CHAPTER III

ARBITRATION AND ITS KINDS - FEATURES OF ARBITRATION AGREEMENT

INTRODUCTION

Parties determine to settle their disputes finally in accordance with the provisions of the Act in case of failure to arrive at amicable settlement. Once the parties agree for resolution of dispute in accordance with the Arbitration and Conciliation Act 1996, the said Act will take care of the entire processes and procedure. A clear intention of the parties to submit themselves before the arbitration proceedings for settlement of disputes is sufficient. If such plain intention is evident from the arbitration clause, the same cannot be treated as vague on the ground that it does not satisfy the suggested checklist of all matters to be considered while drafting an arbitration agreement.

In fact, so prevalent was the system of Arbitration in India, that Hon’ble Chief Justice Marten, was compelled to state:

“Arbitration is indeed a striking feature of ordinary Indian life, and I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a Panch is one of the natural ways of deciding many a dispute in India”\(^{62}\)

\(^{62}\) Chambasappa Gurushantappa V. Baslinagayya Gokurnaya Hiremath AIR 1927 Bom 565
Arbitration was originally frowned upon as expelling the purview of the court. This scenario came to be changed by the dictum of law laid down by the House of Lords in *Scott V. Avery*, in which it was held that till an award has been made, no right of action shall arise. This clause makes an award a condition precedent to any right of action for commencing the arbitration proceedings. It was decided in that case that though it is a principle of law that parties cannot oust the jurisdiction of the Court, any person may agree that no right of action shall accrue to him till the arbitrator have decided on any difference, that may arise between the parties to the agreement.

Arbitration is one of the oldest systems of alternative dispute resolution to the traditional state administered court litigation. According to Aristotle, ‘it is equitable to be patient under wrong (not to retaliate); to be willing that a difference shall be settled by discussion rather than by force; to agree to arbitration rather than to go to court- for the umpire in an arbitration looks to equity, whereas the juryman sees only the law. Indeed, arbitration was devised to the end that equity might have full sway’. This precept has been echoed by William O Douglas J. in *Bernhardt V Polygraphic Co* in the following language: ‘The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result’.

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63 (1856) 25 L.J. Ex. 308
64 The Rhetoric of Aristotle, Book I, ch.13
65 (1956) 350 US 198, 203
DEFINITIONS

The Arbitration Act 1940 did not contain any definition of the term ‘arbitration’. Still, knowledge of this term’s exact meaning was taken for granted. Article 2(a) of the Model Law defines arbitration to mean ‘any arbitration whether or not administered by a permanent arbitral institution’. Therefore, it pertains to pure ad hoc arbitration and to any type of administered or institutional arbitration.66

The definition of “Arbitration” in Section 2 (1) (a) of the Arbitration and Conciliation Act 199667 is merely a clarification that the Act covers both adhoc and institutional arbitration. This definition corresponds to the definition as mentioned in clause (a) of Article 2 of UNCITRAL Model Law on International Commercial Arbitration. Evidently, this definition does not spell out the denotation of the term ‘arbitration’. At its core, arbitration as a method of solving the litigation has been in meaning for centuries. The need for a definition has always been subsidiary to its purpose although attempts have been made at a definition. Quite a large number of definitions of arbitration have been given from time to time. We may note down below a few of them for the purpose of our study.

The definition provided by Romilly M.R. in Collins V. Collins as “An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties”68

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67 Section 2 in the Arbitration and Conciliation Act 1996 Definitions.-(1) In this Part, unless the context otherwise requires,-
(a) “arbitration” means any arbitration whether or not administered by permanent arbitral institution;
68 (1858)26 Beav.306, 312 reported in English cases pages 916-919
Q. Hogg states that “An Arbitration is the reference for binding judicial
determination of any matter in controversy capable of being compromised by an
agreement by way of accord and satisfaction or rendered arbitrable by statute between
two or more parties to some person or persons other than a Court of competent
jurisdiction”.

Sir John Donaldson in *Northern Regional Health Authority V. Derek Crouch*\(^{69}\) stated:

“Arbitration is usually no more and no less than litigation in the private sector.
The arbitrator is called upon to find the facts, apply the law and grant relief to one or
other or both of the parties”. “Arbitration is a procedure in which a dispute is
submitted, by agreement of the parties, to one or more arbitrators who make a binding
decision on the dispute. In choosing arbitration, the parties opt for a private dispute
resolution procedure instead of going to court”\(^{70}\). The definition propounded by
Fouchard, Gaillard, Goldman\(^{71}\) describes arbitration as: “A device whereby the
settlement of a question, which is of interest for two or more persons, is entrusted to
one or more other persons – the arbitrator or arbitrators – who derive their powers
from a private agreement, not from the authorities of a State, and who are to proceed
and decide the case on the basis of such an agreement”. “The essence of arbitration
is that some dispute is referred by the parties for settlement to a tribunal of their own
choosing instead of to a court”.\(^{72}\)

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\(^{69}\) [(1984) Q B 644 (C.A)]

\(^{70}\) World Intellectual Property Organisation (WIPO)

\(^{71}\) International Commercial Arbitration, first edn. 1999

\(^{72}\) Russell on Arbitration, 19\(^{th}\) Ed., p 1
Ronald Bernstein giving, what he calls, legal definition says: “where two or more persons agree that a dispute or a potential dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner, that is upon evidence put up before him or them, the agreement is called an arbitration agreement or a submission to an arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called arbitration, and decision when made is called an award”.73

To explain arbitration to a layman Ronald Bernstein says: “In an arbitration your claim, instead of being heard publicly in court and decided by a judge, is heard privately by one, two or three persons (“arbitrators”) chosen by agreement between you and the person against whom you are claiming (“the respondent”): or, if you cannot agree upon the choice, chosen by someone whom you have agreed upon to choose: or, if all else fails, chosen by the court. The procedure for deciding your claim can, if you insist, be almost as formal as if you had gone to court. But it is much more likely to be a relaxed and informal procedure: the arbitrator is likely to be very experienced in deciding this kind of dispute. Your claim and the respondent’s answer to it will be put forward at a hearing before the arbitrator(s) unless, as often happens, you agree or have already agreed that it shall be decided on the documents without a hearing. If there is a hearing, it will be in private. Whether it is cheaper or not depends on the kind of procedure adopted. If you and the respondent want a full scale hearing, as if you were in court, it may well cost even more than a court hearing. Otherwise, it is in most cases much quicker than going to court. And when the

73 Ronald Bernstein’s Handbook of Arbitration Practice, p 9
arbitrator has made his decision (which is called an “award”) it can be enforced as if it were an order of the court”. 74

Halsbury says: “An arbitration is the reference of a dispute or difference 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”. 75 Arbitration has been defined as “the determination of a matter in dispute by the judgment of one or more persons, called arbitrators, who in case of difference usually call in an umpire to decide between them” 76 Arbitration thus “An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation” 77

“Arbitration is where two or more parties submit all matters in dispute to the judgment of arbitrators who are to decide the controversy” 78

Legally defined “an arbitration is the reference of a dispute or difference 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” 79

“Arbitration is a procedure in which the dispute is submitted to an arbitral tribunal which make a decision (an award) on the dispute that is binding on the parties” 80

Arbitration as “a private process set up by the parties as a substitute for court

