

# Arbitration and Conciliation Act ,1996



**ANNAMALAI UNIVERSITY**

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**PARAG SHETH**

FIE, FIV, MICA, MASCE, LL.B, DPM

CHARTERED ENGINEER ▪ ARBITRATOR ▪ GOVT. REGD. VALUER  
INSOLVENCY PROFESSIONAL

# ARBITRATION

**Arbitration and Conciliation Act ,1996**





# Vodafone to consolidate two international arbitrations if India agrees : Says The Economic times

## Legal Tangle

Vodafone's lawyer Harish Salve:



- ↳ Vodafone will tell the second tribunal, under the India-UK BIPA, to consolidate the two proceedings if India were to consent to it
- ↳ This would be the company's defence against India's argument that the two proceedings under the different BIPAs was an abuse of the process of law

The SC had on Dec 14, 2017 said the chairman or presiding arbitrator can be appointed so that the tribunal is set up but it should not commence hearing till the Delhi HC decides the pending matter by Jan 10



### The Case

- ↳ Govt feels that the Hutchison-Vodafone deal was liable for TDS under the IT Act, and since Vodafone had not deducted TDS, the govt raised the demand of ₹**11,000 crore**. With interest and penalties, demand has risen to around ₹**20,000 crore**

- ↳ While the Supreme Court subsequently quashed the demand on Jan 20, 2012, the govt amended its IT Act retrospectively, putting the liability back on Vodafone Group

### GOVT'S STAND

Centre argues that disputes encompassing tax demands raised by a host state were beyond the scope of arbitration provided under the BIPA as taxation was a sovereign function and could only be agitated before a constitutional court of the host state

Vodafone Group has said it would agree to consolidate its two international arbitrations initiated against India in connection with a tax demand of ₹11,000 crore .....!!

# Daiichi wins Rs 3,500 crore arbitration case against Singh brothers in Delhi High Court : The Economic Times

## HC Asks Singh Bros to Pay Daiichi ₹3,500 Cr

Former Ranbaxy promoters have to pay up arbitration award by a Singapore tribunal

Our Bureau

**New Delhi:** The Delhi High Court ordered former Ranbaxy promoters Malvinder Singh and Shivinder Singh to pay Daiichi Sankyo Rs 3,500 crore as part of an arbitration award, marking a victory for the Japanese company. A Singapore tribunal had said the brothers needed to pay the money for concealing information related to wrongdoing at Ranbaxy, once India's largest

### What's At Stake

 Experts believe judgement may impact deals related to Fortis Healthcare and Religare Enterprises

Malvinder and Shivinder Singh likely to appeal against order in SC

Daiichi has tried to block the sales of Fortis and Religare Health Insurance to protect its award



#### FORTIS HEALTHCARE LTD

MCap (as on Jan 31, 2018): ₹7,213.97 cr

Promoter holding (as of Dec 2017): 34.33%, but 98.52% of this is pledged

#### RELIGARE ENTERPRISES LTD

MCap (as on Jan 31, 2018): ₹774.50 cr

Promoter and promoter group holding (as of Dec '17): 13.06% but 83.92% of this is pledged

drug maker, when Daiichi acquired it from the brothers for \$4.6 billion in 2008.

Daiichi had approached the high court to collect the dues in May 2016 but the Singhs had challenged the petition arguing that "substantive objections" existed

under India's arbitration law to make the award unenforceable. The high court's 115-page order said that it was "clearly" within the domain of the arbitral tribunal to assess damages.

Impact on Stake Sale Efforts >>> 19

# Get Ready

“India to be made the next Arbitration Hub”

# Alternate Dispute Resolution

- Dispute resolution away from the court or before the court is approached
- Negotiation
- Mediation
- Conciliation
- Arbitration
- Dispute avoidance mechanism

# Negotiation

- ▶ Between the parties done privately without involvement of any third party
- ▶ Def: - the process of discussing something with someone in order to reach an agreement with them, or the discussions themselves
- ▶ Discussion aimed at reaching an agreement.

# Mediation

- Intervention in a dispute in order to resolve it
- It is assisted negotiation.
- He just facilitates and acts like partner to the parties.
- Non binding
- Very common in divorce, child custody and related cases. Also in financial default cases.

