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Law of and Procedure for Appointment of Arbitrator(s)

By

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I. Introduction:

Arbitration may be defined as "the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law"[1].

There can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties[2].

The source of the jurisdiction of the arbitrator is the arbitration clause. The arbitration clause is normally a part of the main contract governing the parties. An arbitration agreement on the other hand constitutes a separate agreement, distinct from the main contract, and is binding on the parties. Parties can, even after the disputes have arisen, agree to have their disputes referred to arbitration. The agreement, however, must be in writing. Although contracts are required to be signed by the parties, arbitration clause need not be signed by the parties. An arbitration clause is binding if the parties have given their express or implied or tacit consent to refer the disputes to arbitration. Subject to the law of limitation, parties can refer their disputes to arbitration any time.

There are two forms of arbitration namely, ad hoc and institutional arbitration. Both forms have separate mechanism for appointment of arbitrators. In ad hoc arbitrations, parties make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. However, an institution administers the arbitral process as per the institutional rules on payment of administrative fees by the parties. The institution also allows the parties to select

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[1] Halsbury's Laws of England (Butterworths, 4th edition, 1991) para 332 and 601.
[2] S.N. Prasad, Hitek Industries (Bihar) Limited v. Monnet Finance Limited, (2011) 1 SCC 320.

arbitrator(s) from the institution's panel of arbitrators comprising experts drawn from various parts of the world.

II. Arbitration Agreement:

An arbitration agreement is collateral to the substantial stipulation of the contract. It is merely procedural and ancillary to the contract and it is a mode of settling the disputes, though the agreement to do so is itself subject to the discretion of the court. It is distinguishable from other clauses in the contract. It embodies an agreement of both parties with consensus ad idem that if any dispute arises with regard to the obligations undertaken therein which one party has undertaken towards the other, such a dispute shall be settled by a tribunal of their own constitution[3]. It is the procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities[4].

III. Rule of 'incorporation by reference':

The rule of 'incorporation by reference' asserts that, even though the contract between the parties does not have a provision for arbitration but is contained in an independent document it will be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, if the reference is such as to make the arbitration clause in such document, a part of the contract. The wording of provisions of the Act[5] makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing.

The intention of the Indian Legislature is not to incorporate an arbitration clause contained in a separate document, merely on reference to such document in the contract. The intention was to ensure that the reference is such as to make that arbitration clause part of the contract and there is a conscious acceptance of the arbitration clause in another document, by the parties, as the part of their contract, before such arbitration clause could be read as a part of the contract between the parties[6].

The Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract can be construed as a reference incorporating an arbitration clause contained in such document, into the contract. In the

[3] K. Sasidharan v. Kerala State Film Development Corporation, (1994) 4 SCC 135.
[4] National Thermal Power Corporation v. Singer Company, (1992) 3 SCC 551.
[5] Section 7, sub-section 5 of the 1996 Act.
[6] M. R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd., AIR 2009 SC (Supp) 1786.

absence of such statutory guidelines the normal rules of construction of contracts would have to be applied. The court in ascertaining the intention of the parties would determine as to whether the intention of the parties was to borrow specific terms and conditions contained in the separate document or the reference to that document was made with the intention to incorporate the contents of that document in its entirety into the contract.

The test is that there should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document in the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of a trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same. The standard forms of terms and conditions of trade associations or regulatory institutions are drafted by experience gained from trade practices and conventions, frequent areas of conflicts and differences, and dispute resolutions in the particular trade. They are also well known in trade circle and parties using such formats are usually well versed with the content thereof including the arbitration clause therein. Therefore, even a general reference to such standard terms, without special reference to the arbitration clause therein, is sufficient to incorporate the arbitration clause into the contract[7].

IV. Ad hoc arbitration:

Ad hoc arbitration is an arbitration which is not administered by an institution providing arbitration facilities and it is left to the parties to determine all aspects of the arbitration like appointment of arbitrators, manner in which appointment is made, procedure for conducting the proceedings and for designation of rules, applicable law, procedures and administrative support. Ad hoc arbitration is mainly governed by the provisions of Arbitration and conciliation Act 1996 ('Act') and parties are free to determine the procedure.

V. Institutional arbitration:

In institutional arbitration, a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. The institution only facilitates and

[7] Groupe Chimique Tunisien SA v. S. P. I. Corpn. Ltd., AIR 2006 SC 2422, the purchase orders placed by the respondent on the petitioner constituted as contracts between the parties and the purchase orders were subject to 'Fertilizer Association of India Terms and Conditions for Sale and Purchase of Phosphoric Acid' (FAI) terms which contained the arbitration clause. It was held that the case was covered by the provisions of section 7(5) of the 1996 Act and there was an arbitration agreement between the parties. All the purchase orders were signed on behalf of the respondent and the same had been counter-signed by the petitioner in token of acceptance of the purchase orders. Also see: Vessel M. V. Baltic Confidence v. State Trading Corpn. of India Ltd., AIR 2001 SC 3381.

administers the process and the tribunal is appointed either by the parties or the institution. Often, the contract between the parties will contain an arbitration clause which will designate an institution as administrator by stating that the arbitration would be conducted as per the party designated institutional rules. For administering and facilitating the arbitration and providing secretarial services and facilities for conducting the arbitration proceedings, the institution normally levies administrative charges on the parties. The primary disadvantages of the institutional arbitration are:

(i) Administrative fees are imposed ad valorem and depend on the claim amount. Fees for services and use of facilities are high in disputes over large amounts;

(ii) Pre-established rules and procedures without any flexibility for conducting the proceedings may contribute to parties dis-satisfaction;

(iii) Parties to the arbitration may be required to comply with procedural requirements in unrealistic time frames.

