Section 7 in THE ARBITRATION AND CONCILIATION ACT, 1996

7 Arbitration agreement. —

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Which is an Arbitration Agreement: Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement.The courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Let us examine some case laws on the subject.

1. In **K.K. Modi Vs. K.N. Modi and others (1998) 3 SCC 573** Hon'ble Supreme Court observed that the authorities seem to agree that while there are no conclusive tests, by and large, one can follow a set of guidelines in deciding whether the agreement is to refer an issue to an expert or whether the parties have agreed to resolve disputes through arbitration.

2. In **Russell on Arbitration,** 21st Edn., at p. 37, para 2-014, the question how to distinguish between an expert determination and arbitration, has been examined. It is

stated,"Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as `arbitrator', `arbitral tribunal', `arbitration' or the formula `as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive…. . Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an `issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a `formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; ….. An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion …."

Therefore, our courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement.There are, of course, the statutory requirements of a written agreement, existing or future disputes and an intention to refer them to arbitration. (Vide Section 2 Arbitration Act, 1940 and Section 7 Arbitration and Conciliation Act, 1996.)

4. In the case of **Rukmanibai Gupta v. Collector, Jabalpur (1980) 4 SCC 556** Supreme Court dwelt upon the fact that disputes were referred to arbitration and the fact that the decision of the person to whom the disputes were referred was made

final, as determinative of the nature of the agreement which the Court held was an arbitration agreement.

5. In the case of **State of U.P. v. Tipper Chand (1980) 2 SCC 341** a clause in the contract which provided that the decision of the Superintending Engineer shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions was construed as not being an arbitration clause. The Supreme Court said that there was no mention in this clause of any dispute, much less of a reference thereof. The purpose of the clause was clearly to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time.

6. In the case of **Cursetji Jamshedji Ardasser Wadia v. Dr. R.D. Shiralee AIR 1943 Bom 32 : 44 Bom LR 859** the test which was emphasised was whether the intention of the parties was to avoid disputes or to resolve disputes. In the case of **Vadilal Chatrabhuj Gandhi v. Thakorelal Chimanlal Munshaw (1953) 55 Bom LR 629 : AIR 1954 Bom 121** the emphasis was on judicial enquiry and determination as indicative of an arbitration agreement as against an expert opinion. The test of preventing disputes or deciding disputes was also resorted to for the purpose of considering whether the agreement was a reference to arbitration or not. In that case, the agreement provided that the parties had agreed to enter into a compromise for payment of a sum up to, but not exceeding, Rs. 20 lakhs,

"which shall be borne and paid by the parties in such proportions or manner as Sir Jamshedji B. Kanga shall, in his absolute discretion, decide as a valuer and not as an arbitrator after giving each of us summary hearing".

In the case of **State of W.B. v. Haripada Santra AIR 1990 Cal 83; (1990) 1 Cal HN 76** the agreement provided that in the event of a dispute, the decision of the

Superintending Engineer of the Circle shall be final. The Court relied upon the fact that the reference was to dispute between the parties on which a decision was required to be given by the Superintending Engineer. Obviously, such a decision could be arrived at by the Superintending Engineer only when the dispute was referred to him by either party for decision. He was also required to act judicially and decide the disputes after hearing both parties and after considering the material before him. It was, therefore, an arbitration agreement.

8. In the case of **J & K State Forest Corpn. v. Abdul Karim Wani (1989) 2 SCC 701 (para 24)** Supreme Court considered the agreement as an agreement of reference to arbitration. It has emphasised that (1) the agreement was in writing ; (2) it was a contract at the present time to refer the dispute arising out of the present contract and (3) there was a valid agreement to refer the dispute to arbitration of the Managing Director, Jammu and Kashmir State Forest Corporation. The Court observed that endeavour should always be made to find out the intention of the parties, and that intention has to be found out by reading the terms broadly and clearly without being circumscribed.

9. The decision in the case of **Rukmanibai Gupta** (supra) has been followed by Supreme Court in the case of **M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd. (1993) 3 SCC 137**. Commenting on the special characteristics of an arbitration agreement the Court has further observed in the above case that arbitration agreement embodies an agreement between the parties that in case of a dispute such dispute shall be settled by an arbitrator or an umpire of their own constitution or by an arbitrator to be appointed by the Court in an appropriate case (p. 143, para 8)

"It is pertinent to mention that there is a material difference in an arbitration agreement inasmuch as in an ordinary contract the obligation of the parties to each other cannot, in general, be specifically enforced and breach of such terms of contract

results only in damages. The arbitration clause, however, can be specifically enforced by the machinery of the Arbitration Act."

The Court has further observed that it is to be decided whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstance of the case. This, in turn, depends on the intention of the parties to be gathered from the relevant documents and surrounding circumstances.

10. The decisions in the case of **State of U.P. v. Tipper Chand** (supra) **and Rukmanibai Gupta** (supra) have also been cited with approval by Supreme Court in the case of **State of Orissa v. Damodar Das (1996) 2 SCC 216**. In this case, the Court considered a clause in the contract which made the decision of the Public Health Engineer, final, conclusive and binding in respect of all questions relating to the meaning of specifications, drawings, instructions ..... or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to the contract, drawings, specifications, estimates … or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract. The Supreme Court held that this was not an arbitration clause. It did not envisage that any difference or dispute that may arise in execution of the works should be referred to the arbitration of an arbitrator.

11. The decision of Hon'ble Supreme Court in **K.K. Modi Vs. K.N. Modi and others** (supra) has been followed by M.P. High Court, Jabalpur in **M.P. Housing Board and another vs. Satish Kumar Raizada 2003 Arb.W.L.J. 109 (M.P.)**. The M.P. High Court observed (in para 19) that if there is a provision for reference of the dispute to an authority and it is required to decide it in judicial or quasi-judicial manner after hearing both the sides that would amount to an arbitration agreement. On the other hand if that authority has to decide the question without any reference to it administratively or as an expert that would not give rise to arbitration agreement.