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**Rajput Jain & Associates**  
Chartered Accountants

**ARBITRATION AND CONCILIATION  
ACT, 1996**

# About Us

- Rajput Jain & Associates is a Chartered Accountants firm, with its headquarter situated at New Delhi (the capital of India). The firm has been set up by a group of young, enthusiastic, highly skilled and motivated professionals who have taken experience from top consulting firms and are extensively experienced in their chosen fields has providing a wide array of Accounting, Auditing, Taxation, Assurance and Business advisory services to various clients and their stakeholders. focus at providing tailor made solutions to challenging problems of our clients, and perform with high quality and timely service.
- Rajput jain & Associates, a professional firm, offers its clients a full range of services, To serve better and to bring bucket of services under one roof, the firm has merged with it various Chartered Accountancy firms pioneer in diversified fields
- Our main office is located at Delhi. Incidentally, Delhi is the Capital of India. Our other offices are in Mankapur & Moradabad (U.P.). We have associates all over India in big cities. All our offices are well equipped with latest technological support with updated reference materials. We have a large team of professionals other than our Core Team members to meet the requirements of our prospective clients including the existing ones. However, considering our commitment towards high quality services to our clients, our team keeps on growing with more and more associates having strong professional background with good exposure in the related areas of responsibility. Further to meet the growing demands of the fiercely competitive market we are constantly looking forward for team of associates comprising of highly skilled professionals to cater the needs ever increasing clientele.

# BACKGROUND OF THE ARBITRATION ACT

Purpose of Arbitration and Conciliation Act, 1996 is to provide quick redressal to commercial dispute by private Arbitration. Quick decision of any commercial dispute is necessary for smooth functioning of business and industry. Internationally, it is accepted that normally commercial disputes should be solved through arbitration and not through normal judicial system. Resolutions of disputes through judicial process is very time consuming and costly in terms of time, money and energy. Litigation really weakens both the parties, and hence is not a business-based solution.

## ALTERNATE DISPUTE RESOLUTION (ADR).

There are four methods of ADR - negotiation, mediation, conciliation and arbitration. 'Negotiation' is cheapest and simplest method. If it does not work, mediation through a mediator can be tried. If it does not work, conciliation and arbitration will be useful. Arbitration Act makes provision for conciliation and arbitration as ADR mechanisms.

An arbitrator is basically a private judge appointed with consent of both the parties. He is expected to give his decisions quickly as he is not bound by the technical formalities of a court. In India, the need of arbitration is more because of very heavy burden on the judicial system and huge backlog of pending cases.

Arbitration means submission by two or more parties of their disputes to the judgment of a third person called 'arbitrator' who has to decide the dispute in impartial manner following principles of natural justice.



# SCHEME OF THE ACT

**The Act is divided in to following parts :**

**Part I** - Domestic arbitration.

**Part n** - Enforcement of foreign awards.

**Part in** - Conciliation procedures.

**Part IV** - Supplementary provisions.

**First Schedule** - Convention on recognition and enforcement of foreign arbitral award as per New York Convention

**Second Schedule** - Protocol on Arbitration clauses

**Third Schedule** - Convention on the execution of foreign arbitral awards as per Geneva Convention.

**Fourth Schedule** - Model fees by Arbitrator

**Fifth Schedule** - Grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators.

**Sixth Schedule** -Declaration and Disclosure by proposed arbitrator.

**Seventh Schedule** - Declaration of Interest of Arbitrator in dispute and relationship with parties and Counsel

## **Court for purpose of Arbitration Act**

**'Court' means (i) In the case of an arbitration other than international commercial arbitration,**

the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court - Section 2(1 )(e) of the Arbitration and Conciliation Act, 1996 amended on 23-10-2015.

# CRITERIA FOR DETERMINING WHETHER ARBITRATOR IS INDEPENDENT OR IMPARTIAL

In order to ensure that Arbitrator is independent and impartial, section 12(1) of Arbitration and Conciliation Act, 1996 expects Arbitrator to make disclosure of his possible connection or interest. Fifth Schedule to Arbitration and Conciliation Act, 1996 specifies grounds to guide on which independence and impartiality of Arbitrator can be doubted.

The criteria is quite exhaustive and covers both direct and indirect interests in one of the parties to the dispute.

In brief, if proposed arbitrator is employee, advisor, law firm, advocate or consultant of one of the parties to arbitration agreement or connected with such advocate, law firm etc., his independence and impartiality can be doubted.

It is not that such person cannot be appointed as Arbitrator at all. However, he must make full disclosure in his declaration. The declaration should be in form as contained in Schedule Six.