In institutional arbitration, the first issue arising for agreement of the parties is choice of the institution appropriate for the resolution of disputes arising under the contract. Whilst making such choice, there are various factors to be considered i.e. nature & commercial value of the dispute, rules of the institution (as these rules differ), past record and reputation of the institution and also that the institutional rules are in tune with the latest developments in international commercial arbitration practice.

The advantages of institutional arbitration outweigh those of ad hoc arbitrations. Some of the advantages are:

(i) Administrative fees for services and use of facilities are often borne by the losing parties.

(ii) Institutions provide administrative assistance in the form of a secretariat or court of arbitration;

(iii) Maintains a panel of qualified arbitrators having expertise in different commercial sectors;

(iv) Institution can act as appointing authority of arbitrators on parties consent;

(v) Provides hearing room facilities and support services for arbitrations;

(vi) Extends assistance in encouraging reluctant parties to proceed with arbitration; and

(vii) Offers an established rules and procedure for conducting arbitration proceedings.

VI. Number of arbitrators:

The Act[8] provides that parties are free to determine the number of arbitrators which however, should not be an even number. Failing any determination by the parties, the arbitral tribunal shall consist of a sole arbitrator[9]. The statutory requirement of odd numbers of arbitrators is a derogable provision[10]. The words in the provision "the parties are free to determine the number of arbitrators" indicate that if they desire to exercise their option in favour of even number of arbitrators and agree to not to challenge the consequent award, the award rendered would be a valid and binding. The provision only gives a ground to either of the party in the event of appointment of even number of parties to object to such composition of the arbitral tribunal. A party has a right to object to the composition of the arbitral tribunal, if such composition is not in accordance with the Act. There is, however, no provision for the eventuality in case where the parties agree to even number. If neither of the parties challenge the composition then any challenge to the composition must be raised by a party before the time period prescribed under the Act[11], failing which it will not be open to that party to challenge the award after it has been passed by the arbitral tribunal. The Act enables the arbitral tribunal to rule on its own jurisdiction[12]. A challenge to the jurisdiction of the arbitral tribunal must be raised, not later than the submission of the statement of defence even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator[13]. The Act[14] recognises the right of both parties to choose the number of arbitrators. If the party wishing to exercise the right fails to exercise such right within the time frame provided[15] then he will be deemed to have waived his right to so object[16].

VII. Qualification of arbitrators:

The agreement executed by the parties has to be given great importance. An agreed procedure for appointing the arbitrators has to be given preference to any other mode for securing appointment of an arbitrator. If the procedure for appointment as agreed between the parties fails and an application is filed in court for appointment, the court cannot ignore provisions contained in Clause (a) of Sub-section (8) of section 11 of the

[8] Section 10 of 1996 Act.
[9] Section 10(2) of 1996 Act.
[10] Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 56.
[11] Section 16 of 1996 Act.
[12] Section 16 of 1996 Act.
[13] Section 16(2) of 1996 Act.
[14] Section 10 of 1996 Act.
[15] See section 16 (2) of 1996 Act.
[16] Section 4 of 1996 Act.

Act wherein it is specifically provided that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties[17].

A clause in the agreement providing for settling the dispute by arbitration through arbitrators having certain qualifications or in certain agreed manner is normally adhered to by the courts and not departed with unless there are strong grounds for doing so[18]. The appointment of an arbitrator can be challenged by a party on the ground that he does not possess the qualification agreed to by the parties[19]. Such challenge has to be brought within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the circumstance that he does not possess the necessary qualification[20].

VIII. Nationality of the arbitrator:

Parties are free to agree to the nationality of the arbitrator. The word "may" in the Act[21] confers a discretion on the Chief Justice or his nominee. It is not mandatory that the arbitrator should be of a nationality other than the nationalities of the parties to the agreement.

IX. Named person or authority as arbitrator:

The parties to an arbitration agreement may agree to refer their disputes to a specific person and may either name him or give his designation in the agreement. For example, parties may state that the "Chief Engineer" of the department shall act as the arbitrator. If the person named therein or person holding the designation refuses to act as arbitrator and the parties have not intended that the vacancy should not be supplied, in that event the court will have jurisdiction to appoint another arbitrator. The basis for assuming such jurisdiction is that the clause would otherwise be rendered inoperative[22].

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[17] Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703.
[18] Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703, at page 709.
[19] Section 12 (3) (b) of 1996 Act.
[20] Section 13 (2) of 1996 Act.
[21] Section 11 (9) of 1996 Act.
[22] State of West Bengal v. National Builders, AIR 1994 SC 200. In Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523, at page 527 it was held that "the object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders".

