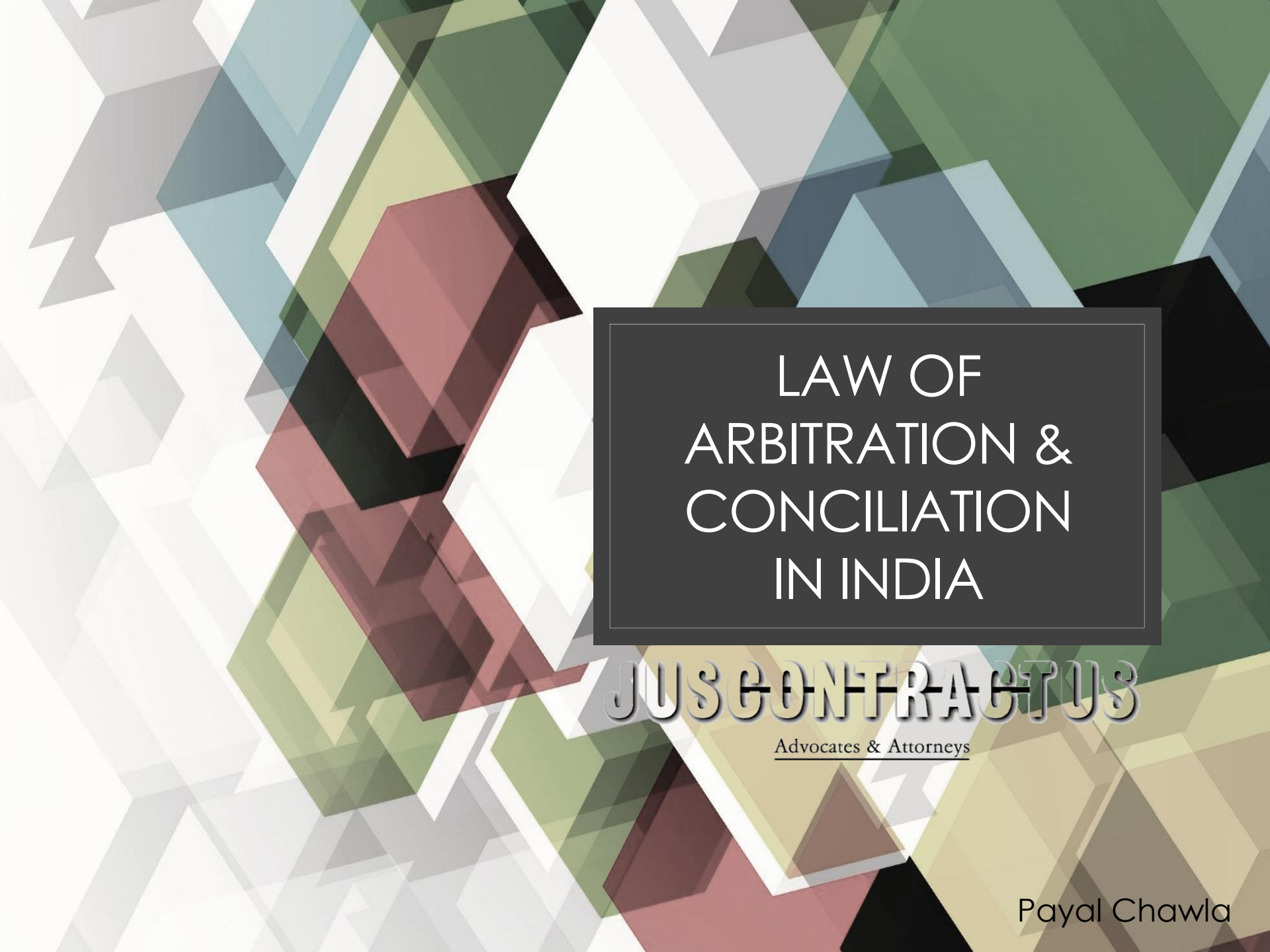




# LAW OF ARBITRATION & CONCILIATION IN INDIA

**JUS CONTRACTUS**

Advocates & Attorneys

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# INTRODUCTION

- Basics of Arbitration
- Adhoc v. Institutional
- kompetence-kompetence
- Severability of an Arbitration Clause
- Section 5 “***5.Extent of judicial intervention.***—*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*”