# ARBITRATION



- It is one of the oldest methods of settling civil disputes between two or more persons
- By reference of the dispute to an independent and impartial third person, called arbitrator
- Instead of litigating the matter in the usual way through the courts,
- it saves time and expense It also avoids unnecessary technicalities and
- It ensures “Substantial justice within limits of the law”

# Arbitration

- By contractual obligation for dispute resolution
- Arbitration panel acts like a tribunal and arbitrator like a judge
- As per 'The Arbitration and Conciliation Act 1996 – As amended in 2015'
- Award is mandatory.

# Dispute Avoidance Mechanism

- Appointment of dispute avoidance authority during contract stage
- Identify possible areas of disputes
- Create measurable parameters for such areas
- Enforce mechanism to achieve the same
- Monitor of the same by authority

# Objectives of the Act

- To comprehensively cover both international and domestic arbitration and conciliation
- To make provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration
- To make Arbitral tribunal to give reasons for its arbitral award
- To ensure that the arbitral tribunal remains within the limits of its jurisdiction
- To minimize supervisory role of courts in the arbitral process

# Objectives of the Act (Cont..)

- To permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes.
- To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court
- To provide that a settlement reached by the parties as a result of conciliation proceedings will have the same status and affect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal

# Steps in Arbitration

Arbitration Clause



Submission of a Claim



Admission of a Claim and Appointment of arbitrator / arbitrators



Arbitration Proceedings



Arbitration Reward and Enforcement of it

# Definitions

## ➤ Arbitration

Arbitration is a domestic forum. It is a forum other than a Court of law for determination of disputes and differences, after hearing both the sides, in a judicial manner.

## ➤ Conciliation

**This** is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a **conciliator**, who meets with the parties both separately and together in an attempt to resolve their differences.

# ARBITRATION AGREEMENT

- 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
- A non contractual legal relationship for example may arise from a tort.
- E.g. ; A agrees to supply 100 quintals of ponni rice to B. He supplies the rice but B disputes about the quality of the rice. If they agree to refer the dispute to arbitration, they will be referring an existing or present dispute

# ESSENTIALS OF ARBITRATION AGREEMENT

- It must be in writing
- It must have all the essential elements of valid contract
- It must be to refer a dispute, present or future, between the parties to arbitration.
- It may be in the form of an arbitration clause in a contract or in the form of a separate agreement
- The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement
- if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

# ADVANTAGES AND DISADVANTAGES OF ARBITRATION

## Advantages

- Avoidance of publicity, the proceedings are held in private
- Simplicity of procedure
- Avoidance of delay and uncertainty involved in appeals
- Reduction of expenses in most cases
- Saving of time
- Appointment of a person having the required technical qualification as arbitrator
- Social efficiency, the award of the arbitrator being the decision by the consent of parties frankness in presenting facts and figures

## Disadvantages

- The arbitrator may be incompetent Injustice may result from the informality of the procedure

# POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION

- There must be a valid and a subsisting arbitration agreement capable of being enforcement
- The subject matter must be within the scope of arbitration agreement
- The application must be made by a party to the arbitration agreement or by some person claiming under him
- The applicant must make the application at the earliest stage of the proceedings
- The application must be made to the judicial authority before which the proceedings are pending
- The application must be accompanied by the original arbitration agreement
- The judicial authority must be satisfied that there is sufficient reason why the matter should not be referred

# MATTERS WHICH MAY NOT BE REFERRED

- Determination of damages in breach of contract
- Question of validity of marriage (maintenance to wife)  
Question of law (separation) Matters of personal or private rights of the parties
- Disputes regarding compliment and dignity
- Time barred claims
- Matrimonial matters (divorce)
- Testamentary matters (Validity of Will)
- Insolvency matters
- Matters relating to public charities and charitable trusts
- Lunacy proceedings
- Matters relating to the guardianship of a minor
- Matters of criminal natures Execution proceedings

# ARBITRATOR

- The person who is appointed to determine differences and disputes is called the arbitrator or arbitral tribunal.
- The proceedings before him is called arbitration proceedings
- The decision is called an AWARD

# Appointment of Arbitrator :

- The parties can agree on a procedure for appointing the arbitrator or arbitrators.
- If they are unable to agree, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator. [section 11(3)].
- The party can request Chief Justice to appoint an arbitrator. [section 11(4)].
- In case of international commercial dispute, the application for appointment of arbitrator has to be made to Chief Justice of India.
- In case of other domestic disputes, application has to be made to Chief Justice of High Court within whose jurisdiction the parties are situated.

