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Arbitration Agreement and its Construction: An Analytical Study

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Abstract

The primary objective of this paper is to analyze how arbitration has evolved as an alternative to dispute resolution apart from regular and cumbersome court proceedings. The researcher has further dealt with the relevance of an arbitration clause in the contract. How one need to be cautious while drafting an arbitration agreement. In this paper researcher has extensively discussed the essential elements of an arbitration agreement and when an agreement will be considered to satisfy the provisions lay down under section 7 of the Arbitration Act, 1996. The researcher has also traced down the trend followed in India while interpreting the existence of valid arbitration agreement. The relevance of words may and shall use in the agreement and what impact it has on the validity of the contract. In this paper researcher has confined her discussion to the importance drafting arbitration agreement in Indian context and has not extended her research to other jurisdictions.

Key word: Arbitration, Settlement of cases, Arbitration mechanism,

What is Arbitration?

In general terminology we say Arbitration is nothing but an alternative method of dispute resolution between the parties by a third impartial person or tribunal without intervention of judicial institutions. The third person acts in an independent manner while arriving at settlement and is referred as an 'Arbitrator'. If we draw an analogy then an arbitrator holds a position similar to that of a judge. In most of the cases appointed arbitrator has an expertise in the area of dispute which arises between the parties.

In legal terminology arbitration is understood as dispute adjudication which may or may not be administered by any permanent "arbitral institution".[1]

Bernstein has defined arbitration as "A mechanism for the resolution of disputes which takes place usually in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable at law"[2]

According to WIPO arbitration is a mechanism whereby parties agree to submit their dispute to an independent arbitrator whose decision is final and binding upon them. It is an option adopted by

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[1] Section 2(1)(a), The Arbitration and Conciliation Act.1996

[2] Bernstein, Hand Book of Arbitration practice, 3rd Edn. 1998,p.13

parties where they prefer to go for private dispute settlement rather than going through cumbersome court proceedings.

ESSENTIALS OF ARBITRATION:

By going through all these definitions we can that following are the essential characteristics of arbitration:

Arbitration is consensual in nature: for an arbitration to take place consensus ad idem between the parties is an essential requirement. Parties entering into contract insert an arbitration clause or enter into separate arbitration agreement whereby they agree to resolve all future disputes arising out of such contract by way of arbitration. Once entered into arbitration later parties cannot withdraw from it unilaterally.

In arbitration parties have right to choose the arbitrator(s): under arbitration parties get the option of deciding mutually and appoint a sole arbitrator or they can also appoint three members tribunal. In case they want a three member's tribunal then both the parties appoint one arbitrator each and later both the arbitrators together decide and agree upon third arbitrator who also acts as a presiding officer.

Arbitration is impartial and neutral: the decision arrived at in arbitration is fair and free from bias. In case of international commercial arbitration parties are given freedom to decide seat of arbitration, law to be applied and language of arbitration process. In other way it also looks after that no country enjoys home court advantage over the other.

The award delivered by arbitrator is final and binding upon the parties: Arbitration being different from litigation hearing power is conferred upon third party. It can be an individual or a tribunal, in case of tribunal n number of arbitrators can decide upon the issue. However, it is insisted to have odd number of arbitrators, usually one or three are preferable. Odd numbers of arbitrators are recommended to avoid tie. It is binding in nature thus different from other alternative mode of dispute settlement for example negotiation, mediation, conciliation etc.

Private settlement of dispute without court intervention: Arbitration is an alternative mode of dispute resolution whereby there is no judicial intervention by the courts. However, the settlement must ensure that outcome is not against public interest.