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74 Ronald Bernstein’s Handbook of Arbitration Practice, p 9
76 Wharton’s Law Lexicon
77 Black’s Law Dictionary
78 Mozley and Whitle quoted in A Premier on Alternative Dispute Resolution
79 John B. Souders quoted in A Premier on Alternative Dispute Resolution
80 P.C. Rao quoted in A Premier on Alternative Dispute Resolution
litigation to obtain a decision on their disputes” 81 Arbitration is defined as “a means of settlement of disputes or differences by the decision not of regular and ordinary courts of law but of a person or persons who are called arbitrators and are appointed by the parties or with their actual or constructive consent”82

From the discussion in the foregoing paragraphs, four basic features of arbitration are discernible:

AN ALTERNATIVE TO COURT LITIGATION

The most salient factor differentiating court litigation from arbitration is the rigidity of the court procedure. Arbitration can be much more flexible both in time and procedure. As arbitration is consensual, the parties can choose the most suitable procedure. Neither they nor the tribunal are tied to inflexible rules of court. The parties can also be represented by anyone other choice, they are not bound by rules limiting appearance to persons with particular legal qualifications. The Tribunal may also conduct the proceedings in the manner it considers appropriate in case of default of the agreement by the parties. This power includes the power to determine the admissibility, relevance, materiality and the weight of any evidence83. Arbitration has always operated as an extrajudicial and informal trial process that allows the designated experts to adjudicate the disputes equitably which arise within specialized, self regulating communities. The arbitral procedure, despite variations, which is uniformly applied to the resolution of commercial, labour, maritime, and construction disputes; is basically the same.

81 M.A. Sujan quoted in A Premier on Alternative Dispute Resolution
82 Encyclopaedia Britannica
83 Sec. 19 of The Arbitration and Conciliation Act 1996
PRIVACY

Arbitration legislation accords privacy wherein the parties are permitted instead of resorting to court jurisdiction, they can very well agree to submit their disputes if arise in future to arbitration and that the arbitration proceedings to be thereafter commenced and resolved privately. The existence of arbitration, the subject matter, the evidence, the documents that are prepared for and exchanged in the arbitration, and the arbitrator’s award cannot be divulged to third parties. The tribunal, the parties and their representatives are the only persons allowed to participate in the proceedings unless the parties and the tribunal agree otherwise.

PARTY AUTONOMY

The most salient feature of arbitration is party autonomy. Party autonomy comprehends various options available to the parties with respect to the conduct of arbitration. It also gives the parties freedom from judicial intervention except where otherwise provided in the Act. Arbitration offers them neutrality in the choice of law, procedure and tribunal and other details of the arbitration. As a matter of fact, Sec. 5 of the Arbitration and Conciliation Act 1996 permits court intervention in matters governed by the arbitration law to the extent provided in the Act. Only where the parties are silent as to some extent of arbitral process, court intervention is permissible.
ENFORCEABILITY OF THE AWARD

The award confers finality and the same has a binding effect upon the parties and also the parties claiming under them respectively. A further feature of arbitration is the extensive enforceability of the award. Section 36 of the present 1996 Act provides that the award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of a civil court. This is a both a contractual commitment of the parties and the effect of the applicable law. Resorting to Execution in terms of Order 21 of the Code of Civil Procedure commencing from Rule 1 to Rule 106 is normal in almost all the execution of a civil court decree.

VARIETIES OF ARBITRATION

There are various arbitrations depending upon the terms, subject matter of the dispute and the law governing the arbitration agreement. Some types of such arbitrations are discussed in the following paragraphs:

84 Sec. 35 of The Arbitration and Conciliation Act 1996,
85 Section 33 in The Arbitration and Conciliation Act 1996
86 Enforcement.—Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.
86 Order 21 - Rule 1 to 2 - Payment under decree
Rule 3 to 9 - Courts executing decrees
Rule 10 to 23 - Application for execution
Rule 24 to 25 - Process for execution
Rule 26 to 29 - Stay of execution
Rule 30 to 36 - Mode of execution
Rule 37 to 40 - Arrest and detention in the civil prison
Rule 41 to 57 - Attachment of property
Rule 58 to 63 - Adjudication of claims and objections
Rule 64 to 73 - Sale generally
Rule 74 to 81 - Sale of movable property
Rule 82 to 96 - Sale of immovable property
Rule 97 to 106 - Resistance of delivery of Possession to decree-holder or purchaser
DOMESTIC ARBITRATION

Domestic arbitration refers to arbitration, which takes place in India, wherein parties are Indians and disputes are decided in accordance with the substantive law of India. The term ‘domestic arbitration’ as such has not been defined in the Arbitration and Conciliation Act of 1996. However a co joint reading of Section 2 (2) (7) of the Act 1996, it is apparent that ‘domestic arbitration’ means an arbitration in which the arbitral proceedings are held in India, and in accordance with Indian substantive and procedural law, and the cause of action for the dispute has wholly arisen in India, or where the parties are subject to Indian jurisdiction.

INTERNATIONAL ARBITRATION

When arbitration takes place within India or outside India containing ingredients of foreign origin in relation to the parties or the subject matter of the dispute is called as International Arbitration. Depending upon the facts and circumstances of the case and the contract in this regard between the respective parties the law applicable may be Indian or foreign law. To satisfy the definition of International Arbitration it is suffice if any one of the parties to the dispute is resident or domiciled outside India or if the subject matter of dispute is abroad.

INTERNATIONAL COMMERCIAL ARBITRATION

Ambrose Bierce defines ‘International Commercial Arbitration’ as ‘the substitution of many burning questions for a smouldering one’. In the picturesque language of Nani Palkhiwala, ‘International Commercial Arbitration’ ‘is a 1987

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87 Justice JS Verma (former Chief Justice of India), New Dimensions of Justice, Article ‘Courts and the Arbitral Process’, ch. 17, 12
Honda car, which will take you to the same destination with far greater speed, higher efficiency and dramatically less fuel consumption’.  

The term ‘International Commercial Arbitration’ has been defined in Sec. 2(f) of the Arbitration and Conciliation Act 1996. International Arbitration is ‘commercial’ if it relates to disputes arising out of a legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

1) an individual who is a national of, or habitually resident in, any country other than India or
2) a body corporate which is incorporated in any country other than India, or
3) a company or an association or a body of individuals whose central management and control is exercised in any country other than India or
4) the government of a foreign country.

In International Commercial Arbitration 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; any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules.  

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88 We The Nation, Chapter International Arbitration V. Litigation, p 205, 209
89 Sec. 28 (b) (i) (ii) of the Arbitration and Conciliation Act
INSTITUTIONAL ARBITRATION

When arbitration is conducted by an arbitral Institution, it is called Institutional Arbitration. The parties may specify, in the arbitration agreement, to refer the dispute or differences to be determined in conformity with the rules of a particular arbitral Institution. One or more arbitrators are appointed in such arbitration from a pre-selected panel by the governing body of the institution or even by selection by the disputants themselves but restricted to the limited panel. “Institutional Arbitration” is arbitration conducted under the rules laid down by an established arbitral organization. Section 2(6) of the Arbitration and Conciliation Act 1996 provides that where Part I except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorize any person including an institution, to determine that issue. Section 2(8) of the Act expressly provides that where Part I ‘refers to the fact that the parties have agreed or that they may agree, or in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement’.

Some of the leading Indian institutions are The Indian Council of Arbitration (ICA), New Delhi, Federation of Indian Chambers of Commerce and Industry (FICCI), New Delhi, International Centre for Alternative Dispute Resolution (ICADR), New Delhi, Bengal Chamber of Commerce and Industry, Indian Chamber of Commerce, the East India Cotton Association Ltd., and the Cotton Textiles Export Promotion Council. There are a large number of such institutions in the other metropolitan cities.

