

A blurred background image of a business meeting. Several people in professional attire (suits, blouses) are gathered around a table. One person is holding a tablet displaying a document with charts and text. Another person is holding a smartphone. There are white disposable coffee cups on the table. The overall tone is professional and collaborative.

AN OVERVIEW OF INDIAN CONTRACT ACT, 1872 AND ARBITRATION AND CONCILIATION ACT, 1996

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ADVOCATE

Session Objectives

Understand

Understand the core legal principles behind every contract you administer

Connect

Connect Contract Act provisions to real clauses you use daily:
EOT, LD, Force Majeure, Bank Guarantees

Recognize

Recognize legal risk points in tendering, execution, and dispute resolution

Build

Build a common vocabulary between engineering and legal/contracts wings

Why This Act Matters to You

Every NIT, tender, work order, and agreement you sign is governed by this Act

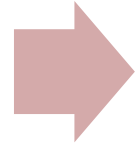
Disputes over EOT, LD, termination, and performance security all trace back to these provisions

It is the "operating system" beneath CPWD/MoRTH/State PWD standard contract conditions

Helps you defend the department's position confidently in arbitration and court

What Is a Contract? (Section 2(h))

"An agreement enforceable by law is a contract" — Section 2(h)



Agreement (Sec 2(e)) =
Offer + Acceptance

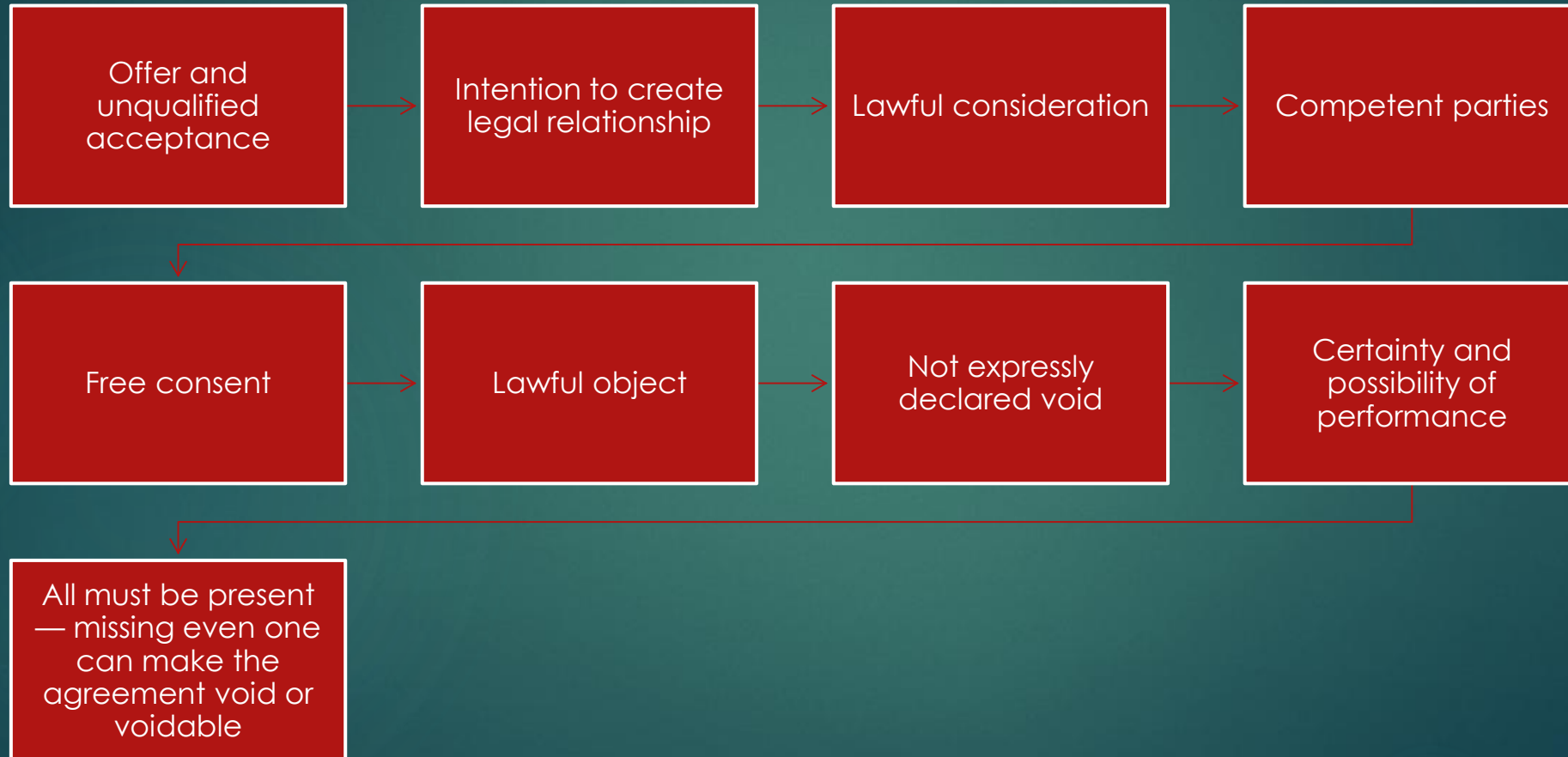


Contract = Agreement +
Enforceability by law

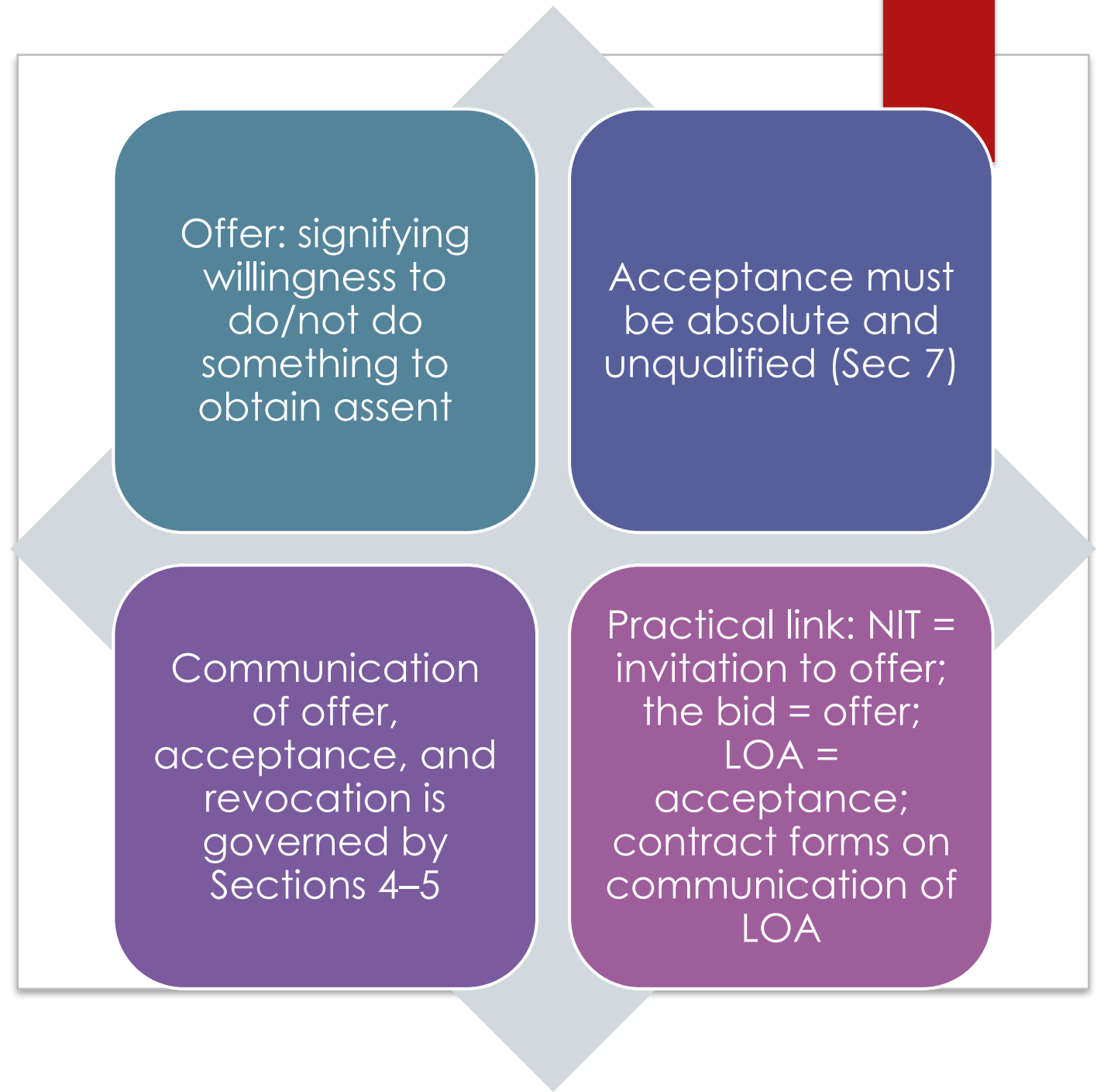


Example: Once a Letter of Acceptance (LOA) is issued and accepted, the agreement becomes a binding contract

Essential Elements of a Valid Contract (Section 10)



Offer & Acceptance (Sections 2(a), 2(b), 3–9)



Consideration (Sections 2(d), 25)

Consideration = "something in return" for a promise

Rule: No consideration, no contract

Exceptions (Sec 25): natural love & affection (registered), compensation for a past voluntary act, promise to pay a time-barred debt

In works contracts: payment for work executed is the consideration flowing both ways

