

**HAND-BOOK
& GUIDE FOR**

- **CONTRACT**
- **DISPUTES**
- **ARBITRATION**
- **CONCILIATION**
- **MEDIATION**



SUDHAKAR DOKHANE
PAST PRESIDENT : PEATA (I)

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Town Planners Association (India)**

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MESSAGE FROM SPONSORER



Shri. Chandrakant D. Shah

Undoubtedly, Practising Engineers, Architects and Town Planners Association, popularly known as PEATA (India) is giving its professional and intellectual contribution to the Building Industry, thus has created unbreakable bond between professionals and developers together with all component agencies in Construction Industry.

PEATA (India) has published many useful books written by Shri. Sudhakar Dokhane – Former President of Association, which were widely appreciated and proved helpful not only to the professionals, but equally for developers as well as for end consumer.

We are in Construction and Real Estate Business for over 5 decades, (established in 1962) and are known for quality product. I personally know Mr. Sudhakar Dokhane for over 4 decades and always impressed by his commitment and dedication towards practising professionals and all players of Real Estate. When Mr. Dokhane requested me to sponsor this most informative and must essential book, I felt it my duty to respond. It is felt obligatory for me to sponsor this most useful book, whereby the disputes in construction business and activities can be resolved amicably without any litigation, which I am sure of.

Many thanks to author Mr. Sudhakar Dokhane, Shri. Shirish Sukhatme – President (PEATA) and Executive Committee Members of the Association, for giving me this novel opportunity to interact with the professionals.

Thanking you,



Shri. Chandrakant D. Shah
(Chairman)

Damji Shamji Shah Group

Mumbai.
2014



PRELUDE

Real Estate in itself is a complex and multifarious subject which involves various component agencies right from professionals to consumers. This being service oriented business, the players has to face problems, disputes and conflicts of interest at one stage or other, which some time are inevitable.

However at the end, in any case the disputes are required to be settled with the help of experienced professional in the line, either by any of the dispute settlement procedures, explained in this Hand-Book. Moreover, I am sure that this guide may help professionals to great extent, for rendering their impartial services in the matter of settlement of disputes.

Experienced and expert Architects and Engineers can offer multifold professional services. Besides their regular practice they can also act as Valuer, Arbitrator, Conciliator and or Mediator, for settling the disputes between the parties out of Court of Law. These professionals can create their own footprint in these specialised services since at present public trend is increasing considerably for out of Court settlement.

It is seen that after age of 65 and above, most of the professionals invariably prefer counsel practice, which can give them not only mental satisfaction but a chance to share their expertise, knowledge and experience in settling the disputes which is a social service in itself.

Parties to dispute/s are preferring settlement of disputes by arbitration / conciliation or mediation, instead of fighting long term and expensive litigations in the Court of Law. This changed attitude has increased the demand of arbitrators, conciliator and mediator considerably.

On this backdrop issues from contract to conciliation are discussed and explained in this Hand-Book and Guide, which I am hopeful that it will give enough material and guidance for offering professional services in the field of Arbitration, Conciliation and Mediation which is a need of the hour.

Any suggestions, corrections and guidance to this Hand-Book, from the studied professionals and readers will be highly appreciated, which will be considered on its merit and will be included in the next edition .

I have made liberal use of the materials available on the subjects and also have referred to number of standard books, journals websites etc. and thus tried to assimilate the texts presenting in orderly manner as far as possible.

My sincere thanks goes to various authors and authorities listed in bibliography for their valuable and studied information incorporated in their works, which has given me desired references for this compilation.

Mumbai
2014

Sudhakar Dokhane
(Former President of PEATA (I))



FORWARD

The Disputes, and the Conflicts are part and parcel of social interaction. Small fights, fierce litigations and deadly world wars having been witnessed due to disputes of boundaries and sharing of natural resources amongst neighbouring countries. If it is said that, 'the necessity is mother of invention then 'the conflict is a father of arbitration'. Author Shri. Sudhakar Dokhane has rightly stated in his Prelude that "this hand book would and should be helpful to those who are in practice of Arbitration, Conciliation and Mediation", and truly enough each and every term related thereto has been included in this endeavor.

This hand book and guide covers the whole gamut of technical and legal process involved in process of solving disputes and conflicts especially related to tenure of land, title to the property, construction activities and professional services involved thereof.

Author Shri. Sudhakar Dokhane, has covered this complex subject in 42 Chapters. Even though book is having dry title, every subject is effectively explained in lucid, simple and flowing language. The Author was also a visiting lecturer, who taught the subject of Professional Practice and D.C. Regulations, in renowned Architectural Institutes of Mumbai for many years. Being senior practicing professional, he has vast experience in the field of Real Estate.

Shri. Sudhakar Dokhane a multi dimensional personality has written several non fictional technical books on topics of Real Estate Transactions, Mumbai Water Management, Re-development of Society Buildings, Manual for Site Supervision, Right of Information Act, Public interest Litigations, Lok-Adalat etc. The Author is also well known for his ability to give studied talk on any subject.

The development or construction activity necessarily focuses in bringing change in the environment. These changes are brought by vigorous movements of labor, material, money. It is natural that any movement brings friction, so it would be too romantic to assume that the developmental movement would not cause abrasive friction of conflict. Every contract is bundle of expectations and expectations give rise to conflicts. But simultaneously it is also true that there is no dispute or conflict which cannot be solved. It is rightly said that "even single sheet of paper has two sides."

"One cannot shake hands with clinched fists". This proverb is the basic principal of bringing parties to disputes on one table of Arbitration, Conciliation and or Mediation. Even seemingly smaller words like Contract, Disputes, Arbitration, Conciliation and Mediation have several fine legal shades. This book covers each and every terminology, process, procedures required to be adopted legally until the award for final decision is delivered.

This hand book is actually a multi colored cross section of entire world of handling and settling the disputes and conflicts mainly related to building industry. Author discusses about necessity of contract and types of various agreements, in numerated types of disputes, breach of contract, clause of Arbitration etc. Chapter 14 to 39 covers Arbitration and Conciliation Act 1996 with definitions and its broad rules and its provisions. Chapter No 31, discusses the advantages and disadvantages of Arbitration, over Court Litigations.

Any professional, like a Architect, Legal Consultant, Structural Engineer etc. comes across some sort of dispute for settlement at least once in his professional career. Unforeseen circumstances like building collapses, professional misconduct, stoppage of construction work, non-payment of professional fees, complaint to council of architecture regarding misconduct of professionals get primarily addressed to the contract, its clauses and interpretation. The Chapters 3 to 13 give knowledge of fundamentals of disputes and role of Contract document.

Many times Conciliation is preferred over the Arbitration for amicable settlement. Arbitration, Conciliation and Mediation have distinct advantages and disadvantages depending upon need of the situation. In this book author very

meticulously describes each aspect, and its overlapping terms. This book quotes responsibility, role and duties of the disputants and dispute settler also.

This being a book of references does not have bibliography or any book references, but it has grand glossary of terms in practice in Chapter No. 1, involving more than 175 terms.

Like several other popular publications of PEATA (I), this new book will give desired assistance to all connected to construction industry. While forwarding this book to readers, I recommend this book as handy reference material worth keeping on our table particularly by each professional and component agency connected to building industry.

Mumbai
2014

Ar. Shirish Sukhatme

M.Arch (IIT)

President – PEATA (I)

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▪ GENERAL ▪





CHAPTER – 1

GLOSSARY OF COMMONLY USED TERMS IN PROPERTY DISPUTES, LITIGATIONS & ARBITRATION

Following are some of commonly used terms, related to various agreements, deeds, contracts for settlement of disputes through Arbitration in connection with Real Estate transactions. It is necessary, that the parties involved in such transactions, atleast should be aware of the meanings of such terms for the purpose of clarity.

Access, easement of: An easement of access is the right which an abutting owner has of ingress to and egress from his premises, in addition to the public easement in the street.

Accessory: Anything which is joined to another thing as an ornament, or to render it more perfect, or which accompanies it, or is connected with it as an incident, or as subordinate to it, or which belongs to or with it.

Acquisition: The act of becoming the owner of certain property; the act by which one acquires or procures the property in anything.

Acquittal/ Acquit: To set free, release or discharge as from an obligation, burden or accusation. To absolve one from an obligation or a liability; or to legally certify the innocence of one charged with crime. A release, absolution, or discharge from an obligation, liability or engagement.

Ad hoc: For this; for this special purpose. An attorney ad hoc, or a guardian or curator ad hoc, is one appointed for a special purpose, generally to represent the client or infant in the particular action in which the appointment is made.

Ad interim: In the meantime. An officer as interim is one appointed to fill a temporary vacancy, or to discharge the duties of the office during the absence or temporary incapacity of its regular incumbent.

Affidavit: A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Affirmation: A solemn and formal declaration or asseveration that an affidavit is true, that the witness will tell the truth, etc; this being substituted for an oath in certain case.

Adjudge: To pass on judicially, to decide, settle, or decree, or to sentence or condemn.

Adjudicate/ Adjudication: To settle in the exercise of judicial authority. To determine finally. The legal process of resolving a dispute. The formal giving or pronouncing a judgement or decree in a court proceeding; also the judgement or decision given. The entry of a decree by a court in respect to the parties in a case.

Agent : An Agent is a person employed to do or discharge any act of the former, including to represent another in dealings with third person/s.

Agreement : It is a contract executed between parties enforceable by Law.

Agreement-to-Sale: This is initial contract between the Vendor (seller) and Purchaser, specifying the terms and conditions mutually agreed upon, for sale/purchase of any immovable property.

Agreement of Leave and License: This is a short-term contract (not more than 9 years) executed between "Licensor" & "Licensee" and is legally binding on both the parties. Under this contract the licensee is permitted to use the premises, fittings & fixtures provided therein against monthly compensation payable by the licensee to licensor.

Appeal: A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed.

Appellate: Pertaining to or having cognizance of appeals and other proceedings for the judicial review of adjudications.

Appellate Court: A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, error or report.

Appendix: Supplementary materials added to appellate brief; e.g. record on appeal.

Arbitration: A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.

Arbitration Agreement : Means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of legal relationship, whether contractual or not.

Arbitral Award : Means a final judgment, verdict or a decision given by the panel of Arbitrators in the matter of settlement of dispute by arbitration.

Arbitration Board : It is a panel of arbitrators appointed to hear and decide a dispute according to the provisions of contract and as per the rules of arbitration.

Arbitration Clause : It is a contractual provision mandating arbitration and thereby avoiding litigation of disputes about contracting parties' rights duties and liabilities.

Arbitration Procedure : A impartial procedure established by Law of Arbitration, which should not be arbitrary, unfair or unreasonable.

Arbitral Tribunal : Means a sole arbitrator or panel of Arbitrators.

Attorney: In the most general sense this term denotes an agent or substitute, or one who is appointed and authorised to act in the place or stead of another. An agent or one acting on behalf of another.

“Bailment”, “Bailor” and “Bailee”: A “Bailment” is the delivery of goods by one person to another for some purpose, against the contract that they have executed, and when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the “Bailor” and the person to whom are delivered is “Bailee”.

Bank Guarantee : This is a separate, distinct and independent contract under which the Bank undertook to pay the guaranteed amount to the party concerned if agreed to pay to in the event of non performance or Breach of Contract, as the case may be and in accordance to the Agreement of Bank Guarantee.

Built-up Area : Means area covered by floor plate of building / structure on all floors including cantilevered portion if any measured out to out.

Bench: A seat of judgement or tribunal for the administration of justice. The seat occupied by judges in courts.

Beneficiary: The person in whose favour a promissory note or bill of exchange is payable; or any person in whose favour a contract of any description is executed.

Bona fide: In or with good faith; honestly, openly, and sincerely; without deceit or fraud.

Breach of Contract : Failing to perform, honour and discharge of their obligations by either of the parties to the contract in respect to any term / condition of contract either written or oral without legitimate legal excuse is a “Breach of Contract”.

Breach of Trust: Any act done by a trustee contrary to the terms of his trust, or in excess of his authority and to the detriment of the trust; or the wrongful omission by a trustee of any act required of him by the terms of the trust.

Carpet Area : Means the net usable area within the premises / building / structure excluding the area that covered by walls, and measured inside-to-inside.

Cause of Action: The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence.

Challenge : In civil actions, either of the aggrieved party can defy the decision before Court of Law.

Claim: To demand as one’s own or as one’s right; to assert; to urge; to insist. A cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or thing. Demand for money or property as of right.

Client: An individual, corporation, trust, or estate that employs a professional to advise or assist it in the professional’s line of work.

Conciliation : It is a process of settling of disputes without litigation, arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

Conciliator : An umpire or referee who is competent to settle the dispute by conciliation without litigation.

Collateral: Property pledged as security for satisfaction of debt. Collateral is a secondary or additional security for performance of principal obligation or that which is by the side, and not in direct line.

Compensation : A make up payment payable by the person whose acts or omission have caused loss or injury to another.

Conflicting Evidence: Evidence given by the plaintiff and or the defendant, or prosecutor and or defence which is inconsistent and or cannot be reconciled.

Confirming Party: A person / party having his third party rights and or interest in the immovable property, and who some time agrees to release his rights in favour of Purchasers through the Vendors, against consideration agreed upon in the capacity of a confirming party for the transaction.

Contempt of Court: Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity, committed by a person who, being under courts' authority as a party to the proceedings, willfully disobeys its lawful orders or fails to comply with an undertaking he has given.

Contract: An agreement of promises executed between two or more persons which creates an obligation to do or not to do a particular thing/s by respective parties to the contract which is enforceable by Law.

Contract of Indemnity : This is a contract according to which one party promises to save the other from loss/es caused to him by the conduct of the Promisor himself or by the conduct of any other person.

Contingent Contract : This is a contract to do or not to do something by the parties, if in some event, collateral to such contract does or does not happen. In other words it is possible but uncertain contract.

Contractor : A person or firm who undertakes and promises to produce given result for any establishment, with whom the contract of specific terms executed.

Conveyance: An instrument executed by and between the owner of the property (Vendor) and the Purchaser whereby the Vendor relinquish, transfer all his rights, title and interest the property in perpetuity including handing over physical possession of the property in favour of Purchaser.

Covenant: An agreement, convention, or promise of two or more parties, by deed in writing, signed and delivered, by which either of the parties pledges himself to the other that something is either done, or shall be done, or shall not be done, or stipulates for the truth of certain facts.

Damages : It constitute the sum of money claimed or adjudged to be paid in compensation for the loss or injury sustained.

Debts Recovery Tribunal : A tribunal established under Sub-Section(1) of Section-3 of the Recovery of Debts under Financial Institutions Act – 1993 due to Banks.

Dispute : A debatable controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

Deal: An arrangement to attain a desired result by a combination of interested parties; the prime object being usually the purchase, sale, or exchange of property for a profit.

Declaration: An unsworn statement or narration of facts made by the party to the transaction.

Decree: The judgment of a court of equity or chancery, answering for most purposes to the judgment of a court of law. A decree in equity is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit, according to equity and good conscience.

Deed of Conveyance: This is an instrument of absolute transfer of all rights, title and interest of “vendor” (seller) and all his heirs, nominees etc. in perpetuity in favour of “purchaser/s”.

Deed of Assignment: This is an Indenture by which the property can be transferred to be held in trust, for the benefit of assignee/s and or creditors.

Deed of Confirmation: This is a legal document to be executed by and between the parties confirming any prior execution of agreement/ document which could not be registered within specific time limit.

Defamation: An intentional false communication either published or publicly spoken, that injures another’s reputation or good name.

Default: By its derivation, a failure. An omission of that which ought to be done.

Defense: That which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks.

Defendant: The person defending or denying; the party against whom relief or recovery is sought in an action or suit or the accused in a criminal case.

Delinquent: Person who has been guilty of some crime, offense, or failure of duty.

Demised premises: That property, or portion thereof a property which is leased to a tenant.

Denounce: To pronounce or condemn something as being evil or morally wrong.

Depose: To make a deposition; to give evidence in the shape of a deposition; to make statements which are written down and sworn to; to give testimony which is reduced to writing by a duly qualified officer and sworn to by the deponent.

Deponent: One who deposes (that is, testifies) to the truth of certain facts; one who gives under oath testimony which is reduced to writing; one who makes oath to a written statement.

Development: An action of erecting structures, building including its improvement, betterment, enlargement etc.

Development Control Rules: The bye-laws or regulations of civic authority governing, controlling and regulating development of city or a region.

Development Rights: Rights acquired by third party i.e. Developer, from the land owner to develop or redevelop the property on certain terms and conditions mutually agreed upon.

Direct Evidence: Evidence in form of testimony from a witness who actually saw, heard or touched the subject of questioning.

Direct examination: The first interrogation or examination of a witness, on the merits, by the party on whose behalf he is called. The first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

Documentary evidence: Evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances.

Due process of law: Law in its regular course of administration through courts of justice. A course of legal proceedings according to rules & principles which have been established in legal system.

Easement: A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters or any other similar rights etc.

Ejectment: A common law, which lay for the recovery of the possession of land, and for damages for the unlawful detention of its possession.

Employer : A company, firm or individual who employ and engages the services of other person who agrees to discharge his duties by performing the terms and conditions of engagement.

Enactment : The action or process of making into Law.

Encumbrance : Means claim or liability of third party which burdens attached to the property for ex-lease, mortgage, easement, restriction, covenants etc.

Enforcement : Means to impose or compel obedience to Law or to compel observance of Law.

Equity: Justice administered according to fairness as contrasted with the strictly formulated rules of common law.

Escrow Account: A bank account generally held in the name of the depositor and an escrow agent which is returnable to depositor or paid to third person on the fulfillment of escrow condition.

Essence of the Contract: Any condition or stipulation in a contract which is mutually understood and agreed by the parties to be of such vital importance that a sufficient performance of the contract cannot be had without exact compliance with it is said to be "of the essence of the contract."

Evidence: Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.

Exchange of Property: An immovable property which can be exchanged for another immovable property without any monetary consideration.

Exhibit: A paper or document produced and exhibited to a court during a trial or hearing, and which, on being accepted, is marked for identification and annexed to the deposition or otherwise made a part of the case.

Ex parte: On one side only; by or for one party; done for; in behalf of, or on the application of, one party only.

Fair Market Value: The amount at which property would change hands between a willing buyer and a willing seller, neither under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

Floor Space Index (FSI) : Means the quotient of the ratio of the combined gross floor area of all floors to the total plot area, Viz.,

$$\text{Floor Space Index (FSI)} = \frac{\text{Total covered area on all floors}}{\text{Plot Area}}$$

Forum: A court of justice, or judicial tribunal; a place of jurisdiction; a place of litigation; an administrative body.

Forfeiture : Some thing imposed as penalty / punishment for an offence, illegal act or negligence.

Fraudulent: Based on fraud; proceeding from or characterized by fraud; tainted by fraud; done, made, or effected with a purpose or design to carry out a fraud.

Freehold: An estate for life or in fee. A "freehold estate" is a right of title to land and held by free tenure.

Frivolous: Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent.

Gazette Notification : A declaration of State or Central Govt. published in its official journal for the information of public.

Gift: A voluntary transfer of property to another made gratuitously and without consideration.

Guaranty: A collateral arrangement or a contract for performance of undertaking, as the case may be.

Hearing : A process in which disputants place their defence before the competent authority.

Hearing Evidence : In the Law of evidence any fact is required to be proved against any one, the testimony of the witness or evidence produced is ought to be proved in his presence. Otherwise such evidence is not admissible.

Heritage Property: Any building, artifacts or structure having historical or aesthetical or architectural or cultural value and which is listed in heritage notification of the Government.

Hereditary Property: Ancestral property inherited by the legal successors.

Hypothecation (General) : The pledging of something as a security without delivering of titled possession.

Hypothecation (Real Estate Transactions) : A mortgage on real property; the right vested in a creditor by the assignment to him of real estate as security for the payment of his debt, whether or not it be accomplished by possession.

Immovable Property: A Land, befits arising out of land and things attached to the earth such as structure, building, trees etc.

Immunity: Exemption, as from serving in an office, or performing duties which the law generally requires other citizens to perform; e.g. exemption from paying taxes.

Impound: To seize and take into the custody of the law or of a court.

Indemnity Bond: An undertaking given by an obligor to reimburse an obligee for any loss suffered due to the conduct of the obligor or a third person.

Indenture: In real estate conveyancing, a deed to which two or more persons are parties and in which these enter in to reciprocal and corresponding grants or obligations towards each other.

I.C.A. : The Indian Council of Arbitration

I.I.A. : The Indian Institute of Arbitrators

Indictment: An accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable on indictment.

Indenture : A deed intended to be executed between two or more parties according to the nature of transaction intended to be effected.

Insolvent : A person who has ceased his capacity to repay his debts in the ordinary course of business, or when debts become due for payment.

Interpretation : It is the ascertainment, which defines the meaning of certain words or provisions incorporated in the document,

Infringement: A breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right.

Inter alia: Among other things. A term anciently used in pleading, especially in reciting statutes, where the whole statute was not set forth at length.

Interpretation of Contract : It is the matter for the arbitrator to decide in which Court can not substitute its own decision in place of the decision of arbitrator.

Internal Mediator : An Conciliator appointed by the parties to the contract to settle their dispute amicably without long term litigations and or arbitration proceedings

Interim Order: One made in the meantime, and until something is done.

Intervention: The procedure by which a third person, not originally a party to the suit, but claiming an interest in the subject matter, comes into the case, in order to protect his right or interpose his claim.

Joint Venture: A legal entity in the nature of a partnership engaged in the joint undertaking of particular transaction for mutual profit.

Judicature: A power of dispensing justice by legal trial.

Judicial inquiry: Such inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.

Leasehold Rights: Short term transfer of rights to use, occupy and enjoy any property or part thereof against payment.

