

WELCOME



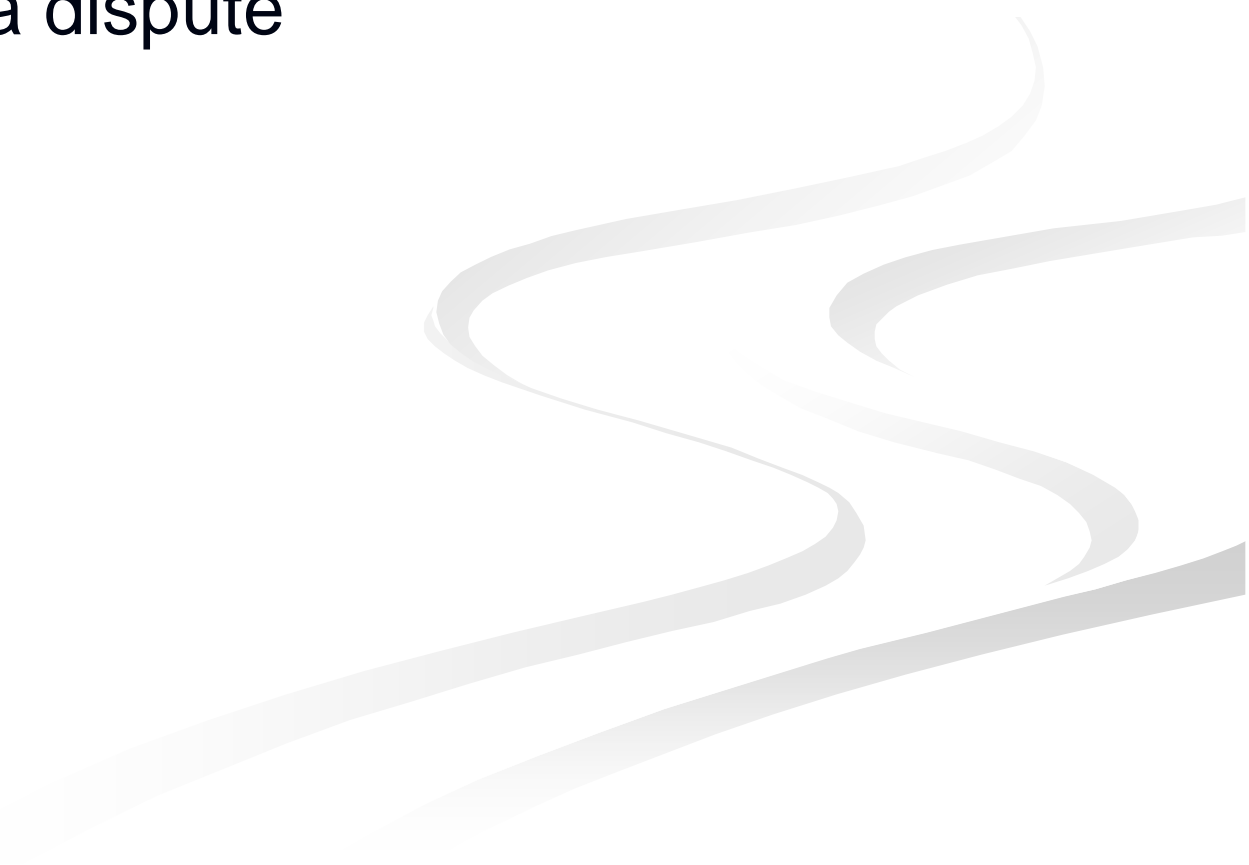
Contract Dispute Resolution



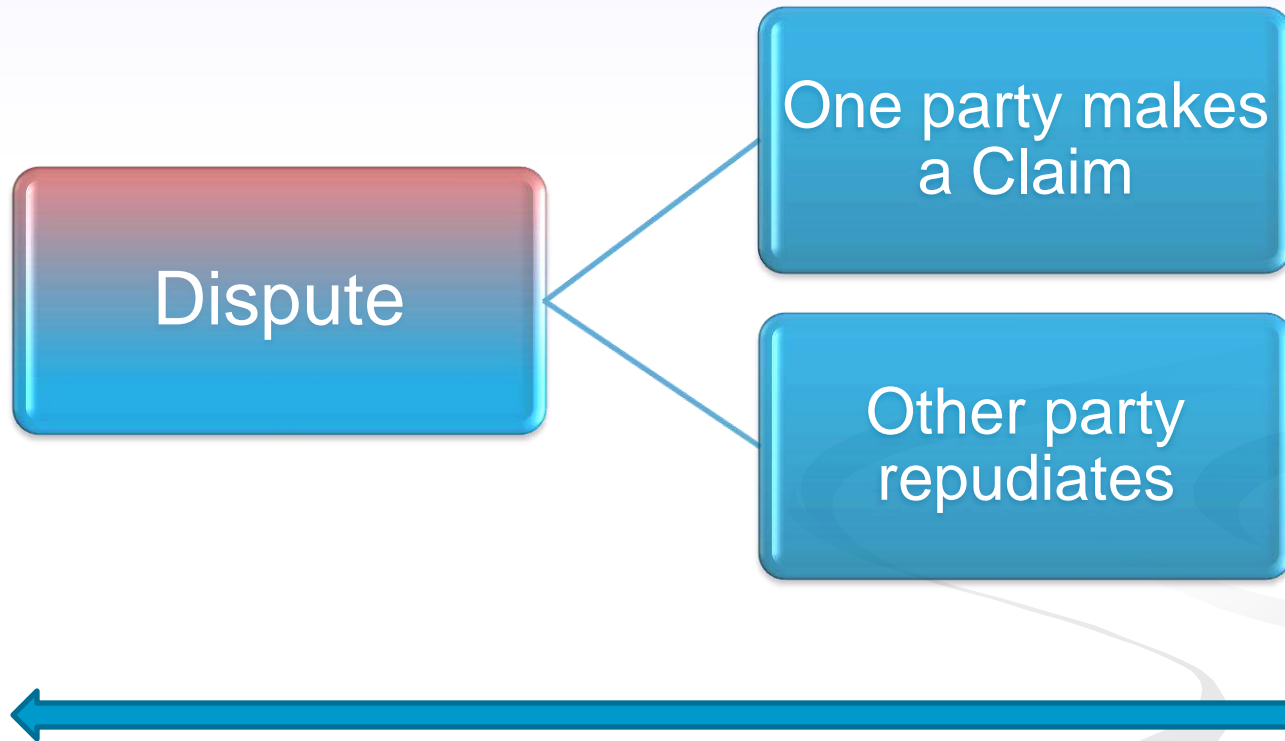
What to expect today

- What is a Dispute
 - Dispute Resolution Mechanism
 - ADR Methods
 - Need for Arbitration
 - Arbitration clause in the contract
 - Amendments to Arbitration Act
 - Court views on amended Arbitration Act
 - Jurisdiction of Court
 - Strategy for successful Arbitration
- 

What is a dispute?

- A dispute mean an assertion of a right (claim) by one party and **repudiation** thereof by another
 - A claim and counter-claim(w/o repudiation) does not constitute a dispute
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How does a dispute arise



Contract Dispute resolution

Strategy for dealing with disputes

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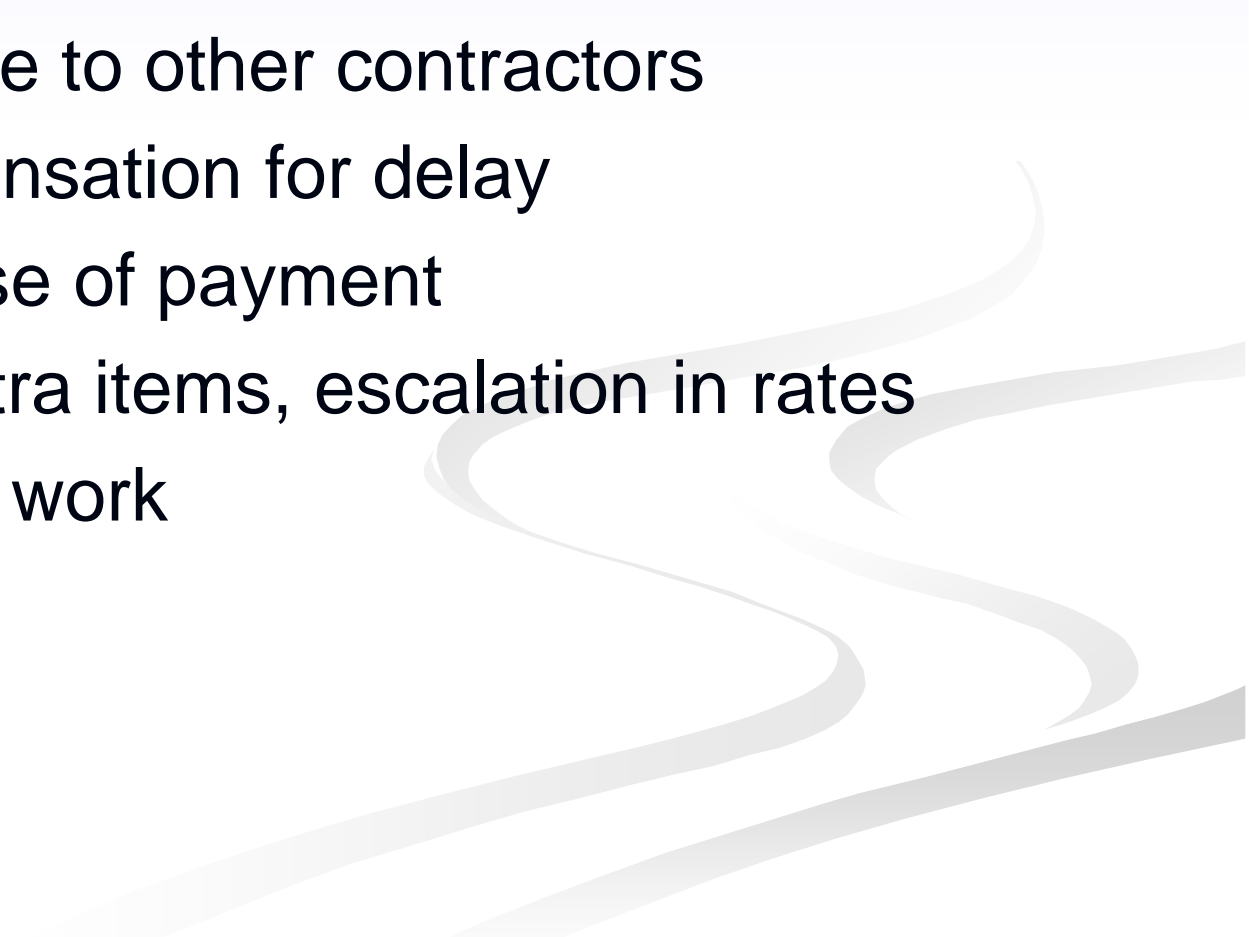
Prevention of disputes

- Drafting of contract
- Contract Mgmt
- DRB

Settlement of disputes

- ADR
- Court

Why do disputes arise?