Capacity to Contract (Sections 11–12)

- ▶ Parties must be: of the age of majority, of sound mind, not disqualified by any law
- ▶ Contracts by minors are void from the start
- ▶ Practical relevance: verify Power of Attorney / Board Resolution / authorized signatory before accepting a bid or signing an agreement

Free Consent (Sections 13–22)

Consent must be free from:
Coercion (Sec 15), Undue
Influence (Sec 16), Fraud
(Sec 17), Misrepresentation
(Sec 18), Mistake (Sec 20–22)

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graph TD; A[Consent must be free from:  
Coercion (Sec 15), Undue  
Influence (Sec 16), Fraud  
(Sec 17), Misrepresentation  
(Sec 18), Mistake (Sec 20–22)] --> B[A contract without free  
consent is voidable at the  
option of the aggrieved party]; B --> C[Practical relevance: false  
credentials in bids (fraud),  
coercive negotiation, or  
mutual mistake about site/soil  
conditions];
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conditions

Void, Voidable & Illegal Agreements

- ▶ Void agreement (Sec 2(g)): unenforceable from the start
- ▶ Voidable contract (Sec 2(i)): enforceable at the option of one party
- ▶ Key void categories (Sec 24–30): unlawful consideration, restraint of trade/legal proceedings, uncertain terms, wagering agreements
- ▶ Relevance: unreasonable restrictive clauses or vague scope-of-work risk being struck down as void

Performance of Contracts (Sections 37–67)

- ▶ Both parties must perform or offer to perform their respective promises (Sec 37)
- ▶ Rules on time and place of performance
- ▶ Section 55 — "Time is of the Essence": late performance can make the contract voidable if time was essential
- ▶ Direct legal basis for Extension of Time (EOT) provisions in highway works contracts

Discharge of Contract & Force Majeure (Section 56)

- ▶ A contract is discharged by: Performance, Mutual Agreement, Breach, or Impossibility (Frustration)
- ▶ Section 56: an agreement to do an impossible act is void; a contract becomes void if performance later becomes impossible or unlawful
- ▶ Legal basis for "Force Majeure" clauses (natural calamities, pandemics, government action)
- ▶ Frustration requires genuine impossibility — not mere hardship or increased cost

Breach of Contract & Remedies (Sections 73–75)

- ▶ Section 73: the injured party is entitled to compensation for loss naturally arising from breach
- ▶ Section 74: where a penalty/liquidated sum is named, reasonable compensation up to that amount can be awarded — legal basis for LD (Liquidated Damages) clauses
- ▶ Section 75: a party who rightfully rescinds is entitled to compensation
- ▶ Remedies: Damages, Specific Performance, Injunction, Rescission

Quasi-Contracts (Sections 68–72)

- ▶ Obligations resembling contracts, even without a real agreement
- ▶ Section 70: a person who enjoys the benefit of a non-gratuitous act must compensate — legal basis for Quantum Meruit claims
- ▶ Practical relevance: extra/additional work done without a formal variation order can still attract a payment claim
- ▶ Section 72: money paid by mistake or coercion must be repaid

Contingent Contracts (Sections 31–36)

- ▶ A contract to do/not do something if an uncertain future event happens (or doesn't)
- ▶ Enforceable only when that event occurs (or fails to occur)
- ▶ Relevance: payment terms linked to release of government funds, or conditions tied to statutory approvals/clearances

Contract of Indemnity (Sections 124–125)

- ▶ A promise to save the other party from loss caused by the promisor's own conduct or a third party's conduct
- ▶ Common use: contractor indemnifies the department against third-party claims or damage during construction
- ▶ Basis for Indemnity Bonds against mobilization advance, secured advance, or material handed over

Contract of Guarantee & Performance Security (Sections 126–147)

- ▶ Guarantee: a promise to perform/discharge the liability of a third person (principal debtor) on default — involves Creditor, Principal Debtor, Surety
- ▶ Section 128: surety's liability is co-extensive with the principal debtor's, unless stated otherwise
- ▶ Direct legal basis for Performance Bank Guarantees, Bid Security, and Advance Bank Guarantees
- ▶ Sections 133/139: surety is discharged if the creditor varies contract terms without consent, or impairs the surety's remedy — critical when amending a contract after a BG is in force

Contract of Bailment (Sections 148–171)

- ▶ Delivery of goods by one person (bailor) to another (bailee) for a purpose, to be returned or disposed of as directed
- ▶ Section 151: the bailee must take reasonable care of the goods
- ▶ Relevance: free-issue material, plant, or machinery handed over by the department to the contractor
- ▶ Proper documentation on handover and return protects both parties

Contract of Agency (Sections 182–238)

- ▶ Agent: a person employed to act for another (principal) in dealings with third parties
- ▶ Relevant to PMCs, Engineers-in-Charge, or authorized representatives acting on behalf of the department or contractor
- ▶ The principal is bound by acts of the agent within the scope of authority — define authority limits clearly in appointment letters

