AN OVERVIEW OF THE LAW ON ARBITRATION

PAWAN KR AGARWAL

INTRODUCTION

Indian legal system is known for its delays and disparities. It is a known fact that our courts are over-burdened with the pending cases and it is almost impossible to provide quick and efficient relief to the aggrieved parties. Therefore, to meet the situation, nowadays, the alternative Dispute Resolution (ADR) mechanism is used all over the world which is more effective, faster and less expensive.

Under ADR mechanism, there are basically four methods:-

a) Negotiation
b) Mediation
c) Conciliation
d) Arbitration

While the first two methods are not recognised by law, the methods of conciliation and arbitration are quasi-judicial methods to resolve a dispute with minimum of outside help. The same is now recognised by the Arbitration and Conciliation Act, 1996 (ACT 26 of 1996). The courts have always assisted in proper conduct of the arbitration proceedings and enforcement of arbitration awards.

In this article, an attempt has been made to present an overview of the Law on Domestic Arbitration. For the sake of clarity and simplicity, reference to sections of the Act or court cases has been, by and large, avoided.

BRIEF HISTORY

The system of settlement of disputes without the intervention of the court exists in India since time immemorial. There were Panchayats in every community and every village and all disputes were settled by those panchayats. It was the easiest, cheapest and quickest system of settlement of disputes. With the advent of the British Rule, attempts were made to regulate the judicial system in the country. The Regulation and Acts were passed to formulate a system of Arbitration in India since the 18th century. The Indian Contract Act, 1872 and the specific Relief Act, 1878 recognised the settlement of disputes by Arbitration. In the year 1899, The Arbitration Act of 1899 was passed though its operation was limited to the presidency towns and to such other areas to which it was extended by the then provincial Government.

The Code of civil procedure, 1908 contained the provisions of the Law on Arbitration which extended to the areas not covered by the Arbitration Act, 1899.

In 1940, to consolidate and amend the law of arbitration, the Arbitration Act 1940 was passed which came into force on 1st July 1940.

The Act of 1940 laid down the framework within which the domestic arbitration was conducted in India. There were two more enactments which dealt with foreign awards. They were the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1960.

It was widely felt that the 1940 Act, has become outdated and was not in harmony with the arbitral mechanism available to resolve the disputes in most of the countries in the world. As far back as in the year 1981, the Supreme Court of India had emphasised the need for amending the Act in Guru Nanak Foundation V. Rattan Singh & Sons [AIR 1981 SC 2075(1981) 4 SCC 634] in the following words:-

The author is a practising C. A. in Mumbai.

“Interminable time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 (Act for short). However, the way in which the proceedings under the Act are concluded and without an exception to challenged in courts, had made lawyers laugh and legal philosophers weep.”

Thus there was a strong need to update the same to meet the contemporary requirements. Accordingly, The Arbitration And Conciliation Bill, 1996 was promulgated which came into force w. e. f. 25th January, 1996 by way of ordinance and the same was enacted and came on the statute Book as The Arbitration And Conciliation Act, 1996 (26 of 1996) w. e. f. 16th August, 1996.

The New Act of 1996 was enacted to update the law of Arbitration in India on the lines of the model law of UNCITRAL (United Nations Commission on International Trade Law) on international commercial Arbitration. The new Act of 1996 has repeated the Arbitration Act, 1940 and also the Acts of 1937 and 1960.

DEFINITION

ARBITRATION can be defined as a method by which parties to a dispute get the same settled through the intervention of a third person. Parties can also settle their disputes through a permanent arbitral Institutions like, Indian Council of Arbitration, Chamber of Commerce, etc. Halsbury has defined Arbitration as follows :-

“Arbitration is the reference of dispute between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.

ADVANTAGES OF ARBITRATION OVER LITIGATION

The author is a practising C. A. in Mumbai.

1. Arbitration promises PRIVACY. In a civil court, the proceedings are held in public which often embarrasses the parties.

2. Arbitration provides liberty to choose an arbitrator, who can be a specialist in the subject matter of the dispute. The arbitrators may be experts and can resolve the dispute fairly and expeditiously as they are well versed with the usages and practices prevailing in the trade or industry.

3. The venue of arbitration can be a place convenient to both the parties. It need not be a formal platform. A simple office cabin is enough. Likewise, the parties can choose a language of their choice.

