CHAPTER – IV

MECHANISM OF COMMERCIAL ARBITRATION

With the liberalization of Indian economy, its integration with the world economy and coming into existence the world trade organization, there is going to be spurt in trading in good, services, investments, intellectual properties. Disputes are likely to arise between the trading parties, which would be diverse in nature and complex, involving big sums. Such disputes require quick and amicable settlement, and cannot tolerate the prolonged legal process in courts, appeal, review and revision. Hence there is a need for settlement of disputes outside judicial system. Arbitration is one of those mechanisms which settle the disputes outside the judicial system. The mechanism of arbitration or commercial is provided in the arbitration and conciliation act 1996 form section 7 to section 60. The “Arbitration Agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arisen between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of arbitration clause in a contract or in form of a separate agreement. An arbitration agreement shall be in writing. An arbitration agreement writing if it is contained in –

1. The Arbitration and conciliation act, 1996; section 7(1).
2. The Arbitration and conciliation act, 1996; section 7(2).
3. The Arbitration and conciliation act, 1996; section 7(3).
(a) A document signed by the parties\(^4\),

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement\(^5\), or (c) 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\(^6\). 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\(^7\).

Consent in writing to submit dispute to arbitration, is the important ingredient of the arbitration agreement. Before a party could be said to have consented to submit to arbitration, it must have known that the dispute has to be referred to the arbitration and the arbitral award would be binding upon it. Consent in writing implies the application of mind to the reference of dispute to arbitration in accordance with Arbitration and Conciliation law and the binding nature of the award made there under.

Validity of an arbitration agreement is determined by the requirement of writing as provided in section 7. This was so held by the Supreme Court in *MMTC v. Sterlite Industries (India) Ltd*\(^8\). In that case the arbitration clause contained in a contract entered by the parties provided for the

\(^4\) The Arbitration and conciliation act , 1996 ; section 7(4)(a)
\(^5\) The Arbitration and conciliation act , 1996 ; section 7(4)(b)
\(^6\) The Arbitration and conciliation act , 1996 ; section 7(4)(c)
\(^7\) The Arbitration and conciliation act , 1996 ; section 7(5)
\(^8\) JT [1996] 10 SC 390
appointment of one arbitrator by each party and an umpire, by those arbitration. It was argued that the arbitration clause could not be resorted to and invalid in the light of section 10 of the arbitration and Conciliation Act, 1996. That section provides that the parties are free to determine the number of arbitrations, provided that such number shall not be an even number. The Supreme Court rejected the plea and held that the relevant provision to determine the validity of the arbitration agreement in section 7, which contains the writing requirement, and that there is no reference to number of arbitrators within this provision, that the validity of the arbitration clause does not depend on the number of arbitrators specified therein, and that the arbitration clause was valid.

Application of mind to refer dispute to arbitration in requirement of the arbitration agreement. That requirement is satisfied if the agreement is in writing, so that it is enforceable. It is insisted upon for two reasons; to give validity and to use as evidence. An enforceable agreement may be established by a bargain in which there is a manifestation of mutual assent to the exchange and a consideration subsection(4) of section 7 sets out such situations. Writing means printing, typewriting or any other intentional reduction to tangible form, any mode of representing or reproducing words in visible form. It implies application of mind to the contents and consequences of the document. It is thus a necessary requirement of

signature. The basic purpose of signing a document is to authenticate, and of a contract, to identify and bind the signing persons. The execution of a document implies intelligent and conscious appreciation of the contents thereof, and the facts connected therewith\(^\text{10}\).

Writing gives validity and makes admissible as evidence and thus ensures enforceability. Its purpose is that the information contained in a document is accessible so as to be usable for subsequent reference. Transactions are now conducted through electronic means, collectively “electronic commerce”, dispensing with the paper document. The Information Technology Act, 2000, meets the requirements of the traditional paper documents with respect to electronic documents. The traditional law requires paper to write down an agreement, transaction and signature, to ensure authenticity, integrity and enforceability. The paper documents are available for future reference and use, authenticated by signature and are in the form acceptable to courts. The main basic features of the paper based regime are “writing”, “signature” and “original”. The law of information technology provides that where the law requires information to be in writing, that requirement is met by electronic data message if the information contained therein is accessible so as to be usable for subsequent reference. “Writing”, as aforesaid, gives validity and provides evidence and thus ensures enforceability.

\(^{10}\) N. Ethirajulu Naidu v. K.R. Chinnikrishnan Chettiar AIR 1975 Mad. 333.
“Signature” authenticates documents and identifies signer. “Original” ensure integrity. Enforceability, authenticity, and integrity of a paper document can also be achieved by an electronic document.

The definition has given the widest possible meaning to the written form of the agreement as to include within its embrace telex and other means of telecommunication which provide a record of agreement, to cover the submission-situation of an exchange of statements of claim and defence in which the existence of a agreement is alleged by one party and not denied by another. Section 7(3) of the Act requires an arbitration to be writing. Sub-section(4) describes the kind of that writing. An arbitration agreement is valid if it satisfies that requirement\(^\text{11}\). Write is thus an essential requirement of an arbitration agreement. It cannot be oral or presumed or inferred. It should be either in the written form as required in section 7(3) or in the form as statutorily provided in section 7(4).

Arbitration agreement cannot be assumed on the basis of conduct of the parties. It has to be either in writing signed by the parties or in another document which provides a record of the agreement\(^\text{12}\).

Signature is necessary, if the arbitration agreement is contained in a document. It is a mark upon the document made with the intention to authenticate it. It may be signer’s name written by the signer himself, or a

\(^{11}\) M.M.T.C. Ltd. v. Sterlite Industries(India) Ltd. [1996] CLA 285 (SC)
\(^{12}\) H. Small Limited v. Goldroyce Garment Limited, dated 13 May 1994, Case 64 MAL; [1992] ADRLJ235 (Hong Kong High Court.)
symbol made or adopted with the intention, actual or apparent, to authenticate the writing as that of the signer. Signature in not a part of the transaction. It only authenticates its substance and contents. If identifies a person, provides certainty to his involvement in the act of signing and also association with the contents. Signature also indicates his intention to be bound by the content, to endorse the authorship of the text, to associate with the content written by someone else. The execution of a document is not mere signing of it. It is a solemn act of the executant who must own up the recitals in the instrument and there must be clear evidence that he put his signature in a document after knowing fully its contents. The executant of a document must, after fully understanding the contents and the terms of the document does not means merely signing but signing by way of assent to the terms of contract\textsuperscript{13}.

**Interim measures under the Arbitration and Conciliation Act 1996**

Under the Arbitration and Conciliation Act 1996, both the court and the arbitral tribunal are given powers to order interim measures\textsuperscript{14}. Before or during arbitral proceeding or at any time after the making of the arbitral award but before it is enforced\textsuperscript{15}, a party may apply to a court:

1. for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings\textsuperscript{16}; or

\textsuperscript{13} S. Ramanurthy v. Jayalakshmi Ammal [1990] 2 MLJ 497.
\textsuperscript{14} Arbitration and Conciliation Act 1996 ss 9,17.
\textsuperscript{15} In accordance with the Arbitration and Conciliation Act 1996 ss 36.
\textsuperscript{16} Arbitration and Conciliation Act 1996 ss 9(i)
(2) for an interim measure of protection in respect of any of the following matters\(^ {17} \):

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property of thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of these purposes any person to enter upon or into any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunctions or the appointment of a receiver; and

(e) such other interim measure of protection as may appear to the court to be just and convenient.

The court has the same powers for making orders as it has for the purpose of, and in relation to, any proceedings before it\(^ {18} \).

The arbitrator also has power to order interim measures of protection. Unless otherwise agreed by the parties, the arbitral tribunal may,

\(^{17}\) Arbitration and Conciliation Act 1996s 9(ii) (a)-(c)

\(^{18}\) Arbitration and conciliation Act 1996s 9.
at the request of a party, order a party to take any interim measure of
protection as the arbitral tribunal may consider necessary in respect of the
subject matter of the dispute\textsuperscript{19}. The arbitral tribunal may require a party to
provide appropriate security in connection with any such measure\textsuperscript{20}.

\textit{Power of interim protection under the Arbitration Act 1940 :}

Subject to the statutory provisions and rules of the Arbitration Act 1940 the court has, for the purpose of and in relation to arbitration proceeding, the same power of making orders in respect of any of the matters set out in Schedule 2 to the Arbitration Act 1940 as it has for the purpose of and in relation to any proceedings before the court\textsuperscript{21}.