Mapping the Act to Your Contract Clauses

- ▶ Time is of the Essence (Sec 55) → EOT Clause
- ▶ Frustration (Sec 56) → Force Majeure Clause
- ▶ Damages/Penalty (Sec 74) → Liquidated Damages Clause
- ▶ Guarantee (Sec 126–147) → Performance Bank Guarantee / Bid Security
- ▶ Indemnity (Sec 124–125) → Indemnity Bond
- ▶ Bailment (Sec 148–171) → Free-Issue Material / P&M Handover
- ▶ Quantum Meruit (Sec 70) → Extra Item / Deviation Payment
- ▶ Novation (Sec 62) → Contract Amendment / Supplementary Agreement

Key Takeaways for Contract Administration

- ▶ Verify all 7 essentials before treating a document as a binding contract
- ▶ Track EOT applications carefully — grounded in Section 55 logic
- ▶ Document variations, extra work, and force majeure events thoroughly to support future claims
- ▶ Ensure surety's concurrence before amending any contract term backed by a Bank Guarantee
- ▶ Consult the legal/contracts cell before invoking termination, LD, or BG encashment



Concepts and essential features of Arbitration

Arbitration-Defined

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- ▶ Arbitration is a formal, private dispute resolution mechanism. The outcome of the process is a legally binding and enforceable decision with res judicata effect.



Arbitration and Litigation

- ▶ Competence and Expertise of the Decision Maker
- ▶ In litigation, parties generally do not have any influence over the selection of the judge assigned to hear their dispute and are therefore not in a position to assess how technically competent he or she is. In an arbitration, however, the parties are able to select the arbitrators (or the entity which will select for them in the event of disagreement) and can select individuals with the relevant technical expertise to decide their dispute

Arbitration v. Litigation

- ▶ Privacy/Confidentiality
- ▶ Litigation is generally open to the public, with the documents filed and judgment of the court available for public inspection. Arbitration proceedings, documents and awards, however, are typically private between the parties and arbitral tribunal. However, privacy is not the same thing as confidentiality. An arbitral award can enter the public domain when an enforcement proceeding is commenced, or where a party has a legal obligation to disclose. Some courts have ruled that arbitral documents and proceedings are not protected by confidentiality, so the local law may be an important factor in choosing the seat for the arbitration.

Arbitration v. Litigation

- ▶ Enforceability
- ▶ Court judgments are enforced through the coercive powers of the state. Arbitration awards do not have any such automatic powers of enforcement, meaning that the award must be voluntarily complied with by the losing party. Where this does not happen, the winning party can seek enforcement before a national court.

Arbitration v. Litigation

- ▶ Speed and Finality
- ▶ A court judgment is generally subject to appeal on the merits and usually becomes final only when it is no longer appealable. In contrast, an arbitral award is final and subject to appeal on only very limited grounds. Challenges to arbitral awards are usually limited occasions where there has been a procedural flaw or for reasons of public policy.

Arbitration v. Litigation

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- ▶ Neutral Forum
- ▶ Litigation takes place before national courts connected to either the dispute or a party to the dispute. A party litigating before a national court must have standing to sue before the court. In contrast, parties in arbitral proceedings can arbitrate in any forum of their choice without the necessity of a connection to the forum. Forum neutrality is one of the major advantages of arbitration since disputing parties from different countries often prefer to have the arbitration take place in a neutral third country to assure a level playing field and to avoid one party getting a "home advantage" and the perception of bias

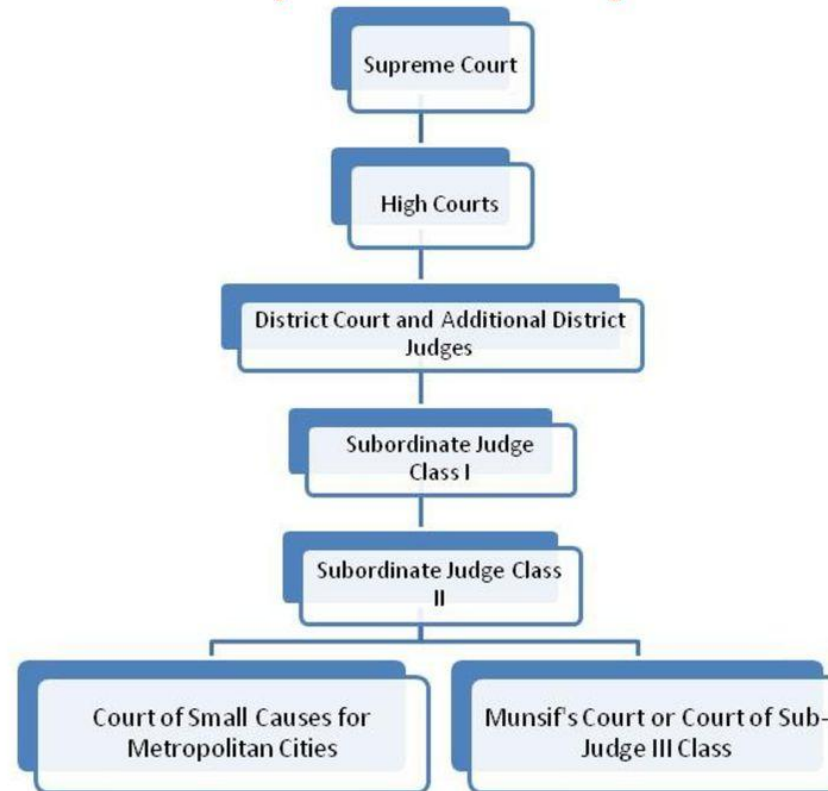
Why Arbitration?