Where the agreement itself specifies and names the arbitrator, it is obligatory upon the court, in case it is satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It is not open to the court to ignore the arbitration clause and to appoint another person as an arbitrator. Only in cases where the arbitrator specified and named in the agreement refuses or fails to act or where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator. The court is bound to refer the dispute only to the arbitrator named and specified in the agreement[23].

If the arbitration agreement mentions a "named arbitrator", he should be identifiable by name, designation or office. Reference of such a person by class, description or in the generic sense would not amount to naming the arbitrator in the arbitration agreement[24]. The court would always try to give effect to the terms of the arbitration agreement even though the contracting party had failed to act according to the contract[25]. Failure on the part of the party to appoint an arbitrator in terms of the agreement would amount to abdication of the right of that party to make such appointment and the court would then be competent to appoint the arbitrator of its choice[26].

It will not be open to a party, at least in government contracts, to contend that appointment of a sole arbitrator only by one party to the dispute violates the equitable principle that no man can be a judge in his own cause if that party had entered into the contract with eyes wide open and had accepted the terms and conditions of the contract[27]. Any challenge to the maintainability of the proceedings before the arbitral tribunal and to the tribunal's jurisdiction on the ground that the arbitration clause in the contract between the parties is void and unenforceable law will be rejected. In Nandan Biomatrix Ltd. v. D1 Oils Ltd., it was contended that appointment of a sole arbitrator only by one party to the dispute violates the equitable principle that no man can be a judge in his own cause. Rejecting the contention the Court held that the petitioner having accepted the terms and conditions of the contract cannot now resile from the same[28].

Whether appointment has to be made de hors the contract on failure by the named authority or institution? The Chief Justice or his designate cannot ignore the contractual terms between the parties and appoint an arbitrator even when the person or authority named is available. The court summed up the position stating:

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[23] S. Rajan v. State of Kerala, (1992) 3 SCC 608. See Rite Approach Group Ltd. v. Rosoboronexport, (2006) 1 SCC 206 and Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703.
[24] Union of India v. Bhaskar Construction Co. (2003) 2 Arb. LR 180 (Gauhati High Court).
[25] G. Ramachandra Reddy and Co. v. Chief Engineer, AIR 1994 SC 2381.
[26] Union of India v. Prahallad Moharana, AIR 1996 Orissa 19.
[27] Societe Pepper Grenoble S.A.R.L v. Union of India, AIR 2004 Delhi 376.
[28] Nandan Biomatrix Ltd. v. D1 Oils Ltd., (2009) 4 SCC 495.

> *"1. The Chief Justice or his designate even if the authority or institution named does not nominate the Arbitrator which is required to be done or to constitute the Arbitral Tribunal, will ordinarily direct the authority or institution to nominate the Arbitrator and effectively constitute the Arbitral Tribunal. This is more so in the case of public bodies and Corporation, where failure on the part of an official holding howsoever a high post, shall not result in that body being saddled with an arbitral Tribunal not in terms of the contract it entered into or was entered on its behalf.*
>
> *2. It is only in the event, for some good reason that the Arbitrator cannot be named or, the Tribunal constituted in terms of the contract, shall the Chief Justice or designate nominate the Arbitrator or constitute the Arbitral Tribunal beyond the terms of the Contract".*[29]

A party would forfeit its right to appoint an arbitrator in terms of arbitration clause after the end of the statutory period of 30 days and if no steps have been taken to appoint before the other party makes an application to the court seeking appointment; the court may appoint an arbitrator[30].

X. "Notice of Arbitration" and "Commencement of Arbitration":

According to the Act, arbitral proceedings would commence on the date of service of a notice for appointment of an arbitrator[31]. The notice must be issued to and received by the respondent indicating that the claimant seeks arbitration of the disputes. If the request / notice is not received or there is a denial by the respondent of such receipt, the burden is on the party making the request to show that the respondent can be deemed to have received the request. This may be so in a situation where the request is sent by registered post and the acknowledgement to which bears the signature of the respondent.

Request to appoint an arbitrator need not be in express and precise language, it may be implied[32]. The test is to determine whether the 'communications were in their context

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[29] JESMAJO Industrial Fabrications - Karnataka Pvt. Ltd. v. Indian Oil Corporation Limited, (2003) 3 Arb. LR 289 (Bombay).

[30] Bhaskar Wires Private Limited vs. Union of India (2003) 102 DLT 870, the court rejected the contention that it cannot appoint an independent arbitrator contrary to the terms of arbitration agreement between the parties. However, in Bel House Associates Pvt. Ltd. v. The General Manager, Southern Railway, AIR 2001 Kerala 163, it was held that the Court must implement the procedure agreed upon between the parties for appointment of an Arbitrator.

[31] Section 21 of 1996 Act.

[32] Charles M Willie & Co (Shipping) Ltd. v. Ocean Laser Shipping Ltd., [1999] 1 Lloyd's Rep 225, The Court further observed that it was possible to show that arbitration had been commenced by means other than a notice requiring appointment or agreement of an arbitrator i.e. by way of telex. Allianz Versicherungs-Aktiengesellschaft v. Fortuna Co. Inc., [1999] 2 All ER 625. See also Nea Agrex SA v. Baltic Shipping Co. Ltd.

sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt that they were intended to operate as a call for the appointment of an arbitrator'.