The court has power to pass order for the following purposes\textsuperscript{22}.

(1) the preservation, interim custody or sale of any goods which are the subject matter of the reference\textsuperscript{23};

(2) securing the amount in difference in the reference\textsuperscript{24};

(3) the detention, preservation or inspection of any property which is the subject matter of the reference or as to which any questions may arise therein and authorizing for this purpose

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19. Arbitration and conciliation Act 1996s 17(1)\\
20. Arbitration and conciliation Act 1996s 17(2)\\
21. Arbitration Act 1940s 41(b); Krishnawati Devi v H.M. misbra AIR 1974 All 209. The source of this power cannot be traced to s 41(a) of the Act; H M Kamaluddin Ansari v Union of India AIR 1984 SC 29,\\
22. Arbitration Act 1940s 41(b)\\
23. Arbitration Act 1940 Sch 2 r 1; Code of Civil Procedure 1908 O 39 r 1.6\\
24. Arbitration Act 1940 Sch 2 r 2; Code of Civil Procedure 1908 O 38 r 1.2.5.\\
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any person to enter upon or into any land or building in the possession of any party to the reference, or authorizing any samples to be taken or any observation to be made, or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.\textsuperscript{25}

(4) interim injunctions\textsuperscript{26} or the appointment of a receiver\textsuperscript{27}; and

(5) the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceeding.\textsuperscript{28}

The court has power to pass an order of attachment before judgment.\textsuperscript{29}

\textbf{Composition of Tribunal Under The Arbitration and Conciliation Act 1996}

The parties to an arbitration agreement can determine the number of arbitrators, which must be an odd number.\textsuperscript{30} Failing such a determination, the arbitral tribunal will consist of a sole arbitrator.\textsuperscript{31}

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\textsuperscript{25} Arbitration Act 1940 Sch 2 r 3; Code of Civil Procedure 1908 O 38 rr 6,7.
\textsuperscript{27} Arbitration Act 1940 Sch 2 r 4; Code of Civil Procedure 1908 O 39 rr 1,2; O 40 r 1.
\textsuperscript{28} Arbitration Act 1940 Sch 2 r 5; Code of Civil Procedure 1908 O 32 rr 3,15.
\textsuperscript{29} Manohar Singh v Hind Kumar Kohli AIR 1991 MP 373.
\textsuperscript{30} Arbitration and Conciliation Act 1996 s 10(1)
\textsuperscript{31} Arbitration and Conciliation Act 1996 s 10(2)
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Appointment of tribunal where procedure for appointment is agreed upon

The parties to an arbitration agreement can decide on the procedure for appointing the arbitrator\(^\text{32}\). An agreement that each party nominates one arbitrator and the two arbitrators appoint an umpire is valid\(^\text{33}\). Under such an appointment procedure if (1) a party fails to act as required; or (2) the parties (or the appointed arbitrators) fail to reach an agreement expected of them; or (3) a person, including an institution, fails to perform any function entrusted to him, a party may request the chief justice or any person or institution designated by him to take the necessary measure, unless the agreement provides other means for securing the appointment\(^\text{34}\).

Appointment of tribunal where there is no agreement on procedure

Where the parties to an arbitration agreement fail to agree on a procedure for appointing the arbitrator, in an agreement which provides for three arbitrators, each party appoints one arbitrator, and the two appointed arbitrators appoint the third arbitrator, who then acts as the presiding arbitrator\(^\text{35}\). If, however, (1) a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party; or (2) the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment is made by the chief justice.

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32. Arbitration and Conciliation Act 1996 s 11(2)
33. MMTC Ltd. v Sterlite Industries (India) Ltd. (1996) 6 SCC 716.
34. Arbitration and Conciliation Act 1996 s 11(6). As to appointment by the chief justice see.
35. Arbitration and Conciliation Act 1996 s 11(3)
justice (or any person or institution designated by him) upon request of a party\textsuperscript{36}. The chief justice (or an person or institution designated by him) also appoints a sole arbitrator upon a request by a party if the parties fail to agree on the arbitrator within 30 days from receipt of a request by one party from the other party to so agree\textsuperscript{37}.

**Appointment of arbitrators by chief justice:**

The chief justice\textsuperscript{38} may make appropriate schemes for the appointment of arbitrators\textsuperscript{39}. The chief justice (or the person or institution designated by him), in appointing an arbitrator, must have due regard to (1) any qualifications of the arbitrator required by the agreement of the parties; and (2) other considerations required to secure the appointment of an independent and impartial arbitrator\textsuperscript{40}. Where more than one request has been made to the chief justices of different high courts for appointment of arbitrator, the chief justices to whom the request has been first made is alone competent to decide on it\textsuperscript{41}. A decision on any matter entrusted to the chief justice or the person or institution designated by him is final\textsuperscript{42}.

**Grounds for challenging the appointment:**

An arbitrator can be challenged only if (1) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or (2)

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\item \textsuperscript{36} Arbitration and Conciliation Act 1996 s 11(4).
\item \textsuperscript{37} Arbitration and Conciliation Act 1996 s 11(5).
\item \textsuperscript{38} Arbitration and Conciliation Act 1996 s 11(12)(b).
\item \textsuperscript{39} Arbitration and Conciliation Act 1996 s 11(10).
\item \textsuperscript{40} Arbitration and Conciliation Act 1996 s 11(8).
\item \textsuperscript{41} Arbitration and Conciliation Act 1996 s 11(11).
\item \textsuperscript{42} Arbitration and Conciliation Act 1996 s 11(7).
\end{itemize}
he does not possess the qualifications agreed to by the parties. A party can challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

**Procedure for challenging the appointment of arbitrators**

The parties can decide to agree on a procedure for challenging an arbitrator. Failing such agreement, a party who intends to challenge an arbitrator must, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances giving rise to doubts as to impartiality, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the arbitrator who is challenged withdraws from his office or the other party agrees to it, the tribunal decides on the challenge. Where such challenge is not successful, the arbitral tribunal continues the arbitral proceedings and make an arbitral award. The party challenging the arbitrator can make an application for setting aside such an arbitral award. Where an arbitral award is set aside pursuant to an application, the court can decide as to whether the arbitrator whose appointment is challenged is entitled to any fees.

43. Arbitration and Conciliation Act 1996 s 12(3).
47. Arbitration and Conciliation Act 1996 s 13(2).
Termination of the mandate of arbitrator

The mandate of an arbitrator terminates if (1) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act; and (2) he withdraws from his office or the parties agree to terminate his mandate. The mandate of an arbitrator also terminates (a) where he withdraws from office for any reason; or (b) by or pursuant to agreement of the parties. If a controversy remains concerning any of the above grounds a party can apply to the court to decide on the termination of the mandate. If an arbitrator withdraws from his office or a party agrees to the termination of an arbitrator, it does not imply acceptance of any ground of challenge or termination. Where the mandate of an arbitrator terminates, a substitute arbitrator is appointed according to the relevant rules. Where an arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal. An order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator is not invalid solely because there has been a change in the composition of the arbitral tribunal.

Mode of appointment of arbitrators:

Parties are at liberty to agree on the mode and manner of appointment of an arbitrator.

52. Arbitration and Conciliation Act 1996 s 14(1).
59. India Hosiery works v Bharat Woollen Mills Ltd. AIR 1953 Cal 488.
Appointment can be by consent of the parties\(^{60}\) or the parties can appoint an arbitrator each to the arbitral tribunal\(^{61}\). The parties to an agreement can agree that any reference under such agreement is to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder, for the time being, of any office or appointment\(^{62}\). Such a person could be a company or association or body of individuals, whether incorporated or not, including a chamber of commerce\(^{63}\). Where the arbitration clause give power to one party to appoint the arbitrator, then the other party need not be consulted for appointing the arbitrator\(^{64}\). The appointment of the arbitrators is an irregularity consent\(^{65}\). A defect in the appointment of the arbitrators is an irregularity and can be cured by the conduct of the parties\(^{66}\). A party cannot resile from arbitration after an arbitrator is appointed\(^{67}\).

