed the arbitral award appealed against.

4.3 The process of appointment of appellate panel of arbitrator(s) shall be completed by the stock exchange within 30 days from the date of receipt of complete application for appellate arbitration.

[15] *SOP for Bombay Stock Exchange (BSE). The SOP for NSE are also similar.*

5. Arbitration Fees

5.1 The fees per arbitrator shall be Rs. 18,000/- plus stamp duty, service charge etc. as applicable per case. The fees plus stamp duty, service charge etc. as applicable shall be collected from RTAs/ Listed companies and shareholder(s)/ investor(s) separately by the Exchange, for defraying the cost of arbitration.

5.2 If the value of claim is less than or equal to Rs.20 lakhs, then the cost of arbitration with respect to the shareholder(s)/investor(s) shall be borne by the Exchange.

5.3 Further on passing of the arbitral award, the fees and stamp charges paid by the party in whose favor the award has been passed would be refunded and the fees and stamp charges of the party against whom the award has been passed would be utilized towards payment of the arbitrator fees.

5.4 For appellate arbitration, fees of Rs. 54,000/- plus stamp duty, service charge etc. as applicable shall be paid by the appellant only. The Appellate fees shall be nonrefundable.

5.5 In case, an appellant filing an appeal is a shareholder/an investor having a claim of more than Rs. 10 lakhs, the appellant shall pay a fee not exceeding Rs. 30,000/- plus stamp duty, service charge etc. as applicable and, in case of a claim upto Rs. 10 lakhs, the appellant shall pay a fee not exceeding Rs. 10,000/- plus stamp duty, service charge etc. as applicable. Further expenses thus arising shall be borne by the Stock Exchanges and the Investor Protection Fund of Stock Exchanges equally.

6. Place of Arbitration

6.1 The arbitration and appellate arbitration shall be conducted at the regional centre of the stock exchange nearest to the shareholder(s)/investor(s). The application under Section 34 of the Arbitration and Conciliation Act, 1996, if any, against the decision of the appellate panel of arbitrators shall be filed in the competent Court nearest to such regional centre.

7. Hearings

7.1 No hearing shall be required to be given to the parties involved in the dispute if the value of the claim or dispute is upto Rs. 25,000/-. In such a case, the arbitrator(s) shall proceed to decide the matter on the basis of documents submitted by the parties concerned.

7.2 If the value of claim or dispute is more than Rs. 25,000/-, the arbitrator(s) shall offer to hear the parties to the dispute unless parties concerned waive their right for such hearing in writing.

7.3 After appointment of the arbitrator(s) in the matter, the Exchange in consultation with the arbitrator(s) shall determine the date and time of the hearing and a notice of the same shall be given by the Exchange to the parties concerned at least ten days in advance. The parties concerned may opt for physical hearings which are conducted in the Stock Exchange Premises or hearing through Video Conference. The hearings through Video Conference may be conducted by the Stock Exchanges after taking consent from the parties concerned.

7.4 The arbitrator(s) may conduct one or more hearings, with a view to complete the case within the prescribed timelines.

8. Passing of Award

8.1 Arbitral Award

8.1.1. The arbitration proceedings shall be concluded by way of issue of an arbitral award within four months from the date of appointment of arbitrator(s).

8.1.2. The stock exchanges may extend the time for issue of arbitral award by not more than two months on a case to case basis after recording the reasons for the same.

8.2 Appeal against Arbitral Award

8.2.1. The appeal against an arbitral award shall be disposed of by way of issue of an appellate arbitral award within three months from the date of appointment of appellate panel.

8.2.2. The stock exchanges may extend the time for issue of appellate arbitral award by not more than two months on a case to case basis after recording the reasons for the same.

8.2.3. A party aggrieved by the appellate arbitral award may file an application to the court of competent jurisdiction in accordance with Section 34 of the Arbitration and Conciliation Act, 1996.

8.3 In case the parties wish to settle/withdraw the dispute, the arbitrator(s)/ appellate panel may pass an award on consent terms.

8.4 Where the award is against the Listed Company/RTA, the Listed Company/RTA shall update the status of compliance with the arbitration award promptly to the exchange.
8.5 The stock exchanges shall put in place a framework for imposition of penalty on Listed Companies in cases where Listed Companies/RTAs do not honor the arbitral award.

