

A GLANCE ON ARBITRATION AND CONCILIATION

Knowledge beyond imagination - LAWXPERTSMV

What is arbitration ?

Arbitration = procedure in which a dispute is submitted, by agreement of the parties

To whom ? One or more arbitrators

What they do ? A binding decision on the dispute # Defined by WIPO.

What is conciliation?

Conciliation = process of amicable settlement of disputes by the parties with the assistance of a conciliator.

In India at present the arbitration and conciliation proceedings are governed by Arbitration and Conciliation Act, 1996

What is the object of this Act ?

The main objectives of the Act can be gathered from its statement of reasons and objective:

1. To cover international commercial + domestic - arbitration & conciliation .
2. To provide fair , efficient arbitral procedure .
3. To make arbitral awards an reasoned decisions .
4. To ensure that the Arbitral tribunal remains within the limits of its jurisdiction.
5. To minimize the supervisory role of courts in the arbitral process.
6. To permit other amicable ways to settle disputes viz mediation, conciliation etc
7. To enforce arbitral award as if it were the decree of the court.
8. To treat conciliation settlements as arbitral award.
9. To provide mechanism to enforce foreign award.

Arbitration analysed !

What is arbitration ? # Relevant Provision : Sec: 2 (1) (a),

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Definition : Arbitration = any arbitration whether or not administered by permanent arbitral institution.

The above definition actually do not define what is an arbitration thus lets resort to other sources.

Other definitions :

Definition by WIPO (Refer supra)

Definition : Justice Romilly : Case Law : Collins v Collins:

Arbitration = reference to the decision of one or more persons, either with or, without an umpire of a particular matter in difference between the parties.

Common Understanding : Thus ! Arbitration = the submission by two or more parties of their dispute to the judgment of a third person called the “arbitrator”, and who is to decide the controversy in a judicial manner.

PRINCIPLES TO BE REMEMBERED

- ✓ Arbitration requires a dispute.
- ✓ An agreement to refer future disputes to arbitration is only an agreement, and not arbitration.
- ✓ Even where a dispute has arisen and the parties agree to have it decided by a third person that may not be arbitration unless that person is to act judicially.

THUS ! Arbitration require the existence of dispute between the parties and their agreement to refer it to the decision of a third person with the intention that he shall act judicially.

UPSC MAINS QUESTION 2005 : PART II: QUESTION 8 a

BRAIN TICKLE ! Can criminal matters be referred to arbitration ?

Answer : Whatever be the type of dispute, the matter in dispute must be of a civil nature. Matters of criminal nature cannot be referred to arbitration.

Reason : In most cases, reference to arbitration shuts out the jurisdiction of the courts, except as provided in the Act and since criminal courts cannot be deprived of their jurisdiction to try criminals, no criminal matter can be referred to arbitration.

Further crime is action against state thus it cannot be lightly dealt by an arbitrator.

What is an Arbitration agreement ? Relevant Provision : Section (7) (1)

Arbitration agreement = an agreement by parties to submit to arbitration in respect of a defined legal relationship, whether contractual or not.

REQUIREMENTS OF AN ARBITRATION AGREEMENT :

REQUIREMENT I – It must be concerned with some legal relationship # **ICICI Ltd., v East Coast Boat Builders and Engineers Ltd.**

REQUIREMENT II – It must refer some dispute – present or future !

REQUIREMENT III- The dispute must not be criminal in nature !

What is the effect of existence of such arbitration agreement ?

Relevant Provision section : 8

IF ! any party to an arbitration agreement brings before a judicial authority the matter covered by the agreement.

THEN ! the other party may apply for stay of the suit and for order of reference to arbitration.

NOW ! the judicial authority before which an action is sought shall refer the parties to arbitration.

PRE- REQUISITE : The only condition is that the application shall be accompanied with the original arbitration agreement or a duly certified copy thereof.

APPOINTMENT OF ARBITRATOR

Who decides the number of arbitrators ?

Relevant Provision : Section 10

Who ? The parties are free to determine the number of arbitrators

Condition : such number shall not be an even number

If not decided : the arbitral tribunal shall consist of a sole arbitrator.

Who appoints the arbitrator ?

Relevant Provision : Section 11

Who ? The parties must appoint the arbitrator within 30 days.

On failure ! The other party may apply for appointment of an arbitrator by filing an application under section 11(6).

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Insufficiency of arbitrator : Even if two arbitrators nominated by the parties do not appoint a presiding officer, an application can be made.

To whom ? The Hon'ble Chief Justice for appointment of the presiding arbitrator.

CASE LAW : West Bengal & Ors. vs. Associated Contractors

FINDINGS : The applications under section 11 is not to be moved before the Court as defined but before the Chief Justice either of the High Court or Supreme Court or their delegates as the case may be. It has no precedential value being a decision of the judicial authority, which is not a Court of record.

Appointment of arbitrator by court !

Who can appoint ?

- ✓ In the case of domestic arbitration - the Chief Justice of a High Court may appoint an arbitrator
- ✓ In the case of international commercial arbitration - the Chief Justice of the Supreme Court of India may appoint

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