

Arbitration Award and how it can be challenged.

Initial evolution of arbitration in India can be traced back “*Brihadaranyaka Upanishad*” under the Hindu Law. It consisted of a various type of arbitral bodies which comprised of three primary bodies: i) The local court ii) The people engaged in the same business or profession iii) Panchayat. The members to the Panchayat were known as panchas, who were the arbitrator of that time. They dealt with the disputes under the given system. With time this system evolved and a legislative system was introduced for British India, where India got its first enactment on Arbitration to be known as the "Indian Arbitration Act, 1899 ". This act was applicable only to the presidency : Calcutta, Bombay, and Madras. Fundamentally, this act was based on the British Arbitration Act, 1889. Thereafter was introduced "Arbitration Act, 1940 ”, which was applied to the whole of India ( including Pakistan and Baluchistan ), this was further mortified and replaced by many other. The present date Act in implementation is know "Arbitration and Conciliation Act, 1996 ".

Arbitration form of Alternate Dispute Resolution (ADR).Arbitration as a concept is the resolution of the dispute between two parties within a minimum amount of time without the involvement of procedural technicalities which is associated with courts functioning. The Black's Law dictionary defines Arbitration as "*In practice. The investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called “arbitrators” ”*". In the English case *Collins v. Collins, 1858 28 LJ Ch 184: 53 ER 916* the court defined the concept of arbitration: "*arbitration is a reference to the decisions of one or more persons either with or without an umpire, a particular matter in difference between the parties.*"Arbitration is quite different from litigation; litigation takes place inside the court whereas arbitration takes place outside the court with the very rare examination of the court in arbitrator's final decision. There are also other methods of dispute resolution outside the court. The methods that come under ADR are:

1. Negotiation
2. Mediation
3. Conciliations

#### 4. Mini Trial

However, arbitration is considered the most important as India has a high pendency of court cases. There are different clauses in arbitration. The arbitration clause is defined as *"a section of the contract that defines the rights of the parties in the case any dispute arises over the contractual obligation or any other matter related to such contract."* There are tribunals in Arbitration. Section 2(1) (d) of the Arbitration and Conciliation Act, defines tribunal as *"a sole arbitrator or a panel of arbitrators."* It also states that *"the parties are free to determine the number of arbitrators."* and if *"parties fail to determine the number of arbitrators, the arbitration tribunal shall consist of a sole arbitrator."* Arbitration award is the award granted by the arbitrator in the decision. This can be money that one party has to provide another or can be a non-financial award such as stopping the business practice or other non-financial remedies.

Once the award is presented by arbitrator, parties cannot appeal against the award as to its merits and the court also cannot interfere in its merit, as the Supreme Court has observed *"an arbitrator is a judge appointed by the parties and as such an award passed by him is not to be lightly interfered with"* However, this does not imply that there is no check on the arbitrators conduct. To maintain a check and balance and assure the proper conduct of proceeding the law has provided certain remedies against awards provided.

Under the 1940 Act (repealed) there were 3 remedies available against award- modification, remission and setting aside. These remedies have now been divided into two groups under the 1996 Act.

*Section 34 provides that an arbitral award may be set aside by a court on certain grounds specified therein. Under Section 34 of the Act, a party can challenge the arbitral award on the following grounds-*

- *the parties to the agreement are under some incapacity;*
- *the agreement is void;*
- *the award contains decisions on matters beyond the scope of the arbitration agreement;*

- *the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;*
- *the award has been set aside or suspended by a competent authority of the country in which it was made;*
- *the subject matter of dispute cannot be settled by arbitration under Indian law; or*
- *the enforcement of the award would be contrary to Indian public policy.*

*The Amendment Act has added an explanation to Section 34 of the Act. In the explanation, the public policy of India has been clarified to mean only if:*

- *the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81, or*
- *it is in contravention with the fundamental policy of Indian law, or*

*it is in contravention with the most basic notions of the morality or justice.*

*Section 34(2)(b) mentions two more grounds which are left with the Court itself to decide whether to set aside the arbitral award:*

1. *The dispute is not capable of settlement by arbitral Process*
2. *The award is in conflict with the public policy of India*

The Amendment Act clarifies that an award will not be set aside by the court merely on an erroneous application of law or by re-appreciation of evidence.<sup>1</sup> A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.<sup>2</sup> The Amendment Act has also introduced a new section providing that the award may be set aside if the court finds that it is vitiated by patent illegality which appears on the face of the award in case of domestic arbitrations. For ICA seated in India, 'patent illegality'

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<sup>1</sup> *Proviso to section 34(2A) of the Act*

<sup>2</sup> *Explanation 2 to section 48 of the Act*

has been kept outside the purview of the arbitral challenge.<sup>3</sup> A challenge under this section can be filed only after providing prior notice to the opposite party.<sup>4</sup> In *Municipal Corp. of Greater Mumbai v. Prestress Products India (2003) 4 RAJ 363 (Bom)*, the court held that the new Act was brought into being with the express Parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.<sup>5</sup>

In *Sanshin Chemical Industry v. Oriental Carbons & chemical Ltd. (AIR 2001 SC 1219)* there arose a dispute between the parties regarding the decision of the Joint Arbitration Committee relating to venue of arbitration. The Apex Court held that a decision on the question of venue will not be either an award or an interim award so as to be appealable under Section 34 of the act.<sup>6</sup>

In *Brijendra Nath v. Mayank (AIR 1994 SC 2562)* the court held that where the parties have acted upon the arbitral award during the pendency of the application challenging its validity, it would amount to estoppels against attacking the award.<sup>7</sup>

Though there are remedies provided in substance it is important to look at its form. Arbitration is a true success only when the people start to accept the arbitration award as finality as that of the judgment of the final court. Therefore it is necessary to maintain check in the decision awarded by the arbitrator as to provide rightful justice.

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<sup>3</sup> Section 34(2A) of the Act

<sup>4</sup> Section 34(5) of the Act

<sup>5</sup> India: Validity and Grounds for challenging an award, mondaq connecting knowledge and people, Mahip Singh Sikarwar, May 15 2017.

<http://www.mondaq.com/india/x/594102/Arbitration+Dispute+Resolution/VALIDITY+AND+GROUNDS+FOR+CHALLENGING+AN+AWARD>

<sup>6</sup> Supra5

<sup>7</sup> Supra5