- Private
- Neutral venue
- Tribunal chosen by the parties
- Runs on the parties' timetable
- Tailored procedures
- Limited scope to challenge the arbitral award
- Award will be amenable to recognition and enforcement under the New York Convention.

Hierarchy of Civil Courts in India

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Hierarchy of Judiciary in India



Types of ADR

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- ▶ Arbitration
- ▶ Mediation
- ▶ Conciliation
- ▶ Negotiation

Examples of Arbitration Clauses

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- ▶ Law
- ▶ Law governing Arbitration
- ▶ Seat
- ▶ Venue
- ▶ Time Limit for Invocation
- ▶ What Disputes be decided by the Arbitrator?
- ▶ Number of Arbitrators and Manner of Appointment

Arbitration Clause

- ▶ A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract [is/shall be] the substantive law of []. "

Things to keep in mind

- ▶ **Use Terms Precisely**
- ▶ All terms used in the arbitration clause are important, as those terms are going to be interpreted by the arbitral tribunal. By interpreting arbitration clauses, arbitral tribunals will attach primordial importance to the text of the clause itself. They will look at what the parties actually agreed to, not at what they could have agreed to, but ultimately did not, agree. For example, there is a considerable difference between the terms "*shall*" and "*may*". The former has mandatory significance, the latter only an optional one. Wording should be precise.

- ▶ **Keep the Arbitration Clause Simple and Non-Ambiguous**
- ▶ The best-drafted arbitration clauses are ones that are simple, precise and non-ambiguous. This means that all terms are clear and evident and, thus, cannot be seriously challenged. For example, ambiguity is created when the arbitration clause states in one sentence that the dispute shall be resolved by a sole arbitrator, but in another sentence specifies that *"each arbitrator shall be independent and impartial"*. What is ambiguous in this particular example is that it is difficult to see whether the intention of the parties was to have only one arbitrator or a panel of arbitrators to rule upon an eventual dispute.

- ▶ **The Ambit of the Arbitration Clause Matters**
- ▶ The ambit, or scope of application, of the arbitration clause relates to issues and disputes that are covered by the clause and, thus, can be resolved via arbitration. Here again, the wording used in the arbitration clause is important. Although parties can agree to arbitrate specific contract claims only, they are also free to provide a deliberately broad scope of the arbitration agreement covering not only all disputes under a contract, but also disputes related to it, including, in some cases, non-contractual claims. In this respect, different terms such as any or all disputes *"arising out of the contract"*, *"arising under the contract"*, *"related to the contract"*, *"in connection with the contract"* are generally used. However, one should bear in mind that they have fundamentally different meanings depending on how restricted the scope of the arbitration clause is intended to be, as well as the law governing the arbitration agreement.

- ▶ **Appointing a Proper Number of Arbitrators**
- ▶ In their arbitration clause, the parties are free to agree on the number of arbitrators that will sit on an arbitral tribunal; usually one or three members are specified. The number of arbitrators will have a direct impact on the overall costs that the parties will need to pay for the arbitrators' fees. If a three-member tribunal is to be appointed in a case where only a small amount of damages or receivables are at stake, the costs relating to the arbitrators' fees may be disproportionate given the amount in dispute (even, at times, exceeding the amount in dispute).

- ▶ **Name the Applicable Law**
- ▶ The applicable, or governing law (also named the "*substantive law*" or the "*law of the contract*"), is another element parties should not forget to include in their agreement, if they wish to avoid subsequent debates after the initiation of an arbitration. Selection of an appropriate law applicable to the merits of a dispute when none is named is not an easy task to do and a number of considerations will be taken into account by the arbitral tribunal, creating legal uncertainty. The parties should be mindful that laws and legal systems provide different legal regimes for contractual clauses. For example, a *force majeure* clause is not interpreted in the same way under French and English law. Thus, care should be taken to select an appropriate governing law.