- Owner unable to hand over site as agreed
 - Incorrect ground data
 - Hindrances due to other contractors
 - Levy of compensation for delay
 - Delay in release of payment
 - Deviations, extra items, escalation in rates
 - Suspension of work
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Prevention of Dispute

- Fair allocation of contract risks
- Unambiguous drafting of key clauses
- Timely action by the parties
- Team approach
- A standing DRB; prevents growth of disputes; Settlement is arrived at during the course of contract execution

What is ADR?

- It's term used to describe a variety of approaches/ processes where the parties arrive at a compromise (resolve disputes) **without litigation** (Court proceedings)
- It may involve cooperation of parties themselves or appointment of a neutral third party who plays the assigned role for resolution of dispute.
- **In a way, the parties appoint their judge**

Methods of ADR

Negotiation

OEC/ ESC/SAC

Mediation

Conciliation

Arbitration

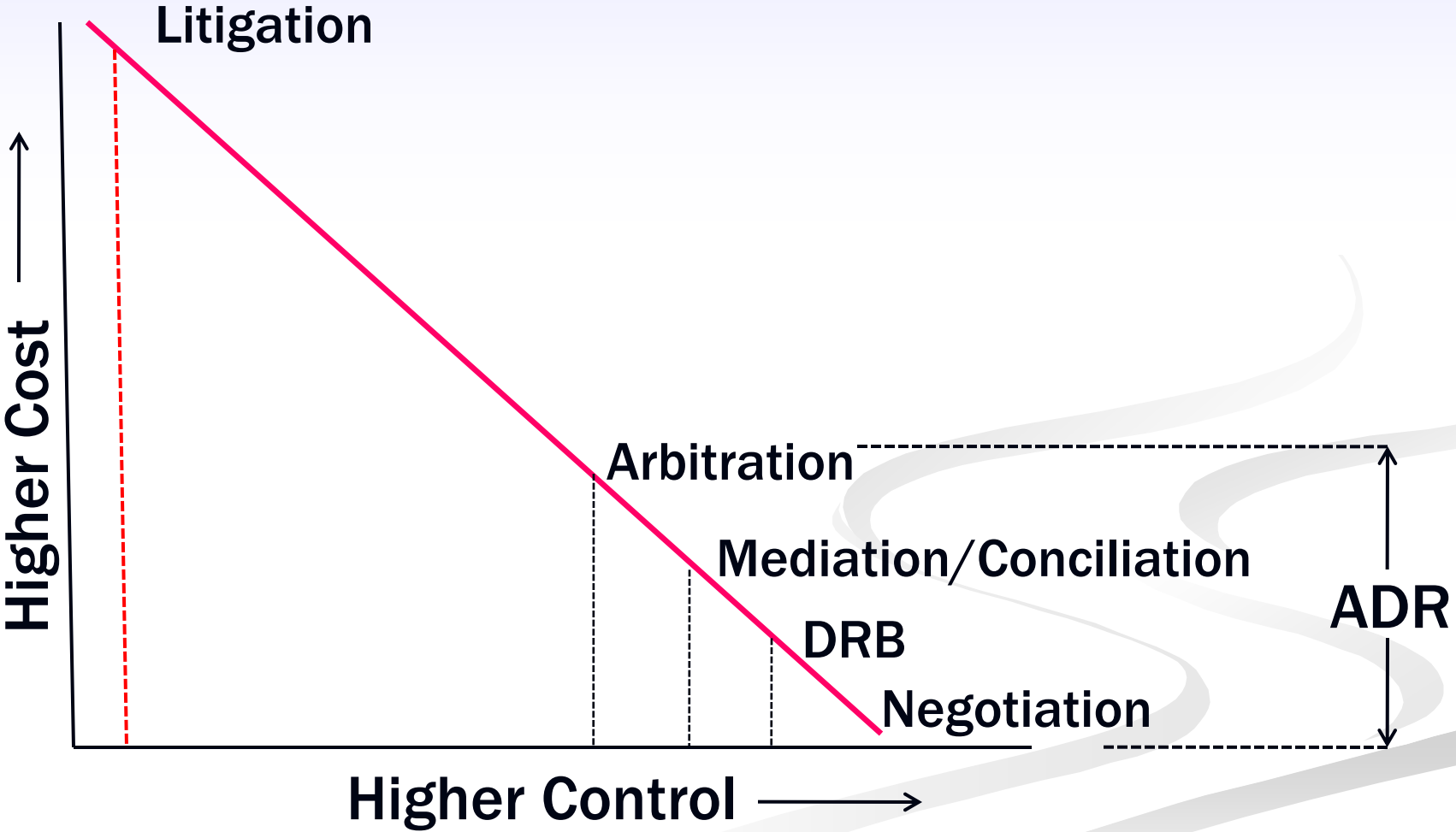
ADR in India- an age old practice

- In India, the '*Panchayat*' deal with contractual, matrimonial, land, and even criminal disputes.
- Art 39 A of Constitution- States to promote justice, make it available to have-nots. '**Lok Adalat**'- People's Court is a step in that direction


Advantages of ADR

- It's convenient, provides flexibility
- **Saves time, energy and expenses**
- Party participation, fosters communication
- **Preserves relationships** (win-win outcome)
- Avoids stress of litigation
- Confidentiality maintained
- **Within the reach of a common man**
- Reduces court congestion

DRS-Cost and Control



Disadvantages of ADR

- No guaranteed resolution (except for Arb)
 - After ADR, expenses may be incurred in litigation
 - Informal, more scope for abuse of power
 - May not be suitable for every dispute
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Preferred mode of dispute resolution

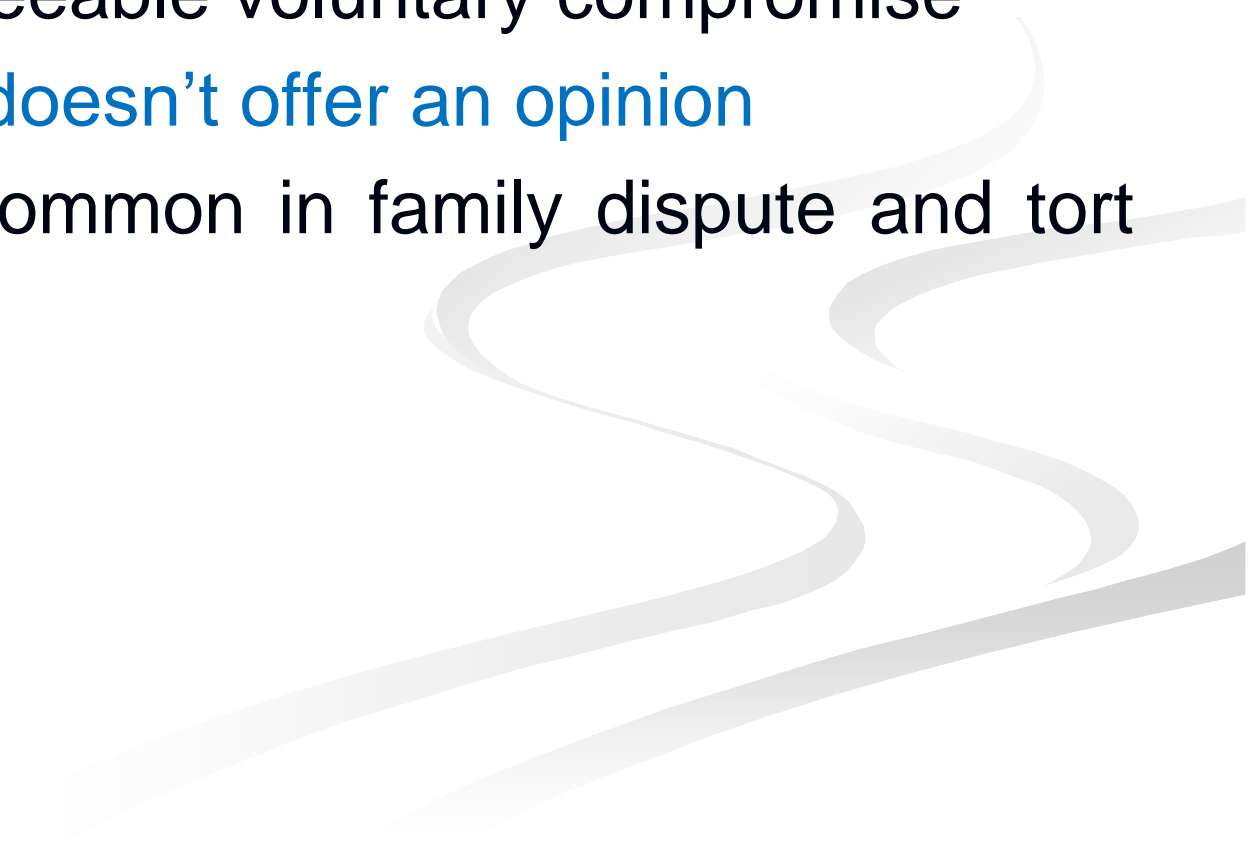
- **Negotiation, Mediation and Conciliation** are preferred as they provide opportunities for decision making by the disputants which paves the way towards a win-win solution, maintains confidentiality and preserves relationship