By and large, basically the rules of these institutions follow a similar pattern, although they are expressly formulated for arbitrations that are to be administered by the institution concerned; the clause recommended by the ICC, for instance, states:

“All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Such a clause is evidently advantageous, because even if at some future stage, one party starts dragging its feet to proceed further with arbitration proceedings, it will nevertheless be possible to arbitrate effectively, because a set of rules exists to regulate the way in which the arbitral tribunal is to be appointed and the arbitration is to be administered and conducted.\footnote{Redfern and Hunter, Law and Practice of International Commercial Arbitration, fourth edn. 2004, P.p 47, 1–99}
Parties will be well advised to verify in advance whether the arbitral institution
to which they wish to refer their disputes has some experience in the particular
commercial sector concerned. An institution with the relevant experience will
typically have a list, or panel of potential arbitrators with expertise in the field, from
which it may appoint one or more in a case where the parties themselves will not
appoint the arbitrators. Some arbitral institutions do not grant to the parties the liberty
of designating an arbitrator or a co-arbitrator. They may, in accordance with their
rules, recognize parties to choose an arbitrator from a list, which the institution
provides. Some arbitral institutions may restrict the arbitrators appearing on this list
to nations of their own country, or to persons, with a specialist background. Other
arbitral institutions may not use a list system at all and give the parties complete
freedom to select the arbitrator or arbitration at their choice.

ADHOC ARBITRATION

Without resorting to an Institution, if the parties themselves agree and arrange
for arbitration, it is termed as Adhoc Arbitration. It may be domestic, international or
foreign arbitration.

Russell on Arbitration has this to say on the definition of ad hoc arbitration:

“The expression ‘Ad Hoc’, as in ‘Ad Hoc Arbitration’ or ‘Ad Hoc
Submission’ is used in two quite different senses: an agreement to refer an existing
dispute, and/or an agreement to refer either future or existing disputes to arbitration
without an arbitration institution being specified to supervise the proceedings, or at
least to supply the procedural rules for the arbitration. This second sense is more common in international arbitration.\(^91\)

Ad Hoc Arbitration means that the arbitration is not conducted pursuant to the rules of an arbitral institution. Since, parties are not obliged to submit their arbitration to the rules of an arbitral institution; they may largely stipulate their own rules of procedure. In other words, Ad Hoc Arbitration is a do it yourself arbitration. The geographical location of Adhoc Arbitration will be of great importance, because most of the difficulties concerning the arbitration will be resolved in accordance with the national law of the seat of arbitration.

If the parties have arranged to Ad Hoc Arbitration before one or three arbitrators and that one of the parties does not participate in the proceedings at all. How many arbitrators will be appointed? Who will decide that? And who will appoint the arbitrator(s)? The answer largely depends on and generally is bound by the arbitration and procedural rules of the nation which is the seat of arbitration. If the seat of arbitration is in India, for example, according to The Arbitration and Conciliation Act 1996, failing a determination by the parties of the number of arbitrators, the arbitral tribunal shall consist of one arbitrator. That arbitrator shall be appointed by the Chief Justice of the Supreme Court of India or the Chief Justice of a High Court of India. If the place of arbitration is to be Cairo, according to the Egyptian Arbitration Law 1994, failing a determination by the parties of the number of arbitrators, the number of arbitrators shall be three, and the court of appeals of Cairo shall appoint the co arbitrator of the failing party. The two co arbitrators will

\(^91\) Russell on Arbitration, 21\(^{st}\) Ed. 1997, p 42
then have 30 days to agree on the third arbitrator, if they cannot, then the court of appeals of Cairo shall appoint the third arbitrator.

‘Ad Hoc Arbitration’ is, therefore, arbitration agreed to and arranged by the parties themselves, without recourse to an arbitral institution. It is; however, open to the parties to agree to adopt the Rules framed by a particular arbitral institution without submitting its disputes to such institution. ‘Ad Hoc Arbitration’ may be domestic or international commercial arbitration. Section 6 of the Arbitration and Conciliation Act 1996 provides that in order to facilitate the conduct of the arbitral proceedings, the parties or the arbitral tribunal, with the consent of the parties may arrange for such administrative assistance by a suitable institution or persons.

SPECIALIZED ARBITRATION

“Specialized Arbitration” is arbitration conducted under the auspices of arbitral institutions which might have framed special rules to meet up the exact needs for the conduct of arbitration in respect of disputes of particular types, such as, disputes as to commodities, construction or specific areas of technology. “Look Sniff” or “Quality Arbitrations” are hybrid kind of arbitrations which may be found in particular commodity trades.

Ronald Bernstein states: “The procedure envisaged, by long established practice, is that the arbitrator will be chosen for his expertise in the particular trade: will be sent copies of the contract and of any other relevant documents, and (If the sale is by sample) be sent the sample or part if it: that he will then without further
reference to the parties and possibly in their absence inspect the goods and will
decide, by way of award, whether they conform to the contract and if so what
consequences should follow."92

According to Russell, the rules of London Court of Arbitration authorize an
arbitrator to proceed on his own in quality disputes and also require him to do so in
the attendance of all parties.

The London Chamber of Commerce maintains a Court of Arbitration, which
has great experience in settling commercial disputes. The rules of the court provide
for informal (and to cheap and quick) arbitration, where only the quality of the goods
is in dispute, and give the arbitrators great latitude in ascertaining the price of goods
in distant markets.93

The rules of the London Court of Arbitration permit an arbitrator to proceed
on his own in quality disputes, but require him if he does hear evidence or arguments
to do so in the presence of all parties clearly a more appropriate procedure for the
more formal type of arbitration to which those rules normally apply.94

Some of the institutions are specialized in special types of disputes such as
building contracts, maritime and commodity trade contracts, etc. Some such
institutions are Institution of Civil engineers (ICE), Royal Association of British
Architects (RABA), London Maritime Arbitration Association (LMAA), Grain and

93 Russell on Arbitration, 19th Ed., p 121
94 Russell on Arbitration, 19th Ed., p 225
Feed Trade Association (GAFTA). Such institutions have their own particular rules to meet the precise needs in such a fashion to conduct the arbitration proceedings in their particular specialized areas. Such specialized institutions have elaborate rules providing for expeditious and inexpensive arbitration. Such rules give wide discretion to an arbitrator to find necessary, relevant evidence and information.

**STATUTORY ARBITRATION**

When arbitration is conducted in accordance with the provisions of a special enactment, which specifically provides for arbitration in respect of disputes arising on matters covered by that enactment, it is called Statutory Arbitration. Statutory Arbitration is such a proceeding where the parties are referred to the arbitrator in terms of the provision made in a particular statute. There are a number of Central and State Acts, which provide for such arbitrations.