# When the appointment of Arbitrator Challenged

- An arbitrator is expected to be independent and impartial
- If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment.
- Appointment of Arbitrator can be challenged only if
  - (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality
  - (b) He does not possess the qualifications agreed to by the parties.
- Appointment of arbitrator cannot be challenged on any other ground.
- The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award.

# When the appointment of Arbitrator Challenged (Contd..)

- ▶ However, in such case, application for setting aside arbitral award can be made to Court.
- ▶ If the court agrees to the challenge, the arbitral award can be set aside. Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to court.
- ▶ The arbitration can continue and challenge can be made in Court only after arbitral award is made.

# Composition Of Arbitral Tribunal

- Any number, as long as it is an even number, else a single arbitrator may be appointed.
- Any nationality unless otherwise agreed by the parties.
- Impartial and independent.
- Each party may appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
- One or more experts may be appointed to report on specific issues.

# Chief justice appoint Arbitrator

- If one party fails to appoint arbitrator within 30 days, or
- If the two appointed arbitrators fail to agree on the third arbitrator,
- Then the Chief Justice of High Court may appoint any person or institution.
- Chief Justice of High Court will pay due regard to any qualifications required of the arbitrator by the agreement of the parties and any other considerations required to appoint an independent and impartial arbitrator.

# Arbitral Proceedings :

- The parties shall be treated with equality and
- Each party shall be given a full opportunity to present their case.
- The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
- Failing any agreement, the A. T. may conduct the proceedings in the manner it considers appropriate.
- It has the power to determine admissibility, relevance, materiality and weight of any evidence .

# Place and language of Arbitration Award

- ▶ Location may be decided by parties, failing which, decision may be taken by A. T.
- ▶ The arbitral proceedings for a particular dispute shall commence on the date on which a request for arbitration is received by the respondent.
- ▶ Any language/s; failing which A.T. may decide.
- ▶ A.T. may order any documentary evidence to be accompanied by translation.

# Intervention by Court - :

- Now, approach to court has been drastically curtailed
- In some cases, if an objection is raised by the party, the decision on that objection can be given by Arbitral Tribunal itself.
- After the decision, the arbitration proceedings are continued and the aggrieved party can approach Court only after Arbitral Award is made.
- Appeal to court is now only on restricted grounds.
- Of course, Tribunal cannot be given unlimited and uncontrolled powers and supervision of Courts cannot be totally eliminated.
- (One of the major defects of earlier arbitration law was that the party could access court almost at every stage of arbitration - right from appointment of arbitrator to implementation of final award. Thus, the defending party could approach court at various stages and stall the proceedings.)

# Powers and Duties of Arbitrator :

- Administrative Assistance Jurisdiction
- Interim measures
- Place of arbitration and language Hearing and written proceedings
- Termination of proceedings
- Appointment of experts Court assistance in taking evidence
- Correction of errors in ,and interpretation of, awards
- After receiving notice of appointment the arbitrator should see that his appointment in order. If it is not in order it is to be put in order.
- Enter into the reference and make an award with in a prescribed time.

# Contd..

- ▶ Act judicially and impartially
- ▶ Shall have no interest in the subject matter of the dispute
- ▶ Disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartially
- ▶ Shall not misconduct himself or the proceedings
- ▶ in any way Encourage settlement of dispute by mediation or conciliation or other proceeding
- ▶ Shall observe the rules of natural justice
- ▶ Shall give a final award on the matters refer to him , unless he is empowered to make several awards.

# Arbitral Award

- The decision of Arbitral Tribunal will be by majority.
- The arbitral award shall be in writing and signed by the members of the tribunal.
- It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given.
- The award should be dated and place where it is made should be mentioned.
- Copy of award should be given to each party.
- Tribunal can make interim award also.

