

OPPORTUNITIES IN ALTERNATE DISPUTE RESOLUTION (ADR)



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DISPUTE RESOLUTION

Dispute Resolution:

A process of resolving a dispute or conflict between different parties

Alternative Dispute Resolution

Any means of settling disputes or conflict outside of the courtroom

DISPUTE RESOLUTION METHODS



Dispute Resolution Methods are of two types:



ADJUDICATIVE:

Arbitration
Litigation



CONSENSUAL:

Negotiation
Mediation
Conciliation
Facilitation

DISPUTE RESOLUTION METHODS



In adjudicative methods, the decision is on merits of the issues raised by parties and involves application of legal principles and applicable laws on such issues.



In consensual methods, the decision is not on merits of the case but based on the basis mutually agreeable decisions which resolve the dispute between the parties to their satisfaction, regardless of the actual merits of each individual claim under law.



In addition to being more flexible, these methods are also guided on the theory of 'a bird in the hand is worth two in the bush'.

DISPUTE RESOLUTION METHODS

In consensual methods, process can be terminated by either party to the dispute by consent, whereas, the adjudicative method can be terminated only by the party initiating / invoking the proceedings.

If any party under consensual dispute resolution chooses to submit his dispute to an adjudicative process to be decided by law on merits, the consensual process is terminated.

DISPUTE RESOLUTION



What to do when dispute arises?



Party can choose either the adjudicative method or consensual method to get the dispute resolved.

STEPS WHEN DISPUTE ARISES

1. SWITCH GEARS- Guiding a Company in getting ready for Dispute

Communications now to be drafted with an eye to legal rights and obligations

If possible vetted by counsel even in case of potential dispute

Without prejudice

2. IDENTIFY REMEDY: Early assessment of options available and guiding Drafting Clause

Is the dispute governed by an arbitration clause?

STEPS WHEN DISPUTE ARISES

3. IDENTIFY IMMEDIATE REQUIREMENTS: Putting practical insight into identifying remedies required.

Do you need urgent interim relief?

4. PRE-ARBITRATION STEPS:

Are there contractually stipulated pre-arbitration steps?

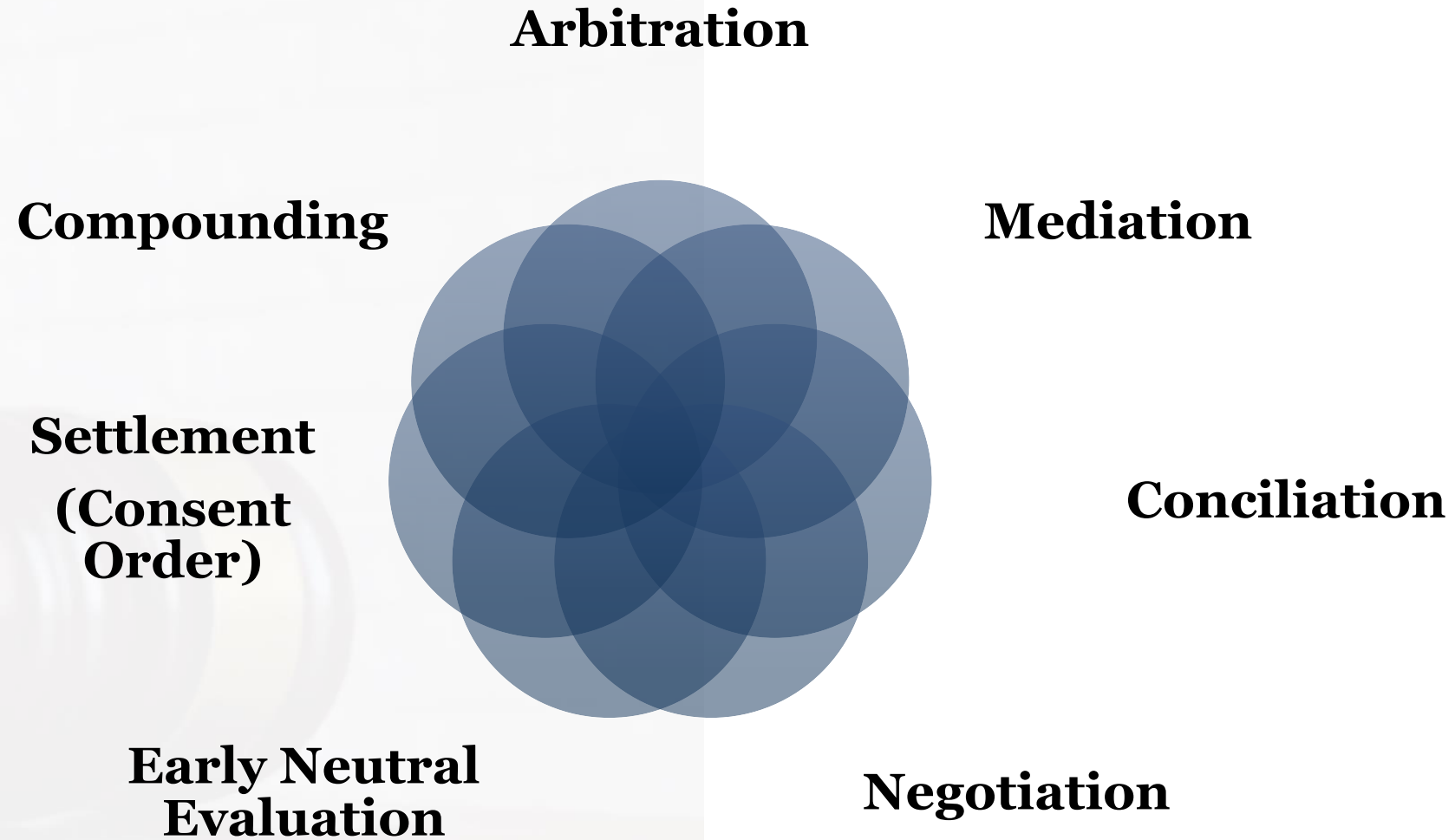
Are these mandatory to be followed? Observe language

**5. NOTICE OF BREACH AND INVOCATION OF ARBITRATION/
PRE-ARBITRATION MEDIATION**

UNIQUE ROLE OF PROFESSIONALS IN CONSENSUAL ADR

- ❖ In Consensual ADR, emphasis is often on practicality, business viability, and commercial sense, rather than intricacies of law.
- ❖ Professionals have the expertise and domain knowledge to draw upon while guiding parties
- ❖ Legal experience/ qualifications not a requirement for being mediator/ negotiator
- ❖ Process is not trammled with CPC or strict evidentiary rules
- ❖ Professionals are often “insiders” to the commercial disputes and have a more intimate nexus with the people and facts of a dispute rather than external counsels

FORMS OF ALTERNATE DISPUTE RESOLUTION





EARLY NEUTRAL EVALUATION

- ❖ Early neutral evaluation is a preliminary assessment of facts, evidence, or legal merits.
- ❖ It is a non-binding Dispute Resolution Method.
- ❖ Its purpose is to facilitate further negotiations or to give the parties an idea of what to expect upon litigation of the dispute.
- ❖ In this form of ADR, a neutral third party hears a summary of both parties' positions and then renders an opinion.