Win-Win

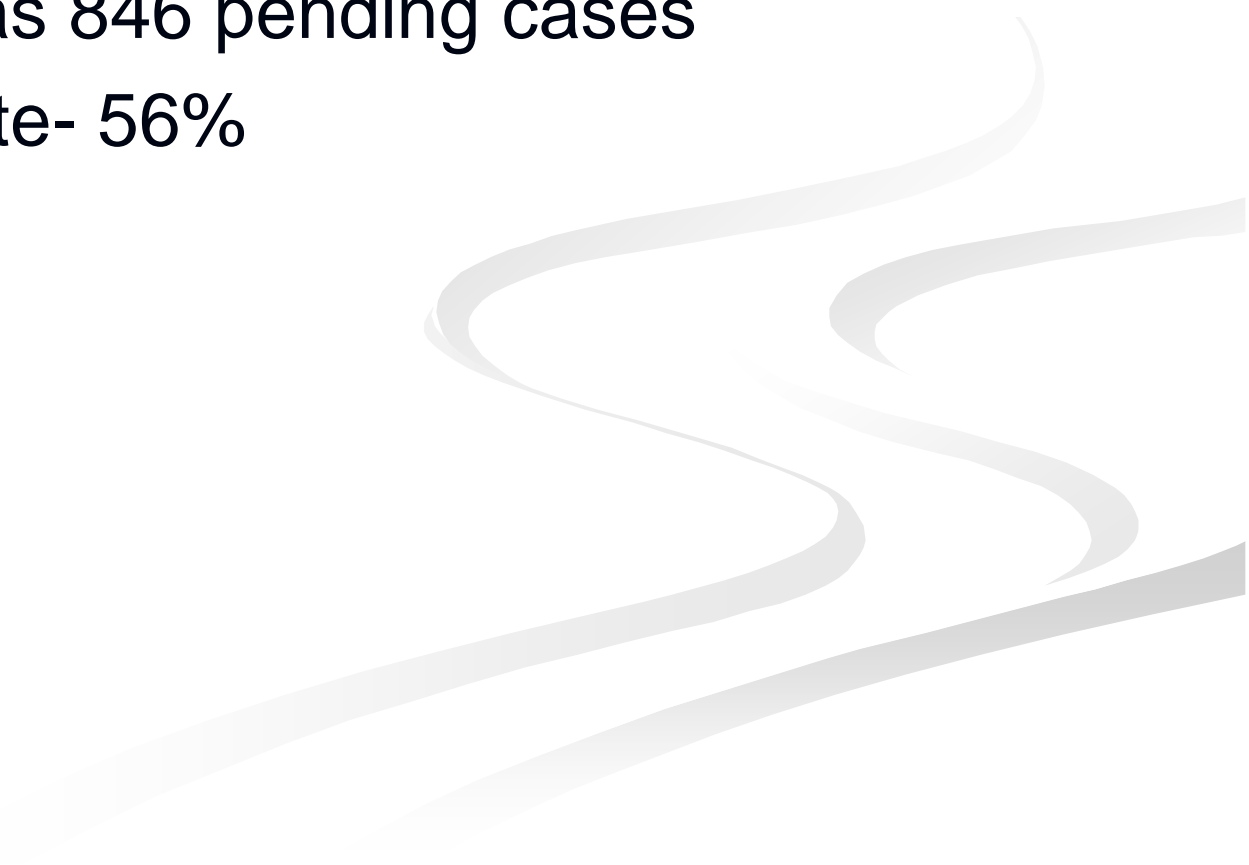


Relationship preserved

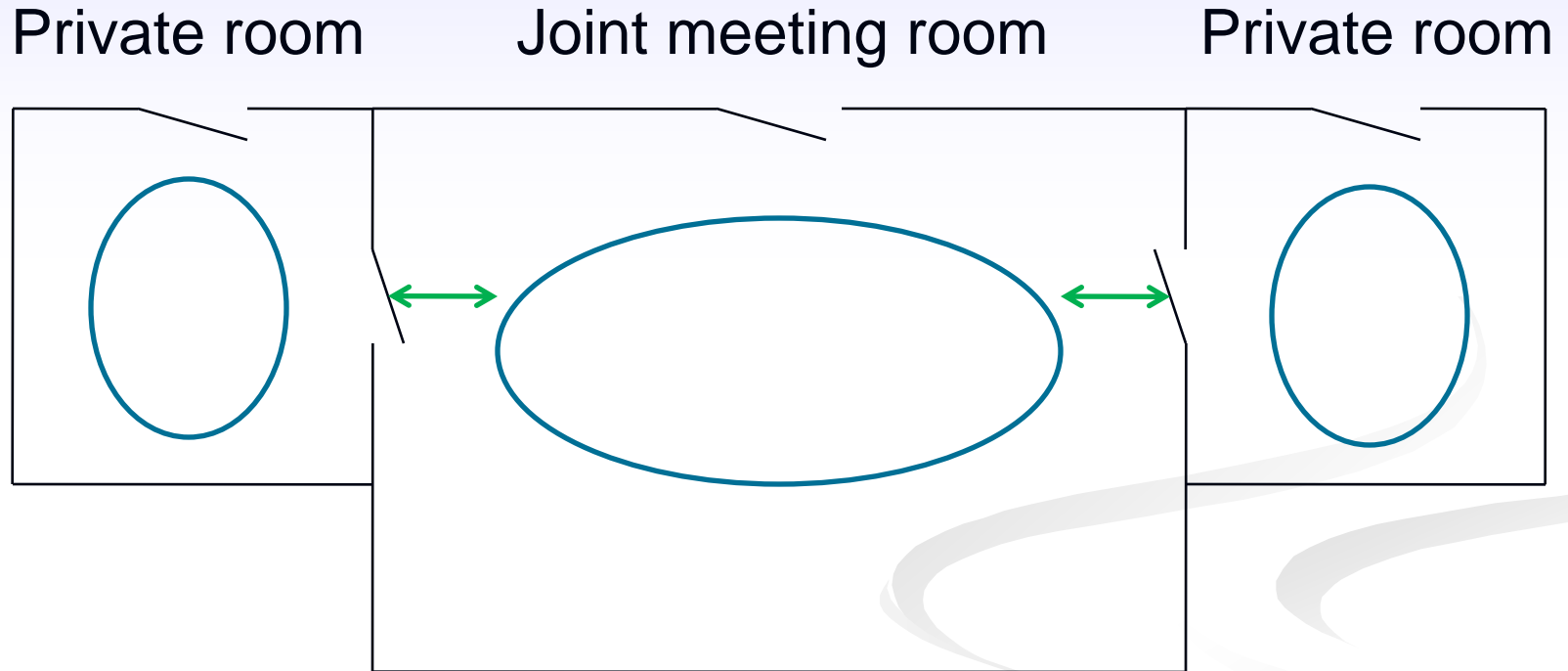
Mediation

- The parties appoint a **neutral third party**
 - The third party takes offers between the parties; provides assistance as a **facilitator** in reaching a mutually agreeable voluntary compromise
 - The mediator **doesn't offer an opinion**
 - Mediation is common in family dispute and tort cases
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On-line Mediation: Samadhan

- “*Samadhan*” started mediation in 2006
 - It started **On-line mediation since June, 2020**
 - It also organises regular training workshops
 - Presently, it has 846 pending cases
 - It's success rate- 56%
- 

The setting for mediation/conciliation



- First, Opening /Joint session followed by private sessions
- In between, there will be more joint sessions
- Final joint session

Six stages of mediation process

Mediator's opening statement

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Disputants' opening statement

Joint discussion

Six stages of mediation process

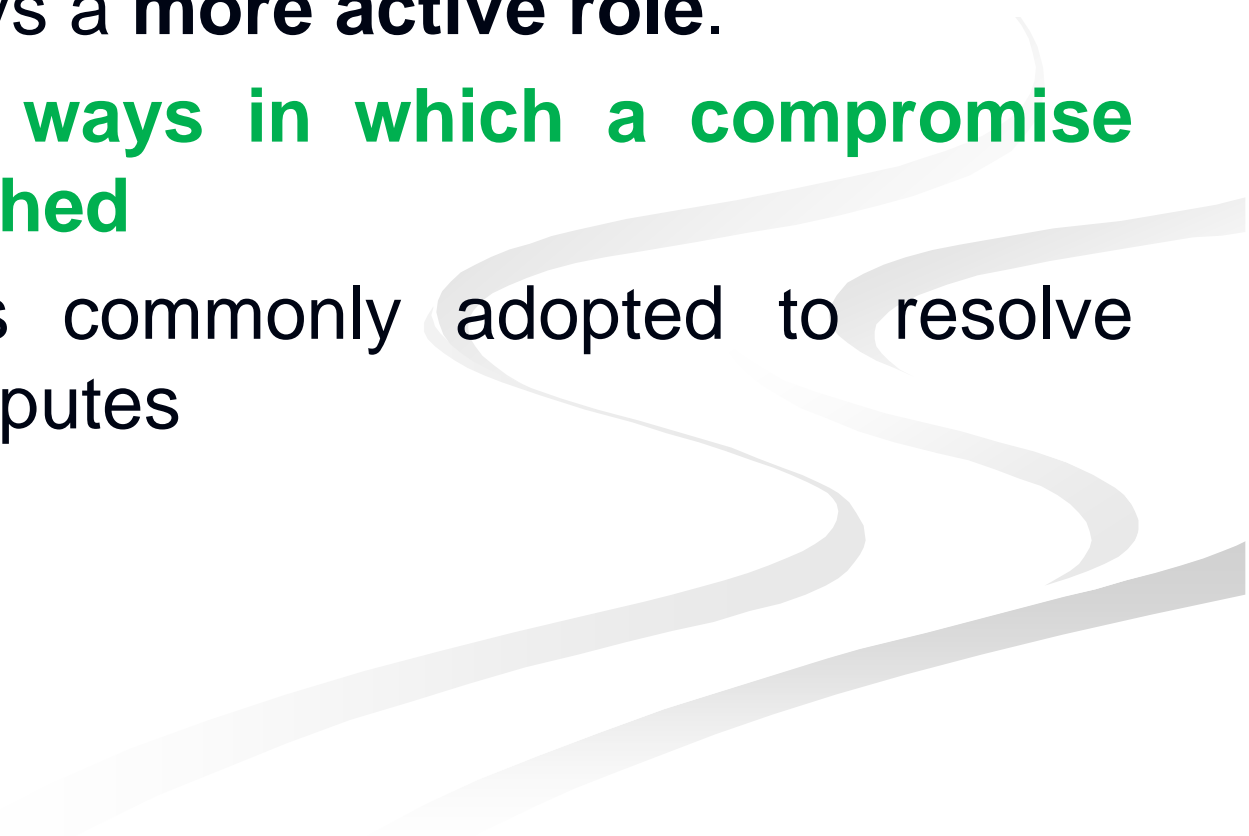
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graph TD; A[Separate meetings] --> B[Joint negotiation]; B --> C[Agreement];
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Separate meetings

Joint negotiation

Agreement


Conciliation

- This is similar to mediation
 - There is a neutral third party who helps the disputants to resolve the dispute. However, the conciliator plays a **more active role**.
 - **He suggests ways in which a compromise could be reached**
 - Conciliation is commonly adopted to resolve contractual disputes
- 

Conciliation proceedings

- Conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account
- The circumstances of the case,
- The wishes the parties may express, including any request by a party that the conciliator hear oral statements and
- The need for a speedy settlement of dispute- S 67(3)

Proposals for settlement of dispute

- Conciliator may, at any stage of conciliation proceedings, make proposals for settlement of disputes. Such proposals need not be in writing and need not be accompanied by a statement of reasons- Sec 67(4)
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Process of mediation/conciliation

- Preliminary communications and preparations
 - Meeting of the parties and mediators/conciliators
 - Presentation by the parties
 - Collection of relevant information/ data
 - Deliberations and negotiations
 - Drafting and signing of agreement
- 


What is Arbitration

- Arbitration is a method of settling civil disputes between two or more parties by reference of the dispute to independent and impartial person(s), called arbitrator(s) instead of litigating the matter in the usual way through courts
- The Arbitrator serves like a **judge** and delivers a binding award. It saves time, energy, expenses and reduces burden on the Courts.