- ▶ **Procedural Rules Selected**
- ▶ The parties are free to opt either for institutional arbitration or for a purely *ad hoc* arbitration. It is generally a bad idea to select purely *ad hoc* arbitration (unless the UNCITRAL Arbitration Rules are used), since if the parties are unable to agree upon a tribunal when a dispute arises, which frequently occurs, court intervention will be required to constitute the arbitral tribunal, leading to delays and wasted time and costs.
- ▶ If institutional arbitration is chosen, except for the mandatory rules of the seat of arbitration, the arbitration will be conducted under the rules of arbitration of the given arbitration institution. These rules set out a number of obligations that need to be respected regarding, for example, written submissions to be filed, the payment of advance on costs, the conduct of the hearings, the deadline to issue an award, etc. However, here again, it is fundamental that the arbitration clause contains a precise indication of the arbitration institution. For example, if the parties wish to resort to ICC arbitration, the arbitration clause should refer to the "*Rules of Arbitration of the International Chamber of Commerce*" correctly.

- ▶ **Place/Seat of Arbitration and Type/Venue of Hearing**
- ▶ The selection of the place of arbitration (also referred to as the seat of arbitration) in the arbitration clause is of importance. The place/seat of arbitration has several legal consequences. It determines the place, i.e., country, where the arbitral award may face annulment proceedings initiated by a losing party and where State courts may intervene in the arbitration proceedings. In general, it is recommended to select a seat of arbitration where there will be minimal potential judicial interference in arbitration proceedings and which are considered to be arbitration-friendly. Popular seats of arbitration include Paris, London, Geneva and Singapore.

Fowler's Five Rules of Drafting

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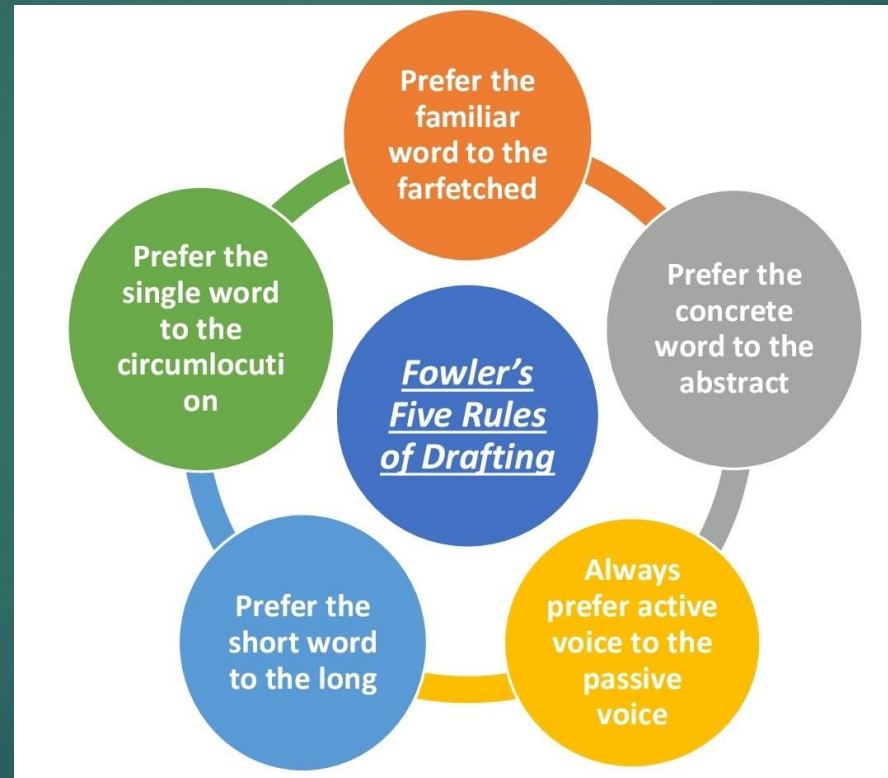
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Fowler's Five Rules of Drafting

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Arbitration Clauses

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- ▶ It can mention Time-Limit, Excepted matters, Notice how to be given and Multi-tiered Dispute Resolution