EARLY NEUTRAL EVALUATION : HOW IT WORKS

❖ It is a confidential process in which a neutral third party, who is an expert in the subject matter of the dispute, hears abbreviated arguments on the claims, defenses and expected court outcomes from each party.

❖ The Expert then issues a non-binding opinion of the likely outcome of disputed issues or the likely court resolution.

❖ An ENE session is intended to occur relatively early in the pre-trial period-so litigants can use it to reduce the disproportion between litigation transaction costs and case value and to craft the most critically focused and efficient case development plan possible.

NEGOTIATION

- ❖ Simplest form of dispute resolution mechanism.
- ❖ No specific procedure to be followed.
- ❖ No involvement of third party in the process, though parties may appoint an advocate to negotiate on their behalf.
- ❖ Face to face interaction of concerned parties.
- ❖ Parties can enter into definitive contract upon successful settlement of disputes.



NEGOTIATION

- ❖ A flexible process with no set structure, involving a neutral and objective third party.
- ❖ Facilitator encourages open communication and facilitates parties to clearly and objectively address their issues.
- ❖ Encourages communication and collaboration between parties to help them resolve a dispute, a facilitator may suggest possible solutions.
- ❖ Often, Facilitators are also crucial at a pre-conflict stage, to help prevention of friction and disputes in workplaces/ transactions

NEGOTIATION- HOW IT WORKS?



Preparation and planning.



Definition of ground rules.



Clarification and justification.



Bargaining and problem-solving.



Closure and implementation.

CONCILIATION

- Process of adjusting or settling disputes in a friendly manner through extra-judicial means. [**Black's law dictionary**]
- Conciliator brings the disputants to an agreement through negotiation. Decision of Conciliator is called "award".
- Similar to mediation but the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties.

CONCILIATION

- ❖ **Step 1:** Notice for initiation of conciliation to other party.
- ❖ **Step 2:** Appointment of Conciliator
- ❖ **Step 3:** Brief Statement of facts and grounds before Conciliator.
- ❖ **Step 4:** Conciliation Proceedings
 - ❖ Role of conciliator is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute
 - ❖ Parties are entitled to suggest terms of settlement.
 - ❖ Suggestions could be given by the conciliator on such terms for their observations but the conciliator cannot impose a settlement as conceived by him on the parties.

CONCILIATION

❖ **Step 5: Settlement Agreement**

- ❖ When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.
- ❖ The settlement agreement shall be binding have the same status and effect as an arbitral award on agreed terms under Section 30.

❖ **Step 6: Termination**

- ❖ Parties cannot initiate any arbitral or judicial proceedings during the pendency of conciliation.
- ❖ Views expressed/proposals made shall not be admissible as evidence before arbitral/judicial proceedings

MEDIATION

- ❖ Mediation involves a neutral third party as mediator who is mutually chosen by the parties.
- ❖ Approach of mediator is to identify critical as well as non-critical aspects of dispute, acceptable resolutions, underlying/hidden conflicts, and to aid parties in proposing settlement terms which satisfy each parties on elements of the dispute crucial to them and resolve the overall dispute on mutually acceptable terms.
- ❖ Mediator tries to avoid opinions and judgments. They rather facilitate and encourage parties to
upon up their communications and disclose their interests and priorities.
- ❖ Advantages
 - ❖ Informal
 - ❖ Control of parties
 - ❖ Cost saving and time effective

MEDIATION- THE MOST RELAVANT CONSENSUAL ADR?

Perhaps the most important form of consensual ADR; strong emphasis being laid upon mediation in India and abroad.

Legislations that deal with Mediation:

Companies Act 2013

Commercial Courts Act 2015

Mediation Bill 2023

MEDIATION: THE COMPANIES ACT, 2013

Section 442

- Mediation and Conciliation as viable options for dispute resolution to which the concerned parties can resort to at any stage of the proceedings between them.
- The Companies (Mediation and Conciliation Rules), 2016 have been notified by the Central Government for this purpose.
- An expert panel called as Mediation and Conciliation Panel is maintained by Central Government for conducting mediation between the parties in course of pendency of any proceedings before the Central Government or NCLT or NCLAT.

MEDIATION: THE COMPANIES ACT, 2013

Section 442

- Rule 3 of the (Mediation and Conciliation Rules), 2016 states that the Regional Director appoints the panel who appoints eligible mediators and conciliators as experts in the respective regions.
- The Regional Director invites applications in Form MDC-1 for an appointment every year during February and update the panel effective from 1st of April every year.
- Mediator/ Conciliator is also not bound by the intricacies of CPC and The Indian Evidence Act.

MEDIATION: THE COMPANIES ACT, 2013

Who can be empaneled as Mediator?

Rule 4 of the Rules, 2016 states that A person shall not be qualified for being empaneled as mediator or conciliator unless he-

- (a) has been judge of the Supreme Court of India; or
- (b) has been a judge of High Court; or
- (c) has been a District or Sessions judge; or
- (d) has been a Member or Registrar of Tribunal constituted as a National Level under any law for the time being in force; or
- (e) has been an officer in Indian Corporate Law Service or Indian Legal Service with fifteen years experience; or

MEDIATION: THE COMPANIES ACT, 2013

Who can be empaneled as Mediator?

Rule 4 of the Rules, 2016 states that A person shall not be qualified for being empaneled as mediator or conciliator unless he-

- (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 a 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.

MEDIATION: COMMERCIAL COURTS ACT, 2015

- ❖ Commercial Courts Act, 2015 provide for an option of resolving disputes by way of mediation.
- ❖ Section 12A of the Act provides that a suit which does not contemplate any urgent relief shall not be instituted unless the Plaintiff exhausts the remedy of pre-mediation in accordance with the **Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.**
 - It is time effective.
 - The settlement, if reached by way of mediation, shall have the same effect and force as that of the arbitral award.

PRE-INSTITUTION MEDIATION AND SETTLEMENT

Whether the statutory pre-litigation mediation contemplated under Section 12A of the Commercial Courts Act, 2015 is mandatory?

