

# Arbitration

## Arbitration Agreement

An arbitration agreement can be defined as an agreement between two parties to submit their present or future disputes to arbitration notwithstanding the fact that an arbitrator is named in the agreement or not. This agreement is also known as submission. A criminal matter, however, cannot be referred to arbitration.

Whenever any person enters into an agreement with another to refer all disputes between them, either existing or future, to arbitration, he cannot institute any suit in a court of law relating to those disputes; otherwise the very purpose of arbitration will be frustrated.

If he institutes any such proceedings against the other party, the latter can apply to the court before which the proceedings are pending to stay the proceedings and the court will grant an order staying such suit or proceeding, provided the following conditions are satisfied:

- (a) That the suit or proceeding is in respect of the matter agreed to be referred to arbitration. Before an order can be made for stay of the suit, the court must be satisfied that the suit has been instituted in respect of a matter agreed to be referred. If the subject matter of the suit falls outside the scope of the submission, the court will not stay the suit. If, however, the suit relates to matter which are partly within the submission and partly not covered by the submission, it depends on the discretion of the court to grant a stay order or not. In such a case it is not right to cut up the litigation into two actions, one to be tried by the court and the other by arbitration.
- (b) That the applicant was and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.
- (c) That there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement.
- (d) That the party instituting the suit was not induced to enter the arbitration agreement by fraud.
- (e) That the party asking for the stay order has not filed a written statement by way of defence in the suit, sought to be stayed, or taken any other steps in the proceedings. The following steps in the proceedings debar a defendant to a suit from procuring a stay order on the strength of an arbitration agreement:
  - (i) An application for stay of suit coupled with an order for security from the plaintiff.
  - (ii) An application for further time to file the written statement.
  - (iii) An application for leave to administer interrogatories, i.e. questions to the other party.
  - (iv) Appearance without objection on a Chamber Summons for direction.
  - (v) Submitting to the jurisdiction of the Court.

If the court is satisfied that the matter should be decided by arbitration, it stays the suit or proceeding. It does not dismiss the suit, for in case the award is remitted or set aside the stayed suit can be heard without the necessity of instituting it all over again.

### Appointment of an Arbitration by Court

In the following cases, any party to an arbitration agreement may serve the other party or the arbitrators with a written notice to concur in the appointment or in the filling of the vacancy:

- (a) When an arbitrator includes or refuses to act, or is incapable of acting, or dies, and the parties do not fill the vacancies;
- (b) Where an arbitration agreement provides for the appointment of one or more arbitrators by consent of the parties, and the parties do not concur in the appointment, or where the parties or the arbitrators are required to appoint an umpire and then do not appoint him.

If the appointment is not made within 15 clear days after the service of the notice, the court may appoint an arbitrator or arbitrators or umpire on the application of the party who gave the notice.

### Powers of an Arbitrator

The powers of an arbitrator are:

- (a) to administer oath to the parties and witnesses;
- (b) to state a special case for the opinion of the court of any question of law involved;
- (c) to make the award conditional or in the alternative;
- (d) to correct any clerical or accidental error in the award;
- (e) to administer interrogatories to any party; and
- (f) to make an interim award.

### Duties of an Arbitrator

An arbitrator occupies a quasi-judicial position. His award is a final judgement for which there is no appeal. It is, therefore, very important that he should be absolutely impartial. If he is not interested in the subject matter of the dispute or in the parties appearing before him, he must disclose these facts to the other parties before his acceptance to act as an arbitrator. He must act strictly within the scope of the submission and should sign the award.

### Removal of an Arbitrator

Under Section 11 of the Arbitration Act, 1940, the court may remove an arbitrator under the following conditions:

- (a) On the application of any party to a reference, the court may remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. This means that for the exercise of power conferred by this clause, there must, first of all, be an application for the removal of the arbitrator or umpire by a party to the reference. Secondly, it must be proved that the arbitrator is guilty of improper delay in the conduct of the arbitration or in making the award. What is reasonable dispatch or what is undue delay depends, in every case, on the nature of the arbitration proceedings, the length of evidence taken, the number of witnesses, adjournment necessary for the proper convenience of the parties and so on. An arbitrator will be deemed to have failed to use reasonable dispatch only when, taking all the circumstances, it is clear that a much shorter time would have been reasonably sufficient for any other arbitrator.

- (b) The court may remove an arbitrator or umpire who has misconducted himself and the proceedings. In this case, the court may exercise its power *suo moto* and without an application by the party where the arbitrator or umpire has misconducted himself and the proceedings. Misconduct is, as pointed out by Russell in his arbitration and award, an ambiguous term. It includes acts involving moral turpitude like fraud, acceptance of bribes and so on as also honest but erroneous breach of responsibility which amount to improper hearing or conduct of the reference or impropriety in making the award or anything which leads to injustice or unfairness to the parties though no moral misconduct or turpitude can be suggested. The latter kind of misconduct includes amongst others the starting of reference without notice to all the parties or the giving of unduly short notice or the rejection of proper and material evidence, the conduct of proceedings *ex parte* or the improper refusal to grant adjournments and so on.

