

EXPERTS CORNER

"Consent" in Arbitration Agreement - Substance Prevails Over Form



Vasanth Rajasekaran
Founder and Head



Harshvardhan Korada
Counsel

Home › Experts Corner › **“Consent” In Arbitration Agreement — Substance Prevails Over Form: Crystallisation Of Indian Jurisprudence**

“Consent” in Arbitration Agreement — Substance Prevails Over Form: Crystallisation of Indian Jurisprudence

by Vasanth Rajasekaran* and Harshvardhan Korada**

Published on September 18, 2025 - By Editor



Introduction

It is often presumed that arbitration agreements must always take the form of a formally executed and signed contract. This presumption is rooted in the traditional view of arbitration as a consensual process, where the parties' consent is documented through a signed contract. However, a deep dive into the Indian legal position on this issue would demonstrate that such a rigid viewpoint is misplaced.

In a recent decision in *Glencore International AG v. Shree Ganesh Metals*¹, the Supreme Court of India has reaffirmed that parties do not always need to sign an arbitration agreement. The intention to submit disputes to arbitration can also be inferred from correspondence exchanged between parties. As long as the arbitration agreement is in writing and complies with

the statutory standards outlined in Section 7² of the Arbitration and Conciliation Act, 1996 (Arbitration Act), the parties ought to be referred to arbitration.

Contrary to popular belief, the decision in the *Glencore International case*³ is neither a new development nor a departure from established practice. As early as 2001, the Supreme Court had already recognised that arbitration agreements do not need to be strictly formalised, and subsequent judgments have consistently prioritised substance over form.

In fact, whether through the exchange of correspondence, incorporation by reference, or the conduct of the parties, Indian courts have shown a willingness to infer an intent to arbitrate and have therefore upheld the enforceability of arbitration clauses where the underlying commercial reality justifies it.

The statutory framework

Section 7⁴ of the Arbitration Act defines an arbitration agreement as:

7. Arbitration agreement.— ... 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.

Importantly, sub-section (3) of Section 7⁵ of the Arbitration Act states that such an agreement must be in writing, while sub-section (4)⁶ clarifies that this requirement is satisfied if the agreement is contained in: firstly, a document signed by the parties; secondly, an exchange of letters, telex, telegrams, or other means of telecommunication; and thirdly, an exchange of statements of claim and defence where the existence of the contract is alleged and not denied.

In addition to the above, Section 7⁷ of the Arbitration Act also recognises incorporation of an arbitration agreement by reference to a document containing an arbitration clause.

Section 7⁸ of the Arbitration Act is a verbatim replication of the first two clauses of Article 7 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (UNCITRAL Model Law)⁹.

Over the years, this statutory flexibility has been faithfully given effect by Indian courts. The jurisprudence shows a consistent trend that wherever documents, correspondence or conduct show an unambiguous intent to

submit disputes to arbitration, the courts have enforced the agreement. Conversely, where the language used suggests mere possibility rather than obligation, courts have been reluctant to refer parties to arbitration. This careful balance between substance and form is the basis for the evolution of case law that we turn to now and trace.

Early foundations: Substance over form

The seeds of the jurisprudence were sown in *Smita Conductors Ltd. v. Euro Alloys Ltd.*¹⁰, wherein the Supreme Court gave a wide and purposive construction to Section 7¹¹. The Supreme Court reiterated that there is no need for an arbitration agreement to conform to a specific format as long as there is written evidence of the intention of the parties to arbitrate. In essence, in the absence of signatures, a demonstrable consensus was insisted on. This marked a significant departure from the stricter formalism under the erstwhile Arbitration Act of 1940¹², aligning Indian law with international best practices.

The trajectory received a boost in *Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co.*¹³ Here, the Supreme Court had enforced an arbitration agreement implicit in the commercial exchanges between the parties, adding that trade transactions could not be undone for the lack of ceremonious documentation. The Supreme Court preferred to give effect to the evident commercial intent, rather than allow formality to trump substance and held that:

60. ... stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want — an efficient, effective and potentially cheap resolution of their dispute.¹⁴

In *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.*¹⁵, the Supreme Court went a step ahead and recognised that the absence of a formally signed contract was not decisive where the parties had already acted on the terms and manifested their consensus to arbitrate.

The same year, the Supreme Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.*¹⁶ addressed the question of interpreting an arbitration clause that was poorly drafted, causing confusion regarding whether it constituted a conciliation agreement or an arbitration agreement.

The Supreme Court looked beyond the text of the clause in question and

considered the overall intention of the parties, holding that the clause indeed constituted an arbitration agreement in nature.