The provisions of Part I of The Arbitration and Conciliation Act 1996 in general apply to Statutory Arbitrations, except sub sec. (1) of Sec.40 of this Act providing that arbitration agreement shall not be discharged by the death of any party thereto\(^5\); Sec. 41 of 1996 Act providing for the enforceability or otherwise of arbitration agreement to which insolvent is a party or is adjudged insolvent

\(^5\)Section 40 in the Arbitration and Conciliation Act 1996

*Arbitration agreement not to be discharged by death of party thereto.*—

(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.
(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.
(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.
and Sec. 43 of 1996 Act providing for the applicability of the Limitation Act to arbitrations. But such of the provisions of Part I, which are inconsistent with the enactment or the rules of any particular statutory arbitration, shall not apply to that kind of Statutory Arbitration.97

There would be no inconsistency if the provisions of Part I on any subject matter and the provisions of the other enactment on that subject matter can be read together without any conflict. Given the test of inconsistency, Halsbury observes “The provisions of the Arbitration Act 1950 (English Arbitration Act 1950) are not inconsistent with the provisions as to the same subject matter contained in the Act regulating arbitration if they can be read together without any conflict.”98

There would be no inconsistency where the provisions of arbitration merely add to the provisions of another statutory enactment. Russell has observed: “Arbitration Act (The English Arbitration Act 1950) is not to be regarded as inconsistent with another statute merely because it adds something to the provisions of that other statute”.99

96 Section 41 in the Arbitration and Conciliation Act 1996
Provisions in case of insolvency.—
(1) Where it is provided by a term in a contract to which an insolvent is a party that any dispute arising thereout or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.
(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.
(3) In this section the expression “receiver” includes an Official Assignee.

97 Sec. 2 (4) of The Arbitration and Conciliation Act 1996
99 Russell on Arbitration, 19th Ed., Page 12
FLIP-FLOP ARBITRATION

In this arbitration, the parties prepare their own cases, and then request the arbitrator to decide one of the two. On the proof adduced by the parties, the arbitrator decides upon the correctness of either submissions and passes an award finally in favour of that party. This system has travelled from the USA to the United Kingdom, Department of the Environment, Transport have produced a glossary of commercial property terms. Flip-flop Arbitration is defined as being ‘A form of arbitration under which the arbitrator bases his award on the submission he considers most reasonable. It is claimed that this encourages parties to be more reasonable in their submissions and reduces polarization’. Flip Flop Arbitration is also called as ‘Pendulum Arbitration’. However, the use of pendulum arbitration has been endorsed in employment arbitrations and encourages both employers and employees to start negotiations from a realistic starting point. This method is adopted on the basis that the parties being businessmen, will take a pragmatic approach and should be encouraged to be reasonable in the formulation of their cases.

FAST TRACK ARBITRATION

Fast Track Arbitration also called as documents only arbitration is time bound arbitration, with stricter rules of a procedure, which do not allow for any laxity or scope for extensions of time and delays. Fast Track Arbitrations are best suited in those cases, which can be resolved on the foundation of documents, and that oral hearings and witnesses are not necessary. The reduced span of time makes it cost effective. As the arbitral process became more and more complex, the ultimate users, i.e. The major arbitral institutions all over the world, notably the ICC court became
more critical about the usual arbitral process and started looking for more time as well as cost effective ways for resolving the disputes by arbitration albeit getting through the surrounding foliage in order to reach to the essential issues as soon as possible by adopting an accelerated procedure. This generated the notion of ‘Fast Track Arbitration’ or ‘Documents only arbitration’. This precisely means that in the absence of an agreement by the parties that there shall not be oral hearings, the arbitral tribunal may upon request, and put forth by a party shall permit oral hearing during the appropriate phase of the proceedings.

Awards in fast track arbitrations are final and binding, are like decrees of the court, and are most effective when immediate dispute redressal is required, and there is no need to go into minute details of facts, and intricate questions of law. Pleadings are filed within the stipulated time frame, failing which, the arbitration does not proceed or proceeds exparte, and arbitrators make the arbitration does not proceed or proceeds exparte, and arbitrators make the award in the least possible time. It is relevant to note here that Fast Track Arbitration, as its name suggest, is still an arbitral process seeking to resolve the dispute between the parties by arbitration and it is not an ADR technique like mediation or conciliation. The resulting award is binding on the parties, and enforceable as a decree of the court.  

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100 Sec. 35 of The Arbitration and Conciliation Act 1996
101 Sec. 36 of The Arbitration and Conciliation Act 1996
Further, “such arbitrations are common place in certain categories of domestic arbitrations, notably in relation to small claims cases involving, for example, complaints by holiday makers against tour operators and climes under insurance policies. In the international context, the main examples of ‘documents only’ arbitrations are those conducted under the Rules of the London Maritime Arbitrators Association, in connection with disputes arising out of charter parties and related documents”.  

Documents only arbitration is not oral and is based only on the claim statement and statement of defence, and a written reply by the claimant, if any. It also includes the documents submitted by the parties with their statements along with a list of reference to the documents or other evidence submitted by them. The written submissions may simply take the form of a letter to the tribunal from the party or his representative, or may be a more formal document produced by lawyers. The parties may agree upon, or, in default, the tribunal may adopt the procedure to resolve the dispute only on the basis of the documents submitted to the tribunal and without any oral hearing or cross-examination of the witnesses. In a situation where the parties have agreed that ‘no oral hearing shall be held’, the normal assumption would be that the tribunal is bound by this agreement.

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102 Redfern and Hunter, Law and Practice of International Commercial Arbitration, fourth edn., 2004
104 In Shipping and Grain Trade Disputes, the arbitrations are conducted in this way.
Documents only arbitrations are appropriate in simple disputes, or where the parties are situated far from one another, and they consider a hearing inconvenient and unnecessary, or if the dispute revolves around a point of law, an interpretation of a document or a technical term. Documents only arbitration is also appropriate where written arguments can be submitted and there is no need to examine witnesses. However, where the credibility of witnesses is in issue, it will not be appropriate.105

The main advantages of the documents only arbitration are in cost, speed and convenience. The Arbitration and Conciliation Act 1996, emphasize the autonomy of the parties by encouraging them to decide their own procedures, provides default procedures, which the parties can include, exclude or modify, which would better, suits their requirements. The Act is fast track friendly. Parties are free to make the arbitration time bound and rapid, without the risk of derogating from the provisions of the Act, which empower the parties to mould the arbitration according to the degree of haste required. Thus, the Act has provisions that allow for fast track arbitrations. All that remains then is the will of the parties, the conduct of the proceedings by the arbitral tribunals, and judicial determination not to interfere.

ARBITRATION AGREEMENT

The essential requirement to attract provisions of the Arbitration and Conciliation Act 1996 is that there must be an arbitration agreement. The question what is an arbitration agreement assumes importance because an arbitration agreement is the foundation on which the jurisdiction of an arbitrator rests. The

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The conception of Arbitration Agreement is spelled out in Section 2 (1) (b) of the Arbitration and Conciliation Act 1996\textsuperscript{106} and Section 7 of the Arbitration and Conciliation Act 1996\textsuperscript{107}. These provisions are analogous to Section 2(a) of the old Act 1940\textsuperscript{108} and Article 7 of UNCITRAL Model law\textsuperscript{109}. The applicability of the Act does not depend upon the dispute being a commercial dispute. Reference to arbitration and arbitrability depends upon the existence of an arbitration agreement and not upon the question whether it is civil dispute or commercial dispute. Therefore significance is attached to the framework of arbitration agreement.

\textsuperscript{106} Section 2 (1) (b) of the Arbitration and Conciliation Act 1996: “Arbitration Agreement means an Agreement referred to in Section 7.

\textsuperscript{107} Section 7 – (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

© An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) 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.

\textsuperscript{108} Section 2 in The Arbitration Act, 1940

Definitions: In this Act, unless there is anything repugnant in the subject or context,-

(a) " arbitration agreement” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

\textsuperscript{109} Article 7 – Definition and form of arbitration Agreement (1) “Arbitration Agreement” is 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 defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.
Some of the changes affected in the definition of ‘arbitration agreement’ as detailed in Section 7 of the Act are –

(a) The previous definition used the word ‘differences’ while the present definition uses the word ‘disputes’.