Multi-Tiered Dispute Resolution Clauses

- ▶ Known as filter clause, Escalation clause, Med-Arb Clause

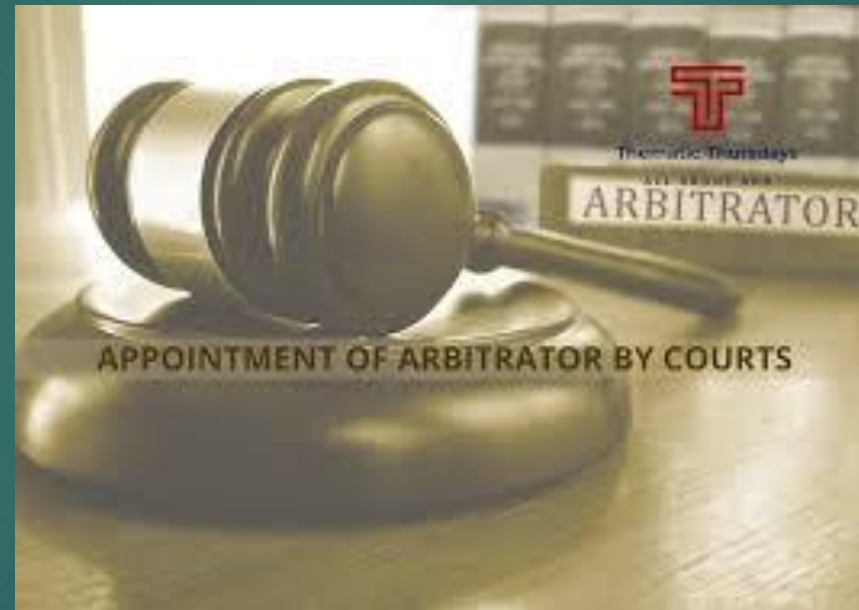
Model Multi-tiered Arbitration Clause

- ▶ *“Any dispute relating to this Agreement which cannot be resolved by negotiation between the parties within [insert number] days of either party giving notice to the other party that a dispute has arisen shall be submitted to mediation pursuant to the Mediation Rules of the ADR Group and failing settlement of that dispute by mediation within [insert number] days thereafter, the dispute shall be submitted by any party for final resolution by arbitration by [insert number] arbitrator(s) conducted in [insert city] in the [insert] language and in accordance with the Rules of Arbitration of the [insert name of arbitral body].”*

Appointment of Arbitrator

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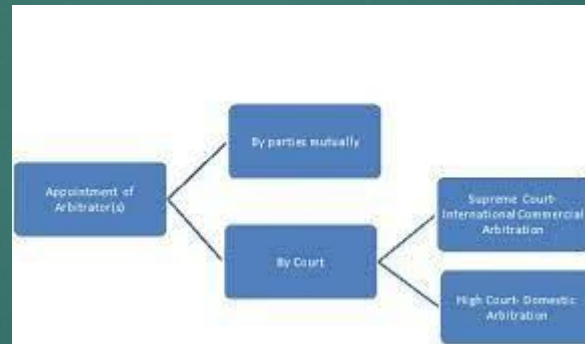
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Appointment of Arbitrator

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Procedure in Arbitration

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- ▶ It is different from the procedure followed in Civil Court.
- ▶ Arbitral Tribunal can give interim relief.



ARBITRATION PROCESS

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Arbitration-Sittings





Court Sitting

Arbitration Process in India

01

Arbitration Clause - An agreement or the clause specifically stating that if the dispute arises between the parties they will resolve it through the process of arbitration.

02

Arbitration notice - In case a dispute has arisen and the party has opted to follow the procedure of arbitration then the party against whom the default has been committed will send an arbitration notice for invoking arbitration process steps between the parties.

03

Appointment of Arbitrator- After receiving the notice by other parties both the parties will appoint the arbitrators in the manner as specified in the arbitration agreement or arbitration clause.

Arbitration Process in India

Statement of Claim- Next step in an arbitration proceeding in India is to draft a statement of claim. Statement of claim contains the dispute between the parties, events which lead to the dispute and the compensation claimed from the defaulting party. The other party can file a statement of counterclaim along with reply to the statement of claim. Get your statement of claim, reply to the statement of claim or counterclaim through top arbitration lawyers.



Hearing of Parties - Arbitral tribunal will hear both the parties and their evidence.



Award - After hearing the parties, the arbitral tribunal will pass the decision. The decision of the tribunal is known as 'Award' and is binding on the parties. However, an appeal against the arbitral award can be filed before the High Court.

Arbitration Process in India

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- ▶ **Execution of Award** - Once the award has been passed by the tribunal it has to be executed. The party in whose favour the award has been passed has to file for execution or enforcement of award with the help of a good arbitration lawyer.

Counter-Claim

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- ▶ The Respondent can file a Counter-Claim

Award

- ▶ Types of Award
- ▶ Interim, Partial, Final

Section 34-Challenge to the Award

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- ▶ Slots or Grounds in which Award Can be Set-Aside

Enforcement of Arbitral Awards

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- ▶ Section 36 of the Arbitration and Conciliation Act

Arbitrator's Fee

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- ▶ Fourth Schedule or institutional rules.

Ad-Hoc v. Institutional Arbitration

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- ▶ Ad hoc Arbitration Ad hoc arbitration refers to an arbitration conducted without the assistance of an arbitral institution. This may mean that the parties and arbitral tribunal will make up the procedural rules as they go along. An important consequence of this option is that the arbitration law of the place of arbitration may frequently establish the procedures which will be used by the parties and tribunal. In some jurisdictions, the national arbitration law applies by virtue of the arbitral proceeding being held there. National arbitration laws typically contain certain mandatory rules from which the parties and arbitrators may not derogate. They may also contain non-mandatory provisions which act as default rules, which apply where the parties have not provided for that particular circumstance. These provisions also serve as guidance to the parties and tribunal.

