

Amendment under Arbitration and Conciliation Act 1996

Amendment 2015

1- Definition of Court u/s. 2(1) e

2- Reference of Parties to Arbitration u/s-8

3- Interim Measures. u/s-2(2).

4- Ensuring Impartiality (Neutrality) of an Arbitrator.

5. Arbitration Fees u/s. 11

6- Strict timelines u/s-9

7- Fast Track Arbitrations - u/s. 29B

8- A New Expansive Cost. Regime U/s- 31 A

9. Challenge an Award. u/s34

2019 Amendment Committee under Chairmanship of "Justice B. N. Srikrishna

1. Arbitration Council of India.

2. Arbitral Institutions and Appointment of Arbitrators.
3. Express Qualifications to be Accredited as an Arbitrator.
4. Timelines for Completion of Pleading Sec-23, Extension of Time u/s. 29A, and Arbitral Award.
5. Pre-requisites for Interference with Arbitral Award u/s 34
6. Confidentiality of Arbitration Proceedings. u/s-42 A.
7. Reduction of Power of Arbitrators to grant Interim Relief-17, 36
8. Amendment In Sec-45
- 9- 2015 Amendment made Non-Retrospective
10. Protection for Arbitrators. u/s-42B.

2021 Amendment –

1. Amendment of Sec-36.
- 2- Substitution of Sec- 43J.
- 3- Omission of 8th Schedule.

The Arbitration and Conciliation Act, 1996.

w.ef. 22 Aug.1996.

Initially this act consist 4 Parts and Part-I A added in 2019 Amendment. Part- I from Sec. 2 to Sec-43 relates to Arbitration and this part contains 10 Chapters.

This Arbitration Proceedings is an Adjudicatory process by a Private Forum. Whereas Conciliation is non-adjudicatory process.

Sec-2.(1) contains Definition clause and Important clause are- (a) to (e). Sec-2(2) irrespective of the Nationalities of the Parties if the Place of Arbitration is in India, Part I shall apply to the arbitration but the provisions of Part-1 shall not be attracted where the Venue of Arbitration is outside the country.

Sec- 2(3).by virtue of any other law certain disputes are not referred to Arbitration Tribunal

matters pertaining to Industrial Disputes.

Insolvency

Testamentary matters.

Criminal proceedings.

Matrimonial Causes.

What matters cannot be referred to arbitration?

The following kinds of matters cannot be referred to arbitration:

- (i) Criminal proceedings - If the criminal proceedings (non-compoundable) involve a dispute which is purely criminal and which cannot be the subject of a civil action, such matter cannot be referred to arbitration.
- (ii) Illegal transactions - Where the subject matter of a reference is illegal, no award can be binding.
- (iii) Matrimonial matters - A suit for divorce (even if divorce by mutual consent) cannot be referred to arbitration.
- (iv) Testamentary matters - The question of genuineness or otherwise of a Will cannot be referred to arbitration as the Probate Court is the only court to determine whether a Probate of an alleged Will shall be issued [Ghelabai v Nandubai, 21 Bom. 335]. But an executor or administrator can, under certain circumstances, refer to arbitration questions concerning any debt, account or claim in relation to the estate provided such reference is not with the avowed purpose of modifying the terms of the Will [Soudamini v Gopal Chandra, 19 C.W.N 948].
- (v) Insolvency /bankruptcy proceedings - Insolvency proceedings cannot be referred to arbitration but the official assignee or receiver can refer to arbitration disputes arising between the insolvent and his creditors
- (vi) Lunacy proceedings - Lunacy proceedings are not the subject of arbitration as it is the prerogative of Government to protect lunatics.
- (vii) Proceedings for industrial disputes - If filed in the Labour Court, yet, through negotiations, use of good offices and means of reconciliation, etc. in solving the industrial dispute are still in vogue and are valid.

(viii) Winding up proceedings of a company under the Companies Act, 1956.

(ix) Disputes covered by Consumer Protection Act - and the victim party chooses the Forum of Consumer Court.

(x) Tort of harming of business reputation through advertising campaigns.

(xi) Claim of ownership of properties lying in a foreign country. (xii) Proceedings of appointment of guardians - if it has been preferred by a court.

All the above cases stand outside the purview of arbitration because of the provisions made by the statutes which govern them, and under Sec. 2(3) of the 1996 Act, it is provided that where some special law has prohibited the application of arbitration for solution of their disputes, the 1996 Act will not apply.