### Powers of Courts over Awards by Arbitrators

On the filing of the award the court may (i) modify or correct the award, or (ii) remit the award, or (iii) set aside the award, or (iv) pronounce judgment in terms of the award.

#### Power to Modify Award

The court may modify or correct an award in the following cases:

- (a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred to.

**For example:** A and B refer to arbitration a dispute between them regarding the amount of money. A owes to B for the latter's construction of a house for A. The arbitrators find in their award the amount of Rs 4,000 which A owes to B on account of the house. They also find in the award that A owes to B another sum of Rs 5,000 on a separate transaction. Here the arbitrators give an award part of which is upon a matter not referred to arbitration, namely: A's debt to B on the separate transaction. The award thus can be separated into one part which comes within the scope of arbitration and the other part which falls outside, in this case the court may modify the award by striking out the part which falls outside the arbitration; or

- (b) Where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision or;
- (c) Where the award contains a clerical mistake or an error arising from an accidental slip or omission.

#### Power to Remit Award

The court may remit, i.e. send back the award or any matter referred to arbitration to the arbitrators or the umpire, as the case may be, for consideration in any of the following cases:

- (a) Where the award has left undetermined any of the matters referred to arbitration.
- (b) Where the award determines any matter not referred to arbitration.
- (c) Where the award is so indefinite that it cannot be executed.
- (d) Where an objection as to the legality of the award is apparent upon the face of it.

#### Setting Aside an Award

Before the Arbitration Act of 1940 came into operation, the court could set aside an award under the powers contained in Section 15, Schedule II of the Civil Procedure Code on the grounds of

- (a) corruption or misconduct of the arbitrator or umpire, or
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire, or
- (c) the award having been made after the issue of an order by the court superseding the arbitrator or after the expiration of the period allowed by the court, or being otherwise invalid.

But Section 30 of the Arbitration Act has brought changes in this direction. Under it, the court can set aside an award on one or more of the following grounds:

- (a) That an arbitrator or umpire has misconducted himself or the proceedings. This means that the arbitrator or umpire has shown bias or has taken bribes from one party and so on, or that he has ignored the principles of natural justice, for example: by carrying on proceedings behind the back of a party without affording him any opportunity to appear and be heard.
- (b) That the award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become automatically invalid under Section 35 because of the whole subject matter of the reference having been referred to regular legal proceedings in a court of law.
- (c) That an award has been improperly procured or is otherwise invalid. This clause is much wider in application than the second clause of Section 15, Schedule II of the Civil Procedure Code as set out above. It not only includes fraudulent concealment of facts or the misleading and deception of the arbitrator or umpire by one party but also any other improper conduct which according to the court offends the principles natural justice or is against public policy.

In an arbitration without intervention of the court, the court may exercise the following powers:

- (a) The authority of an arbitrator or umpire cannot be revoked except with leave of the court.
- (b) The court may appoint an arbitrator or umpire, if the parties fail to do so.
- (c) The court may remove an arbitrator or umpire under Section 11 of the Arbitration Act, 1940.
- (d) When an arbitrator or umpire is removed or his authority is revoked, the court may appoint persons to fill the vacancy or it may appoint a person to act as a sole arbitrator or it may cancel the arbitration agreement.
- (e) The court may modify or correct an award or may remit it to the arbitrators for their reconsideration.
- (f) When an award has been filed in the court, the court may pronounce judgment in terms of the award.
- (g) The court may, at any time after filing the award but before passing of judgment thereon, pass an interim order thereon.
- (h) The court may supersede the reference and there upon the arbitration agreement will come to an end.
- (i) The court may enlarge the time for making award.
- (j) The court may set aside an award under Section 30 of the said Act.
- (k) The court may decide any question relating to the validity of the arbitration agreement or the award; and
- (l) The court may state legal proceedings commenced against a party to an arbitration agreement.

### Appointment of a New or Sole Arbitrator

Where an arbitration agreement provides that there shall be two arbitrators, one to be appointed by each party, then:

- (a) If either of the appointed arbitrators refuses to act or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator;
- (b) If one party fails to appoint an arbitrator within 15 clear days after the service by the other party of a notice in writing to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as a sole arbitrator and his award shall be binding on both parties.

## TEST QUESTIONS

1. Define an arbitration agreement. What are the effects of submission to arbitration on an action?
2. Explain cases when a court may appoint an arbitrator.
3. State the powers and duties of an arbitrator.
4. When can a court remove an arbitrator?
5. What powers do courts in Pakistan enjoy over awards by arbitrators?
6. When can an award be set aside?
7. When can an award be remitted for the consideration of the same arbitrator?
8. In an arbitration, without intervention of the Court, what powers can a Court exercise?
9. Under what circumstances can a sole arbitrator be appointed?