# TYPES OF ARBITRATION



Domestic  
Arbitration



International  
Commercial  
Arbitration



Foreign  
Seated

## SAMPLE ARBITRTION CLAUSE

ANY CLAIM, DISPUTE OR DIFFERENCE RELATING TO OR ARISING OUT OF THIS AGREEMENT SHALL BE REFERRED TO THE ARBITRATION OF A SOLE ARBITRATOR. THE ARBITRATION SHALL BE SUBJECT TO THE ARBITRATION AND CONCILIATION ACT, 1996 AS MAY BE AMENDED FROM TIME TO TIME. THE NANI PALKHIVALA ARBITRATION CENTRE (“NPAC”), NEW DELHI), WILL APPOINT THE SOLE ARBITRATOR AND WILL CONDUCT THE ARBITRATION IN ACCORDANCE WITH ITS RULES FOR CONDUCT OF ARBITRATION PROCEEDINGS THEN IN FORCE AND APPLICABLE TO THE PROCEEDINGS. THE SEAT AND VENUE OF ARBITRATION SHALL BE NEW DELHI, INDIA. THE PROCEEDINGS SHALL BE UNDERTAKEN IN ENGLISH. THE ARBITRATION AWARD SHALL BE FINAL AND BINDING ON THE PARTIES. SUBJECT TO THE AFOREGOING, THE COURTS AT NEW DELHI ALONE SHALL HAVE THE JURISDICTION IN RELATION TO THE DISPUTES AS MENTIONED HEREINBEFORE.

# **DRAFTING OF ARBITRATION AGREEMENT**

## SECTION - 7

7. Arbitration agreement. — (1) In this Part, “arbitration agreement” means 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**.

(2) An arbitration agreement may be in the form of an **arbitration clause in a contract or in the form of a separate agreement**.

(3) An arbitration agreement **shall be in writing**.

(4) An arbitration agreement is in writing if it is contained in—

- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- (c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
- (d) 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.

# DEFINITION

## THERE IS NO DEFINITION OF AN ARBITRATION AGREEMENT IN THE ACT

- Section 10 of the Contract Act, 1872 defines what agreements are contracts
- “10. What agreements are contracts. —All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”
- Section 10 of the Contract Act also stipulates that aforesaid requirements shall not affect any law in force in India (and not expressly repealed) by which a contract is required to be made in writing, in presence of witnesses or any law relating to registration of documents.
- Thus, an arbitration agreement should satisfy the mandate of Section 10 of the Contract Act and also the requirements of Section 7 of the ACA.



## SECTION 7(2) & SECTION 16

### ARBITRATION CLAUSE IS SEVERABLE

- An arbitration clause is separate, distinct and severable.
- Section 16(a) states, “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the Contract.”
- So unless the Arbitration is not invalid, it will be enforced.
- An invalid contract does not ipso jure invalidate an arbitration clause.

## SECTION 7(3) TO (5)

- Section 7(3) - Agreement shall be in writing.
- Section 7(4) the term ‘arbitration agreement in writing’ would include any agreement by exchange of letters, telegrams, electronic mails or communications which provide a record of the agreement or exchange of statements of claim and defence in which one party claims the existence of the agreement and the other party does not deny it.
- Section 7(5) states that reference in a contract to a document containing an arbitration clause would constitute a valid arbitration agreement if the contract is in writing and reference is made to the arbitration clause that forms a part of the contract.

