# Arbitration

Arbitration is an alternate means of settlement of a dispute, besides approaching a court. Every commercial contract has an arbitration clause. Arbitration emerged with the development of trade, commerce and contract law. A contracting party could seek remedy for a breach of contract by going to a court. Going to a court, however, was not always the most effective solution for the parties. This was because, one, courts could take a long time to settle a dispute and award remedy. Two, court proceedings are always adversarial. The traders, as they would, most probably, continue to deal with each other in the future as well, preferred an amicable settlement of disputes. Three, court proceedings are open to public. This makes the trade relations and terms of contracts between the parties public. This is not in the business interests of either of the parties. There was a way out for the parties. As contracts were consensual, like other terms of the contract, the parties could provide that in the case of a dispute, they would refer the dispute to persons other than a court. This came to be called arbitration. While arbitration solves some kinds of problems, it gives rise to newer issues. Let us explore these issues with the following illustration.

A has to supply certain goods to B under a contract. A supplies the goods but B refuses to pay the contracted price. B claims that the goods supplied are defective. The contract has an arbitration clause under which, any dispute arising from the contract would be referred to arbitration. Despite arbitration by C, in favour of A, B decides to take the case to a court. From the point of view of the law, it is the duty and the right of the State and courts to give justice to individuals. No private party can take away this privilege from the State or the courts. Section 28 of the Contract Act, thus, expresses the principle:

> **Section 28:** Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

It would be unfair to B, however, if the court were to take up the case. This would not facilitate trade, commerce and efficient performance of contracts. The courts, thus, formulated the general rule that if the parties had settled on arbitration, the jurisdiction of the court could be ousted. However, there were several occasions where ousting the jurisdiction of the court could lead to injustice. For example, despite an agreement, one of the parties may not co-operate in taking the dispute to arbitration. Two, the arbitrator could be incompetent or biased. Three, a party may not follow the award of the arbitrator.

Thus, the stipulation in contract documents on arbitration, unlike other aspects, posed questions that could not be settled by the courts alone. As access to the courts was central in seeking justice, a fine balancing had to be done between arbitration and ousting the jurisdiction of the courts; and allowing access to the courts despite an arbitration agreement. Thus, arbitration became a subject matter on its own, through the Arbitration Act, 1889 in England. India adopted its Arbitration Act in the 1800s and then in 1940, as the Arbitration Act, 1940. As a result of the legislative interest in arbitration, its evolution has been different from other aspects of contracts. Contract law emerged as a result of layering of the interpretations of the courts over a century. In the case of arbitration, it became the text of the law in the enactment by the legislature.

India adopted a new law on arbitration under the Arbitration and Conciliation Act, 1996. Since the 1990s, through the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) and other international bodies, there has been much standardisation of domestic and international practices concerning trade and commerce. Arbitration in a country, is not limited to the local parties only. It may exist between a local party and a foreign party. Thus, the global community has been interested in not only standardising arbitration but also facilitating it. The United Nations Commission on International Trade Law (UNCITRAL) created a model law towards this end. India, as a signatory to the body, gave effect to it by enacting the Arbitration and Conciliation Act, 1996. The Statement of Object for the Act declares:

> WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:

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AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice; AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation; AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules; BE it enacted by Parliament in the Forty-seventh Year of the Republic of India as follows:

Thus, the current law on arbitration in India is not a result of local development but a distilling of experiences worldwide. To understand it, we have to refer to the text of the law and its interpretation by the courts. The Act provides for domestic arbitration as well as enforcement of a foreign arbitration award against an Indian party in India.

## Arbitration and Interim Measures

Arbitration is an agreement between two parties, to submit their dispute to an arbitrator as opposed to a court. An arbitration agreement can be in respect of a contract or other legal relationships. An arbitration agreement is binding between the parties only if it is in writing. An arbitration agreement can be a part of the main contract or made separately through a written exchange. The disputing parties to a contract would end up terminating the contract. On the termination of a contract, the parties are not bound to follow the terms. A party to a contract can only claim damages from the other party. A party can thus claim that as the contract has been terminated, the arbitration agreement, a part of the contract, does not bind the parties anymore! The position would defeat the very purpose of the arbitration clause. The courts, thus, consider the arbitration clause to be collateral to the main contract. The other terms of the contract fall but the arbitration clauses survive.