Arbitrator, while giving declaration under section 12(1) of Arbitration and Conciliation Act, 1996 has to state whether he has sufficient time to complete assignment within 12 months.

## PERSON WHO CANNOT BE APPOINTED AS ARBITRATOR

As per section 12(5) of Arbitration and Conciliation Act, if Arbitrator has interest (direct or indirect) as specified in Schedule Seven of the Arbitration and Conciliation Act, 1996, he cannot be appointed as Arbitrator, unless both parties agree in writing, after dispute has arisen. Thus, a mere clause in Arbitration Agreement about appointment of arbitrator of choice of one of the parties is not sufficient.

This is a very good provision. The reason is that, at the time of contract, one of the parties is usually in dictating position and other party has practically no option to sign on dotted lines.

These provisions are applicable only in respect of arbitrator appointed on or after 23-10-2015. The provisions are not applicable in respect of arbitrator appointed prior to 23-10-2015.

Though section 12(5) is not applicable to arbitrator appointed prior to 23-10-2015, objection can be raised about his declaration by Arbitrator about his independence, as these criteria is already specified in Schedule Five of the Arbitration Act.



## CHALLENGE TO APPOINTMENT OF ARBITRATOR

Appointment of Arbitrator can be challenged only if (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality (b) He does not possess the qualifications agreed to by the parties, [section 12(3) of Arbitration and Conciliation Act].

Appointment of arbitrator cannot be challenged on any other ground. The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award. However, in such case, application for setting aside arbitral award can be made to Court. If the court agrees to the challenge, the arbitral award can be set aside, [section 13(6) of Arbitration and Conciliation Act].

Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to court. The arbitration can continue and challenge can be made in Court only after arbitral award is made.

## TERMINATION OR SUBSTITUTION OF ARBITRATOR

Arbitrator can withdraw if his appointment is challenged by one party and the challenge is accepted by him or other party agrees to challenge, [section 13(3) of Arbitration and Conciliation Act]. Mandate of an arbitrator shall terminate if (a) he becomes de jure or de facto unable to perform his functions and (b) he withdraws from his office (c) the parties agree to the termination of mandate, [sections 14 and 15 of Arbitration and Conciliation Act]. If appointment of arbitrator is terminated, another arbitrator should be appointed following procedure similar to appointment of initial arbitrators, [section 15(2) of Arbitration and Conciliation Act]. Even after the change, orders passed by earlier Arbitral Tribunal continue to be valid.

# CONDUCT OF ARBITRAL PROCEEDINGS

- The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present his case, [section 18]. The Arbitral Tribunal is not bound by Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. [section 19(1) of Arbitration and Conciliation Act].  
**Commencement of arbitral proceedings** - Commencement of arbitral proceedings in respect of a particular dispute **commences on the date on which a request from one party to refer the dispute to arbitration is received by other party**, [section 21 of Arbitration and Conciliation Act].
- **Law of limitation applicable** - Limitation Act, 1963 is applicable. For this purpose, date on which the aggrieved party requests other party to refer the matter to arbitration shall be considered. If on that date, the claim is barred under Limitation Act, the arbitration cannot continue, [section 43(2) of Arbitration and Conciliation Act]. If Arbitration award is set aside by Court, time spent in arbitration will be excluded for purpose of Limitation Act. [so that case in court or fresh arbitration can start].

# HEARINGS AND WRITTEN PROCEEDINGS

- After submission of documents and defense, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be oral hearing or proceedings can be conducted on the basis of documents and other materials. However, if one of the parties requests, the hearing shall be oral. Sufficient advance notice of hearing should be given to both the parties, [section 24 of Arbitration and Conciliation Act] [Thus, unless one party requests, oral hearing is not compulsory].

Hearing of Arbitrator Tribunal should be on day to day basis without adjournment. If any party seeks adjournment without sufficient cause, costs including exemplary costs can be imposed on him - - proviso to section 24(1) of Arbitration and Conciliation Act.



## COST OF ARBITRATION

- As per provisions of section 31 A(5) of Arbitration and Conciliation Act, an agreement to pay whole or part of costs of arbitration in any event shall be valid only if such agreement is made after dispute has arisen.  
Thus, a mere clause in Arbitration Agreement about payment of costs by one of the parties is not sufficient.  
This is a very good provision. The reason is that, at the time of contract, one of the parties is usually in dictating position and other party has practically no option to sign on dotted lines.  
If the parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such case, any party can approach Court. The Court will ask for deposit from the parties and on such deposit, the award will be delivered by the Tribunal. Then Court will decide the costs of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party, [section 39 of Arbitration and Conciliation Act].