**Appointment by consent**

Unless otherwise expressly provided the appointment of the arbitrator is by consent\(^{68}\). Consent can be express or implied\(^{69}\). Consent will be implied where the reference of disputes is to the sole arbitrator to be appointed by both the parties\(^{70}\) or where both the parties agree to refer the dispute o the

\(^{60}\) See [20.063]
\(^{61}\) Arbitration Act 1940 s 9.
\(^{62}\) Arbitration Act 1940 s 4.
\(^{63}\) Ganges Manufacturing Co v Indra Chan ILD (1960) 33 Cal 1196
\(^{64}\) President of India v Kesar Singh AIR 1966J & K 113.
\(^{65}\) Kesvavisingb Dwarkadas v Indian Engineering Co AIR 1969 Bom 227.
\(^{66}\) Nanalal M Varna & Co v G Ambala (Export) AIR 1956 Cal 476,60 Cal WN 810.
\(^{67}\) Jagdish Chander Bhatia v Lachhbhai Das Bhatia AIR 1991 SC 89, 1991 Suppl (2)
\(^{68}\) India Hosiery Works v Bharat Woollen Ails Ltd AIR 1953 Cal 488.
\(^{69}\) Food Corpn of India v Sunil Krishna Samanta AIR 1979 Cal 193.
\(^{70}\) Everest Co-owners, ABC v Madhya Pradesh State Warehousing Corpn (1993) 1 SCC 281
arbitrator appointed by a their party\textsuperscript{71} or where a party has the sole power under the arbitration agreement to appoint the only arbitrator\textsuperscript{72}. The appointment is not with the consent of parties (1) where one arbitrator is to be nominated by one party and the other also by the same party out of a panel of three names supplied by the other party\textsuperscript{73}; (2) where the appointment of one or more arbitrators is to be made by each party separately\textsuperscript{74}; (3) where the arbitrator agreement names the person who is to nominate the arbitrator\textsuperscript{75}; (4) where the contract provided for appointment of two arbitrators, one to be selected by the one party as the other party’s nominee out of a panel of three names to be suggested by the latter and the other to be appointed by the former\textsuperscript{76}; (5) where the arbitrator is named or where the parties that the arbitrator to be appointed by a person designated in the agreement either by name or the office-holder for the time being in office\textsuperscript{77}.

**Appointment by nomination by parties**

Where an arbitration agreement provides for a reference to two arbitrators, one to be appointed by each party, then, unless otherwise expressed in the agreement, if one party fails to appoint an arbitrator

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\textsuperscript{71} Food Corpn of India v Sunil Krishna Samanta AIR 1979 Cal 193.
\textsuperscript{73} Sunil Mukherjee v Union of India AIR 1978 Cal 37; Union of India v Krishna Rao AIR 1970 MP 49; Union of India v Gorakh Mohan Ad AIR 1964 ALL 477
\textsuperscript{74} Ram Chandra Ram Nag Ram Rice and Oil Mills Ltd. v Howrah Oil Mill Ltd. Air 1958 Cal 620;
\textsuperscript{75} Borjab Basavish & Sons v India telephone Industries Ltd Air 1973 Mys 309.
\textsuperscript{76} Union of India v Gorakh Mohan Das AIR 1964 All 477.
\textsuperscript{77} Habans Singh Tuli & Sons Builder (P)Ltd v Union of India AIR 1992 SC 1124, (1992) 2 SCC 225;
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originally for 15 clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who served such notice can appoint that arbitrator to act as sole arbitrator in the reference, and his award will be binding on both parties. The court can set aside any appointment as sole arbitrator and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit. It is permissible for a party to appoint its employee as its arbitrator.

**Court’s discretion to set aside appointment**

Where the arbitrator nominated by one party is appointed as sole arbitrator, his appointment cannot be held to be invalid because he is an employee of that party in the absence of any material to show that he is biased in favour of that party. If any one of the parties shows before the court that there were certain other supervening circumstances which prevented that party from appointing an arbitrator, the court can exercise its discretion to appoint an arbitrator. If the defaulting party satisfies the court that he was not being obstructive or evasive and had acted with diligence, the appointment can be set aside. The discretion granted by the Arbitration

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78. Arbitration Act 1940 s 9; Ghasilal Todi v Biswanath Kerwal AIR 1964 Cal 466.
79. Arbitration Act 1940 s 9 proviso.
82. HMT Ltd v Hindustan Exports and Imports Corpn Ltd. (1990) 1 Karn LJ 41.
Act 1940 enables the court to condone the delay in appointment. But, all the same, while setting aside an appointment of a sole arbitrator, the court must see whether there is justification on equitable grounds for such setting aside and whether it is equitable.

**Court’s power to appoint an arbitrator or umpire**

The court has no inherent power to appoint arbitrators. Where one or more arbitrators are to be appointed by consent of the parties, and all the parties do not concur in the appointment or where the parties or that arbitrators are required to appoint an umpire and do not appoint him, any party can serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or in supplying the vacancy and the court has power to appoint an arbitrator. If the appointment is not made within 15 clear days after service of the notice, the court can, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint and arbitrator or arbitrators or umpire, as the case may be, with like powers to act in the reference and to take an award as if he or they were appointed by consent of all parties.

However, a party cannot apply for filing the agreement in court.

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84. *Arbitration Act 1940* s 9 proviso.
86. *Sunil Mukherji v Union of India* AIR 1978 Cal 37; *Bharat Construction Co Ltd v Union of India* AIR 1954 Cal 606.
87. *Arbitration Act 1940* s 8(1).
88. See (20.075)
89. *Arbitration Act 1940* s 8(2); *Probodh K Sarkar v Union of India* AIR 1953 Cal 385.
90. Under the *Arbitration Act 1940* s 20: See (20.095)
if he has already started a proceeding for appointment of an arbitrator under this provision. The difference between the two provision lies in the fact that under its power to appoint an arbitrator, the court is only called upon to supply the arbitrator and the moment it names the arbitrator the court becomes functus officio whereas, under the procedure for filing the agreement in court, the arbitration proceedings are controlled by the provisions of the Arbitration Act 1940 and the court can give directions to the arbitrator from time to time 91.

**Termination of Authority by Revocation or Removal**

**Revocation of authority**

The authority of an appointed arbitrator or an umpire is not revocable except with the leave of the court, unless otherwise expressed in the arbitration agreement92. If there is no provision in the arbitration agreement for revocation of the authority, the only course open to a party seeking a revocation is to apply to the court for it93. Leave to revoke is at the discretion of the court, which is to be exercised only in exceptional circumstances94 and only where some manifest injustice will be the consequence of the refusal to grant the leave95. Until an award is made a decree of the court96, the submission remains and it can within the language of this provision97, be revoked with leave98.

92. Arbitration Act 1940 s 5;
93. Dulari Devi v Rajendra Prakash AIR 1959 All 711;
94. AmarchandLalitkumar v Shree Ambica Jute Mills Ltd. AIR 1966 SC 1036;
95. Amarchand Lalitkumar v Shre Amica Jute Mills Ltd. AIR 1966 SC 1036;
96. See {20.187}
97. Ie the Arbitration Act 1940s 5.
98. Devi Narain v Harish Chandra AIR 1981 Raj 67
Grounds for revocation

The court can revoke the authority of the arbitrator where:

(1) there is apprehension of bias\textsuperscript{99};

(2) continuation of proceedings will lead to multiplied expenses and interminable delays\textsuperscript{100};

(3) the arbitrator is in fraudulent collusion with the opposite party\textsuperscript{101};

(4) the arbitrator is found to be connected or related to one party and this fact is not disclosed to the other party, or where such a fact might lead to operative prejudice on the part of the arbitrator\textsuperscript{102};

(5) one of the arbitrators is found to be indebted to one of the parties\textsuperscript{103};

(6) an agreement for arbitration provided for appointment of an umpire who will go against one party\textsuperscript{104};

(7) the matter in dispute is not within the jurisdiction of the arbitrator\textsuperscript{105};

\textsuperscript{99} Jiwan Kumar Lohia v Durgadutt LohiaAIR 1992 SC 188
\textsuperscript{100} Kesholal Ramdayal Kahar v Laxman Rao Ramkrishna Rao Deshpande AIR 1940
\textsuperscript{101} Bansi Dhar v Sital Prasad 3 all LJ 613,
\textsuperscript{102} Gbulam Mahomed Khan v Gopaldas Lalsing AIR 1933 Sind 68;
\textsuperscript{103} Mohd Wahiduddin v Hakiman ILR (1902) 29 Cal 278
\textsuperscript{104} Goverdhandas Vishindas v Ramchand Maujimal (1918) 47 IC 783,
\textsuperscript{105} Madura Mills Co Ltd v N M S Krishna Ayyar AIR 1937 Mad 405.
(8) the arbitrator makes up his mind so as not to be open to change it upon argument\textsuperscript{106};