Lease Deed: It is also a contract by which one conveys real estate equipment or facilities for a specified term and for specified rent; duly executed between the "Lessor" & "Lessee" and legally binding on both the parties for the lease period.

Legal Title: One cognizable or enforceable in a court of law, or one which is complete and perfect as regards the apparent right of ownership and possession.

Letter of Intent : It is a document duly signed by the parties concerned which indicates the intentions of the parties to enter in to contract on certain terms and conditions.

Lien : The word 'Lien ' originally means "binding" from the Latin Ligamen. Its Lexical meaning is "Right to Retain". However it is variously described and used under different context such as 'Contractual Lien', 'Lien on arbitral award' etc.

Lis Pendens: A pending suit. Jurisdiction, power, or control which courts acquire over property in litigation pending action until final judgment.

Limitation : A restriction or circumspection defining an estate or property by which certain time is allowed by statute for litigation proceedings.

Liquidator : A person appointed to conduct the winding-up of Company under the Companies Act-1929.

Liquidated Damages : An amount of compensation payable by one party to other for the breach of contract to the extend of actual damage sustained.

Marketable Title: A title to the property which is free from encumbrances and any reasonable doubt as to its validity, and which readily can be sold or mortgaged.

Mesne Profits: Intermediate profits accruing between two given periods.

Modus operandi: Method of operating or doing things (M.O.). Term used by police and criminal investigators to describe the particular method of a criminal's activity.

Mortgage : It is a short term transfer of interest in specific immovable property for the purpose of securing payment of money / loan, for a specific time limit and purpose till the loan amount is refunded to the financier with interest if any thereof.

Movable Property: Any assets in different forms such as money, Jewellery, artifacts, shares etc. which can be adjustable, changeable, portable and or transferable.

Notice of Motion: A notice in writing, entitled in a cause, starting that on a certain day designated, a motion will be made to the court for the purpose or object stated. Such notice is required to be served upon all the parties concerned.

Null and void: Naught; of no validity or effect. Usually coupled with the word "void"; as "null and void" The words "null and void", when used in a contract or statue are often construed as meaning "voidable."

Operative part: That part of a conveyance or of any instrument intended for the creation or transference of rights, by which the main object of the instrument is carried into effect.

Original Jurisdiction: Jurisdiction to consider a case in the first instance. Jurisdiction of court to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts.

Out- of- Court settlement: A case which is compromised, settled and withdrawn by mutual consent/ agreement of the parties privately, without being referred to the Court.

Petition: A supplication, a prayer or a written application made to the court of law.

Plaint: In civil law, a complaint; a form of action, particularly one for setting aside a testament alleged to be invalid.

Plaintiff: A person who brings an action; the party who complains or sues in a civil action and is so named on the record.

“Pledge” – “Pawnor” and “Pawnee” : The bailment of goods as security for payment of debt or performance of promise/s is termed as “Pledge”. The Bailor in this case is called the “Pawnor” and bailee is termed as “Pawnee”.

Power of Attorney: An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal.

Prima Facie: At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Probate: Court procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally refer to the legal process wherein the estate of a defendant is administered.

Property: An asset and or estate of any nature which has marketability, value, title and power of transference.

Quasi Judicial Function : Means an administrative function which the law requires to be exercised in some respects as if it were judicial.

Ready Reckoner: This is a hand-book and guide published by State Government wherein the market value of various types of user structures and lands are determined for the specific financial year, which is taken as base for calculating market value of the property upon which stamp duty is worked out.

Real Estate Laws: Acts and or legislations related to immovable properties and or construction industry.

Reciprocal Contract: A mutual or bilateral contract in which parties to contract enter into engagements on mutually agreed terms.

Repeal of Act / Ordinance : It is an enactment by which former Act is revoked or abrogated.

Repugnancy: An inconsistency, opposition, or contrariety between two or more clauses of the same deed, contract or statute, or between two or more material allegations of the same pleading, or any two writings.

Respondent: In equity practice, the party who makes an answer to a bill or other proceeding in equity.

Restraining order: An order in the nature of an injunction which may issue upon filing of an application for an injunction forbidding the defendant from doing the threatened act until a hearing on the application can be had.

Rider: A schedule or small piece of paper reflecting an amendment, addition or endorsement annexed to some part of a contract, document, or record.

Right of Entry: The right of taking or resuming possession of land by entering on it in a peaceable manner.

Right of way: Term used to describe a right belonging to a party to pass over land of another.

Royalty: Compensation for the use of property, usually copyright material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced.

Sealed and delivered: These words, followed by the signatures of the witnesses, constituted the usual formula for the attestation of Deeds.

Settlement of Dispute : A compromise in the matter of disagreement / dispute.

Summon: To command to a defendant to appear in court to cite and to answer a suit which has been begun against him; to notify the defendant that an action has been instituted against him, and that he is required to answer to it at a time and place named.

Specific Performance: The legal remedy of requiring exact performance of a contract in the specific form in which it was made, or according to the precise terms and conditions agreed upon between the parties to the Contract.

Stamp Duty: It is a tax levied by the State Government for any document whereby any right, title, interest and or liability is created and to obtain legality to the instrument and for its registration in Government revenue records.

Tender : Means an unconditional offer of money or performance to satisfy debt or obligation.

Tenure: Tenure is a right and title, and or mode of holding or occupying immovable property.

Testimony: A formal statement, evidence or proof one given in the court of Law.

Testament: A person's will or evidence or proof of facts or events.

Third Party: One who has certain rights and interest in movable and non movable properties under transaction, but not a executing party to an agreement, contract.

Title: The formal right of ownership of property. Title is the means whereby the owner of lands has the just possession of his property.

Title deeds: Deeds which constitute or are the evidence of title to lands.

Transfer of Development Rights(TDR): This is a non-monetary compensation granted to the owner of the land against the acquisition of his land reserved for public purposes in the Development Plan. The development potential which may be separated and made available to the owner of the land and allowed to be utilised or loaded on other plot of land wherever such utilization is permitted.

Trespass: An unlawful interference with one's person, property, or rights.

Trust (Property): As per Section 3 of Indian Trust Act, 1882, a trust is an obligation annexed to the ownership of a property and arising out of a confidence reposed and accepted by the owner, or declared and accepted by him.

Undertaking: A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other.

UNCITRAL : United Nations Commission on International Trade Law.

Unison : The fact of two or more things being said or happening at the same time.

Utility : The state of being useful or profitable having several functions or uses.

Valid : A sound or logical reason/ argument legally binding or officially acceptable.

Valid Contract: A properly constituted contract having legal force, with all the elements of a contract present and, therefore, enforceable by law.

Value: It is a ratio between the price of money and the price in return, which possess utility, durability, transferability and marketability.

Valuation: It is a process to estimate fair worth/value of a property / asset whether movable or immovable at a given time and place under specific market conditions.

Vendor: The owner who transfers his property by sale to the Purchaser.

Vendor's Lien: A creature of equity, being a lien impliedly belonging to a vendor for the unpaid purchase price of land, where he has not taken any other lien or security beyond the personal obligation of the purchaser.

Venture : a business enterprise involving considerable risks.

Vested Interest: A present right or title to a thing, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future, as distinguished from a future right, which may never materialize or ripen into title, and it matters not how long or for what length of time the future possession or right of enjoyment may be postponed, if the present right exists to alienate and pass title.

Virtual : Almost or nearly the thing described but not completely or not existing in reality but made to appear to do so.

Void : Not valid and or not legally binding.

Void Contract: A contract which cannot be enforceable by Law having no legal force or binding effect.

Voluntary : Working, doing or acting of one's own free will under conscious control.

Warrant : An official authorization giving police or some other body the power to make an arrest and or search premises etc.

Warranty : A written guaranty made by a person promising that certain statements are true and or that certain conditions shall be fulfilled.

Will: Wish; desire; pleasure; inclination; choice; the faculty of conscious, and especially of deliberate, action. When a person expresses his "will" that a particular disposition be made of his property, his words are words of command, and the word "will" as so used is mandatory, comprehensive, and dispositive in nature.

Without Prejudice: Where an offer or admission is made "without prejudice", or a motion is denied or a suit dismissed "without prejudice", it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided.

Written Statement: A legal written statement submitted to court of law by the Plaintiff and/or Defendant.

Writ: A legal document by which one is summoned or required to do something.

Yield : Give away, submit, succumb or surrender under force, demands or pressure.

MEASUREMENTS & CONVERSION TABLES

During British regime, entire land of India was physically surveyed, measured and urban & Village plans were prepared and made available to public. This valuable original old record, is still preserved in the office of the Surveyor General of India at Kolkata. It is necessary that one must be acquainted with measurements & conversions of various units commonly used in real estate transactions. Originally they were based on British unit system. However now Metric unit system is in use. Since old documents contain measurements in British unit system, it is felt necessary to give adequate information on its conversions from British system to Metric system for guidance.

CONVERSION TABLE

BRITISH UNITS	METRIC UNITS
A. (LENGTH MEASUREMENTS)	(LENGTH MEASUREMENTS)
12 Inches = 1 Foot	1 Foot = 0.3048 Mtr.
3 Feet = 1 Yard	3.28 Feet = 1 Meter
220 Yards = 1 Furlong	1.09 Yards = 1 Meter
8 Furlongs = 1 Mile	1 Yard = 0.91 Meter
	1 Mile = 1.61 Kilometer
B. (SQUARE MEASUREMENTS)	(SQUARE MEASUREMENTS)
121 Sq. Yards = 1 Guntha	10,764 Sq. Feet = 1 Sq. Meter
40 Gunthas = 1 Acre	1 Sq. Yard = 0.836 Sq.mtr.
144 Sq. Inches = 1 Sq.ft.	1.20 Sq.Yards = 1 Sq. Meter
9 Sq. Foot = 1 Sq.Yds.	4840 Sq. Yards = 4046.86 Sq. mtr
4840 Sq. Yards = 1 Acre	2.471 Acres = 1 Hectar
640 Sq. Acres = 1 Sq.mile	
C. (OLD REVENUE TERMS)	(NEW REVENUE TERMS)
1 Acre = 4046.86 Sq Mtr	1 Ares = 100 Sq.Mtr
1 Guntha = 101.17 Sq. Mtr	100 Ares = 1 Hectare
1 Bigha = 1600.00 Sq Mtrs	10000 Sq. Meters = 1 Hectare
1 Acre = 2.53 Bighas	1 Hectare = 2.47 Acres
	1 Hectare = 6.25 Bighas

· CONTRACT ·





**NECESSITY OF CONTRACT
FOR
ARBITRATION AND CONCILIATION
(LIMITED TO REAL ESTATE TRANSACTIONS)**

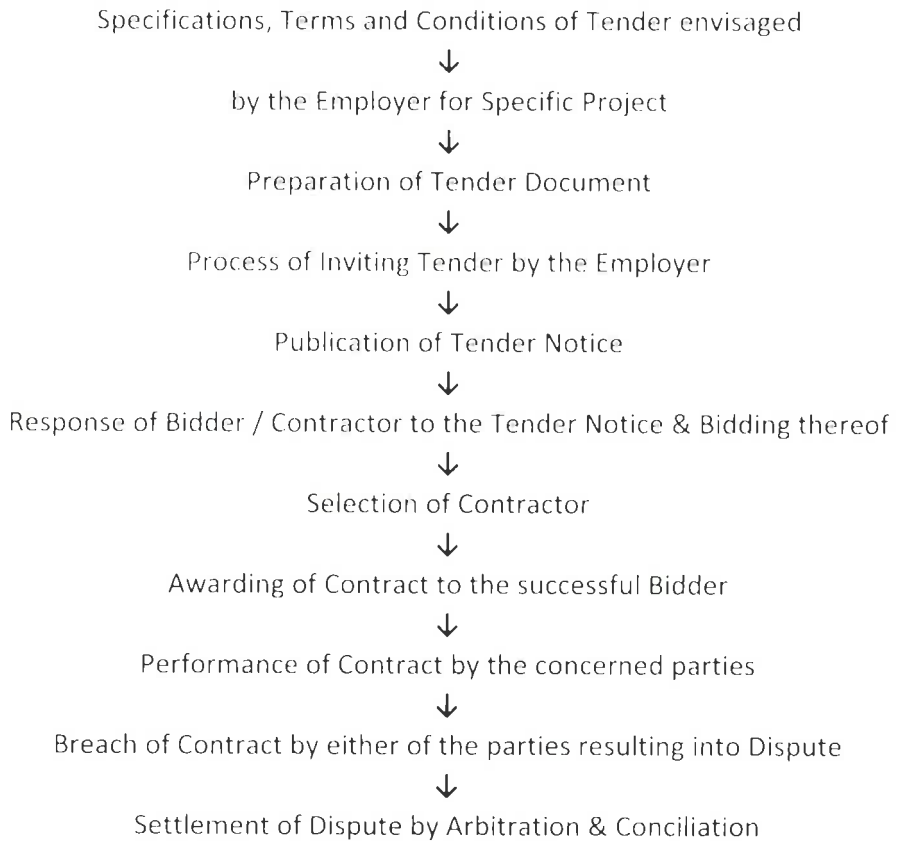
The Agreement which can be enforceable by Law is a Contract. Before going through the provisions of “The Indian Contract Act-1872” and “The (Indian) Arbitrations and Conciliation Act – 1996” it is essential to understand as to why and under which circumstances the Arbitration and Conciliation becomes inevitable pertaining to the disputes, since there is implicit relation between the contract and arbitration / conciliation to settle the disputes amicably.

It is universal truth that unless and until the dispute has arisen between two or more parties to the Agreements / Contract, due to breach of Contract by either of the party, till that time dispute cannot be referred to Arbitration. It presupposes that in such agreement there is an arbitration clause.

The Agreements / Contracts in real estate transactions are mainly related to immovable properties generally for deciding share or claim of the beneficiary in family owned property, sale or purchase of vacant land, or land with buildings, as well as, development rights are granted to the developer etc.

In real estate activities invariably it is found that dispute arises between the Owner, Contractor, sub-contractor or even sometimes between the suppliers of the Contractor during or at the end of construction. Most of the time the disputes invariably are of additional monetary claims, counter claims which ultimately needs to be amicably settled through Arbitration or Conciliation.

For example the Construction Contract is generally executed for the Construction of specific project on mutually agreed terms between Employer and Contractor, based on the provisions of Tender Document. The fair sequence of the exercises involved right from preparation of terms and conditions of contract to settlement of disputes can be stated as under :-



Moreover it can be the same sequence and exercise for the other trade, business and finance transactions /contracts with suitable amendments in the terms and conditions as the case may be. In view of above, the processes and provisions involved in these exercises right from Tender of Contract, performance of contract, breach of contract and thereafter up to Arbitration and Conciliation, if any, are described in various Chapters appearing hereafter, which will explain and prove the basic necessity of the contract with suitable clause of Arbitration, without which there can not be any Arbitration or Conciliation in case of such disputes.

THE INDIAN CONTRACT ACT. - 1872

To define and amend certain parts of the Law relating to contracts, "The Indian Contract Act. 1872" came into force w. e. f. 1st September 1872, and made applicable to the whole of India except the State of Jammu & Kashmir. The Bare Act consists of mainly following Chapters, which can be read as under :-

The Indian Contract Act-1872 (10 Chapters and 238 Sections)

Chapter No. 1 : Communication, Acceptance and Revocation of Proposals.
(Sections : 3 to 9)

Chapter No. 2 : Valid Contracts, Voidable Contracts and Void Agreements.
(Sections : 10 to 30)

Chapter No. 3 : Contingent Contracts.
(Sections : 31 to 36)

Chapter No. 4 : The Performance of Contract.
(Sections : 37 to 67)

Chapter No. 5 : Certain relations resembling those created by Contract.
(Sections : 68 to 72)

Chapter No. 6 : The Consequences of Breach of Contract.
(Sections : 73 to 75)

Chapter No. 7 : Sale of Goods.
(Sections : 76 to 123 are repealed by the Indian Sales of Goods Act -1930)

Chapter No. 8 : Indemnity and Guarantee.
(Sections : 124 to 147)

Chapter No. 9 : Bailment.
(Sections : 148 to 181)

Chapter No.10: Agency.
(Sections : 182 to 238)

The aforesaid chapters are provided with various Sections describing provisions along with commentary and related case studies thereof, which gives simple and fair information to understand object and over all provisions of "The Indian Contract Act,1872".

Numbers of Books on "The Indian Contract Act,1872" are written by renowned authors and are available for interested readers and practicing professionals. In those books you can find legal and logical interpretation of its every section thereof. The commentary and case studies explain its correct interpretation and as such it will be helpful for experts of respective field for their professional practice.

Since the Contract is a basic act to be referred in the matter of settlement of disputes through Arbitration and Conciliation, it is essential to understand the meaning of "The Contract" its legality, scope, issues, provisions and preparative and conclusive procedures related thereto in its right perspective which are explained sequence wise in the next chapters.

Note : Irrespective of personal interpretation of the Act, the provisions incorporated in "The Indian Contract Act – 1872" shall be always final unless amended with due process of Law.

TENDER AND TENDER DOCUMENT

• Tender & Tender Notice

“Tender” is an unconditional offer of money or performance to satisfy debt or obligations as the case may be. In Real Estate Transactions mainly there are two types of Tender and Tender Document for the general purpose of (i) Activities of Sale or Purchase of immovable property and (ii) Construction activities, supply of materials etc.

The importance of Tender Notice and Tender Documents can be explained as under :-

• Public Notice for Sale & Purchase of Immovable Property :

Before entering into agreement, thorough investigation of title of the property by the legal advisor of the interested purchaser is absolutely essential. For calling objections from third parties having their interest, claims and or rights, if any, in the property under transaction, Public Notice is given in following format in two local News Papers one in English and other in local language.

(PUBLIC NOTICE FOR SALE & PURCHASE
OF IMMOVABLE PROPERTY)

NOTICE is hereby given that Shri/Smt/M/s. {Name of Vendor} residing at {Address of Vendor} have agreed to sale & transfer of their property (full description of property) within the limits of _____ Municipal Corporation / Council / Panchayat together with all the benefits, rights, clear and marketable title, free from encumbrances and with vacant possession thereof, to our clients.

Any person/s having any claim/s by way of sale, mortgage, lease, lien, gift, easement, exchange, possession, inheritance, succession or otherwise howsoever in respect to the said property, the same are required to intimate to the undersigned together with proof thereof within 15 days of publication of this notice failing which my clients shall complete the sale/transaction, and in such event all such claims, if any, shall be deemed to have been waived and/or abandoned.

Place: _____

Dated: _____

(Name & Address and Contact number
of Advocate of the Purchaser)

- **Contract Document :**

This is initial exercise for preparation of "Tender Document for Construction" to be executed between Employer and Contractor. This exercise involves scope of work, terms, conditions and obligations of respective parties under contract. Once Tender Document is finalized Tender Notice for publication, is prepared, with following contents.

- **Contents of Tender Notice for Construction Activities :**

Generally following are the contents of Tender Notice :

- i) Description of work / project.
- ii) Basis of Rates according to which Quotations are invited.
- iii) Amount of Earnest Money Deposit.
- iv) Cost of Tender Document.
- v) Information regarding Sale of Tender document, Place and Working hours of establishment for its collection.
- vi) Last date of submission of Tender.
- vii) Date, Time & Place of Opening of Tender.
- viii) Name, Address, Contact Number/s of inviting Agency.

FORMAT OF TENDER NOTICE (FOR CONSTRUCTION)

SEALED TENDERS are invited on Item Rate / Lumpsum Rate on per Sft. basis from the reputed Contractors for the construction of multistoried Residential / Commercial / Industrial building/s on property bearing S. No. / CTS No. _____ of Village _____, Ta. _____ & Dist. _____, admeasuring _____ sq. Mts. _____ Sft. of built-up area. Relevant details of proposed work are as under :-

- i) Amount of Earnest Money Deposit : Rs. _____ /-
- ii) Cost of Tender Document : Rs. _____ /- (Non- Refundable)
- iii) Place, Date and Working hours of establishment during which
- iv) the Tender Document can be obtained :- _____
- v) Last date of Submission of Tender : _____
- vi) Date, Time and Place of opening of Tender: _____

Note : The Owners / Employers reserve the rights to accept or to reject one or all the Tenders without assigning any reason thereof.

At _____
Date _____

(Name, Address and Contact
Number of Tender Inviting Agency)

● **Publication of Tender Notice :**

The invitation or call for Tender bidding is a special procedure for generating competing offers from reputed and qualified bidders for granting award of Contract. After Tender Document is prepared, the Owner/Employer or the Agency appointed / authorised for the purpose can publish the Tender Notice in above format in minimum 2 Local News Papers of repute, i.e. one in English and other in Local Language inviting quotations from reputed bidders.

Note : It is mandatory for State & Central Government, Corporations, Public undertakings and other Government Bodies and Agencies including public institutions and or registered bodies to invite the Tenders for their proposed project by publishing Public Tender Notice in minimum 2 News Papers as explained above.

● **Types of Tenders :-**

The different types of Tenders can be explained as under :-

- i) Open Tenders
- ii) Advertised Tenders
- iii) Invited Tenders
- iv) Restricted Tenders

“Open Tenders” or “Advertised Tenders” are open to all bidders / contractors who can assure guaranteed performance and discharge of duties and obligations thereof. Whereas “Invited Tenders” or “Restricted Tenders” are open only to selected / invited prequalified bidders or contractors.