# Appeal against Arbitral Award

- An arbitral award may be set aside by the court only if-
- (a) The party making the application furnishes proof that-
  - (i) A party was under some incapacity, or
  - (ii) The arbitration agreement is not valid under the law to which the parties have subjected it or
  - (iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration
  - (v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties 24

# Setting aside of award

## The court finds that-

- (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- (ii) The arbitral award is in conflict with the public policy of India. An award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

## Procedure

- An application for setting aside to be made within three months from the of the arbitral award
- On receipt of an application the court may adjourn the proceedings for a period of time, in order to give the A.T. an opportunity to take such action that will eliminate the grounds for setting aside the arbitral award.

# Limitation

- ▶ Limitation Act, 1963 is applicable.
- ▶ For this purpose, date on which the aggrieved party requests other party to refer the matter to arbitration shall be considered.
- ▶ If on that date, the claim is barred under Limitation Act, the arbitration cannot continue.
- ▶ If Arbitration award is set aside by Court, time spent in arbitration will be excluded for purpose of Limitation Act. [so that case in court or fresh arbitration can start].

# Conciliation

- ▶ Between the parties done privately with involvement of known neutral third party
- ▶ We use this generally in family dispute
- ▶ It is very prevalent in labor, consumer disputes
- ▶ Works by building positive relation and confidence between the parties.
- ▶ Conciliator is generally seen as an authority and guides the parties to solution
- ▶ It is non binding Arbitration.
- ▶ Is Covered by 'The Arbitration and Conciliation Act 1996 – As amended in 2015'

# Conciliation

- ▶ The party initiating conciliation shall send to the other party a written invitation to conciliate, briefly the subject of the dispute{sec.62(1)}.
- ▶ Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate{sec.62(2)}.
- ▶ If the other party rejects the invitation, there will be no conciliation proceedings{sec.62(3)}
- ▶ If the party initiating conciliation does not receive a reply within 30 days from the date on which he sends the invitation, or within such other period of time as specified in the invitation,
- ▶ he may elect to treat this as a rejection of the invitation to conciliate and
- ▶ if he so elects, he shall inform in writing the other party accordingly{sec.62(4)}.

# Appointment of conciliators

- In the conciliation proceedings with one conciliator, the parties must agree on the name of a sole conciliator.
- In the conciliation proceedings with two conciliator, each party may appoint one conciliator.
- In the conciliator proceedings with three conciliator, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator{sec64(1)}.

# Role of conciliator

- The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.{sec.67(1)}.
- He shall be guided by principles of objectivity, fairness and justice, giving among other things- the rights and obligation of the parties, the usages of the trade concerned the circumstances surrounding the dispute, including any previous business practices between the parties {sec.67(2)}.
- The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account- the circumstances of the case the wishes the parties may express, including any request by a party that the conciliator hear oral statements the need for a speedy settlement of the dispute{sec.67(3)}.
- The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the disputes.
- Such proposals need not be in writing and need not be accompanied by a statement of the reason{sec.67(4)}.

# Procedure for conciliation

- ▶ In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.
- ▶ Communication the conciliator may invite the party to communicate with them orally or in writing Place of meeting the place shall be determined by the conciliator Disclosure of information when the conciliator receives information about the dispute subjected to specific condition that must be kept confidential, the conciliator shall not disclose that information to other parties
- ▶ Cooperation of parties with conciliator the party shall in good faith cooperate with the conciliator Suggestion by parties for settlement of disputes each party may, on his own initiative or at the invitation of the conciliator submit the suggestion for settlement of dispute.

# Termination of conciliation proceedings

- By the signing of the settlement agreement by the parties, on the date of the agreement
- By a written declaration of the conciliator, after consultation with the parties, to the effect that the further efforts at the conciliation are no longer justified, on the date of the declaration
- By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration
- By the written declaration of the party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of declaration.
- The conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

# Sharing of cost

- ▶ The cost shall be borne equally by the parties unless the settlement agreement provide for a different apportionment. all the other expenses incurred by a party shall be borne by that party.
- ▶ The conciliator may direct each party an equal amount as an advance for the costs of the conciliation which he expects will be incurred.
- ▶ Further during the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.
- ▶ If the required deposits are not paid in full by both parties within 30 days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of the declaration
- ▶ the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

# Arbitration act Background

- ▶ UNCITRAL – United Nations Commission on International Trade Laws
- ▶ Model law framed in 1985 adopted by all countries including India.
- ▶ Based on the model law 'The Arbitration and Conciliation Act 1996' was framed.
- ▶ Amended in Oct 2015 and came in practice wef 25 Jan 2016.