9. Record and Disclosures
9.1 The stock exchanges shall preserve the documents related to arbitration for five years from the date of arbitral award, appellate arbitral award or Order of the Court, as the case may be; and register of destruction of records relating to above, permanently.
9.2 The stock exchanges shall disclose on its website, details of disposal of arbitration proceedings and details of arbitrator-wise disposal of arbitration proceedings as per the formats prescribed by SEBI for already available arbitration mechanism.

Process of Arbitration

Applications may be filed by non -Trading Members against Trading Members and vice-versa. The disputing parties are advised to refer to Bye Law under Chapter XIII (3) of BSE, relating to 'Limitation', while filing an Arbitration application with BSE.

Documents to be submitted:

Following are the documents to be submitted for filing an application for arbitration alongwith fees, as applicable:

- Statement of the case explaining brief history of the relationship of applicant with the respondent, details about the dispute and the nature of transaction/s and bifurcation of the claim amount into claim on account of genuine delivery based transaction and square off transaction/s.
- Contract Notes pertaining to the transaction in dispute
- Bills issued/ received by the applicant
- Copy of the Statement of Accounts given by the Trading member.
- Documents pertaining to receipt / delivery of shares
- Any other documents in support of the claim
- An accurate list of the documents produced
- PAN / GIR No. of the applicant
- Certified copy of the Balance Sheet of the applicant showing the dues
- Copy of acknowledgement of the latest Income Tax Return

The applicant will have to file the requisite form depending upon whether the claim amount is upto ₹ 25 lakhs or above.

Appointment of Arbitrators:

An applicant has to provide the names of three arbitrators with preferences and the respondent will also have to provide the names of three arbitrators with preferences. The proposed names are entered in the Centralised Arbitrator Appointment Process (CAAP) as per SEBI circular dated March 18, 2013. In case of claims below ₹ 25 lacs, one arbitrator is appointed and in case of claims above ₹ 25 lacs, three arbitrators are appointed.

The system selects the name/s of the arbitrator/s and neither the Exchange officials nor the parties to the arbitration are directly involved in the appointment process.

Deposit of the fees for Arbitration will be exempted for client whether Applicant or Respondent, in case where the claim amount is up to ₹ 20 Lakhs, and shall be borne by the Exchange.

A copy of the documents filed by the applicant along with Forms 3, 4 and 5 / 3A, 4A and 5A (as applicable) are sent to the respondent advising him / her / them to submit the details of counter claim, if any, consent to the proposed arbitrator / appointment of arbitrator (as applicable), payment of arbitration fees (as applicable). Both parties are intimated by BSE regarding the appointment of arbitrators.

Subsequently, Notice of Hearing is sent to the parties. The hearings are then arranged as decided by the Arbitrators. Minutes of every hearing is prepared and taken on record. Advocates may appear on behalf of each party subject to permission from the Arbitral Tribunal.

As per the provisions of Bye-laws under Chapter XIII 13 (c) and (d) of the Rules, Bye-laws and Regulations of BSE, the Arbitral Tribunal shall make the award within four months from the date of appointment of Arbitrators or within an extended time, if approved, which shall not be more than two months. The award has to be a speaking award. The final award is printed on stamp paper and signature(s) of Arbitrator(s)s are obtained on the final award. The award is forwarded to the applicant as well as to the respondent.

Any party to the arbitration, within 15 days from the date of receipt of Award, may request the Arbitral Tribunal to correct any computational / arithmetical / clerical / typographical / any similar error in the award or to give an interpretation of a specific point or part of the Award.

Appeal provision in the Bye-laws pertaining to Non-Trading Member V/s Trading Member Arbitration

Time Limit: Appeal against the Award of the arbitrators is to be filed within one month from the date of receipt of the award.

Fees for Appeal: A party appealing against an award is required to pay the necessary appeal fees as decided from time to time.

Appeal Memo: A party desiring to prefer an appeal against an award of the Arbitrator(s) is required to submit five sets of Memorandum of Appeal.

Appeal Bench: The Appeal filed by a party against a Lower Bench award will be heard and decided by an Appeal Bench of three Arbitrators as appointed through CAAP system. The Appeal Bench decides the appeal within three months from the appointment of Arbitrators. However, on an application by either party or arbitrator(s) and for sufficient cause in recorded in writing, an extension for a maximum period of 2 months may be considered by the Exchange on case to case basis.

Settlement of awards:

If an Award is given against a Trading Member of BSE, the member is advised to deposit the awarded amount with the Exchange or make the payment directly to the award holder, within specified time period. If the member fails to do so, the awarded amount is set aside from the deposits of the trading member with the Exchange. If there are no funds available, a show cause notice is issued by BSE to the Trading Member. If the member still do not make the payment, matter is placed before the Disciplinary Action Committee (DAC) for suitable directions in the matter, including declaring the trading member, as defaulter.