- ❖ The Division Bench in the batch case ***M/s Patil Automation Private Limited and others versus Rakheja Engineers Private Ltd and connected matters*** held that Section 12A of the Commercial Courts Act, which mandates pre- institution mediation, is mandatory and suits which are filed violating this mandate are liable to be rejected at the threshold under Order VII Rule 11 of the Code of Civil Procedure.
- ❖ Section 12A not a procedural provision. Exhausting pre-institution mediation by the plaintiff, with all the benefits that may accrue to the parties and, more importantly, the justice delivery system as a whole, would make Section 12A not a mere procedural provision.

THE MEDIATION BILL, 2023: OBJECTS AND REASONS

The Mediation Bill, 2023 seeks to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost-effective process and for matters connected therewith or incidental thereto.

SAILENT POINTS : THE MEDIATION BILL 2023

Section 23 affords protection against admissibility and privilege against disclosure. All mediation communication is confidential.

Section 21 ensures that non-settlement reports by the mediator do not disclose the cause of non-settlement.

It introduces the concept of “Community mediation” disputes which can be settled through community mediation with prior mutual consent of the parties to the dispute.

Under **Section 24**, any party can, at any point in the mediation, voluntarily opt out of the process.

Section 27 provides for enforcement of a mediated settlement agreement in a manner as if it were a judgment or decree passed by a court.

Online mediation is covered by the law. Mediation proceedings can be virtual, online or hybrid. This enhances the convenience of participation and allows a wide reach.

A **Mediation Council of India (MCI)** will be set up to monitor, maintain standards and lay down the ethical code of conduct for mediators and training institutions.

SAILENT POINTS : THE MEDIATION BILL 2023

Section 2. (1) Subject to sub-section (2), this Act shall apply where mediation is conducted in India, and—

(i) all or both parties habitually reside in or are incorporated in or have their place of business in India;

Section 5. (1) A mediation agreement shall be in writing, by or between parties and anyone claiming through them, to submit to mediation all or certain disputes which have arisen or which may arise between the parties.

2) A mediation agreement may be in the form of a mediation clause in a contract or in the form of a separate agreement.

(3) A mediation agreement is in writing, if it is contained in or recorded as—

(a) any document signed by the parties;

(b) an exchange of communications or letters including through electronic form as provided under the Information Technology Act, 2000;

(c) any pleadings in a suit or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other.

SAILENT POINTS : THE MEDIATION BILL 2023

Section 6. (1) Subject to other provisions of this Act, whether any mediation agreement exists or not, any party before filing any suit or proceedings of civil or commercial nature in any court, shall take steps to settle the disputes by pre-litigation mediation in accordance with the provisions of this Act:

Provided that pre-litigation mediation in matters of commercial disputes of Specified Value shall be undertaken in accordance with the provisions of section 12A of the Commercial Courts Act, 2015, and the rules made thereunder.

(2) The provisions, of sub-section (1) shall be applicable to the tribunals notified by the Central Government or a State Government, as the case may be.

Section 8. (1) If exceptional circumstances exist, a party may, before the commencement of, or during the continuation of, mediation proceedings under this Act, file suit or appropriate proceedings before a court or tribunal having competent jurisdiction for seeking urgent interim relief.

(2) The court or tribunal shall after granting or rejecting urgent interim relief, as the case may be, refer the parties to undertake mediation to resolve the dispute, if deemed appropriate

SAILENT POINTS : THE MEDIATION BILL 2023

Power of Court or Tribunal to refer parties to mediation

Section 9. (1) Notwithstanding the failure to reach any settlement under sub-section (1) of section 6, the court or tribunal may, at any stage of proceeding, refer the parties to undertake mediation, if a request to this effect is made by them.

DISPUTES NOT FIT FOR ARBITRATION

First Schedule

It lists out disputes under “Schedule-I”, which will not be eligible for mediation. The list includes disputes involving

- ❖ allegations of serious and specific fraud,
- ❖ fabrication of documents,
- ❖ forgery,
- ❖ impersonation,
- ❖ coercion,
- ❖ criminal offences
- ❖ Proceedings before appropriate Commissions, and the Appellate Tribunal for
- ❖ Electricity, under the Electricity Act, 2003 etc.

THE MEDIATION BILL, 2023: THE EIGHTH SCHEDULE

In the Companies Act, 2013 (18 of 2013), for section 442, the following section shall be substituted, namely:—

"442. Reference to mediation.—(1) Any of the parties to a proceedings before the Central Government, Tribunal or the Appellate Tribunal may, at any time apply to the Central Government, Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees, if any, as may be prescribed, for referring the matter pertaining to such proceedings for mediation and the Central Government, Tribunal or the Appellate Tribunal, as the case may be, shall refer the matter to mediation to be conducted under the provisions of the Mediation Act, 2021.

(2) Nothing in this section shall prevent the Central Government, Tribunal or the Appellate Tribunal before which any proceeding is pending from referring any matter pertaining to such proceeding suo motu to mediation to be conducted under the provisions of Mediation Act, 2021 as the Central Government, Tribunal or the Appellate Tribunal, deems fit.

(3) The mediator or mediation service provider shall file the mediated settlement agreement arrived at between the parties with the Central Government or the Tribunal or the Appellate Tribunal under the Act.

(4) The Central Government or the Tribunal or the Appellate Tribunal shall pass an order or judgment making the said Mediated settlement agreement as part thereof.

(5) The fee of the mediator shall be such as may be prescribed."

THE MEDIATION BILL, 2023: OBJECTS AND REASONS

The Mediation Bill, 2023 seeks to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost-effective process and for matters connected therewith or incidental thereto.

WHO CAN BE THE MEDIATOR?



Unless agreed upon by the parties, Mediator can be :



registered with the Council



empanelled by a court annexed mediation centre



empanelled by an Authority constituted under the Legal Services Authorities Act, 1987; and

ARBITRATION



“Arbitration” means any arbitration whether or not administered by permanent arbitral institution; [**Sec 2(1)(a), Arbitration & Conciliation Act 1996**]



NSE defines Arbitration as a quasi-judicial process of settlement of disputes between Trading Member, Investor, Clearing Member, Authorised Person, Listed Company etc. Arbitration aims at quicker legal resolution for the disputes.

ARBITRATION



Arbitration is a dispute resolution mechanism in which parties submit a dispute to one or more neutral third party (Arbitrator) who renders a final and binding decision after hearing both parties. The decision by the arbitrator is enforceable in the Courts.