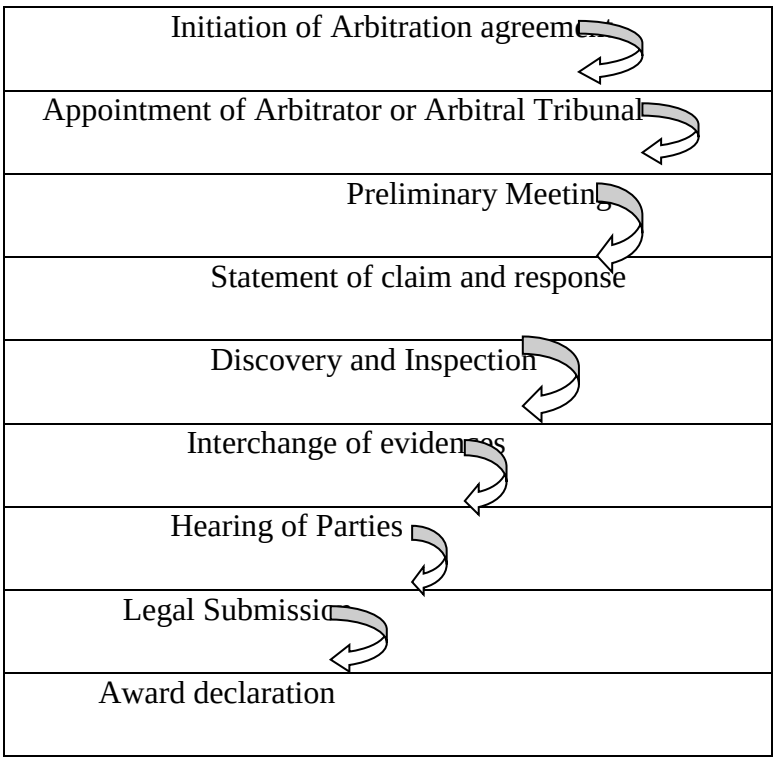
Arbitration process is convenient, flexible and private affair: the place and time of arbitration are decided as per the convenience of parties and there is no strict procedure to be adopted. The procedure adopted must be legally enforceable it doesn't matter if the same is tailor-made and simplified.

Arbitration is also preferred means of dispute resolution as final award are not published or made accessible to the outsiders. Hearings take place in a private meeting and are kept confidential.

Arbitration is like splitting the child:

In arbitration process there is no strict liability to follow law of evidence or other procedural laws. However, arbitration is required to deliver award keeping in mind the principle of natural justice. Therefore, in words of Thomas Crowley arbitrator can go on granting both the parties relief to some extent if not completely. There is no mandate on part of arbitrator to grant complete relief to one party. His partial relief for what was requested by the parties, leave them with an impression that justice was not delivered. As no appeal lies from the arbitration unless there exist prima facie evidence of fraud, corruption, biasness on the part of arbitrator.[3]

Steps in Arbitration



WHAT IS ARBITRATION AGREEMENT

At some point or other we all have entered into an arbitration agreement. When we click on agree icon while doing online shopping or agree to certain terms and conditions while downloading any application. We have entered into such agreements without even realizing the same.

In lucid terms arbitration agreements are nothing but consensus in writing between the parties signed in the beginning of any contractual relationship to resolve any disagreement in future through arbitration. It is one of the alternative modes of dispute settlement mechanism which gives parties to any

[3] Section 34, Arbitration and Conciliation Act, 1996

contract to refer their future dispute to a third party who is impartial while adjudicating and arriving at solution. Third party is referred as an "Arbitrator". In India arbitration law is governed by the Arbitration and Conciliation Act, 1996(herein after referred as the Act), section 2(b) of this Act defines arbitration agreement as those agreements given under section 7 of the Act. Section 7 defines "arbitration agreement" as one where parties mutually decide to pass all or any particular conflicts arising between then or those which have already arisen (submission agreement). The agreement to refer to arbitration must be with respect of defined legal relationship.[4]

Requirements for a valid arbitration agreement, under section 7:

- It may be in the form of separate agreement of added as an arbitration clause in the contract itself.
- The agreement must be in writing. It is considered to be in writing if:
    - It the same is included in document signed by respective parties
    - If the same is in the form of telex, by way of exchange of letter, other mode of telecommunication , telegram, postcard, communication via email or other electronic modes.[5]
    - If there exist any proof of statement between the parties in which one has alleged existence of arbitration agreement and the other party has not repudiated such claim.
- Lastly if any reference is made in a contract between the parties to any document which has an arbitration clause in it then the same is considered as a valid arbitration agreement if such contract is in writing.

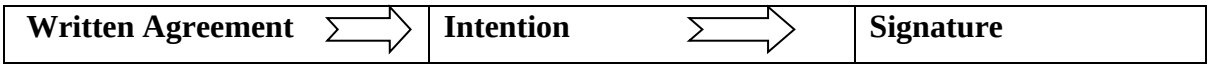
Advantages and disadvantages of "Arbitration Agreement"

Faster and less expensive than court litigation	**Award is non-appealable in court of law**
Private affair thus confidential	**Decision to arbitrate taken well in advance later cannot turn around to court settlement**
Right to choose arbitrator (having specialized technical knowledge)	**Entering such agreements means giving up certain important legal rights**
Final and binding decision	**Agreements can be impartial favoring the party who wrote such agreement**
Arbitration allows for more creative ruling than civil courts can give.	