(9) a concluded compromise in undisputed terms is placed before the court by all the parties\textsuperscript{107};

(10) the claim is hopelessly time barred\textsuperscript{108};

The following have been held not to constitute sufficient cause for revocation of the authority of an arbitrator:

(a) appearance of the arbitrator as a witness for prosecution against the party seeking to revoke the agreement\textsuperscript{109};

(b) unreasonable delay in the conduct of the proceedings caused by the party seeking to revoke\textsuperscript{110};

(c) the possibility that the arbitrator may commit a mistake in law\textsuperscript{111};

(d) an advocate appointed an arbitrator in another matter appearing for one of the parties\textsuperscript{112};

(e) the acceptance of fees in advance by an arbitrator from the party who appointed him unless such a demand is excessive\textsuperscript{113};

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\item[106.] Roshan Lal Setbi v The Chief Secretary AIR 1971 J & 91.
\item[107.] Prafulla Chandra Karmaker v Panchanan Karmakar AIR 1946 Cal 427.
\item[108.] Panchu Gopal Bose v Boardof Trustees for part of Calcutta (1993) 4 SCC 338.
\item[109.] Sheo Narain v Bala Rao AIR 1932 All 348, 1932 ALL LJ 331.
\item[110.] Kunj Lal v Banwari Lall AIR 1918 Pat 83(86), 4 PLJ 394.
\item[111.] Le to revoke the authority of the arbitrator on the ground that the arbitrator may commit a mistake in law, the court must be satisfied that there is a likelihood of miscarriage of justice: Bhuwalka Bros Ltd v Fatechand Mulidhar AIR 1952 Cal 294.
\item[112.] Anand Builders v Driples Water Engg. (P) Ltd 1983 Punj LF (D) 86.
\item[113.] State of Orissa v S B Joshi AIR 1983 Ori 125.
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Effect of revocation

The court’s statutory power of revocation does not contemplate the revocation of an arbitration agreement but only revocation of the authority of the arbitrator. After the revocation fresh arbitrators can be appointed to decide the dispute. An award made by an arbitrator whose powers have been revoked is not void initio and has to be set aside. The order of revocation by the court merely permits a party to revoke the authority of the arbitrator. An order of the court allowing leave to revoke the authority of the appointed arbitrator is not an order superseding the arbitration and, therefore, cannot be appealed against. Where a court wrongly exercises this jurisdiction, the high court can convert an appeal against such a decision of the court into a revision and hear it as such.

Power of court to remove arbitrators or umpire

The court can, on the application of any party to a reference, remove an arbitrator or an umpire who fails to use reasonable dispatch in entering on and proceeding with the reference and making an award or who misconducts himself or the proceedings.

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114. Arbitration Act 1940 s 5.
115. Union of India v Bahadur Singh AIR 1963 Assam 195;
116. Arbn Hindusthan Steel v Apejay Pvt. Ltd. AIR 1967 Cal 291;
117. Kallepalli Subbayya v Kura Venkatadri (1941) 2 Mad LJ 393 at 395.
118. Union of India v S Mohinder Singh AIR 1979 ALL 342.
120. Ie under the Arbitration Act 1940 s 5.
121. Ie under the code of civil procedure 1908 s 115.
122. Arbitration Act 1940 s 11(1)
123. Arbitration Act 1940 s 11(2). As to misconduct see (20.072)
The expression ‘proceeding with the reference’ includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire\textsuperscript{124}. Where an arbitrator or an umpire is removed under this provision, he is not entitled to receive any remuneration for his services\textsuperscript{125}. A party is not estopped from objecting to the continuance of the proceedings by consenting to the order of reference to arbitration\textsuperscript{126}.

**Power of court where arbitrator is removed or his authority revoked**

Where the court removes an umpire who has not entered on the reference or one or more arbitrators, the court can, on the application of any party, fill such vacancies\textsuperscript{127}. Where the authority of an arbitrator or an umpire is revoked by leave of court or where the court removes an umpire or a sole arbitrator or all the arbitrators, the court can, on the application of any party\textsuperscript{128}, either appoint a person to act as sole arbitrator in the place of the person displaced\textsuperscript{129} or order that the arbitration agreement cease to have effect with respect to the difference referred\textsuperscript{130}. A person who is appointed as an arbitrator or an umpire by the court has the power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement\textsuperscript{131}.

\begin{flushleft}
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\begin{itemize}
\item 124. Arbitration Act 1940 s 11(4)
\item 125. Arbitration Act 1940 s 11(3)
\item 126. Robindra Deb Manna v Jogendra Deb Manna AIR 1923 Cal 410.
\item 127. Arbitration Act 1940 s 12(1)
\item 128. Arbitration Act 1940 s 12(2)
\item 129. Arbitration Act 1940 s 12(2)(a)
\item 130. Arbitration Act 1940 s 12(2)(b)
\item 131. Arbitration Act 1940 s 12(3)
\end{itemize}
\end{flushleft}
The court is not confined in its choice of arbitrator to the category named in the arbitration agreement\textsuperscript{132}. The parties must be given an opportunity to submit a panel of names or there must be a hearing regarding filling up of vacancy caused by revocation of the authority of the arbitrator\textsuperscript{133}. However, the statutory provision is not subject to an agreement to the contrary between the parties\textsuperscript{134}. The cancellation of the reference does not revoke decisions of the arbitrators which have been accepted by the parties\textsuperscript{135}. The power to supersede\textsuperscript{136} can be exercised only in exceptional circumstances in order to prevent miscarriage of justice\textsuperscript{137}. The scope of arbitration proceeding before the new arbitrator is confined to the disputes covered arbitration before the first arbitrator\textsuperscript{138}.

**POWERS AND DUTIES OF THE ARBITRAL TRIBUNAL UNDER THE ARBITRATION AND CONCILIATION ACT 1996**

**Arbitrator’s duty to give reasons**

The arbitral award must state the reasons upon which it is based unless the parties agree that no reasons are to be goive\textsuperscript{139} or the award is an arbitral award on agreed terms\textsuperscript{140}.

**Arbitration’s power to decide jurisdictional questions**

The arbitral tribunal can rule on its own jurisdiction, including ruling

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132. Chief Engineer Rural Engineering Organisation v Ram Chandra Sahu (1980) 49 Cut LT 259:
134. Under the Arbitration Act 1940 s 12.
136. Arbitration Act 1940 s 12(2)(b)
137. Panchu Gopal Bose v Board of trustees for Port of Calcutta (1993) 4 SCC 338
138. Arora v Union of India 1 SCC 492.
139. Arbitration and Conciliation Act 1996 s 31(3)(a)
140. Arbitration and Conciliation Act 1996 s 30: s 31(3)(b)
on any objections with respect to the existence or validity of the arbitration, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose (1) an arbitration clause which forms part of a contract is treated as an agreement independent of the other terms of the contract; and (2) a decision by the arbitral tribunal that the contract is null and void, does not entail ipso jure the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence; however, a party is not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter of its authority is raised during the arbitral proceeding. An arbitral tribunal can, in either of these cases, admit a later plea if it considers the delay justified. The arbitral tribunal decides on a plea as to whether it has jurisdiction or has exceeded its authority and, where it takes a decision rejecting the plea, continues with the arbitral proceeding and makes an arbitral award. A party aggrieved by such an arbitral award can make an application for setting it aside.

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143. Arbitration and Conciliation Act 1996 s 16(2).
144. Arbitration and Conciliation Act 1996 s 16(3).
145. Arbitration and Conciliation Act 1996 s 16(2) or (3).
147. Arbitration and Conciliation Act 1996 s 16(5).
Where the arbitral tribunal accepts the plea, an appeal lies to a court from the order of the arbitral tribunal\textsuperscript{149}.

**POWER OF ARBITRATORS PRIOR TO THE ARBITRATION AND CONCILIATION ACT 1996**

**Certain powers of arbitrator conferred by the Arbitration Act 1940**

The arbitrators or umpire, unless the agreement expressly states otherwise,, have power to: (1) administer oaths to the parties court on any questions\textsuperscript{150}; (2) state a special case for the opinion of the court on any questions of law involved, or state the award, wholly or in part in the form of a special case of such questions for the opinion of the court\textsuperscript{151}; (3) make the award the award conditional or in the alternative\textsuperscript{152}; (4) correct in an award any clerical mistake or error arising from any accidental slip or omission\textsuperscript{153}; (5) administer to any party to the arbitration such interrogatories as may be necessary\textsuperscript{154}. An arbitrator cannot be compelled to exercise these powers\textsuperscript{155}.