## NOT ALL DISPUTES ARE ARBITRABLE

- Patent, trademarks and copyright;
- Anti-trust/competition laws;
- Insolvency/winding up;
- Bribery/corruption/fraud/criminal matters;
- Eviction or tenancy matters governed by special statutes;
- Matrimonial disputes;
- Testamentary matters;
- Guardianship matters.

**Principle :** Right in rem v. Right in personam

# JUDGEMENTS

- **Booz-Allen & Hamilton Inc. v. SBI Home Finance Ltd.** [2011 5 SCC 532]
- **Shri Vimal Kishor Shah & Ors. v. Mr. Jayesh Dinesh Shah** - (Trusts not arbitrable]
- **A. Ayyasamy v. A Paramasivam** (2016) 10 SCC 386 – Serious fraud not arbitrable.  
[*Rashid Raza v Sadaf Akhtar, Avitel Post Studioz Limited v. HSBC Pi Holdings Deccan Paper Mills Co. Ltd. V. Regency Mahavir Properties & Global Mercantile Private Limited v Indo Unique Flame Limited* ]
- **Emaar MGF Land Limited v. Aftab Singh** [2018 SCC OnLine SC 2771]  
Optionality to Consumer. If consumer opts for Consumer Forum, the arbitration agreement is not valid.
- **Vidya Drolia vs Durga Trading Corporation** Tenancy disputes (except statutory tenancies) under the Transfer of Property Act are arbitrable.

## PRE-ARBITRATION RESOLUTION / MEDIATION

- **Ravindra Kumar Verma v. Bharat Bhushan** – Delhi High Court- Conciliation not mandatory.
- **M/s Welspun Enterprises Ltd. v. M/s NCC Ltd. - DB DHC** – Mandatory.

# Language

**“22. Language.—**(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.”

## Binding nature of an Agreement

***K. K. Modi v. K N Modi*** [(1998) 3 SCC 573] - essential attribute of a valid arbitration agreement includes the decision of an arbitral tribunal to *'be binding on the parties to the agreement'*.

## NUMBER OF ARBITRATORS

| SOLE ARBITRATOR     | THREE<br>(OR MORE ARBITRATORS)                         |
|---------------------|--------------------------------------------------------|
| Most cost efficient | Expensive                                              |
| Easier Logistics    | Logistics are difficult in terms of date, records etc. |

**10. Number of arbitrators.**—(1) The parties are free to determine the number of arbitrators, provided that such number **shall not be an even number**.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.



# Fees of the Arbitral Tribunal

- **ONGC v. Afcons Gunanusa JV**, [2022 SCC online 1122]
- Fourth Schedule is directory and not mandatory.
- The ceiling is separate for Claim and Counter-claim.
- Ceiling does not apply to three-member arbitral tribunal.
- Arbitrator has no authority to pass directions as to the quantum of fees
  - parties have to agree – party autonomy.

## KEY ELEMENTS

- Should be widely worded to encompass every claim and dispute between the parties
- Mutual resolution/mediation
- Number of arbitrators
- Manner of appointment of arbitrators
- Adhoc or institutional arbitration
- In institutional arbitration, the name of the institution/its rules
- Should mention the seat and venue of arbitration
- The language the arbitration shall be conducted in.
- That the award shall be final and binding on the parties.
- The supervisory jurisdiction of the courts
- In international commercial arbitration (in addition to the seat), the lex arbitri, lex fori (or curial law) and the lex contractus.
- Decide on arbitral fees.
- Keep it simple!

# **Seat/Venue of Arbitration/Rules applicable to substance of dispute**

- ☐ **Important – has a direct impact on  
jurisdiction**

## FOUR ELEMENTS (POTENTIALLY) DETERMINE SUPERVISORY JURISDICTION

SEAT

LEX FORI OR CURIAL LAW  
[RULES OF ARBITRATION]

LEX ARBITRI  
[LAW OF ARBITRATION]

LEX CONTRACTUS  
[LAW OF THE CONTRACT]

## DETERMINING THE RULES OF PROCEDURE

- **Institutional Arbitration** – the Rules of the Institute will govern the arbitration.
- **Adhoc Arbitration :**
  - Decide rule of procedure, or
  - Adopt procedures of an arbitral institution

# Determining Rules of Procedure – Section 28

- When both/all parties to the arbitration are Indian and the dispute is in India, the substantive law of the contract and arbitration shall be Indian law.
- Where one party is foreign, but the seat of arbitration is India, “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”.
- If parties have not designated any law, then “the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute”.