Mortgage cases which affect in rem i.e. are not confined to two parties are not of in personam nature, are to be treated as beyond the scope of arbitration machinery. The 'non-arbitrable' cases are assigned to the jurisdiction of a proper court through discretion.

Sec- 2(4) provides if any enactment of Statute contains the provision for Arbitration in a particular matter then rules of such enactment apply and this act will not apply. for eq. Bombay Stock Exchange Act. etc.

Sec-3. Receipt of Written Communications. any written communication is deemed to have been received if it is delivered to addressee

personally or at his place of business or residence or deemed to have been received if it is sent to the addressee's last known place.

Sec-3(2) Communication is deemed to have been received on the day it is so delivered.

Sec-4- Waiver of Right to object-Doctrine of Waiver. This doctrine is based on the principle that a party should not be allowed to blow hot and cold simultaneously. Thus, where a party with full and clear knowledge of non-compliance of some non-mandatory provision under part-1 of the Arbitration Act or some irregularity in arbitration proceedings lies by and allows the occasion to exercise his legal right to object to pass by he is presumed to have acquiesced in or assented to such non-compliance or irregularity and he cannot afterwards be allowed to complain for he shall be deemed to have waived his right and proceeded with the arbitration.

Case- BSNL vs Motorola India Pvt. Ltd. 2008.

A party who knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives his right to object.

Sec-5. Extent of Judicial intervention - No Judicial authority shall intervene except where so provided in this part.

Sec-6. Administrative assistance the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Sec-7- Arbitration agreement - agreement b/w the parties to submit to arbitration all or certain disputes which have arisen or which may arise b/w them in respect of a defined legal relationship, whether contractual or not. be in the form of an arbitration

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

Agreement shall be in writing and signed by parties and record in form of letters and electronic form.

(5) 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.

Ques. Arbitration clause deemed as independent clause and can be separable from main Contract. If main contract declared null and void, what will be the fate of Arbitration clause?

Ans- In above question Arbitration agreement treated as arbitration agreement clause as a separate contract creates two different situations where first is in general sense arbitration agreement clause creates as a separate contract as u/s-16 and in second sense it shows as arbitration. agreement clause in contract which was not duly stamped or insufficient stamped.

In general sense - Sec-16 declare that for the purpose of deciding the jurisdiction by arbitral tribunal, an arbitration clause which forms the part of contract shall be treated independent of it, a decision by the arbitral tribunal that the contract is null and void shall not entails ipso jure the invalidity of the arbitration clause. Thus, laying the controversy regarding arbitration clause perishing along with Contract at rest. The definition of 'arbitration agreement' also makes the intention of legislature clear that it does not want the arbitration agreement to be declared, along with the contract, illegal and void.

Allowing an arbitration agreement to be automatically terminated along with the main contract would be akin to destroying precisely what the parties sought to create as a dispute resolution device.

.In *Ashok Traders vs Gurumukh Das Saluja* 2004, held that under the scheme of 1996 Act, the arbitration clause is seperable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. It is a 'contract within a contract. The arbitration clause commands the nature of sui generis (on its own force) hence it is not automatically affected by the fate of the main contract of which it forms a part.

In Special Sense where unstamped / insufficient stamped contract and Arbitration agreement

*SMS Tea Estates Pvt. Ltd is Chandimari Tea Co. Pvt. Ltd.* 2011-

The non-payment of stamp duty under stamp Act would make the substantive contract inadmissible as evidence, there is would be no legal impediment to the enforceability of the arbitration agreement



But in Year 2021 SC in NN. Global Mercantile Pvt. Ltd vs Indo Unique Flame Ltd 2021, SC held that when parties entered into a commercial contract containing an arbitration clause, they essentially entered into two separate agreements. Severability and separability of an arbitration agreement from the underlying substantive agreement in which it may be embedded, thereby stating that non-stamping or insufficient stamping of the substantive agreement does not render the underlying arbitration agreement as void and unenforceable.

Later on this case was referred to Constitution bench and held that an unstamped instrument without the required stamp duty is void and unenforceable.

Sec-8- Power to refer parties to arbitration where there is".an arbitration agreement -

If there is a valid arbitration clause then it is the mandatory duty of a court to refer the dispute to Arbitrators.

Case - P. AnandGajapathiRajuv P.V.4 Rajo 2000 Power of Judicial authority is not discretionary but a mandatory duty is cast upon it, if the conditions are satisfied it shall refer the parties to arbitration. The language of Sec-8 is preemptory. It is therefore obligatory for the court to refer the parties. to arbitration in terms of their arbitration agreement.