Where the jurisdiction of the arbitrator is disputed, the appropriate course of action for the arbitrator is to state a case for the opinion of the court\textsuperscript{156}.

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\textsuperscript{149} Arbitration and Conciliation Act 1996 s 37(2)(a)
\textsuperscript{150} State of Haryana v J K Jain AIR 1962 SC 551.
\textsuperscript{151} Clive Mills Ltd v Swalal Jain AIR 1957 Cal 692.
\textsuperscript{152} Arbitration Act 1940 s 13(c)
\textsuperscript{153} Arbitration Act 1940 s 13(d)
\textsuperscript{154} Arbitration Act 1940 s 13(a)-(e)
\textsuperscript{155} Rikhabdass v Ballabhdas AIR 1962 SC 551.
\textsuperscript{156} Baldey Jagidisbwarayya Act Kotagiri Tejalingam AIR Hyd 63
A party can ask the arbitrator to state a special case on the questions of law involved and if the arbitrator refuses to do so, he must only apply for the revocation of the authority of the arbitrator or umpire\(^\text{157}\). However, the power given to the arbitrators or umpire is discretionary and the arbitrators or the umpire cannot be compelled to state a special case or to state the award in the form of a special case for the opinion of the court\(^\text{158}\). The failure of the arbitrator to do so is not indicative of bias\(^\text{159}\). Parties to an arbitration have no right to apply to the court for an order directing the umpire to state a case and the court has no power to enforce any directions in this regard\(^\text{160}\). In stating the award in the form of a special case, the findings of fact must be clearly recorded, and only a questions of law must be referred back to the arbitrator for reconsider ratio of the whole question\(^\text{161}\). By stating a case for opinion the arbitrator still remains the final judge of law and fact, and it is for him to decide whether he must or must not act upon it\(^\text{162}\). In the absence of special circumstances, the arbitrator is bound to act upon such opinion and if he does not, it can be a good ground for impeaching his award\(^\text{163}\).

No appeal or revision lies against an order giving an opinion on a case stated by the arbitrator, as the opinion is not a decision equivalent to a judgment or order\(^\text{164}\).

\(^{157}\) Arbitration Act 1940 s 5.  
\(^{158}\) Oil and Natural Gas Commission v Western Co of America AIR 1990 Bom 276  
\(^{159}\) International Airport Authority of India v K D Bali AIR 1988 SC 1099.  
\(^{160}\) Arunachala Ayyar v Louis Dreyfus & Co AIR 1928 Mad 107.  
\(^{161}\) Rallis India Ltd v B V Manickram Chetty & Co AIR 1962 Mad 351  
\(^{162}\) Sohan Lal v Amin Chand & Sons AIR 1973 SC 2572.  
\(^{163}\) Re Adamji Lukmanji & Luis Dreyfus & Co AIR 1925 Sind 83.  
\(^{164}\) Sohan Lal v Amin Chand & Sons AIR 1973 SC 2572.
If the opinion is erroneous, and the arbitrator bases his award on it, the court can set aside the award on the ground of an error of law on the face of the award\(^{165}\). Where the arbitrator or umpire states a special case\(^{166}\) the court, after giving notice to the parties and hearing them, will give its opinion and such opinion is added to the award\(^{167}\). This opinion is then binding and hence and appeal lies against an order on an award stated in the from of a special case\(^{168}\).

**Arbitrator’s duty to give reasons**

An arbitrator is not obliged to give reasons for his award except when he is required to do so by the arbitration agreement, or deed of submission, or an order of court, or the statute governing the arbitration\(^{169}\). Where it is obligatory that the arbitrator must give reasons, it is not obligatory to give a detailed judgment. Short intelligible indications of the grounds must be available to find out the mind of the arbitrator for his action\(^{170}\). The arbitrator is also not bound to give a reasoned order at every stage of the proceedings even if the agreement require the arbitrator to give a reasoned award\(^{171}\).

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\(^{165}\) British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (1912) 3 KB 128  
\(^{166}\) Arbitration Act 1940 s 13(b)  
\(^{167}\) Arbitration Act194 s 14(3)  
\(^{168}\) Arbitration Act 1940 s 39(1)(ii)  
\(^{169}\) Raipur Development Authority v Chokhamal Contractors AIR 1990 SC 1426,  
\(^{170}\) Indian Oil Corp Ltd. v Indian Carbon Ltd AIR 1988 SC 1340  
\(^{171}\) International Airports Authority of India v KD Bali AIR 1988 SC 1099
Arbitrator’s power to decide jurisdictional questions

Under the pre-1996 Act regime, the court only has the power to decide questions relating to the extent of jurisdiction of the arbitrator\(^\text{172}\). Even if the arbitrator finds that the arbitration agreement is valid, such a finding cannot bind the parties, if later the court finds that the arbitration agreement is invalid\(^\text{173}\). The parties can, however, invest the arbitrator with power to decide such questions by a collateral or separate agreement\(^\text{174}\).

Where the arbitration clause is contained in the underlying commercial contract and includes within its scope questions of its existence, validity and effect (scope), then question as to he existence and/or validity of the agreement cannot be decided by the arbitrator whereas questions as to its effect (scope) can be decided by the arbitrator\(^\text{175}\). Whether a dispute relating to the arbitrator’s jurisdiction comes within the purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ. Expressions such as ‘arising out of or ‘in respect of’ or ‘in connection with’ or ‘in relation to’ or ‘in consequence of’ or ‘concerning’ or ‘relating to’ the contract are of wide amplitude and content and include questions as to the existence, validity and effect (scope) of the arbitration

\[^{172}\text{Renusagar Power Co Ltd v General electric Co AIR 1985 SC 1156,}\]
\[^{173}\text{Clive Mills Ltd v Swalal Jain AIR 1957 Cal 692.}\]
\[^{174}\text{Renusagar Power Co Ltd v General Electric Co AIR 1985 SC 1156}\]
\[^{175}\text{Renusagar Power Co Ltd v General Electric Co AIR 1985 SC 1156}\]
agreement. If the parties agree to refer specific question whether the dispute raised is covered by the arbitration agreement, it becomes a specific questions of law even if it involves the jurisdiction of the arbitrator; the decision of the arbitrator is then binding on the parties even if it appears to be erroneous on the face of the award and the court cannot interfere with such an award. Where the question is whether certain facts exist which make the contract or the submission void and unenforceable in law or by statute, the arbitrator is competent to decide the issue of fact, if it is otherwise within the language and scope of the submission.

**LIMITATION IN RELATION TO ARBITRATION PROCEEDINGS**

(1) **ARBITRATION AND CONCILIATION ACT 1996**

**Applicability and commencement**

The Limitation Act 1963 applies to arbitrations as it applies to proceedings in court. For this purpose an arbitration is deemed to have commenced on the date the respondent received a request for the dispute to be referred to arbitration.

**Time bar clause in the arbitration agreement:**

Where an arbitration agreement to submit future dispute to arbitration provides that any claim to which it applies shall be barred unless some step to commence arbitral proceedings place take within a time fixed by the

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177. Tarapore & Co v Cochin Sjipyard Ltd Cochin AIR 1984 SC 1072
179. Arbitration and Conciliation Act s 43(1) See generally (205) LIMITATION OF ACTIONS.
agreement, and a dispute arises, the court, if it is of the opinion that undue hardship would be cause, notwithstanding the expiry of the time fixed may extend the time for such period as it thinks proper\textsuperscript{181}.

**Exclusion of time where award is set aside:**

Where the court orders an arbitral award to be set aside\textsuperscript{182}, the period between the commencement of the arbitration and the date of the order of the court is excluded in computing the time prescribed by the Limitation Act 1963 for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted\textsuperscript{183}.

