

Law of Arbitration and Conciliation: Salient features

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ARBITRATION

Arbitration is a process in which a dispute is submitted to an impartial outsider who makes a decision which is usually binding on both the parties.



ARBITRATION

The arbitration and conciliation comes under an Alternate Disputes Resolution.

What is ADR

Alternative Dispute Resolution is a method for resolving disputes outside of the official judicial mechanisms

Classified into 4 types

➤ **Negotiation**

Voluntary – no involvement of 3rd party who facilitates or imposes.

➤ **Mediation**

Involvement of 3rd party who facilitates the resolution process

Does not impose a resolution on the parties

➤ **Collaborative law**

Each party has an attorney who facilitates the resolution process within specifically contracted terms

➤ **Arbitration**

Involvement of 3rd party who imposes a resolution

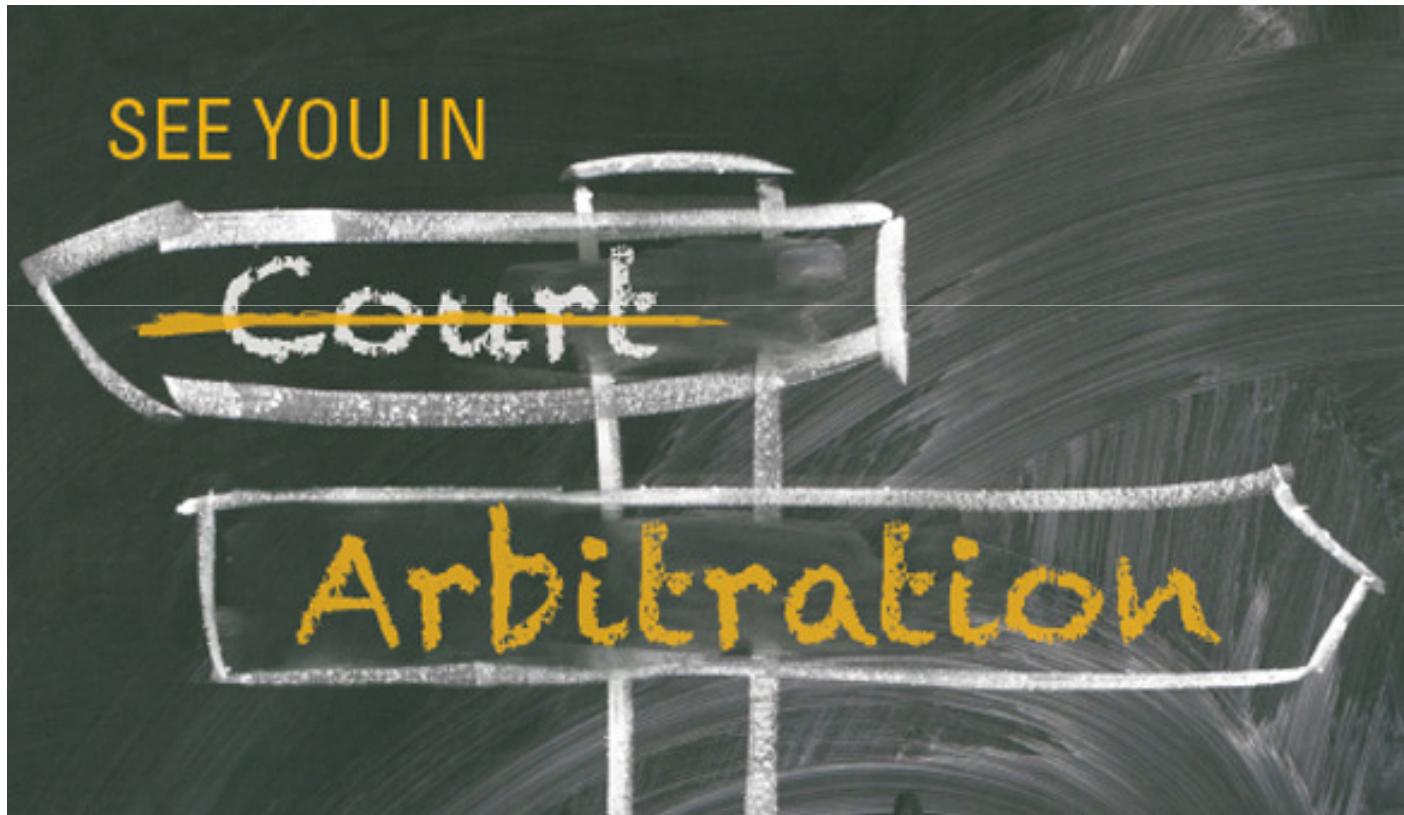
Occurs due to arbitration clause. Also known as “Scott Avery Clause”