# Thrust for Arbitration

- Arbitration compulsory before approaching court
- Reasons of Challenges have become very limited and well defined.
- Including challenging the award.
- Who can not be arbitrator for a dispute is defined.
- To reduce court workload
- Time bound. Time limit in the act itself.

# Problem Areas

- ▶ Arbitration clause
- ▶ Party taking advise from CA, CS, their lawyers who are not trained adequately on arbitration
- ▶ In correctly framed arbitration clause
- ▶ Number of arbitrators, place and language of arbitration
- ▶ Parties taking help from lawyers for whom arbitration is a part time practice
- ▶ Retired judges as arbitrator
  - ▶ Takes court procedure to arbitration
- ▶ Ad hoc arbitration instead Institutional
- ▶ Other professional not aware of the opportunities
- ▶ Not sufficient arbitrators who are certified as per international standards

# Important Changes in Act

- If arbitration clause in contract then arbitration mandatory before court admitting the case
- Time frame
- Efforts to close doors to delay proceedings
- Use of electronic media
- Interim order related issues - enforceable
- Model fees structure is included as fourth schedule
- Appointment of arbitrators – disclosure of relationship by arbitrator, fifth schedule

# Important Changes in Act

- ▶ Respondent is allowed to put counter claim
- ▶ Oral hearing on day to day basis, without adjournment. Cost of adjournment on party seeking adjournment
- ▶ Time limit for arbitral award. Incentive and deduction of fees for arbitrators.
- ▶ Interest on the sum of award.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

1. The first and foremost welcome amendment introduced by the ordinance is with respect to definition of expression 'Court'. The amended law makes a clear distinction between an international commercial arbitration and domestic arbitration with regard to the definition of 'Court'. In so far as domestic arbitration is concerned, the definition of "Court" is the same as was in the 1996 Act, however, for the purpose of international commercial arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction. Accordingly, in an international commercial arbitration, as per the new law, district court will have no jurisdiction and the parties can expect speedier and efficacious determination of any issue directly by the High court which is better equipped in terms of handling commercial disputes.

2) **Amendment of Section 2(2):** A proviso to Section 2(2) has been added which envisages that subject to the agreement to the contrary, Section 9 (interim measures), Section 27(taking of evidence), and Section 37(1)(a), 37(3) shall also apply to international commercial arbitrations, even if the seat of arbitration is outside India, meaning thereby that the new law has tried to strike a kind of balance between the situations created by the judgments of Bhatia International and Balco v. Kaiser. Now Section 2(2) envisages that Part-I shall apply where the place of arbitration is in India and that provisions of Sections 9, 27, 37(1) (a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India unless parties to the arbitration agreement have agreed to the contrary.

3) **Amendment to Section 8: (Reference of parties to the dispute to arbitration):** In Section 8, which mandates any judicial authority to refer the parties to arbitration in respect of an action brought before it, which is subject matter of arbitration agreement . The sub-section(1) has been amended envisaging that notwithstanding any judgment, decree or order of the Supreme Court or any court, the judicial authority shall refer the parties to the arbitration unless it finds that *prima facie* no valid arbitration agreement exists. A provision has also been made enabling the party, who applies for reference of the matter to arbitration, to apply to the Court for a direction of production of the arbitration agreement or certified copy thereof in the event the parties applying for reference of the disputes to arbitration is not in the possession of the arbitration agreement and the opposite party has the same.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

**4. Amendment to Section 9 (Interim Measures):** The amended section envisages that if the Court passes an interim measure of protection under the section before commencement of arbitral proceedings, then the arbitral proceedings shall have to commence within a period of 90 days from the date of such order or within such time as the Court may determine. Also, that the Court shall not entertain any application under section 9 unless it finds that circumstances exist which may not render the remedy under Section 17 efficacious.

