

# **OPPORTUNITIES IN ARBITRATION**

## **FOR PROFESSIONALS**

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### **INTRODUCTION**

Disputes and differences in business dealings are common. The overburdened courts and judiciary system of our country are a proof of the same. But a dispute must be resolved. Unresolved dispute in business hinders its smooth flow and future growth of not only domestic trade but also of international trade. A dispute is normally resolved by way of litigation or through Alternative Dispute Resolution (ADR) mechanism.

In litigation a dispute is referred to a court of Law. Litigation is expensive, time consuming and full of complexities.

ADR is a system whereby disputants resolve their disputes with the minimum outside help.

The ADR procedure consists of four basic methods of dealing with disputes, which are:-

1. Negotiations
2. Mediations
3. Conciliations
4. Arbitration.

### **Negotiations**

In Negotiation the disputant parties resolve their differences out of the court by way of negotiation. No lawyers or outsiders are generally involved. There are no hard and fast rules, no technicalities and complicated procedure. However, if a dispute cannot be resolved through negotiations, one can try mediation.

### **Mediations**

In mediation generally a third party is involved who acts as a facilitator. In a typical mediation, there is always a win-win situation. However, the settlement reached through mediation is non-binding. So we come to the next best method that is “Conciliation”.

### **Conciliation**

Conciliation is now recognised by the Arbitration and Conciliation Act, 1996. In Conciliation, the disputant parties resolve their disputes with the help of one or more conciliators. The settlement agreement reached by the parties and authenticated by the conciliator is binding upon the parties.

### **Arbitration**

Arbitration is a quasi judicial method for resolving disputes outside the court. Arbitration is a preferred mode of dispute resolution in domestic as well as international trade. It is preferred over litigation as our overburdened courts are not in a position to provide timely justice.

## **Role of Professionals**

Professionals like chartered Accountants and Company Secretaries are well versed and experienced in taxation, accounting, projects, financial services, business planning, take - over etc. He is in an advantageous position of appreciating the business background of a dispute or difference. When there is a dispute between two parties, they first go to their Chartered Accountant and not to an Advocate. Day in and day out, a Chartered accountant is engaged in resolving disputes of his Clients though informally. He also has extensive experience of drafting commercial agreements, negotiating with government authorities and represents clients in a number of ways.

Arbitration and other methods of Alternate Dispute Resolution (ADR) offer a promising opportunity to a Chartered Accountant and a Company Secretary. In ADR methods, the counsel need not be a lawyer because the proceedings are dependent primarily on factual merits. He must look at ADR as a positive addition to the skill he can offer to his client. He can be instrumental in resolving the complex disputes by utilising his wide range of experience. The following are few of the areas where he can render his services.

### **AS AN ARBITRATOR**

A professional is required to maintain a high degree of professional competence and technical standard. He is bound by the code of conducts framed by the Institute of Chartered Accounts of India and Institute of Company Secretaries of India.

Indian Council of Arbitration, a specialised Arbitral body, sponsored by GOI and certain apex business organisations, also recognises Chartered Accountants to act as arbitrators. The above organisation maintain a panel of arbitrators drawn from the various fields. Clause III(b) of the "broad categories of qualification and experience for Empanelment as an arbitrator indicates that Chartered Accountants are eligible for Empanelment. Clause III(b) reads as follows :-

III(b),"Chartered Engineers, Chartered Accountants, Chartered Secretaries, Architects, Valuers or other technical consultants in any branch of engineering, accountancy" etc. With at least 15 years experience in Government, Private organisation or in professional practice with adequate knowledge and experience in arbitration matters.

So, a professional having 15 years of professional experience is eligible for Empanelment as an arbitrator with Indian Council of Arbitration.

There are large number of organisations, national as well as international, which maintain panel of arbitrators. A list of few such organisations is given as annexure to this article.

The job of an arbitrator is often challenging and satisfying. The assignment is reasonably paid and above all the timing and venue of the meeting is arranged to suit the convenience of the parties and arbitrator. However, an arbitrator has to maintain high level of integrity. There is no formal qualification to become an Arbitrator at the moment. But normally professionals with legal background are preferred.

### **AS AN AMIABLE COMPOSITEUR**

The mechanism of ADR is being evolved and many new methods of resolving disputes are emerging throughout the world. Many arbitral organisations handle amiable composition as an additional alternative for dispute resolution. Amiable composition is different from conciliation in the sense that in this method the parties delegate the resolution of their dispute on third parties called amiable compositeurs and undertake to accept any decision adopted by them. Many organisations e.g. Bogota Chambers of Commerce, provide special training in the field of amiable composition. A professional like Chartered Accountant, Company Secretary and others can profitably explore this area and add values to the services they render to their clients.