Unless challenged by either of the parties, an arbitration award becomes a decree after expiry of the relevant period as applicable in law and a decree can be executed through a competent court of law.

Lesson 9: Conceptual Framework of International Commercial Arbitration

London Court of International Arbitration (LCIA)

In this topic, the following update is to be read:

Sir Michael Kerr's illustrious successors in the role of President of the LCIA Court have, to date, been Professor Dr Karl-Heinz Böckstiegel (1994 - 1998), The Honourable L Yves Fortier CC OQ QC (1998 - 2001), Professor Dr Gerold Herrmann (2001 - 2004), Jan Paulsson (2004 - 2010), Professor William W Park (2010 - 2016), Judith Gill QC (2016 - 2019),Paula Hodges KC (2019 - 2025), Professor Maxi Scherer (2025 - Present)

Lesson 11: Introduction to Conciliation and its Importance for MSMEs

1. IMPORTANT DEFINITIONS

According to section 7 of the MSME Act:

Micro Enterprises

Investment in Plant and Machinery or Equipment: Not more than Rs. 2.5 crore and Annual Turnover not more than Rs. 10 crore.

Small Enterprises

Investment in Plant and Machinery or Equipment: Not more than Rs. 25 crore and Annual Turnover not more than Rs. 100 crore.

Medium Enterprises

Investment in Plant and Machinery or Equipment: Not more than Rs. 125 crore and Annual Turnover not more than Rs. 500 crore.

Conciliation

There is no set definition of Conciliation provided in the Arbitration and Conciliation Act, 1996. However, as per the Halsbury Laws of England, conciliation is a process of persuading parties to reach an agreement.

According to Wharton's Law Lexicon, conciliation is a non-adjudicatory alternative dispute resolution process which is governed by the conditions of the Arbitration and Conciliation Act, 1996. Section 61 of the Arbitration and Conciliation Act of 1996 outlines the scope and application of conciliation. It specifies that conciliation can be applied to disputes, regardless of whether they are contractual or not, as long as they arise from a legal relationship where one party has the right to sue and the other party is liable to be sued.

Additionally, the process of conciliation can be applied to all proceedings related to the dispute. The provisions regarding conciliation are provided in part III of the Arbitration and Conciliation Act, 1996. However, Part III of the Act does not apply to disputes that cannot be submitted to conciliation due to any prevailing law.

Lesson 13: Mediation: An Introduction and its Process along with Rules

1. Qualifications of a Person to be appointed as Mediators in Court annexed or referred Mediation

As per Delhi High Court rules,4 following persons may be enlisted in the panel of Mediators/Conciliators under rule 3:

- Retired judges of the Supreme Court of India
- Retired judges of the High Court
- Retired District & Sessions Judges or retired Officers of Delhi Higher Judicial Service
- District & Sessions Judge or Officers of Delhi Higher Judicial Service
- Legal practitioners with at least five years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts.
- Experts or other professionals with at least fifteen years of standing
- Persons who are themselves experts in mediation/ conciliation

Similar qualifications are also stipulated by the Bombay High Court rules as well.

2. Disqualifications in Court Annexed Mediation

The following persons shall be deemed to be disqualified for being empanelled as mediators/conciliators:

(a) any person who has been adjudged as insolvent or persons (i) against whom criminal charges involving moral turpitude are framed by a criminal court and are pending or; (ii) Persons who have been convicted by a criminal court for any offence involving moral turpitude.

(b) any person against whom disciplinary proceedings have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.

(c) any person who is interested or connected with the subject-matter of dispute(s) or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.

(d) Any legal practitioner who has or is appearing for any of the parties in the suit or in any other proceedings(s).

(e) Such other categories of persons as may be notified by the High Court.

2. Legislative Provisions on Mediation

Mediation in India is governed by the following legal provisions:

I. The Code of Civil Procedure, 1908: Section 89 of the Code of Civil Procedure provides for the settlement of disputes through alternative dispute resolution mechanisms, including mediation.

II. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015: This Act requires parties to attempt to resolve commercial disputes through mediation before proceeding to trial.

III. The Legal Services Authority Act, 1987: This Act provides for the establishment of legal services authorities at the national, state and district levels to provide legal aid and services to the poor and marginalized sections of society, including through the use of mediation.