Arbitration is a quasi-judicial method to resolve a dispute with minimum court intervention.

WHY ARBITRATION?

- ❖ Party autonomy
- ❖ Faster and effective
- ❖ Suitable for technical disputes
- ❖ Reduced costs
- ❖ Quick redressal

TYPES OF ARBITRATION

Ad-hoc arbitrations: Administered by the concerned arbitrator or arbitrators themselves *sans* any procedure to appoint arbitrators, procedure for hearings and filings and any aspect relating to the proceedings;

Institutional arbitrations: Specialized institution governs the administration of the arbitration having specific rules, pool of arbitrators, appointment procedure and other aspects. Delhi International Arbitration Centre (DIAC), Nani Palkhivala Arbitration Centre, Mumbai Centre for International Arbitration etc., are some of the leading institutional arbitration centers.

Domestic Arbitration & International Commercial Arbitration

CONTOURS OF DOMESTIC ARBITRATION

- ❖ Arbitration in India is governed under the provisions of Arbitration and Conciliation Act, 1996. The Act was enacted to bring together the laws relating to domestic, international commercial arbitrations and their implementation.
- ❖ Although the Act does not define domestic arbitration, Part-I of the Act contains several meanings which clear its meaning.
- ❖ A holistic reading of the provisions suggest the following basic features of domestic arbitration:
 - ❖ Merits of dispute and procedure for arbitration is as per the laws applicable in India.
 - ❖ The arbitration is conducted in India.

INTERNATIONAL COMMERCIAL ARBITRATION

❖ International Commercial Arbitration is an arbitration where either of the parties is a foreign national or resident, or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands.

❖ **International Commercial Arbitration when seat in India:**

❖ an arbitration seated in India between one foreign party and an Indian party, though defined as ICA is treated akin to a domestic arbitration and Part I of the Act applies to it.

❖ **International Commercial Arbitration when seat outside India:**

❖ where an ICA is seated outside India, Part I of the Act would have no applicability on the parties but the parties would be subject to Part II of the Act.

INTERNATIONAL COMMERCIAL ARBITRATION

Subject to the agreement to the contrary between the parties, the following provisions of the Arbitration Act shall apply even in case of ICA seated outside India:

- **Section 9:** Parties may file an application before the Court seeking interim relief even before the constitution of arbitral tribunal, or during the arbitral proceedings or even after passing but before the execution of arbitral award.
- **Section 27:** Parties may seek court assistance in evidence by seeking issuance of
• summons to third parties.
- **Section 37(1)(b):** Parties may file an Appeal against an order granting or refusing the interim relief under Section 9.
- Therefore it is on the discretion of parties to exclude applicability of Part-1 at the time of negotiating the agreement.

VALID ARBITRATION AGREEMENT/CLAUSE

What constitutes a valid Arbitration Agreement / Clause?

- ❖ Must be an agreement
- ❖ Must contain an arbitration clause / mutual reference of disputes to arbitration
- ❖ Must be in writing
- ❖ Must be signed by parties

(For e.g. Trust Deeds, Wills do not constitute arbitration agreements)

VALID ARBITRATION AGREEMENT/CLAUSE

Valid Agreement / Clause can be said exist in four manners as recognized in law:

- ❖ A Contract containing arbitration clause signed by parties
- ❖ Separate arbitration agreement signed by parties
- ❖ Arbitral Clause in a contract contained in exchange of letters
- ❖ Separate arbitration agreement contained in exchange of letters

MODEL ARBITRATION CLAUSE

Any claim, dispute or difference relating to or arising out of this Agreement shall be referred to arbitration through an arbitral tribunal comprising of three members. Each party may nominate an arbitrator within 10 days of receipt of the notice invoking arbitration, who shall then jointly nominate a third arbitrator within 2 days after their appointment.

The arbitration shall be subject to the Arbitration and Conciliation Act, 1996 as may be amended from time to time. The seat and venue of arbitration shall be New Delhi. The proceedings shall be undertaken in English.”

DRAFTING ARBITRATION CLAUSE-PITFALLS TO AVOID

- ❖ Clearly impose an obligation to arbitrate disputes.
- ❖ Clearly define the disputes to be arbitrated.
- ❖ Specify the governing law of the arbitration agreement. This is most likely to be the same as the governing law of the contract or the law of the seat of arbitration.
- ❖ Specify the seat of arbitration. Ideally this will correspond to the governing law of the contract and arbitration clause.

DRAFTING ARBITRATION CLAUSE-PITFALLS TO AVOID

- ❖ Address the qualifications and appointment of arbitrators, including the number of arbitrators.
- ❖ Specify the language of proceedings and the law to be applied by the tribunal.
- ❖ State whether institutional rules apply.
- ❖ State any obligations of confidentiality

EXISTING ADR PROCEDURES PREVALENT IN CAPITAL MARKETS

EXISTING ADR PROCEDURES PREVALENT IN CAPITAL MARKETS



Arbitration by Stock Exchanges

[Under Byelaws, Rules & Regulations of Stock Exchanges]



SEBI Settlement Procedure

[SEBI (Settlement Proceedings) Regulations 2018]



Mediation & Conciliation

[Provision u/s 442, Companies Act read with Mediation & Conciliation Rules 2016]

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

Till now, the Arbitration mechanism is used mainly against the complaints dealing with brokers and depository participants.

Applicability of Arbitration Mechanism after this SOP

Listed Companies/ RTAs offering services on behalf of listed companies along with Trading Members, Investor, Clearing Member, Authorised Person etc.

In case of claims/ disputes arising between shareholders/ investors of listed companies and the RTAs, the RTAs shall be subjected to Stock Exchange arbitration mechanism. In all such instances, the listed company shall necessarily be added as a party.

When arbitration may be referred by investors?

Arbitration Mechanism shall be initiated post exhausting all actions for resolution of complaints including those received through SCORES Portal.

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

What is the Limitation to apply?

As prescribed under The Limitation Act, 1963.

Appointment of Arbitrators:

Matters involving a claim of up to Rs.25 lakhs: Sole arbitrator

if the value of the claim is more than Rs. 25 Lakhs: Panel of three arbitrators

Process of appointment of arbitrator(s) → completed by stock exchange within 30 days from date of receipt of complete application.

Which matters may be considered by arbitration?

Disputes emanating from investor service requests such as transfer/transmission of shares, demat/remat, issue of duplicate shares, transposition of holders, investor entitlements like corporate benefits, dividend, bonus & rights shares, credit of securities in public issue, interest/coupon payments on securities and delay in processing/wrongful rejection of investor service requests.

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

What is Arbitration Fees?