## DIFFERENCE BETWEEN – SEAT V. VENUE

### Seat

- Decides the supervisory jurisdiction of Courts
- *Lex arbitri* and seat follow each other when either not specified.
- Can be prolonged litigation around Conflicting Seat, *lex arbitri*, *lex contractus* and *lex fori*

### Venue

- Is merely the place where the arbitration is conducted
- Venue can be treated as set in certain instances – therefore very important to clearly specify – seat / venue in the Clause.

## **SEAT OF ARBITRATION / JURISDICTION**



## BHATIA INTERNATIONAL VS. BULK TRADING S.A.

- Section 2(2) of the Arbitration and Conciliation Act, 1996 (the “Act”), contained in Part I of the Act, states that “This Part shall apply where the place of arbitration is in India.”
- Unless the contract specifically stated that Part 1 of the ACA does not apply, Indian Courts will have jurisdiction, even to foreign seated arbitrations.
- As a result, Indian Courts were competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers existed unless Part I was expressly or impliedly excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad hoc manner.

## BALCO V. KAISER - 2012

- Five Judge Bench overruled Bhatia
- Parts I and II of the Act are mutually exclusive of each other.
- Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India.
- The seat is the “centre of gravity” of arbitration.
- If the seat was foreign, Part I would be inapplicable. If Seat is outside India, Indian courts will not have jurisdiction
- Even if Part I was expressly included “it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law.”
- Even in cases of Mareva Injunctions – asked Government to legislate
- Even when two foreign parties arbitrate in India, Part I would apply and, by virtue of section 2(7), the award would be a “domestic award”.
- Cut off date as on the date of the judgement -the decision in BALCO was expressly given prospective effect.

# JURISDICTION

## DOMESTIC ARBITRATION

- Tradition principles of jurisdiction embodied in CPC
- Section 20 CPC – Cause of action / where Defendant resides.
- Doctrine of Ouster – **Hukum Chand**
- In arbitration, traditional CPC principles don't apply
- **Indus Mobile Distribution v. Datawind Innovation** – (2017 SCC OnLine SC 442)
- Upheld in **BGS SGS Soma Jv. v. NHPC Ltd.** 2019 SCC OnLine SC 1585

## **PART 2**

# **CONDUCT OF ARBITRAL PROCEEDINGS**

# COMMENCEMENT OF PROCEEDINGS

- Dispute has arisen
- ***“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”***

# Appointment of an Arbitrator – Section 11

**“11. Appointment of arbitrators.—**(1) A person of **any nationality** may be an arbitrator, unless otherwise agreed by the parties.” [In ICA, court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities [s.11(9)]

“(2) Subject to sub-section (6), the **parties are free to agree on a procedure for appointing** the arbitrator or arbitrators.

(3) **Failing any agreement** referred to in sub-section (2), in an arbitration **with three arbitrators**, each party shall appoint **one arbitrator**, and the **two appointed arbitrators** shall appoint the **third arbitrator who shall act as the presiding arbitrator**.

(4) If the **appointment procedure in sub-section (3) applies** [refers to 3 member tribunal] and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, **upon request of a party**, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]”; © 2/2021

# Appointment of an Arbitrator – Section 11

(5) Failing any agreement referred to in sub-section (2) [where no procedure has been agreed to], in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

# Section 11(6A)

6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.