If a party brings a dispute before the court which is the subject matter of an arbitration agreement, the court would not take up the case and refer the parties to arbitration. Section 8 provides the mechanism for it. A party may move the court in a matter which is subject to an arbitration agreement. However, the other party can bring it to the notice of the court that the dispute is subject to arbitration, by submitting a copy of the written arbitration agreement. However, there may be injustice in ousting the jurisdiction of the court in all cases. There may be the need in a given situation, to take immediate steps, rather than wait for the arbitrator to settle the dispute. Section 9 and 17 do this balancing by giving access to the court to the parties, for getting some interim intervention of the court. Section 9 provides:

**9. Interim measures, etc., by Court.**

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely: —

(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 or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising 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 injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

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(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Section 17 is titled 'Interim measures ordered by arbitral tribunal', giving the powers to the tribunal to order interim relief. It covers the same grounds as Section 9. Section 17(2) provides that an order issued by the arbitral 'shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure,1908 (5 of 1908), in the same manner as if it were an order of the Court.' The Supreme Court of India in Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited.[1], has observed:

In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power of the Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.

Section 9 of the Arbitration Act provides that a party may apply to a Court for an interim measure or protection inter alia to (i) secure the amount in dispute in the arbitration; or (ii) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

In Amazon.com NV Investment Holdings LLC v. Future Retail Limited,[2] which was on the enforcement of a foreign award, the Supreme Court noted:

The heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(1), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator, the context of Section 17 "otherwise requiring" - the context being interim measures that are ordered by arbitrators. The same object and context would apply even to Section 9(3) which makes it clear that the court shall not entertain an application for interim relief once an arbitral tribunal is constituted unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. Since Section 9(3) and Section 17 form part of one scheme, it is clear that an "arbitral tribunal" as defined under Section 2(1)(d) would not apply and the arbitral tribunal spoken of in Section 9(3) would be like the "arbitral tribunal" spoken of in Section 17(1) which, as has been held above, would include an Emergency Arbitrator appointed under institutional rules.

The Supreme Court noted that Section 17 is a mirror of Section 9, making it clear that an arbitral tribunal has the same power as a court to provide for interim relief. Also, Section 17(2) provides that tribunal orders are enforceable as orders of the court. The schema makes Section 17 on par with Section 9. In this context, the court noted:

An Emergency Arbitrator's "award", i.e., order, would undoubtedly be an order which furthers these very objectives, i.e., to decongest the court system and to give the parties urgent interim relief in cases which deserve such relief. Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against an Emergency Arbitrator being appointed, as has been held by us hereinabove, it is clear that an Emergency Arbitrator's order, which is exactly like an order of an arbitral tribunal once properly constituted, in that parties have to be heard and reasons are to be given, would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1), when read with the other provisions of the Act, as delineated above.

## Appointment of Arbitrators

The Act refers to the arbitrators as the 'arbitral tribunal'. Section 2 defines the term to mean 'a sole arbitrator or a panel of arbitrators'. Thus, the getting together of the arbitrators constitutes the arbitral tribunal. Section 10 provides as follows:

**10.** Number of arbitrators – (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in Sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

[1] Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited., AIR 2022 SC 4294.
[2] Amazon.com NV Investment Holdings LLC v. Future Retail Limited, AIR 2021 SC 3723.

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Thus, if the parties have not contemplated on the number of arbitrators, there will be only one arbitrator. If the parties, however, contemplate on the number of arbitrators, it has to be an odd number. Section 11 states that the 'parties are free to agree on a procedure for appointing the arbitrator or arbitrators'. Several things can go wrong once the parties develop a dispute. It may be beneficial for one party to go to arbitration, but it may not be so for the other party. In this case, the latter party would tend to not respond to the request of the other party to follow the agreed procedure for the appointment of arbitrator(s). It can simply become inactive; it can respond by alleging that there is no valid arbitration agreement or that the dispute is not covered by an arbitration agreement; or it can delay in doing its part in appointing the arbitrator(s). Section 11 gives the remedy to the parties to go to the High Court/Supreme Court for the appointment of the arbitrators.

## Arbitration Procedure

The parties to an arbitration agreement can appoint arbitrators on their own or through the intervention of the court on an application by one of the parties. Once the arbitrator(s) are appointed, an arbitral tribunal is in place. The tribunal will start its business of deciding the dispute. Section 19 provides on the procedure to be followed by the arbitral tribunal. It declares that the tribunal is not to be encumbered with the procedural load of the ordinary court in following the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. In fact, the parties are at liberty to specify the procedure to be followed. If the parties have not contemplated the procedure to be followed, the arbitral tribunal can set its own procedure for all aspects of its functioning. However, this freedom for the parties or the arbitral tribunal is subject to the provisions of the Act. That is, whatever is contained in any other section on the working of the tribunal, has to be followed. Let us appraise the other sections which guide the working of the tribunal. Section 18 provides that each party has to be 'treated with equality and … given a full opportunity to present his case.' Thus, neither the parties, nor the tribunal can set procedures where the parties are not treated as equals or full opportunity is not given to them to present their case.