Fees per arbitrator = Rs. 18,000 + stamp duty + service charge etc.

For appellate arbitration, fees = Rs.54,000 + stamp duty + service charge etc. as applicable shall be paid by the appellant only. The Appellate fees shall be non-refundable.

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

What shall be the place of arbitration?

Regional centre of the stock exchange nearest to the shareholders/investors.

[Stock Exchange where the initial complaint has been addressed.]

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

Arbitral Award

Arbitration proceedings shall be concluded by way of issue of an arbitral award within 4 months from the date of appointment of arbitrator(s).

Stock exchanges may extend the time for issue of award by not more than 2 months on a case-to-case basis after recording the reasons for the same.

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

How does Hearing take place?

If the value of the claim/ dispute is up to Rs. 25,000/-, no hearing; arbitrator(s) shall proceed to decide on the basis of documents submitted by parties. Otherwise, the arbitrator(s) shall offer to hear the parties to the dispute unless parties concerned waive their right for such hearing in writing.

Parties may opt for physical or virtual hearings by Video Conferencing.

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

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

Appellate Arbitration

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

Appellate panel shall consist of 3 arbitrators → different from the one(s) who passed the arbitral award appealed against.

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.

The application u/s 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.

Disposed of within 3 months from date of appointment of appellate panel; extension by not more than 2 months

SOP FOR DISPUTE RESOLUTION UNDER THE STOCK EXCHANGE ARBITRATION MECHANISM BY SEBI [MAY, 2022]

Record and Disclosures

Stock exchanges shall preserve the documents related to arbitration for 5 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.

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.

COMPOUNDING

A settlement mechanism, by which, the offender is given an option to pay money in lieu of prosecution, thereby avoiding long and lengthy litigation proceedings.



COMPOUNDING UNDER SEBI ACT 1992

Characteristic features of compounding u/s 24A

A non-obstante clause;

This provision applies only where a fine is an alternative to imprisonment;

The offence may be compounded either before or after the institution of any proceeding;

The offence may be compounded by SAT or by a Court, before which such proceedings are pending;

a copy of the application for compounding must also be sent to SEBI, which will place it before HPAC; and

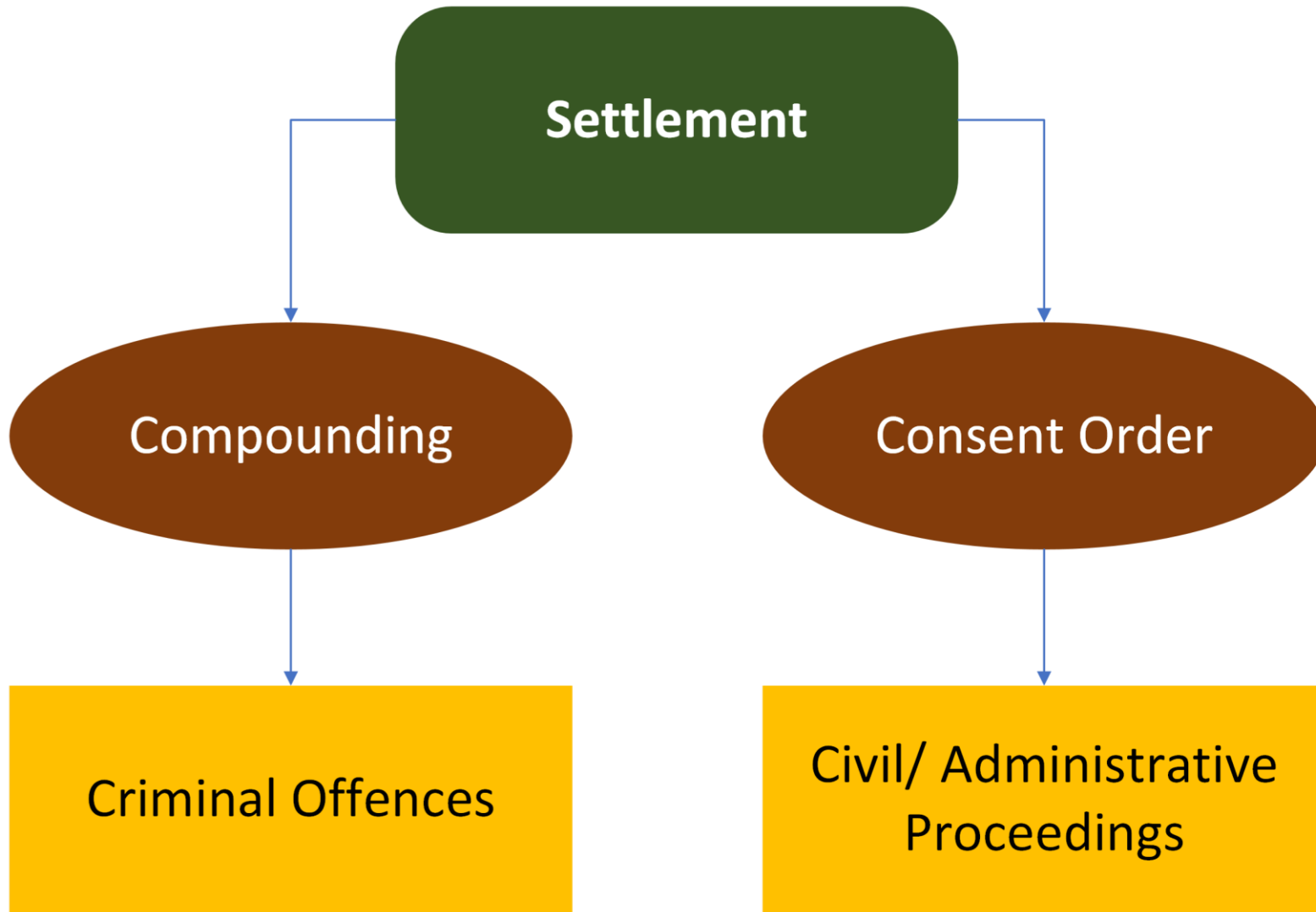
HPAC's decision, be it acceptance or objection, shall be placed before the court, which will have to pass appropriate orders.

SETTLEMENT/ CONSENT ORDER

Consent Order means an order settling administrative or civil proceedings between the regulator and a person (Party) who may prima facie be found to have violated securities laws.

It may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved. A Consent Order may or may not include a determination that a violation has occurred.





GOVERNING LAW UNDER ARBITRATION

The law which will be used to interpret the terms of the contract and to decide validity of the aspects of contract / underlying rights and obligations in case of dispute.