### **AS A COUNSEL**

Of late, there is a move all over the world to encourage professionals and experts like, Chartered Accountants, Company Secretaries, Engineers, Advocates etc. to play an active role in Arbitral process. The objective of arbitration is to provide expedient, efficient and economical justice to the aggrieved parties as it is felt that too much lawyering defeats the very purpose of arbitration.

A Chartered Accountant and a Company Secretary can equip themselves to enter into the field with considerable advantage.

A Chartered Accountant and a Company Secretary normally represent the cases of their clients before various authorities including the ITAT, Company Law Benches, SEBI, RBI, etc. They can definitely specialise in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, Commercial disputes, rights of properties, Lease transactions, etc. and represent their clients in Arbitration Proceedings.

### **AS AN EXPERT**

Under Section 26(1) of the Act, The Arbitral Tribunal may appoint expert(s) to report on any specific issue to be determined by it. It may also require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection. An expert may be examined and cross-examined on request of a party and where the arbitral tribunal considers it necessary. The expert may be required

on request of a party to make available to that party for examination, all documents, goods or other property in the possession of the expert on the basis of which he prepares his report [section 26(2) & (3)].

A Chartered Accountant can help the Arbitral Tribunal in the capacity of an expert. It is not uncommon that the arbitrators take the help of the Chartered Accountants in various matters like Accounts, Commercial transactions, Lease transactions etc.

### **AS A CONCILIATOR**

Conciliation is a process by which the conciliator (a third party) endeavours to bring the disputant parties to agreement. The Conciliator uses his expertise in creating a cordial atmosphere, enhancing communications, suggesting potential solutions, providing technical assistance and reaching an amicable settlement. Conciliation is an independent method of settling disputes arising out of any legal relationship, contractual or otherwise where the parties choose a 'third person' to settle their dispute. Though the terms 'conciliation' and 'mediation' are used interchangeably yet they are different. Mediation is a structured method where the mediator helps the disputant parties reach an amicable settlement of their disputes. A mediator is normally taken to be person of disputants' choice. He may meet each party separately to know its view-point and impress upon each party to comprehend the view-point of the other disputant. The Conciliator, on the other hand, is instrumental in drawing up the terms of the settlement in the shape of an agreement, consequent upon comprehensive discussions with the parties to the dispute. The

primary duty of both is alike, e.g. settlement of dispute in an amicable manner.

In our day to day practice, we often help our clients in settling their disputes through Conciliation. Chartered Accountant/Company Secretary can render the services as Conciliator professionally. This will require the respective professional to sharpen their skill and acquire latest knowledge of the technology of Conciliation.

### **IN OTHER CAPACITY**

#### **A) CONSULTANCY**

A professional can also advise the client whether a particular dispute is arbitrable or not. In case of arbitrable disputes, he can provide various services like advising the clients on selection of arbitrator, initiating the arbitral proceedings, preparation of statement of claims or defence, pleadings etc. He can help in deciding which ADR process the client should choose.

After enough experience in arbitration and other ADR methods, he can also play an important role in solving the pending disputes of his clients by identifying those cases which are suitable for resolution through ADR.

B) The code of civil procedure, 1908 has been recently amended and amendment Act of 1999 has recognised ADR as an effective

tool for resolving disputes. The purpose of the amendment is to speed up the judicial process and get over the problem of backlog of civil cases. Now, at the state of inception itself, the court is required to scrutinise and assess whether the matter can be settled or be referred to arbitration and other ADR methods. This amendment will encourage the process of ADR to a greater extent and professional can see lot of opportunities in this field. I quote here section 89(1) of the code of civil procedure (Amendment) Act, 1999 that is quite relevant and self-explanatory.

### **Settlement of dispute outside the court**

Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for -

- 1) Arbitration
- 2) Conciliation
- 3) Judicial settlement including settlement through Lok Adalat or,
- 4) Mediation.

### **Where A Dispute Has Been Referred :-**

- 1) For arbitration or conciliation, the provision of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provision of that Act,
- 2) To Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provision of that Act shall apply in respect of the dispute to be referred to the Lok Adalat.
- 3) For judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provision of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under provisions of that Act;
- 4) For Mediation, the court shall effect a compromise between the parties and shall follow procedure as may be prescribed.

So, the amendment in C. P. C. Is going to substantially enhance the activities in ARBITRATIONS and the Professionals can find a foothold in this ever growing field.