● **Tender Document (For Construction purpose)**

As per the requirements of the Employer, the Architect or Consulting Engineer or any such Agency appointed by the Employer for the purpose prepares complete Tender Document based either on item rates or lumpsum rate on per square foot (built-up area) basis. If the Tender Document is based on item rate basis the quantities of each of the items are required to be worked out (with the help of quantity Surveyor if required so) by the professional agency giving full description and quantity of each of the item involved in the project, including general and special conditions, along with other required details for the information and guidance of the bidder. The contents of Tender Document moreover can be as follows :-

● **Contents of Tender Document :**

- i) Set of detailed working drawings
- ii) Schedule of quantities in detail of all items involved
- iii) Scope of work
- iv) General Terms and Conditions
- v) Special conditions if any
- vi) Obligations and duties of Contractor
- vii) Obligations and duties of Employer
- viii) Obligations and Duties of Professional appointed
- ix) Column for Schedule of Rates
- x) Schedule of Payment payable by the employer
- xi) Time Limit for completion of project
- xii) Status of bidder / Contractor
- xiii) Condition of appointment of Supervisory Staff if any.
- xiv) Name, Address and Contact numbers of all component agencies appointed by the Employer for the project
- xv) Provision of Bank Guarantee required if any.
- xvi) Provision of clause of Arbitration and Conciliation for settlement of disputes.
- xvii) Provision of Penalty for delay beyond time limit
- xviii) Incentives offered by Employer if work is completed before time limit.
- xix) Rebate offered by the Bidder / Contractor.
- xx) Liability of payment of Taxes, Levies etc.

- **Execution and Award of Contract, Work Order etc. :**

After all the above exercises are completed and Contractor is appointed by the employer according to the recommendations of the concerned professional/s, the final contract document is prepared for execution on the basis of agreed terms and conditions of tender in Duplicate in Original i.e. one copy for each of the parties' record.

Both the parties thereafter execute / sign the Contract Document in the presence of the appointed professional who will also sign the document in the capacity of witness, and there after the Work Order is issued to the Contractor.

Note : Terms and Conditions of Contract are binding on executing parties to the contract. This being a civil liability contract the disputes arises if any during or at the end of work, can be resolved either by Arbitration and Conciliation or through concerned Civil Court provided specific arbitration clause is incorporated in the Contract.

DEFINITIONS AND INTERPRETATIONS OF CONTRACT

- **Contract :**

The term Contract is defined in Section 2(4) of the Indian Contract Act, 1872 as under :

“The Agreement enforceable by Law is a Contract.”

In other words, for the formation of Contract, it should possess following elements :-

- i) The Contract must be an Agreement, and
- ii) The Agreement should be enforceable by Law

An agreement becomes the Contract when it includes following objects and fulfills following conditions:-

- i) There must be some consideration for the Contract
- ii) There must be Lawful object for the Contract
- iii) The parties must be competent to execute the Contract
- iv) There must be free consent by the parties for the Contract.

It can be from the above elements that the Contract means an Agreement of promises executed between two or more persons / parties, which creates an obligation to do or not to do particular thing/s by respective parties which can be legally enforceable by Law.

- **Elements and Features of Contract :**

The main elements of contract are (i) Offer (ii) Acceptance (iii) Consideration (iv) Honest intention, and (v) Mutual consent to create legal relationship between two parties. In this exercise one party makes an offer (Proposer) for specific

assignment, and the other party responds and accepts the offer against consideration agreed to be given by the proposer on the terms and conditions mutually agreed upon, including provisions of legal detriments thereto.

The Contracts which can be enforceable by Law (Valid) or the contracts which cannot be enforceable, by Law (Void) are explained in "The Indian Arbitration Act. 1872, with the following definitions and or interpretations :-

- a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtain the assent of other to such act or abstinence, such persons is said to make a "**Proposal**";
- b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and in the circumstances when proposal is accepted it becomes a "**Promise**";
- c) A person making the proposal is called the "**Promisor**" and the person accepting the proposal is called the "**Promisee**";
- d) When, at the desire of the Promisor, the Promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstained from doing something, such act or abstinence or promise is called a "**Consideration for the Promise**";
- e) Every promise and every set of promises including consideration agreed between Promisor and Promisee is an "**Agreement**";
- f) Promises which form the consideration or part of the consideration for each other are called "**Reciprocal Promises**";
- g) An Agreement not enforceable by Law is said to be "**Void**";
- h) An Agreement enforceable by Law is a "**Valid Contract**";
- i) An Agreement which is enforceable by Law at the option of one or more of the parties thereto, but not at the option of the other or others is a "**Voidable Contract**";

If you go through above text carefully you will find a clear sequence from Promise to Contract. Firstly the proposals is made by one and accepted by the other willingly. Thus the person makes a promise becomes "Promisor" and the person accept the proposal becomes "Promisee". When promises forming the consideration for each other become a "Agreement" and such Agreement which can be enforceable by Law becomes a "Contract". It is to be understood that any agreement which cannot be enforceable or ceases to be enforceable by Law automatically becomes void. Similarly an agreement which is enforceable by Law at the option of one but not at the option of other is a "Voidable Contract".

TYPES OF CONTRACT

In our day-to-day life sometimes it becomes inevitable for a person to enter into an agreement / contract with other person/s based on the necessity of the issues involved and reliefs sought there from. As such the contracts are bound to be different from each other depending upon its nature and objects. The contracts are mainly related to the family matters, real estate, financial, and business/trade transactions. Since nature and purpose of each contract is different it is necessary to classify the same for clarity purpose. Broadly the Contracts can be classified as under :-

- **Classification of Contracts :**

- 1) Family Contracts :**

Generally these type of contracts are executed between the family members and beneficiaries to settle their disputes arising out of their share and or claim in movable and immovable family properties, including transfer of title of property by way of Gift Deed to blood relative out of love and affection etc.

- 2) Business / Trade Contracts :**

These contracts are related to business / trade transactions between two or more parties, and or between two or more partnership firms or companies as the case may be, identifying the scope of work, responsibilities, liabilities and obligations in respect to Business / Trade Transactions which are mostly of commercial nature.

- 3) Real Estate Contracts :**

Mainly in Real Estate Transactions the Contracts are divided in their categories such as, (i) Transfer of Title and Ownership Rights, (ii) Transfer of Development Rights and (iii) Construction Contracts etc. Following are different types of Contracts under each heading related to Real Estate Transactions:-

- **Transfer of Title:**

In this category the Transfer of rights and title in immovable properties from one person to other either in perpetuity and or for specific time limit are made through following deeds :-

a) Deed of Conveyance :

This indenture is for Transfer of Rights, Title and Interests of Owner (Vendor) in favor of Purchaser against specific consideration. The Transfer of Ownership Rights under such deed are in perpetuity and of permanent nature.

b) Deed of Assignment :

By this Deed the rights, title and interests of the "Assignor" in the property held in trust, can be transferred permanently in favor of "Assignee" on the terms, conditions and consideration agreed between the parties to the said Deed of Assignment.

c) Lease Deed :

In this contract the 'Lessor' conveys his rights in Real Estate equipments or facilities to 'Lessee' for a specified period subject to the terms and conditions and consideration mutually agreed upon, which are legally binding on both the parties during the term of lease period granted. The contract can be renewed at the option of both the parties. This document requires registration. In this contract the ownership and title always remain with the Lessor.

d) Leave and Licence :

This is also a short term contract (not more than 9 years) executed between the Licensor and Licensee and is legally binding on both the parties. Under this contract the Licensee is permitted to use & occupy the Premises of the Licensor with or without fittings, fixtures or facilities as the case may be against monthly compensation payable by the Licensee to the Licensor. This contract is limited to specific term unless renewed with the consent of both the parties. This document requires registration.

● **Transfer of Development Rights :**

In this Contract the Land Lord can grant development rights to the Developer / Builder for the development of his immovable property on specific Terms and Conditions, which in reality is a process of transfer of title of Vendor in favor of ultimate consumer through the developer. This basically is a barter system, wherein generally the Land Lord can demand the compensation / value of his property from

the Builder / Developer in the form of newly constructed premises plus additional compensatory payment according to the terms and conditions mutually agreed between the parties.

- **Construction Contract :**

In this contract the Employer enters into an agreement with the Contractor for construction of specific type of project / premises either on item rate or lumpsum rate on per square foot (Built-up Area) basis. It consists of construction rate, area of construction, time limit, liabilities and responsibilities of parties to contract including general & special terms and conditions as the case may be. Invariably Arbitration Clause is incorporated in this types of contract thus making fair provisions of settlement of disputes that may arise during the contract period.

- **Contract between Owner / Developer and Consumer :**

This contract is executed in the form of Agreement to Sale of specific premises in specific building either under construction or proposed to be constructed, between the Developer and actual Purchaser (Consumer). In this contract generally the Owner acts as a "Vendor", Developer as a "Confirming Party" and Consumer as a "Purchaser", wherein the Purchaser agrees to purchase specific premises on the terms and conditions mutually agreed upon.

4) Financial Contracts :

Generally these contracts are related to monetary transactions of different nature. It involves Loan/Advance required from Banks or from Financial Institutions for purchase of goods, Land, Construction of Premises, Purchase of Car etc., against equitable mortgage/s on the terms and conditions agreed between the Borrower and Financing Institution.

5) Contract of Indemnity :

In this contract the "Promisor", promises to save the other from Loss/s likely to be caused to him by the conduct of Promisor himself, or by the conduct of any other person. In other words, if Party-A indemnify to Party-B against the consequences of any proceedings which Party-C may take against Party-B in respect to damages, costs and compensation payable equivalent to the extent of Loss/s.

6) Contract of Guarantee :

This contract is executed between the 'Surety', (Guarantor), 'Principal Debtor' and 'Creditor'. In this collateral engagement, the surety is liable to make the payment of debt of principal debtor on his behalf to the Creditor to whom the guarantee is given. These contracts are mainly related to the recovery of payment of Loan/Advance etc.

7) Contracts with Professionals :

In this contract the 'Employer' enters into a contract with the 'Professional/s' appointed for specific project which includes scope of work & obligations of professional/s, and employer/s, terms conditions and obligations mutually agreed upon including schedule of fees payable under the Contract etc.

8) Employment Contract :

This contract is executed between the 'Employer of the Establishment' and 'Employee/s and or Union of Employees' as the case may be, wherein terms, conditions obligations and scope of work of Employees and specific obligations of Union of Employees respectively are incorporated in the agreement / contract including the obligations of Employer thereof, in accordance to the provisions of Labour Law and other Employment Laws applicable.

Note : It is advisable that the above contracts (wherever required) should be registered with the Registrar of Assurances, without which the same will not be entertained by the Court of Law in case of litigations.

CONTENTS OF CONTRACT

Generally the contracts are executed between Private Parties, as well as, Statutory Authority and Contractor respectively for discharge of specific obligations incorporated in the contract thereof. Since the contracts are of for various purposes, the terms and conditions also differs in each type of contract. However, general contents of Contract are more over identical except some specific arrangements required for specific purpose, which are explained hereafter :

● Contents of Different Types Contracts :

In any Contract there are two or more parties who execute the contract on mutually agreed terms and conditions, which should be enforceable at Law. Following are the general contents of different types of Contracts :-

a) Family Contracts :

- i) Full Name, Age, Nationality, Address and PAN Number of all the Family Members to the contract.
- ii) Object and Purpose of Contract.
- iii) Description of immovable property under reference.
- iv) Terms and Conditions mutually agreed upon to decide the share of claim of each Member.
- v) Consideration of the transaction if any.
- vi) Schedule of Payment.
- vii) Obligations of the parties to Contract.
- viii) Period to discharge the obligations, by respective parties.
- ix) Provision of Arbitration and Conciliation Clause to settle the dispute if any.

b) Transfer of Title Contract :

- i) Full Name, Age, Nationality and Address of Vendor.
- ii) Full Name, Age, Nationality and Address of Purchaser.
- iii) Full Name, Age, Nationality and Address of Developer.
- iv) Purpose and Object of Contract.
- v) Description of property under reference.
- vi) Terms and Conditions of Contract.
- vii) Obligations of parties to Contract.
- viii) Time limit of Contract.
- ix) Provision of Arbitration and Conciliation.

c) Trade / Finance Contract :

- i) Name, Age, Nationality and Address of Borrower / Mortgagor.
- ii) Name and Address of Financer.
- iii) Object and Purpose of Contract.
- iv) Amount of Finance / Loan / Advance.
- v) Rate of Interest.
- vi) Period of Contract.
- vii) Details of equitable mortgage / securities.
- viii) Terms of recovery of Finance / Loan / Advance
- ix) Provisions of settlement of dispute and recovery of funds.
- x) Any other relevant terms mutually agreed upon.

d) Construction Contract :

- i) Name, Age, Nationality, Address etc. of Employer.
- ii) Name, Age, Nationality, Address etc. of Contractor.

- iii) Object, Purpose and Type of Contract.
- iv) Description and Scope of work.
- v) Specifications of work / project.
- vi) Obligations of each of the Party / Agency to the Contract.
- vii) General Terms & Conditions including special conditions and obligations if any.
- viii) Schedule of Quantities and rates.
- ix) Schedule of Payments.
- x) Time Limit of Contract.
- xi) Provisions of incentives and penalties if any.
- xii) Provisions of Arbitration and Conciliation to settle the disputes if there is breach of contract by either parties during validity of Contract.
- xiii) The schedule of property under reference.

The parties to the Contract should always remember that the said agreement / contract is between Promisor & Promisee executed in good faith and with honest intentions, so that the same can be implemented and honoured by respective parties in its proper and true spirit.

It is to be mentioned here that terms and conditions of contracts should be drawn in such a way that the same can be honoured, observed, and complied with easily by respective parties and same should be within the reach of human efforts. The contract should be designed and or drawn in such a manner that it can be enforceable at Law, with provisions of arbitration and conciliation to settle the disputes arises, if any.

VALIDITY AND BREACH OF CONTRACT

As stated earlier, the contract means an agreement of promises and obligations agreed and executed between two or more person / parties which creates legal binding between them to do or not to do specific things, which are governed by the State and or Statutory Civil Laws in force. Following contracts are termed either as 'Valid' or 'Void' contracts under the Indian Contract Act, 1872 :

1) Valid Contracts / Agreements :

The Contract enforceable by Law is a valid Contract. The contract becomes valid and legitimate when it possess following elements :-

- i) Status and Capacity of the parties to the Contract
- ii) Offer and Acceptance
- iii) Consideration
- iv) Certainty of Terms and Conditions
- v) Legality of Purpose
- vi) Intention to create legal relationship
- vii) Provisions of Responsibilities, Liabilities including Claim of Damages etc.
- viii) Time Frame / Limit of Contract

2) Void (Invalid) Contracts / Agreements :

In simple terms an agreement or contract NOT enforceable by Law is Void. As per different Sections of 'The Indian Contract Act – 1872', following types of agreements / Contracts are termed to be Void:-

- i) The Agreements of which Objects are unlawful,
- ii) The Agreements of which Considerations are unlawful,
- iii) The Agreement without Consideration (except made on account of natural love and affection between two or more blood relatives i.e. Gift Deed etc.),
- iv) The Agreements in restraint of marriage,
- v) The Agreements in restraint of Trade,

- vi) The unmeaning Agreements,
- vii) The Wagering Agreements,
- viii) The Agreements to do impossible Acts.

3) Enforceability of Contract :

Section 10 of the Act elaborates the conditions of enforceability of Contract by Law. The contracts becomes enforceable when it complies with following conditions :-

- i) The parties to the agreement should be 'Competent' to execute the agreement / contract.
(The person/s attained age of majority and is /are of sound mind are treated as competent)
- ii) The parties concerned has given 'Free Consent' to the Agreement / Contract.
(The Consent is said to be Free when it is not caused by coercion, under influence, fraud, misrepresentation or mistake)
- iii) The Agreement / Contract to be executed should be for the 'Lawful object/s'.
(The purpose/ object/s of Contract should be allowed by Law or obeying law or rules and regulations)
- iv) The Agreement and or the Contract should reflect 'Lawful Consideration' (Price of the Promise) for the purpose.
(The consideration of an agreement is lawful unless it is forbidden by law).

Notes : The Law of Contract restricts itself to the enforcement of voluntarily created civil obligations to certain extent, however it do not cover entire range of civil obligations.

● Breach of Contract :

Failing to perform and or discharge the obligations by either of the parties to the Contract in respect to any item of contract written or oral, without legitimate legal excuse is a "Breach of Contract", which may be actual or anticipatory.

- i) "Actual Breach" occurs when either of the party to the Contract refuses to perform his side of obligations under the Contract on due date, and or has performed incompletely.

- ii) **“Anticipatory Breach”** occurs when either of the party to the Contract announces and intimate in advance to the other party prior to due date of performance, that he/she intends not to perform his/her side of bargain and or obligations.

In above situations the aggrieved party is left with no option but to immediately approach to the appropriate Court of Law for specific reliefs as soon as non performance is announced by the other party.

LAW OF OBLIGATIONS AND SPECIFIC PERFORMANCE OF CONTRACT

● Law of Obligations :

Any Agreement enforceable at Law is termed as “Contract” under the Indian Contract Act, 1872 which is governed by the State and or Statutory Civil Laws in force. Every agreement is a contract of promises and obligations to be discharged by the parties to contract, under the law of obligations. It is to be mentioned here that all Agreements are not contract, however all contracts are agreements.

The obligations under the agreement of contract are mostly related to the issues of succession, relationship of family members’ between each of them, ownership and title of property, as well as real estate, financial, trade and business transactions. In simple term the obligation is a legal bond with which parties to agreement / contract are bound for necessity of performance within the parameters of Civil Legal System. Basically every obligation should possess following elements :

- i) “A Passive Subject” in which Debtor or Obligor is bound to fulfill and discharge his obligations under the Contract.
- ii) “An Active Subject” in which Creditor or Obligor is entitled to demand fulfillment of obligation under the Contract.

Note : “A Legal Title” includes distinct and efficient cause/s that binds and or legally connects the parties to the Contract.

● Specific Performance under order by Court of Law:

Under the contract specific performance is a equitable relief given by the Court of Law, (when there is a breach of Contract), in the form of judgment, wherein the defendant is directed by the Court to actually perform the Contract, i.e. to fulfill the obligations according to the terms and conditions stipulated therein. The term obligation includes every duty enforceable by Law. Therefore the term of specific relief can be defined as the “Specific Performance of Contract.”

In the case of the “**Specific Performance by Court Order**” wherein the Court directs concerned party to perform specific act in respect to his obligations usually what is stated and provided in the Agreement of contract. In other words the Specific Performance can be in the form of ‘**Forced Action**’ to perform and fulfill the obligations recorded in particular agreement of contract. In case performance is not possible then the compensation and or damages will be liable to be paid by the party committing the Breach of Contract.

The Specific Performance is an equitable relief which is normally remedial and or of protective in nature. In Civil Law the Specific Performance is considered to be the basic right.

● **When Specific Performance Order would not be granted?**

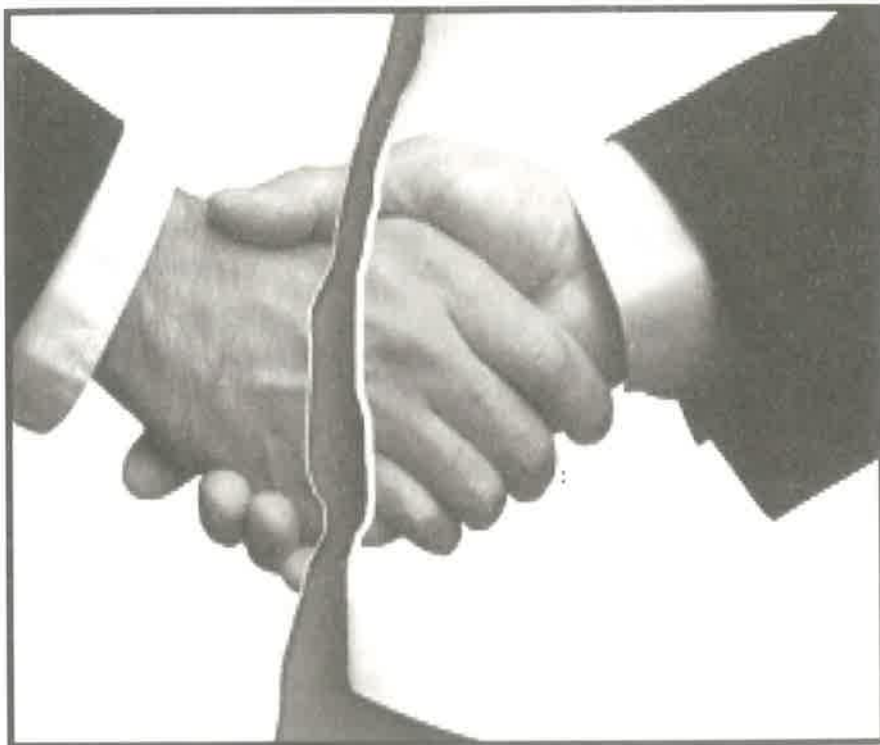
In the following circumstances Order of Specific Performance would Not be granted :-

- i) When the Agreement of Contract is Void;
- ii) When Agreement of Contract is too vague to be enforced;
- iii) When the Agreement of Contract is terminable at will;
- iv) When the Agreement of Contract is made with no Legal Object and or for no Consideration;
- v) When the Agreement of Contract is unconscionable;
- vi) When the Specific Performance is impossible;
- vii) When mutuality is lacking in the Agreement of Contract;
- viii) When Specific Performance would cause severe hardship to the Defendant.

