

PROFESSIONAL OPPORTUNITIES IN ALTERNATE DISPUTE RESOLUTION (ADR)



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The Chartered Accountant (CA)

- The advancement of the CA profession has its roots connected to the economic development of the country
- Today's CAs are key players in business, industry and financial services in India and around the world.
- The increasing awareness and demands of society is compelling more organisations to seek professional help to cater to diverse needs.
- From healthcare to software, its hard to find any business without the presence of CAs.
- However new opportunities keep emerging and it is wise to explore further.

Professional Opportunities

- S. 2 (2) (iv) of the Chartered Accountants' Act, 1949 read with Regulation 191 of the Chartered Accountants' Regulations, 1988 specifically provides that a Chartered Accountant in his professional capacity is allowed to act as an Arbitrator.
- Chartered Accountants with their objective, independent and balanced in their approach to a problem can be ideally placed to act as arbitrators or conciliators and play a mediator's role in resolving conflict situations between partners, business associates, employers and employees etc

As an Arbitrator

- A Chartered Accountant is required to maintain a high degree of professional competence and technical standard. He is bound by the code of conduct framed by the Institute of Chartered Accountants of India.
- There are a large number of organisations, national as well as international, which maintain a panel of arbitrators.
- Indian Council of Arbitration, a specialized arbitral body, sponsored by Government of India recognise Chartered Accountants as arbitrators. Clause III (b) of the “broad categories of qualification and experience for empanelment as an arbitrator” indicate that Chartered Accountants having 15 years of professional experience are eligible for empanelment as an arbitrator.

As a Counsel for the client

- A Chartered Accountant normally represents the cases of his clients before various authorities including the Tribunals, Company Law Benches, SEBI, RBI etc. He can specialize in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, commercial disputes, rights of properties, lease transactions etc. and represent his clients in Arbitration proceedings.

As an Expert

- Under Sec 26(1) of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal may appoint expert/s to report on any specific issue to be determined by it.
- A CA can help the arbitral tribunal in the capacity of an expert in matters relating to accounts, commercial transactions, lease transactions etc where he has sufficient domain knowledge

In Other Capacity

- A Chartered Accountant can also advise the client whether a particular case is arbitrable or not. In case of arbitrable disputes, he can provide various services like, advising the clients on selection of arbitrator, initiating the arbitral proceedings, preparation of statement of claims or defence, pleadings etc. He can help in deciding which ADR process the client should choose. After enough experience in arbitration and other ADR methods, he can also play an important role in solving the pending disputes of his clients by identifying those cases that are suitable for resolution through ADR.

Role under Arbitration & Conciliation Act, 1996

- Drafting of Arbitration Agreement
- Representing either of the party (plainant/defendant) to the dispute in the arbitral proceedings
- Assisting Arbitrator in drafting arbitral award
- Assisting both parties to go to Court of Law
- Assisting in preparing submissions to arbitrator
- Member of Arbitral Tribunal
- Assisting Trade and Industry associations in setting up Alternate Dispute Redressal (ADR) mechanism.
- Acting as arbitrator where required. In some legislations, redressal of dispute or particular kind of disputes are mandatorily to be resolved through Arbitration.

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- Acting as arbitrator in Micro and Small Enterprises Facilitation Council u/s 18 of the Micro, Small and Medium Enterprises Development Act, 2006.
- In Clause 14 of First Schedule to the Limited Liability Partnership Act 2008 - All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.
- Assisting Indian Judiciary u/s section 89 of Code of Civil Procedure 1908, where there is possibility of settling of dispute through arbitration
- Acting as Arbitrator in different countries

Role in International Commercial Arbitration (ICA)

- To help clients in the process of Selecting an Arbitration Institution.
- Issues to consider at the time of selection of an Arbitration Institution include:
 - History of the institution's administration of international arbitrations.
 - Experience in handling disputes
 - Selection of Arbitrators
 - Procedures adopted by the Institution
 - Cost of the Institution
 - Services of the Institutions Staff

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- Act as arbitrator for international commercial disputes
- Determining the procedural law to be applied
- Draft commercial trade agreements in consonance with the principles of Alternative Dispute Resolution
- Draft Arbitration clauses in international contracts.
- Standard Arbitration Clauses are of the Following Types:
 - a. ICC Arbitration Clause
 - b. AAA Arbitration Clause
 - c. London Court Arbitration Clause
 - d. Stockholm Chamber Arbitration Clause
 - e. Ad Hoc Arbitration Clause

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- Drafting of a proper arbitration agreement considering the arbitration rules promulgated by various international institutions
- Parties may either develop their own rules or select established arbitration rules to govern the arbitration. Parties may use the rules of an arbitration institution without submitting the dispute to that institution.