ARBITRATION

In Maharashtra & Gujarat arbitration proceedings are held in respect of Draft Town Planning Schemes framed and published under the provisions of respective Town Planning Acts, where a valuer may be required to either function as an Arbitrator/Town Planning Officer or represent his client who may be either individual owner or a Local Planning Authority. Further a valuer may be required to function as an Arbitrator in case of dispute between two or more parties regarding fair market value of a property.

The knowledge of the Law of Arbitration is therefore essential for a professional valuer.

WHY ARBITRATION?



WHY ARBITRATION?

Arbitration Matters

- Cost of the proceeding
 - Lower as compared to courts
- Time efficient
- Power with the parties
 - Arbitrator is appointed by the parties
- Specialisation
 - Since arbitrator is appointed by the parties, they may appoint a person who possess specialised knowledge in that sector/ area

Court Matters

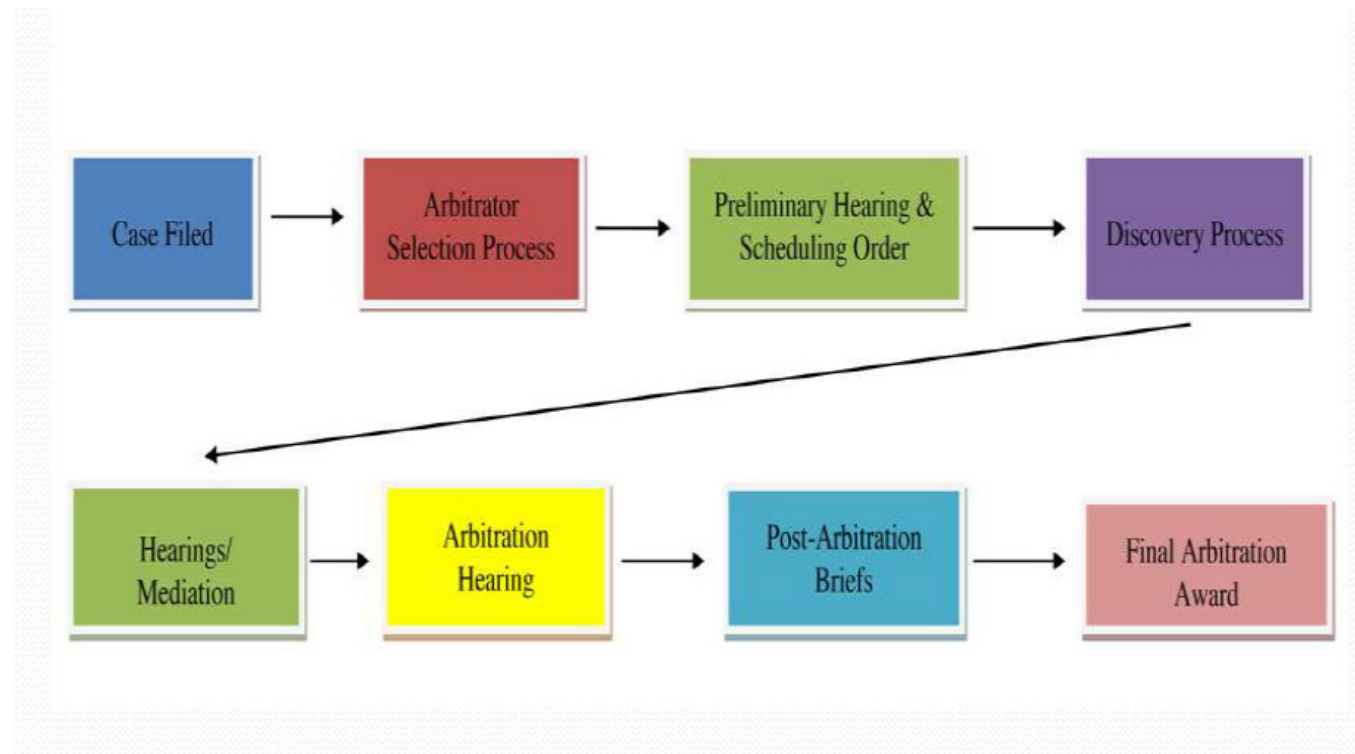
- Cost of the proceeding
 - Heavy cost
- Time taking process
- Power with the parties
 - No power in the hands of arbitrator except jurisdiction
- Specialisation
 - The judge may or may not posses the required skills.
 - Rely on expert view