The Four pillars

- Three general principles
 - General duty of the tribunal
 - The general duty of parties
 - The mandatory and semi-mandatory provisions
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The three general principles

- Speedy, inexpensive and fair trial by an impartial tribunal
 - Party autonomy
 - Minimum Court intervention
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Party autonomy

- Party autonomy relates choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to
- It is because of this reason, as a normal practice, the Court will insist on the parties to adhere to the procedure to which they have agreed upon (Para 16 of SC judgment)

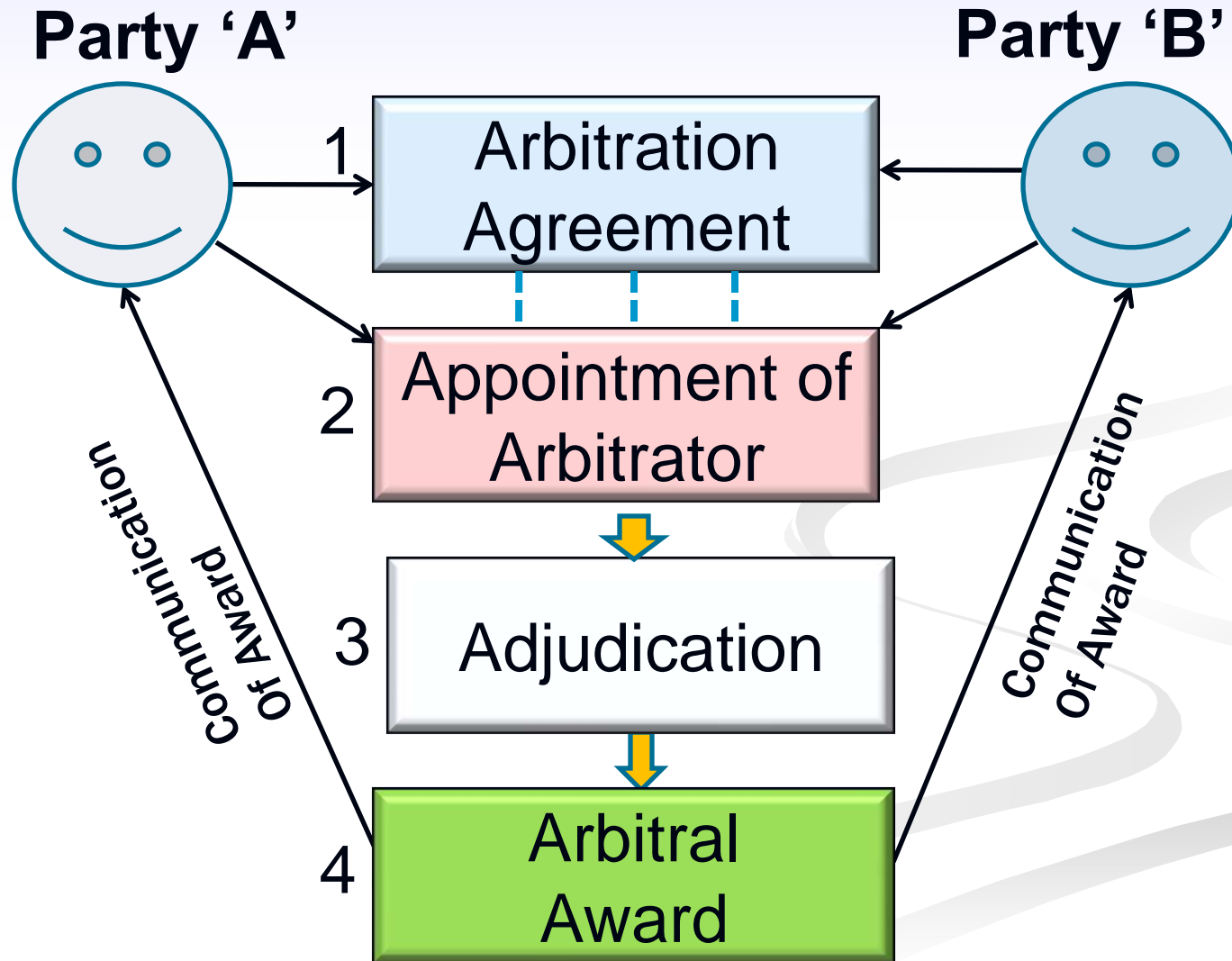
Essentials of Arbitration agreement

- An agreement by the parties to refer disputes, present or future between them in respect of their legal relationship to arbitration.
- **It must be in writing**
- Parties must be *ad idem* (consensus between parties)
- It may be in the form of an arbitration clause in a contract or as a separate agreement

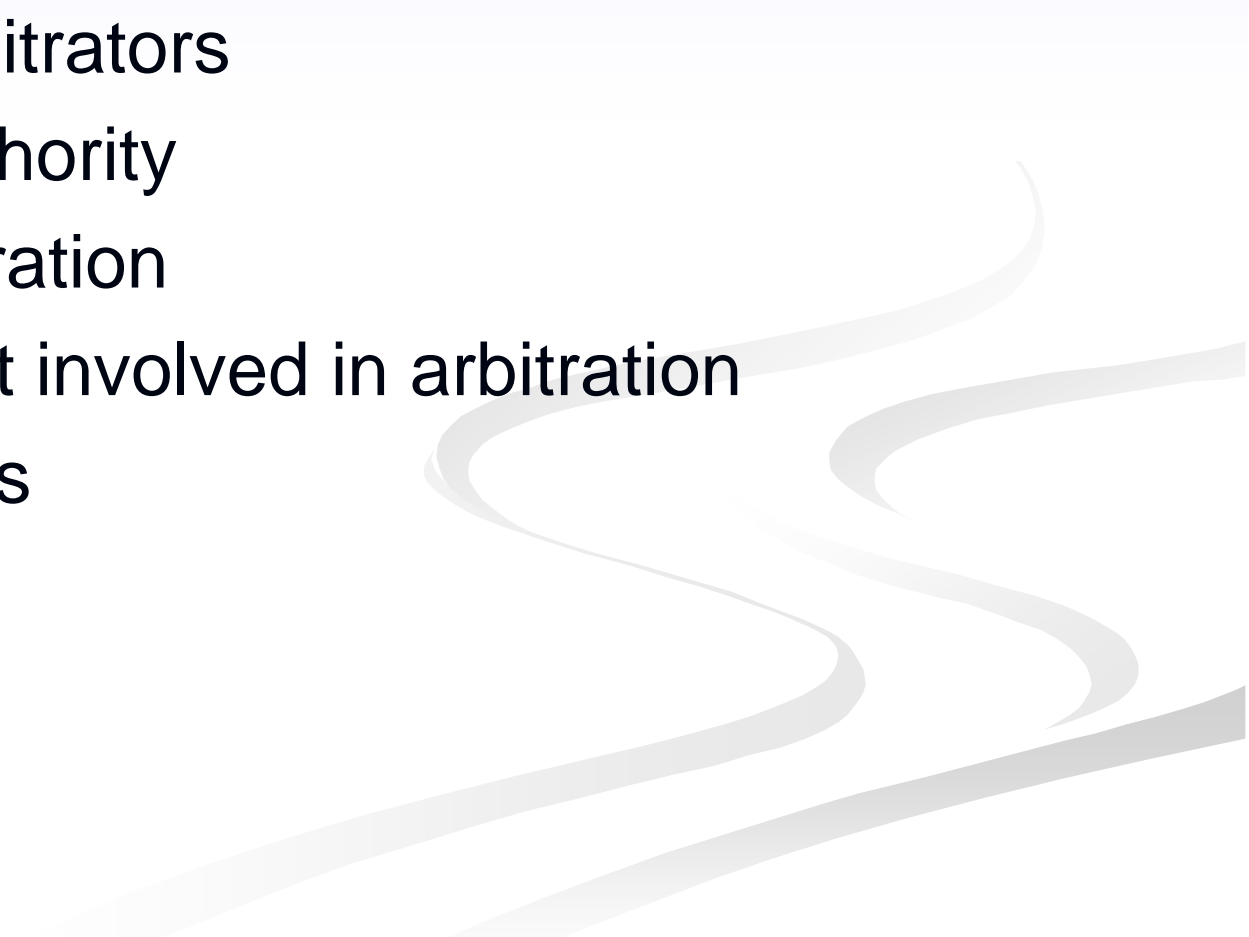
Essentials of Arbitration agreement - SC

- In Bihar State Mineral Development Corpn v Encon Builders- *AIR 2003 SC 3688*, SC laid down the essential elements as follows:
- There must be present or a future dispute
- Intention of parties to settle such dispute
- Parties must agree to be bound by decision of such tribunal
- Parties must be *ad idem* (consensus between parties)

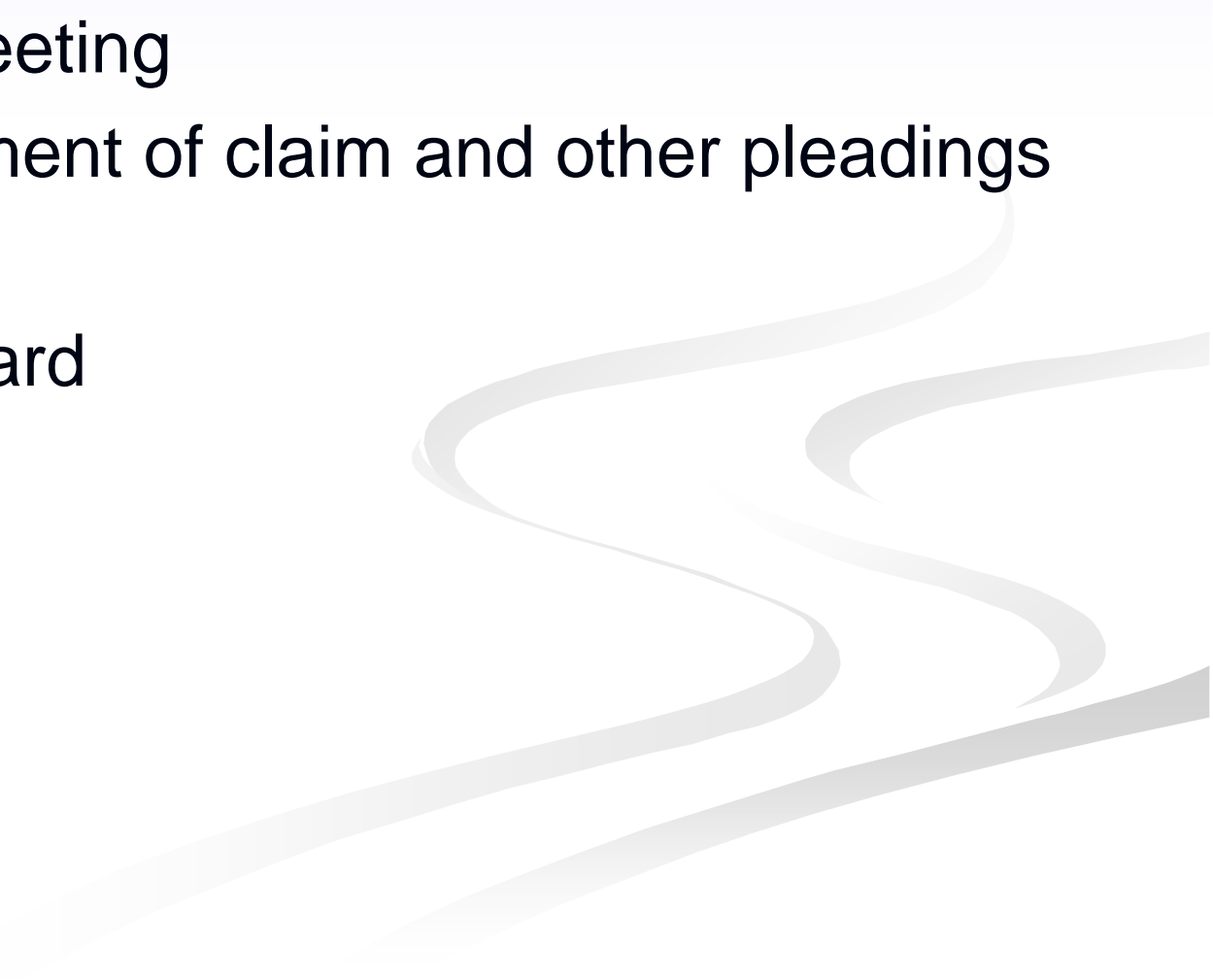
Arbitration process



Arbitration agreement to include...