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- Unless parties select an arbitration institution that requires use of its own rules, parties may use the rules of some major International Institutions.

Major International Arbitration Rules are:

- a. UNCITRAL Arbitration Rules
- b. AAA Arbitration Rules
- c. ICC Arbitration Rules
- d. London Court Arbitration Rules

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- Where the parties select the arbitration format and structure without using an arbitration institution (Ad Hoc Arbitration) - CA should ensure:
 - Parties specify in the arbitration clause all aspects of the arbitration, including applicable law, rules under which the arbitration will be carried out, the number of arbitrators, the method for selecting the arbitrator(s), the language in which the arbitration will be conducted and the place of arbitration.

Dispute Resolution

- The Oxford Dictionary defines the term ‘Dispute’ as an argument or a disagreement between two people, groups or countries.
- A dispute must be resolved. Unresolved disputes in business hinder the smooth flow and future growth not only of domestic trade but also of international trade.
- A dispute is normally resolved by way of
 - Litigation; or
 - Alternative Dispute Resolution (ADR) mechanism.

Litigation

- In litigation a dispute is referred to a court of Law.
- Litigation is expensive, time consuming and full of complexities.
- Besides, the constant rise in the costs of litigation coupled with time delays continues to plague the litigants.

Alternate Dispute Resolution (ADR)

- Alternate or Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom.
- ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation.

Forms of ADR

- **Negotiation** - where interested parties resolve disputes, agree upon courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes which serve their mutual interests.
- **Mediation** - where a third party attempts to arrange a settlement between the two sides.
- **Conciliation** - the disputing parties resolve their disputes with the help of one or more conciliators. The settlement agreement reached by the parties and authenticated by the conciliator is binding upon the parties
- **Arbitration** - disagreeing parties agree to be bound by the decision of an independent third party

The Code of Civil Procedure, 1908

- The legislature by the Code of Civil Procedure (Amendment) Act, 1999, amended section 89 of the CPC with effect from 1.7.2002 to promote alternative methods of dispute resolution.
- Section 89(1) of the Code of Civil Procedure (Amendment) Act, 1999- Settlement of disputes outside the court –
Where it appears to the court that there exist elements of a settlement which maybe acceptable to the parties, the court shall formulate the terms of settlement and give it to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for —

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- 1) Arbitration
- 2) Conciliation
- 3) Judicial settlement including settlement through Lok Adalat or
- 4) Mediation

Where a dispute has been referred

- For arbitration or conciliation - the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provision of that Act;
- To Lok Adalat - the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provision of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

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- For Judicial settlement - the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
- For Mediation - the court shall effect a compromise between the parties and shall follow such procedure as maybe prescribed.

Arbitration

- Arbitration is a process of ADR in which a neutral third party (called the arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. It is the means by which parties to a dispute get the same settled through the intervention of a third person, but without having recourse to court of law.
- Section 2(1)(a) of the Arbitration and Conciliation Act, 1996 defines "arbitration" as - means any arbitration whether or not administered by permanent arbitral institution;

International Commercial Arbitration

- International Commercial Arbitration is one of the several forms of ADR for International Commercial Agreements.
- International Arbitration in the context of India is arbitration where at least one of the parties is an individual national of or habitually resident in a country other than India or a body corporate incorporated outside India or a company or an Association or a Body of Individuals whose central management and control is exercised from out of India or by a Government of a Foreign Country.