## MODEL FEES PAYABLE TO ARBITRATOR

The model fees payable to Arbitrator have been specified in Fourth Schedule inserted to Arbitration and Conciliation Act. The fee varies between Rs 45,000 to Rs 30 lakhs depending on the sums in dispute.  
This is a good guideline to fix fees by Court while passing the order for appointment of arbitrator, though can have different rule - section 11(14) of Arbitration and Conciliation Act, 1996 Court .  
The arbitrators can ask for deposits towards the arbitration expenses, before commencement of proceedings. They can also ask for supplementary deposits towards expenses, [section 38 of Arbitration and Conciliation Act]. Excess of deposit over actual expenses should be refunded.

## SETTLEMENT DURING ARBITRATION

It is permissible for parties to arrive at mutual settlement even when arbitration is in progress. In fact, even the Tribunal itself can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms. Such Arbitral Award shall have the same force as any other Arbitral Award. [section 30 of Arbitration and Conciliation Act].



## ARBITRAL AWARD

Decision of Arbitral Tribunal is termed as 'Arbitral Award'.

Arbitrator can decide in justice and in good faith - Arbitrator can decide the dispute ex aequo et bono (In justice and in good faith) if both the parties expressly authorize him to do so. [section 28(2)].

This type of arbitration is new. This involves settlement of dispute by mutual concessions by waiving the theories or principles for the sake of settlement. The Tribunal may decide the dispute in good faith so as to do justice to all parties.

## INTERIM MEASURES

Arbitral Tribunal can order a party to take interim measure of protection. The arbitral tribunal can also require a party to provide for appropriate security in connection with the interim measure, [section 17 of Arbitration and Conciliation Act].

Arbitral tribunal can order following interim measures for appointment of guardian of minor or person of unsound mind (b) protection for subject matter, securing payment, detention, preservation or inspection of any property

(c) Interim injunction.

Such order will be deemed to be order of Court for all the purposes and is enforceable under CPC.

Thus, very wide powers have been given to Arbitral Tribunal for interim relief.

Interim Award - Tribunal can make interim award also, [section 31(6) of Arbitration and Conciliation Act].

Decision by majority - The decision of Arbitral Tribunal will be by majority. The arbitration award shall be in writing and signed by the members of the tribunal, [section 29 of Arbitration and Conciliation Act].

## TIME LIMIT FOR MAKING AWARD

Section 29A of Arbitration and Conciliation Act, 1996 specifies following time limits for passing Arbitration Award.

The Arbitral Tribunal shall make Arbitration Award within 12 months from date of reference. The period can be extended by the parties upto six months by mutual consent. Fees payable to Tribunal can be reduced upto 5% for each month of delay. If award is not made within that period, the mandate of arbitrator terminates. However, Court can further extend the mandate on suitable terms and conditions.

In fact, now Arbitrator, while giving declaration under section 12(1) of Arbitration and Conciliation Act, 1996 has to state whether he has sufficient time to complete assignment within 12 months.

## FAST TRACK PROCEDURE FOR ARBITRAL AWARD

- - If both parties agree in writing, the arbitral tribunal can follow fast track procedure. Here, decision will be on basis of written pleadings, documents and submissions. Oral hearing will be only to clarify certain points. Technical formalities for oral hearing may be dispensed with by arbitral tribunal. The award shall be made within six months  
- section 29B of Arbitration and Conciliation Act.
- Law applicable to Arbitration  
In case of domestic arbitration, the dispute should be decided in accordance with substantive law in force in India. In case of international commercial arbitration, the dispute will be decided in accordance with the rules of law designated by the parties as applicable [section 28(1) of Arbitration and Conciliation Act].  
The arbitrator has to decide in terms of contract and he shall take into account usages of the trade applicable to the transaction, [section 28(3) of Arbitration and Conciliation Act].

## GROUND FOR INTERVENTION OF THE COURT

Arbitration Act, 1996 provides for intervention of Court on following grounds

- \* Section 8 - Power to refer matter to arbitration \* Section 9 - Interim measures of protection \* Section 11 - Appointment of arbitrator in certain cases \* Section 15 - termination of mandate of arbitrator \* Section 27 - Assistance in taking evidence \* Section 34 - Setting aside the award \* Section 36 - Enforcement of an award by way of decree \* Section 37 - Appeal from certain orders of a court ' Section 41 - Reference of a dispute to arbitration in insolvency proceedings.

Arbitration can continue even if other party approaches Court -If one party decides to approach Court despite an arbitration agreement, other party can make application to court to refer the parties to arbitration. Once such application is made, an arbitration can be commenced or continued, even if the application is pending before judicial authority, [section 8(3) of Arbitration and Conciliation Act].