- Unconditional agreement by the parties to refer contractual disputes to arbitration
 - Number of Arbitrators
 - Appointing authority
 - Venue of arbitration
 - Sharing of cost involved in arbitration
 - Governing laws
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Arbitration process

- Initiating Arbitration
 - Appointment of Arbitrator
 - Preliminary meeting
 - Filing of statement of claim and other pleadings
 - Hearings
 - Passing of award
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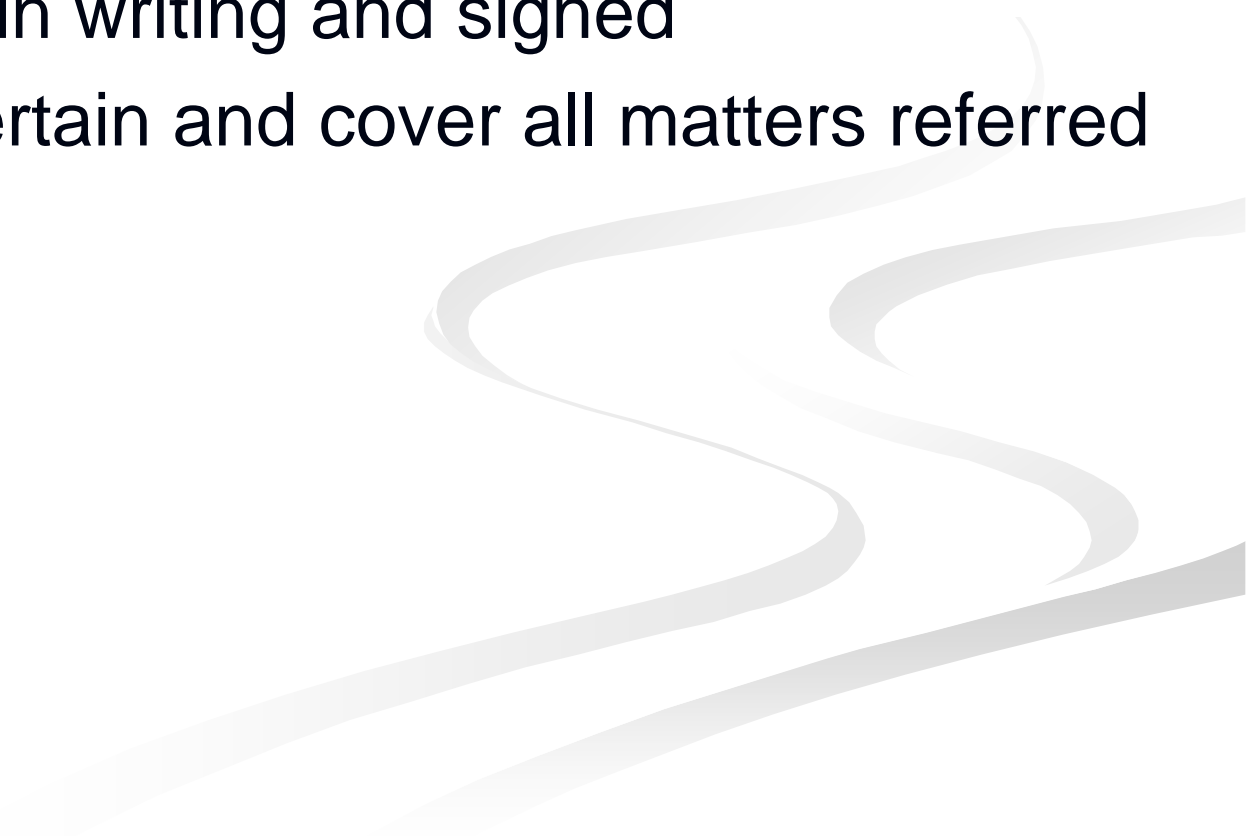
Conducting hearings

- Administer oath to parties and witness appearing
- The Claimant makes an opening statement
- The Claimant calls and examines his witnesses who may be x-examined by the Respondent
- If a witness is x-examined by R, the claimant may re-examine him on any matter raised in x-examination (only on issues of x-examination, **NO** re-examination on other issues)

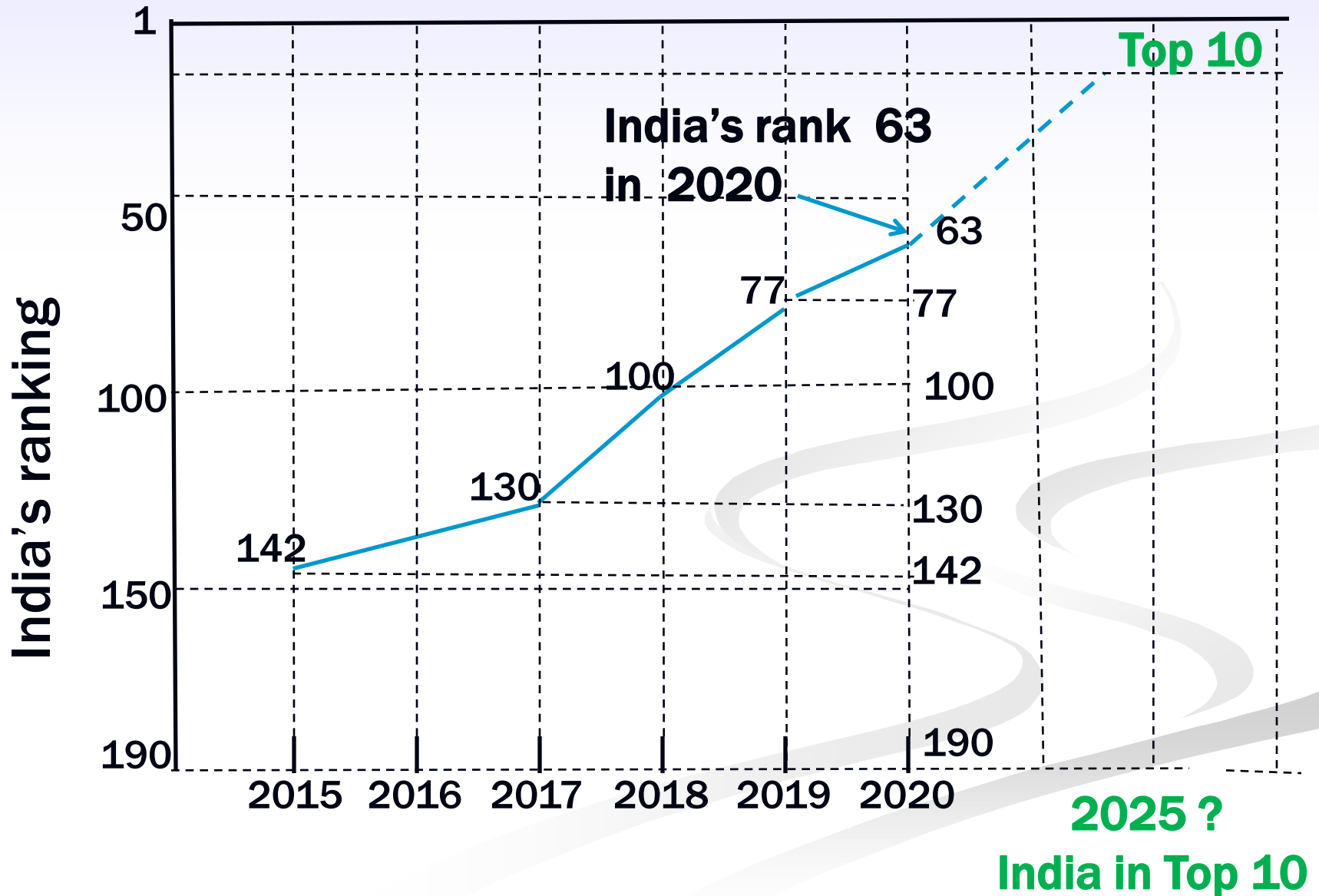
Conducting hearings

- The Respondent opens his case
- The Respondent calls and examines his witnesses who may be x-examined by the C
- If a witness is x-examined by C, the respondent may re-examine him on any matter raised in x-examination (only on issues of x-examination)
- Respondent addresses Arbitrator summing up his whole case
- Finally, the Claimant submits a reply

Arbitration award

- Award to be made within time limit and include:
 - (i) Should be in the direction of arb agreement
 - (ii) Can be reasoned or unreasoned
 - (iii) Should be in writing and signed
 - (iv) Must be certain and cover all matters referred
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Ease of doing business (EODB)



Where India stands

Indicator	2019	2018
Starting business	137	156
Construction permits	52	181
Getting electricity	24	29
Registering property	166	154
Getting credit	22	29
Protecting minority investors	7	4
Paying taxes	121	119
Cross-border trade	80	146
Enforcing contracts	163	164
Resolving insolvency	108	103
Overall rank	77	100

Selection of Arbitrator

- Person having a degree with 10 yrs experience
- Person of high integrity, complete impartiality
- Believes in principles of natural justice and practical approach
- Technical person with domain knowledge
- Should understand legal procedure
- Should not have been convicted of an offence involving moral turpitude or economic offence

Qualification & experience of Arbitrator

2019 Amendment

- Advocate/ CA/ Cost Accountant/ Company Secy with 10 years of practice experience
- Has been an officer of the Indian Legal Service
- Has been an officer with Engg degree having 10 years experience in Govt, Autonomous Body, PSU or at a senior level managerial position in private sector or self employed; or
- Has been an officer having senior level experience of administration in Central Govt, State Govt or having experience of senior level management of a PSU, or Govt Company or a private company of repute