ARBITRATION

Basics

- *The arbitrator enforces his own point of view on the contending parties and the opinions of the participants are not given any predominance.*
- *Arbitration is a judicial process*
- *The award of the arbitrator is binding and rests on equity and justice, i.e., there is no scope for compromise*

ARBITRATION PROCESS



ARBITRATION

Composition of Arbitral Tribunal - (Section 10)

Under this section, the parties are free to determine the number of arbitrators provided that such number shall not be even numbers. A sole arbitrator can be appointed. A dispute arose in MMTTC Ltd. Vs. Sterlite Ltd. (1996 (6) SCC 716), where in the arbitration clause provided for nomination of the arbitrator by each of the parties and the arbitrators so nominated were required to appoint an umpire. The MMTTC Ltd. contended that since the arbitration clause provided for appointment of even number of arbitrators, such clause was not valid in view of provisions of Section 10(1). This controversy was resolved by the Supreme Court by stating that the validity of the arbitration agreement does not depend on the number of arbitrators. The arbitration agreement though specifying an even number of Arbitrator cannot be a ground to render the arbitration agreement invalid in as much as the agreement satisfied the requirement of the section 7 of the Act and as such it is a valid agreement. By nominating an umpire a valid arbitral tribunal of three persons (Odd Number) can be constituted satisfying the requirement of the section 10 of the Act.

ARBITRATION

Appointment of Arbitrators - (Section 11)

Arbitrator can be appointed by agreement of parties and in case of failure of either of the parties, when request is made for appointment, the aggrieved party may approach the Chief Justice of the concerned High Court in case of Domestic Arbitration and the Chief Justice of India in case of International Commercial Arbitration for appointment of arbitrator. All High Courts in India have framed a scheme for such purpose. While appointing the arbitrator, the designated authority shall have due regard to any qualification fixed by the agreement of the parties for the arbitrator and also to other considerations as are likely to secure the appointment of an independent and impartial arbitrator as held by the Hon'ble Supreme Court in the case of ICICI Ltd. Vs. East Coast Boat Building and Engineers (1998 (9) SCC 728). The decision with respect to appointment of arbitrator by a designated authority is normally final and binding on the parties.

ARBITRATION

Conduct of Arbitral Proceedings - (Section/s 18-25)

The parties to the arbitration have to be treated equally and have to be given full opportunity, by following the principles of natural justice, to present their case (Section 18). The arbitral tribunal shall not be bound by the Code of Civil Procedure or by Indian Evidence Act. Parties are free to agree on procedure and in case of non-agreement, the tribunal shall conduct the proceedings in the manner it consider appropriate. Normally the arbitration proceedings shall be deemed to have commenced on the date on which a request for reference of the dispute to arbitration has been received by the respondent (Section 21). The arbitrator has power under Section 22 to appoint one or more expert/s to report on specific issue and also seek assistance of the court in taking evidence.

ARBITRATION

Making of Arbitral Award and Termination of Proceedings - (Sections 28-33)

No time limit is fixed for making the award, though it is always expected under the scheme of the Act that the tribunal will resolve the dispute in accordance with the substantive law for the time being in force in India.

In the case of tribunal consisting of more than one arbitrator, any decision of the tribunal shall be made by the majority of the members of the tribunal. A crisis may arise when there is no consensus between the members of the tribunal and when the members of the tribunal take divergent views. In such circumstances, the Arbitration will fail. The parties may settle the matter during the arbitral proceedings either by mediation, conciliation or by other proceedings and in such case the settlement will take the form of award.

ARBITRATION

Form and Contents of Arbitral Award - (Section 31)

- (a) The award should be in writing and signed by the members of the tribunal, and unless the parties have agreed otherwise, it must state reason.
- (b) The tribunal may at any time during the proceedings make an interim award in any matter with respect to which it may make a final award.
- (c) In case of an award for payment of money, the tribunal will award interest.
- (d) The award shall state the date and place of arbitration, the cost of arbitration and the party entitled to cost and the party who will pay the cost and the manner in which the cost shall be paid.