Law applicable to the contract and the substantive law governing the rights and obligations of the parties

- Contract Law
- Foreign Exchange Laws
- Companies and Securities laws

“This Agreement and any dispute of claims arising out of or in connection with its subject matter shall be subject to and governed by the laws in force in India”

GOVERNING LAW UNDER ARBITRATION

Indian Parties cannot “contract out” the applicability of Indian laws

28. Rules applicable to substance of dispute.—

(1) Where the place of arbitration is situate in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(iii) failing any designation of the law under clause (i) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

CURIAL LAW

The provisions regulating the procedure to be followed in the arbitration proceedings.

Law governing the process of arbitration
All procedural aspects and laws

Will include

- Limitation
- Appointment of Arbitrator, Challenge to Arbitrator
- Challenge to Award
- Interim Relief

“... Arbitration proceedings shall be conducted as per Arbitration & Conciliation Act, 1996”

CURIAL LAW

Curial Laws are tied to the “Seat” or “Place” of arbitration.

Even Indian parties in domestic arbitration may choose foreign curial laws.

SEAT, PLACE AND VENUE

- **Seat and venue not defined in the 1996 Act**
- **Mixed into “Place”- leading to confusion and conflicting arbitration clauses in contract**
 - **The word ‘place of arbitration’ is defined under the 1996 Act.**

20. Place of arbitration—

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

PLACE

Section 2(2)

This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 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.

VENUE

Venue / Place of Arbitration is geographical location chosen by the parties where arbitration proceedings shall be held.

“Arbitral proceedings shall be conducted at New Delhi”

- ❖ Not defined under the 1996 Act
- ❖ Does not impact applicability of curial or governing law
- ❖ Merely a concept of convenience
- ❖ Might change from session to session
- ❖ Examine Section 28(3)- Indian concept of Venue

SEAT

- ❖ The seat of arbitration defines the curial law or procedural law governing the arbitration and also determines which court(s) will exercise supervisory jurisdiction over such arbitration.
- ❖ Ties curial law
- ❖ Must be decided by parties, or inferred from terms of contract, or determined with view to expediency and natural justice
- ❖ To avoid conflicts in determining the jurisdiction of courts, parties often select a particular jurisdiction to the exclusion of all other jurisdiction. The parties by consent may confer exclusive jurisdiction to determine the disputes.

STEP BY STEP OVERVIEW OF ARBITRATION PROCESS

STEP 1: PRE-ARBITRATION AMICABLE RESOLUTION

- ❖ The most vital part of dispute resolution mechanism is amicable resolution at the earliest.
- ❖ Most arbitration clauses do not contemplate pre-arbitration amicable settlement mechanism.
- ❖ If the contract provides for a time-frame for amicable resolution then the same shall be mandatorily acted upon by the parties before issuing the Notice invoking Arbitration.

STEP 1: PRE-ARBITRATION AMICABLE RESOLUTION

Ways to improve

- Institutionalize the mechanism
- One of the consensual mechanisms to be adopted
- Identified consensual mechanism to be made mandatory
- Detailed procedure to be laid down

STEP 2: INVOCATION NOTICE

Contents of Arbitration Invocation Notice

- It should set out facts in brief leading to the issuance of the invocation notice.
- It should set out the nature of dispute and steps taken to mitigate the dispute.
- If the contract provides for any pre-requisite steps which are to be resorted to before the invocation of arbitration then the notice must contain all the details pertaining to the fulfilment of pre-requisite steps.
- Party invoking arbitration shall also nominate the name of the arbitrator(s) as per the terms of the contract.

- Whether arbitration proceedings can be initiated without issuing the Arbitration invocation notice?
- No, the arbitration proceedings are only deemed to initiate once the Notice as per the terms of the contract is issued to the other contracting party.

STEP 3: APPOINTMENT OF ARBITRATOR

- ❖ The appointment of Arbitrator can be by way of two modes:
 - ❖ By the consent of the parties
 - ❖ By the order of the Court.
- ❖ It is important to understand the terms of the contract to determine the constitution of the Arbitral Tribunal.
- ❖ The Arbitral Tribunal may either consist of:
 - ❖ Sole Arbitrator; or
 - ❖ Three Arbitrators (two nominee and one presiding arbitrator)

STEP 3: APPOINTMENT OF ARBITRATOR

❖ APPOINTMENT BY MUTUAL CONSENT OF THE PARTIES:

- ❖ Party invoking the Arbitration clause may nominate the name of the sole arbitrator/nominee arbitrator, as the case maybe, in terms of the contract.
- ❖ The sole arbitrator nominated cannot be the employer of the party invoking Arbitration.
- ❖ The interested party invoking arbitration shall mandatorily nominate the sole arbitrator, failing thereby, the parties may move before the court for appointment.

STEP 3: APPOINTMENT OF ARBITRATOR

❖ APPOINTMENT BY COURT:

❖ IN CASE OF SOLE ARBITRATOR:

- ❖ If the parties fail to appoint an arbitrator within 30 days from the receipt of the request to do so, the Hon'ble High Court having jurisdiction or Hon'ble Supreme Court (in case of International Commercial Arbitration) shall make the appointment, upon request.

❖ IN CASE OF 3 MEMBER ARBITRAL TRIBUNAL:

- ❖ If the two nominated arbitrators fail to appoint the presiding arbitrator within 30 days from the date of their appointment, the Hon'ble High Court having jurisdiction or Hon'ble Supreme Court (in case of International Commercial Arbitration) shall make the appointment, upon request.

STEP 3: APPOINTMENT OF ARBITRATOR

How to get empanelled as an Arbitrator under Stock Exchange Arbitration Mechanism?

Applicants who are interested to be empanelled as an Arbitrator with the 'Exchange', may send their resume along with the below application form duly filled at arbitration@nse.co.in or at the Regional Arbitration Centre's Email ID.

STEP 3: APPOINTMENT OF ARBITRATOR

Can a CS become an Arbitrator?

- ❖ There are no specified eligibility criteria to become an arbitrator.
- ❖ However, where disputes involve issues of law, having a law degree is usually preferred. If the dispute involves issue of fact, then someone who is an expert in that particular sector may be the most suitable arbitrator.
- ❖ The **Delhi International Arbitration Centre (DIAC) vide notification dated November 24, 2020** has revised the rules for empanelment of Arbitrator(s) with DIAC. Under the revised rules a Company secretary (within the meaning of the Company Secretaries Act, 1980) having minimum ten years of practice experience as a Company Secretary is eligible for empanelment as Arbitrator.