[4] Chapter II, Section7(1), Arbitration and Conciliation Act, 1996

[5] Chapter II, Section7(4)(b), Arbitration and Conciliation Act, 1996 (Ins. by Act 3 of 2016, sec. 3 (w.e.f. 23.10.2015)

Essentials of Arbitration Agreement:



1. As per section 7(4) of the Act arbitration agreement must be in writing. Further certain examples are given which validates that such agreement is in writing.
2. "Consensus as idem" or meeting of minds is the prime ingredient of arbitration agreement. For an agreement to be a valid one it need not contain words like "arbitration", "arbitrator" etc. What is important is that from the arbitration clause or agreement intention of the parties to refer their dispute to arbitration was clearly discernible.[6] Mere use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" will not render an agreement to be a valid arbitration agreement.[7]
3. Third essential ingredient of an arbitration agreement is signature of the parties on the agreement in question. It need not be signed by both the parties simultaneously and thus one party may draft an agreement which has arbitration clause in it and the other party puts his signature thereto.

Essential characteristics of Arbitration Agreement:

According to Mustill and Boyd following attributes must be present in an arbitration agreement:

1. The arbitration agreement must ensure that the outcome of arbitral tribunal decision or award given by the arbitrator will have a binding effect on the parties and the can cannot be appealed against.
2. The tribunal's jurisdiction to adjudicate upon the rights of the parties who have entered into an arbitration agreement must be arising out of consensus ad idem between the parties or out of statute or by way of order of the court and there must be clarity regarding settlement of dispute by way of arbitration.
3. The consensus ad idem between the parties to refer their dispute to arbitrator and their intention to get the decision of arbitrator or tribunal enforced by way of law must also be clear.
4. The arbitration agreement must make it clear that any dispute relating to substantive rights of the parties will be decided by the sole arbitrator or institution which parties have agreed for in the arbitration agreement.

[6] Bihar State Mineral Dev. Corpn. and Anr v. Encon Builders (I) Pvt. Ltd, (2003) 7 SCC 418
[7] (1998) 3 SCC 573

5. The arbitration agreement should also make this clear that the dispute to be adjudicated by the tribunal is formulated prior to its reference to the tribunal to adjudicate upon.
6. The adjudication upon the dispute by the arbitrator regarding rights of the parties must be done in an neutral and impartial manner. While hearing and deciding upon the dispute the tribunal must follow the principle of fairness and natural justice towards parties.

The above mentioned attributes were upheld by Hon'ble Supreme Court to be essential for a valid arbitration agreement in **K.K. Modi case**.[8] Supreme Court has cited in other cases as well that these essential attributes of an arbitration agreement need not be in expressed form its implied meaning is also to be taken into consideration.[9] Further Supreme Court also held that given that above mentioned attributes are essential for arbitration agreement and thus it is different from 'expert determination' or 'reference to an expert'. The intention of parties is to be assembled from the terms laid down by tem in the agreement, and mere possibility of going for arbitration does not constitute a valid arbitration agreement.[10]

In another case of **Jagdish Chander v. Ramesh Chander**[11] clause 16 of the contract was in question, which read as follows:

- **Clause 16: "**If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners **or shall be referred for arbitration if the parties so determine"**

Going through the essential ingredients of a valid arbitration agreement Hon'ble Supreme Court held that in the present case intention to refer dispute to third party for adjudication was not clear. Therefore, there was no valid arbitration agreement between the parties. One need to apply his mind carefully while drafting an arbitration agreement and intention to go for arbitration and willingness to be bound by the decision of the arbitral tribunal must be clear. Therefore it was held that power under section 11 of the Act can be exercised only when there is a valid arbitration clause, which was missing in the present case.

In ***M/S Linde Heavy Truck v. Container Corporation of India Ltd***.[12] Clause read as under:

"...that in case either party may require that the dispute be referred for resolution by arbitration..."

Court held that the use of word **may require** in the clause does not clearly establishes the intention of the parties to go for arbitration. Thus, agreement was held not to be a binding one.