4. Even the rules governing arbitration proceedings can be defined mutually by both the parties. For example, the parties may decide that there should not be any oral hearing.

5. A court case is a costly affair. The claimant has to pay for the advocates, court fees, process fees and other incidental expenses. In arbitration, the expenses are lesser and many times the parties themselves argue their cases. The arbitration involves few procedural steps and no court fees.

6. Arbitration is faster and can be expedited. The court has to follow its own system and takes abnormally longer time to dispense of the cases. It is a trite that millions of unresolved cases are pending before the courts.

7. A judicial settlement is a complicated procedure. A court has to follow the procedure laid down in the Code of Civil Procedure, 1908 and the Rules of the Indian Evidence Act. In arbitration, the procedure is simple and informal. An arbitrator has to follow the principles of natural justice.

8. Section 34 of the Act provides very limited grounds upon which a court may set aside an award. The Act has also given the status of a decree to the award by arbitrators. The award of the arbitrators is final and generally no

The author is a practising C. A. in Mumbai.

appeal lies from the award. While in a regular civil suit there may be an appeal and appeal against appeal.

9. In arbitration, the dispute can be resolved without inflicting stress and emotional burdens on the parties which is a common feature in court proceedings.

10. In a large number of cases, 'Arbitration' facilitates the maintenance of continued relationship between the parties even after the settlement.

ARBITRATION AGREEMENT

Section 7(1) of the Act mentions that Arbitration Agreement means an agreement by the parties to submit to arbitration all or certain disputes which have been arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

An arbitration agreement should be in writing and signed by both the parties. It need not be in a particular form. However, the intention to refer to arbitration must be established. An arbitration can be agreed by way of exchange of letter, telex, telegram fax, etc.

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.

An Arbitration Agreement is a contract and it must satisfy all the essential elements of a contract. As per the Contract Act, 1872, an agreement between two parties which is enforceable by law is a contract.

The Amendment Act of 2016, now recognizes communication through electronic means also.

The author is a practising C. A. in Mumbai.

PRECAUTION IN DRAFTING ARBITRATION AGREEMENT

Proper care should be taken while drafting an Arbitration Agreement. The act lays considerable stress on party autonomy. It gives a presumption in most of the sections that unless a specific mention is made under the Arbitration Agreement to various issues, the Arbitral tribunal would have the power to decide on the same. Thus, except a few provisions which are mandatory in the Act, almost all the provisions are subject to the agreement of the parties. The parties may determine the number of arbitrators, the procedure for appointing arbitrators, rules of procedures, the venue of Arbitration, the language of the Arbitration proceedings, procedure of challenging an Arbitrator etc.

For example, if the place of Arbitration is not determined by the parties, then the Arbitral Tribunal may decide upon the same. So is the case with the language and other procedures.

It is advisable to obtain legal advise at the initial stage of drafting an agreement to avoid any differences later on.

The Arbitration Agreement should precisely mention the scope and the subject matter of the reference. It should preferably specify the venue and the language of the proceedings and the mode of services of notice or other communications.

DISPUTES EXCLUDED FROM ARBITRATION

Generally speaking all disputes of a civil nature can be referred to Arbitration e.g. breach of a contract, question of marriage right to hold premises etc. However,

certain disputes where the law has given jurisdiction to determine certain matters to specified tribunal only, cannot be referred to arbitration

The author is a practising C. A. in Mumbai.

An illustrative list of such matters is given below:-

- Testamentary matters involving questions about validity of a will.
- Disputes relating to appointment of a guardian.
- Disputes pertaining to criminal proceedings
- Disputes relating to Charitable Trusts
- Winding up of a company
- Matters of divorce or restitution of conjugal rights
- Lunacy proceedings
- Disputes arising from an illegal contract
- Insolvency matters, such as adjudication of a person as an insolvent.
- matters falling within the preview of the M. R. T. P. Act.

WHAT DISPUTES CAN BE REFERRED TO ARBITRATION

Generally speaking, all disputes of a civil nature or quasi-civil nature, which can be decided by a civil court, can be referred to arbitration. Thus disputes relating to property, right to hold an office, question of marriage or maintenance and finance, compensation for non-fulfillment of a clause in a contract, disputes in a partnership etc. can be referred to arbitration. Even the disputes between an insolvent and his creditors can be referred to arbitration by the official receiver or the official assignee with the leave of the court. Thus disputes arising in respect of defined legal relationship, whether contractual or not, can be referred to Arbitration.