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- Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 Act, defines “International commercial arbitration” as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-
 - (i) An individual who is a national of, or habitually resident in, any country other than India; or
 - (ii) A body corporate which is incorporated in any country other than India; or
 - (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
 - (iv). The Government of a foreign country;

Why Arbitration?

- " I realised that the true function of a lawyer was to unite parties... A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul.“ – *Mahatma Gandhi*
- "Discourage litigation. Persuade your neighbours to compromise whenever you can . . . the nominal winner is often a real loser in fees, in expenses, and waste of time." - *Abraham Lincoln*
- “Our litigation system is too costly, too painful, too destructive, too inefficient for a truly civilised people.” - *Chief Justice Warren Burger of US Supreme Court*

How does Arbitration Work

- Arbitration procedures are very similar to court. The only difference being that there are no hurdles of the strict rules of procedure or law of evidence, yet legally binding. After the claim is filed and the opposite side responds; the parties exchange information relevant to the case; the arbitrator hears both sides, studies the evidence, and decides the case.
- Arbitration often is contractual: two parties agree to use arbitration to resolve a dispute. The parties agree on what basis they want the arbitrator to decide the case.

What can be referred to Arbitration

- Generally speaking, all disputes of a civil nature or quasi-civil nature, which can be decided by a civil court, can be referred to arbitration.
- It is necessary that there is a defined legal relationship between persons, companies, association of persons, body of individuals etc. created or permitted by law, before a reference can be made to arbitration.
- However, the relationship may not be a contractual one. A dispute may arise out of quasi contracts; .e.g., the division of family property. The same may be validly referred to Arbitration.

What cannot be referred to Arbitration

- As per general practice, matters involving moral questions or questions of public law cannot be resolved by arbitration.
- For instance, the following matters are not referred to arbitration:
 - Matrimonial matters, like divorce or maintenance;
 - Insolvency matters, like declaring a person as an insolvent;
 - Criminal offences;
 - Dissolution or winding up of a company.

However, the above is not an exhaustive list.

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- Section 2(3) of the Arbitration and Conciliation Act 1996 provides that: — This part shall not affect another law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.
- Thus if a matter is governed by any other law which excludes reference to Arbitration, this Act will not apply. Since in those cases, the law has given precise jurisdiction to specified courts or tribunals only and those cases cannot be decided through the mechanism of Arbitration

Sources of Arbitration Law

- States regulate arbitration through a variety of laws. The main body of law applicable to arbitration is normally contained either in the national Private International Law Act (as is the case in Switzerland) or in a separate law on arbitration (as is the case in England). In addition to this, a number of national procedural laws may also contain provisions relating to arbitration.

International Instruments on Arbitration Law

- By far the most important international instrument on arbitration law is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.
- Some other relevant international instruments are:
 - The Geneva Protocol of 1923
 - The Geneva Convention of 1927
 - The European Convention of 1961
 - The Washington Convention of 1965 (governing settlement of international investment disputes)
 - The UNCITRAL Model Law (providing a model for a national law of arbitration)
 - The UNCITRAL Model Rules (providing a set of rules for an ad hoc arbitration)

United Nations Commission on International Trade Law (UNCITRAL)

- UNCITRAL was established by The General Assembly 1966 (Resolution 2205(XXI) of 17 December 1966) as a subsidiary body of The General Assembly of the United Nations.
- It was established with the purpose of removing obstacles in the flow of International Trade.
- In regard to its Mandate, UNCITRAL has prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on International Trade.
- At present, India is a member of UNCITRAL and its membership expires in 2016

Law regulating Arbitration in India

- The statutory provisions on arbitration are contained in the Arbitration and Conciliation Act, 1996
- The Arbitration and Conciliation Act, 1996 came into force with effect from 25th January 1996. The Act of 1996 was enacted to update the Law of Arbitration in India on the lines of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

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- Before the enactment of the Arbitration and Conciliation Act 1996, statutory provisions on arbitration were contained in three different enactments:
 - the Arbitration Act, 1940,
 - the Arbitration (Protocol & Convention) Act, 1937; and
 - the Foreign Awards (Recognition & Enforcement) Act, 1961.
 - Domestic arbitrations were conducted under the 1940 Act while the other two acts dealt with foreign awards.