[8] K.K. Modi v K.N. Modi & Ors: (1998) 3 SCC 573
[9] Bharat Bhusan Bansal v. U.P. Small Industry Corporation Ltd., (1999) 2 SCC 166
State of Orissa v. Damodar Das, (1996) 2 SCC 216
[10] ibid
[11] (2007) 5 SCC 719
[12] 195(2012)DLT366

Further in case of ***Smita Conductors Ltd v. Euro Alloys Ltd***.[13] Court SC held that **the agreement must be in writing** even if there was no contract or telegram confirming clause between the parties, but in certain correspondences between the parties the was an indication of contract containing arbitration clause. Further, the same was not disagreed by any of the parties during correspondence, nor did they disagree with presence of arbitration clause. Therefore, court concluded that there was valid arbitration agreement in writing existing between the parties. The court held that Article II Para2 of New York Convention[14] and section 7 of Arbitration Act are pari material to each other.

According to Article II Para 2[15] an agreement is considered to be in writing if it contains any of these four elements:

1. Presence of arbitration clause
2. In a contract signed by the parties
3. An arbitration agreement signed by the parties
4. An arbitral agreement contained in telegram, in exchange of letters or othermode of correspondence.

Finally court concluded that if the arbitration clause falls under any of these four categories then it must be considered as an agreement in writing.[16]

Apart from agreement being in writing Hon'ble Supreme Court further held that there must be clear intention on part of both the parties and they should agree in writing to be bound by the decision of arbitrator or arbitral tribunal. There must be consensus ad idem between the parties.[17]

Further, in case of Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.[18] SC held that from the ingredients given under section 7 of the Act it is easy to establish presence of an arbitration agreement by inferring to documents signed by the parties or any correspondence between parties via emails, letters, telegrams, telex etc. what is required here is that there must exist record of such agreement, it can be in any other means of telecommunication also.

Drafting of an arbitration clause

While drafting an arbitration clause following points with respect to arbitration must be taken care of:

[13] (2001) 7 SCC 728
[14] Article II (1) New York Convention "a defined legal relationship, whether contractual or not"
[15] ibid
[16] Powertech World Wide Limited vs. Delvin International General Trading LLC:MANU/SC/0092/1998
[17] Bihar State Mineral Development Corporation v. Encon Builders: (2003) 7 SCC 418
[18] (2009) 2 SCC 134

1. **Nature of disputes to be resolved**: this clause ensures that there is clarity of mind between the parties regarding nature of disputes they are agreeing to be settled by way of arbitration. Further, whether they intend to solve all or any particular dispute arising in future by way of arbitration must be made clear in the clause.
2. **Appointment of arbitrator** – Procedure: Section 11 of the Arbitration Act is the governing provision with respect to appointment of arbitrator in India. It says that person of any nationality can be appointed as an arbitrator unless otherwise expressly agreed between the parties to appoint arbitrator of any particular nationality.[19] There is no strict rule regarding procedure to be followed during appointment of arbitrator by the parties. They are free to adopt any procedure they want to for the appointment. They can have a clause regarding appointment of sole arbitrator or tribunal whereby one arbitrator each is appointed by the parties and selected arbitrators appoint the third arbitrator as the presiding officer of the tribunal. However, in case of international commercial arbitration there is a restriction on appointment of arbitrator having nationality same as that of either of the parties to the dispute.
3. **Seat of Arbitration**: This clause in the agreement clearly mention the place where sitting of arbitration will take place. The seat also becomes important because it will identify the procedural laws to be followed during the arbitration process. However, procedural laws to be followed need not be same as the seat where hearing takes place. Procedure of arbitration doesn't get affected by the seat of arbitration agreed upon by the parties in the arbitration agreement. Use of word place of arbitration in the agreement should be avoided if the intention of the parties is to refer to it as 'seat', use of word seat denotes that parties intend to submit their dispute to a particular jurisdiction. Take for example it is preferred to have seat at such place where property in dispute is situated.
4. **Qualification of arbitrator**: section 10 of the Arbitration and conciliation Act, 1996 is the governing provision with respect to number of arbitrators to be appointed or qualification of a person to be appointed as an arbitrator. The number of arbitrators to be appointed to arbitrate upon any dispute arising between the parties can be determined by the parties. In case no number is specified by the parties in the arbitration agreement of arbitration clause then sole arbitrator will be appointed by the arbitrator.
5. **Law governing Arbitration process**: most of the dispute arising with respect to arbitration agreement relates to law that will be governing the dispute arising between the parties. It is majorly referred as substantive law of arbitration agreement. Therefore, parties while drafting an

[19] Section 11, Arbitration and Conciliation Act, 1996

arbitration agreement must ensure that they decide upon the law they want to be governed by in case any dispute arises between them. If there is no clarity with respect to governing law of arbitration it will give rise to disputes in the future.