Qualification & experience of Arbitrator

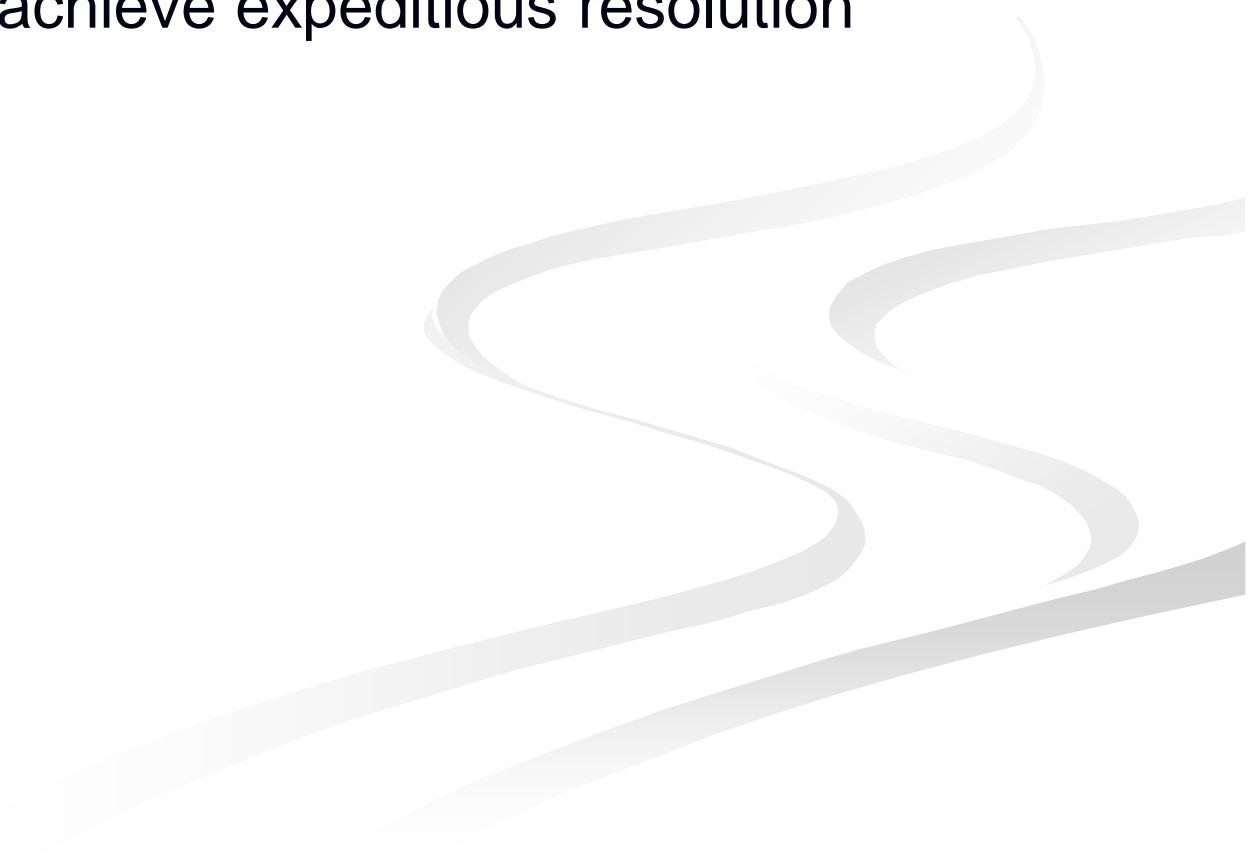
2019 Amendment

- is a person, in any other case, having educational qualification at degree level with 10 years experience in scientific or technical stream in the fields of telecom, information technology, intellectual property rights or other specialised areas in the Govt, Autonomous Body, PSU or at a senior level managerial position in a private sector, as the case may be

Time for award S29A

- 6 months for completion of pleading
- 12 months for proceedings and award
- Upto 6 months extension by parties
- Further extension of time by Court on an application
- Court can remove an arbitrator who caused delay
- Court can impose exemplary costs
- Bonus for quick disposal and penalty for delay
- No time limit for international commercial arbitration

Indian Arbitration and Conciliation Act- S19

- The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872
 - The essence of arbitration is expedition. The above provision has been incorporated to avoid the lengthy trial route and to achieve expeditious resolution
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For quick resolution of disputes

2015 Amendment

- The provision of **fast-track** procedure introduced under section 29B through the 2015 amendment generally dispenses with oral hearing by agreement of the parties and paves the way for expeditious resolution of disputes
- It sets resolution **time-line of 6 months**

Fast-track procedure

2015 Amendment-S 29 B

- Parties at any stage either before or at the time of appointment of arbitral tribunal, may agree in writing to have their dispute resolved by fast-track procedure, whereupon the tribunal shall have to make the award within **6 months**
- The tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without oral hearing.
- “An oral hearing may be held only if **all** the parties make a request **or** if the tribunal consider it necessary to have oral hearing for clarifying certain issues.”


Fast-track procedure

Extension of time

- The parties “may agree that the arbitral tribunal shall consist of a **sole arbitrator** who shall be chosen by the parties.”
- The arbitral tribunal shall make the award in **6 months**
- If the award is not made within 6 months, the said time period can be extended by 6 months by the parties
- Further extension can be given by the Court and the Court is required to give its decision within 60 days

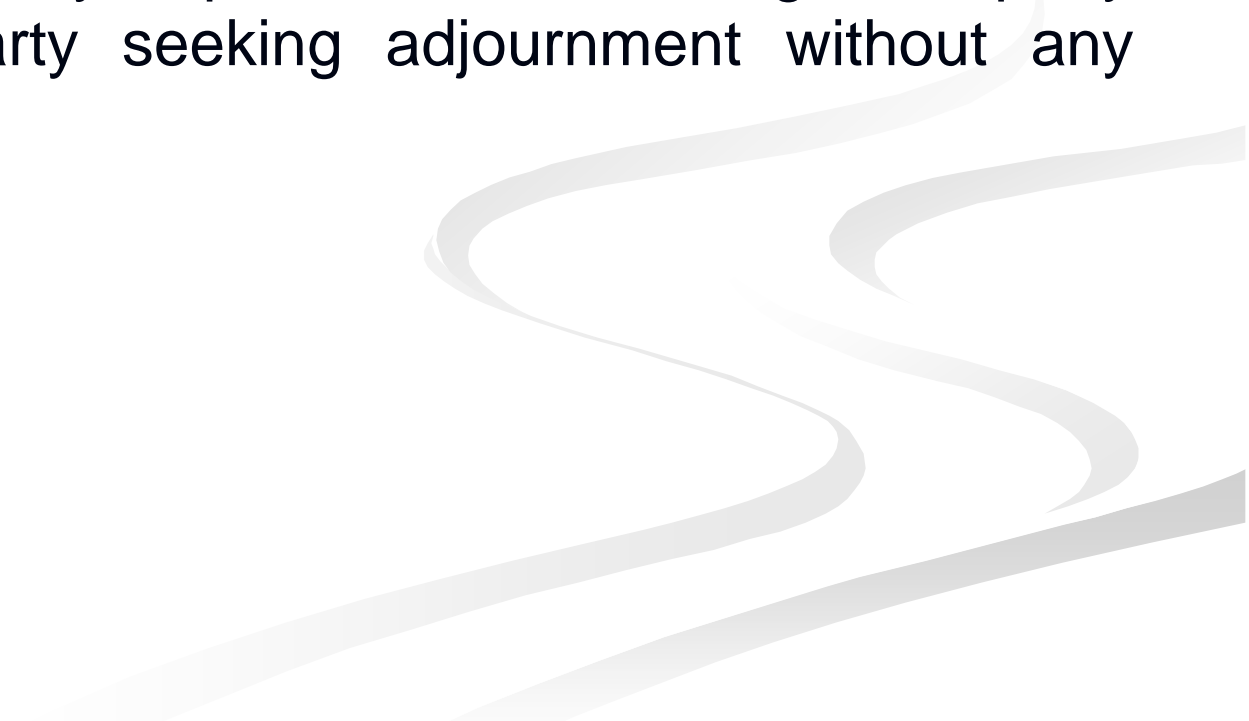
Day-to-day hearing for quick resolution

Inserted in S 24 vide 2015 Amdt

- “Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral arguments on **day-to-day** basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.”
- 

Day-to-day hearing

Introduced in S 24, 2015 Amdt

- “Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral arguments on **day-to-day** basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.”
- 

Act 2015: Fourth schedule

Sum in dispute	Model fees
Upto 5 lakhs	Rs 45000
Above 5 and upto 20 lakhs	Rs 45000 plus 3.5% of claim amount over and above 5 lakhs
Above 20 and upto 1 Cr	Rs 97500 plus 3% of claim amount over and above 20 lakhs
Above 1 Cr and upto 10 Cr	Rs 3,37,500 plus 1% of claim amount over and above 1 Cr
Above 10 Cr and upto 20 Cr	Rs 12,37,500 plus 0.75% of claim amount over and above 10 Cr
Above 20 Cr	Rs 19,87,500 plus 0.5% of claim amount over and above 20 Cr with a ceiling of 30 lakhs

Note- in the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of 25% on the fee payable as per the table set out above

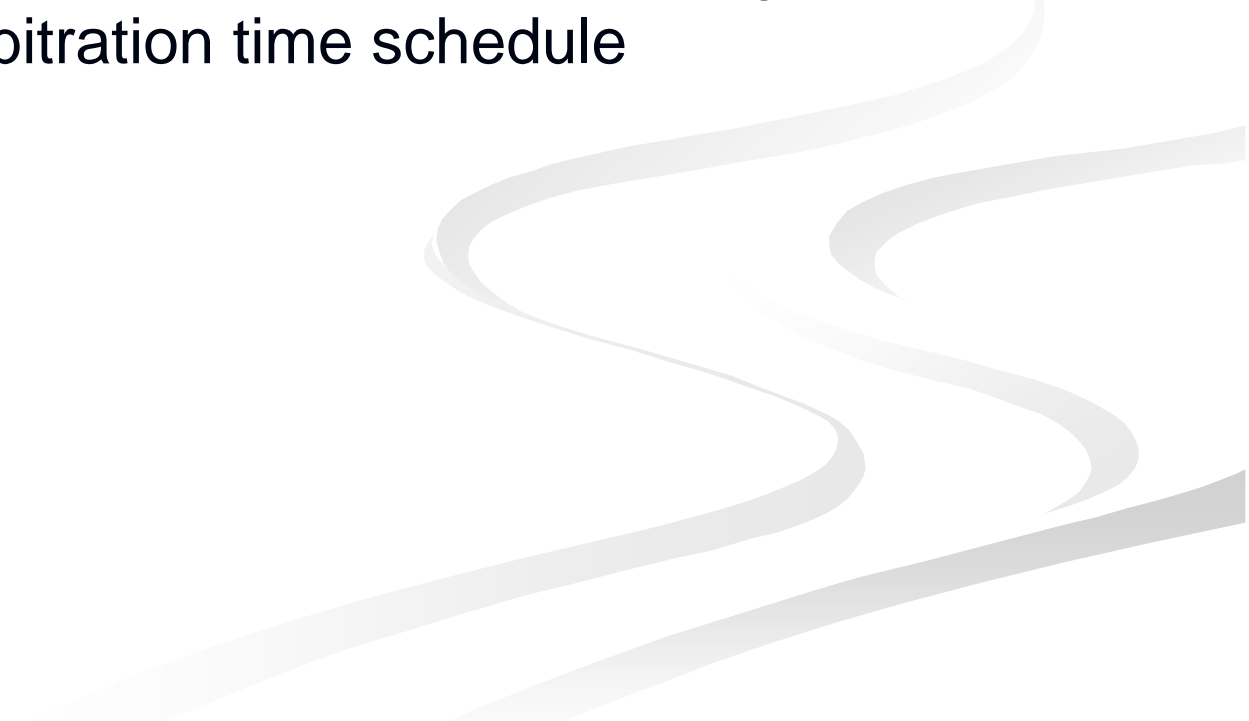
Saving arbitration from **Arbitration Costs** Arbitrators' fees