Importantly, the absence of words like “arbitrator”, “arbitration” and “reference” was held not to be decisive, and inartistic drafting could not be used as an excuse for avoiding arbitration. With this, the Supreme Court firmly laid down the principle that substance, context, and intent prevail over mere choice of words.

The evolution of jurisprudence

The Supreme Court’s decision in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*¹⁷ was an important step in the further development of the jurisprudence. The Supreme Court considered whether discharge vouchers containing arbitration clauses, signed under alleged coercion, prevent reference to arbitration. The Supreme Court stated that if a party prima facie proves undue influence, fraud or coercion, such a voucher would be deemed void and inoperative.

In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*¹⁸, the moot point was whether joint arbitral proceedings could be maintained against two entities, one of which was a member of the Bombay Stock Exchange (BSE) while the other was not, and both were accordingly governed by different bye-laws of BSE.

The Supreme Court noted that there was no bar in the bye-laws against having a joint arbitration, especially when the claimant has a single claim against two respondents. The Supreme Court also pointed out that having the parties take part in two separate arbitrations could lead to multiple proceedings and increase the risk of conflicting decisions.

In *Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.*¹⁹, the Supreme Court dealt with a matter in which the arbitration rules of an institution were expressly incorporated by reference in a trade agreement. The Supreme Court held that incorporation of institutional rules of arbitration by reference is sufficient to constitute an arbitration agreement in terms of Section 7²⁰ of the Arbitration Act.

Similarly, in *Inox Wind Ltd. v. Thermocables Ltd.*²¹, the Supreme Court upheld a clause for arbitration printed on standard terms of purchase order, even

though the parties did not separately sign the standard terms. The judgment emphasised that when parties regularly act on standard terms in their commercial dealings, consent and the intention to arbitrate can be inferred from their conduct.

The principle got a new edge in *National Highways & Infrastructure Development Corpn. Ltd. v. BSCPL Infrastructure Ltd.*²² The moot point in this matter was whether an unsigned draft of the arbitration agreement forming part of the request for proposal (RFP) could be invoked at the stage of acceptance of the letter of award (LOA).

The Supreme Court emphasised that the mere issuance or acceptance of an LOA does not automatically make an arbitration clause, which is part of the bid documents or tender conditions, legally binding. The dispute resolution clause in the RFP, which in this case gives the Delhi courts exclusive jurisdiction, applies to disagreements arising during the bidding process or LOA until the formal contract is signed. The Supreme Court explained that a standard arbitration clause in a draft agreement cannot override the specific provisions in the RFP.

Modern reinforcements

A landmark judgment in this continuum was that of *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*²³ The Supreme Court held that even in the absence of a signed formal contract, an arbitration agreement could be inferred from the exchange of emails and telex messages. In the instant case, the parties at dispute had exchanged a series of correspondence which reflected that the parties were ad idem on having disputes resolved through arbitration.

This reasoning has since been applied in a variety of cases where courts have given effect to arbitration clauses which were contained in invoices, standard terms and conditions or other ancillary documents.

In *SRF Ltd. v. Jonson Rubber Industries Ltd.*²⁴, the petitioner before the High Court of Delhi sought reference to arbitration on the basis of clauses present in invoices, whereas the corresponding purchase orders had provided for a jurisdiction clause only. The High Court held that arbitration clauses printed on invoices may constitute valid agreements under Section 7²⁵ if the invoices were acted upon and not repudiated. This was reiterated by Delhi High Court

in *Mohd. Eshrar Ahmed v. Tyshaz Buildmart India (P) Ltd.*²⁶ In *Eshrar Ahmed case*²⁷, the High Court emphasised that arbitration clauses evidenced by correspondence and documentation between the parties would be sufficient to satisfy the requirements of Section 7²⁸ of the Arbitration Act.

A similar finding was rendered in *Sanjiv Manmohan Gupta v. Sai Estate Consultants Chembur (P) Ltd.*²⁹ The dispute arose in this case from a term sheet for advertising services, for which invoices were issued by the applicant. Each invoice included an arbitration clause. The High Court found that the invoices were accepted, acted upon, and paid in part. Hence, relying on Section 7³⁰ of the Arbitration Act, the Bombay High Court referred the matter to arbitration.

In *Radico Khaitan Ltd. v. Harish Chouhan*³¹, the High Court was faced with a dispute where an arbitration clause was included in a set of commercial documents, but the respondent argued that the lack of a standalone and signed arbitration agreement was fatal. The High Court rejected this technical argument, pointing to the fact that commercial dealings in modern practice are seldom contained in a single document. What is important, it held, is if the commercial arrangement as a whole reveals consensus to arbitrate. By giving primacy to substance, the High Court thus once again endorsed a purposive reading of Section 7³².