(b) Under the old Act the parties were bound to “refer” “all present or future differences” to arbitration whereas under the new Act, “all or certain disputes” may be “submitted” to arbitration.

(c) Under the new Act the expression “defined legal relationship whether contractual or not” has been added which points out that whether or not there was really an agreement to refer the dispute for arbitration has to be ascertained on the facts and circumstances of each case. Such an expression did not exist in the old Act.

(d) The new Act recognises two types of Arbitration Agreements, namely (i) as contained in an Arbitration clause in a contract, and (ii) in the form of a separate agreement. The old act did not provide such types of arbitration agreements and specified the existence of an agreement, which was to be in writing even without the signatures of the parties.

(e) Under the new Act an arbitration agreement besides being in writing need not be in a particular document and can be considered as an agreement if it is contained in a document signed by the parties or can be spelt out from the exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. No such provision was made in the old Act. The reference in a contract to a document containing an arbitration
clause constitutes an arbitration agreement under the new Act. Such a provision was also non-existent under the old Act.

(f) The old definition did not specify the meaning of the expression ‘written agreement’. The new definition ascribes specific meaning to the words ‘agreement is in writing’.

(g) Under the new Act the parties are free to determine the number of arbitrators in the agreement, provided that such number is not an even number. The old Act did not deal with the number of the arbitrators and had no similar provision as now is contained in Section 10 of the Act.

The changes have been introduced by the legislature keeping in mind the Statement of Object and Reasons, which necessitated the repeal of the old Act by enacting the new Act.

FEATURES OF ARBITRATION AGREEMENT

The opening words of the definition of arbitration agreement “In this part” signify that the definition of “Arbitration Agreement” is applicable and relevant only for the purpose of Part I. In so far as the provisions of Part II, pertaining to foreign awards the definition is to be found in Article II of the First Schedule read with Section 44 of the Act. Following words “Arbitration agreement means an agreement by the parties” clearly indicates that wherever Legislature use the words “means” in a definition, the definition is considered to be exhaustive and nothing more can be added to it as is possible to do when the words used are “includes”. Among the
attributes which must be present for an agreement to be considered as an arbitration agreement are:\footnote{K.K.Modi V. K.N. Modi, AIR 1998 SC 1291}:

1. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.

2. That the jurisdiction of the tribunals to decide the rights must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration.

3. The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal.

4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.

5. That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

6. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

\textbf{ARBITRABILITY}

The question of what matters can be referred for arbitration is a significant consideration in the law of arbitration because it establishes which disputes can be lawfully submitted to arbitration. The fulfillment of the requirement of Arbitrability means that the subject matter that is in dispute must be capable of settlement by
arbitration. If the subject matter is not arbitrable, the arbitration agreement remains without effect. The rules determining Arbitrability may differ from one country to another, from one legal system to another. The arbitrators should take these differences into consideration when determining an issue relating to Arbitrability.

All disputes arising between the parties out of a valid contract are referable to the arbitration for adjudication excepting those which are directly or impliedly prohibited by law to be referred to the arbitration. It may be noted as a general rule that all matters of a civil nature which can form the subject matter of a suit within the meaning of Section 9 of the Code of Civil Procedure can be referred to arbitration. In other words criminal matters, especially the ones which the policy of law would not permit to be compromised, cannot be referred to arbitration. The matters covered by a statutory provision requiring adjudication in a particular manner, cannot be permitted to be referred to the arbitrator even with the consent of the parties.

Where the law has given jurisdiction to determine, certain matters to specified tribunals only, such matters cannot be referred to arbitrations, examples which is not exhaustive

a. Insolvency proceedings.
b. Probate proceedings.
c. Suit under Section 92 CPC.
d. Proceedings for appointment of guardian.
e. Industrial disputes.
f. Title to immovable property in a foreign country - Nachiappa Chettiar V. Subramaniam Chettiar.\textsuperscript{111}

g. Claim for recovery of octrio duty - Union of India V. Nagar Mahapalika.\textsuperscript{112}

h. Similarly matters which are exclusively within the jurisdiction of the matrimonial courts cannot be referred to the arbitrator for adjudication - V.V. Pushpakaran V. P.K. Sarojini.\textsuperscript{113}

\textbf{CAPACITY}

The fulfillment of the requirement of capacity means that the parties to the contract must have the legal capacity to enter into that contract. Section 11 of the Indian Contract Act 1872, every person is competent to contract unless otherwise disqualified by law\textsuperscript{114}. Every person capable of entering into a contract may be party to an arbitration agreement. In other words, he who cannot contract cannot refer matter to arbitration. However, minors and persons of unsound mind may act through their guardians. The rules determining the capacity of a party are not uniform and they made differ from one country to another and from one legal system to another.

\textbf{INTENTION}

Arbitral proceedings are seen as an expression of the will of the parties and, on the basis of party autonomy. That is, the consensus of the parties to have their disputes settled by arbitration is essential for the validity of an arbitration agreement. A binding contract requires consensus ad idem – agreeing “to the same thing in the

\begin{itemize}
  \item \textsuperscript{111} AIR 1960 SC 307
  \item \textsuperscript{112} ILR 1971 All 795 (FB)
  \item \textsuperscript{113} AIR 1992 Ker. 9
  \item \textsuperscript{114} \textbf{Section 11 in The Indian Contract Act, 1872}
  \textbf{Who are competent to contract}.—Every person is competent to contract who is of the age of majority according to the law to which he is subject,\textsuperscript{1} and who is of sound mind and is not disqualified from contracting by any law to which he is subject.
same sense by the parties”. 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 declared void under the Indian Contract Act 1872”\textsuperscript{115}. The consent is not ‘free’ if it is caused by coercion, undue influence, fraud, misrepresentation or mistake. In other words, a contract would be void if the parties had no intention to agree upon the same subject matter of the contract in the same

\textsuperscript{115} Section 10 in The Indian Contract Act 1872,

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. Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Section 15 in The Indian Contract Act 1872,

‘Coercion’ defined.—‘Coercion’ is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. Explanation.—It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

Section 16 in The Indian Contract Act 1872,

‘Undue influence’ defined.—(1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other...” Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

Section 17 in The Indian Contract Act 1872,

17. ‘Fraud’ defined.—‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive; to” (4) any other act fitted to deceive;”

(5) any such act or omission as the law specially declares to be fraudulent

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.

Section 18 in The Indian Contract Act 1872,

18. “Misrepresentation” defined.—“Misrepresentation” means and includes—(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true (2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.
sense. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement can come into existence between them through correspondence - *Rickmers Verwaltung GmbH V. Indian Oil Corporation Ltd.*\(^{116}\)

**ALL OR CERTAIN DISPUTES**

The definition contemplates two types of agreements. One in which the parties agree to refer to arbitration certain or specific disputes only and the agreements in which “all disputes” are agreed to be referred. For example, in a building and engineering contract parties agree to refer to arbitration certain disputes and exclude from the scope of arbitration certain other types of disputes such as quality of materials, workmanship, etc. Such provisions are called in the construction industry as “excepted matters”.