It is necessary that there is a defined legal relationship between persons, companies, association of persons, body of individuals etc. created or permitted by law, before a reference can be made to arbitration.

However, the relationship may not be a contractual one. A dispute may arise out of quasi contracts e.g. the division of family property. The same may be validly referred to Arbitration.

The author is a practising C. A. in Mumbai.

APPOINTMENT OF ARBITRATORS

Though any person can be appointed as an arbitrator, generally impartial and independent persons in whom parties repose confidence are to be selected and appointed as arbitrators. Generally, Chartered Accountants, Company Secretaries, engineers, retired judges and other professionals are preferred. Parties are free to determine the number of arbitrators, provided that such number shall not be an even number. If the Arbitration Agreement is silent in this respect, the arbitral tribunal shall consist of a sole arbitrator. In cases, where three arbitrators are to be appointed, each party will appoint one arbitrator and the two appointed arbitrators will jointly appoint a third arbitrator, who will be the presiding arbitrator. In certain cases of failure to appoint the arbitrators, the Chief Justice of the High Court or his designate has been given power to appoint the arbitrator.

DUTIES AND RESPONSIBILITIES OF ARBITRATORS

The Arbitrator should give the parties to the reference a fair opportunity to remain present before the Arbitral Tribunal either in person or through their authorised representative and to produce their evidence before it to their respective claims.

An Arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of document.

An Arbitrator must be disinterested and unbiased. He must not have any financial or other interest in any of the parties to the dispute or in the outcome of the award.

Arbitration is a private tribunal for redressal of disputes. The public, therefore, may not be admitted if admission is objected to by either party to the reference or the arbitral tribunal. However, various persons who may appear are the parties themselves, all persons claiming through them respectively, and parties

The author is a practising C. A. in Mumbai.

interested for, or attending on behalf of, the parties to the reference. Parties are entitled to have persons to attend to assist them in presenting their case before the arbitral tribunal.

DISCLOSURE BY ARBITRATOR

Section 12 provides that the arbitrator before accepting his appointment shall disclose in writing to the parties such matters as are likely to give rise to justifiable doubts about his independence or impartiality. The same holds good throughout the arbitral proceedings and any time after his appointment such situations arise, he must disclose the same in writing to the parties.

The Amendment Act of 2016, has inserted Sixth Schedule to the Act which provides a format of disclosure to be given by Arbitrator.

JURISDICTION OF ARBITRATORS

The Act of 1996 empowers the arbitrators to rule on their own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose

a) An arbitration clause which forms part of a contract will be treated as an agreement independent of the other terms of the contract, and

b) A decision by the arbitral tribunal that the contract is null and void will not entail ipso jure the invalidity of the arbitration clause.

REMOVAL OF AN ARBITRATOR

The appointment of an arbitrator may be challenged only if

a)Circumstances exist that give rise to justifiable doubts as to his independence or impartiality or

b)he does not possess the qualification agreed to by the parties.

An arbitrator has to disclose his interest in writing as discussed above.

The Act provides that a party may challenge an arbitrator appointed by him also. But this can be done only for those reasons of which he becomes aware after the appointment has been made.

The Amendment Act of 2016, has inserted the Fifth Schedule to the Act which contains about 34 circumstances which may give rise to justifiable doubts as to the independence or impartiality of the Arbitrator.

REMUNERATION OF ARBITRATORS

As per normal practice, the remuneration of arbitrators is decided in the first meeting after their appointment. The remuneration will vary from case to case and there is no uniform practice in this respect. Many institutions like Indian Council of Arbitration has fixed schedule of fees payable to arbitrators appointed from the panel maintained by them.

Under Section 31, unless otherwise agreed by the parties, the cost of an Arbitrator shall be fixed by the Arbitral Tribunal. The tribunal shall specify:

a) The party entitled to costs;

b) The party who shall pay the costs;

c) The amount of costs or method of determining that amount; and

d) The manner in which the costs shall be paid.

The Amendment Act of 2016, has introduced Section 31-A titled "Regime of Costs", which elaborately deals with costs which may be awarded by the Arbitrator.

STATEMENT OF CLAIMS AND DEFENCES

The author is a practising C. A. in Mumbai.