6. **Language to be used in Arbitration**: having decided in advance on the language to be used in arbitration saves parties a lot of money which they would otherwise sped on translator. Therefore, having mention in the arbitration agreement regarding language to be used makes the whole process cost effective and saves parties from any further dispute and ambiguity. In a country like India where more than two are spoken it is advised to have mention of language in order to have an effective resolution of disputes.
7. **Name of the Arbitration Institution if any:** if parties have agreed to refer their dispute to any particular arbitration institution then it is pertinent to mention the same in their arbitration agreement. Along with the name of the institution the parties are also required to mention branch they intend to go to if the centre has multiple branch in multiple cities. The parties should ensure that the words used in the agreement are not vague and unambiguous. If there exist any ambiguity in the agreement with respect to name of institution that same can lead to nullifying the whole arbitration clause of the contract.
8. **Type of Arbitration**: there are majorly two type of arbitration. One being Institutional Arbitration and the other one being Ad-hoc Arbitration. Further, whether it is domestic arbitration or international. The parties should clearly specify if the arbitration is fast track arbitration agreement. In case they choose Institutional Arbitration then they cannot have liberty of adopting their own set of rules for arbitration. These institutional arbitration centers have their own set of rules which they follow during arbitral proceedings conducted by them. However, in case of Ad-hoc Arbitration parties are free to decide the rules governing the arbitration process and they are responsible for arranging everything and no outside help is sought from arbitration institutions.
9. **Confidentiality Clause:** if parties want the decision of the arbitration to be confidential, it is advised that they put a confidentiality clause in their arbitration agreement. Even though arbitration is a private affair it is not mandatory upon parties to keep the award confidential unless mentioned otherwise.
10. **Time Frame:** the parties should also agree upon the time frame within which the dispute must be settled. If no time frame is mentioned then the arbitration process must be finished within one year, which is extendable by another six months on reasonable grounds. If they have agreed got

fast track arbitration then process should be completed within six months, which is extendable by another six months.

In case of Visa International Ltd. [20]delivered by Hon'ble SC court came across the issue of interpreting arbitration clause included in the MoU (Memorandum of Understanding) between the parties. Arbitration clause read as under:

"Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996."

Court in this case held that there was a valid arbitration agreement between the parties and therefore petitioners were entitled for reference under section 11 of the Act. Further court said that party once agreeing to arbitrate cannot go back from it. They are not allowed to take advantage of "inartistic drafting"[21] of arbitration clause. It will be sufficient for courts to conclude that there was a valid arbitration clause if the intention of the parties to go for arbitration is evident and clear from the material on record and surrounding circumstances.

In another case of Power tech World Wide Limited[22] Hon'ble SC held that the letters exchanged between the parties were sufficient to prove the existence of valid arbitration agreement between the parties because respondent did not disagree with it in any of his correspondence. There was a consensus ad idem between the parties to the idea of having a common sole arbitrator appointed to adjudicate upon the disputes arising out of the contract between the parties.

Arbitration agreement v. Expert Determination

There has always been a grey area with respect to treatment of agreement entered into by the parties. Whether the agreement construes an agreement a under section 7 of the Arbitration and conciliation Act or whether it is merely agreement to go for expert determination. According to Russel, there have been several instances in the past and many cases have been fought over the issue that whether the chosen form of dispute settlement mode is an expert determination or arbitration.[23] In order to find out the intention of the parties behind such clause one needs to make an objective enquiry into the construction of the contract.[24] Therefore, one should not arrive at any conclusions on the basis of words used in the clause. Mere use of words "Expert Determination" or "Arbitration" won't be the conclusive prove regarding the nature of the agreement. Thus nomenclatures of the agreements are only persuasive in nature and not final.

[20] VISA International Ltd. v. Continental Resources (USA) Ltd.: (2009) 2 SCC 55
[21] ibid
[22] Powertech World Wide Limited vs. Delvin International General Trading LLC: MANU/SC/1333/2011
[23] Russel, Arbitration and Concilation
[24] ibid

The test to determine whether an agreement is an arbitration agreement or merely expert determination can be manifold:

- The first instance is the nature of "issue" between the parties. In case there is an dispute between the parties regarding value of assets of the partnership firm because they did not take any defined position beforehand, later when the issue came it was held to be 'expert determination'. Whereas, in cases where there exist "formulated dispute" between the parties and they have taken defined stand regarding the same then the case was held to be of arbitration.
- The second thing to be kept in mind is the nature of "function" to be performed by the arbitral tribunal or expert. In case of arbitration, arbitrator performs a judicial function whereas experts give their decision depending upon their expertise knowledge only.
- The third difference between the two is that in case of arbitration principle of natural justice is to be followed by the arbitrator whereas in expert determination, experts need not follow the same. They have to decide upon the dispute by applying their expertise.
- Another difference between the two is that in case of arbitration, award is delivered after hearing the parties and taking into consideration the evidences and submissions made thereof. Whereas in case expert determination this is not the case.
- In case of arbitration law governing the process of arbitration is to be mutually decided between the parties unless there is any other consideration. While there is no governing law in case of expert determination. The expert is not bound by any law and is free to make his own enquiries and apply his own expert knowledge and give decision on the basis of his own expert opinion.

In the leading case of State of U.P. v. Tipper Chand[25], where clause 22 of the agreement was in question before the court

- Clause 22: "Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions herein before mentioned."

It was held by the court that empowering Superintending Engineer to take decisions with respect to above mentioned work was to be done by him on his own and not after hearing the parties. Thus, his work was more of a supervisor having an administrative control and he was not to act as an arbitrator. Therefore it was held that the clause 22 was not in the nature of an arbitration agreement rather it was more of an expert determination sort of work assigned to the Superintending Engineer. He was not

[25] (1980) 2 SCC 341

supposed to take decision on the basis of reference made to him by the parties rather he had to take decisions all by himself.

Therefore in case of arbitration following conditions must exist:

Substantial right of parties in dispute
Parties took defined positions
Referred for adjudication
Principle of Natural Justice followed

May v. Shall

The word used in the arbitration agreement must disclose an obligation as well as determination on the part of the parties to go for arbitration in case of any dispute and it should not merely be contemplation with respect to possibility that parties might think of going for arbitration in future. In case of Wellington v. Kirti Mehta[26] it was agreed between the parties that any difference of dispute arising between the parties in future 'may' be referred to arbitrator[27] as per 1940 Act. It was held by the court that the clause in question did not amount to a valid arbitration clause and it was merely an enabling provision, therefore requiring fresh consent of the parties in case they want to arbitrate.

In case of **Jyoti Brothers v. Shri Durga Mining company**[28] use of word "can be settled" in the arbitration agreement was held not to be a valid arbitration agreement by the Calcutta High Court. Similarly in case of Gopal Das v. Cota Straw Board[29] use of word "may be" in the arbitration clause was held not to be binding upon the parties unless fresh consent for arbitration was taken by them.

CONCLUSION

The drafting an arbitration agreement is an art of careful and cautious way of including dispute adjudication in an unambiguous and comprehensive manner. While drafting an arbitration agreement the contents of it must be carefully read and negotiated between the parties. We can draw an analogy of drafting an arbitration agreement with that of drafting a contract under Indian Contract Act, 1872.

[26] (2004) 4 SCC 272
[27] Arbitration Act, 1940
[28] AIR 1956 Calcutta 280
[29] 1970 WLN 572

Therefore after going through the meaning, requirement and essential ingredients of an arbitration agreement we can conclude by saying that, drafting of such agreement in a cautious manner is of prime importance in order avoid future dispute between the parties with respect to mode of dispute resolution to be adopted. Finally going through the checklist the person drafting an arbitration agreement must ensure a) proper identification of the parties to such agreement, b) whether those parties are competent to enter into such agreement[30] c) there should be clear reference of intention of the parties to go for arbitration, d) mode of appointment of tribunal of arbitration or the arbitrator, e) what qualification an arbitrator must possess also there should be mention of special qualification required if any, f) language to be used during arbitration process, g) what all disputes will be resolved by way of arbitration mentioning the nature of disputes if any, h) the time period within which the arbitration process should be completed (it should not exceed one year) and to maximum it can be extended by six months,[31] and lastly the drafting personnel must mention the confidentiality clause which is to be abided by both the parties.

Thus we can say that insertion of Arbitration clause or entering into an Arbitration agreement is a weapon which restricts judicial authority from intervening into the matter.[32] If there exist arbitration then even if claim is brought before the court of law, it is their duty[33] to send parties to arbitration unless on prima facie reading of the agreement, court is of the view that these is 'no valid arbitration agreement' between the parties.

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[30] Section 11,Indian Contract Act, 1872

[31] AIR 1956 Calcutta 280

[32] Section 5, Arbitration and Conciliation Act, 1996

[33] Section 8, Arbitration and Conciliation Act, 1996