- In its judgment in *UOI v Singh Builders Syndicate*, S C observed that contrary to legislative intent, arbitration proceedings had become disproportionately expensive and needed to be **“saved from arbitration costs.”**. - *UOI v Singh Builders Syndicate*, (2009) 4 SCC 523
- Consequently, Law Commission recommended a fee structure which was incorporated in the 2015 amendment. This was further streamlined in the 2019 amendment (Arbitral institution shall determine the fees subject to rates specified in Fourth Schedule)

Grounds for setting aside the award- s34

- **Parties:** Incapacity of party
- **Arbitration Agreement:** Invalidity of Arbitration Agreement
- **Dispute:** Disputes not arbitral under the law
- **Arbitral Tribunal:** Improper constitution of Arbitral Tribunal
- **Justice:** Violation of principles of Natural Justice
- **Award:** Beyond the scope of submission, violates pub policy
- **Time:** 3 month, extension of 30 days on sufficient grounds

2019 Amendments- Welcome features

- Constitution of Arbitration Council of India (**Council**)
 - Limiting the time for completion of pleading to **6 months**
 - **Delegation of power** to designated arbitral institutions to appoint arbitrators within 30 days
 - **Continuation of arbitrator's mandate** pending application for extension of arbitration time schedule
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2019 Amendments- Welcome features

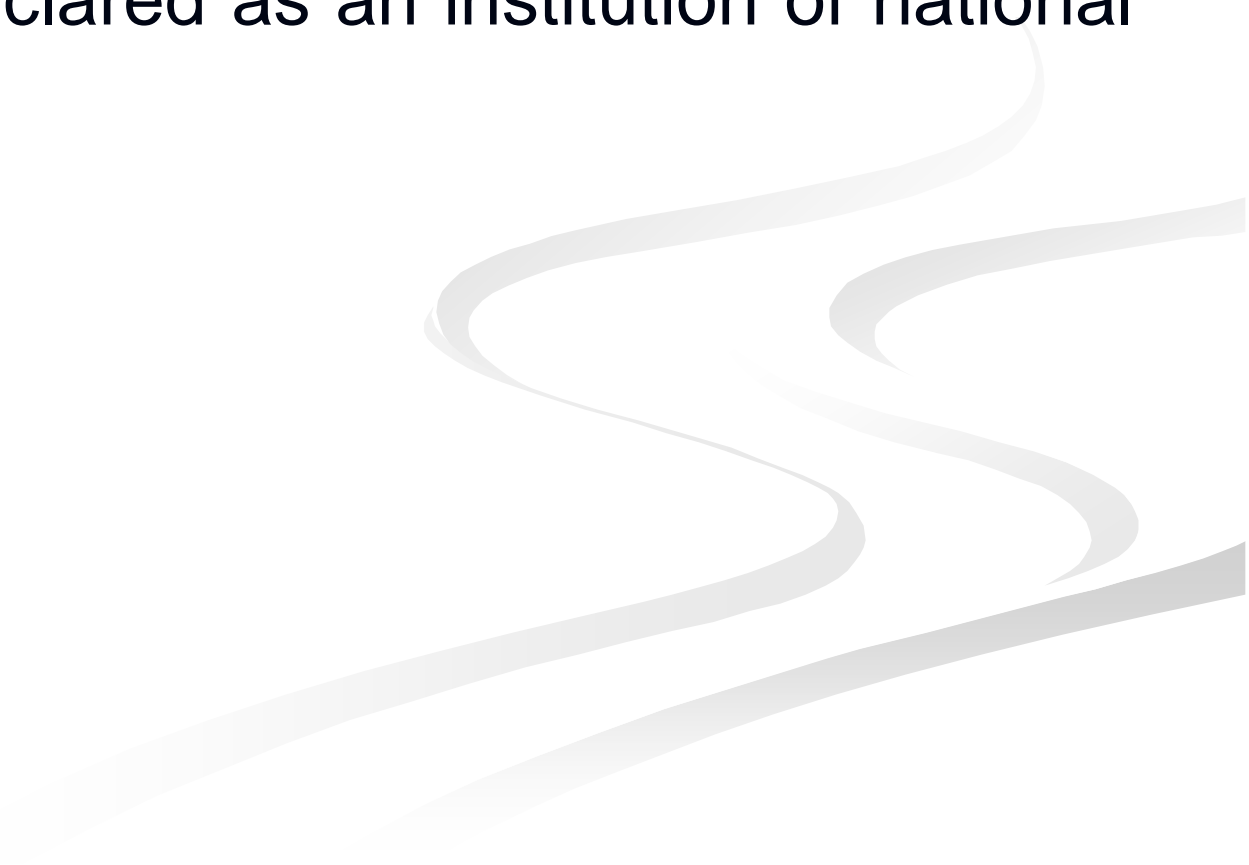
- Amendment to section 34 that parties challenging the award must rely only on the record of the arbitral tribunal- (“establishes on the basis of record of the arbitral tribunal” replaces “furnishes proof that”)
- Introduction of confidentiality, section 42A and immunity to arbitrator, sections 42B
- Introduction of schedule 8 which lays down the required qualifications and experience of the arbitrators

Introduction of Confidentiality and Immunity


2019 Amendment

- **Confidentiality:** The parties are required maintain confidentiality of all arbitral proceedings except in case such disclosure is necessary for implementation and enforcement of award S 42A
- **Immunity:** It also protects an arbitrator for acts and/or omission done during the arbitration proceedings ie the arbitrator shall not be subject to a suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings. S 42B


New Delhi International Arbitration Centre (NDIAC)

- Set up in 2019 to conduct arbitration, mediation and conciliation
 - It has been declared as an institution of national importance
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Functions of NDIAC

- Facilitate conduct of arbitration, mediation and conciliation in a professional, timely and cost – effective manner
 - Promote studies in the field of ADR
 - Maintain a panel of professionals to conduct arbitration, mediation and conciliation
 - Conduct training and seminars on ADR topics
- 

Benefits of NDIAC

- Avoid delay in resolution of commercial disputes
 - Reduce burden on Judiciary
 - Make India an investor friendly decision
 - Presently India's rank in EODB is 77, however rank in the sub-category "Enforcing Contracts" is 163, this is expected to improve
- 

Setting up of ACI 2019 Amendment

- **One of the most notable feature of 2019 amendment** is the introduction of a regulatory body- Arbitration Council of India (“Council”) for promotion of arbitration, mediation, conciliation and other dispute resolution systems
- The **ACI**, inter alia, will grade arbitral institutions, accredit arbitrators, make policies for establishment and operation of uniform professional standards for all ADR systems and maintain a depository of arbitral awards made in india and abroad

Appointment of Arbitrator

- DMRC awarded a contract dated Aug 12, 2013 to Voestalpine for supply of rails. Certain disputes arose between the parties. DMRC imposed LD amounting to Euro 400,129,397 etc. So Voestalpine invoked arbitration
- The arbitration clause in the contract provided that there shall be a tribunal comprising 3 arbitrators. It entitled DMRC to make a panel of arbitrators and then short-list Five Names from that panel.
- The Supplier and Purchaser shall choose one arbitrator each , and the two so chosen, shall choose the third arbitrator from the said short-listed panel of Five Names.

Appointment of Arbitrator

- In their letter dated June 14, 2016, while invoking arbitration, Voestalpine took the stand that appointment of arbitral tribunal as per procedure laid down by DMRC from a short-listed panel of Five Names, if followed, would lead to appointment of “inelligible persons” being appointed as arbitrators.
- So Voestalpine nominated a sole arbitrator (a retired SC Judge) and requested DMRC to for its consent.

Appointment of Arbitrator

- But DMRC stuck to the laid-down procedure and sent a “panel of Five Names” on July 8, 2016 to Voestalpine.
- Failing to get a response from Voestalpine, DMRC appointed on July 19, 2016 one person (who is a retired IRSE officer) as its nominee from the said “panel of Five Names” and called upon Voestalpine to appoint its nominee arbitrator from the remaining panel of four persons

Appointment of Arbitrator

- At this juncture, Voestalpine filed a petition on Aug 17, 2016 in SC. It prayed to SC that arbitrator nominated by them (former SC judge) may be made sole arbitrator if agreed to by the other party or SC may appoint any tribunal of three
- Voestalpine argued that the panel is contrary to S12 (5) of the Act read with Entry 1 Seventh Schedule. It claimed that the panel didn't consist of independent arbitrators.
- **Issue-** Whether (i) the panel of arbitrators prepared by DMRC violates the amended provisions of the Act, namely, section 12(5) of the Act read with Entry 1 of Seventh schedule (ii) whether panelists were ineligible