Let us get an overview of the other provisions of the Act by noting the headings of some of the Sections:

Section 18. Equal treatment of parties;
Section 19. Determination of rules of procedure;
Section 20. Place of arbitration;
Section 21. Commencement of arbitral proceedings;
Section 22. Language;
Section 23. Statements of claim and defence;
Section 24. Hearings and written proceedings;
Section 25. Default of a party;
Section 26. Expert appointed by arbitral tribunal;
Section 27. Court assistance in taking evidence.

Sections 20 to 22 deal with the place of arbitration, commencement of arbitral proceedings and language, respectively. Thereafter, Sections 23 to 25 deal with statements of claim and defence, hearings and written proceedings and the procedure to be followed in case of default by a party. Section 24 is important. It provides that:

> **24. Hearings and written proceedings**. (1) Unless otherwise agreed by the parties, the Arbitral Tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:
>
> Provided that the Arbitral Tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.
> Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.
> (2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the Arbitral Tribunal for the purposes of inspection of documents, goods or other property.
>
> (3) All statements, documents or other information supplied to, or applications made to the Arbitral Tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the Arbitral Tribunal may rely in making its decision shall be communicated to the parties.

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After hearing the parties, the tribunal would make an award and bring the proceedings to an end. An important question that arises in relation to the arbitral proceedings is whether the award has to be based on the substantive law of the country or the arbitral tribunal can apply its own sense of justice and fairness. A joint reading of Sections 28 and 31 provides the answer. Section 28 provides guidelines on the substance of the dispute. It reads as follows:

> **28. Rules applicable to substance of dispute:**
>
> (1) Where the place of arbitration is situated in India-
>
> (a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
>
> (b) in international commercial arbitration.-
>
> (i) the Arbitral Tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
>
> (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of law rules;
>
> (iii) failing any designation of the law under Clause (a) by the parties, the Arbitral Tribunal shall apply the rules of law it considers to be appropriate, given all the circumstances surrounding the dispute.
>
> (2) The Arbitral Tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorised it to do so.
>
> (3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

Section 31 provides that:

> **31. Form and contents of arbitral award** – (1) An arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. ...
>
> (3) The arbitral award shall state the reasons upon which it is based, unless ... the parties have agreed that no reasons are to be given, or

From a reading of the two sections, a few significant things emerge. If both the parties are Indian parties, the arbitration will have to be in accordance with the terms of the contract and additionally, it must be in accordance with the substantive law of India. In the event of one party being an international one, the parties can decide the country whose law would apply to the contract. Further, under Section 31, the award has to be in writing and the arbitrators have to give reasons for their award. Section 31, thus, implies that the award should base its judgment on the application of the law. Section 28(2) creates an alternative to the application of a legal system. It uses the term *ex aequo et bono,* which means, 'According to what is right and good', 'justice and fairness'. *Amiable compositeur* means 'amicable settlement'. The arbitral tribunal will follow this only if the parties have expressly authorised it to do so. An arbitration award can be set aside by the court if the arbitration agreement is not valid, the dispute is not covered by the arbitration agreement, or a party has not been given the opportunity to present its case.

## Impartiality of Arbitrators

In several contracts, it was common for the dominant party setting the written terms of the contract to appropriates the right to appoint an arbitrator and worse, appoints itself as the arbitrator. The Arbitration and Conciliation Act, 1996 has been amended in 2016, bringing in checks and moving towards the impartiality of the arbitrator. The amended section 14 reads:

> Sec. 12 Grounds for challenge. -
>
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. - The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if -

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may 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.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

We will explore the effects of the provisions introduced by the amendment with the following review of judgments of the Supreme Court.

## Court Case: TRF Ltd v. Energo Engineering Projects Ltd, AIR 2017 SC 3889

In the contract between the parties, clause (d) of the term in the contract on arbitration provided: [3]

d. Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee.

The Seventh Schedule, which contains the list of ineligible arbitrators, lists: '1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.' Thus, the managing director of a company is clearly ineligible to be the arbitrator. As the amendment had come into effect, the managing director appointed another person as an arbitrator. The Supreme Court clearly recognised that the managing director was ineligible to be the arbitrator. It noted:

There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law.

The court then moved to the question, 'whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator'?

At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. ....

In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the

[3] TRF Ltd v. Energo Engineering Projects Ltd, AIR 2017 SC 3889

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> objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.

**Court Case: HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)**

The arbitration term in the contract provided for each party appointing its arbitrator, who in turn appointed the third presiding arbitrator.[4] In this context, the Supreme Court noted on the amendments:

> After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground.

In contract to this, the fifth schedule requires the named arbitrator to make disclosures. The court noted:

> As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds.

The court noted on the entries in the schedules five and seven:

> It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule.

The court explored the contention that the Fifth and Seventh Schedules should be construed 'in the most expansive manner, so that the remotest likelihood of bias gets removed.' The court rejected it as 'not an acceptable way of interpreting the Schedules.' It noted:

> … every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad common-sensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly.