Note : *On the above backdrop it can be seen that the Order for Specific Performance can be considered by the Court only in the cases of valid Agreement of Contract where breach is established beyond doubts.*

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• DISPUTES •





VALUATION OF PROPERTIES

The Valuation of property of any nature at any given time is essential requirement for all the component agencies in construction industry as well as for all the players of Real Estate Development, at various stages of trading and transactions which gives fair assessment of the value of the project and quantum of investment involved. The Valuation report can be used as a effective tool of resolving the disputes between the parties to dispute. The basic details and fundamentals of the Valuation are explained in brief hereunder:-

• **Definations :-**

- **Value :-** Means worth or utility of anything which is measured by price. Interestingly the price is a fact whereas the value is an estimate of ought to be price.
- **Valuer :-** A qualified, registered technocrat and or estimator who is expert in the specific field, and has professional integrity and credibility and can ethically discharge his multifold duties to ascertain and estimate fair market value of the property / assets at a given time, place and under specific circumstances.
- **Valuation :-** Valuation is a process by which the fair value of any asset (tangible or intangible) can be properly assessed and or fairly estimated. This is an important exercise for assessing the present value of any asset with future benefits taking into consideration economic indicators such as inflation, fiscal and non-fiscal policies, GDP Growth rate as well as its influence value.

• **Types of Values :-**

The value is a ratio between the price of money and its price in return which has to possess characteristics of utility, durability, transferability, marketability and scarce. The Value can be classified in the following categories which are generally related to finance and economic activities related to trading and real estate transactions:-

- Accommodation Value
- Assessed Value
- Book Value
- Market Value

- Monopoly Value
- Ratable Value
- Residual Value
- Reversionary Value
- Earning Value
- Economic Value
- Forced Value
- Investment Value
- Insurance Value
- Salvage Value
- Speculative Value
- Replacement Value
- Distress Value
- Potential Value

• **Purpose of Valuation :-**

The Valuation of any movable or immovable property is required for various purposes under specific market forces and conditions to fulfill the following purposes:-

- Land Acquisition
- Mesne Profit
- Income Tax, Wealth Tax and Capital gain Tax
- Mortgage, Loans and Finance Advances.
- Fair Standard Rent and Fair Lease Rent
- Sale of Trust Property
- Insurance Claim
- Auction Bid
- Family or Business Partition
- Probate Petition
- Sale or Purchase of Immovable Property
- Recovery of Stamp Duty and Loans
- Arbitration

• **Importance and Necessity of Valuation :-**

The Valuation of any movable or immovable property is essential to determine the fair estimated value of the property which is equally important for seller and purchaser in the matter of sale or purchase of land and or land alongwith the building thereon, so that the transaction can become satisfactory for both the parties.

In the case of dispute between Employer and the Contractor of the construction project, the valuation plays very important role in resolution of dispute, since both the parties become aware and realize the value of work under dispute to

enable each of the party to settle their dispute amicably instead of approaching Court of Law for long term futile fight.

The Valuation is of a paramount importance to estimate the value of family assets either for family or business partition as well as for obtaining probate order from the Court of law in the matter of will or testament. In the matter of disputes in connection with Income Tax, Wealth Tax or Capital Gain Tax, the Tax Authority invariably insists valuation report of the asset under reference from Senior Registered Valuer to settle the Tax claim in fair manner.

The Banks and or financial institutions insist valuation report of the assets for the consideration of value of equity mortgage before granting advance or loan amount.

It is clear from the above text that the parties for any transaction, acquisition or a contract if insist valuation report for the present and future assets/products to pre-determine the value and quantum of investment to be involved in the project, ultimately will be proved helpful for amicable settlement of the disputes arises if any, at earliest possible date without wasting time and money in the Court proceeding. In fact it is suggested that like arbitration clause in the agreement, there should be suitable provision for the valuation report in the contract to avoid unnecessary disputes at the later date.

**PROPERTIES
AND
THE TRANSFER OF PROPERTY ACT, 1882.**

- **PROPERTY :-** As a matter of fact, there is no specific or clear cut definition of “Property” either in the Transfer of Property Act, 1882 or otherwise. The dictionary meaning of word “Property” is : an assets, estates, chattels, effects, holdings, wealth etc. exclusively belonging to someone. In other words an asset of any nature which has proven ownership, marketability, value, title, interest, power and right of transference, can be referred to as “Property”.
- **TYPES OF PROPERTY :-** Normally the property can be divided in to 2 categories popularly known as Immovable and Movable properties which are more particularly described as under:-

IMMOVABLE PROPERTY

As per General Clause Act, 1897, a land, benefits arising out of land and things attached to the earth (structure, building etc.) is defined as “Immovable Property”. However it is also included a structure, building, house together inseparable fixtures attached thereto. The Immovable Property again can be further classified in 2 categories i.e. **Freehold** and **Leasehold** which are described as under :-

- **FREEHOLD PROPERTY :-**

- **Definition :-** Any immovable property or any part thereof which has marketability and can be sold and or conveyed on ownership basis in perpetuity together with all rights, title, interest and possession by the Vendor (Owner) to the Purchaser can be referred as “Freehold Property”.

- **Types of Freehold Properties :-** The freehold properties can be classified in the following categories according to its nature, use and occupation thereof :-

- | | | |
|-------------------------|------------------------|------------------------|
| ● Sole Ownership | ● Beneficial Ownership | ● Vested Ownership |
| ● Co-Ownership | ● Trust Ownership | ● Contingent Ownership |
| ● Corporeal Ownership | ● Legal Ownership | |
| ● Incorporeal Ownership | ● Equitable Ownership | |

● **LEASEHOLD PROPERTY** :- Any immovable property specifically related to land or land alongwith the buildings thereon, or a building or premises or part thereof, which is allowed by the owner to another to hold, use and occupy his such property, for a specific period and against payment of fixed premium and or compensation can be termed as "**Leasehold Property**", which is divided in following 2 Categories :-

- i) **Leased Property** :- In this category the owner of the land and or premises in the capacity as a '**Lessor**', let outs his property to the recipient i.e. '**Lessee**', for use, occupation and enjoyment for certain period on specific terms and conditions against monthly lease rent / compensation mutually agreed upon. In this case the rights of the Lessee are strictly limited to the '**Lease Agreement**' whereas the ownership of the premises shall always remains with the Owner.
- ii) **Licensed Property** :- This category is generally related to the use and occupation of the premises for a short term by the third party. In this case the owner of the premises as a '**Licensor**' let outs his premises to the '**Licensee**' for a short term period, on certain terms and conditions against payment of monthly compensation by the Licensee to the Licensor as mutually agreed upon. In this case the Licensee shall not have rights limited to '**Leave and License Agreement**', and the ownership of the premises shall remain always with the Owner.

MOVABLE PROPERTY

The General Clauses Act, 1887, define and mean movable property as any property of every description except immovable property. The movable property consists of all such assets and or belongings including a wealth in different forms in absolute possession, which can be easily adjustable, changeable, detachable, floating, mobile, portable and transferable. The money, Jewellery, artifacts, shares, promissory notes, guarantees, hundies etc. are generally termed as movable property since they are salable, changeable and transferable.

THE TRANSFER OF PROPERTY ACT, 1882

The Transfer of Property Act, 1882, came into force w.e.f. 1st June 1882. This legislation of Union Government is applicable to whole of India except Jammu and Kashmir and other such restricted territories declared by the Government.

● **Definations** :-

- i) **Transfer of Property** :- Means an act which permits a living person to convey and or transfer his property at present date or in future in favor of any one or more living persons.

ii) **Living Person** :- Under this Act, the living person includes an individual/s Body of individuals, an Association or Company whether incorporated or not.

• **Transactions covered under this Act of Transfer** :- Following transactions and transfers of movable and immovable properties are covered under the Transfer of Property Act, 1882 :-

- Sale of Movable or Immovable Property
- Mortgage of Assets and or Property
- Leasing and or Licensing of the Property
- Exchange of Property
- Receipt of Property by will, gift or inheritance.

• **What can be transferred under this Act?**

All types of properties and or assets either movable or immovable can be sold, conveyed and transferred in perpetuity by the owner of the property including relinquishing, discharging of his rights, title, interest and possession in favour of the Purchaser.

• **What cannot be transferred under this Act?**

The Transfer of Property Act, 1882, strictly prohibits transferred of following non-transferrable transactions :-

- Easement Rights cannot be transferred.
- A mere right of re-entry for breach of condition cannot be transferred.
- Short or Long term Lease or License rights cannot be transferred.
- A mere right to sue cannot be transferred.
- A right to future maintenance in any manner whatsoever cannot be transferred.
- Tenancy rights cannot be transferred.
- Limited rights or interest of third party in the property cannot be transferred.
- Any property (even if transferrable) which requires obligatory consent or written permission from the State or Central Government as the case may be cannot be transferred.
- Any property of which handing over physical possession is not possible, such properties cannot be transferred.

DISPUTES & LITIGATIONS

To defend, protect and fight for self rights is a natural instinct of every human being. In day-to-day life everybody has to struggle hard to face and overcome challenges and also compromise to settle the disputes of various natures from time to time. Many times it is seen that, in the matter of property transactions some of the disputes arose due to lack of Legal clarity, misunderstandings and strained family relations.

Such disputes can be of for deciding share in the property, family partitions, challenging of will and or probate. Whereas some of the disputes are forced upon; specifically in the matter of immovable properties and business transactions. Third party claims, debts recovery due to financial institutes, disputes among Landlord and Tenants, Employers and Tenants etc are some of other disputes.

If the disputes are not settled amicably in time by and between the parties to disputes, ultimately it leads to long term litigation in The Court of Law which is always time consuming and expensive where the results are unpredictable.

The aggrieved parties prefer appeals after appeals in Higher Courts against the Judgment of Lower Courts. In such event litigations continues for years together; by the time plaintiff and defendant both get frustrated and ultimately settle the disputes out of Court by consent terms.

In any transactions where Consumer's interest and or rights are denied, special judicial authority is constituted by the Govt. of India popularly known as "Consumer Disputes Redressal Forum" in each State, to settle the disputes speedily; of which the results are much satisfactory.

Disputes arose when either of the party to dispute do not perform and or refuse to honor terms of Contract agreed by and between the parties. Such disputes are settled either by Court of Law or through Arbitrator/Conciliator as the case may be.

The disputes can be generally classified in following groups:-

- 1) Domestic and Family Disputes
- 2) Property and Real Estate Disputes
- 3) Business and Commercial Disputes
- 4) Construction and Development Disputes
- 5) Employer and Employee Disputes
- 6) General Disputes (Landlord & Tenant, Insurance & Medical Claim etc.)

The aforesaid disputes are explained in the following order :-

1) Domestic and Family Disputes :-

A) Various types of family disputes :-

Disputes regarding family partition, divorce, child custody, child support, marital properties, alimony and other family law issues are covered under this category.

Family partition, share of beneficiaries in ancestral property can be referred to the arbitrator whereas disputes regarding divorce, child custody, alimony etc can be settled by the Family Courts.

B) Disputes between Co-owners and or Beneficiaries :-

Mainly such disputes arise out of claims of beneficiaries for deciding their specific share in the immovable property when the same is ancestral and or jointly owned by the co-owners. The legal beneficiaries can claim their right, title, interest and or possession in the disputed property.

Other than above, family partitions, challenging of will and or probate by the beneficiaries and other similar family matters are involved, in this category. In the absence of will of the deceased (head of the family) and or probate thereof, it becomes very difficult to decide exact percentage of share of each of beneficiaries. The disputes arise in such situation if can not be settled amicably, it may lead to a long term Court litigations.

2) Property and Real Estate Disputes :-

A) Disputes arising out of Defective Title of the Property :-

Main disputes in this category are arising out of defective title to the property, wherein due to various encumbrances i.e. covenants, lien, charge, rights of third party etc. the marketability of the property is affected.

For any real estate transaction either for sale or purchase of immovable properties, the transaction can not be concluded unless the property is made free from all encumbrances so that it can hold clear and marketable title.

It is a set practice to give Public Notice calling for objections or legitimate claims of third parties in advance to enable them to take necessary steps to settle the claims of such third parties if any, so that the property can re-hold clear and marketable title.

B) Dispute between Vendor and Developer :-

In this category, disputes are related to recovery of payments agreed under the Agreement to sale and or assignment of Development Rights between Land Owner & Developer / Purchaser which are payable as per Schedule of Payment agreed by both the parties under the contract. In such event the Land Owner (Vendor) as Plaintiff can approach to the appropriate Court by filing 'Suit for Specific Performance' for recovery of arrears of payment with interest from the Developer/purchaser when the Developer/purchaser purposely delays or refuse to pay the payments.

Such Suits can be filed as per jurisdiction either in Hon'ble High Court or District Courts, by paying appropriate court fees. The Plaintiff has to provide copies of all the related and relevant documents duly certified as "True Copy" by his advocate, as a part of the plaint, giving separate Exhibit numbers to each document upon which the Plaintiff is relied upon.

Apart from claim amount, the plaintiff can request and pray to Hon'ble Court to grant interim stay on ongoing project against Developer / Purchaser, till the suit is disposed off.

C) Disputes arising out of Third Party claims/rights :-

These are mainly arose by the intervention of Third Party who has legal interest in the property either by specific covenants, mortgage, license, possession and or Right of access / way over their property etc.

Therefore in the initial stage it is essential to call for objections from interested third parties if any through Public Notice before entering in to any transactions.

In such event property remains encumbered and can not be purchased or sold in open market unless the legitimate claims of the third party are settled either in the Court of law and or by Out-of-the-Court settlement, with consent terms.

3) Business and Commercial Disputes :-

A) Trade and Financial Disputes :-

Many times it is seen that disputes arose within Business and or Commercial institutions in respect to business partnerships, business/ commercial Contracts, bankruptcy, debts, insolvency, disposal of company assets, trade secrets, mortgage, partnership and business dissolutions etc.

Such disputes can be referred to arbitrator for amicable settlement and or to the appropriate Courts for final verdicts; as may preferred by the parties to dispute.

B) Disputes of recovery of Debts due to Bank-Financial Institution :-

The disputes of recovery of debts due to Bank-Financial Institution are covered under this category, which mainly arise between Bank-Financial Institution and Borrower, when there is continues default in timely repayment of installments on the part of the borrower.

Where recovery of high payments / stakes are involved, there is no alternative for the Bank-Financial Institution to refer the matter to the 'Debt Recovery Tribunal' a constituted judicial authority, depending upon nature and quantum of recovery from the borrower, for necessary verdict.

4) Construction and Development Disputes :-

A) Disputes between Employer and Contractor :-

In this category disputes arises mainly between the Employer (Owner, Institution, Statutory Authority as the case may be) and the Contractor to whom a specific project is awarded for its successful completion based on the agreed terms and conditions of the contract executed by and between the parties thereto. The disputes are mainly for (i) premature or ex parte termination of contract by either of the parties, (ii) delay in work, (iii) delay in payments, (iv) inferior quality of work, (v) dishonoring time and payment schedules etc. which otherwise are expressly agreed

by and between the parties to the Contract. These disputes are generally referred to the Arbitrator for the settlement.

B) Disputes between Developer and Consumer:-

In this case, the Agreement to Sale for residential premises is executed between the Developer (Seller) and Consumer (Purchaser) by specific contract under Maharashtra Ownership Flats Act (MOFA). Generally the disputes arise between Consumer (Purchaser) & Developer, in respect to inferior quality of construction, agreed amenities not provided, wrongful and deliberate delay in handing over the possession of the premises and or refusal thereof. In such events the aggrieved purchaser can approach to the 'Consumer Disputes Redressal Forum' for settlement of disputes for the necessary relief or order from the Hon'ble Consumer Court.

5) Employer and Employee Disputes :-

A) Employment Disputes :-

These disputes mainly arose between Employer and Employee; in which discrimination, harassment, relations, wrongful discharge, severance issues, wages, claims, benefits and working hour disputes are involved.

The aforesaid disputes can be amicably settled by the Employer and Employee alone or by the Employer and Labour Union as the case may be. However if the disputes are not resolved then it can be referred to the Labour Court for its verdict.

6) General Disputes :-

A) Disputes between the Landlord and Tenant :-

Purposely delaying and or not paying monthly rent and or refusal to pay permitted yearly increase in monthly rent, carrying out structural changes in the rental premises, without the written permission of the Landlord, challenging termination of tenancy, landlord not maintaining the building in tenable conditions etc. are basic disputes covered in this category. If the disputes are not amicably resolved, in such events the Tenant and or Owner has to approach to the appropriate Court of Law for necessary reliefs.

B) Disputes between Landlord & Civic Authority for recovery of Taxes:

In this category, mainly the disputes are between Property Owner/s and Civic Authority for recovery of Property Taxes, mistakes in area calculations, and Ratable Value, increase in taxes, Lease rents etc. In such matters the Land Lord can achieve amicable and satisfactory results from the Civic authority to avoid long term Litigations. If such disputes are not settled then they are generally referred to the Hon'ble Small Causes Courts.

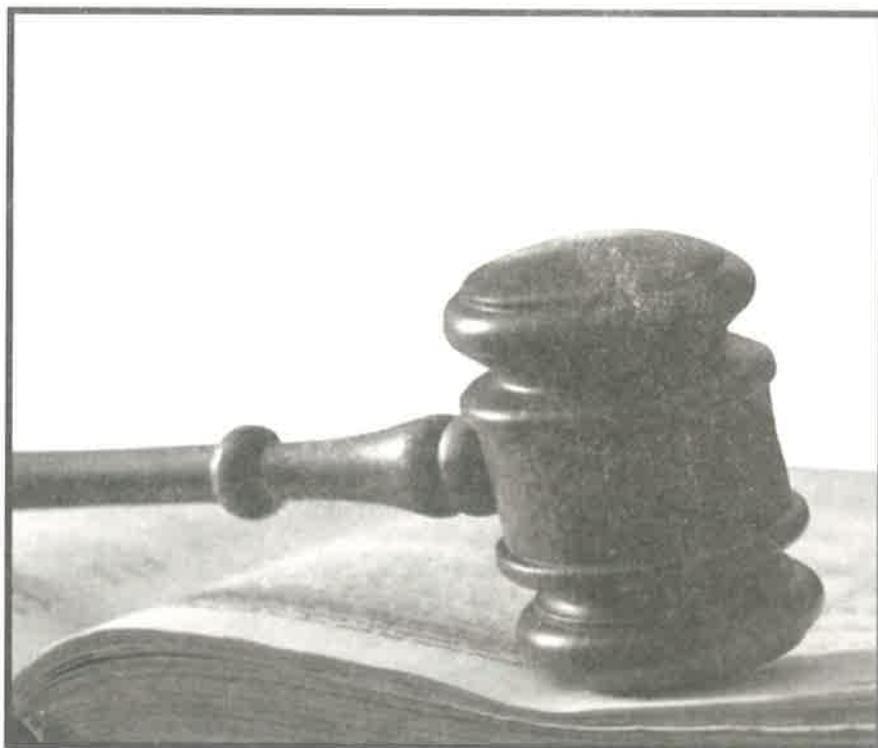
C) Disputes of Insurance Claims:-

The disputes arose between Insurance Companies and insured or non-insured claimants, when there is personal injury due to automobile accident, accidental death, medical claim and such other torts. The insurance companies can challenge the claim on the grounds of coverage given in insurance policy, and related denial issues thereof. If the claims are not settled the aggrieved parties has no option but to approach to appropriate Court/Forum for adequate reliefs.

D) Public Interest Litigations (PIL):-

In this category a citizen of India, can file a Suit in appropriate Court of Law, against either State or Central Govt., Civic Authorities, and or any Statutory Authorities, challenging any specific enactment, notification, policy, regulations etc., which applicant feels that, it is unconstitutional and or harmful in social and public interest.

▪ **ARBITRATION** ▪





THE ARBITRATION AND CONCILIATION ACT, 1996 (Act No. 26 of 1996)

The Arbitration and Conciliation is an effective instrument for settlement of domestic and international commercial disputes between parties with the help of independent third party which is getting recognition day-by-day worldwide.

The Arbitration and Conciliation Act, 1996, came into force on 22nd August 1996 and is applicable to the all states of India (except Jammu & Kashmir) which is broadly based on United Nations' Commission On International Trade Law's (UNCITRAL) Model Laws and Rules thereof. According to the provisions mentioned therein parties to the dispute may seek an amicable settlement of their disputes by recourse to Arbitration and or to Conciliation / Mediation method.

The Bare Act consists of IV parts with 14 Chapters and almost 86 Sections thereto. Brief description of said Chapters and Sections can be read as under :-

PART – I (10 Chapters has 43 Sections i.e. Section No. 1 to 43)

- 1) Chapter No. 1, gives general provisions of Act.
- 2) Chapter No. 2, is related to the Arbitration Agreement.
- 3) Chapter No. 3, describes Composition of Arbitral Tribunal.
- 4) Chapter No. 4, explains Jurisdiction of Arbitral Tribunal.
- 5) Chapter No. 5, is related to the Conduct of Arbitral Proceedings.
- 6) Chapter No. 6, describes Making of Arbitral Award and Termination of Proceedings.
- 7) Chapter No. 7, gives the directive for Recourse against Arbitral Award.
- 8) Chapter No. 8, is related to Finality and Enforcement of Arbitral Award.
- 9) Chapter No. 9, is for Appeals and Appealable Orders.
- 10) Chapter No. 10, deals with miscellaneous provisions thereto.

PART – II (2 Chapters has 17 Sections i.e. Section No. 44 to 60)

This part is related to the Enforcement of Certain Foreign Awards

- 1) Chapter No. 1, is related to New York Convention Awards (Section 44 to Section 52).
- 2) Chapter No. 2, describes Geneva Convention Awards. (Section 53 to 60)

PART – III (1 Chapter has 21 Sections i. e. 61 to 81)

This part relates to Application and Scope of Conciliation

Conciliation is a single chapter with 21 Sections (Sections 61 to 81) giving all the provisions applicable for the entire process and provisions for Conciliation proceedings.

PART – IV (1 Chapter has 5 Sections i.e. 82 to 86)

This part is related to supplementary provisions of the Act.

This part consists of Sections 82 to 86, related to Powers of High Court to make Rules, Removal of difficulties, Power to make rules, Repeal and Saving, Applicability of old Act in making award and Repeal of Ordinance 27 of 1996 and Saving. At the end Model Forms are given for the appointment of Arbitrator/s, Appointment of Arbitrator by Court, Cancellation of arbitration agreements, Interim measures prayed for in petition, as well as Service of Notice to Lessee vide Arbitration Agreement.