→ Suppose there is an Arbitration agreement b/w A & B regarding particular contract and A was made a Breach of Contract and other party B file a suit In a Civil Court for Damages, then in Written statement A has to state that "A and B" signed a valid arbitration clause and Court must refer the case to Arbitration. In this situation Sec-8 (1) provides now it is the task of Court to decide its jurisdiction and the

validity of Arbitration clause and if it finds Arbitration clause is valid it will refer the matter to Arbitration.

Similarly if u/s-16 matter is before Arbitration and other party make objection relating to Arbitration clause then Competency of Jurisdiction decided by Arbitrator himself, and his decision will be final and if he decided to proceed in case then aggrieved party has only remedy that to wait till arbitration award come and then he can file objection u/s.34 for competency of Arbitrator in a Court.

→ Dispute regarding jurisdiction and competency must be decided by Court or Arbitrator before which such matter is pending. Eg. - Sec-9 CPC, Sec-8 and 16 of Ac Act.

Sec-9 and 17 relate to interim order and sec- 37 provides these order are appealable.

Sec-10. Number of arbitrators shall not be an even number.

Sec-11 provides for Appointment of Arbitrator in case of party fail. to appoint Arbitrator within 30 days of Letter of request by other party - if each party appoint 1 arbitrator then both arbitrator appoint 3rd Arbitrator because number of Arbitrator odd in number.

this section further provides if Arbitrators fails to appoint 3 Arbitrator or party fail to appoint arbitrator within 30 days of Notice. then the SC In case of International Arbitration and HC in Case of Domestic Arbitration appoint Arbitrator.

Sec-12 Grounds for Challenge and Sec-13 defines Procedure of challenge Arbitrator shall disclose all the justifiable thing related to himself in writing

Arbitrator may be challenged to his independence or impartiality an also on qualifications ground which any ground or when and define

under schedule Seven shall be ineligible to be appointed as an arbitrator.

u/s13 a party who intends to challenge an arbitrator shall within 15 days after aware. before the Arbitration Tribunal.

Sec-21- Commencement of Arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Sec-23 Statement of claim and defence. + Sec-29(4) The statement of claim and defence under this section shall be completed within 6 months from the date:

a period of 12 months from the date of completion of pleadings.

u/s23(4).

•Sec-25 Default of a party - Ex-partee proceedings O-IX cPC.

Sec-30 Settlement - the arbitral Tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Sec-31 Form and contents of arbitral award

31(6) at any time make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money the tribunal may include in the sum for which the award is made interest, at such rate as reasonable, on the whole or any part of the money, for whole or any part of the period b/w the date on which the cause of action arose and the date on which the award is made.

b) carry interest at rate of 2% higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Sec-33. Correction and interpretation of award, additional award within 30 days from the receipt of arbitral award.

Sec-34- Application for setting aside arbitral award- arbitral award may be set aside by Court

34(3) application for setting aside may not be made after 3 months have elapsed from the date on which party received arbitral award, but where court is satisfied the applicant has sufficient cause for making application provide further 30 days period but not thereafter.

(5) Application of this section only after prior notice to opposite party and such application accompanied by an affidavit.

(6) application under this section shall be disposed within period of 1 year from the date of notice to other party.

Sec-35- Arbitral award shall be final and binding on parties and persons.

Sec-36. Award shall be enforced in accordance with CPC in same manner as if it were a decree of court.

(2) application for setting aside u/s-34 shall not by itself render that award unenforceable unless the Court grants an order of stay of the operation of said arbitral award.

Sec-37 Appealable orders. lie in Court- orders given under sec-8, 9, 34, 16, 17.

Sec-40- Arbitration agreement not to be discharged by death of party thereto.

Sec- 43 Limitation act shall apply to arbitrations.

Ad hoc arbitration- Ad hoc arbitration' is a proceeding constructed by the parties themselves (and not a stranger or institution) with rules created solely for that specific case. The parties make their own arrangement with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where arbitration will be held, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration.

While parties in ad hoc arbitration adopt own set of rules, it is always open to them to adopt the rules of an arbitral institution adapted to their case or of Model Law of UNCITRAL

Ad-hoc arbitration can be sought:

- (a) when the parties involved in commercial transaction choose to incorporate arbitration clause as a part of agreement to refer their future disputes
- (b) when a dispute that arose between the parties to a business transaction could not be settled through conciliation mediation or
- (c) when the parties agree to submit to arbitration 'all or any' differences which have arisen or may arise
- (d) only (b) and (c).