### C) **SPECIFIC AREAS**

There are innumerable areas where professionals can profitably settle the disputes through ADR. The followings are a few of them:-

- 1 Loss of Profit
- 2 Lease or Hire Purchase Transactions
- 3 Insurance Claims
- 4 Company Law
- 5 Commercial Contracts
- 6 Issues relating to amalgamation, mergers, Take overs etc.
- 7 Securities Fraud
- 8 Rights of Properties
- 9 Joint Venture Agreements
- 10 Breach of Contracts
- 11 Buy Back of Shares
- 12 Sale and Purchase of Securities

**D) THE MULTI-STATE COOPERATIVE SOCIETIES ACT, 2002.**

The multi-state Co-operative Societies Act has been amended w.e.f. 19<sup>th</sup> Aug., 2002 and disputes touching the constitution/ management or business of such Cooperative will have to be referred to Arbitration. Sec. 84(1) and 84 (2) are reproduced below:-

**84. Reference of disputes**

- 1) Notwithstanding anything contained in any other law for the time being in force, if any dispute [other than a dispute regarding disciplinary action taken by a multi-State co-operative society against its paid employee or an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 (14 of

1947), touching the constitution, management or business of a multi-State co-operative society arises -

- a) Among members, past members and persons claiming through members, past members and deceased members, or
- b) Between a member, past members and persons claiming through a member, past member or deceased member and the multi-State co-operative society, its board or any officer, agent or employees of the multi-State co-operative society or liquidator, past or present, or
- c) Between the multi-State co-operative society or its board and any past board, any officer, agent or employee, or any past officer, past agent or past employee, heirs or legal representatives of any deceased office, deceased agent or deceased employee of the multi-State co-operative society or,
- d) Between the multi-State co-operative society and any other multi-State co-operative society, between a multi-State co-operative society and liquidator of another multi-State co-operative society or between the liquidator of one multi-State co-operative society and the liquidator of another multi-State co-operative society.

Such disputes shall be referred to arbitration.

2. For the purpose of sub-section (1), the following shall be deemed to be disputes touching the constitution, management or business of a multi-State co-operative society, namely :-
- a) A claim by the multi-State co-operative society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;
  - b) A claim by a surety against the principal debtor where the multi-State co-operative society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or Not.
  - c) Any dispute arising in connection with the election of any officer of a multi-State Co-operative society.

#### **(E) OPPORTUNITIES UNDER THE COMPANIES ACT, 1956**

1. It is not uncommon that Articles of Association of a company contains the provision that disputes between the company and its members be referred to arbitration. In such cases, it will be obligatory on the part of the parties to the dispute, to resolve the same through arbitration or conciliation.

2. Companies (second Amendment) Act, 2002 has introduced part IX A consisting of section 581A to 581 ZT to enable incorporation of producer companies and conversion of existing multi-state cooperatives into producer companies on discretionary basis. In the amended Act a provision for resolution of disputes through Arbitration has been introduced. Section 581 ZO of the Companies Act, 1956 now provides that where disputes relating to the formation, management or business of a producer company arise amongst members or between member and producer company or between the producer company and its directors, such disputes shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996.

## **INITIAL STEPS FOR BEGINNERS**

**Those who want to pursue ADR/ Arbitration as a career should take some initial steps which are as follows:-**

### **Acquire sufficient knowledge of the subject- read a good book**

1. Subscribe to at least one journal on Arbitration or ADR
2. It helps to become a member of the Arbitral organisation like Indian Council of Arbitration.
3. Attend a formal training programme, if possible. ICADR, New Delhi is conducting a postgraduate diploma course in ADR.
4. Since most of the Arbitral organisations maintain independent panels. Chartered Accountants can empanel themselves with these organisations.

5. He must be alert to the opportunities available. E.g. while preparing Balance Sheet he can analyse the debts outstanding over six months and suggest remedial measures to the clients. Thus, he can add value to his services.
6. Bring professionalism – have a mandate in writing and keep a record.
7. Value addition to our services:-

He can assist in drafting arbitration agreements and in case of dispute or differences suggest ways to resolve the same.

## **CONCLUSION**

It will not be out of place to mention that the field of ADR is bound to grow by leaps and bound in times to come. Nani Palkiwala has once said “If I were appointed a dictator of this country, in the short period between my appointment and my assassination, I would promulgate a law making all commercial disputes compulsorily referable to arbitration.”