# SETTING ASIDE ARBITRAL AWARD BY COURT

- As per section 34(1) of Arbitration and Conciliation Act, recourse to Court against an arbitral award can be made only for reasons as provided in section 34(2)(a) or 34(2)(b) of Arbitration and Conciliation Act (and not for any other reason).  
As per section 34(2)(a) of Arbitration and Conciliation Act, the award can be set aside by the Court if the party making the application furnishes proof that—
  - (i) a party was under some incapacity; or
  - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
  - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (However, in such a case, the part of award that was in connection with matter submitted to Tribunal can be enforced); or
  - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or was not in accordance with this Part.As per section 34(2)(b) of Arbitration and Conciliation Act the award can be set aside if the Court finds that - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India. (If the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 of Arbitration and Conciliation Act, it will be treated as against public policy).  
Application under section 34 of Arbitration Act to set aside award cannot be made directly to Supreme Court even if Supreme Court has appointed Arbitrator or issued directions. Supreme Court cannot be court of first instance - State of Jharkhand v. Hindustan Construction Co. (2018) 2 SCC 602 (SC 5 member bench).

# MEANING OF 'PUBLIC INTEREST'

- 'As per explanations to section 34(2)(b) of Arbitration and Conciliation Act, 1996 -  
Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—  
(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or  
(ii) it is in contravention with the fundamental policy of Indian law; or  
(iii) it is in conflict with the most basic notions of morality or justice.  
Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.  
Thus, now, Courts cannot go into merits of the arbitral award.  
Setting aside arbitral award on basis of patent illegality on face of the award  
- An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. However, an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. - section 34(2A) of Arbitration and Conciliation Act.  
Thus, now, Court cannot decide upon legality of award and cannot re-appreciate evidence. In short. Court cannot go into merits of the award.

## PROCEDURE FOR SETTING ASIDE THE AWARD

An application for setting aside the award must be made within 3 months from receipt of the award or within three months after making request to Tribunal for correction and interpretation of award. [section 34(3) of Arbitration and Conciliation Act], Court can entertain the application within a further period of thirty days, but not thereafter, if sufficient cause is shown.

Appeal against order of District Court

Appeal against order of District Court lies to the Court authorised by law to hear appeals from original decrees of the Court passing the order. Such appeal can be made only against following orders and no others - (a) granting or refusing to grant any interim measure under section 9 (b) setting aside or refusing to set aside an arbitral award under section 34 (c) Order of Tribunal accepting the challenge to its jurisdiction (d) Order of Arbitral Tribunal granting or refusing to grant an interim measure under section 17. [section 37 of Arbitration and Conciliation Act].



# CONCILIATION

- Part III of the Act makes provision for conciliation proceedings. In conciliation proceedings, there is no agreement for arbitration. In fact, conciliation can be done even if there is arbitration agreement. The conciliator only brings parties together and tries to solve the dispute using his good offices. The conciliator has no authority to give any award. He only helps parties in arriving at a mutually accepted settlement. After such agreement they may draw and sign a written settlement agreement. It will be signed by the conciliator. However after the settlement agreement is signed by both the parties and the conciliator, it has the same status and effect as if it is an arbitral award.

Conciliation is the amicable settlement of disputes between the parties, with the help of a conciliator. In arbitration, there is a decision (award) of Arbitration Tribunal, while in conciliation, it is the decision of the parties.

Offer for conciliation - The conciliation proceedings can start when one of the parties makes a written request to other to conciliate, briefly identifying the dispute. The conciliation can start only if other party accepts in writing the invitation to conciliate. Unless there is written acceptance, conciliation cannot commence. If the other party does not reply within 30 days, the offer for conciliation can be treated as rejected, [section 62 of Arbitration and Conciliation Act].

All matters of a civil nature or breach of contract or disputes of movable or immovable property can be referred to conciliation.

However, matters of criminal nature, illegal transactions, matrimonial matters like divorce suit etc. cannot be referred to conciliation.

# APPOINTMENT OF CONCILIATOR

Conciliator may be one, two or three. They should act jointly, [section 63 of Arbitration and Conciliation Act]. Two parties can mutually agree to appoint one conciliator or each party may appoint one conciliator, or two parties may appoint one conciliator each and the two conciliators may appoint a third person as presiding conciliator. The parties may take help of an institution or person for appointment of conciliator, [section 64 of Arbitration and Conciliation Act],

Submission of statements to conciliator - Each party shall submit a brief written statement of dispute to conciliator and send a copy to another. The conciliator may request any party to submit additional statement or additional information or documents, [section 65 of Arbitration and Conciliation Act], Conciliator is not bound by Code of Civil Procedure, 1908 or Indian Evidence Act, 1872.