Within the agreed period or the period determined by the tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought and the respondent shall state his defence in respect of those particulars. The parties should submit the documents they rely in support of their claim or defence.

CONDUCT OF ARBITRAL PROCEEDINGS

The arbitral tribunal has to decide whether to hold oral hearings for the presentation of evidence or whether the proceedings shall be conducted on the basis of the documents and other materials. At the request of a party, the tribunal shall hold oral hearings. The parties shall be given advance notice of any hearing and any meeting of tribunal for inspection of documents, goods and other property. The Civil Procedure Code and the Indian Evidence Act are not in terms applicable to the arbitration proceedings. Therefore, the arbitrators are free to reach to the conclusions in their own way based on the material before them. The only restriction on them is that they should not violate the rules of natural justice.

The Arbitrators may consult or appoint experts (unless otherwise agreed by the parties) to submit their report on the subject matter of the dispute.

Arbitrators may also make inspection of the subject matter of the dispute.

ARBITRAL AWARD

The award shall be in writing and the reasons on the basis of which award was passed, shall be recorded unless the parties agree otherwise. The award shall be drawn on a proper stamp paper. It shall be dated and signed by the arbitrators. The sum awarded may include the interest which the claimant is entitled. It shall

The author is a practising C. A. in Mumbai.

also provide for the costs and it shall mention the party liable to pay the costs. A signed copy of the award shall be delivered to each party.

The Act also empowers the arbitrator to make an interim arbitral award on any matter with respect to which he may make a final award.

Newly inserted Section 29A provides time-limit for arbitral award. The arbitrator is now obliged to make arbitral award within twelve months from the date he enters upon the reference. Only in certain specified cases, this time period may be extended. Even the fees of the arbitrator may be reduced if the delay is on his part. However, under section 14, an arbitrator's mandate can be terminated if he fails to act without undue delay.

The parties are free to settle the matter any time during the arbitration proceedings. The arbitrator, if satisfied about the bonafideness of the settlement, has to make the award in term of the settlement arrived at by the parties.

APPLICATION FOR SETTING ASIDE AN AWARD

The party dissatisfied with the award may within three months of receiving a copy of the award, apply to the competent Court for setting aside the order on the grounds mentioned in Section 34 of the Act. The Court cannot sit in appeal against the award and cannot interfere with the award on merits by re-appreciating the evidence. Appeal lies against the order passed by the court

under Section 34 of the Act. The grounds for setting aside the awards can be summed up as follows:

a) When the party was under some incapacity.
b) When the arbitration agreement is not valid.
c) When the party was unable to present the case and was not given proper notice.

The author is a practising C. A. in Mumbai.

d) When the award is beyond the terms of reference.
e) When the award is in conflict with the public policy.

The Amendment Act of 2016, has defined Public Policy of India in Expanation 1 to Section 34 to avoid any confusion in interpretation of the same.

ENFORCEMENT OF AWARD

The arbitral award unless it is set aside by the Court is final and binding on the parties and it can be enforced under the Civil Procedure Code in the same manner, as if it is decree of the Court. It is not necessary to file the award in the Court and obtain a decree as was necessary under the old Act i.e. Arbitration Act, 1940.

OTHER IMPORTANT AMENDMENTS BY THE ACT OF 2016

1. Section 17 has been amended which now provides wide power to arbitrators to grant interim measure of protection. The same is now enforceable as per provisions of Code of Civil Procedure, 1908. The amendment thus provides teeth to the arbitrator. He is no more a toothless tiger.

2. Fast Track Procedure- Parties may adopt fast track procedure by following the procedure in Section 29-B. This procedure is required to be completed within six months. Though it seems difficult in practical scenario, but definitely is a welcome provision.

3. Similarly, amended Section 31 provides for award of interest which may pertain to pre-arbitration, during the arbitration and post arbitration also. Besides, Section 31-A provides for cost which may be levied on loosing parties.

The author is a practising C. A. in Mumbai.

CONCLUSION

The Arbitration and Conciliation Act, 1996 seeks to achieve expeditious and effective solution for redressal of disputes. The new law is expected to motivate the parties to settle their disputes without intervention of the court. It will also instil confidence in the international mercantile community. The legal fraternity can look forward to a considerably heightened level of Arbitration and Conciliation activities in the country.

The author is a practising C. A. in Mumbai.