REASONS AND OBJECTS OF THE ARBITRATION AND CONCILIATION ACT – 1996

● Reasons of Enactment :

Prior to Arbitration and Conciliation Act, 1996, came into force (22nd August 1996), there were three settlement Acts in existence i.e. (i) The Arbitration (Protocol and Conciliation) Act, 1937 (6 of 1937) (ii) The Arbitration Act, 1940 (10 of 1940) and (iii) The Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961).

During passage of time it became necessary to update the said acts due to rapid changes in social and economic field. Therefore The Law Commission of India recommended amendments to the said acts to make it more responsive to the contemporary needs, resulting the present Act which in fact substantially consists of the provisions of aforesaid earlier enactments, as well as, the provisions of the United Nations Commission on International Trade Law's (UNCITRAL) model Law and Rules.

● Objects of Enactment :

The broad objects of this enactment can be as under :-

- i) To comprehensively cover Arbitration and Conciliation both at domestic, as well as, international and commercial trade levels.
- ii) To make reasonable provisions for fair, efficient and capable arbitral procedure which will cater the needs for the specific type and category of arbitration.
- iii) To minimize the supervisory role of Courts in arbitral process.
- iv) To make sure that the arbitral tribunal works within the limit of its jurisdiction and powers conferred thereto.
- v) To ensure that the arbitral tribunal shall give reasons for its arbitral award.
- vi) To an arbitral tribunal to adopt / use mediation, conciliation or other procedures in its proceedings to encourage the parties to settle the disputes amicably.

- vii) To make sure that the settlement agreed by and between the parties as a result of conciliation method, it will have same status and effect at par with arbitral award rendered by an arbitral tribunal.

The aforesaid objects of the Act are sufficient, appropriate and adequate to create proper awareness amongst parties so that that they can settle their disputes amicably either by arbitration or conciliation or mediation, whatever is better for fast remedy to resolve their disputes with honest intentions and proper spirit.

DEFINITION, NATURE AND TYPES OF ARBITRATION

Before going through the provisions of Arbitration and Conciliation Act, 1996, it is necessary to understand meaning of Arbitration and different methods of Arbitration, which can be broadly defined as under :-

- **Broad Definition of Arbitration :**

“Arbitration is a process adopted to resolve the disputes between the parties, after hearing representation of both the sides in judicial manner, by an independent third person/s other than a Court of competent jurisdiction”.

- **Nature of Arbitration :**

The nature of arbitration always remains as ‘private adjudication by a forum’ selected by the parties, which is made on consensual reference. Thus arbitration provides effective process of settlement of disputes through arbitral tribunal.

- **Types of Arbitration :**

There are three kinds of Arbitration based on the issued involved, agreement and disagreement of parties and judicial interventions, which can be as under:-

- i) **Arbitration clause or separate arbitration agreement:-**

In this case without filing suit in the Court of Law the parties can refer their dispute for the adjudication by the arbitral tribunal since the award given by the tribunal takes the form of decree of the Court.

- ii) **Arbitration by intervention of Court:-**

When parties to disputes do not agree on the composition of arbitral tribunal, either of the party can apply to the appropriate Court to appoint or nominate arbitrator on the basis of arbitral agreement. In the circumstance Court can issue directive for appointment of arbitrator as deem fit.

iii) Arbitration in Suits :-

When the suit is pending in the Court, at any time during the proceedings, but before the judgment is pronounced, the parties to dispute, can request to the Court, that they are interested to settle their dispute/s by arbitration.

In the circumstances the judicial authority may accept such application and refer the dispute to arbitration.

● **Categories of Arbitration :**

The 'Arbitration and Conciliation Act, 1996' elaborates categories of arbitration in the following manner :-

- i) Domestic Arbitration,
- ii) Foreign Arbitration,
- iii) International Arbitration,
- iv) Statutory Arbitration,
- v) Institutional Arbitration.

BROAD RULES OF ARBITRATION

There is no specific Section in the "Arbitration and Conciliation Act, 1996" which prescribes the Rules of arbitration. However it is possible to interpret the broad rules of arbitration based on overall provisions incorporated in the Act, which can be construed as under:-

● **Rules of Arbitration :**

- 1) For settlement of dispute by arbitration, it is essential that the reference to arbitrator should have been incorporated in the contract either in the form of arbitration clause or in the form of separate arbitration agreement as the case may be.
- 2) With mutual consent, the parties to contract are free to appoint 'Sole Arbitrator' or 'Arbitral Tribunal' consisting of Two Arbitrators i.e. one by each party, and or they are at liberty to refer their dispute to Indian Council of Arbitrators for settlement by arbitration.
- 3) The two arbitrators appointed has to appoint / nominate third arbitrator who will act as Presiding arbitrator (umpire)
- 4) The parties to contract with mutual agreement are free to determine and decide the norms of qualifications & experience of arbitrator in whom they repose their faith and trust.
- 5) The arbitral tribunal shall decide on the following matters :-
 - i) Jurisdiction of arbitral tribunal.
 - ii) Powers of arbitral tribunal.
 - iii) Place of Arbitration and time limit.
 - iv) Conduct of arbitral proceedings.
 - v) Determination of rules of arbitral procedure.

- vi) Fees and expenses payable by the parties to the arbitrator/s
 - vii) Making of arbitral award
 - viii) Termination of arbitral proceedings.
 - ix) Any other duties and powers (other than above) if agreed so.
- 6) In the event, either of the party to arbitration, if not satisfied with arbitral award, he can recourse to the Court against such arbitral award by filing application with the appropriate Court supported by the documentary evidence.
- 7) Unless otherwise challenged, the Arbitral award shall be final and binding on all the parties to arbitration.
- 8) The arbitral award shall be enforced under the Code of Civil Procedure, 1968 (5 of 1908) in the same manner as if it is a decree of Civil Court.

ARBITRATION AGREEMENT

Section 7 (Sub-Sections 1 to 5) of the Arbitration and Conciliation Act, 1996 has provided necessary guidelines in respect to “Arbitration Agreement”.

- **Arbitration Agreement :**

In Sub-Section (1) of Section – 11 the Arbitration Agreement is defined as under :-

“Arbitration Agreement means an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not”.

- **The Arbitration Agreement should possess following elements :-**

- a) The Arbitration Agreement can be either in the form of arbitration clause in the contract or in the form of separate agreement (Sub-section(2) of Section 11)
- b) The Arbitration Clause / Agreement must be in writing duly signed by the parties (Sub-section(3) of Section 11)
- c) The Arbitration Agreement is complete when :-
 - i) The document is signed by the parties.
 - ii) It is established by exchange of letters or through any mode of communication which can create written record including exchange of statements of claims and defense, on the basis of terms of contract. (Sub-section(4) of Section 11)
- d) A written arbitration clause (for referring the disputes to arbitrator) in contract document is sufficient to establish an arbitration agreement (Sub-section (5) of Section11)

The Arbitration agreement if possess aforesaid elements it can be held as 'Valid'. It can be seen from the above provisions that arbitration agreement do not require any specific format. However the Arbitration Clause is mandatory for the appointment of arbitrator, because mere provision or reference in agreement that 'the parties 'may' go to suit or may go to arbitration' can not constitute Arbitration Agreement.

Note : *As per the provisions of Section 7 of the Act, under the arbitration agreement both parties can nominate one arbitrator or two arbitrators (nominated by each of the party) and third arbitrator (i.e. presiding arbitrator or umpire) appointed by two arbitrators before commencing arbitration proceedings.*

● **Court decisions on Arbitration Agreement :**

The judgments given on the issue of arbitration agreement given by various Courts it can be seen that :-

- i) The validity of arbitration agreement is not depend upon number of arbitrators, however they should be odd in numbers (*Ref : MMTC Ltd v. Sterlite Industries (India) Ltd. 1996 (6) SCC 716*)
- ii) If the arbitration clause is incorporated in the agreement, the dispute has to be decided by the arbitrator (*Ref : M/s. Gail (India) Ltd. V. Nagarjun Cerachem Pvt. Ltd. AIR 2005 AP 151*)
- iii) The Contract / Agreement with arbitration clause, even if it is coming to end due to breach of contract by either of the party, the arbitration clause does not get redundant or not enforceable but still subsists and or survives. (*Ref : M/s. Magma Leasing v. Potluri – AIR 2010 SC 488*)
- iv) The arbitration clause incorporated by father in his will, is binding on his surviving Sons & Daughters after his death, even if Sons & Daughters are not signatories to will of father. (*Ref : AIR 1939 Cal 500 / R. N. Sharma v. Vijay Kumar – AIR 2008 Raj 160 (Jaipur Bench)*)

CATEGORIES, QUALIFICATIONS AND EXPERIENCE OF ARBITRATOR

● Broad Categories of Arbitrator :

Since the contractual disputes are of various nature depending upon issues involved therein, instead of filing suit in the Court of Law and fighting litigation without any estimated time limit, parties to dispute always prefer the settlement of dispute by the arbitrator who can be expert and possess adequate qualifications in the field and long term experience in settlement of dispute by arbitration and or by conciliation. Most of the time the disputes are generally related to family matters, title and ownership of immovable property, transactions in real estate, finance, trade and commercial activities which require expert person as arbitrator related to the field of respective practice. On the above background broadly the arbitrators for settlement can be classified in the following manner :

● Classification of Arbitrators :

- i) Retired Hon'ble judges of High Court / Supreme Court.
- ii) Practicing or retired Advocates and Councilors of High Court / Supreme Court.
- iii) Practicing or retired Architects.
- iv) Practicing or retired Engineers.
- v) Practicing or retired Chartered Accountants.
- vi) Company Executive in Government of Private Sector.
- vii) Experts in settlement of Domestic disputes.
- viii) Experts in settlement of International Commercial disputes.
- ix) Experts of any other specialized field / area.

● Qualifications of Arbitrator :

"The Arbitration and Conciliation Act – 1996" does not prescribe any specific qualifications for an Arbitrator. It is left to the discretion of parties to contract, to decide about qualifications and expertise of the arbitrator, including acceptance of his appointments as will be mutually agreed upon.

Sub-Section 8 of Section No. 11 of the Act describes the guide lines for appointment of Arbitrator and the qualifications required thereto etc. which reads as under :

Sub-Section 8 of "Section 11 : The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to :-

- a) Any qualification required of the arbitrator by the agreement of parties, and
- b) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

● **Guidelines for qualifications and experience of Arbitrator :**

Even though the Arbitration and Conciliation Act, 1996, is silent on the qualifications and experience of a person who can be nominated / selected as Arbitrator. However the Indian Road Congress (IRC) and Indian Council of Arbitration has provided certain guidelines in respect to the qualifications and experience of any third person who can take the assignment as Arbitrator to settle the disputes between the parties, and the same are reproduced as under :-

1) Guidelines of Indian Road Congress :

The Indian Road Congress (IRC) has given certain guide lines for empanelment of arbitrators and qualifications required thereof which are broadly described as under:-

- 1) The person (Arbitrator) should hold at least a Bachelor's Degree in Civil Engineering or its equivalent in engineering faculty.
- 2) The person applying for empanelment of Arbitrators should be mentally and physically fit and sound.
- 3) The person should have minimum age of 50 years and maximum age of 70 years, on the last date of submission of application for empanelment.
- 4) The person should have experience and expertise in dealing with Contract matter / Contract disputes for a period of minimum 5 years.

It is reasonably clear from the above guidelines that in the matter of disputes arising out of technical Contracts, the minimum qualification for the arbitrator is decided as at least a Bachelor's Degree in Civil Engineering and or in similar engineering faculty i.e. Architect, Town Planner etc.

2) Guidelines of Indian Council of Arbitration :

The Indian Council of Arbitrators (ICA) has given broad categories, qualifications and experience etc. for empanelment of Arbitrators from different disciplines which can be reads as under :-

- i) **Judges** : Honorably retired Judge of the Supreme Court or any of the High Courts and have made judicial pronouncements in some arbitration cases.
- ii) **Advocates** : Advocate practicing in the Supreme Court or at the level of the High Court for at least 15 (fifteen) years with experience in arbitration matters and knowledge of Corporate Laws, particularly Arbitration and Contract Law and Arbitration Procedures thereto.
- iii) **Engineers, Chartered Engineers etc.:**
 - (a) Honorably retired technocrat not below the rank of Chief Engineer in the CPWD or in any other Department of the Central or State Governments.
 - (b) Chartered Engineers having specialization of Engineering, Construction Contracts and have worked in specific field of valuation of buildings, urban laws, designing of building, building construction, architectural or structural designing of buildings, construction projects, government contracts etc. for at least 15 (Fifteen) years, and or at least 5 (five) years' experience in conducting of arbitration cases, laws and procedure.
- iv) **Chartered Accountants** : Chartered Accountants / Chartered Secretaries with at least 15 (fifteen) years' experience and knowledge in the profession and at least 5 (five) years' experience in conducting of arbitration cases, law & procedures.
- v) **Executives** : Company Secretaries, Senior Legal and Commercial Executives in Government, Public sector undertakings or private commercial organizations or Professor/Lecturer with at least 15 (fifteen) years' experience in the profession and at least 5 (five) years experience in legal, arbitration or commercial procedures.

- vi) **Shipping** : Having knowledge and at least 5 (five) years' experience of shipping laws practices and procedures, particularly in international matters at a senior level in a company or institution of standing or otherwise having a distinguished career in shipping matters and at least 5 (five) years' experience in conducting of naval arbitration cases and maritime law.
- vii) **Businessmen** : Company Directors and other persons with outstanding reputation and experience in domestic or international trade for at least 10 (ten) years' and at least 5 (five) years' experience in the arbitration law & procedure.
- viii) **Foreign Nationals** : Suitable person of any nationality other than Indian resident in India or abroad who have adequate knowledge and at least 15 (fifteen) years' experience in foreign commercial and arbitration law and procedures.
- ix) **Other Specialists and Experts** : Persons having 15 (Fifteen) years' experience in any other specialized areas and have at least 5 (five) years' experience in the arbitration law & procedure.

Based on above guide lines, it can be seen that minimum qualifications for an arbitrator who should be physically and mentally fit and sound must possess at least Bachelor's Degree of the respective faculty. The minimum and maximum age for empanelment of arbitrator is recommended to 50 to 70 years with minimum experience of 5 years in arbitration of contract matters / contract disputes.

The above provision is ample clear that the person to be appointed as arbitrator should be minimum graduate or equivalent of the appropriate faculty, and also should be senior, experienced and competent enough to settle the disputes between the parties by arbitration, conciliation and or mediation, as the case may be.

APPOINTMENT OF ARBITRATOR/S AND ARBITRAL TRIBUNAL

- **Appointment of Arbitrator/s :**

As per Section 11 of the Arbitration and Conciliation Act- 1996, a person of any nationality can be appointed as arbitrator unless otherwise agreed by the parties to disputes.

When a specific person is not nominated in the arbitration contract / or in arbitration clause of the agreement / contract, the parties to dispute are entitled to chose an expert in the field, in whom they repose faith and trust, who has capacity to resolve and settle the dispute amicably, by adopting congenial procedure rather than cumbersome adversarial system of litigation. The parties also can decide on the procedure for the appointment of the Arbitrator or Arbitrators as the case may be.

- **Procedures for Appointment of Arbitrators :**

There are different procedures which can be adopted for the appointment of Arbitrator. The appointment of 'sole' arbitrator by express agreement and consent of the parties, is most satisfactory way of composition of arbitral tribunal. In case of appointment of more than one arbitrators, the appointment procedure is explained in Sub-Section 2, 3 and 4 of Section 11 of the Act, which reads as under :-

- **Section : 11 of the Act :**

- **Sub-Section (2) :** subject to Sub-section(6), the parties are free to agree on procedure for the appointment of sole arbitrator.
- **Sub-Section (3) :** Failing any agreement referred to in ub-Section (2) each party shall appoint one arbitrator, and two appointed arbitrators shall appoint third arbitrator who shall act as the presiding arbitrator (umpire)
- **Sub-Section (4) :** If the appointment procedure in Sub-Section (3) applies and,

- a) a party fails to appoint an arbitrator within thirty (30) days from the receipt of a request to do so from the other party, or
- b) two appointed arbitrators fail to agree on the third arbitrator within thirty (30) days, from the date of their appointment,
- c) Upon request of a party the appointment of arbitrator can be made by the appropriate judicial authority or any person or institution designated by him.

Note : In the circumstances when a decision on the matter is entrusted to the Judicial authority a person or institution designated by him as arbitrator is final and binding on the parties.

● **Procedure of Appointment of Arbitrator when complete :**

It is to be mentioned here that Hon'ble Justice Shri. S. B. Malik in his Book "The Commentary on the Arbitration and Conciliation Act-1996" (Fifth Edition), has explained (item No. 66-Page No. 386) in detail as to when the procedure of appointment of Arbitrator is complete which reads as under : -

"The appointment of arbitrator by either party is an agreement for reference to two arbitrators is not complete unless he lets the other party know the object of his choice. Nomination in fact implies notice to the other party. The word 'nominate' implies not only to the choice of an arbitrator but communication of the appointment to the other party".

Note : In case of failure of a party to communicate the appointment of his arbitrator within 15(Fifteen) days, the other party is entitled to nominate his arbitrator as "The Sole Arbitrator" (Ref : Dominion of India V. Kalyan Kumar Purkayastha, 1949 (53) CWN 180)

SCOPE AND POWERS OF ARBITRAL TRIBUNAL

To avoid long term litigations, the Arbitration and Conciliation is effective instrument provided by the “Arbitration and Conciliation Act, 1996”, to settle the disputes amicably. The enactment encompasses all the procedures and provisions to make the arbitration process as fair and impartial as possible. The Act has prescribed the Scope and powers conferred to arbitral tribunal, which are described in short as under :-

- **Broad Scope and Powers of Arbitral Tribunal :**

- 1) The Scope of Arbitral Tribunal is limited to the terms and conditions of the contract and dispute arises thereof, which are referred to them for decision.
- 2) Unless otherwise agreed by the parties the arbitral tribunal is empowered to rule on its own jurisdiction including ruling on any objection in respect to validity, existence and enforceability of arbitration agreement. The parties to arbitration, by agreement, cannot exclude jurisdiction of arbitral tribunal.
- 3) Unless otherwise agreed by the parties to arbitration, the arbitral tribunal has to conduct the arbitration proceedings in appropriate manner as it consider deem fit. However the arbitral tribunal has to give equal treatment to both the parties, giving them full opportunities, order on inspection of documents, and sufficient advance notice of hearings without any disregard to principles of natural justice.
- 4) Section 19 of the Act empowers the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any documentary evidence produced.
- 5) Unless otherwise agreed by the parties, the arbitral tribunal may decide place of arbitration taking into considerations the convenience of all the concerned parties thereto.

- 6) Unless otherwise agreed arbitral tribunal can commence the arbitration proceedings once the dispute is referred by the party on the date on which the intimation is received by other party to arbitration.
- 7) Unless otherwise agreed by the parties the arbitral tribunal may appoint one or more experts in the field to report to it on specific issues to be decided by the arbitral tribunal.
- 8) The arbitral tribunal is empowered to apply to the Court for assistance in taking the relevant evidence.
- 9) With the consent of parties to arbitration, the arbitral tribunal may use mediation, conciliation and or adopt other similar procedures at any time of during the arbitral proceedings at it find deem fit to encourage the parties for an amicable settlement of their dispute.
- 10) During the arbitral proceedings, if settlement is arrived between the parties with the procedure of conciliation or mediation, with the consent of parties, the arbitral tribunal can terminate the proceedings and record the settlement in the form of arbitral award based on terms and conditions agreed by and between the parties.
- 11) Unless otherwise agreed, at any time during the proceedings, the arbitral tribunal can make an 'Interim Arbitral Award' on any matter or issue with respect to which it may make its final award.
- 12) Unless otherwise agreed, the award of arbitral tribunal should be of reasoned award.
- 13) Unless otherwise agreed the arbitral tribunal, under Sub-Section(1) of Section 31, is empowered to fix the cost of arbitration which generally consists of :
 - i) Fees and expenses of the arbitrators and witnesses.
 - ii) Expenses of proceedings.
 - iii) Fees of experts whose services are engaged for specific report.
 - iv) Administration fees.

- v) Any other expenses incurred in respect to arbitration proceedings and arbitral award thereof.
- 14) Under Section 38, The arbitral tribunal can fix the amount of deposit and or additional supplementary deposits, as an advance towards the costs referred to in Sub-Section (1) of Section No. 31 which it expects that will be incurred towards arbitration proceedings, and claims & counter claims as the cause may be and the same can be recovered as under :-
- i) The Deposit amount referred to Sub-Section (1) shall be payable by the parties to arbitration in equal shares respectively.
 - ii) Where one party pays his share of his deposit, but other party does not pay his share of deposit, the arbitral tribunal can suspend and or terminate the arbitral proceedings in respect of the claims under arbitration.
- 15) Under Section 39, subject to any provisions contrary to the arbitration Agreement, the arbitral tribunal shall have lien on the arbitral award for any unpaid costs of the arbitration.

DUTIES OF ARBITRAL TRIBUNAL AND ARBITRAL PROCEEDINGS

Section 18 to 27 of the 'Arbitration and Conciliation Act, 1996', gives broad outline on as to how the arbitral proceedings should be conducted. Even though the arbitral agreement empowers arbitral tribunal to evolve and or adopt its own procedure for arbitral proceedings, it cannot deviate from the applicability of the paramount principles of natural justice and fairness in entire proceedings, in spite it is specifically recorded or included in the arbitral agreement or not. With due consent of the parties once arbitral tribunal is constituted, it has to follow minimum procedural requirement to discharge its duties in most fair and impartial manner, which can broadly be as under :-

● Duties of Arbitral Tribunal :

1) Equal Treatment :

Section 18 of the Act, lays dual duties on the arbitral tribunal i.e. (i) It will act in an impartial manner, and (ii) it should give equal treatment to each of the party to arbitration. In other words the arbitral tribunal must be honest, impartial, disinterested, and unbiased, to achieve the main object with due respect to the principle of natural justice.