# INTERIM MEASURES

- Section 9 deals with interim measures by the Court.
- A party may, **before or during arbitral proceedings or at any time after** the making of the arbitral award but before the award is enforced seek interim measures from the court.`
- If interim orders are sought before commencement of the arbitral proceedings, the arbitral proceedings have to be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.
- Once the arbitral tribunal has been constituted, the Court **shall not entertain an application under s. 9(1))**, unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]

# INTERIM MEASURES BY AN ARBITRAL TRIBUNAL

- Section 17 deals with interim measures by the arbitral tribunal
- Powers are very wide and similar to the powers of the court under s. 9, including clause (e). –  
*“(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient.”*
- “(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and **shall be enforceable under the Code of Civil Procedure, 1908** (5 of 1908), in the same manner as if it were an order of the Court.]”*

## Determining Rules of Procedure

**19. Determination of rules of procedure.**—(1) *The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*

(2) *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*

(3) *Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*

(4) *The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

**LEX FORI** ☐

## Pleadings/Time for completion of pleadings /completion of arbitration.

- According to s. 23 parties can agree to the time period to submit their SOC, SOD, counter-claims/plead set-off etc..
- s. 23(4) – SoC/SoD **shall** be completed within a period of six months **from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment.**] [notice it is not subject to agreement of the parties]
- s. 25 – failure to follow the time-line in S. 23 is serious:
  - SoC beyond time – **shall** terminate proceedings;
  - SoD beyond time – discretion to close (without treating it as an admission of contents of SoC)
  - Failure to appear at oral hearings/file documentary evidence – discretion with tribunal to proceed and decide with the evidence before the tribunal.

## **SECTION 29 A- Time limit for arbitral award**

- Time bound
- Domestic Arbitration – 13 months/endeavour to complete in 12 months in ICA
- 6 months with the consent of the parties
- Beyond that period the court has to grant an extension.
- If no extension the mandate of the arbitrator shall terminate; or substitute the arbitrator(s)(if delay due to arbitrator(s)).

## FAST TRACK ARBITRATION –Section 29 B

- Embodied in Section 29-B
- Flexibility to dispense with technical formality when oral hearing is required for expeditious disposal.
- Award has to be made in six months from date of entering reference.
- Section 29 A applies
- Parties and arbitrator can agree on fees and mode of payment.

## **EXPERT APPOINTMENT AND COURT ASSISTANCE IN TAKING EVIDENCE – Section 27**

27 (5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

## MANNER OF APPOINTMENT OF ARBITRATOR



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Named Arbitrator in the Contract

Mutually Appoint

Unilateral Appointment

Appointment from Panel of Arbitrators



## UNILATERAL APPOINTMENTS

- Unilateral appointment by one party is invalid in law (Perkins Eastman Architects DPC v. HSCC (India) Limited [2019 (9) SCC OnLine SC 1517])
- Followed TRF Limited v. Energo Engineering Projects Ltd. [(2017) 8 SCC 377] (MD ineligible to be appointed as an arbitrator under V Schedule, so will be his nominee)
- Voestalpine.

## APPOINTMENT FROM A PANEL OF ARBITRATORS

Unless power to appoint an arbitrator by one party was counter-balanced by an equal power in favour of the other party - Central Organisation For Railways Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company [2019 SCC OnLine SC 1635]

## TWO – TIER ARBITRATION

- Validity of two – tier arbitration
- Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.  
[2017 2 SCC 228]
- Party autonomy
- Provision for appellate arbitral tribunal
- Doctrine of merger
- Award by the appellate tribunal will get merged with the award by the first arbitral tribunal

## KEEP IT SIMPLE !

- Keep the language Simple
- Avoid verbosity
- Must contain necessary Ingredients of an Arbitration Clause.
- Use language that is precise and clear.
- Avoid 'may'. Use 'shall'.
- Language regarding covering dispute should be expansive.
- Avoid the 'amicable settlement' clause –
- Precondition to arbitration is to be seen as directory (Ravindra Kumar Verma v. M/s BPTP Ltd. & Anr - [2014 SCC OnLine Del 6602])



THANK YOU

JUS CONTRACTUS

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