ISBN : 9788193710067

Dr. Mayank Pratap

LAW OF ARBITRATION & CONCILIATION

(Cases and materials with Amendment Act, 2019)

Aditi Publication

Law of Arbitration & Conciliation

(Cases and materials with Amendment Act, 2019)

Writer :

Dr. Mayank Pratap, LL.M Ph.D

Assistant Professor

Law School, BHU, Varanasi, Uttarpardesh, INDIA

Publisher :

Aditi Publication, Raipur Chhattisgarh, INDIA

Law of Arbitration & Conciliation : (Cases and materials With Amendment Act, 2019)

2020
Edition : 01, Volume : 01

Writer : **Dr. Mayank Pratap**,
Assistant Professor, Law School, BHU, Varanasi, Uttarpardesh, INDIA

ISBN : **978-81-937100-6-7**

Price : Rs. **300.00**

Publisher :
Aditi Publication,
Near Ice factory, Opp Sakti Sound Service Gali, Kushalpur, Raipur Chhattisgarh, INDIA
+91 9425210308

Preface

The Arbitration & Conciliation Act of 1996 modelled on the UNCITRAL Model Law on International Commercial Arbitration, consolidated the law of arbitration law in India, repealing all three earlier statutes namely the Indian Arbitration Act, 1940 (dealing with domestic arbitration); and the Arbitration (Protocol) and Convention) Act, 1937; and the Foreign Awards (Recognition and Enforcement) Act, 1961 (both dealing with recognition and enforcement of foreign awards under the Geneva Protocol & Convention and the New York Convention, respectively). The Act came into force at the time of India's economic liberalisation and intended globalisation and was expected to be a shot in the arm for a quick and cost effective form of alternative dispute resolution through arbitration.

Almost twenty years later, Indian courts were still seen to be particularly interventionist, refusing to give up jurisdiction and entertaining applications even where the seat of arbitration was outside India. That apart, the gross delays of the judicial system meant that instead of being seen as a pro-arbitration jurisdiction, India was usually one of the last choices of an international commercial arbitration seat. The landmark Supreme Court decision in 'BALCO' and various proposals for amendment of the Act , finally culminated in the 20th Law Commission's Report No. 246 (issued in August 2014,7 with a Supplementary Report in February 20158), on proposed amendments. The Report had a fresh look at the various lacunae in the Act and subsequent court rulings over the years, and suggested some long awaited and critical amendments. Extensive amendments were brought about by the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect from October 23, 2015 ("the 2015 Amendments"). The 2015 Amendments demonstrated a clear preference for institutional arbitration. Recognising the necessity for a further revamp of the Act and the benefits of institutional arbitration, the Government set up a High Level Committee to Review the

Institutionalisation of Arbitration Mechanism in India under the Chairmanship of Justice B. N. Srikrishna, Retired Judge of the Supreme Court. The Report rendered in August, 2017 recommended extensive measures to improve the overall quality and performance of arbitral institutions in India and to promote India as a viable if not preferred seat of arbitration. Consequently, the further amendments intended by Arbitration and Conciliation (Amendment) Bill, 2018 came before Parliament and passed as Arbitration and Conciliation (Amendment) Act, 2019. On August 9, 2019, the President of India gave his assent to the amendments to the Arbitration and Conciliation Act, 1996 and the same has been published in the Official Gazette of India.

In this first edition of the Book, an attempt has been made to encapsulate the major changes that have been introduced in the Act including recent cases, which provides a better framework for an effective enforcement of law relating to arbitration in India. The legal implications of the various changes and new concepts have been examined critically and analyzed in minute details along with judicial pronouncements as to make the subject material more readable and fascinating.

The author has made liberal use of material available on subject and referred to a number of books, journals, websites and tried to assimilate the text with a view to presenting it in a lucid and orderly manner.

The author takes this opportunity to express his thankfulness to the teachers and students of Law Faculty BHU for their blessings and encouragement. The author is also thankful to his mentor late Prof. D K Sharma. The author express his thanks to publisher of this book.

All helpful suggestions for the further improvement of the book will be gratefully received.

Dr. Mayank Pratap
Law School, BHU, Varanasi

INDEX

Table of Cases

A

B

C

Chandok Machineries **Vs.** SN Sunderson & Co.

Charls **Vs.** CadiffColliries Ltd

Cheran Properties Limited **Vs.** Kasturi and Sons Limited

Chittaranjan Maity **Vs.** Union of India

Chloro Controls (I) P. Ltd. **Vs.** Severn Trent Water Purification Inc. & Ors

Clause U.P. Rajkiya Nirman Nigam Ltd., **Vs.** Indure Pvt., Ltd

Collins (Contractors) Ltd. **Vs.** Baltic Quay Management Ltd.

Continental Construction Ltd., **Vs.** National Hydro electric Power Corp. Ltd

CVS Insurance and Investments **Vs.** Vipul IT Infrasoft Pvt. Ltd

D

Daelim industrial Co. **Vs.** Numaligarh Refinary Ltd.