## **ANNEXURE - A**

### **ARBITRAL ORGANISATIONS IN INDIA**

1. The International Centre For Alternative Dispute Resolution  
Trikot - II, 3<sup>rd</sup> Floor, Bhikaji Cama Place,  
R. K. Puram, New Delhi - 110066  
Tel. No. 91-011-6102805/06/07 & 6106315  
Fax No. 91-011-6102803
2. The Indian Council of Arbitration  
Federation House, Tansen Marg,  
New Delhi - 110 001

Tel. No. 91-11-3319251-61

Fax No. 91-11-3320714

3. The Stock Exchange Mumbai  
Rotunda Building (1<sup>st</sup> floor),  
Mumbai Samachar Marg,  
Mumbai - 400 001.  
Tel. No. 91-22-2655630/31/32 direct - 2672613  
Fax No. 91-22-2673677 extn. 8320
4. The Arbitration Cell  
National Stock Exchange of India Ltd.  
Exchange Plaza, Bandra Kurla Complex,  
Bandra (East), Mumbai - 400 051.
5. National Securities Depository Ltd.  
Trade World, 5<sup>th</sup> floor, Kamla Mill Compound,  
Senapati Bapat Marg, Lower Parel, Mumbai - 13.
6. Bengal Chamber of Commerce & Industry  
Post Box No. 280, Royal Exchange, 6,  
Netaji Subhash Road, Calcutta - 700 001
7. Indian Merchants' Chamber  
Lalji Naranji Memorial Indian Merchants' Chamber Bldg. 76  
Veer Nariman Road, Churchgate, Mumbai - 400 002.
8. Punjab, Haryana & Delhi Chamber of Commerce & Industry  
PHD House, Opp. Asian Games Village,  
New Delhi - 110 016.
9. Southern India Chamber of Commerce and Industry  
P. B. No. 1208, Indian Chamber Building,  
Madras - 600 001.
10. Travancore Chamber of Commerce  
P. B. No. 200, Alleppey, Kerala
11. Bombay Chamber of Commerce & Industry  
Machinnon Mackenzie Building,  
Ballard Estate, Mumbai - 400 038.
12. Coimbatore Chamber of Commerce  
C/o. T. Stanes & Co. Ltd.  
6/13-24 Race Course Road,  
Coimbatore - 641018.
13. Indian Chamber of Commerce  
India Exchange, India Exchange Place,  
Culcutta - 700 001.

14. OTC Exchange of India  
92, Maker Tower "F"  
Cuffe Parade,  
Mumbai - 400 005.
15. Inter Connected Stock Exchange of India Ltd.  
International Infotech Park,  
Tower No. 7, 5<sup>th</sup> Floor,  
Sector 30, Vashi,  
Navi Mumbai - 400 703.
16. The Central Registrar of Co-operative Societies  
Ministry of Agriculture,  
Dept. of Agr & Co-operation  
Dr. Rajendra Pd. Road,  
Krishi Bhawan,  
New Delhi - 110 001.
17. FIMMDA of India  
220, Maker Chamber V  
Nariman Point,  
Mumbai - 400 021.
18. National Association of Companies for Technology Training  
50/2386, Vijaydeep, Opp. MIG Club,  
Gandhinagar, Bandra (East),  
Mumbai - 400 051.  
Tel. No. : 26453867/26512564
19. Central Depository Services (India) Ltd.  
Phiroze Jeejeebhoy Towers,  
28<sup>th</sup> Floor, Dalal Street,  
Mumbai - 400 023.  
Tel. No. 2723333  
Fax No.: 91-22-2723199  
Website: [www.centraldepository.com](http://www.centraldepository.com)

## **ANNEXURE - B**

### LIST OF PERIODICALS

1. Sebi And Corporate Laws  
Published By - Taxmann Allied Services Pvt. Ltd.  
59/32, New Rohtak Road,

New Delhi - 110 005

3. ICA Arbitration (Quarterly)  
Published By - Indian Council of Arbitration  
Federation House, Tansen Marg,  
New Delhi - 110 001.
4. Arbitration Law Reporter  
A Monthly Journal, 27-28,  
Gokhale Market, Opp. Tis Hazari Court,  
Delhi - 110 054.
5. ADR News & Views  
International Centre for Alternative Dispute Resolution  
Trikoort - II, 3<sup>rd</sup> Floor,  
Bhikaji Cama Place,  
New Delhi - 110 066

## **ANNEXURE - C**

### **RECOMMENDED BOOKS**

1. Law of Arbitration and Conciliation  
By Saraf and Jhunhunwalla
2. Commentary on Arbitration  
By Malhotra
3. Handbook of Arbitration Practice  
By Ronald Bernstein
4. The Law and Practice of Commercial Arbitration in England  
By Mustill and Boyd
5. Arbitration  
By Russell
6. Arbitration made easy published by Indian Council of Arbitration  
New Delhi
7. Arbitration and Conciliation Law of India  
By G K Kawatra (published by Indian Council of Arbitration)
8. Commentary on Arbitration & Conciliation Act, 1996  
By H C Johari
9. Commentary of Arbitration

By Bachawat