(2) **ARBITRATION ACT 1940**

**Applicability of Limitation Act:**

All the provision of the Limitation Act 1963\textsuperscript{184} apply to arbitration proceedings under the Arbitration Act 1940 as they apply to proceedings in court\textsuperscript{185}. An arbitrator while dealing with a reference must apply the law of limitation\textsuperscript{186} except where the questions is not raised by the parties\textsuperscript{187}. This rule does not refer to arbitration under any other provision of law\textsuperscript{188} nor does it apply to arbitration proceedings before court\textsuperscript{189}.

\begin{table}[h]
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\begin{tabular}{|c|c|}
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\textbf{181. Arbitration and Conciliation Act 1996 s 43(3)} & \\
\textbf{182. Ie under the Arbitration and Conciliation Act 1996 s 34} & \\
\textbf{183. Arbitration and Conciliation Act 1996 s 43(4)} & \\
\textbf{184 Arbitration and Conciliation Act 1996 s 43(1).} & \\
\textbf{185. Arbitration Act 1940 s 37(1).} & \\
\textbf{186. Wazir Chand mahajan v Union of India AIR 1967 SC 990} & \\
\textbf{187. Secretary, Irrigation and power Department, Government of Orissa v Niranjan Swain (1998) 8 SCC 651} & \\
\textbf{188. Thilakan v MCV Co-operative Society AIR 1975 Ker 14 at 15;} & \\
\textbf{189. Wazir Chand Mahajan v Union of India AIR 1967 SC 990;} & \\
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\end{tabular}
\end{table}

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Where the award is required to be registered, the period during which judicial proceedings regarding the award were pending is to be excluded\textsuperscript{190}.

**Commencement of proceedings**

For the purpose of the Arbitration Act 1940 and the Limitation Act 1963 an arbitration is deemed to be commenced when one party to the arbitration agreement serves on the other parties a notice requiring the appointment of a arbitrator, or, where the arbitration agreement provides that the reference is to be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated\textsuperscript{191}. The date when a party puts in his claim in pursuance of a arbitration clause is the relevant date, and not the date when the arbitration court may be constituted\textsuperscript{192}. Service of notice on the other party is mandatory. However, a notice sent by the arbitrator to one of the parties is not sufficient\textsuperscript{193}.

**Time bar clause in arbitration agreement under the 1940 Act**

Parties may lawfully provide of a ‘time bar clause’ in an arbitration agreement under which claims arising under the agreement will be barred unless notice to appoint the arbitrator or some other step is taken within a stated time\textsuperscript{194}. Where an arbitration agreement provides that any claims will be barred unless notice to appoint

\textsuperscript{190} Raj Kumar Dey v Tarapada Dey AIR 1987 SC 2195, (1987) d SCC 398
\textsuperscript{191} Arbitration Act 1940 s 37(3)
\textsuperscript{192} Maharaj Singh v Vulcan Insurance Co Ltd AIR 1972 Del 182,
\textsuperscript{193} Daya Shankar v Sheo Ram 1956 All LJ 40
\textsuperscript{194} Jai Chand Bhasin v Union of India AIR Del 508 at 510 para 6.
an arbitrator is given or an arbitrator is appointed or some step to commence arbitration proceedings is take within a time fixed by the agreement, and a difference arises to which the agreement applies, the court has discretion to extend the time. The principle for allowing the extension of time by the court should be in accordance with the statutory provisions of the limitation Act 1963: thus all the relevant facts which as the cause of the delay, such as the bona fides of the parties, the reasonableness of their conduct, the amount involved and the possibility of material prejudice to the other side caused by the extension of time, should be taken into account.

COMMENCEMENT OF ARBITRATION PROCEEDINGS

Application to file arbitration agreement in court:

Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II of the Arbitration Act 1940, may apply to a court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court. The application must be in writing and must be numbered and registered as a suit between one or more of the parties interested as plaintiff.

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195. Arbitration Act 1940 s 37(4)
196. Sterling General Insurance Co Ltd v Planters Airways Pvt. Ltd. AIR 1975 SC 415
197. Crompton Greaves Ltd v Toshiba Anand Lamps Ltd AIR 1987 Ker 27;
198. Vallabhb Pitte v Narsingdas G Kalani AIR 1963 Bom 157
199. Arbitration Act 1940 s 20(1)
or plaintiffs and the remainder as defendant or defendants if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants. On such application being made, the court directs notice to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed. Where no sufficient cause is shown, the court orders the agreement to be filed and make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court. Thereafter the arbitration proceeds in accordance with, and is governed by, the other provisions of the Arbitration Act 1940 so far as they can be made applicable.

**Application in case of statutory arbitration:**

The provisions of the Arbitration Act 1940 as to applying to file an arbitration agreement in court also apply to statutory arbitrations.

**Writ petition to enforce an arbitration agreement:**

The parties are not entitled to invoke the writ jurisdiction of the high court for enforcement of a right under an arbitration agreement.

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200. Arbitration Act 1940 s 20(2)
201. Arbitration Act 1940 s 20(3)
202. As to the meaning of ‘sufficient cause’ see [20.102]
203. Arbitration Act 1940 s 20(4)
204. Arbitration Act 1940 s 20(5)
205. Arbitration Act 1940 s 20
206. Arbitration Act 1940 s 46
Existence of the arbitration agreement

In dealing with the application for filing an arbitration agreement, the court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit and also that a dispute has arisen with regard to the subject matter of the agreement. If the existence of the agreement is denied, the court has to give a definite finding as to where the agreement does or does not exist\(^{208}\). The agreement remains in effect until superseded, and until such time it is permissible for the parties, or either of them, to move the court to make a reference to the arbitrator for decision of the dispute a fresh\(^{209}\).

Existence of difference

Before a reference to an arbitrator can be made by the court\(^{210}\), the existence of a dispute is essential\(^{211}\). If there is no dispute, the entire proceedings including the award and a decree passed, if any, are null and void\(^{212}\). There can be a dispute only when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of a dispute. Whether in a particular case a dispute has arisen or not has to be ascertained from the facts and circumstances of the case\(^{213}\).

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208. Anwarul Hasan Khan v Ali Mohammad AIR 1961 All 558;
209. Deesons Engineers Co v CP Engineering Co AIR 1973 P & H 242;
210. Arbitration Act 1940 s 20
212. Vinubhai R Parekh v General Manager Western Railway Bombay AIR 1984 Guj41
213. Inder Singh Rekhi v Delhi Development Authority AIR 1988 SC 1007,
An objection that one of the parties to an arbitration agreement was a minor must, it has been held, be taken at the time the application under the Arbitration Act 1940 is under consideration\(^{214}\). Ordinarily, in an application for filing the questions of liability of the opposite party is not to be considered by the court, as that is a questions for consideration of the arbitrators\(^{215}\). Whether any claim is maintainable or barred by time is a matter for the consideration of the arbitrators\(^{216}\). It is open to the parties to prescribe the period of limitation or to restrict such period by mutual consent\(^{217}\). A dispute may be referred to arbitration even though there has already been a civil litigation between the parties and a decision thereon, and it will be for the arbitrator to consider the effect of that decision on the present difference between the parties\(^{218}\). But is the opposite party is not a party as such to the arbitration agreement, and is being impleaded as being liable under the statute, the questions may be considered and decided by the court\(^{219}\).

**Dispute to which the agreement applies:**

Whether the arbitration agreement applies to the dispute is to be determined by the court and not by the arbitrator\(^{220}\).

\(^{214}\) Kapur & Sons Amritsar v raj Kumar Khanna AIR Punj 235
\(^{215}\) State if Kerala v Gopalkrishnan 1990 (1) KLT 311
\(^{216}\) Navbharat Dal Mills v Food Corpn of India AIR 1993 Del 87
\(^{217}\) Union of India v Risbi Raj & Co AIR Del 15 (2)
\(^{218}\) Naraindas v Vallabhdas AIR 1972 SC 1, (1971).
\(^{219}\) Union of India v Chamandla Loona & Co AIR 1957 SC 652,
\(^{220}\) J & K State Forest Corpn v Abdul Karim Wani (1989) 2 SCC 701
An agreement to refer to arbitration a dispute regarding the enforcement of an agreement to sell is not maintainable, as courts alone have jurisdiction to grant or refuse specific performance.\(^{221}\)

**Who can apply**

Only a party to the agreement can apply for filing the agreement.\(^{222}\) A beneficiary under the agreement or a person vitally interested can, however, move an application for enforcement of the agreement.\(^{223}\) One who is not a party to the agreement cannot be impleaded, unless by operation of law he was deemed to be a party.\(^{224}\) A partner of a dissolved firm is entitled to move an application, on the basis of an arbitration clause in the partnership agreement.\(^{225}\) A firm can file an application for the reference of a dispute arising out of a contract to arbitration, where one of the partners of a firm entered into that contract on behalf of the firm in the usual course of business and which was not repudiated by any of the partners.\(^{226}\) In the case of incorporated companies, only the company as such or its board of directors or, subject to the terms of its articles of association, its chairman, can move an application for reference against a third party.\(^{227}\) If an application is moved by the company, the reference can be proceeded with even after the company goes into liquidation.\(^{228}\)

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221. Sulochana Uppal v Surender Sheel Bhakri AIR Del 138.
222. Arbitration Act 1940 s 20
223. Indian Mutual General Insurance Society Ltd v Himalaya Finance and Construction
224. Arbitration Act 1974 Del 114
225. DDA v Kocher Construction Work (1998) 8 SCC 559
226. Sanganer Dal and Flour Mill v FCL AIR 1992 SC 481
227. CG Thorborg v Union of India AIR 1968 Del 292;
228. Re Monghyr Electric Supply Co Ltd AIR 1968 Pat 166.
Appointment of arbitrator

Generally, the court will make an order of reference to the arbitrator appointed by the parties in the agreement, where the parties do not agree, the court will appoint an arbitrator\(^{229}\). The court has discretion not to make a reference to an arbitrator if there is sufficient cause to do so\(^{230}\). If it is shown that the arbitrator named in the agreement or to be appointed by the opposite party, is likely to show bias, or there is sufficient reason to suspect that he will act unfairly or has been guilty of continued unreasonable conduct\(^{231}\), then the court will require the parties to agree to some other person to act as an arbitrator or it will itself appoint the arbitrator\(^{232}\). Due regard must be given to the terms of the arbitrator clause on the agreement and the dispute must normally be referred to the arbitrator specified in the agreement\(^{233}\).