The above amendments to Section 9 are certainly aimed at ensuring that parties ultimately resort to arbitration process and get their disputes settled on merit through arbitration. The exercise of power under Section 9 after constitution of the tribunal has been made more onerous and the same can be exercised only in circumstances where remedy under Section 17, appears to be non-efficacious to the Court concerned.

**5. Amendment to Section 11 (Appointment of Arbitrators):** In so far as section 11, "appointment of arbitrators" is concerned, the new law makes it incumbent upon the Supreme Court or the High Court or person designated by them to dispute of the application for appointment of arbitrators within 60 days from the date of service of notice on the opposite party.

As per the new Act, the expression 'Chief Justice of India' and 'Chief Justice of High Court' used in earlier provision have been replaced with Supreme Court or as the case may be, High Court, respectively. The decision made by the Supreme Court or the High Court or person designated by them have been made final and only an appeal to Supreme Court by way of Special Leave Petition can lie from such an order for appointment of arbitrator. The new law also attempts to fix limits on the fee payable to the arbitrator and empowers the high court to frame such rule as may be necessary considering the rates specified in Fourth Schedule.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

**6. Amendment to Section 12:** Amendment to Section 12, as per the new law makes the declaration on the part of the arbitrator about his independence and impartiality more onerous. A Schedule has been inserted (Fifth Schedule) which lists the grounds that would give rise to justifiable doubt to independence and impartiality of arbitrator and the circumstances given in Fifth Schedule are very exhaustive. Any person not falling under any of the grounds mentioned in the Fifth Schedule is likely to be independent and impartial in all respects. Also, another schedule (seventh schedule) is added and a provision has been inserted that notwithstanding any prior agreement of the parties, if the arbitrator's relationship with the parties or the counsel or the subject matter of dispute falls in any of the categories mentioned in the seventh schedule, it would act as an ineligibility to act as an arbitrator. However, subsequent to disputes having arisen, parties may by expressly entering into a written agreement waive the applicability of this provision. In view of this, it would not be possible for Government bodies to appoint their employees or consultants as arbitrators in arbitrations concerning the said Government bodies.

**7. Amendment to Section 14:** Amendment of Section 14 aimed at filling a gap in the earlier provision, which only provided for termination of mandate of the arbitrator. If any of the eventualities mentioned in sub-section (1) arises. The new law also provides for termination of mandate of arbitration and substitution and his/her substitution by another one.

**8. Amendment to Section 17 (Interim Measures by Arbitral tribunal):** The old Act had lacunae where the interim orders of the tribunal were not enforceable. The Amendment removes that lacunae and stipulates that an arbitral tribunal under Section 17 of the Act shall have the same powers that are available to a court under Section 9 and that the interim order passed by an arbitral tribunal would be enforceable as if it is an order of a court. The new amendment also clarifies that if an arbitral tribunal is constituted, the Courts should not entertain applications under Section 9 barring exceptional circumstances.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

**9. Amendment to Section 23:** The new law empowers the Respondent in the proceedings to submit counter claim or plead a set-off and hence falling within the scope of arbitration agreement.

**10. Amendment to Section 24:** It requires the arbitral tribunal to hold the hearing for presentation of evidence or oral arguments on day to day basis, and mandates the tribunal not to grant any adjournments unless sufficient causes shown. It further empowers the tribunal the tribunal to impose exemplary cost where adjournment is sought without any sufficient cost.

**11. Insertions of new Section 29A and 29B( Time limit for arbitral award and Fast Track Procedure) :** To address the criticism that the arbitration regime in India is a long drawn process defying the very existence of the arbitration act, the Amended Act envisages to provide for time bound arbitrations. Under the amended act, an award shall be made by the arbitral tribunal within 12 months from the date it enters upon reference. This period can be extended to a further period of maximum 6 months by the consent of the parties, after which the mandate of the arbitrator shall terminate, unless the Court extends it for sufficient cause or on such other terms it may deem fit. Also, while extending the said period, the Court may order reduction of fees of arbitrator by upto 5% for each month such delay for reasons attributable to the arbitrator. Also, the application for extension of time shall be disposed of by Court within 60 days from the date of notice to the opposite party.