IV. The Companies Act, 2013: Section 442 of the Companies Act provides for the settlement of disputes between companies and their shareholders or creditors through mediation.

V. The Consumer Protection Act, 2019: This Act provides for the settlement of disputes between consumers and businesses through mediation.

Lesson 16: International and Emerging Aspects under Mediation Law

1. MEDIATION UNDER VARIOUS LEGISLATIONS

Companies Act, 2013

The provisions relating to mediation under the Companies Act, 2013 are found in Section 442. According to Section 442(1), the Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

Rule 3(1) of The Companies (Mediation and Conciliation) Rules, 2016 provides that theRegional Director shall prepare a panel of experts willing and eligible to be appointed as mediators or conciliators in the respective regions and such panel shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be notified by the Central Government.

Further according to rule 3(3), a person who intends to get empanelled as mediator or conciliator and possesses the requisite qualifications shall apply to the Regional Director in Form MDC-1.

Rule 4 of The Companies (Mediation and Conciliation) Rules, 2016 provides for the Qualifications for empanelment as Mediator or Conciliator. It states, a person shall not be qualified for being empanelled as mediator or conciliator unless he -
(a) has been a Judge of the Supreme Court of India ; or
(b) has been a Judge of a High Court ; or
(c) has been a District and Sessions Judge ; or
(d) has been a Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force ; or
(e) has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years experience ; or
(f) is a qualified legal practitioner for not less than ten years ; or
(g) is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary ; or
(h) has been a Member or President of any State Consumer Forum ; or
(i) is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation.

Further, rule 5 provides for the Disqualifications for empanelment. According to rule 5, a person shall be disqualified for being empanelled as mediator or conciliator, if he -

(a) is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending ;

(b) has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude ;

(c) has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government ;

(d) has been punished in any disciplinary proceeding, by the appropriate disciplinary authority ; or

(e) has, in the opinion of the Central Government, such financial or other interest in the subject matter of dispute or is related to any of the parties, as is likely to affect prejudicially the discharge by him of his functions as a mediator or conciliator.

Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or National Company Law Tribunal (NCLT) or National Company Law Appellate Tribunal (NCLAT), apply to the Central Government or NCLT or NCLAT, as the case may be, in such form along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in section 442(1).

Further, the Central Government or NCLT or NCLAT before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or NCLT or NCLAT, as the case may be, deems fit.

Rule 11 of The Companies (Mediation and Conciliation) Rules, 2016 provides the Procedure for disposal of matters.

(1) For the purposes of mediation and conciliation, the mediator or conciliator shall follow the following procedure, namely :-

(i) he shall fix, in consultation with the parties, the dates and the time of each mediation or conciliation session, where all parties have to be present;

(ii) he shall hold the mediation or conciliation at the place decided by the Central Government or the NCLT or NCLAT, as the case may be, or such other place where the parties and the mediator or conciliator jointly agree ;

(iii) he may conduct joint or separate meetings with the parties ;

(iv) each party shall, ten days before a session, provide to the mediator or conciliator a brief memorandum setting forth the issues, which need to be resolved, and his position in respect of those issues and all information reasonably required for the mediator or conciliator to understand the issue and a copy of such memorandum shall also be given to the opposite party or parties:

Provided that in suitable or appropriate cases, the above mentioned period may be reduced at the discretion of the mediator or conciliator;

(v) each party shall furnish to the mediator or conciliator such other information as may be required by him in connection with the issues to be resolved.

(2) Where there is more than one mediator or conciliator, the mediator or conciliators may first concur with the party that agreed to nominate him and thereafter interact with the other mediator or conciliator, with a view to resolve the dispute.

Section 442 of the Companies Act, 2013 provides a structured mechanism for resolving corporate disputes through mediation and conciliation during pending proceedings. By clearly laying down the framework for empanelment, eligibility and procedure, the provisions ensure competence, neutrality and fairness in the mediation process, while facilitating efficient and consensual resolution of disputes before the Central Government, NCLT and NCLAT.

Code of Civil Procedure, 1908 (CPC)

Section 89 of Civil Procedure Code, 1908 provides the provisions relating Settlement of disputes outside the Court including by way of mediation.

According to section 89, where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:

(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat; or
(d) mediation.

The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure ('the Code') by Amendment Acts of 1999 and 2002 was rejected by Supreme Court {Salem Advocates Bar Association, T.N. v. Union of India [(2003) 1 SCC 49]}.