ARBITRATION

Termination of Proceedings – (Section 32)

The arbitral proceedings shall be terminated by the final award or by an order of the tribunal under Section (2), i.e. in the circumstances when (a) the claimant withdraws (b) the parties agree on the termination of the proceedings or (c) when the tribunal finds that the continuation of the proceedings has, for some reasons, become unnecessary and impossible.

ARBITRATION

Arbitral Disputes

- Property
- Insurance
- Contract (including employment contracts)
- Business / partnership disputes
- Family disputes (except divorce matters)
- Construction
- Commercial recoveries

ARBITRATION

Non Arbitral Disputes

- Matters of criminal nature
- Disputes relating to matrimonial relations
- Testamentary matters relating to the validity of a will
- Relating to trusts for public purposes of charitable or religious nature
- Insolvency matters
- Matters relating to the guardianship of a minor or lunatic.
- Any execution proceedings .

ARBITRATION

Arbitration proceedings

➤ Place of arbitration

- ▫ Parties may decide
- ▫ In case of failure of any mention in the agreement – place shall be determined by the arbitral tribunal (convenient to the parties)

➤ Commencement of proceeding

- ▫ Date on which a request for that dispute to be referred to the arbitration is received by the respondent

➤ Language

- ▫ Parties may decide
- ▫ In case of failure of any mention in the agreement – shall be determined by the arbitral tribunal

ARBITRATION

Arbitration procedure

- Section 23 to 27 stipulates the procedure to be followed in arbitration proceedings
 - Claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought,
 - the respondent shall state his defence in respect of these particulars
 - The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
 - Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings,
 - ❖ unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

ARBITRATION

Arbitration procedure

- Default by the parties – without showing sufficient cause
 - the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23,
 - ❖ the arbitral tribunal shall terminate the proceedings;
 - the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23,
 - ❖ the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant.
 - a party fails to appear at an oral hearing or to produce documentary evidence,
 - the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Some similar terms

➤ Conciliation

- Conciliator brings the disputants to agreement – negotiated settlement
- Conciliator is appointed only after the dispute has arisen

➤ Mediation

- It is a structured process
- Mediator assists the disputants to reach a negotiable settlement
- This process results in signed agreement which defines the future behaviour of the parties

CONCILIATION

The provision of conciliation is given under Sections 61-81 under Part III of the Arbitration and Conciliation Act. The conciliation can be initiated by the consensus of the parties and once the machinery of conciliation is set into motion, parties are precluded from initiating any arbitral or judicial proceedings in respect of a dispute which is subject matter of conciliation proceedings except under Section 9 of the Act for interim protection of the substance of the dispute.

A Conciliator, who may be appointed by the parties, is required to assist the parties, in an independent and impartial manner, in reaching an amicable settlement of dispute. A conciliator is required to be guided by the principal of objectivity, fairness and justice, giving consideration to rights and obligations of the parties, usages of the trade and circumstances surrounding the dispute, including any past business practice between the parties. Any settlement arrived at pursuant to conciliation has the same status and effect as an arbitral award.

Another important feature of the conciliation is that the conciliator and the parties are required to maintain confidentiality in all matters related to conciliation proceedings and its fallout. If the conciliation fails then neither of the parties may rely or take benefit of (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute, (b) admission made by the other party in the course of conciliation proceedings, (c) proposal made by the conciliator, and (d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

DIFFERENCE BETWEEN ARBITRATION AND CONCILIATION

Points for discussion	Arbitration	Conciliation
Pre-condition	The process can start only if there is Arbitration Agreement between the parties to dispute	No such requirement
Appointment	Can be even before dispute arises	Appointed only after the dispute has arisen
Number can be even/odd	Number of arbitrators need to be odd	Number of conciliator can be even
Decision is known as	Arbitral award	Settlement
Signed by	Arbitral tribunal members	Parties concerned

Advantages of Arbitration

- *Choice of decision maker with expertise*
- *Speed*
- *Lower-cost*
- *Flexible*
- *Confidentiality*
- *Less formal than court*
- *Preservation of business relationships*

Thank

You



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