The Ordinance also provides that the parties at any stage of arbitral proceeding may opt for a fast track procedure for settlement of dispute, where the tribunal shall have to make an award within a period of 6 months. The tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without oral hearing, unless the parties request for or if the tribunal considers it necessary for clarifying certain issues. Where the tribunal decides the dispute within 6 months, provided additional fees can be paid to the arbitrator with the consent of the parties.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

**12. Amendment to Section 25:** The new Act empowers the tribunal to treat Respondent's failure to communicate his statement of defence as forfeiture of his right to file such statement of defence. However, the tribunal will continue the proceedings without treating such failure as admission of the allegations made by the Claimant.

**13) Amendment to section 28:** The new law requires the tribunal to take into account the terms of contract and trade usages applicable to the transaction. In the earlier law, the arbitral tribunal was mandated to decide disputes in accordance with the terms of the contract and to take into account the trade usages applicable to the transaction. To that extent, the new law seeks to relieve the arbitrators from strictly adhering to the terms of the contract while deciding the case. However, the arbitrator can still not ignore the terms of the contract. Therefore, the new amendment seems to bring in an element of discretion in favour of the arbitrators while making of an award.

**14) Amendment to Section 31:** This provides for levy of future interest in the absence of any decision of the arbitrator, on the awarded amount @2% higher than current rate of interest prevalent on the date of award. The current rate of interest has been assigned the same meaning as assigned to the expression under Clause (b) of Section 21 of the Interest Act, 1978.

In addition, the new Act lays down detailed parameters for deciding cost, besides providing that an agreement between the parties, that the whole or part of the cost of arbitration is to be paid by the party shall be effective only if such an agreement is made after the dispute in question had arisen. Therefore, a generic clause in the agreement stating that cost shall be shared by the parties equally, will not inhibit the tribunal from passing the decision as to costs and making one of the parties to the proceedings to bear whole or as a part of such cost, as may be decided by the tribunal.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

**15. Amendment of Section 34 (Limiting the gamut of Public Policy of India):** As per the new amendment, an award passed in an international arbitration, can only be set aside on the ground that it is against the public policy of India if, and only if, – (i) the award is vitiated by fraud or corruption; (ii) it is in contravention with the fundamental policy of Indian law; (iii) it is in conflict with basic notions of morality and justice. The present amendment has clarified that the additional ground of “patently illegality” to challenge an award can only be taken for domestic arbitrations and not international arbitrations. Further, the amendment provides that the domestic awards can be challenged on the ground of patent illegality on the face of the award but the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. The new Act also provides that an application for setting aside of an award can be filed only after issuing prior notice to the other party. The party filing the application has to file an affidavit along with the application endorsing compliance with the requirement of service of prior notice on the other party. A time limit of one year from the date of service of the advance notice on the other parties has been fixed for disposal of the application under Section 34. Significantly, there is no provision in the new Act which empowers the court or the parties to extend the aforesaid limit of one year for disposal of the application under Section 34.

# Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

16) **Amendment to Section 36 (Stay on enforcement of award):** The Ordinance provides that an award would not be stayed automatically by merely filing an application for setting aside the award under Section 34. There has to be a specific order from the Court staying the execution of award on an application made for the said purpose by one of the parties. The Ordinance aims to remove the lacunae that existed in the previous Act where pending an application under Section 34 for setting aside of arbitral award, there was an automatic stay on the operation of the award. The new law also empowers the Court to grant stay on operation of arbitral award for payment of money subject to condition of deposit of whole or a part of the awarded amount.

17) **Amendment to Section 37:** Under Section 37(1), the new law makes provision for filing of an appeal against an order of judicial authority refusing to refer the parties to arbitration under Section 8.

18) As regards enforcement of certain foreign awards, the new law seeks to add explanation of Sections 48 and 57 thereby clarifying as to when an award shall be considered to be in conflict within public policy of India. The parameters are the same as are provided under Section 34. Similarly, the expression "Court" used in Sections 47 and 56 have been defined to mean only the High Court of competent jurisdiction.