Where an arbitrator other than the arbitrator named in the agreement is appointed, it amounts to filing an agreement different from the one which the parties arrived at, or in other words, refusal to file the agreement\(^{234}\).

Where a party enters into the agreement under a misconception as to the authority of a minor’s mother to do the same, he is entitled to withdraw from it on finding that the guardian has no such authority\(^{235}\). If the person does not withdraw from the agreement the court will appoint an arbitrator\(^{236}\).

\(^{229}\) Arbitration Act 1940 s 20(4).
\(^{230}\) Arbitration Act 1940 s 20(4).
\(^{231}\) Pastonjee Nussurwanjee v Manockjee & Co (1868) 12 Moo IA 112.
\(^{232}\) Secretary of State v Balwant Singh AIR 1933 Lah 18.
\(^{234}\) Kalipada Das v North Bihar Sugar Mills Ltd. AIR 1982 Cal 48.
\(^{235}\) Mohesenuddin Ahmad v Kabiruddin Ahmad AIR 1921 Cal 818.
\(^{236}\) O R Coley v V A Dacosta ILR (1889) 17 Cal 200.
Where one of the parties to arbitration has already obtained the opinion of the arbitrator, the opposite party cannot be compelled to submit to arbitration\textsuperscript{237}.

**Modification of procedure by consent**

The parties can alter the number or the constitution of the arbitral tribunal by common consent\textsuperscript{238}. If alteration of the tribunal is made by one party alone, he other party can object to it at any stage before the altered tribunal enters upon its duties. But if he co-operates and acquiesces in the altered state of things, he is estopped by the principles of equity from raising the question after the award is delivered\textsuperscript{239}. The Arbitration Act 1940 does not confer the power of review on the courts\textsuperscript{240}.

**Scope of the reference**

When an agreement is filed in the court and order of reference is made then the claim as a result of the order of reference is limited to a particular relief and the arbitrator cannot enlarge the scope of the reference and entertain fresh claims without a further order of reference from the court\textsuperscript{241}.

**Limitation for commencement of proceedings**

As provisions of the Limitation Act 1963 will apply to arbitration as they apply to proceedings in court\textsuperscript{242}.

\textsuperscript{237} Amritsar Improvement trust, Amritsar v Waryam Singh AIR 1955 (NUC) (Punj) 5391.

\textsuperscript{238} Mahmud Sheikh v Kankinarah Co Ltd. AIR 1924 Cal 665

\textsuperscript{239} Abdul Shakur v Muhammad Yusuf AIR 1921 All 64

\textsuperscript{240} Food Corpn of India v Bibhutibhusan Patra AIR 1987 Ori 230

\textsuperscript{241} Industrial Development Corpn of Orissa Ltd v Jajodia Overseas (P) Ltd. AIR 1980 Ori 66

\textsuperscript{242} Arbitration and Conciliation Act 1996 s 43(1)
The limitation period for an application for filing an arbitration agreement is three years from the date when the right to apply accrues. The right to apply accrues only after a demand is made to refer the dispute to arbitration under the arbitration agreement.

Application for order of reference

Under the Arbitration Act 1940, where in any suit all the parties interested agree that any matter in difference between them in the suit be referred to arbitration, they can at any time, before judgment is pronounced, apply in writing to the court for an order of reference. The arbitrator is appointed in a manner agreed upon between the parties. The court, by order, referees to the arbitrator the matter in difference which is required to be determined, and in the order specifies the time it thinks reasonable for the making of the award. When a matter is referred to arbitration, the court cannot, save in the manner and to the extent provided in the Arbitration Act 1940, deal with such matter in the suit. Where only some of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by this provision, the court can, if it thinks fit, refer such matters to arbitration (provided that

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242. Arbitration and Conciliation Act 1996 s 43(1)
243. Arbitration Act 1940 s 20
244. Limitation Act 1963 Art 137
245. Union of India v Vijay Construction Co, Meerut AIR 1981 Del 193
247. Arbitration Act 1940 s 22.
248. Arbitration Act 1940 s 23(1).
249. Arbitration Act 1940 s 23(2).
they can be separated from the rest of the subject matter of the suit) in the manner provided in that provision but the suit must continue so far as it related to the parties who have not joined in the application and to matters not contained in the reference as if no such application had been made, and an award made in pursuance of such a reference is binding only on the parties who have joined in the application\textsuperscript{250}. The other provisions of the other Chapters in the Act will, so far as they can be made applicable, apply to arbitrations under Chapter IV of the Act\textsuperscript{251}. But the court can, in any of the circumstances mentioned in the Act\textsuperscript{252}, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the court makes an order superseding the arbitration\textsuperscript{253}, it will proceed with the suit\textsuperscript{254}.

**Rules of procedure**

An arbitrator is not bound by the technicalities of procedure as in a court of law\textsuperscript{255}. The procedure followed by the arbitrator must be such that substantial justice is done\textsuperscript{256} and there is no violation of the principles of natural justice\textsuperscript{257}. An arbitrator must ensure that the proceedings are conducted with reasonable diligence\textsuperscript{258}.

\textsuperscript{250.} Arbitration Act 1940 s 24.\n\textsuperscript{251.} Arbitration Act 1940 s 25.\n\textsuperscript{252.} Arbitration Act 1940 ss 8,10,11,12.\n\textsuperscript{253.} Arbitration Act 1940 s 19.\n\textsuperscript{254.} Arbitration Act 1940 s 25 proviso.\n\textsuperscript{255.} State Trading Corpn of India Ltd v Indian Molasses Co Pvt Ltd AIR 1981 Cal 440\n\textsuperscript{256.} Mehta Teja Singh & Co v Union of India AIR 1977 Del 231\n\textsuperscript{257.} Jagdish Chander v Hindustan Vegetable Oils Corpn AIR 1990 Del 204\n\textsuperscript{258.} Bhodilal Purshottam v Chimanlal Amrital AIR 1928 Bom 49
The proceedings before the arbitrator are judicial proceedings and an arbitrator, like any other judge, is bound, where he is not expressly absolved from doing so, to observe ordinary rules which are laid down for the administration of justice. If an arbitrator adopts a particular procedure in accordance with the express wishes of the parties, they cannot subsequently raise an objection that the procedure adopted was defective. Parties have the right by contract to provide for their own private forum of arbitration and also their own private procedure so long as it is not against the law of the land. Where an irregularity is committed by the arbitrator or arbitrators in proceeding with the reference, the party who considers himself adversely affected by it must object to it immediately. Irregularities in the procedure adopted by an arbitrator can be waived by the parties provided they know of the irregularities and waive them with such knowledge. Under the Arbitration and Conciliation Act 1996, a party who knows that an of the statutory provisions from which the parties may derogate, or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is objection of such non-compliance without undue delay or, if time limit is provided for stating that

259. Dattaram Munshilal v Harjimal & Sons AIR 1930 Sind 170
260. Gita Ram v Kesho Ram AIR 1934 Lah 305(1)
261. D L Miller & Co Ltd v Daluram Goganmul AIR 1956 Cal 361.
262. Prasun Roy v Calcutta Metropolitan Development Authority AIR 1988 SC 205
263. Rethamali Servai v Ramasami Servai AIR 1919 Mad 22.
objection, within that period of time, is deemed to have waived his right to object\textsuperscript{264}. If an arbitrator follows an irregular procedure, but the aggrieved party continues to attend subsequent proceedings (with knowledge of the irregularity)\textsuperscript{265}, it will be a waiver of the irregularity\textsuperscript{266}.