In *Vedanta Ltd. v. Gujarat State Petroleum Corpn. Ltd.*³³, the dispute arose when Gujarat State Petroleum Corporation (GSPC) refused to sign the final gas sales agreement (GSA) and asserted that no arbitration agreement existed, despite being the highest bidder in Vedanta's gas auction.

Vedanta argued that the arbitration clause was triggered by the bidding process, the draft GSA shared with GSPC, and GSPC's actions, such as submitting signed documents and accepting gas allocation. The Delhi High Court ruled in favour of Vedanta, determining that there was prima facie consensus to arbitrate, as required under Section 7³⁴ of the Arbitration Act.

The limits of Section 7

Even as courts have expanded the scope of enforceability of arbitration clauses, they have been careful not to overreach the limits set by Section 7³⁵ of the Arbitration Act.

Indian courts have recognised that arbitration is based on consent: there must be a binding agreement to arbitrate, not merely the potential to do so. Three decisions — *Pure Diets India Ltd. v. Lokmangal Agro Industries Ltd.*³⁶, *Sunil Kumar Samanta v. Sikha Mondal*³⁷ and *BGM & M-RPL-JMCT (JV) v. Eastern Coalfields Ltd.*³⁸ illustrate this cautious approach.

The Delhi High Court in *Pure Diets case*³⁹ was dealing with a clause which mentioned arbitration but only in the context of allowing the parties to seek equitable or interim relief “prior to or during any arbitration”. The petitioner insisted that these words were sufficient to bring the clause within Section 7⁴⁰ of the Arbitration Act. The High Court held that the provision did not reflect a present obligation to arbitrate disputes but merely envisaged that if arbitration was to take place in the future, certain ancillary remedies would be available.

The High Court emphasised that the mere use of the word “arbitration” or “arbitrator” will not necessarily turn a clause into an arbitration agreement. Relying on *Jagdish Chander v. Ramesh Chander*⁴¹ and *K.K. Modi v. K.N. Modi*⁴², the High Court reiterated that clauses only indicating a future possibility or requiring further consent are not arbitration agreements but agreements to agree.

A similar treatment was given by the Calcutta High Court in *Sunil Kumar Samanta case*⁴³. The clause in question provided that disputes “may” be referred to arbitration. The High Court found the language of the clause to be permissive rather than binding. Therefore, the High Court was not convinced that the applicant could establish the mutual agreement to submit disputes to arbitration.

In *Eastern Coalfields case*⁴⁴, the Supreme Court upheld the approach adopted by the Delhi High Court in *Pure Diets case*⁴⁵ and the Calcutta High Court in *Sunil Kumar Samanta case*⁴⁶, where clauses using permissive language were found to be non-binding and not an arbitration agreement in terms of Section 7⁴⁷ of the Arbitration Act.

In *South Delhi Municipal Corpn. v. SMS Ltd.*⁴⁸, the Supreme Court extensively examined what constitutes a valid arbitration agreement under Section 7⁴⁹ of the Arbitration Act. The case related to a number of concession agreements between the Municipal Corporation of Delhi and the private contractors, in which the main point was whether Article 20 of the contracts

can be read as an arbitration clause or not, since it was titled as “mediation by the Commissioner”.

Having examined the text and framework of Article 20, the Supreme Court concluded that it lacked the essential elements of a valid arbitration agreement: (i) it did not show the intention to arbitrate; (ii) there was no mention of a neutral or independent tribunal; (iii) there was no adversarial process; and (iv) there was no reference to the Arbitration Act⁵⁰. Rather, Article 20 proposed an in-house administrative system, which could not be compared to arbitration.

In one of the latest pronouncements by the Supreme Court in *Glencore International case*⁵¹, the case concerned a proposed fifth contract for the supply of zinc metal. Glencore signed and sent the contract to the respondent, who did not formally execute it. Nonetheless, the two sides performed their part of the bargain.

When arbitration was sought to be invoked, the respondent objected, arguing that its signature was not on the alleged arbitration agreement. The Supreme Court rejected this contention placing reliance on the longstanding jurisprudence on the issue.

Analysis

The judicial pronouncements reviewed indicate a legal landscape that is both supportive and cautious. On one hand, the courts have consistently emphasised that arbitration agreements should not be invalidated due to technical defects or lack of formal signatures. On the other hand, they have established a clear boundary: Section 7⁵² requires consensus ad idem, which cannot be assumed from incidental references or permissive language.

The primary focus of existing jurisprudence is the judicial fidelity to the parties' intent. From *Smita Conductors case*⁵³ to *Glencore International case*⁵⁴, courts have reiterated that arbitration depends on consent, but this consent need not be formalised with elaborate procedures. What matters is that the intention is objectively provable, whether through correspondence, invoices, or the incorporation of institutional frameworks by reference.