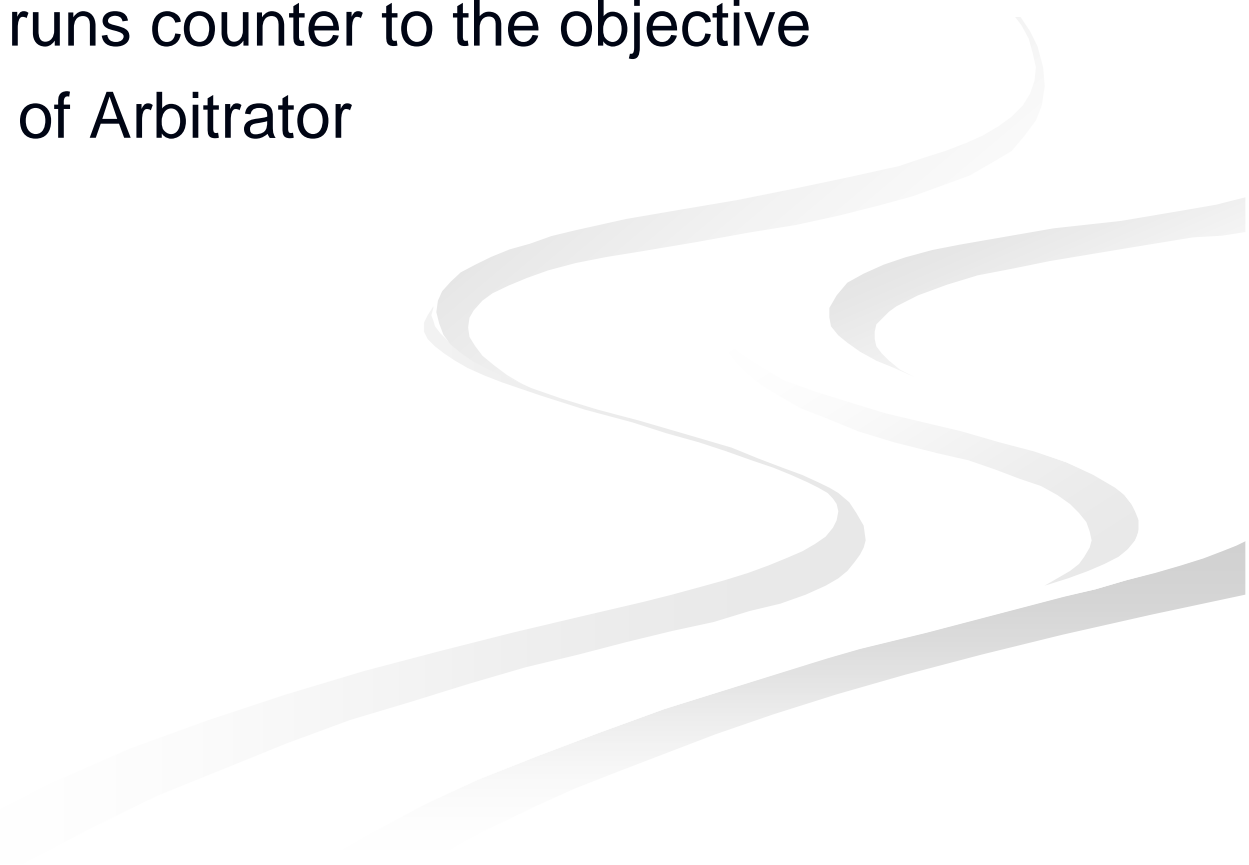
Appointment of Arbitrator

- Sec 12 (5) of the Act reads as under:
- “Notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties, or counsel or subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as arbitrator.”
- SEVENTH SCHEDULE: Arbitrator’s relationship with parties or counsel
- (1) the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party

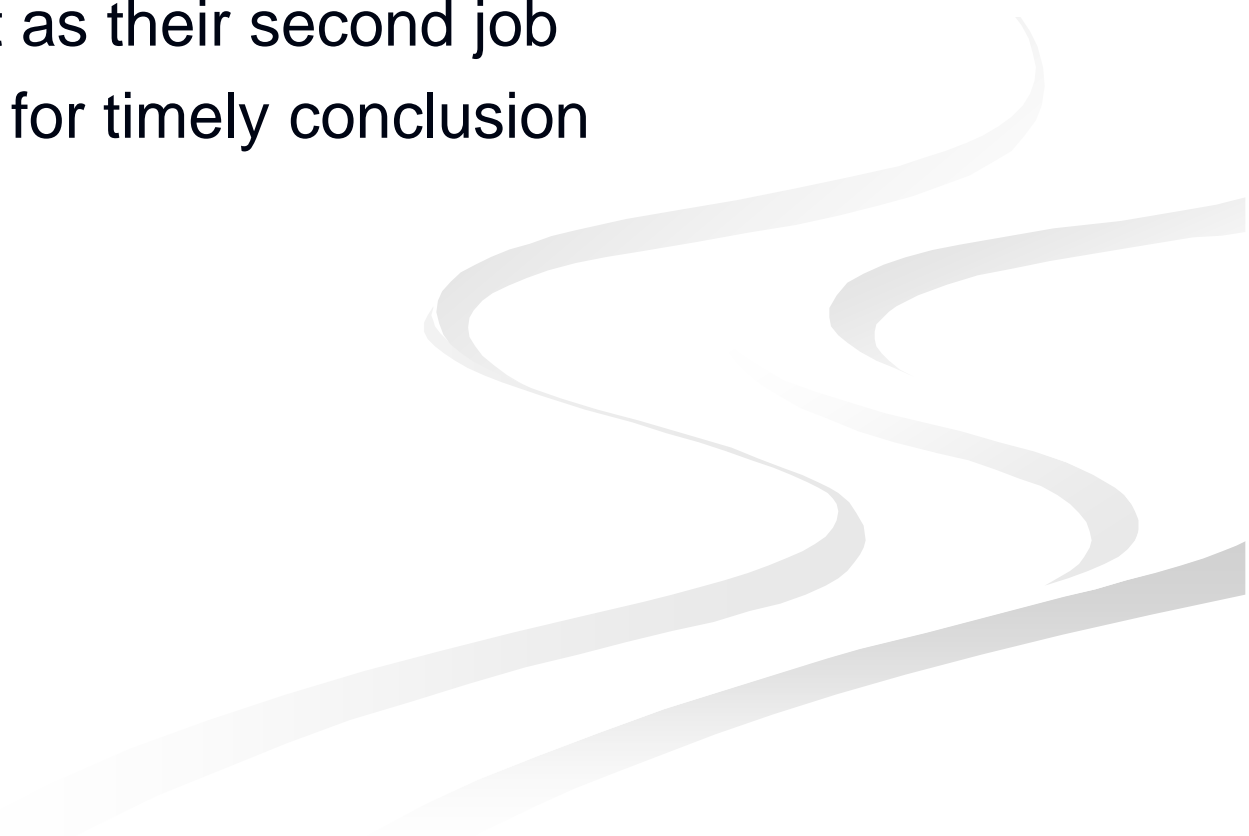
SC Judgments-Analysis

- A perusal o judgments in **TRF, Perkins and Voestalpine** cases clearly indicate that all three of them have common thread that runs through them, ie the importance of upholding not only neutrality of arbitrators, but more importantly upholding the independence and impartiality of arbitrators
- Consequently, the power to unilaterally appoint a sole arbitrator by either party to an agreement (which was earlier permissible) has now been done away with as per above judgments

Why is arbitration not so successful?

- The arbitration clause not comprehensive
 - The parties remain indifferent
 - Higher fees negates the very objective of arbitration
 - Longer time also runs counter to the objective
 - Lack of expertise of Arbitrator
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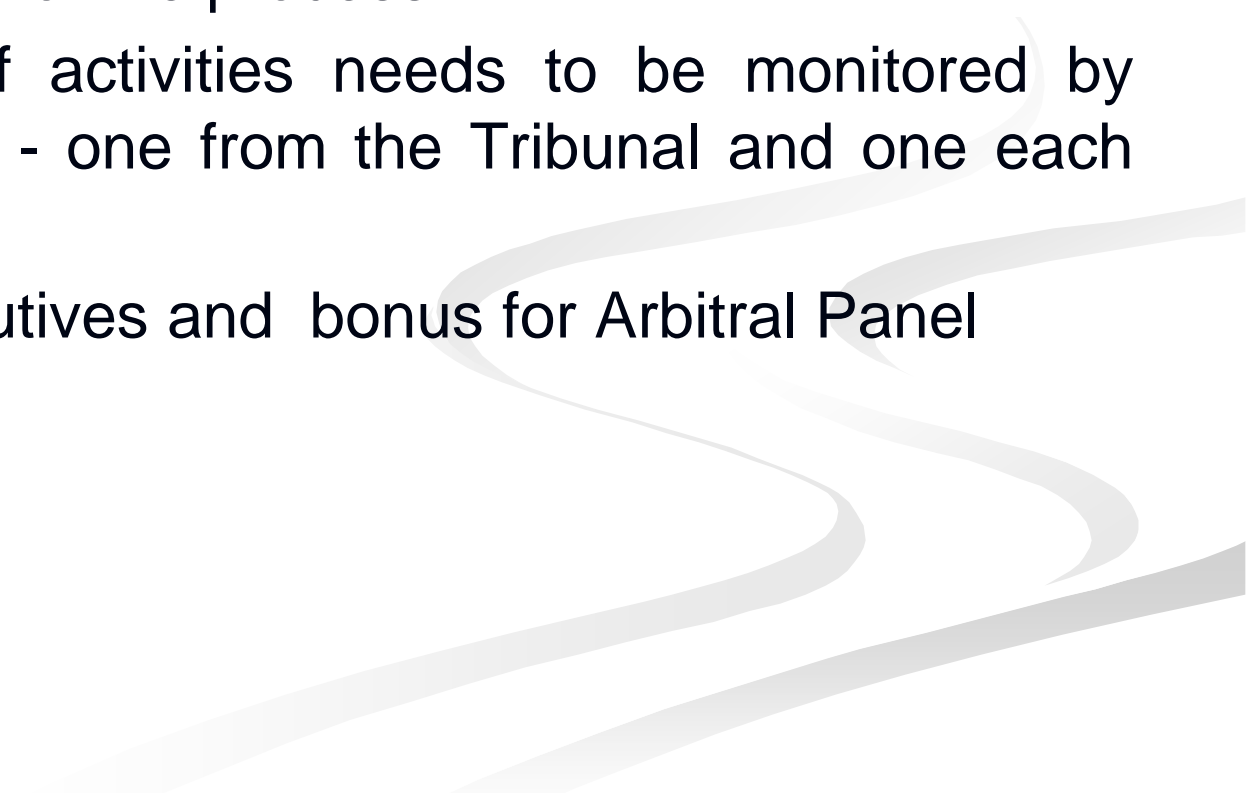
Why is arbitration not so successful?

- Many Arbitrators tend to adopt Court procedure
 - Usually, no Planning is done for timely conclusion
 - There is no separate Bar for Arbitration
 - Advocates take it as their second job
 - Lack of incentive for timely conclusion
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Strategy for successful arbitration

- A comprehensive arbitration clause may be drafted and incorporated in the contract. This may include:
 - Fast-track procedure.
 - Time-limit for conclusion with consent of both parties
 - The Arbitrators should commit to such time-limit.
 - Provision regarding limiting the volume of paper work.
 - Fees of arbitrator & sharing of cost involved in arbitration.


Strategy for successful arbitration

- The Parties may ask for a planning meeting to be held at the outset (within 2 weeks) between the parties and the tribunal to draw a schedule of activities to facilitate timely completion of the process.
 - The schedule of activities needs to be monitored by three executives - one from the Tribunal and one each from the Parties
 - Reward for executives and bonus for Arbitral Panel
- 

Strategy for successful arbitration

- **“Cases are won in Advocate’s chambers.”**
- This stresses importance of planning & preparation
- Identify the conversant officer
- In case of his non-availability, select a suitable officer
- Treat the arbitration case as a **New Project**
- Adjust the work-load of the selected officer so that he finds time to devote to the arbitration case
- Issue directions from top level to others to provide required information promptly to the selected officer

Strategy for successful arbitration

- Find out inconsistency between pleadings and documents of the other party
 - Locate case law in support of your stand (Palkiwala)
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