If facts are presented before an arbitrator which are contrary to the pleadings and he is called upon to determine the case after hearing such statements of fact, it is then not regarded as misconduct on his part when he proceeds under such circumstances\textsuperscript{267}. The counterclaim by the other party can be made only after the order of reference; the arbitrator cannot expect it to be made on the date the order of reference is made\textsuperscript{268}. An arbitrator is not required to frame issues and then give his decision on each one of them\textsuperscript{269}. An arbitrator is not compelled by law to keep minutes of proceedings or sign such minutes of proceedings\textsuperscript{270}.

**Jurisdiction of the arbitrator**

The jurisdiction on the arbitrator is limited by the reference\textsuperscript{271}. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract\textsuperscript{272}. A conscious disregard of the law or the provisions of the contract from which the arbitrator derives his authority vitiates the award\textsuperscript{273}.

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\textsuperscript{264} Arbitration and Conciliation Act 1996 s 4.
\textsuperscript{265} SCT AI Alagappa Chettiar v SSCT Chidambaram Chettiar AIR 1931 Mad 619.
\textsuperscript{266} U Paw v Ma Ye AIR 1939 Rang 164
\textsuperscript{267} Tapesh Narain Singh v Thakur Prasad AIR 1955
\textsuperscript{268} Indian Oil Corp Ltd v Amritsar Gas Service (1991) 1 SCC 533
\textsuperscript{269} Jupiter General Insurance co ltd v Corp of Calcutta AIR 1956 Cal 470.
\textsuperscript{270} Damodar Valley Corp v Ikrah Nandi Coal Co AIR 1972 Cal 153
\textsuperscript{271} S Harcharan Singh v Union of India AIR 1991 SC 945
\textsuperscript{272} Associated Engineering Co v Government of Andhra Pradesh (1991) 4 SCC 93 103
\textsuperscript{273} Associated Engineering Co v Government of Andhra Pradesh (1992) SCC 232,
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When the reference is confined to the claim made in the plaint the arbitrator must restrict his award only to that claim\textsuperscript{274}. It is misconduct on the part of arbitrator when he gives directions in his award touching persons who are not parties before him or on a subject matter not referred to him\textsuperscript{275}. If the reference limits the authority of the arbitrator as to the manner in which the questions in dispute are to be determined the arbitrator must determine the disputes in the manner provided and, if he violates such instructions, he travels beyond the scope of the reference\textsuperscript{276} except where such matter is dealt with on the invitation of the parties contained in their statement\textsuperscript{277}.

\textbf{Application of legal principles}

The arbitrator is bound to apply the correct law\textsuperscript{278}. It is a well-settled principle that arbitrators are not beyond the law and they are bound to follow the well-settled principles of law\textsuperscript{279}. It is an implied term of an arbitration agreement that the arbitrators decide the dispute in accordance with the ordinary law and this rule can be departed from only if specifically provided for in the submission. The arbitrator must not touch the interest of strangers to the arbitration agreement\textsuperscript{280}.

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\textsuperscript{274} Nawarllal Shamaldas & Co, Bombay-I v Minerals and Metals Trading Corp of Indian Ltd. New Delhi AIR 1982 Del 44
\textsuperscript{275} Dulari Devi v Rajendra Prakash AIR 1959 ALL 711
\textsuperscript{276} Jivarajbhaji Ujamsi Sheth v Chintamanrao Balaji AIR 1965 SC 214
\textsuperscript{277} Waverly Jute Mills Co Ltd v Raymond & (India) Pvt Ltd AIR 1963 SC 90,
\textsuperscript{278} Associated Engineering Co v Government of Andhra Pradesh AIR 1992
\textsuperscript{279} State Trading Corpn of India Ltd v Indian Molasses Co Pvt Ltd AIR 1981 Cal 440.
\textsuperscript{280} Rdha Kishan v Sapattar Singh AIR 1957
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Deliberation on the award

All the arbitrators must consult together as to the form that their award must take\(^{281}\). Even when the parties agree that the award of the majority of the arbitrators will prevail, it is essential that there is a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made\(^{282}\). However, where the reference itself provides that in the event of the arbitrators being absent, the arbitration must continue by the remaining arbitrator the award made by the arbitrators present is a valid award\(^{283}\). But such consent of the parties must be clear and explicit\(^{284}\). If all the arbitrators hold their sittings and consultations till the time of arriving at a decision, and there is difference of opinion and the arbitrators who form the minority, retire after that stage, either without assigning any reasons, or on the ground that the view of the majority is against them, the award can be filed by the majority of the arbitrators\(^{285}\). So also where a party to the reference induces one of the arbitrators nominated by him not to take part in preparation of the award and to refuse to sign the award made by the majority of the arbitrators, and the terms of reference permit the majority of the arbitrators to make an award, the award so made is binding upon the parties\(^{286}\).

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\(^{281}\) Sheodutt v Pandit Vishnudatta AIR 1955 Nag 116.
\(^{282}\) Ganesh Chandra Misra v Artatrina Misra AIR 1965 Ori 17.
\(^{283}\) Debendra Nath Shaw v Aubboy Charu Bagchi ILR (1882) 9 Cal 905.
\(^{284}\) Sita Ram v Shantilal AIR 1952 VP 76.
\(^{285}\) Mansa Ram v Karra Ram AIR 1923 Lah 411.
\(^{286}\) Amar Nath v Uggar Sen AIR 1949 All 399.
Time for making the award:

Under the Arbitration Act 1940 the arbitrators must make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court allows\(^{287}\). If the court extends the time, it by order, refers the matter in dispute to arbitration and in the order specifies such time as it thinks reasonable for making of the award\(^{288}\).

Compromise award:

An award can embody a compromise of the parties themselves before the arbitrator\(^{289}\). If the existence of an alleged compromise is disputed, the arbitrator can go into that questions and if he finds the compromise valid he can give his award in terms of such compromise\(^{290}\). The arbitrator has a duty to ensure that the interest of a minor who is a party to the reference is properly looked after by his guardian\(^{291}\).

Framing of the award:

The arbitrator is entitled to make a lump sum award to a party against the other\(^{292}\). Unless specifically required, an award need not formally express the decision of the arbitrator on each matter of difference\(^{293}\).

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287. Arbitration Act 1940 Sch 1 r 3
288. Arbitration Act 1940 s 23(1)
289. Dulan Bai v Sundersao AIR 1938 Nag 132.
290. Hanu Ram v Dhanana Singh-Diwan Singh AIR 1928 Lah 915.
An arbitrator cannot award any sum to any party ex gratia\textsuperscript{294}. The arbitrator must state in the award that he considered all the documents placed before him even if he did not rely on them or discarded them from consideration\textsuperscript{295}. An arbitrator must decide the whole dispute but it is not necessary that he decide all the issues separately\textsuperscript{296} or deal with each item of the claim or counterclaim specially\textsuperscript{297} or record a finding in respect of all the points\textsuperscript{298}. However, if the issues constitute several disputes referred to the arbitrator, and the arbitrator is specifically required to deal with or decide each claim or matter separately, he cannot deliver a consolidated award without deciding each point as required in the submission to adjudication\textsuperscript{299}. Failure to decide the real questions at issue amounts to technical misconduct by the arbitrator\textsuperscript{300}. Where there are separate suits, separate arbitration agreements and separate orders of reference by court, it is irregular for the arbitrator to make a consolidated award\textsuperscript{301}. The costs awarded must not be excessive\textsuperscript{302}. Persons objecting to a legal flaw in the award, such as absence of the arbitrator’s signature, cannot take advantage of it when they themselves procured it\textsuperscript{303}.

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296. State of West Bengal v A K Ghosh & Bros AIR 1975 Cal 227
297. Shivilal Prasad v Union of India AIR 1975 MP 40;
298. S R Bhargava & Sons v Brij Mohan Sharma AIR 1972 Del 242;
299. Khiaram Hirnand v Lalchanad Hianand AIR 1930 Sind 103.
300. IGH Ariff v Bengal Silk Mills Ltd AIR 1949 Cal 350,
301. Turner v Rose (1756) 1 Ld Ken 393
302. Ram Sundar Tewari v Kuhwanthi Kunwar AIR 1922 All 233,
303. Mathulla Mathulla v Thomas George AIR 1962 Ker 320;
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