# Why Govt Promoting Arbitration?

- ▶ While India has the basic legal and physical infrastructure to support international arbitrations, we need basic institutional reforms to strengthen our arbitration framework. – President of India

# Why Govt Promoting Arbitration?

- ▶ Enabling alternate dispute resolution ecosystem is a national priority for India and we need to promote India globally as an arbitration hub. – PM
- ▶ A vibrant ecosystem of alternate dispute resolution needs to be in place as India has become the biggest centre of FDI – PM

# Why Govt Promoting Arbitration?

- ▶ Government and Judiciary will help to improve the institutional capacity necessary to create a vibrant ecosystem to make India the next big hub for international commercial arbitration. – CJI
- ▶ Arbitration is good. But real trouble starts after the award. If challenged, the case remains pending in a court for decades. - CJI

# Important take Away

- ▶ Govt and Judiciary are actively promoting Arbitration and that too Institutional Arbitration
- ▶ Ad-hoc arbitration is costly, takes more time and has no laid down rules and regulations as far as set procedure is concerned.
- ▶ Encouragement to other professionals to be certified arbitrators.
- ▶ Need to improve arbitration, so as to make it credible, reliable and efficient for the disputants to confidently opt for it.
- ▶ need to garner acceptability for India as a safe venue for arbitration among the global business community.
- ▶ A robust legal framework backed by a vibrant arbitration culture is the need of the hour.
- ▶ There is a huge untapped potential for growth of institutional arbitration in India. Both domestic and international arbitral institutions have to play a proactive role in shaping this.

# Need of the Hour

- ▶ Institutional arbitration is still not widespread in India. Needs to be encouraged and set up.
- ▶ Ad hoc arbitration is the norm. They carry the court system along with them in arbitration also.
- ▶ That goes against the cardinal principle – Do not look at the dispute from legal angle.
- ▶ We need **a pool of arbitrators**, which could include lawyers, retired judges, chartered accountants, other professionals, subject-matter experts etc.

# Need of the Hour

- ▶ They must be **trained in the process of arbitration** and who conform to a proper code of conduct.
- ▶ The **lack of specialised arbitrators** has been a crucial reason behind why companies have been unable to embrace arbitration in India.
- ▶ We need ADR lawyers who are experts in the process of arbitration and who does not prolong the process like litigation.
- ▶ We need arbitration **professionals, experienced secretarial services and effective arbitral institutions** which could provide a reliable and responsive Alternative Dispute Resolution system.
- ▶ This will help build confidence in the arbitration ecosystem in India.

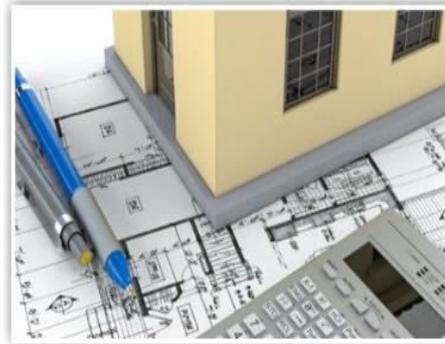
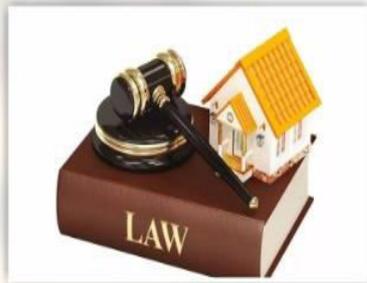
# Where We Can stand?

- Be an arbitrator
- Be an expert witness
- Choose training agency intelligently
- Be aware of arbitration issues and be able to guide your client wisely
- If possible – get onto international arbitration

# Conclusion

- There is a need to improve awareness.
- We need professionals from all professions to be trained and certified arbitrators.
- This brings in the requirement of a quality training agency with proven track record internationally.
- Certification that is recognised internationally.
- Institutes that provide arbitration environment, infrastructure, trained manpower, procedure at reasonable cost.
- Government is putting efforts in right direction but arbitration needs to come out of the clutches of judiciary.

# THANK YOU



## PARAG SHETH

Insolvency Professional, Registered Valuer  
Chartered Engineer & Arbitrator

CHARTERED ENGINEER ■ ARBITRATOR ■ GOVT. REGD. VALUER  
INSOLVENCY PROFESSIONAL

E: [parag@paragsheth.com](mailto:parag@paragsheth.com)

M : 0-98250 25953

[www.paragsheth.com](http://www.paragsheth.com)