The issue of "notice of arbitration" and "commencement of arbitration", has been dealt by Mustill and Boyd. They have stated:

> *"It is common to use expressions such as 'a notice of arbitration' or 'the commencement of an arbitration' as if they had the same meaning for all purposes, in the context of all the various possible types of agreement to arbitrate. This is misleading, for when enquiring whether sufficient steps have been taken to set an arbitration in train, the answer may depend on the reason why the question is being asked. There are several different reasons why it may matter when the arbitration has begun. Of these, the following are probably the most important.*
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> *First, the question may be whether, at a given moment, there is any person or group of persons with jurisdiction to make an award, and power to give directions and make rulings in the course of the reference. For this purpose, what is being considered is whether the arbitration has reached the stage where there is a completely constituted arbitral tribunal.*
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> *Second, the problem may relate to the jurisdiction of the arbitrator. Thus if there is a general reference of disputes the scope of the reference will be determined by the state of the disputes at the moment when the arbitration was begun. Disputes arising thereafter must be the subject of a separate arbitration, unless brought within the existing reference by consent.*
>
> *Third, the purpose of the enquiry may be to ascertain whether the claimant has taken such steps as may be prescribed by statute or contract for the purpose of preventing his claim from being time barred.*
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> *Finally, it may be necessary to consider whether one party has taken sufficient steps towards setting the arbitration in motion to give him certain procedural advantages in the appointment of the tribunal: either as a preliminary to appointing his own nominee as sole arbitrator, or at least by way of preventing the other party from exercising his statutory right to make, or procure, a nomination in default.*
>
> *It is plain that expressions such as 'the commencement of the arbitration' must have different meanings in these various contexts. For example, the giving of a notice to concur in the appointment of a sole arbitrator is sufficient to prevent*

"The Agios Lazaros", [1976] 2 Lloyd's Rep 47, [1976] 1 QB 933, where Lord Denning held that the request to appoint an arbitrator may be implied.

time from running under the Limitation Act 1980; and it is also an essential first step towards the making of a default appointment under Section 10(a) of the Arbitration Act. But the arbitration has not at this stage 'commenced' in any practical sense, since there is no person or group of persons charged with any authority to determine the matters in dispute."[33]

XI. Requirements of a letter of invocation:

(i) It must clearly and unambiguously evince the intention of the sender for appointment of an arbitrator.

(ii) Should specify the contract under which the arbitration clause is being invoked.

(iii) Should record compliance with pre-condition for invocation of the arbitration clause.

(iv) If parties under the contract are required to resolve the disputes amicably after notice of invocation is given, party issuing the notice should call upon the other party for a meeting.

(v) If arbitration is to be referred to three arbitrators one to be appointed by each party and the third arbitrator by the nominated arbitrators, party invoking the arbitration clause should also nominate his arbitrator.

XII. Requirements for filing an application:

The essential pre-conditions to be satisfied before an application for appointment of arbitrator by Court is filed are:

(i) there exists an arbitration clause in the contract in terms of section 7[34];

(ii) the party filing the application is privy to the arbitration agreement;

(iii) there exists a dispute between the parties in relation to the contract containing the arbitration agreement.

(iv) notice invoking the arbitration clause has been issued and received by the other party[35].

[33] Commercial Arbitration, 2nd Edition, page 169.
[34] Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719.
[35] Although in some cases it may not be necessary to send a notice. However, the arbitration agreement may provide for serving of notice on the other party as a precondition to commence arbitration.

(v) in a multi-tier arbitration agreement, the steps preceding invocation of the arbitration agreement has been complied with.

In dealing with an application for filing an arbitration agreement, the Court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and that a dispute has arisen with regard to the subject-matter of the agreement which is within the jurisdiction of the Court[36]. The existence of an arbitration agreement[37] is a condition precedent for exercise of power to appoint the arbitral tribunal[38].

XIII. Existence of arbitration clause:

Before seeking appointment of an arbitrator it is necessary to ascertain as to whether the contract governing the parties contains an arbitration clause. If the contract does not contain an arbitration clause, unless otherwise agreed by the other party, the disputes cannot be referred to arbitration. The aggrieved party would have to file a civil suit before the appropriate forum to have its claim adjudicated. In some contracts, mostly standard form contracts, the arbitration clause is not contained in the contract governing the parties but is contained in a separate document the terms of which are incorporated by reference into the contract signed by the parties.

The Act has conferred the power on the arbitral tribunal to decide whether there is in 'existence' an arbitration clause[39]. The statute uses the word “may” when conferring such power which is a clear indication that even courts could go into such issues when hearing an application for appointment of arbitrator. An option given by the arbitration clause to the parties with the use of the expression “parties may refer the disputes to arbitration” would be a case where no arbitration clause exists between the parties and hence no appointment of an arbitrator can be made[40]. The use of the word ‘may' would imply that parties need not necessarily go to an arbitrator but can also go before the civil court by way of a suit. In order to make such an arbitration clause effective, a fresh consent for arbitration would be necessary[41]. The arbitration clause therefore, must be firm or mandatory.