**DISPUTES**

If one party asserts a right and the other repudiates the same that is a dispute. The meaning of the word ‘dispute’ is “a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other” - *Canara Bank and others V. National Thermal Power Corporation and another.*\(^{117}\)

The word ‘dispute’ has been used in this Section in contradistinction to the word ‘differences’ used in Section 2 (a) of the Arbitration Act, 1940. The word ‘difference’ is wider than the word ‘disputes’. Mere differences between the parties would not be termed as a dispute for the purposes of this Section. The word

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\(^{116}\) (1999)1 SCC 1  
\(^{117}\) (2001) 1 SCC 43
'difference' or the word 'dispute' has a particular meaning in the law of arbitration. A difference may be, for instance, regarding the meaning of a particular term in the contract. It may be that one party feels that he has performed the contract but the other party says that the real meaning of the contract is something else and what has been done is not the true performance of the contract. This then would be a difference. Under the law of arbitration, a dispute means that one party has a claim and the other party says, for some specific reasons that this is not a correct claim. This is a dispute. Difference indicates the working of the mind of a particular party with respect to certain matter. Dispute is more positive term; when such differences assume a definite and concrete form, they become dispute.\textsuperscript{118}.

Reference can be made if there is a dispute, i.e. a assertion made by one party and rejected or denied by the other party and the reference has to be made in accordance with the provisions of the agreement - \textit{Continental Construction Ltd., V. National Hydro electric Power Corp. Ltd.}\textsuperscript{119} The repudiation by the other party may be either express or implied and may be by words or by conduct. Mere silence may amount to repudiation in an appropriate case. Whether in a particular cases a dispute has arisen or not has to be found out from the facts and circumstances of the case - \textit{Inder Singh Rekhi V. DDA.}\textsuperscript{120}

\textsuperscript{118} \textit{Ghulam Qadir V. State} AIR 1972 J&K. 44

\textsuperscript{119} 1998 (1) Arb LR 534 (Del)

\textsuperscript{120} (1988) 2 SCC 338 : AIR 1988 SC 1007
‘HAVE ARISEN’ AND WHICH ‘MAY ARISE’

These words are applicable to “all” as well as “certain” disputes. In other words the definition contemplates past, present or future disputes which have arisen or are likely to arise being capable of reference. The Act of 1940, defined ‘reference’ separately. Section 7 (1) of the Arbitration and Conciliation Act 1996 comprehends submission of disputes between the parties, which ‘have arisen’ and which ‘may arise’ to arbitration. The Act of 1996 has eliminated the word ‘reference’ which in any case was so very obvious that its special inclusion unnecessarily created confusion. If an arbitration agreement is in a form of a clause in an executory contract, all the disputes will be in future only and have to be referred to arbitration as and when they arise. In an agreement to refer future disputes to arbitration, there is no dispute and the arbitrator’s jurisdiction does not arise until a dispute has arisen.

The distinction between the ‘existing’ and ‘future’ disputes is of relevant significance. By agreeing to submit the disputes to arbitration, the parties agree to compromise their full claims to which they will be entitled in civil litigation. Therefore the ‘submission agreement’ is referred to as compromise an ‘arbitration clause’ as clause compromissoire. However, one thing is certain – that, if there is no dispute in existence, there can be no submission to arbitration. Though an agreement with respect to submission of disputes, ‘which may arise’ between the parties, may be the subject matter of an arbitration clause, it cannot be submitted to arbitration till it comes into existence. Thus, an existing or future dispute can be submitted to arbitration only after it has come into existence.
If the parties have entered into a separate agreement, it may be after the disputes have arisen and in which event the parties will have the terms of reference also specifically mentioned. In any way in such an event it is advisable to mention the number of arbitrators, the names of arbitrators, terms of reference etc. also, so as to save loss of time in agreeing upon the same.

The application for arbitration can be made only when a dispute arises between the parties to the arbitration - *Jammu Forest Co. V. State of J & K*.121 To give arbitrators jurisdiction to make an award in dispute regarding a contract, it is incumbent on the party claiming arbitration to show that there are disputes between him and the opposing party arising out of or in relation to contract entered into between them. The existence of disputes contemplated by an arbitration clause is an essential condition and a pre requisite to the exercise of jurisdiction by an arbitrator - *Nandram Hanutram V. Raghunath & Sons*.122

**DEFINED LEGAL RELATIONSHIP**

Dispute must be in respect of a defined legal relationship whether contractual or not as required under Section 7 (1) of the Arbitration and Conciliation Act 1996. The expression “Defined Legal Relationship” has been borrowed from the Model Law. Contractual relationships are those which arise out of contracts. Apart from a contractual legal relationship, an arbitration agreement may as well be in respect of disputes arising out of non contractual relationship.

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121 AIR 1968 J & K. 86  
122 AIR 1954 Cal 245
There are number of relationships which are legal such as a landlord and tenant, employer and employee, businessman and customer, employer/owner and contractor, partner and partner. These relationships are also contractual irrespective of the fact whether there exists a formal contract or not. The phrase “whether contractual or not” also covers disputes arising out of quasi contractual relationships, of the type contemplated by Section 70 of the Indian Contract Act.

There are a large number of disputes which arises out of statutory relationships and the statutes provide for settlement of disputes by arbitration of the disputes arising under them. Non contractual legal relationship would generally arise from breach of statutory obligations.

Apart from statutory relationships, there are tortuous relationships. Claims based on tort can be subject matter of arbitration, if arising out of, or in relation to, or in connection with, the contract - BHEL V. Assam S. E. Bd. referred to U.O.I. V. Sahreen Timber Construction. Cause of action arising out of tort or under law of tort cannot be made the subject matter of an arbitration reference. A tort does not create a legal relationship, though it gives rise to a legal claim. A tort between persons already related may become referable if the relationship is of legal nature.

123 (1990) 1 Arb. LR 335 Gau. J
124 AIR 1969 SC 488
ARBITRATION CLAUSE IN A CONTRACT

An Arbitration agreement may be entirely separate or it may be incorporated in a contract as an ‘arbitration clause’. The status of arbitration clause in a contract should be judged in the light of the provisions of Section 16 (1) (a) and (b) of The Arbitration and Conciliation Act 1996 which enshrines that “…An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”.

In M. Dayanand Reddy V. A.P. Indus. Corporation Supreme Court observed “Arbitration Clause does not classify the rights of the parties under the contract. It relates wholly to the mode of determining the rights”.

Arbitration clause in a contract is quite different from other clauses in the contract. In D.V.C. V. K.K. Kar the Hon’ble Supreme Court observed: “An arbitration clause stands apart from the rights and obligations under the contract, as it has been incorporated with the object of providing machinery for the settlement of disputes arising in relation to or ‘in connection with the contract”.

Arbitration clause in a contract has a unique distinction from that of the other clauses. While the other clauses sets out the obligations which the respective parties have to carry out, arbitration clause is a neutral clause wherein both the parties consent for the same and unanimously agree to refer the dispute to the arbitrator and

125 AIR 1974 SC 158
settled the same through the tribunal of their own choice. – Lord McMillan in
*Heyman V. Darwins*. 126

In *Damodar Shah (Arbitrator) V. U.O.*127 the court observed “A contract with arbitration clause rolls, as it were, two contracts in one. An arbitration clause in a contract amounts to two contracts in one, one relating to the execution of the work……and the other one to resolve the dispute in event any dispute arises in respect of the said contract’.

“No doubt if the main contract does not exist, the arbitration clause (agreement) also does not exist. But the arbitration clause may survive the main contract in respect of disputes arising from the contract which may otherwise have come to an end by performance, repudiation, rescission or substitution”.