Further, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Disputes Resolution (ADR) referred to in Section 89. Accordingly, the Model rules were drafted by the committee.

Also, in the case of *M/S. Afcons Infra. Ltd. & Anr vs M/S Cherian Varkey Constn Co. P. Ltd.*, while examining the nature of ADR Process under section 89 and provisions of Rule 1A of Order 10 of the CPC, the Apex court had decided that the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

Inter alia, the observations and decisions in these cases along have played a significant role in strengthening and advancing the alternative dispute resolution (ADR) framework in the country.

Commercial Courts Act, 2015

Section 12A of the Commercial Courts Act, 2015 provides the provisions relating to Pre-Institution Mediation and Settlement. According to Section 12A(1), a suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

So, the matter that does not contemplate urgent relief shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. The rules pertaining to this section were made in 2018 namely The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.

The Authorities under Legal Services Authorities Act, 1987 may be authorised for the purposes of pre-institution mediation. Further, section 12A(3) mandates the authority to complete the process of mediation within a period of three months from the date of application made by the plaintiff. If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under section 30(4) of the Arbitration and Conciliation Act, 1996. Section 30(4) of Arbitration and Conciliation Act, 1996 provides that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute. The awards can be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

Thus, Section 12A of the Commercial Courts Act, 2015 underscores the legislative intent to prioritise mediation in commercial disputes by making pre-institution mediation mandatory where no urgent interim relief is sought. By conferring mediated settlements the status of arbitral awards and enforceability as court decrees, the provision ensures certainty, finality, and efficiency in dispute resolution. This mechanism significantly promotes speedy and cost-effective resolution while reducing the burden on courts.

Consumer Protection Act, 2019

Mediation is defined as means the process by which a mediator mediates the consumer disputes under the Consumer Protection Act, 2019 (the Act). Section 37(1) of the Act provides the provisions relating to Reference to mediation. It provides that at the first hearing of the complaint after its admission, or at any later stage, if it appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation in accordance with the provisions of Chapter V.

Where the parties agree for settlement by mediation and give their consent in writing, the District Commission shall, within five days of receipt of such consent, refer the matter for mediation, and in such case, the provisions of Chapter V, relating to mediation, shall apply.

Chapter V *inter alia* provides the provisions relating to Establishment of consumer mediation cell, Empanelment of mediators, Nomination of mediators from panel, Duty of mediator to disclose certain facts and Procedure for mediation, Replacement of mediator in certain cases, etc.

Further, Department of Consumer Affairs vide notification dated has made the Consumer Protection (Mediation) Rules, 2020. Under rule 4 of these rules, The following matters shall not be referred to mediation, namely:—
(a) the matters relating to proceedings in respect of medical negligence resulting in grievous injury or death;
(b) matters which relate to defaults or offences for which applications for compounding of offences have been made by one or more parties;
(c) cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion;
(d) cases relating to prosecution for criminal and non-compoundable offences;
(e) cases which involve public interest or the interest of numerous persons who are not parties before the Commission:

Provided that, in any case other than those mentioned in this rule, the Commission before which the case is pending may choose not to refer it to mediation if it appears to the Commission that no elements of a settlement exist which may be acceptable to the parties or that mediation is otherwise not appropriate having regard to the circumstances of the case and the respective positions of the parties.

The Consumer Protection Act, 2019 institutionalises mediation as an effective mechanism for amicable resolution of consumer disputes. It clearly defines the stages, procedure, exclusions, and regulatory framework for mediation. The Act ensures that only appropriate matters are referred for settlement. This structured approach strengthens speedy, consensual, and cost-effective consumer dispute resolution without compromising public interest.

Amendment to various legislation by Mediation Act, 2023

Section 58 to 65 of the Mediation Act, 2023 is amending various legislations by adding/substituting their provisions. The list of these laws are follow:

1. The Indian Contract Act, 1872
2. The Code of Civil Procedure, 1908
3. The Legal Service Authorities Act, 1987
4. The Arbitration and Conciliation Act, 1996
5. The Micro, Small and Medium Enterprises Development Act, 2006
6. The Companies Act, 2013
7. The Commercial Courts Act, 2015
8. The Consumer Protection Act, 2019

These Act will be amended by virtue of Mediation Act, 2023 once sections 58 to 65 will be notified to come into force.

2. Updates in the Topic "Status of Convention"

As of April 2026, the Convention has 59 signatories, of which eight are parties to the Convention. A full list of signatories and parties to the Convention can be found here.

https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

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