In dealing with the issue of existence of an arbitration agreement between the parties, the learned Chief Justice or his designate is required to decide the issue finally and it is not permissible in a proceeding under Section 11 to merely hold that a party is prima facie a party to the arbitration agreement and that a party is prima facie bound by it. It is not as if the Chief Justice or his designate will subsequently be passing any other final

[36] Wazir Chand v. Union of India, AIR 1967 SC 990.
[37] As defined under Section 7 of the 1996 Act.
[38] Jagdish Chander v. Ramesh Chander, 2007 (2) Arb. LR 302 (SC).
[39] Section 16 of 1996 Act.
[40] Wellington Associates Ltd. v. Kirit Mehta, AIR 2000 SC 1379.
[41] Jyoti Brothers v. Shree Durga Mining Co., AIR 1956 Cal 280.

decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his designate under Section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court[42]. This is categorically laid down by the Constitution Bench in SBP & Co. v. Patel Engg. Ltd[43].

If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of Section 7(4)(*c*) of the Act. It follows that if in the application filed under Section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties[44].

Notwithstanding the arbitration clause, a party may challenge its effectiveness or validity. A reference to arbitration may be disputed where some of the claims are arbitrable and not all. In other words, parties have expressly stated in the contract that a particular nature of claims cannot be a subject matter of adjudication by the arbitral tribunal. Such non-arbitrable claims would fall within the meaning of "excepted matters", adjudication of which is either completely barred or can be done only before the court.

XIV. Discharge of contract and arbitration clause as a result of full and final settlement:

When a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under Section 11 of the Act or by the Arbitral Tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant[45]. The court in Boghara Polyfab case further observed:

[42] Indowind Energy Limited v. Wescare (India) Limited, (2010) 5 SCC 306.
[43] SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618.
[44] S.N. Prasad, Hitek Industries (Bihar) Limited v. Monnet Finance Limited, (2011) 1 SCC 320.
[45] National Insurance Company Limited v. Boghara Polyfab Private Limited, (2009) 1 SCC 267.

"52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject are:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no-claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

(iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of rupees six lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard-pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The "accord" is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration."

XV. Existence of 'dispute' a pre-condition of the right to seek appointment:

Existence of a dispute or difference is a pre-condition of the right to arbitrate and seek an appointment. It is not necessary for a claim to be formulated to give rise to a dispute. Mere existence of a disagreement on a central issue is sufficient. However, merely raising a claim does not satisfy the pre-condition of the dispute. For a dispute to come into existence there should be an assertion on behalf of one party and a positive denial by the other. There would be no dispute or difference if one party's claim has been expressly or impliedly admitted or if the other party has demonstrably no defence. A 'dispute' and 'difference' is most of the time used interchangeably and are the same although 'difference' has been held to have a wider meaning[46].

The word "dispute" means a genuine and real dispute and a claim which is indisputable because there is no arguable defence, does not create a dispute at all. The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action but upon the existence of a dispute. The question whether the dispute in the suit falls within the arbitration clause involves consideration of two matters. Firstly, what is the dispute in the suit and secondly, what disputes the arbitration clause covers. Thus, where the arbitration clause referred to a dispute regarding the goods of the contract and not to a dispute regarding the contract itself, and the suit was for damages for breach of the contract occasioned by non-delivery of goods. It was held that the suit was not in respect of a matter agreed to be referred to arbitration under the terms of the contract and could not be stayed[47].

XVI. Court intervention:

The Act limits court intervention in the arbitral process to the minimum in order to preserve the sanctity of the agreement of the parties to have their disputes settled by a forum of their choice. In view of this objective the legislative intent was not to make

[46] F&G Sykes (Wessex) Ltd. v. Fine Fare Ltd. [1967] 1 Lloyd's Rep 53 (60).
[47] Middle East Trading Co. v. The New National Mills Ltd., AIR 1960 Bom 292.

each and every order passed by an authority under the Act, a subject-matter of judicial scrutiny of a court of law[48].

XVII. Anti-suit proceedings:

A party seeking to stay the suit and have the disputes referred to arbitration would have to establish that the arbitrator is competent or empowered to decide the dispute. An application would lie only where there is already a judicial proceeding pending even though parties had agreed to refer the disputes to arbitration. The pendency of the proceeding itself is evidence of dispute. All that the court needs to ensure is whether the subject matter of the dispute is covered by the arbitration agreement[49].

The matter will not be referred to the arbitral tribunal, by the Court if (a) no application for referring the dispute to the arbitrator has been filed by the parties to the arbitration agreement; (b) such application is not filed before submitting first statement on the substance of the dispute in a pending suit; or (c) such application is filed without the original arbitration agreement or duly certified copy thereof. Application to the court will not lie if the subject matter of the suit is relating to matters lying outside the arbitration agreement, or between parties not involved in an arbitration agreement[50].

XVIII. Meaning of Court:

"Court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit. It, however, does not include any civil court of a grade inferior to such principal civil court, or any court of small causes.