2) Equal Opportunity :

- i) The arbitral tribunal should give fair opportunity to each party to present their case with supportive statement, evidence, documents and agreements in respect to their claim and counter claim if any.
- ii) The arbitral tribunal should give fair opportunity to both the parties:-
 - a) To be present at the hearing along with is witness/s and or legal advisor allowed if any.
 - b) To be present throughout the hearings.

c) To cross-examine and reply to the arguments as well as hearing of one party in the presence of other to facilitate the cross-examination.

● **Arbitral Proceedings :** Once the arbitral tribunal is constituted as approved by the parties the arbitral tribunal may conduct arbitral proceedings in the following manner :-

- i) The arbitral tribunal should send advance Notice to both the parties informing them, the date, time and place where the hearings will be hold.
- ii) Unless otherwise agreed the arbitral tribunal will not exclude either party from the hearing either partly or completely.
- iii) The arbitral tribunal should not hear evidence or arguments of one party in the absence of other party, unless other party prefers to remain absent.
- iv) The arbitral tribunal should apprise both the parties in respect to statements, documents, evidence or information submitted to the tribunal by either party which may adverse to each other, or the same is collected by the tribunal itself, including the expert report.
- v) Even though the code of Civil Procedure is not applicable to arbitral proceedings, the arbitral tribunal must follow such procedures which are just fair, transparent, and would not cause prejudice to the other party.
- vi) Unless otherwise agreed the arbitral tribunal shall decide whether to hold oral hearings for the presentation or argument or the proceeding should be conducted on the basis of documents and other evidence / materials received.
- vii) The arbitral tribunal should give written minutes of each of the hearings conducted in an agreed language, during arbitral proceedings to each party. The said minutes are required to be signed by all the members of the arbitral tribunal as well as claimants and respondents respectively, incorporating date time and place where hearings are conducted.
- viii) At the end of arbitral proceedings, the arbitral tribunal should declare the prospective date on which the award will be given.
- ix) The arbitral proceedings shall be deemed terminated on the date the final award is issued by the tribunal.

ARBITRAL AWARD

“Arbitral Award” is an ultimate conclusion and a decision given by the Arbitral tribunal towards settlement of dispute arose between the parties to arbitration. Sub-Section (1) to (8) of Section 31 of the Arbitration and Conciliation Act, 1996, (Which corresponds to article 31 of UNCITRAL Model Law), elaborates the form and contents of arbitral award, of which its scope and contents can be broadly explained as under:-

1) Form and Signatories to Arbitral Award :

The award shall have to be made in ‘Writing’ and should be signed by all the members of the arbitral tribunal whether the award is unanimous or not. It is obligatory for each member of the arbitral tribunal to sign the Award to make it as valid. If one member of the tribunal omits to sign the award, the reasons for such omission be stated, and in such event the signatures of the majority of other members of arbitral tribunal, is considered to be sufficient for making the Arbitral Award ‘Valid’.

The minority arbitrator who has refused to sign the award do not affect the validity of award. In the event the minority arbitrator who refuse to sign the award, and gives his own award, the award signed and delivered by majority members of the tribunal shall be treated as ‘Deemed Award’.

2) Reasons of Arbitral Award :

Sub-Section (3) to section 31 of the Act states that, unless otherwise agreed by the parties that either no reasons are required to be given or the award should be strictly in reference to agreed terms under Section 30 of the Act, it is mandatory for the arbitral tribunal to give and incorporate the reasons upon which award is based.

However it is not necessary for the arbitral tribunal to disclose the mathematical calculations and or details of its conclusions in respect to examination of witnesses, arguments, plea or the claims of respective

parties. The arbitral tribunal even though need not to disclose process of reasoning, it has to set out the reasons as to why it has come to specific decision.

3) Date and Place of Arbitration :

Sub-Section (4) of Section 31 of the Act, make it mandatory for the arbitral tribunal to state 'Date of Award' as well as 'Place of Arbitration' in the Arbitral Award, as determined in accordance with Section 20 of the Act.

4) Delivery of Award :

Under Sub-Section (5) of Section 31 of the Act, when the Award is made, it is mandatory for the arbitral tribunal, to deliver signed copy of such award to each party to the arbitration proceedings, and ensure that the respective parties have received their copy of Award.

5) Payment of Money :

Unless otherwise agreed, the arbitral tribunal for the award of payment of money it may include the interest payable thereon as felt deem reasonable on the whole or part of money for the period between the date on which cause of action arose and the date on which award is signed.

Under sub-Section (8) of Section 31 of the Act, unless otherwise agreed by the parties, the arbitral tribunal can fix the reasonable costs of arbitration proceedings including various fees and expenses incurred and the manner in which proportion respective parties has to contribute their share of payment payable thereof.

6) Registration of Award :

Under the Registration Act, 1908, every award is not compulsorily required to be registered. However in certain circumstances registration of award is necessary. Broad provisions of registration of award can be as under :-

- i) When the award creating rights in immovable property worth more than Rs. 100/- should be compulsory be registered, since unregistered award would not be admissible as evidence in the Court of Law.

- ii) An arbitrator award creating lease for six years or more in immovable property, it requires registration, otherwise no relief would be granted by the Court of Law.

7) Registration of Award not necessary :

- i) When the award has simply recorded the pre-existing facts of family matters i.e. Gift Deed, Revocation of Gift deed and or Partition of the property between family members, registration of such award is not necessary.
- ii) An award dealing with the mode of sharing ancestral property does not need registration.

CONTENTS OF ARBITRAL AWARD

After arbitral proceedings are completed, arbitral tribunal make the 'Award' based on the verification and careful study of the terms and conditions of arbitral agreement, claims, counter claims, submissions of defense, statements made during hearing and evidence produced by the parties to arbitration.

The following information and contents are required to be incorporated in Arbitral Award:-

1) Arbitral Tribunal :

Full names of Arbitrator/s, either sole arbitrator or three arbitrators as the case may be.

2) Parties to Arbitration :

Full names and addresses of the parties to arbitration including witnesses and legal representatives appointed by the respective parties.

3) Jurisdiction :

Brief description of the jurisdiction and scope of arbitration determined by the tribunal according to the arbitral agreement / contract and proceedings to be conducted thereof.

4) Matter of Dispute :

Brief summary of disputes arose between the parties, which are referred to arbitral tribunal for settlement.

5) Statement of Claims & Defense :

Brief summary of statements of claims and defense of Claimant/s and Respondent/s based on the arguments and documentary evidence submitted to the arbitral tribunal for its consideration.

6) Observations :

Observations and important noting of the arbitral tribunal, on the claims, counter claims, documentary evidence produced by the parties to arbitration including testimony of the witness/s examined during arbitral proceedings.

7) Reasoning and Summary of Award :

Unless otherwise agreed the arbitral tribunal has to state the reasons on which the Award is based which include summary of issues of settlement, as well as directions of payment if any.

8) Nature of Award :

The tribunal has to record as to whether the Award is unanimous or by majority of the arbitrators. If any of the arbitrator has not signed the Award, it needs to be recorded in the Award.

9) Place, Date :

The Place and Date (day, month and year) on which award is made.

10) Signatories to Award :

It is necessary for all the joint arbitrators and presiding arbitrator to sign the Award at the same time and place.

11) Delivery of Award :

On receipt of dues and fees payable by the parties, the tribunal has to deliver the signed copy of the Award to each of the party and to obtain receipt of acknowledgement.

FINALITY AND ENFORCEMENT OF ARBITRAL AWARD

Section No. 35 of the 'Arbitration and Conciliation Act, 1996', gives the directions on the finality of arbitral award, whereas Section 36 of the Act, is related to the enforcement of arbitral award. Section 35 corresponds to article 35(1) of the UNCITRAL Model Law, and provisions of article 36 thereof. The provisions of Section No. 35 & 36 of this Act in respect to finality and enforcement of arbitral award can be broadly described as under:-

- **Finality of Arbitral Award :**

The Section No. 35 reads as under :-

"The arbitral award shall be final and binding on the parties and persons claiming under them respectively".

In simple words it can be said that by referring and submitting the dispute to arbitration the parties deem to have undertaken to accept the resulting award, which is binding on all parties to arbitration. Since the arbitral award can be enforceable as decree, no other decree is required to be obtained from the Court.

- **Enforcement of Arbitral Award :**

Section 36 of the Act clarifies that :-

"where the time for making application to set aside the arbitral award under section 34 has expired, or such application having been made and it has been refused by the Court, the award of arbitral tribunal shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court".

Since the arbitration is a process of resolution of dispute between two or more parties through the independent third party appointed by them to be arbitrator/s, the Court normally would not dismiss the application for execution /

enforcement of arbitral award merely on the ground either the decree is not filed along with application of execution or the arbitral award has been not made a decree of Court.

It can be cleared from the above provisions that the final arbitral award should be treated as the decree of the Court for its enforcement purpose. Once the parties accept the arbitral award without recourse to Court, the right and liberty of appeal automatically deem extinguished.

Note : *It is to be mentioned here that as long as application for setting aside of arbitral award is pending before the Court, no proceedings can be initiated to enforce any part o the award. (Ref : Damodar Valley Corpn. V. CESC Ltd : AIR 2005 Cal. 67).*

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SETTING ASIDE THE ARBITRAL AWARD

Section 34 (Sub-Sections 1 to 4) of the 'Arbitration and Conciliation Act, 1996', provides facility to the aggrieved party to the arbitration, recourse to a Court against arbitral award. Either of the parties not satisfied with the arbitral award can make application to the appropriate Court requesting for setting aside such arbitral award not accepted by them. Following procedure is required to be followed for setting aside arbitral award :-

1) Application for setting aside arbitral award:

Under Section 33 of the Act, the parties are at liberty to request the arbitral tribunal to correct computation errors if any in the award simultaneously giving such notice to other party, within 30 (Thirty) days from the receipt of arbitral award, and can demand for additional award with correction of errors with necessary interpretation.

If the arbitral tribunal reject such request, then the aggrieved party can approach to appropriate Court for setting aside the arbitral award with necessary documentary evidence upon which his application is based.

However the aggrieved party has to make application to the appropriate Court for setting aside the arbitral award within 3 (three) months from the date of receipt of such award. On receipt of such application, if the Court find it appropriate to give opportunity may issue necessary directions to arbitral tribunal, on the basis of the merit of the case.

2) Grounds for setting aside award :

The arbitral award can be set aside by the Court, on the following grounds when the Court is satisfied that the aggrieved party has produced documentary evidence and proof to the effect that :

- a) He is under some incapacity.
- b) The arbitration agreement is not valid under the law.

- c) He has not been given proper notice for the appointment of arbitral tribunal.
- d) He has not been given sufficient opportunity by the arbitral tribunal to present his case and or defense properly,
- e) The matters of dispute involved therein referred to the arbitrator are beyond the scope and ambit of the arbitration.
- f) The composition of arbitral tribunal and or arbitral proceedings are not in accordance with the arbitration agreement.
- g) If Court finds that :-
 - i) The subject matter of dispute is not possible for settlement by arbitration, and
 - ii) The arbitral award is in conflict with the public policy which will encompass the aspects like fraud, partiality, corruption etc.

Note : It is to be mentioned here that, when arbitral award is given without any allegations of fraud, misconduct or partiality and the same is strictly within the terms of submission, by the arbitrators who were experts in their respective field, generally such award cannot be set aside by the Court unless proved otherwise.

DISPUTES : REFERRABLE AND NON-REFERRABLE TO ARBITRATION

There are certain disputes which can be decided only by the Judicial Authority and therefore the disputes which are within the purview of the Court cannot be referred to arbitration vis-à-vis certain disputes without recourse to the Court, can be referred to arbitration, which are as under:-

● **Disputes which can be referred to Arbitration :**

- i) Matters related to actual possession and title of immovable properties.
- ii) Matters related to decisions for damages.
- iii) Matters related to disputes arising out of terms of Contract.
- iv) Disputes arising out of the terms of contract involving interpretation of Law.
- v) Dispute arising out of facts and laws applicable to contracts.

● **Disputes can not be referred to Arbitration :**

- i) Matrimonial matters such as divorce or restitution of conjugal rights.
- ii) Appointment of Guardian of a minor or other person under disability.
- iii) Insolvency such as adjudication of a person as insolvent.
- iv) Illegal and purely criminal matters.
- v) Matters related to the right of trusteeship of Charitable Trust.
- vi) The allegations of fraud, corruption and serious malpractices.
- vii) Matter of additions and alteration in terms of will, validity of will etc.
- viii) Dissolution or Winding of a Company.
- ix) Matters involving morality, status, public policy etc.
- x) Invoking constitutional rights and duties.
- xi) Any other matters which comes under the discretionary powers of the Court of Law.

ADVANTAGES AND DISADVANTAGES OF ARBITRATION OVER COURT LITIGATION

The process of resolving disputes through arbitration has emerged as most effective instrument to settle the disputes of various nature amicably without any recourse to Court. This inexpensive and less time consuming procedure has encouraged parties to adopt arbitration proceedings rather than fighting long term litigation in the Court of Law. It is established fact that in any alternative Redressal Dispute System, there has to be some advantages, as well as, disadvantages too. In the circumstances both the pros and cons can be stated as under :-

● Advantages of Arbitration over Court Litigations :

Followings can be said to be general advantages of Arbitration over Court Litigations:-

- i) Arbitration proceedings comparatively are less costlier and less time consuming over Court Ligations, which otherwise can be resulted in to speedy result.
- ii) Everything can come into evidence so long as it is relevant and non-cumulative, where exclusionary rules of evidence cannot be applied.
- iii) Arbitration is a private procedure and not subject to a public hearing, and as such confidentiality shall have to be maintained by all the parties to arbitration proceedings where as litigation is a public hearing in the Court of Law, (except in exceptional cases).
- iv) There is less exposure to punitive damages in arbitration compare to litigation.
- v) The pending suit can be hold in abeyance until the dispute is resolved by arbitration.
- vi) The arbitration process is less adversarial than litigation.

- vii) The arbitration procedure is more informal than Court proceedings.
- viii) The arbitral award given by the arbitral tribunal has same status as if it is a decree of the Civil Court.
- ix) Normally in arbitration there is no right of appeal to the parties to dispute to change the arbitral award.
- x) There can be reasonable time limit to conclude the arbitral proceedings, whereas litigation matter goes to trial on merits of disputes, solely at the discretion of the judicial Authority where time limit cannot be estimated.

● **Disadvantages of Arbitration :**

Followings can be said to be disadvantages of arbitration over Court Litigations :-

- i) Generally aggrieved party has no right of appeal once arbitral award is given, even if arbitrator inadvertently has made mistake of fact or Law.
- ii) Unless otherwise provided in the arbitration agreement, there is no right of discovery.
- iii) The Arbitration procedure may not be that inexpensive or less time consuming, when there is panel / tribunal of arbitrators to decide the case.
- iv) There is no provision of jury in the arbitration proceedings which is a serious drawback for the claimants.
- v) The arbitral award is generally based on impartiality, natural justice and equity, and not necessarily based on rules of Law and or Evidence.
- vi) No party can use arbitration award for malicious prosecution.
- vii) Generally the venue of arbitration is at private place which can help to maintain the confidentiality of the arbitration proceedings, where as trial proceedings are open to public in the Court of Law.

FAST TRACK ARBITRATION

“Fast Track Arbitration” is a accelerated procedure, and as such it can not be termed as distinct system of Arbitration. Since ‘no time limit’ is prescribed in the present ‘Arbitration and Conciliation Act, 1996’ right from commencement till passing of award, for last couple of decades sense of frustration is growing amongst parties to arbitration for the abnormal delay in giving the award by arbitral tribunal.

This situation might have been compelled in introduction of bill of amendments to the present Act. The Law Commission of India in its 176th report has proposed amendments by way of the Arbitration and Conciliation (Amendment) Bill-2003, which was introduced in the Rajya Sabha on 22 December 2003, wherein the recommendation of Fast Track Arbitration by Sole Arbitrator was made under insertion of new Chapter XI i.e. Section No. 43-C to 43-F and the First Schedule thereto. In this provision, mainly it is proposed to cut down the time limit of Arbitral proceedings. However in the Section 43-E it is provided that ‘all subsequent applications in respect to Fast Track Arbitration will have to be filed in the Hon'ble High Court’.

The Government of India (Ministry of Law and Justice and Department of Legal affairs) constituted a Committee under the Chairmanship of Hon'ble former Chief Justice of J & K High Court Dr. B. P. Saraf (Justice Saraf Committee) to make in depth study on the implications of the recommendations of the Law Commission of India on proposed Amendment Bill – 2003. Regarding insertion of new Chapter XI (Sections 43-C to 43-F), particularly in respect to Fast Track Arbitration, the Justice Saraf Committee in its Report has strongly objected for the provision of Section 43-E, which otherwise provides that “all subsequent applications in Fast Track Arbitration will have to be filed in the Hon'ble High Court”.

The Saraf Committee in its Report stated that, “It (Committee) is of the firm opinion that monitoring arbitration by the Courts is antithesis of consensual arbitration”.

Since no time limit is prescribed in the present Arbitration Act, the amendments recommended by the Law Commission of India will certainly ease out present impediments specifically in respect to the abnormal delay in giving arbitral award. Some of the important features of proposed amendments Bill-2003 in respect to Fast Track Arbitration are described hereunder.

● **Salient features of the Fast Track Arbitration:** Following provisions are recommended in the Arbitration and Conciliation (Amendment) Bill-2003:-

- i) The Fast Track Arbitration Tribunal shall consist of a '**Sole Arbitrator**'.
- ii) The Sole Arbitrator shall be chosen by the parties unanimously.
- iii) The fees payable to the arbitrator and the manner of payment of fees shall be such, as may be agreed between Sole Arbitrator and parties to arbitration.
- iv) The Fast Track Arbitration Tribunal shall decide the disputes on the basis of the pleadings and documents, affidavits of evidence, expert opinion if any, and written submissions filed by both the parties.
- v) The Fast Track Arbitral Tribunal shall permit the parties to appear and conduct the case personally or through their counsel or by any person duly authorised by the parties to represent them.
- vi) The Fast Track Arbitration Tribunal shall ordinarily fix the time schedule in such a manner that the proceedings are conducted continuously from 10.30 A.M. to 1.00 P.M. and 2.00 P.M. to 4.30 P.M. every day.
- vii) Under new insertions i.e. Section 43-A to 43-D and Schedule IV Fast Track Arbitration is not fully time bound. However initially a period of Six (6) months is provided by statute for passing the Award, which can be extended by the parties for another period of Three (3) months.
- viii) And thereafter, if the award is not passed, the procedure envisaged under Sub-Section (4) & (8) of the Section 29-A, has to be observed. In such event fixing the time schedule by the Hon'ble High Court shall have to be followed till the final award under fast track arbitration is passed.

IMPACT AND REALITY OF ARBITRATION

Impact of Arbitration :-

Arbitration and Conciliation Act is a welcome step in the interest of consumer to settle their dispute through impartial third party without trial proceeding. This Dispute Redressal Process has proved as effective tool to settle differences and disputes out of Courts, which has reduced work load of Courts considerably.

Speedy and Informal Resolutions, Flexibility, Confidentiality and Less Expensive features of these processes became popular and slowly a trend is emerging to settle the disputes by either of these methods, rather than approaching to the Courts, specially knowing that the trial proceedings of Courts take enormous time and quite expensive.

Necessary guidance and help is available for the parties to dispute from the Council of Arbitrators and similar bodies, as well as the services are now available from most experienced and qualified experts from different fields to complete the assignment and settle the dispute by arbitration expeditiously.

Whenever Court feels that the dispute can be resolved out of the Court, it gives necessary directives to the parties to encourage to settle their dispute by arbitration/conciliation. In the circumstances the parties are compelled to accept the Court directive in the matter. Therefore work load on Arbitrators and Conciliators has been increased considerably in recent times.

Reality of Arbitration :-

It is a fact that every enactment and or alternative legal remedy has its own effects and side effects. Naturally this is also applicable to Arbitration and Conciliation.

In reality day by day the Arbitration proceedings are also becoming more time consuming as well as much expensive. Even if the Award is given, the

displeased party can challenge the same and ultimately choose recourse to trial proceedings. These side effects has considerably reduced chances of amicable settlement by Arbitration. Same is the fate of resolution of disputes by Conciliation.

After realizing these ground realities the neutral advisors are now a days are advising their clients instead of arbitration or conciliation to settle their disputes through Mediation through 'Independent Third Party' in whom both the parties repose their faith and trust.

Slowly and slowly the parties to dispute, by and large, are realizing the necessity and urge to settle their disputes amicably by adopting less time consuming and less expensive method of Mediation.

Unless and until the dispute is complex and where there are more than two parties involved, the settlement chances are bound to be reduced considerably. In such circumstances either party has to opt for trial proceedings.

It is to be mentioned here that no matter whatever disadvantages are of each of these alternative methods (which are explained in respective chapters), it is definitely a much effective tool to settle the dispute out of Court which can save time and expenses as against regular trial proceedings.

It is pertinent to read here the commentary of Hon'ble Dr. N. V. Paranjape made in the preface to the fourth edition of his book "Law Relating to Arbitration and Conciliation in India" which is self-explanatory in the matter. For readers' benefit it is reproduced here :-

"The practical working of Arbitration and Conciliation Act, 1996, during the past ten years or so has brought many positive results and helped considerably in inculcating good arbitration culture in the country. It has been welcomed as an effective measure which substantially helps in relieving the pressure on law Courts. Arbitration and Conciliation, both have been conceived as viable alternatives to litigation in Courts which has eroded public confidence due to mounting arrears of cases and delayed justice.