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- The Arbitration and Conciliation Act, 1996 has repealed these three Acts and consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards on the basis of the Model Law on International Commercial Arbitration adopted by the United Nations Commissions on International Trade Law.

The Arbitration and Conciliation Act, 1996

- The 1996 Act contains 86 sections besides the preamble and three Schedules.
- The Act is divided into four parts.
 - Part I - contains general provisions on arbitration.
 - Part II - deals with enforcement of certain foreign awards.
 - Part III - deals with conciliation and.
 - Part IV - contains some supplementary provisions.
- The three schedules reproduce the texts of Geneva Convention on the execution of Foreign Arbitral Awards, 1927, the Geneva Protocol on Arbitration Clause, 1923 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Types of Arbitration

- Ad hoc Arbitration - An arbitration proceeding conducted without recourse to an institution is commonly known as “Ad hoc Arbitration”. It may be: —
 - Domestic Arbitration
 - International Arbitration
 - Foreign Arbitration
- Institutional Arbitration - An institutional arbitration is one in which a specialized institution intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and only the rules of the institution apply.

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- There are number of national and international organisations set up with the main object of settling commercial disputes by way of Arbitration and other Alternative Dispute Resolution mechanism. These organisations lay down rules for the conduct of arbitration. These rules, however, cannot override the Act. These organisations handle the arbitration cases of the parties and provide valuable services like administrative assistance, consultancy and recommending names of arbitrators from the panel maintained by them

Arbitration Agreement

- As per section 2(b), an “Arbitration agreement” means an agreement referred to in section 7 of the Act
- An Arbitration Agreement is the very foundation on which the whole arbitration procedure rests. If there is no valid Arbitration Agreement, there can’t be a valid arbitration.
- An Arbitration Agreement need not be in a particular form. What is important is that there should be an intention of the parties to refer the dispute to Arbitration.
- An Arbitration Agreement maybe in the form of an arbitration clause in a contract or in the form of a separate agreement.
- An Arbitration Agreement shall be in writing.

Arbitration Agreement – A Contract

- An Arbitration Agreement is a contract and it must satisfy all the essential elements of a contract.
- As per the Contract Act, 1872, an agreement between two parties which is enforceable by law is a contract. Section 11 of the Contract Act provides that all agreements are contract if they are:—
 - made by the “Free Consent” of parties competent to contract
 - for a Lawful Consideration and with Lawful objects, and
 - are not expressly declared to be void.

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- Free Consent: Means consent not caused by coercion, undue influence, fraud, misrepresentation or mistake.
- Competent to contract: Every person is competent to contract who is of the age of majority and of sound mind and not disqualified from contracting by any law.
- Lawful consideration: It should not defeat the provision of any law, and lawful objects: involve injury to other person or property, be immoral or opposed to public policy.

Arbitral Tribunal

- As per Section 2(1)(d) - arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Failing the determination the arbitral tribunal shall consist of a sole arbitrator
- A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

Duties and Responsibilities of an Arbitrator

- Any person can be appointed as an arbitrator. No qualifications are prescribed. It is fundamental that an arbitrator act fairly. The Arbitration Act requires the arbitrator to be impartial and independent, and adhere to the rules of natural justice during the procedure and in making the award. It is important for the person appointed to have a good knowledge of the law and practice of arbitration.

Arbitral Award

- The document that gives and explains the decision(s) of an arbitrator is called an award.
- An award is a decision of the arbitrators in writing duly signed by them.
- An award is binding on both parties.
- An arbitrator has authority to issue interim, partial and final awards.
- As per section 2(1)(c) of the Act “Arbitral Award” includes an interim award.
- Having issued a final award, the arbitrator has no further duty or authority upon the arbitration, except for the right to correct any minor slips.

Proposed Amendments to the Arbitration and Conciliation Act 1996

- In the year 2001, the Law Commission of India undertook a comprehensive review of the working of the Arbitration and Conciliation Act, 1996 and recommended many amendments to the Act in its 176th Report submitted to the Government.
- The Government after considering the recommendations of the Report and after consulting the State Governments and certain institutions, decided to accept almost all the recommendations.
- Accordingly the Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha on 22nd December, 2003.