Where the contract itself is illegal eg. Forbidden by law, the particular text being the the arbitration clause which is a part and parcel of the contract is also illegal and void. – *Suwalal V. Clive Mills*. 128

**AUTONOMY**

Dealing with severability or autonomy of arbitration clause in *Union of India V. Kishan Lal*129 the Hon’ble Court, after a review of case law about the fate of arbitration clause on execution of the original contract, observed to the effect that if the contract is not legally valid and enforceable, the arbitration clause has no legs to

126 (1942) 1 All E.R. 337  
127 AIR 1959 Cal. 526  
128 AIR 1990 Cal. 90  
129 AIR 1959 SC 1362
stand. Similarly if the contract goes way by succeeding contract, the arbitration clause therein also simultaneously perishes away. Focusing upon the situations pertaining to repudiation, frustration, breach etc the position is different wherein only the performance of the contract has been put to an end, but the contract is still in existence for certain incidental purpose relating to disputes arising therein and the manner concerned therewith. In these situations since the contract persist for certain purposes, concurrently the arbitration clause therein also cooperates in respect of those purposes. - quoted in *Hindustan Steel V. Ramdaya*.130

This notion of separability is well established by decision in courts which hold that even a contract’s termination does not necessarily terminate arbitration provisions or other forms of dispute resolution. It has been firmly established that an arbitration clause is considered a separable contract between the parties, which survives as an obligation of the promisor even if the underlying contract is voidable.

Applying the Doctrine of Severability, the agreement relates to arbitration in various parts. The offending and objectionable part is without a doubt severable as it is self-governing, independent of the dispute being referred to and resolved by an arbitrator. Consequently, yet in the absence of any other clause, the portion of the clause referring the dispute to arbitrator can be given effect to and enforced. By implementing that part, it cannot be said that the court is doing something which is not completed by the parties or by ‘interpretative process’, the court is rewriting the contract which is in the nature of ‘novatio’. The intention of the parties is unambiguously clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that event, therefore, the agreement is legal, lawful and the

130 (1972) MP.L.J 46
offending part as to the finality and restraint in approaching a court of law can be separated and severed\textsuperscript{131}.

**SCOTT V. AVERY CLAUSE**

Does arbitration agreement or clause hit public policy because it amounts to ouster of the jurisdiction of the court? – Lord Chambell in *Scott V. Avery*\textsuperscript{132} observed as: “Unless there is no statute against such a contract, then on what ground is it to be declared to be illegal? It is contended that it is contrary to public policy…..what pretence can there be for saying that they shall not be liable to any action until their liability has themselves agree. Can the public be injured by it? The object is to prevent the court interfering with arbitration agreements by allowing one party to bring an action in the courts in spite of the arbitration agreement. The clause forms a defence to an action at law. A party to the clause is entitled as of right to a stay of their proceedings, unless he has waived that, or so conducted himself as to forfeit it. A party who has prevented fulfillment of a condition precedent cannot set up the fact of its non – fulfillment”.

It was held that a clause providing that no right of action shall arise unless and until an award has been made. It was decided in that case that though it is a principle of law that parties cannot oust the jurisdiction of the Court, any person may agree that no right of action shall accrue to him till the arbitrator have decided on any difference, that may arise between the parties to the agreement.

\textsuperscript{131} *Shin Satellite Public Co. Ltd., V..Jain Studios Ltd.*, AIR 2006 SC 963
\textsuperscript{132} (1856) 5 HLC 811
In insurance policies there is generally a *Scott Vs Avery* clause making it a condition precedent that an award in arbitration must be obtained before any right of action under the policy may be exercised. A clause like *Scott Vs Avery* has repeatedly been held to be a valid one.

Making of an award as a condition precedent to have a right to file the suit can also be waived. A waiver is an intentional relinquishment of a known right. It involves a conscious, voluntary and intentional relinquishment - *Sikkim Subba Associates V. State of Sikkim*.133

**AGREEMENT TO BE IN WRITING**

The arbitration agreement shall be in writing. Section 7(3) of the Arbitration and Conciliation Act 1996 most emphatically proceeds that “an arbitration agreement shall be in writing”. Prior to the Act of 1996, though judicial opinion as to what is ‘writing’ was almost unanimous, there was some divergence on the questions whether the arbitration agreement was required to be ‘signed by the parties’. This section 7 (3) and (4) now states the law with clarity leaving no room for speculation. This section explains how the agreement could be considered to be in writing.

**IN A DOCUMENT**

One such obvious situation in which an arbitration agreement should be treated in writing is in the form of a document. The specification as to the existence of arbitration clause may be incorporation in the substantive contract itself or it may be in the modus of separate agreement. Whether the arbitration clause is incorporated in

133 (2001) 5 SCC 629
the contract itself or forms part of a separate agreement, the contract or the separate agreement must be signed by the parties. Unless these mandatory requirements are complied with, no valid arbitration agreement will come into existence. This section does not provide any specific form for the arbitration agreement. It is sufficient that the documents containing the agreement indicate that it is an agreement to arbitrate and is signed by the parties - *P. Anand Gajapathi Raju V. PVG Raju*.¹³⁴

**CORRESPONDENCE**

Often an arbitration agreement emerges from the correspondence between the parties. Survival of a lawful arbitration clause could be spelt out from the correspondence and the conduct of the parties - *State of Orissa V. BK Parida*.¹³⁵ An arbitration agreement is said to be in writing if it is incorporated in an exchange of letters, telex, telegrams or other means of telecommunication such as fax or e-mail communications etc which forms part of the agreement - *Taj Buildings V Indore Development Authority*.¹³⁶ All that is required is the assent of each of the parties in a written form. In those cases, it is not a mandatory requirement that the parties should sign the record.

The exchange in writing means an exchange of letters or telegrams which certifies knowledge of proposal and its acceptance. The absence of signature on a document exchanged does not nullify the acceptance but may indicate an uncertainty that it emanates from a party to the contract.

¹³⁴ (2000) 4 SCC 539, 542
¹³⁵ AIR 1982 Ori 147
¹³⁶ AIR 1985 MP 146
By way of exchanging the letters or telegrams the proposal to arbitration agreement and the acceptance thereof should be communicated between the parties. An oral and tacit acceptance of arbitration clause is not a valid acceptance. A contract which is not concluded in writing does not satisfy the condition of written form of requirement.

The terms of an arbitration agreement may be collected from a series of documents. It is not necessary to constitute an arbitration agreement that its terms should be contained in one document. This section does not enjoin that the arbitration agreement should be signed by both the parties. If from the correspondence exchanged and the conduct of the parties, it is clear that the petitioner accepted the contract, he cannot deny the existence of the arbitration clause - *U.P. Rajkiya Nirman Nigam Ltd., V. Indure Pvt., Ltd.* 137

For instance, where the tender of petitioner was accepted and a letter of intent was posted to him, a concluded contract came into existence. The mere fact that the formal contract was not signed would not relieve the parties of their obligations under the contract - *Progressive Construction Ltd., V. Bharat Hydro Power Contraction Ltd.* 138

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137 AIR 1994 NOC 60
138 AIR 1996 Del 92
Where in a charter party agreement, the bill of lading specifically provided that each party may appoint an arbitrator out of a panel of arbitrators maintained by Indian Council of Arbitration and disputes between the parties will be settled according to provisions of arbitration agreement, it can be safely inferred that there exists an arbitration agreement between the parties. - *Pyrites, Phosphates and Chemicals Ltd., V. Sebilan Compania*.139

In the given case there was arbitration clause in the Charter Party but was unfortunately not signed by the respondent. However, there was lot of correspondence exchanged between the parties. This correspondence indicated that the parties had agreed on most of the terms of the agreement and had in fact put these into operation. It was held that by conduct the parties put into effect what had been decided between them and that the contract containing the arbitration clause stood affirmed - *Finnpap Finnish Paper Mills Association V. STC of India*.140

The object of Section 7 (4) © of the Arbitration and Conciliation Act 1996 is only to cover such circumstances where the inference can be made from the subsequent correspondence or even by conduct of the parties. The original agreement may not contain the stipulation of arbitration but still it could be inferred that in given set of circumstances the clause is in writing.