The expression “if the same had been the subject-matter of a suit” means that had there been no arbitration agreement between the parties in the contract governing their obligations then on disputes arising between the parties the appropriate court would be one where the suit would have been filed in accordance with the provisions contained in sections 15 to 20 of the Code of Civil Procedure, 1908 (CPC). Therefore, even for matters which are subject of arbitration agreement the principles underlying the provisions of the CPC will continue to apply for determination of the appropriate “court”. The only qualification to the application of the said provisions of CPC to disputes forming subject matter of arbitration agreement is that it will not include a court inferior to principal civil court in a district. As a consequence even High Courts in exercise of its ordinary original civil jurisdiction would fall under the definition of Court. However, unlike the provisions of section 15 to 20 which refer to the place, where the

[48] Konkan Railway Corporation Ltd. and Ors. v. Mehul Construction Co., (2000) 7 SCC 201.
[49] Lahar Publicity Service v. Union of India, (2003) 2 Arb. LR 541 (MP).
[50] Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya, AIR 2003 SC 2252.

parties reside, dwell or carry on business to determine the court having jurisdiction, provisions of the Act[51] only refers to the subject-matter of the arbitration. The Act excludes residence of parties for purposes of determination of jurisdiction of court. A "subject-matter" of arbitration can be determined from the nature of dispute which is raised by a party to arbitration agreement. Although, a contract between parties can give rise to several kinds of dispute, it will only be disputes which can be referred to arbitration which would fall within the term "subject-matter". Those disputes which under the contract cannot be referred to arbitration cannot be taken into consideration for determination of "subject-matter" of the arbitration although it may be an issue before the arbitrator as to whether it falls within the arbitration agreement or is an excepted matter. If the dispute relates to contract for construction of a building then in that case it will be the place where the contract is to be performed and not merely where the contract had been signed as it may have been signed at the place where the parties reside which may be different from place where the contract is to be performed.

Principal civil court of original jurisdiction in a district will be the Court where an application for enforcement of the award as decree shall have to be filed. The expression "the Principal Civil Court of original jurisdiction in a District" has not been defined under the Act. CPC defines a "district" to mean the local limits of the jurisdiction of a principal civil court of original jurisdiction ("district court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court[52].

The General Clauses Act defines "district judge" to mean the judge of a principal civil court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction[53]. The definition of "court" if read with the definition of "district" and "district Judge" would evince that the Court of district judge is the principal civil court of original jurisdiction in a district.

XIX. Appointment of arbitrator through Court assistance:

The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement or mutual consent[54].

Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co.

[51] Section 2 (e) of 1996 Act.
[52] Section 2, Clause (4) of the Code of Civil Procedure, 1908.
[53] Section 3, Clause (17) of General Clauses Act, 1897.
[54] Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719.

case[55]. The Supreme Court in that case identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is:

(i) issues which the Chief Justice or his designate is bound to decide;
(ii) issues which he can also decide, that is, issues which he may choose to decide; and
(iii) issues which should be left to the Arbitral Tribunal to decide.

The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.
(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.
(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
(ii) Merits or any claim involved in the arbitration[56].

As per the scheme of the Act, in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot

[55] SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618.

[56] National Insurance Company Limited v. Boghara Polyfab Private Limited, (2009) 1 SCC 267.

re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

Section 11 of the Act lays down the procedure for appointment of arbitrator or arbitrators with court intervention. The sole object of seeking court assistance under the Act[57] is to secure constitution of the arbitral tribunal expeditiously. Parties to an arbitration agreement can agree upon a procedure for appointment of a sole arbitrator or arbitrators as contemplated under sub-section (2) of section 11. A party can approach the Chief Justice or his designate if the parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of section 11 of the Act or the circumstances provided for in sub-section (6) have arisen. Section 11(2) provides that the parties are free to agree to any procedure for appointing the arbitrator. In case of failure of the procedure in securing the appointment agreed between the parties, the aggrieved party can invoke sub-sections (4), (5) or (6) of Section 11, as the case may be.

Sub-section (4) of section 11 of the Act deals with the existence of an appointment procedure and the failure of a party to appoint the arbitrator within 30 days from the receipt of a request to do so from the other party or when the two appointed arbitrators fail to agree on the presiding arbitrator within 30 days of their appointment. Sub-section (5) deals with the parties failing to agree in nominating a sole arbitrator within 30 days of the request in that behalf made by one of the parties to the arbitration agreement and sub-section (6) deals with the Chief Justice appointing an arbitrator or an Arbitral Tribunal when the party or the two arbitrators or a person including an institution entrusted with the function, fails to perform the same.

Section 11(6) of the Act applies only when a party has failed to act in terms of the arbitration agreement. Section 11(6) contemplates that a request be made to the Chief Justice of India or his nominee to take the necessary measure if:

(a) a party fails to act as required under the appointment procedure agreed between the parties; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure.

[57] Section 11 of the 1996 Act.

For filing an application for appointment of an arbitrator under section 11(6) of the Act, no time limit has been prescribed, whereas a period of 30 days has been prescribed under section 11(4) and section 11(5) of the Act.