The basic philosophy underlying Arbitration and Conciliation Act is to retrieve the autonomy of parties, minimize interference of Courts and institutionalize arbitration.

Despite these positive aspects, during the working of the new Act for nearly a decade, it has been noticed that it suffers from certain serious defects and deficiencies which hinder the smooth functioning of arbitration law.

After realising the impediments, the Government of India, therefore, came out with the pragmatic provisions in the proposed Arbitration and Conciliation (Amendment) Bill, 2003, by which it is made possible that the proposals can be entertained therein from the users, businessmen and members from legal fraternity. The Bill when will become an Act, it would certainly be a step forward towards improving the present system of arbitration in India”.

ADVANTAGES AND DISADVANTAGES OF TRIAL PROCEEDINGS OVER ARBITRATION

It is said that the basic philosophy of Arbitration and Conciliation Act is to retrieve autonomy of parties, minimize interference of Courts, and institutionalize arbitration'.

However in reality it is seen that in many cases parties are found adamant and not at all interested to settle their dispute through the arbitration or any other method of amicable settlement of disputes and prefer recourse to the Court of Law and land in to long term litigations.

It is felt that, the parties to disputes in their own interest, before referring the dispute to the Court of Law, it is advisable that they should understand the advantages and disadvantages of Trial Proceedings in the Court of Law over arbitration, which are broadly explained as under:-

● Advantages of Trial Proceedings :-

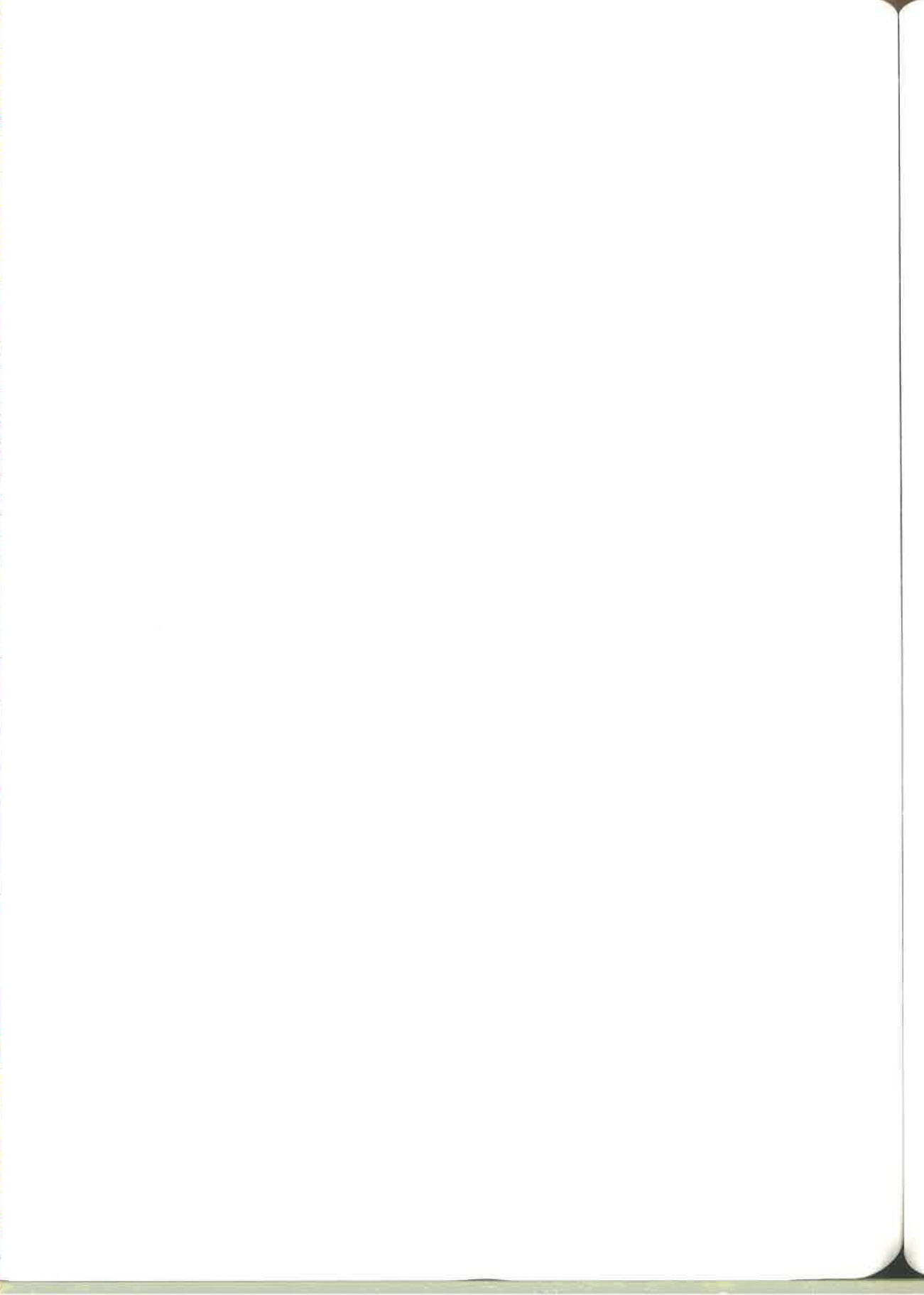
- i) In this case the parties to dispute are compelled to attend the trial proceedings in the Court of Law.
- ii) In the trial proceedings, there is hardly any room or chance of abuse of judicial process.
- iii) At the end of trial, the decision / judgment given by the Hon'ble Court is binding on both the Parties, with rights to appeal in the Higher Court if permitted by the Trial Court.
- iv) The trial proceedings always safe-guard the legal and constitutional rights and interests of both the Parties.
- v) In a complex case of dispute, a specific precedent can be established, which may be considered and may be made applicable to similar cases for dispute resolution.

- **Disadvantages of Trial Proceedings:-**

- i) There is hardly any time limit for completing the trial proceedings, hence the entire process is time consuming.
- ii) Once the dispute is referred to the Court of Law, the parties to dispute do not have any control on trial proceedings as well as on its outcome and or decision.
- iii) Since the trial proceeding is a public process, there cannot be any confidentiality about the dispute whether the parties to dispute like it or not.
- iv) In the trial proceedings, there is heavy burden on the parties to produce admissible documentary evidence, through their legal advisors, which is always a most cumbersome and expensive exercise.
- v) Since the time limit is uncertain in trial proceedings which may continue for years resulting to heavy burden of expenditure on both the parties.
- vi) Since in the trial proceedings the remedies are limited, its ultimate outcome or decision of the Court can not be predicted and therefore it is always uncertain.

■ CONCILIATION ■





DIFFERENCE BETWEEN CONCILIATION AND ARBITRATION

Arbitration and Conciliation though are similar means and alternative methods of settling the disputes out of Court, however both differ to each other in several vital aspects. The only similarity appears between these processes is that “a neutral third person’ is chosen or nominated by the parties to resolve the disputes of their choice in whom they repose their faith and trust.

The points of difference between Arbitration and Conciliation can be described as under :-

- 1) In case of arbitration, the provision of arbitration clause / arbitration agreement is necessary in writing in the agreement to refer the dispute to the arbitration which have arisen or may arise in future.

Whereas in case of Conciliation, mostly the dispute already arisen can be referred to Conciliator, even if there is no such clause or provision in the agreement. It is based on written invitation made by one party, which may or may not be acceptable by the other party.

- 2) In case of arbitration, the award or proceedings may be used as evidence in any judicial proceedings.

Whereas Conciliation proceedings cannot be used as evidence in any arbitral or judicial proceedings.

- 3) In case of arbitration, the arbitrator, besides assisting to the parties, he has to actively arbitrate and resolve the dispute by making arbitral award.

Whereas the Conciliator has to only help and assist the parties to arrive an amicable settlement of their dispute on their own.

- 4) In the case of arbitration there no confidentiality about the factual information given by one party, as the other party is entitled to scrutinize

the said information and as such there is no secrecy to that extent in case of arbitral award.

Whereas in case of Conciliation, the Conciliator can maintain confidentiality about the factual information given by one party, which need not to be disclosed to other party.

- 5) In case of arbitration, the arbitral award is a judgment given on settlement of dispute duly signed by the arbitrator.

Whereas in case of Conciliation, the settlement agreement is made by the parties themselves and Conciliator merely authenticate the same.

- 6) In case of arbitration, the arbitrator has to actively arbitrate, decide and give decision according to the laws applicable.

Whereas the Conciliator irrespective of law can conciliate in the matter of settlement of dispute.

- 7) In case of arbitration, the arbitrator can act as a council or a witness in any arbitral or judicial proceedings.

Whereas the Conciliator cannot act as arbitrator, council or witness in any arbitral or judicial proceedings.

- 8) In case of termination of arbitral proceedings, the arbitrator has to follow the procedure laid down in Section 32 of the Act.

Whereas the Conciliation proceedings can be terminated unilaterally by a written declaration by one party to the other party and Conciliator.

OBJECTS AND ADVANTAGES OF CONCILIATION

Sections 61 to 81 of the 'Arbitration and Conciliation Act, 1996', provides a simple and equally effective alternative to settle the disputes between parties amicably, which is based on co-operation, faith, determination, and will of parties to settle their dispute, through Conciliation.

This process preserves an informal atmosphere and emotional harmony between two parties wherein time and money can be saved considerably.

Therefore it can be said that Conciliation has definite edge over Arbitration proceedings, where parties to arbitration might feel unhappy and or may become aggrieved by the arbitral award.

In other words Conciliation is a voluntary act of the parties who are interested and decided to settle their disputes with their own will and co-operation in a shortest possible time with less expenses.

Note : Originally this alternative provision for settlement of disputes was not there in the earlier Arbitration Act, 1940.

● Objects of Conciliation :

It is established fact that the settlement of disputes by mutual consent is most ideal and honorable compromise rather than seeking adjudication in the adversary system. Negotiations, Conciliation, Mediation and Arbitration are the procedures of alternate dispute resolution.

However Conciliation and or Mediation are more flexible, cost effective and less time consuming than fighting a long term litigation in the Court of Law.

If conciliation method is adopted to resolve the disputes amicably it can definitely reduce pressure of trial courts considerably. Therefore now a days the trend is changing and parties to dispute are preferring alternative dispute resolution through procedure of conciliation / mediation rather than fighting litigation.

- **Advantages of Conciliation :**

Taking in to consideration broad objects of Conciliation the benefit and advantages of settlement of disputes by Conciliation can be summed up in the following manner:-

- i) Conciliation method is cost effective and less time consuming compared to adjudication in an adversary system.
- ii) Conciliation can offer and or provide much flexible alternative to the parties for settlement of disputes of various nature.
- iii) Conciliation can discourage litigants considerably from fighting the litigation in the regular Court of law.
- iv) Without prejudice to their legal rights, the parties to conciliation are at liberty to withdraw themselves from the conciliation at any stage of the conciliation proceedings and can seek recourse to Court or arbitration.
- v) The confidentiality in respect to dispute, submission, offers, claims, counter claims, solutions and settlement is maintained throughout the Conciliation proceedings.
- vi) It helps to maintain cordial relationship between the parties not only throughout the proceedings but even after the settlement.
- vii) There is hardly any scope for moral perversion in this system.
- viii) The settlement by conciliation has long lasting effect.

DEFINITION AND PRINCIPLES OF CONCILIATION

Before going through the provisions of Sections of the Act related to Conciliation process, it is essential to know the meaning of Conciliation and difference between Conciliation and Mediation. Even though there is no definition of Conciliation in 'Arbitration and Conciliation Act, 1996', on the basis of principles of Conciliation the Conciliation can be defined as under :-

- **Definition of Conciliation :**

“Conciliation’ is a voluntary and confidential process of resolution of private disputes between the parties with the help of neutral third party”.

- **Principles of Conciliation :**

Based on the Sections 61 to 81 of the Act and provisions thereof the principles of Conciliation can be defined as follows:-

Conciliation proceedings are of :

- i) Non-adversary nature
- ii) Flexible and variable nature
- iii) Confidential and voluntary nature
- iv) Recommendatory (decision) nature

On the basis of above principles it can be concluded that in this non-judicial proceedings :

- i) There is no claimant or plaintiff in the Conciliation proceedings.
- ii) Unless otherwise agreed, the parties are at liberty to decide and adopt desired procedure which can achieve speedy and inexpensive settlement by mutual co-operation.
- iii) The parties are at liberty to discontinue the proceedings at any time during the process.

- iv) The decision of Conciliator is of a recommendatory nature and as such the dispute is settled by mutual faith and co-operation of the parties to Conciliation.

- **Difference between Conciliation and Mediation :**

As defined in Section 89 of the Code of Civil procedure (Amendment) Act, 1999, the Conciliation and Mediation are different in its concepts, which is evident from the provisions of Sections 61 to 81 of the Arbitration and Conciliation, Act, 1996. The difference between those two procedures of settlement of disputes, can be broadly defined as under:-

- i) The role of the Conciliator in India is 'pro-active and interventionist', whereas role of Mediator is restricted to that of 'facilitator'.
- ii) The Conciliator can formulate and reformulate terms of possible settlement when he is satisfied that there exists elements of settlement, where as the Mediator can only assist and help the parties to arrive at an agreed solution of their dispute.
- iii) The Conciliation is a process in which the Conciliator plays pro-active role to bring about a settlement, whereas in the Mediation process is of a more passive nature.
- iv) The settlement agreement of Conciliation is binding on the parties where as the mediator has no authority to make any decisions and or impose his decision that will be binding on the parties.
- v) The Conciliation is treated as being less formal end where as the Mediation is treated as more formal end of settlement of disputes.

SCOPE, INVITATION, AND COMMENCEMENT OF CONCILIATION PROCEEDINGS

Conciliation is a process to resolve the disputes by which they are persuaded and convinced by an independent third party, to reach to an agreement amicably, as such conciliation cannot be treated as arbitration. The scope, invitation and commencement of conciliation can be broadly explained as under :-

- **Scope of Conciliation :**

The scope of this alternative redressal system is limited to settle and or to resolve the disputes between the parties arising out of legal relationship, whether contractual or not, by conciliation through chosen conciliator. It is to be mentioned here that certain specific disputes can not be submitted to conciliation, which requires to be resolved either by arbitration and or through usual court proceedings.

- **Invitation for Conciliation :**

- i) In the event parties to dispute feel that the dispute can be easily settled by conciliation with co-operation of each other, the initiating party has to send a written invitation for conciliation to the other party thereby giving salient features of dispute.
- ii) If inviting party do not receive acceptance from the other party within 30 days from the date of invitation and or the invitation is rejected, there will not be any conciliation proceedings.

- **Date Commencement of proceedings :**

If the invitation is accepted by the other party, the conciliation proceedings deemed commenced on the date of acceptance of the invitation.

QUALIFICATIONS AND PROCEDURE FOR THE APPOINTMENT/S OF CONCILIATOR/S

An amicable settlement of disputes between the parties, can be arrived at through conciliation method with the help of independent third party popularly known as Conciliator. For the purpose it is advisable for both the parties to decide and accept qualifications of the Conciliator who should be expert in the field of issues involved in the dispute. The qualifications and appointments of Conciliator/s can be broadly described as under :

- **Qualifications of Conciliator :**

Act is silent in the matter of qualifications of the Conciliator. However it is expected that the Conciliator should be :

- i) Expert in the field of issues involved in the disputes.
- ii) Impartial, fair and transparent in discharging his duties.
- iii) Non- related and or not interested in any of the parties either professionally or otherwise.
- iv) Acceptable to both the parties, in whom they can repose their faith and trust.

- **Appointment and number of Conciliator/s :**

With express consent, the parties can appoint a single (sole) Conciliator for the purpose. However the parties are at liberty to appoint one Conciliator from each of them in whom they repose their trust and faith and such two Conciliators has to appoint third Conciliator who will act as Presiding Conciliator.

This process of appointment of the Conciliator is at par with the provisions of the appointment of Arbitrator.

ROLE AND DUTIES OF CONCILIATOR/S

Section 66 & 67 of the Act, elaborates the role of the Conciliator in the process of settlement of disputes through conciliation method, which can be described as under :-

● **Role of Conciliator :**

- 1) The Conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872)
- 2) The role of the Conciliator is pro-active and interventionist.
- 3) The Conciliator has to assist the parties in an independent and impartial manner, to reach an amicable settlement.
- 4) The Conciliator shall be guided by the principles of objectivity, fairness and natural justice.
- 5) The Conciliator, among other things, should give consideration to the rights and obligations of the parties, including usages of trade concerned, provisions of business practices and circumstances surrounding the dispute.
- 6) Unless otherwise agreed, the Conciliator is at liberty to conduct the proceedings of conciliation in such a manner as he considers appropriate and deem fit.
- 7) Unless otherwise agreed, the Conciliator is at liberty to make a proposal of settlement to the parties at any stage of proceedings either in writing or oral which may lead to speedy settlement of disputes.
- 8) Unless otherwise agreed by the parties :-
 - i) The Conciliator should not act as an arbitrator, counsel, or representative in any other proceedings initiated for the same disputes which are subject matter of conciliation proceedings.

- ii) The Conciliator shall not be nominated or presented by the parties as a witness in any other arbitral or judicial proceedings.
- 9) The Conciliator with the consent of parties can arrange for administrative assistance by suitable person / institution for conducting conciliation proceedings.
- 10) The Conciliator shall take into consideration the wishes expressed by the parties, including request of the parties to hear their oral statements and or arguments.

● **Duties of Conciliator :**

- 1) The Conciliator before commencement of proceedings should request parties to submit their written statement of salient features of nature of dispute, points of defense on the issues of dispute supported by documentary evidence.
- 2) If insisted by either of the parties, the Conciliator shall maintain confidentiality of the information received, and he should not disclose such details to the other party.
- 3) The Conciliator is at liberty to meet and or communicate with parties either together or with each of them separately.
- 4) The Conciliator shall take into consideration the suggestions made by the parties during the proceedings, including to drop some of the issues if agreed so.
- 5) The Conciliator at the end of hearings shall formulate the possible terms of settlement based on arguments, and documentary evidence submitted.
- 6) At the time of giving final settlement agreement the Conciliator shall give directives to the parties for payment of fees, expenses, to be shared in equal by both the parties.
- 7) Unless otherwise agreed, the Conciliator shall decide convenient place and dates of hearings to conduct the proceedings.

FEES, EXPENCES AND TIME LIMIT FOR CONCILIATION PROCEEDINGS

Once both the parties have appointed one or two Conciliators of their choice and third (presiding) Conciliator appointed by two Conciliator, before commencement of the proceedings, it is essential for the Conciliators to explain to the parties regarding fees and expenses payable as well as time limit for conciliation proceedings which is described broadly here under :-

a) Fees, Expenses, Deposits etc. :-

- i) Reasonable fees payable to Conciliator/s including related expenses thereof, for the entire exercise.
- ii) Schedule of Payments of fees and expenses etc.
- iii) Amount of deposit/s and stage of payment of deposit/s.
- iv) Share of contribution to be borned by each party towards fees and expenses.

b) Time Limit :-

Once fees and expenses payable are decided and agreed by the conciliator/s it is also essential to understand from the Conciliator/s the estimated time limit for the entire exercise till completion and termination of conciliation proceedings. A provision of extension of time limit required if any solely at the discretion of the Conciliator/s should also be discussed.

The above exercises are essential to know the financial liabilities of each of the party in advance, before commencement of actual proceedings. The advance intimation of financial liability and performance time limit to each of the parties is necessary to avoid differences and inconvenience if any that may arise later on.

SETTLEMENT AGREEMENT, STATUS, IMMUNITY AND TERMINATION OF CONCILIATION PROCEEDINGS

Based on the submissions, arguments, and documentary evidence produced by each of the parties, when it appears that there exist elements of settlement, the Conciliator has to formulate the terms of possible settlement of disputes, for preparation of final settlement agreement.

- **Settlement Agreement :**

After formulating the terms of settlement, acceptable to the parties:

- 1) The Conciliator should submit the terms of settlement to each of the parties calling for their observations and suggestions if any. After receipt of observations and suggestions from the parties the Conciliator may amend the terms accordingly acceptable to the parties concerned.
- 2) Once the terms of settlement are finalized as agreed by the parties, the Conciliator shall draw final settlement agreement.
- 3) When the parties sign the final settlement agreement, the same shall be final and binding on both the parties and or any such person/s claiming under them respectively.
- 4) The Conciliator then authenticate the document and shall give copy of the said settlement agreement to each of the parties and should obtain written acknowledgment from them to that effect.

- **Status and effect of Settlement of Agreement :**

Under Section 74 of the Act, the final settlement agreement shall have the same status and effect, as if it is an arbitral award on agreed terms on the substance of dispute given by the arbitral tribunal under Section 30 of the Act.

- **Termination of Proceedings :**

Section 76 of the Act, states that the conciliation proceedings shall stand terminated in the following circumstances :-

- i) The date on which the agreed terms and conditions of the settlement agreement are executed and signed by all the parties to conciliation.
- ii) The date of written declaration of the Conciliator to the effect that any further efforts at conciliation are no longer justified.
- iii) The date on which parties informed to each other and to the Conciliator to the effect that the conciliation proceedings stand terminated.

- **Immunity to Conciliator :**

As per the provisions of the Act, no Conciliator shall be held liable or responsible for anything inadvertently done with bona fide intent or omitted to be done by him during the Conciliation proceedings for Civil or Criminal action, nor he shall be summarized by any of the party to suit or proceedings to appear in the Court of Law.