EIGHTH SCHEDULE- QUALIFICATIONS OF AN ARBITRATOR

- ❖ In view of the same, the Arbitration and Conciliation (Amendment) Act, 2019 established the Arbitration Council of India (by inserting Part IA to the Act).
- ❖ It also inserted Section 43J which stated qualifications, eligibility criteria and other norms for accreditation of the arbitrators. 43J had then been directed to the Eighth Schedule.
- ❖ The Eighth Schedule was added into the Act to enlist the qualifications, experience, and general norms applicable on an arbitrator.
- ❖ The qualifications to be an arbitrator as per Eighth Schedule were as below:
- ❖ **A company secretary with 10 years experience; and many more.**
- ❖ Though the Eighth Schedule has been omitted but the intent of the Legislature has been very clear in respect to the appointment of an arbitrator.

STEP 4- INTERIM MEASURES

- ❖ The Arbitration Act, provides for a mechanism for seeking interim reliefs at three stages:
 - ❖ Before the initiation of arbitration proceedings;
 - ❖ During the arbitral proceedings;
 - ❖ After the passing of the Arbitral Award but before its enforcement.

- ❖ The parties may either approach:
 - ❖ The Arbitral Tribunal; or
 - ❖ The Court having territorial jurisdiction.

STEP 5- CONDUCT OF PROCEEDINGS

- ❖ The arbitral tribunal shall not strictly be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.
- ❖ The parties have freedom to decide the procedural aspects of the proceedings such as:
 - ❖ Venue;
 - ❖ Language of arbitration proceedings;
 - ❖ Time period for filing of pleadings;
 - ❖ Oral evidence or based on documents;
 - ❖ Appointment of experts
- ❖ The time limit for completion of proceedings and passing of Arbitral Award is 12 months extendable to six more months.

CONDUCT OF PROCEEDINGS



Statements of Claim and Defence:

Within 6 months from the date of appointment of Arbitrator(s), the parties shall complete the filing of statements of claim and defence.



Counter-Claim and Set-off:

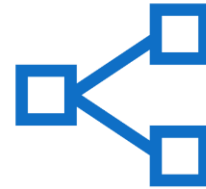
The Respondent may also file a counter-claim and set-off in addition to statement of defence.

The counter-claim and set-off must fall within the scope of the arbitration agreement under which the proceedings are initiated.

CHALLENGE TO THE APPOINTMENT OF ARBITRATOR



A party may challenge the appointment on grounds that may raise doubt to his independence or impartiality.



Arbitrator is required to disclose his:

1. relationship with parties or counsel
2. relationship to the dispute
3. interest in the dispute
4. past involvement with the dispute
5. Relationship with co-arbitrator(s)



A party may challenge the appointment within 15 days of becoming aware of any circumstances that raises doubt the independence or impartiality of the Arbitrator.

CONDUCT OF PROCEEDINGS

❖ **Failure to file Statement of Claim and Defence without sufficient cause:**

- ❖ Arbitral proceedings shall stand terminated if the Claimant fails to file the statement of claim.
- ❖ If the Respondent fails to file the statement of defence, the right to file the same shall stand forfeited and arbitral proceedings shall continue.
- ❖ Failure to file statement of defence shall not be construed as admission of allegations by the Respondent.

❖ **Role of expert in arbitral proceedings:**

- ❖ The Arbitral Tribunal may appoint an Expert for determination of specific issues.
- ❖ The Expert provides its oral or written report on specific/peculiar issues such as accounting, forensic, infrastructure, design, medicine, etc.
- ❖ The Experts may include accountants, engineers, architects, scientists, doctors, etc.
- ❖ Parties are allowed to put questions to Experts on the points of specific issues.

CONDUCT OF PROCEEDINGS

❖ **Nature of Hearing and Evidence during Arbitral proceedings:**

- ❖ The arbitral tribunal is not strictly bound by the provisions of Indian Evidence Act, 1872 or the Code of Civil Procedure 1908.
- ❖ It is on the discretion of Arbitral Tribunal to hold oral hearing for the presentation of evidence and to lead evidence only by way of pleadings and supporting documents or the evidence may be directed to be lead by way of Affidavit of Evidence followed by Examination-in-Chief and Cross Examination.
- ❖ The Arbitral Tribunal has discretion to determine the admissibility , relevance, materiality and weight of any evidence.

CONDUCT OF PROCEEDINGS

❖ **Role of Court in taking evidence**

- ❖ While arbitrators cannot compel third parties to appear before them, the tribunal or a party, with the tribunal's approval, may apply to the court for assistance in taking evidence.
- ❖ It is on the discretion of the Court to pass an order to issue summons and it is not expected to be an automatic order.

CONDUCT OF PROCEEDINGS

Termination of the mandate of the arbitral tribunal

- On the following grounds mandate of the Arbitrator(s) shall terminate and substituted arbitrator shall be appointed:
 - **De jure unable to perform:** relates to circumstances under which the Arbitrator by law is barred from continuing in office, for instance, incapacity, bankruptcy conviction for a criminal offence, etc.
 - **De facto unable to perform:** The second incapacity relates to factual inability, which includes factual situation, in which the Arbitrator is physically unable to perform his functions for instance, such as continuous ill-health, etc.
 - **The Arbitrator(s) withdraws from his office**
 - **By or pursuant to agreement of the parties to terminate the mandate.**
- Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed
- according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHALLENGING THE AWARD

- ❖ **Limitation:** The time period for filing an Application is 3 months from the date of receiving the Arbitral Award extendable to 30 additional days.
- ❖ **Which Court to apply:** The “seat” of the arbitral proceedings shall determine the Court having territorial jurisdiction to entertain the Application under Section 34 of Arbitration Act.
- ❖ **Whether automatic stay is granted on execution of Award:**
 - ❖ No, merely by filing the Application under Section 34, an automatic stay is not imposed on the operation of the Arbitral Award.
 - ❖ Party filing the Section 34 Application must accompany the same with an Application seeking stay on the operation of the Arbitral Award.
 - ❖ In case of award for payment of money, conditional stay may be granted subject to deposit of awarded amount

CHALLENGING THE AWARD

- ❖ An Application can be filed challenging the Arbitral Award under Section 34 Act on the basis of document placed on record before the arbitral tribunal.
- ❖ Grounds for challenge:
 - ❖ Proper notice of invocation or proceedings was not issued;
 - ❖ Disputes were not arbitrable;
 - ❖ Arbitration agreement was not valid in law for the time being in force;
 - ❖ Improper composition of arbitral tribunal;
 - ❖ Making of award was affected by fraud or corruption;
 - ❖ Award is against the fundamental policy of Indian law;
 - ❖ It is in conflict with basic notions of morality or justice.
 - ❖ Patent illegality

Threshold for existence of arbitration agreement

Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

❖ The Apex Court, while considering whether disputes arising out of lease deeds were governed by the Transfer of Property Act, 1882, hence, were arbitrable or not, conducted deeper analysis of two interconnected questions:

(i) the meaning of non-arbitrability of a dispute and

(ii) who decides the question of non-arbitrability.