Sub-sections (3) and (5) will come into play only when there is no agreement between the parties as is referred to in sub-section (2) of section 11 of the Act viz. that the parties have not agreed on a procedure for appointing the arbitrator or arbitrators. If the parties have agreed on a procedure for appointing arbitrator or arbitrators, sub-sections (3) and (5) of section 11 of the Act will have no application. Similarly, under sub-section (6) of section 11 request to the Chief Justice or to an institution designated by him to take the necessary measures, can be made if the conditions enumerated in clause (a) or (b) or (c) of this sub-section are satisfied.

Therefore, a combined reading of the various sub-sections of section 11 of the Act would show that the request to the Chief Justice for appointment of an arbitrator can be made under sub-sections (4) and (5) of section 11 where parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of Section 11. A request to the Chief Justice for appointment of an arbitrator can also be made under sub-section (6) where parties have agreed on a procedure for appointment of an arbitrator as contemplated in sub-section (2) but certain consequential measures which are required to be taken as enumerated in clause (a) or (b) or (c) of sub-section (6) are not taken or performed[58].

Sub-section (7) of section 11, makes the decision of the Chief Justice on the matters decided by him final while constituting the arbitral tribunal. The finality under section 11 (7) of the Act, however, is attached only to a decision of the Chief Justice on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) of that section.

Sub-section (8) of section 11, requires the Chief Justice or the person or institution designated by him to give due regard to the qualifications required for an arbitrator by the agreement of the parties, and other considerations as are likely to secure the appointment of an independent and impartial arbitrator when making an appointment. Even while exercising the jurisdiction under section 11(6), the court is required to have due regard to the provisions contained in section 11(8) of the Act. The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator[59]. In Indian Oil Corpn. Ltd. case[60], it was emphasised that normally the court shall make the appointment in terms of the agreed

[58] Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703 , at page 708
[59] Denel (Pty) Ltd. v. Ministry of Defence, (2012) 2 SCC 759.
[60] Indian Oil Corp. Ltd. Raja Transport Pvt. Ltd., (2009) 8 SCC 520.

procedure, however, the Chief Justice or his designate may deviate from the same after recording reasons for the same.

Sub-section (9) of section 11, deals with the power of the Chief Justice of India or a person or institution designated by him to appoint the sole or the third arbitrator in an international commercial arbitration.

Sub-section (10) of section 11, deals with the Chief Justice's power to make a scheme for dealing with matters entrusted to him by sub-section (4) or sub-section (5) or sub-section (6) of Section 11.

Sub-section (11) of section 11, deals with the respective jurisdiction of the Chief Justices of different High Courts who are approached with requests regarding the same dispute and specifies as to who should entertain such a request.

Sub-section (12) of section 11, clause (a) clarifies that in relation to international arbitration, the reference in the relevant sub-sections to the "Chief Justice" would mean the "Chief Justice of India". Clause (b) indicates that otherwise the expression "Chief Justice" shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Court is situated.

The jurisdiction of the court and the nature of power exercised by it when acting pursuant to the provisions contained in section 11 has been summarized in S.B.P & Co. v. Patel Engineering[61] as under:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the

[61] S.B.P and Co. v. Patel Engineering, (2005) 8 SCC 618.

arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.[62] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

[62] (2002) 2 SCC 388.

If an arbitrator is appointed by the designate of the Chief Justice under Section 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 CPC (on the ground that the disputes were required to be settled by arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator under Section 11 read with Section 15(2) of the Act, if the authority under Section 11 finds it necessary to appoint an arbitrator[63].

While appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, two things must be kept in mind:

(i) That there exists a dispute between the parties to the agreement and that the dispute is alive.

(ii) Secondly, an arbitrator must be appointed as per the terms and conditions of the agreement and as per the need of the dispute[64].

The scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any

[63] Vijay Kumar Sharma v. Raghunandan Sharma, (2010) 2 SCC 486.
[64] Union of India v. Onkar Nath Bhalla, (2009) 7 SCC 350.

person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that:

(a) a party failing to act as required under the agreed appointment procedure; or
(b) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or
(c) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else[65].

XX. Appointment of the third / presiding arbitrator:

[65] Indian Oil Corporation Limited v. Raja Transport Private Limited, (2009) 8 SCC 520.

The Act provides[66] that in arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. It is not necessary that the appointment of the third arbitrator be done by the two appointed arbitrators by sitting together and in writing. The requirement of the law is that there should be an appointment and the appointment should be by the two appointed arbitrators. The statute does not contemplate that such appointment should be made in writing[67]. In Keshavsinh Dwarkadas Kapadia v. Indian Engineering Company[68], it was observed that:

> *"The appointment of an umpire by two arbitrators means that the arbitrators are to concur in appointing an umpire. There is no particular method of appointment of an umpire prescribed by the Act. The usual method of appointment of an umpire by the arbitrators is in writing. Arbitrators who are required to appoint an umpire are under no obligation to obtain the approval of the choice of the personnel by the parties who appointed the arbitrators. If any party is dissatisfied with the choice that will not affect the validity of the appointment. [See, Oliver v. Collings) (1809) 11 East 367 : 103 ER 1045].*
>
> *The appointment by arbitrators of an umpire should be the act of the will and judgment of the two. Such an appointment is to be one of choice and not of chance. [See, Re-Cassell). [(1829) 9 B & C 624 : 109 ER 232]."*