The parties' conduct is vital evidence of consent. The courts have ruled that accepting invoices, fulfilling obligations, or participating in tender processes

can be regarded as an agreement to arbitrate.

At the same time, the courts have carefully moderated the flexibility offered by Section 7⁵⁵ of the Arbitration Act. Cases like *Pure Diets case*⁵⁶, *Sunil Kumar Samanta case*⁵⁷ and *Eastern Coalfields case*⁵⁸ have made it abundantly clear that the judiciary cannot and will not allow loose or permissive drafting to pass muster. Words like “may” or clauses which merely contemplate the possibility of arbitration are insufficient. The law insists that arbitration agreements must embody an obligation to arbitrate, not just an option to consider it.

Finally, the Supreme Court’s recent decisions in *South Delhi Municipal Corpn. case*⁵⁹ and *Glencore International case*⁶⁰ reflect a general pro-enforcement bias such that ambiguities will be interpreted to favour arbitration where the commercial context so suggests. Along with the other decisions discussed, they embody a balanced approach to jurisprudence: supportive of commercial intent but grounded in the principle that arbitration cannot be imposed unless the parties have explicitly agreed to arbitrate.

***Founder and Head, Trinity Chambers, Delhi.**

****Counsel, Trinity Chambers.**

1. 2025 SCC OnLine SC 1815.
2. Arbitration and Conciliation Act, 1996, S. 7.
3. 2025 SCC OnLine SC 1815.
4. Arbitration and Conciliation Act, 1996, S. 7.
5. Arbitration and Conciliation Act, 1996, S. 7.
6. Arbitration and Conciliation Act, 1996, S. 7.
7. Arbitration and Conciliation Act, 1996, S. 7.
8. Arbitration and Conciliation Act, 1996, S. 7.
9. UNCITRAL Model Law on International Commercial Arbitration, 1985, Art. 7.
10. (2001) 7 SCC 728.
11. Arbitration and Conciliation Act, 1996, S. 7.
12. Arbitration Act, 1940.

13. (2008) 14 SCC 240.
14. (2008) 14 SCC 240.
15. (2009) 2 SCC 134.
16. (2009) 2 SCC 55.
17. (2009) 1 SCC 267.
18. (2012) 1 SCC 594 : (2011) 168 Comp Cas 1.
19. (2015) 13 SCC 477.
20. Arbitration and Conciliation Act, 1996, S. 7.
21. (2018) 2 SCC 519.
22. (2019) 15 SCC 25.
23. (2010) 3 SCC 1.
24. 2024 SCC OnLine Del 1819.
25. Arbitration and Conciliation Act, 1996, S. 7.
26. 2024 SCC OnLine Del 6212.
27. 2024 SCC OnLine Del 6212.
28. Arbitration and Conciliation Act, 1996, S. 7.
29. 2025 SCC OnLine Bom 567.
30. Arbitration and Conciliation Act, 1996, S. 7.
31. 2025 SCC OnLine Del 1675.
32. Arbitration and Conciliation Act, 1996, S. 7.
33. 2025:DHC:6185 dated 28-7-2025.
34. Arbitration and Conciliation Act, 1996, S. 7.
35. Arbitration and Conciliation Act, 1996, S. 7.
36. 2023 SCC OnLine Del 4486.
37. AP/15/2022 dated 7-4-2025.
38. 2025 SCC OnLine SC 1471.
39. 2023 SCC OnLine Del 4486.
40. Arbitration and Conciliation Act, 1996, S. 7.
41. (2007) 5 SCC 719.
42. (1998) 3 SCC 573 : (1998) 92 Comp Cas 30.

43. AP/15/2022 dated 7-4-2025.
44. 2025 SCC OnLine SC 1471.
45. 2023 SCC OnLine Del 4486.
46. AP/15/2022 dated 7-4-2025.
47. Arbitration and Conciliation Act, 1996, S. 7.
48. 2025 SCC OnLine SC 1138.
49. Arbitration and Conciliation Act, 1996, S. 7.
50. Arbitration and Conciliation Act, 1996
51. 2025 SCC OnLine SC 1815.
52. Arbitration and Conciliation Act, 1996, S. 7.
53. (2001) 7 SCC 728.
54. 2025 SCC OnLine SC 1815.
55. Arbitration and Conciliation Act, 1996, S. 7.
56. 2023 SCC OnLine Del 4486.
57. AP/15/2022 dated 7-4-2025.
58. 2025 SCC OnLine SC 1471.
59. 2025 SCC OnLine SC 1138.
60. 2025 SCC OnLine SC 1815.