SECTION 8- REFERENCE TO ARBITRATION

Section 8 of the Arbitration and Conciliation Act, 1996 provides that a judicial authority shall, on the basis of the arbitration agreement between the parties, direct the parties to go for arbitration. It also enlists conditions precedent, which need fulfillment before a reference can be made as per the terms of the 1996 Act.

INTERPLAY OF OPPRESSION & MISMANAGEMENT WITH SEC.8

Macquarie SBI Infrastructure Investments Pvt. Ltd. & Anr. v. K Sadananda Shetty 2021 SCC OnLine NCLAT 959

84. Since the issues arising out of the Investors Petition and the Arbitration are distinct, a party invoking the jurisdiction of the NCLT and contending oppression and mismanagement under the Companies Act cannot be held to waive its rights to arbitrate a contractual dispute arising out of an Agreement. Even otherwise, assuming that the appellants have waived their rights to arbitrate, the said determination cannot be made by the NCLT. It can only be decided by an Arbitral Tribunal in keeping with the principles of Kompetenz-kompetenz.

INTERPLAY OF OPPRESSION & MISMANAGEMENT WITH SEC.8

Macquarie SBI Infrastructure Investments Pvt. Ltd. & Anr. v. K Sadananda Shetty 2021 SCC OnLine NCLAT 959

84. ..The Learned NCLT can only decide/examine to satisfy itself on a prima facie basis regarding the existence of an Arbitration Agreement and cannot use the Arbitral Tribunal's jurisdiction to decide if arbitral proceedings are barred or not maintainable. The Arbitration and Conciliation Act 1996 empower the Arbitral Tribunal to decide its own jurisdiction, and Promoter Respondents have the liberty to raise the issue before the Arbitral Tribunal under Section 16 of the Act. Therefore, the averment of the Promoter Respondents that the Appellants have waived their right to arbitrate is unfounded and without any merit.

INTERPLAY OF OPPRESSION & MISMANAGEMENT WITH SEC.8

VGP Marine Kingdom Pvt. Ltd. & Ors. v. Kay Ellen Arnold AIR 2022 SC 5474

“5.4. So far as the second ground on which the High Court has refused to refer the dispute between the parties and appoint an arbitrator, namely that the proceedings at the instance of the Respondent as minority shareholder for oppression and mismanagement is pending before the NCLT is concerned, on the pendency of such proceedings the application Under Section 11(6) of the Act, 1996 cannot be dismissed. It should be left to the arbitrator to consider the entire aspect. The dispute is with respect to the Share Subscription and Shareholders Agreement which is altogether different from the allegations of mismanagement and oppression at the instance of minority shareholder initiated by the Respondent”

What is Non-Arbitrability

- ❖ While distinguishing between non-arbitrable claims and non-arbitrable subject matters, the SC held that ‘the former may arise on account of scope of the arbitration agreement and also when the claim is not capable of being resolved through arbitration. Generally non-arbitrability of the subject matter would relate to non-arbitrability in law.’
- ❖ To understand whether there is implicit non-arbitrability, one must look into the relevant statute to find whether parties are barred from 'contracting out and waiving the adjudication by the designated court or the specific public forum. While examining the doctrine of election, *Vidya Drolia* holds that only when there is no inconsistency between the mandatory statute and arbitration agreement can it be said that a dispute is arbitrable.
- ❖ The decision of the full bench of the Delhi High Court holding that matters covered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are arbitrable was hence overruled.

Who decides Arbitrability?

- ❖ For settling this issue, the Supreme Court examined the following circumstances:
 - i. when a request for reference to arbitration is sought before a civil court (section 8),
 - ii. when an application for appointment of an arbitrator is made (section 11),
 - iii. when arbitration has commenced but statement of defense is yet to be filed (section 16), and
 - iv. when an arbitral award is sought to be set aside (section 34).
- ❖ Since the 2016 amendment of the Act, a court, under section 8, is statutorily required to examine the validity of the arbitration agreement.
- ❖ Under section 16, an arbitrator is empowered to decide on arbitrability. Should the question of arbitrability be decided in favour of the claimant, the defense may appeal under section 34 and challenge arbitrability

Who decides Non-Arbitrability?

- ❖ While distinguishing between validity and arbitrability, the SC held that, '*only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial.*' The SC evaded from commenting on whether an on-going arbitration under section 8(3) must be stayed or deferred during the pendency of application under section 8(1).
- ❖ With respect to section 11, *Vidya Drolia* holds that the mandate for a court is to satisfy itself as to the existence of an arbitration agreement. However, with abundant caution, the SC further states that '*The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a will.*'

INITIATIVES BY ICSI FOR ADR

- ❖ The Institute of Company Secretaries of India (ICSI) plans to set up at least 20 ADR centres across India over the next 12 months to facilitate dispute resolution in line with the guidance of the union law ministry.
- ❖ The 1st ADR will be opened in Hyderabad. It was chosen as pilot for ADR centre as infrastructure is readily available. More such would be opened in Kolkata and Manesar followed by Mumbai and later plans are afoot to have such centres across India.
- ❖ “It need not be only corporates, it can be individual commercial disputes also. Company secretaries can play a role in resolving them through alternate mechanisms — arbitration, mediation, conciliation,”
- ❖ He further said that the institute is building a centre of excellence in New Town which is expected to be operational by December-end and will provide training infrastructure for the company secretaries.

INITIATIVES BY ICSI FOR ADR

- ❖ The **Post Membership Qualification (PMQ)** course on Arbitration is offered to the members of ICSI to familiarize them with legal framework of arbitration, arbitration procedures, and arbitration practice.
- ❖ Keeping in view the wide area of domestic, international Arbitration, Mediation, Conciliation and amendments recently taken place in the statutes.
- ❖ This PMQ course will be helpful for Company Secretaries who are desirous of consolidating their expertise and skills in Arbitration and related areas to position them as multi disciplinary consultants in the global service mark.
- ❖ The major realms which are covered are International Commercial Arbitration, Commercial Transactions, Drafting of Arbitration Agreements, Evidence Law, Conciliation and Mediation, Fast Track Arbitration and Role of CS in ADR.

THANK YOU

For any further clarifications, please contact,

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