The provisions of the Act also do not provide that the appointment of third arbitrator cannot be agreed upon orally or through mutual discussion[69]. It is also not necessary that the two arbitrators appointed by each of the parties must sit at one place, deliberate jointly and take a decision in the presence of each other in regard to the appointment of the third arbitrator. All that needs to be done is that they have actually consulted or conferred with each other and both or one of them has informed the parties that the presiding or the third arbitrator has been appointed by them after joint deliberation. In other words all that the two arbitrators need to do to satisfy the provision of statute, while making the appointment is to:

(i) actually make the appointment,
(ii) appointment should be made after consultation with each other, and

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[66] Sub-section (3) of Section 11 of 1996 Act.
[67] Grid Corporation of Orissa Ltd. v. AES Corporation, (2002) 7 SCC 736. The Court referred to European Grain and Shipping Limited v. Johnston, [1982] 3 All ER 989, wherein Lord Denning had held that the time had come when business convenience requires laying down a different rule. When an agreement or award or another document is to be done by two or three, generally the draft can be exchanged and it would be enough if the final document is signed by all. It is quite unnecessary for them all to meet together to sign it though each signed it at a different time or place from the others.
[68] (1971) 2 SCC 706 (A decision under the old Arbitration Act of 1940).
[69] Section 11(3) of 1996 Act.

(iii) such appointment is communicated to the parties.

The Act no where provides that the parties need to be consulted, involved or informed prior to the appointment of the presiding arbitrator[70].

XXI. Appointment of presiding arbitrator by the arbitral institution:

An arbitration clause may require each of the parties to the dispute to nominate its arbitrator and the third arbitrator is to be chosen by the two arbitrators appointed by the parties who shall act as the presiding arbitrator.

If under the appointment procedure contemplated by the contract, any person or organization or body is required to appoint the presiding arbitrator then the court will not exercise its jurisdiction under the Act[71] to fill the vacancy. The cause of action for moving an application under the Act would exist only if the person or organization or body fails or refuses to appoint the presiding arbitrator[72].

XXII. Refusal by or failure of one party to appoint:

If the party having the responsibility under the arbitration agreement refuses or fails to appoint an arbitrator or arbitrators as the case may be as per the agreed procedure for appointment, within 30 days of the demand being made by the other party, the party having the right to make such appointment can be said to have forfeited his right and it will be open to the other party to approach the court and seek the appointment of the arbitrator in accordance with the agreed procedure. However, the right to appoint the arbitrator or arbitrators of the defaulting party would subsist till the time the other party has not filed an application before the court seeking appointment of the arbitrator or arbitrators. Once the other party moves the Court the right to make the appointment ceases to exist[73] and the procedure envisaged under the arbitration clause for appointment of arbitrator ceases to be in existence.

If, however, after making an appointment of arbitrator, there is a vacancy in the office of the arbitrator by virtue of death, retirement or resignation the appointing authority would not lose his right to supply the vacancy.

XXIII. Challenge to the order of appointment:

The power exercised by the Chief Justice or the Judge designated at the time of appointment of arbitrator on request filed by a party is in the nature of a judicial order. The Chief Justice or the designated Judge would not pass the order of appointment

[70] Grid Corporation of Orissa Ltd. v. AES Corporation, (2002) 7 SCC 736.
[71] Section 11, sub-section (6) of 1996 Act.
[72] You One Engineering and Construction Co. Ltd. v. NHAI, AIR 2006 SC 3453.
[73] Dattar Switchgears v. Tata Finance Ltd, (2000) 8 SCC 151.

going into the contentious issues between the party. The function of the Chief Justice or his designate under Section 11 is simply to fill the gap left by parties in the arbitration agreement or in the nomination of an arbitrator by two arbitrators appointed by the parties. Section 11 does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise even where the other party has failed to appoint an arbitrator within thirty days of the request being made.

XIV. Limitation for filing an application seeking appointment:

The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued, just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued. In arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued[74].

An application under section 11 of the Act for appointment of arbitrator is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. However, there is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arises in a civil action. There must thus, not only be an entitlement to money but there must be a difference or a dispute must arise. An application filed after the expiry of three years from the date of acceptance of final bill and measurement will be barred by limitation. Any negotiations or agreement between the parties after accrual of cause of action to refer the matter to arbitration, does not have the effect of suspending the cause of action so as to stop the running of limitation[75].

A party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator[76]. Cause for arbitration arises on date of service of the notice calling upon respondent to refer matter for arbitration.

Till such time as the settlement talks are going on directly or by way of correspondence no issue arises and with the result the limitation does not start running. As long as parties are in dialogue and even if the differences would have surfaced between the

[74] Panchu Gopal Bose v. Board of Trustees, Calcutta Port, AIR 1994 SC 1615.
[75] Vishnu Bhagchand v. Chairman, Maharashtra State Electricity Board, (2003) 4 RAJ 510. See also Steel Authority of India v. J.C. Budharaja, AIR 1999 SC 3275.
[76] Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, AIR 1988 SC 1007.

parties it cannot be asserted that period of limitation under Article 137 has commenced[77].

[77] Hari Shankar Singhania v. Gaur Hari Singhania, (2006) 4 SCC 658.