- **Conclusion :**

Summarizing the provisions of Section Nos. 61 to 81 of the Act, related to conciliation system, it can be said that this non-judicial method of settlement of disputes which by and large is being preferred by the parties to resolve their disputes amicably in most co-operative manner.

By this method the legal relations between the parties whether contractual or otherwise, always remains cordial during the proceedings and thereafter also.

The Conciliation proceedings which are less expensive and less time consuming, has proved its age over arbitration to the effect that the process is as much as the arbitration. This method is proved more beneficial to settle the disputes between employer and contractor and other component agencies involved in construction and real estate activities.

In view of above it is advisable for the architects that they should incorporate provisions of conciliation or mediation in the contract agreements over and above

the provision of arbitration Clause / arbitration agreement, as a better and preferable choice to settle the disputes amicably between the parties to contract.

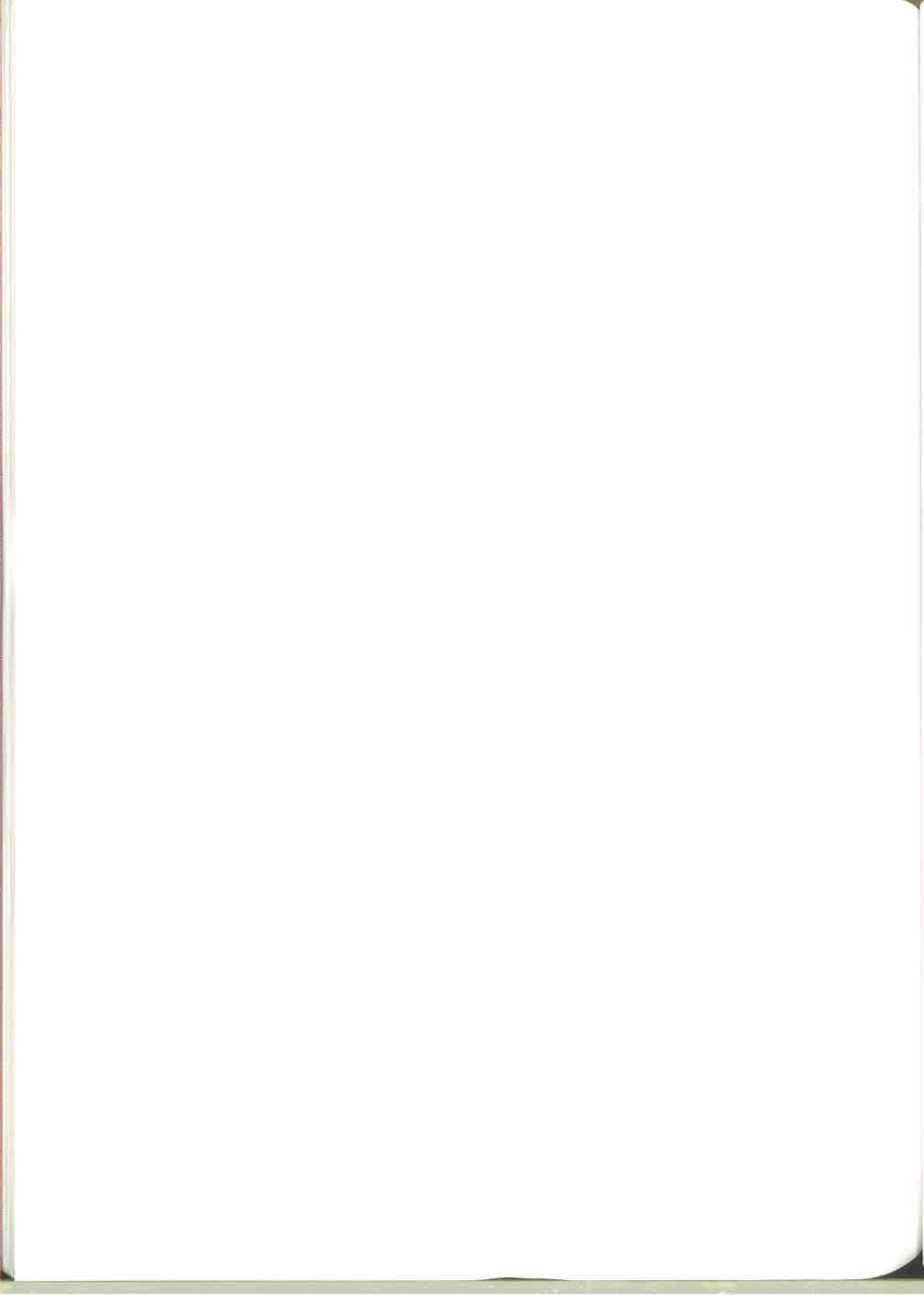
Since settlement agreement has same status and effect as if it is an arbitral award, the conciliation and or mediation is being preferred by the parties to disputes as its first choice to settle their disputes in record time.

It is ample clear from the above text as well as foregoing chapters that the Conciliation undoubtedly is the most commonly accepted method and form of alternative dispute resolution mechanism, and as such the Conciliation has acquired statutory recognition according to the provisions of Section 61 to 81 of Part III of the Arbitration and Conciliation Act, 1996.

As against the arbitration, the conciliation is neither based or controlled by existence of prior agreement between the parties, and therefore it can be arranged even after the parties to dispute has resorted to Court litigations.

· MEDIATION ·





DIFFERENCE BETWEEN MEDIATION AND CONCILIATION

The Arbitration and Conciliation Act 1996, and the Civil Procedure Code (Amendment) Act 1999, treat the Conciliation and Mediation as two different concepts. It is to be mentioned here that there is no definition of 'Conciliation' and or 'Mediation' in either of the Acts.

Prima facie, the Conciliation and Mediation appears to be similar in interchangeable terms. However there is minute / subtle difference between these two process. In this situation the difference in both the above Processes can be visualized by the Functions and Role of Conciliator and Mediator which are broadly described hereunder :-

- i) The Role of 'Conciliator' in India is 'Pro-active and Interventionist'. Whereas the role of 'Mediator' is limited to that of a 'Facilitator' and 'Interventionist'
- ii) The 'Mediation' is a Dispute Resolution Process, wherein the disputes can be settled by the 'Neutral Third Party', who plays an active role as intermediary in working out compromise formula after hearing both the parties, and thereby helps the parties to reach to an agreement acceptable by both of them.

As such, Mediation can be said as 'evaluative' or 'facilitative' processes for amicable settlement of disputes.

- iii) The 'Conciliation' is practically similar process of Dispute Resolution by the 'Neutral Third Party', wherein the Conciliator can play an active role as a 'Interventionist' in bringing both the parties together and prepare them for compromise by adopting mid-way approach to arrive at amicable settlement.
- iv) The 'Conciliator' is an active participant in the process and have powers to make proposal to the parties to evolve acceptable solution through careful

negotiations with the parties and can present the compromised formula for dispute settlement.

- v) The Conciliator also have powers to formulate or reformulate the terms of possible settlement.
- vi) The role of 'Mediator' is not pro-active and somewhat less than Conciliator.
- vii) The Mediator can act only as a 'Facilitator' and as such he has no powers to formulate or reformulate the terms of possible settlement.
- viii) The powers of Conciliator are larger than those of a Mediator, as he can suggest proposals for settlement.
- ix) The Conciliation is treated as being at the less formal end of the spectrum while the Mediation is at the more formal end.
- x) The Conciliator plays a role of interventionist in bringing the parties together and in suggesting possible solutions to help and achieve a proper settlement.
- xi) The Mediation is a method of settling disputes by a third party who helps both the sides to come to an agreement which each of them considers, and as such the Mediation becomes more evaluative or facilitative.

DEFINITIONS, ADVANTAGES AND DISADVANTAGES OF MEDIATION

Either in the 'Arbitration and Conciliation, Act-1996' or in Section – 89 of the Code of Civil Procedure, 1908 (and its amendments) there is no specific definition of 'Mediation' as well as 'Conciliation'.

However the definition of Mediation can be said as under :-

● Definitions of Mediation :

- i) *Mediation is a process in which a neutral person as Mediator takes more facilitative role for resolution of disputes, which either parties are at liberty to accept or reject the proceedings (ACAS)*
- ii) *Mediation is a negotiation carried out with the assistance of a Third Party, who has no powers to impose an outcome on disputing parties. ("Dispute Resolution (Negotiation, Mediation and Other processes" by Stephen B. Goldberg, Frank E.A. Saver and Nancy H. Rogers –US")*
- iii) *Mediation can be evaluative or facilitative procedure to settle the dispute by third party who helps both sides to come to an agreement with acceptable terms.*

● Advantages of Mediation :

Following can be some of the advantages of settlement of disputes by Mediation process :-

- i) Parties to Mediation alone are responsible for taking the decision on the terms of settlement of dispute.
- ii) The Mediator cannot impose any decision on the parties to dispute.
- iii) Privacy and confidentiality is maintained throughout Mediation proceedings.
- iv) No statements of parties and or the witnesses are allowed to be recorded.
- v) There will not be any audio or video recording of Mediation proceedings.

- vi) Mediation can facilitate to reestablish joint communication between the parties in cordial manner.
- vii) Mediation can be utilised in attempts to reduce Court backlogs and resultant delay in normal litigations.
- viii) It can facilitate to prevent incentives for corruption.
- ix) Mediation can facilitate to provide inexpensive and less time consuming procedure.
- x) The Mediation may prevent need to go to the Court to fight long term litigation.
- xi) Even if the Mediation does not result in final settlement, the joint communication established can narrow down the conflict between parties to great extent.
- xii) In Mediation parties have better chance for durable relations and win-win solutions.

● **Disadvantages of Mediation :**

- i) The Mediation may not be sufficient and or adequate to protect the legal rights of the parties to dispute.
- ii) The Mediation can be misused as stalling instrument by either of the party to delay the proceedings.
- iii) The parties to Mediation cannot be forced and or cannot be under any obligations to continue the negotiations.
- iv) The relevant / pertinent parties if excluded from the Mediation it may weaken the proceedings, and may reduce the chances of amicable settlement.
- v) The parties to Mediation may have limited bargaining powers in the Dispute Resolution Process.
- vi) The disclosure of information and its truthfulness depend upon the true intentions and discretion of the parties to Mediation.

- vii) In the cases of complex disputes or where there are more than two parties involved in the process, it may reduce the chances to reach an agreement and or amicable settlement.
- viii) The Mediation is not legally enforceable because it does not have statutory recognition, and as such the enforcement of settlement made by a Mediator depends upon the willingness of the parties. However if the settlement is converted in to a written agreement between the parties, it becomes enforceable like any other contract under the Law of Contracts.

Conclusion :

The Mediation method now a days is increasingly used in the commercial sector at national and international level because it is relatively cheap, less time consuming and settles the dispute in a consensual manner.

APPOINTMENT, QUALIFICATIONS AND DISQUALIFICATIONS OF MEDIATOR

Hon'ble Delhi High Court has framed the 'Mediation and Conciliation Rules, 2004', by Notification under No. 171/Rules/DHC dated 11-08-2005. The rules are applicable to Mediation and Conciliation proceedings. As defined in the said Rules, following are the provisions for appointment of Mediator, his qualifications and disqualifications :-

- **Appointment of Mediator :**

- i) Parties to dispute / suit may agree and are at liberty to nominate Sole Mediator for mediation between them.
- ii) Where there are two or more sets of parties, who are unable to agree on the appointment of Sole Mediator, each party can nominate its own Mediator as it deem fit.
- iii) When parties fail to nominate Mediator either way as described in item No. (i) & (ii) above, the Court may nominate and or appoint Mediator as deem fit.

- **Qualifications of Mediator for empanelment :-**

The following persons can be entitled in the panel of Mediators / Conciliator :-

- i) Retired Judges of the Supreme Court of India.
- ii) Retired Judges of the High Courts.
- iii) Retired Judges of the District and Sessions Courts.
- iv) District and Sessions Judges.
- v) Legal practitioners with at least 10 years standing at the Bar at the level of the Supreme Court, High Court or District Court.
- vi) Experts or Senior professionals with at least 15 years standing.
- vii) Persons themselves expert in Mediation / Conciliation.

● **Disqualifications for Mediator:-**

The following person shall be deemed to be disqualified for empanelment as Mediator / Conciliator :-

- i) Any person adjudicated as insolvent.
- ii) Any person against whom criminal charges involving moral turpitude are framed by the Criminal Court, and or criminal proceedings are pending before the Court.
- iii) Any person have been convicted by the Criminal Court for any offence involving moral turpitude.
- iv) Any person against whom any disciplinary proceedings are pending or have resulted the same in a punishment.
- v) Unless otherwise agreed, any person who is interested or connected with subject matter of dispute, and or is related to any one of the parties to dispute.
- vi) Any legal practitioner who has or is appearing for any of the parties in the suit or in other similar proceedings.
- vii) Any such category of persons that may be notified by the High Court.

ROLE, DUTIES AND ETHICS OF MEDIATOR

It is essential to understand the role, duties and ethics of the Mediator in the interest of parties to dispute, can play a very important role in the matters of settlement of disputes over trial proceedings.

The role and duties of a Mediator as defined in the Notification dt. 11-08-2005, issued by the Hon'ble Delhi High Court, can be read as under :-

● **Role of Mediator :**

The Mediator shall :-

- i) Attempt to facilitate voluntary resolution of dispute/s, by the Parties.
- ii) Communicate view of one party to another.
- iii) Assist them in identifying the issues of disputes involved.
- iv) Try to reduce misunderstanding between the parties.
- v) Clarify priorities, to the parties and process involved.
- vi) Explore areas of compromise and generate options to solve dispute amicably between the parties.
- vii) Emphasize that it is the responsibility of the parties alone to take their own decision in their own interest.
- viii) Not impose any terms of settlement on the parties.

● **Ethics and Duties of Mediator :**

The Mediator shall :-

- i) Follow and observe the rules strictly with due diligence.
- ii) Uphold integrity and fairness of the mediation process.
- iii) Ensure that parties to dispute are fairly informed about procedural aspects of the process.

- iv) Satisfy himself that he is competent and qualified to undertake and complete the assignment.
- v) Disclose any interest or relationship likely to affect impartiality.
- vi) Be faithful to the relationship of trust and confidentiality reposed by the parties in him.
- vii) Refrain from promises or guarantees of results.
- viii) Conduct the proceedings in accordance with the applicable Laws.
- ix) Not to carry on any activity or conduct which could reasonably be considered as a conduct unbecoming of a Mediator.
- x) Avoid, while communicating with the parties any impropriety or appearance of impropriety.
- xi) Maintain the reasonable expectations of the parties as to the confidentiality and prevail upon parties that the Mediation is based on principle of self determination.

RESPONSIBILITIES OF PARTIES TO MEDIATION, SETTLEMENT AGREEMENT, AND IMMUNITY TO MEDIATOR.

Mediation process is a private, informal, oral, facilitative, collaborative and win-win remedy which bring parties together to arrive at amicable settlement, based on the terms exclusively agreed and decided by both the parties alone.

As such it is essential to understand the importance of responsibilities of the parties to mediation in preparation of the final settlement agreement which can be described in brief as under:-

● Responsibilities of Parties to Mediation :

The Responsibilities of the parties to Mediation can be defined as under:-

- i) The parties shall commit to participate in the Mediation proceedings in good faith, with honest intentions to settle the dispute amicably.
- ii) The parties has to decide terms and conditions of settlement agreement that will be mutually agreed upon. However parties can take assistance of Mediator for drafting the same.
- iii) The inviting party has to submit factual information of issues involved in the disputes and reliefs expected to the Mediator empowering him to disclose or forward such information to the other party, to enable other party to present his explanation.
- iv) The parties can request Mediator that the information given be kept confidential and shall not be disclosed to other party.
- v) The parties shall maintain confidentiality of the events that transpired during Mediation .
- vi) The parties in consultation with the Mediator has to decide about the place, time duration, and the scope of work including fees and expenses payable to

Mediator for the entire exercise and share of contribution to be borne by each of the party.

- vii) Generally the parties to Mediation has to deposit 40% of amount of agreed fees and expenses in advance with the Mediator at the time of commencement of mediation proceedings.
- viii) The balance 60% amount has to be paid after the conclusion of Mediation proceedings, at the time of signing the final agreement by the respective parties for settlement.

● **Salient Features of Settlement Agreement :**

When the terms of amicable settlement agreement are reached by and between the parties there by resolving all the issues of disputes, the agreed terms of settlement agreement are required to be prepared and shall have to be reduced in writing for the execution of the document by the parties concerned.

However parties can seek assistance of Mediator for drafting final settlement agreement if desired so for the purpose of execution of the said agreement.

When the terms and conditions of settlement Agreement are finalized, and reduced in writing the same shall have to be signed by all the parties or through their constituted attorney as the case may be.

The parties after retaining one copy of settlement agreement with each of them, it is obligatory for the parties to handover one signed copy of the said document to the Mediator for his record.

● **Forwarding settlement agreement to Court of Law :-**

If the copy of settlement agreement is required to be forwarded to the Court in which the suit proceedings are pending, the Mediator shall forward attested copy of the settlement agreement to the appropriate Court along with his covering letter to that effect duly signed by him.

● **Privacy :-**

The Mediation sessions or meetings should be conducted in utmost privacy in the presence of parties to dispute, and no other person should be allowed to

attend the proceedings without consent of Mediator. Audio or Video recordings shall not be permitted in the Mediation proceedings.

- **Mediator Not bound by Indian Evidence:-**

The Mediator shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act 1872, however he shall be guided by the principles of fairness and justice.

- **Immunity to Mediator :**

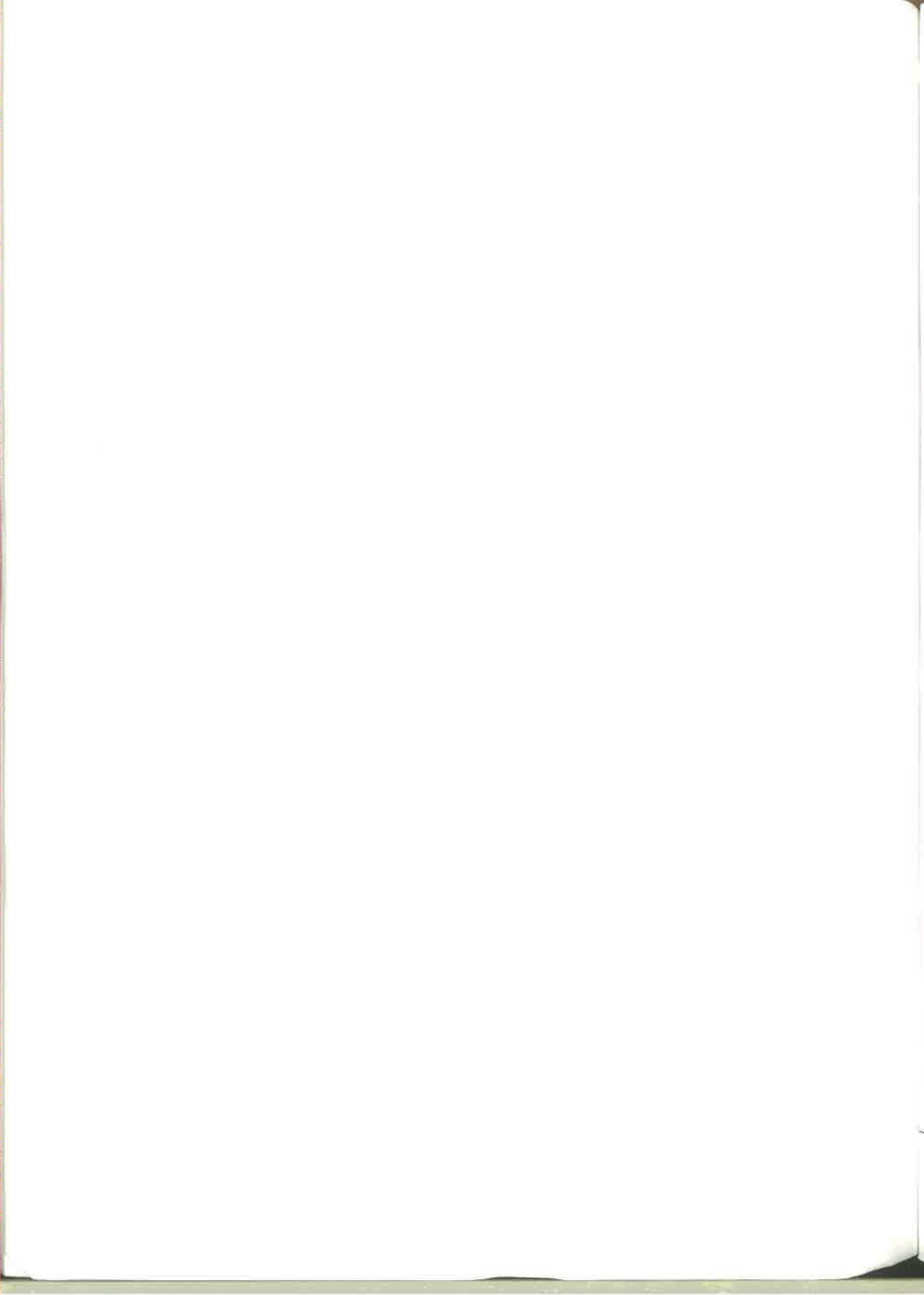
No Mediator shall be held liable for anything bona fide done or omitted to be done by him during Mediation proceedings for Civil or Criminal action, nor he shall be summarized by any of the party to suit or proceedings to appear in the Court of Law. This immunity is provided under the law to the Mediator.

- **Termination of Mediation proceedings :-**

Once the terms of settlement are expressly agreed by the parties to Mediation the final settlement agreement is prepared and executed by and between the parties in presence of Mediator, and after completion of the above exercises Mediation proceedings stands terminated.

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