Institutional Arbitration

- ▶ In some arbitration agreements, the parties opt to conduct their arbitration under the rules of a particular institution. Institutions all over the world provide administrative assistance to parties and usually formulate their own sets of arbitration rules and a standard arbitration agreement⁹. Parties may decide to incorporate an institution's standard arbitration clause into their contract and/or draft their own agreement to conduct their arbitration under the rules of a particular institution. It is important to clearly identify the particular institution in the arbitration agreement to avoid ambiguity and to ensure that the agreement does not become incapable of being performed. Once an institution's arbitration rules are chosen, those rules will be incorporated by reference into the parties' arbitration agreement. The institution will administer the arbitration in accordance with its rules, and the parties will be contractually bound to comply with them. The rules applicable to the arbitration will, in most cases, be the version of the rules in use at the time the dispute is submitted to the institution to administer.

Miscellaneous Topics

Waiver-Section 4

- ▶ a failure to make an objection to an arbitrator's lack of this qualification will constitute a waiver.

Section 16

- ▶ This concept of kompetenz-kompetenz or competence de la competence refers to the arbitral tribunal's ability to rule on its own jurisdiction. Jurisdiction sets the limits within which an arbitral tribunal can exercise its powers. Such power to rule on jurisdiction allows the arbitral tribunal to rule in any objections with respect to the existence and validity of the arbitration agreement.

Seat v. Venue of Arbitration

The seat is the place to which the arbitration procedure is legally connected. Courts with supervisory jurisdiction at the seat will normally render assistance to the parties before commencement and during the arbitral proceedings. These courts can assist the parties in constituting the arbitral tribunal.

The arbitration will be held in one or more geographical locations. Where the parties have not agreed on a juridical seat, the arbitral tribunal will make that decision. The arbitral tribunal, in consultation with the parties, will also decide whether hearings and inspections will be conducted in other locations. The location of evidence, witnesses and convenience of both parties and arbitrators will all be taken into consideration in deciding on relocating the venue of arbitral hearings.

Award of Interest

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► Section 31

Law applicable to Arbitration and Rules of Procedure in Arbitration

- ▶ Section 28 of the Arbitration and Conciliation Act, 1996.

Contractual Limitation

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- ▶ Time limit for invoking Arbitration Clause

Governing Law Clause in Arbitration

- ▶ A typical governing law and jurisdiction clause is as follows: This Agreement shall be governed by the laws of [insert country] and the parties submit to the [exclusive/non-exclusive] jurisdiction of the courts of [insert country] in respect of any dispute or difference between them arising out of this Agreement.

Features of Arbitration and Conciliation Act, 1996

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- ▶ (1) Party autonomy is paramount. Court's intervention has been expressly excluded except when it is so specifically stated;
- ▶ (2) An arbitral tribunal is required to be fair, independent and impartial and is required to conduct arbitrations according to the principles of natural justice unfettered by procedural laws; and
- ▶ (3) In addition to provisions contained in sections 1 to 43, dealing with domestic arbitrations, Conciliation has been given recognition.

(a) Quickness in achieving resolution of disputes by a domestic tribunal without any unnecessary and wasteful expenditure;

(b) The parties have been given a choice in accordance with which they wish the arbitral tribunal to proceed with the adjudication of the controversy between the parties subject only to certain restrictions concerning public interest;

(c) The will of the parties shall prevail without intervention of the courts except as provided under sections 8 and 9;

(d) The parties shall be treated equally and procedural laws will have no applicability before the arbitral tribunal;

(e) If the challenge to the jurisdiction of the arbitral tribunal does not succeed, the arbitral proceedings shall continue till an arbitral award is made;

(f) If the parties cannot agree to choose a venue, the arbitral tribunal shall determine the venue having regard to the circumstances of the case;

(g) Review of an award by the arbitral tribunal within the time stated in the Act rather than remittance of the award to the arbitral tribunal by the court for reconsideration; and

(h) The award itself is a decree unless set aside by the courts on limited grounds available under section 34



► EXISTENCE OF DISPUTE – PRE-REQUISITE FOR ARBITRATION

EXISTENCE OF DISPUTE – PRE- REQUISITE FOR ARBITRATION

- ▶ When an arbitration clause states that disputes between the parties shall be referred to arbitration, it means that crystallized disputes shall be a matter of adjudication. It can, therefore, be inferred that what the parties agreed to between themselves in the agreement was that those points on which the parties cannot agree will be put up to the arbitrator for adjudication and not mere claims, which were never put up before the opposite party for payment before invocation of the arbitration clause. In addition, if the clause in the agreement enjoins upon a party to quantify the claims, then any claim which has not been quantified before being sent to the respondent cannot be adjudicated upon.