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139 AIR 2002 SC 2341  
140 2005 (1) RAJ 553 (Del)
PLEADINGS

An arbitration agreement may be inferred from the statements of claim and defence exchanged, and filed before the arbitral tribunal in which one party asserts the subsistence of an arbitration agreement in his pleading and the same was not refuted by the opponent in his defence statement. The notice which has been sent could be considered to be statement of the claim. The other thing which has been required by the section is that in response to the statement of claim there must be a defence, then only an agreement could be inferred.

In the statement of claim it has to be specifically stated that there is an arbitration agreement, if in the defence nothing is stated on this point, then, arbitration agreement could be presumed. But if there is no reply defence at all then there is no exchange. If the opposite party does not reply and only keep silent would not amount to any defence and that it only concludes that there is no exchange of statement of claim with the defence. If the reply is silent about the arbitration agreement then only such an agreement could be inferred. Raising the plea for arbitration in the statement of claim is only one sided activity. Keeping silence by the other side or refuting the allegation of the arbitration clause would not make it an agreement, for which both the parties must agree. An agreement is valid when it is, by the two parties. It is only to obviate the necessity of written clause in arbitration agreement section 7 (4) © of the Section 7 (1) of the Arbitration and Conciliation Act 1996 has come into existence.
REFERENCE TO ANOTHER DOCUMENT

An arbitration agreement shall be deemed to be in writing if, “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”. 141

The principle of an arbitration clause in contract by reference to another document containing an arbitration clause has been followed by the courts in India. The Landmark case in this connection is *Alimenta SA V. National Agriculture Co-op Marketing Federation of India Ltd.*, 142 where the Supreme Court said, “It is now well established that the arbitration clause of an earlier contract can, by reference, be incorporated into a later contract provided, however, it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated”. This well established principle has now been given statutory recognition in Section 7 (5) of the Arbitration and Conciliation Act 1996 which mandates the following requirements to be fulfilled.

a. There is an express or implied reference in the main contract under which the dispute has arisen to the other document containing the arbitration clause.

b. Any words of incorporation are appropriate to encompass the arbitration clause.

c. The terms of the arbitration clause are appropriate to disputes arising under the contract into which it has been incorporated.

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141 Section 7 (5) of The Arbitration and Conciliation Act 1996
142 (1987) 1 SCC 615
In *JK Jain V. Delhi Development Authority*\(^{143}\) though the arbitration clause was not included in the contract, the Supreme Court held that by accepting the terms and conditions of the tender form including the terms about reference of disputes to arbitration, the appellant had clearly agreed to make these terms and conditions part of the main contract and binding between the parties.

Russell on Arbitration states: “The agreement may arise by the incorporation of one document containing an arbitration clause in another under which the dispute arises. Where parties by an agreement import the terms of some other document, as part of their agreement, those terms must be imported in their entirety, but subject to this, if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported”.

Lord Esher observed in *Hailton and Company V. Mackie and Sons*,\(^{144}\)

“Where in a bill of lading there was such a condition as “as per charter party the conditions of the charter party must be read verbatim into the bill of lading as though they were there printed in extenso….Then if it was found that any of the conditions of the charter party on being so read were inconsistent with the bill of lading, they were insensible, and must be disregarded.”

There could be a stipulation or incorporation by reference to some other rules or bye – laws of the trade associations etc, which may contain a clause of arbitration though the agreement entered into by the parties has not specifically mentioned about the arbitration.

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\(^{143}\) (1995) 6 SCC 571

\(^{144}\) 1989 (5) TLR 677
Mustill and Boyd in the Law and Practice of Commercial Arbitration in England\textsuperscript{145} states:

“…the parties need not set out the terms of their arbitration agreement in the contract itself. It is sufficient for the clause to be incorporated by reference either to a standard form of clause or to a set of trade terms which themselves include provisions requiring disputes to be submitted to arbitration.”

In Halsbury’s Law of England\textsuperscript{146} relied upon in Altas Export Industries V. Kotak & Co.\textsuperscript{147} it is stated

“If the agreement is written, it may be included in a particular contract by reference or implication. The agreement between the parties may incorporate arbitration provisions which are set out in some other document, but in order to be binding, the arbitration provisions must be brought to the notice of both the parties.

It is inherence in case of incorporation by reference that the parties are concerned not with one document alone but with at least two, one of which contains an arbitration clause and the other of which does not. In some cases, the one document may constitute a contract between other parties. A common case is where the two documents concerned are a charter party and a bill of lading. If the relevant contract between the relevant parties is contained in the document which does contain the arbitration clause, no question of incorporation arises. Where this is not the case, the question whether the document containing the arbitration clause is imbedded in

\textsuperscript{146} 4th Edition Vol 2 Pp 522, 267
\textsuperscript{147} AIR 1999 SC 3286
the appropriate contract between the related parties is, as always, a query of construction”.

Where the parties do not dispute the existence of the contract and the arbitration clause in contract is incorporated by reference and the parties knew that the excepting terms specifically set out therein in contract with rest of terms and conditions were to be the same as incorporated in Standard Contract of Grain and Food Trade Association Ltd., London (GAFTA) as effective on the date of the contract, then the parties cannot subsequently be allowed to raise the objection that there was no agreement of reference of disputes to arbitration in accordance with the Rules of GAFTA. - *Altas Export Industries V. Kotak & Co.*^148^  

**DRAFTING**

An arbitration Agreement is the edifice upon where the entire process of arbitration is structured. A well drafter agreement will encompass not only the agreement to arbitrate but also an effective procedure by which it can be done. The essential element that should figure in the agreement includes:

1. Who are the parties to the agreement?
2. Clear mention of intention to refer disputes to arbitration.
3. Number of arbitrators, mode of appointment of the members of the tribunal.
4. Appointing authority if other than the parties themselves.
5. Qualification of tribunal members.

^148^ AIR 1999 SC 3286
6. Place of arbitration.

7. Choice of language.

8. The procedural and proper law.

9. Rules of procedure or evidence.


11. Termination of mandate of an arbitrator.

12. Right to amend pleadings to supplement claim or defence.

13. Appointment of experts.

14. Time limit for giving interpretation or correction or additional award, etc.

TERMINATION

Consensual termination of the arbitration agreement by the claimant withdrawing his claim and the respondent not objecting thereto is contemplated under Section 32(2) of the 1996 Act\(^{149}\). No party can unilaterally terminate the agreement to arbitration. The law will force the recalcitrant party to participate in the proceedings or abide by the valid award given in exparte proceedings.

\(^{149}\) Section 32 in Arbitration and Conciliation Act 1996

Termination of proceedings: (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where----
(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,
(b) the parties agree on the termination of the proceedings, or
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.
The death of one party to the agreement does not ipso facto result in its termination. The death does not discharge it of the obligations arising under the contract because the contract is enforceable against the legal representatives of the deceased and his estate subject to the condition that the right to sue or be sued survives. Section 40 of the Act provides that the even if one of the party to the arbitration Agreement dies, the agreement still remains enforceable and the same can be enforced by or against the legal representative of the deceased. The arbitration agreement would not be discharged by death of a party.