## SETTLEMENT AGREEMENT

- Once both parties agree, a settlement agreement should be drafted. It should be signed by both the parties and conciliator. Once it is signed, the agreement is binding on the parties, [section 73 of Arbitration and Conciliation Act], The settlement agreement has the same status and effect as if it is an arbitral award [section 74 of Arbitration and Conciliation Act],  
Cost of conciliation - Cost of conciliation include fees and expenses of conciliator and witness, expert advice, administrative assistance etc. The cost shall be borne equally by parties unless there is different apportionment in the settlement agreement, [section 78 of Arbitration and Conciliation Act]. The conciliator may ask for deposit towards the costs at the time of commencement or during conciliation proceedings, [section 79 of Arbitration and Conciliation Act].  
Resort to arbitration or judicial proceedings - When the conciliation process is in progress, the parties may not initiate any judicial or arbitral proceedings. However, they may do so only to protect their legal rights, [section 77 of Arbitration and Conciliation Act] [e.g. if the legal action or arbitral proceedings are likely to become time barred].

## NON-ADMISSIBILITY OF EVIDENCE OR STATEMENTS MADE DURING CONCILIATION

Both the parties are expected to have 'give and take' attitude during conciliation proceedings. The parties may admit some facts or agree to certain concessions or payments during conciliation proceedings. It is expected that they should be free to make maximum possible adjustments with a view to resolve the dispute amicably. They should feel completely free to do so.

Hence, following provisions are made - (a) The views expressed or suggestions made or admissions made or proposals made or accepted during conciliation proceedings cannot be used as evidence in any arbitral or judicial proceedings. [section 81 of Arbitration and Conciliation Act], (b) The conciliator cannot act as arbitrator, unless both parties agree [section 80(a)]. (c) The conciliator cannot be presented as a witness in any arbitral or judicial proceedings [section 80(b) of Arbitration and Conciliation Act].



# ENFORCEMENT OF FOREIGN AWARDS AND GENEVA CONVENTION AWARDS

“International commercial arbitration” means 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) 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 - section 2(1)(f) of Arbitration Act.

Subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act - proviso to section 2(2) of Arbitration Act.

## JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION

If parties have entered into arbitration agreement as per New York convention, if a judicial authority is seized of the matter and if one of the parties or person claiming under him requests, judicial authority shall refer the matter to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed [section 45 of Arbitration and Conciliation Act].

**Enforcement of foreign Arbitration award** - Party which intends to enforce a foreign award has to produce the arbitral award and agreement of arbitration [original or its certified copy] to the High court having jurisdiction over the subject matter of the award, [section 47 of Arbitration and Conciliation Act].

The enforcement of award can be refused by court only in cases specified in section 48 of Arbitration and Conciliation Act. Otherwise, the foreign award is enforceable through court as if it is a decree of the court, [section 49]. If the court declines to enforce the arbitral award, appeal can be made to the court where appeal normally lies from the district court. However, no further appeal can be made (except appeal to Supreme Court) - (section 50). [Probably, the aggrieved party may be able to approach International Court of Justice, as the convention is an international convention, signed by many of the member countries].

Only High Court can be approached for enforcement of the foreign award.

Section 48(2)(b) of Arbitration and Conciliation Act, 1996 provides that enforcement of foreign award can be refused if the enforcement of the award would be contrary to the public policy of India.

# Contact Us

- Rajput Jain & Associates Address: P-6/90, Connaught Circus Connaught Place New Delhi-110001
- Mobile No: 9811322785, 9555555480
- Telephone: +91 011 -23343333
- Email : [info@carajput.com](mailto:info@carajput.com), [singh.swatantra@gmail.com](mailto:singh.swatantra@gmail.com)
- Website : [www.carajput.com](http://www.carajput.com)

## Corporate & Head Office

- Address: 1598, Level-1, Sector 22-B, Chandigarh
- Mobile No: 9555555480, 9811322784, 9871857333
- Email : [rajputjainandassociates@gmail.com](mailto:rajputjainandassociates@gmail.com)

• Address: Building No. 53/160 R5, Bhakti Nagar, Pandeypur Varanasi 221002 (U.P) India

• Address: D 301 Omex Royal Apartment Sector 44 Noida, India

• Address: Building No 65 Ward No.10 Lakhe Chaur Marg, Kathmandu Metropolitan Kathmandu, Nepal.

## Branch Offices



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