**Court Case: Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd.**

[4] HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.), AIR 2018 SC (Supp) 636.

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In the case, the employer had the power to appoint the sole arbitrator for resolution of any dispute. The court drew from the TRF Ltd v. Energo Engineering Projects Ltd,[5] reviewed earlier and thus summarised it:

> It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

The court continued:

> We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited (AIR 2017 SC 3889) where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

The court concluded that this had to be the logical conclusion of the TRF Limited case as the court was concerned whether the managing director had become ineligible by 'operation of law'. The court ruled:

> The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. ... in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.

Thus, a contracting party itself cannot be either the sole arbitrator or have the power to appoint a sole arbitrator.

### Foreign Awards

The commercial world has been global for a long while. However, in each of the countries, only the domestic law of that country prevailed. This led to impediments in international trade and commerce. Countries tried to remedy this through country-to-country agreements and later, through conventions involving a larger number of countries. The enforcement of arbitration awards involving foreign parties emerged as one of the concerns. This concern resulted in two conventions, the Geneva Protocol on Arbitration Clauses (1923) and the International Convention on the Execution of Foreign Arbitral Awards (1927). The object of these conventions was to ensure effective recognition and protection of foreign arbitral awards. India was a signatory to the conventions.

While a country can sign international conventions, it becomes operative only when it makes a law to this effect. To give effect to it, the Arbitration (Protocol and Convention) Act, 1937 was enacted. With the further development of international trade, the Geneva Convention became outmoded. It no longer met the requirements of speedy settlement of disputes through arbitration. The convention placed undue emphasis

[5] TRF Ltd v. Energo Engineering Projects Ltd, AIR 2017 SC 3889

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on the law of the land, the selection of arbitrators and the procedure to be followed by these tribunals. Further, it gave ample room to invoke the law of the country for setting aside the awards. To remedy these constraints, the International Chambers of Commerce (ICC) prepared a draft convention.

This was considered by the United Nations Economic and Social Council, in consultation with the governments of various countries and non-governmental organisations. As a result of these consultations, a new International Convention on the Recognition and Enforcement of Arbitral Awards was adopted at New York on June 10, 1958. It came to be called the New York Convention. India was a signatory to the document. The New York Convention replaced the Geneva Convention for the signatory states. To give effect to the New York Convention, the Indian Parliament enacted the Foreign Awards Recognition and Enforcement Act, 1961.

The Parliament decided to consolidate all law on arbitration applicable in India. Thus, the Arbitration and Conciliation Act, 1996 provides on domestic arbitration and Part II of the Act provides on foreign award. The Arbitration and Conciliation Act, 1996 separately makes provisions on both, the Geneva Convention and the New York Convention. However, as the Geneva Convention has ceased to apply to the countries who have signed the New York Convention, it is the New York Convention that has the dominant application. The provisions on the New York Convention are contained in Chapter 1 of Part II, running from Sections 44 to 52. These sections give effect to the Convention by incorporating its articles and stipulations.

Section 45 is titled 'Power of judicial authority to refer parties to arbitration'. It provides that if a party comes to an Indian court with a subject matter for arbitration, the court would not take up the matter but would refer the party to arbitration unless prima facie 'the agreement is null and void, inoperative or incapable of being performed.' Section 48 is titled 'Conditions for enforcement of foreign awards'. If a party which has an international arbitral award, enforceable in India, applies to an Indian court for its enforcement, with all the relevant documentation, the court can set aside the enforcement of the award only on two grounds. One, if the person can furnish proof that the arbitration suffered from infirmity in its constitution, jurisdiction, procedures or award. The second basis relates to the opposition of the award to the Indian law, i.e., if the subject matter of arbitration is prohibited from arbitration in Indian law or the 'enforcement of the award would be contrary to the public policy of India'. Once the court approves the application, the arbitral award takes the effect of a degree of the court.

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**Summary**

1. Arbitration is an alternate means of settlement of a dispute in place of approaching a court. However, this does not amount to a working out of a compromise between the parties. Arbitration award is based on the substantive law.

2. Arbitration and Conciliation Act, 1996, provides the details for all matters related to arbitration.

3. An arbitration clause in a contract does not completely oust the access to the courts. Awaiting arbitration, a party can approach a court for interim relief and measures. This can be for protection of goods, restoring money or protection and preservation of evidence.

4. The parties are free to set the procedure to be followed by the arbitration tribunal. However, each party has to be treated with equality and must be given full opportunity to present his case.

5. The arbitration has to be done in accordance with the substantive law. However, if the parties provide otherwise, the arbitration tribunal can also do an amicable settlement.

6. A party cannot be an arbitrator in its own cause or have the power to appoint a sole arbitrator.

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