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- In July 2004, Government constituted a Committee under the Chairmanship of Justice Dr.B.P.Saraf to make in-depth study of the implications of the recommendations of the Law Commission made in its 176th Report and all aspects relating to the Arbitration and Conciliation (Amendment) Bill, 2003.
- The Bill was then referred to the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee after taking oral evidence of eminent advocates and the representatives from trade and industry, Public Sector Undertakings, representatives of this Department, submitted its report to the Houses of Parliament on 4th August, 2005.

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- In view of the large number of amendments recommended by the Committee and because many provisions of the Bill were contentious, the said Bill was withdrawn from the Rajya Sabha.
- A fresh legislation may be brought after considering the recommendations of the Committee.

Other Updates

- Amendments to the Arbitration & Conciliation Act, 1996 – A Consultation Paper has been published by the Ministry of Law & Justice, Government of India on 8th April 2010.
- The Hon’ble Supreme Court of India has held in “Union of India v. Singh Builders Syndicate” (2009), that it is necessary to find an urgent solution for the problem to save arbitration from the arbitration cost and opined that Institutional arbitration has provided a solution, as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held

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- The Hon'ble Supreme Court of India has in the landmark decision "Salem Advocate Bar Association, Tamil Nadu v. Union of India" (2005) directed that all courts shall direct parties to alternative dispute resolution methods like arbitration, conciliation, judicial settlement or mediation. The draft "Civil Procedure Alternative Dispute Resolution and Mediation Rules 2003" was also considered by the Supreme Court, for enactment by respective High Courts. Direction was issued to all High Courts, Central Government and State Governments for expeditious follow-up action.

Related Websites

- Indian Council of arbitration:
<http://www.ficci.com/icanet/>
- Indian Institute of Arbitration & Mediation:
<http://www.arbitrationindia.com/>
- The International Centre for Alternative Disputes Resolution:
<http://www.icadr.org/>
- Permanent Court of Arbitration:
<http://www.pca-cpa.org>
- United Nations Commission on International Trade Law:
<http://www.uncitral.org>
- International Chamber of Commerce
<http://www.icc.org>

Key to Effectiveness

- Commitment
 - If you think you can or think you cannot you are probably right-*Henry Ford*
- Create Partnership
 - A single arrow is easily broken but not ten in a bundle – *Japanese proverb*
- Be responsible
 - Believe that every right implies a responsibility; every opportunity , an obligation; every possession, a duty
- Decide
 - A man with feet in two boats falls into the river- *Chinese proverb*

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- Be Honest
 - The truth is inconvertible ;Panic may resent it: ignorance may deride it; malice may distort it; but there it is - *Sir Winston Churchill*
- Express Support
 - One who never asks either knows everything or nothing - *Malcolm Forbes*
- Take risks
 - Life is either a daring adventure or nothing at all - *Helen Keller*

Questions/ Suggestions/ Comments???



About the Author

- *CA. Rajkumar S Adukia is an eminent business consultant, academician, writer, and speaker. He is the senior partner of Adukia & Associates.*
- *In addition to being a Chartered Accountant, Company Secretary, Cost Accountant, MBA, Dip IFR (UK), Mr. Adukia also holds a Degree in Law and Diploma in Labour Laws and IPR.*
- *Mr. Adukia, a rank holder from Bombay University completed the Chartered Accountancy examination with 1st Rank in Inter CA & 6th Rank in Final CA, and 3rd Rank in Final Cost Accountancy Course in 1983.*
- *He started his practice as a Chartered Accountant on 1st July 1983, in the three decades following which he left no stone unturned, be it academic expertise or professional development.*

About the Author

- *He has been coordinating with various Professional Institutions, Associations, Universities, University Grants Commission and other Educational Institutions.*
- *Authored more than 50 books on a vast range of topics including Internal Audit, Bank Audit, SEZ, CARO, PMLA, Anti-dumping, Income Tax Search, Survey and Seizure, IFRS, LLP, Labour Laws, Real estate, ERM, Inbound and Outbound Investments, Green Audit etc.*
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THANK YOU