Dalim Kumar Chakraborty **Vs.** Gouri Biswas

Deep Industries Limited **Vs.** Oil and Natural Gas Corporation Limited and Anr

Delhi Airport Metro Express Pvt. Ltd. **Vs.** CAF India Pvt. Ltd

Dewan Chand **Vs.** State of J&K,

Dhirendra Bhanu Sanghvi **Vs.** JCDS Lid, Bombay,

Diamond lock **Vs.** lying Investment

Dinkar Rai Lakshmiprasad **Vs.** Yeshwant rai Hariprasad,

Duro Felguera, S.A. **Vs.** Gangavaram Port Ltd

E

Emkay Global Financial Services Ltd. **Vs.** Girdhar Sondhi,

Enercon (India) Ltd. **Vs.** Enercon Gmbh & Anr

Engineering Project (India) Ltd **Vs.** Indiana Engineering Works Put Ltd,

Ethiopian Arilines **Vs.** Stic Travels (P) Ltd

Etsu Chemical Co. Ltd. **Vs.** Aksh Optifibre Ltd

Exfin Shipping Ltd. **Vs.** TolaniShiping Co

F

Fairclough Building **Vs.** Vale of Veloir

Fargo Freight Ltd. **Vs.** The Commodities Exchange Corporation

FIITJEE Ltd. **Vs.** Dushyant Singh and anr

Fiza Developer and Inter Trade Pvt. Ltd. **Vs.** AMCI Ltd

Fuerst Day Lawson Limited **Vs.** Jindal Exports Limited

G

G. Engineers Pvt. Ltd. **Vs.** Calcutta Improvement Trust held

G. Ramchandra Reddy and Co. **Vs.** Union of India

G. Shivramkrishna **Vs.** M/s Isgec Covema Limited

G.C. Kanungo **Vs.** State of Orissa (1995) SCC96.

Ganesh Shankar Pandey & Co. **Vs.** Union of India and others

Garwale Wall Ropes Ltd **Vs.** Coastal Marine Constructions and Engineering Ltd

Gas Authority of India Ltd. **Vs.** SPIE Capag SA

GayatriBalaswamy **Vs.** ISG Novasoft technology

Ghulam Qadir **Vs.** State

Girdhari Lal **Vs.** Kameshwar Prasad

GMR Energy Limited **Vs.** Doosan Power Systems India Private Limited & Ors

H

H. Srinivas Pai and Anr. **Vs.** H.V. Pai (D) thr. L.Rs. and Ors

Haji Habib **Vs.** Bhikhamchand

Haresh Dayaram Thakur **Vs.** State of Maharashtra

Haskins **Vs.** D.&J. Ogilive (Builders),

Hindustan Construction Company Limited and Ors **Vs.** UOI

Hindustan Petroleum Corpn. Ltd. **Vs.** Pinkcity Midway Petroleums

Hindustan Petroleum Corporation **Vs.** Ashok Kumar Garg,

Hindustan Shipyard Limited **Vs.** Essar Oil Limite

Hindustan Shipyard Limited **Vs.** Essar Oil Limited and Ors

Hindustan Zinc Ltd. **Vs.** Friends Coal Carbonisation

Hindustan Petroleum Corpn Ltd **Vs.** Pinkcity Midway Petroleums

HRD Corpn. **Vs.** GAIL (India) Ltd

HRD Corporation **Vs.** Gail (India) Ltd.

HSBC **Vs.** Avitel

I

ICDS Ltd. **Vs.** Mangala Builders Pvt Ltd,

ICICI Ltd. **Vs.** East Coast Boat Builders & Engineers Ltd.,

IFFCO **Vs.** Bhadra Product

Inder Singh Rekhi **Vs.** DDA

Inder Singh, Rakhi **Vs.** Delhi Development Authority,

India Bulls Financial Services Limited **Vs.** Jubilee Plots and Housing Private Limited

India Household and Healthcare Ltd. **Vs.** LG Household and Healthcare Ltd.

Indian Farmers Fertilizers Co-operative Limited **Vs.** M/s Bhadra Products

Indian Organic Chemical limited **Vs.** ChemtexFibres Inc

Infrastructure Finance Limited **Vs.** Tuff Drilling Private Limited

InTamilnaduElectricity Board **Vs.** Sumathi

Intertole ICS (Cecons) O & M Company **Vs.** NHAI

Iron & Steel Co. Ltd. **Vs.** Tiwari Road Lines

J

J & K Power Development Corporation **Vs.** KJMC Global Market Ltd.

Jagmesh Castor Industries **Vs.** Devi Leasing Co

Jansonv. Driefontein Consolidated Gold Mines Ltd.

Jindal Financial and Investment Services **Vs.** Prakash Industries Ltd.

K

K.K.Modi **Vs.** K.N. Modi,

Karishma MEP services **Vs.** KGS Milestone Construction Ltd.

Konkan Railway Corporation **Vs.** Mehul Construction Co.

Konkan Railways Corporation Ltd. **Vs.** Rani Construction Pvt

KR Raveendranathan **Vs.** State of Kerala,

M

M. Anasuya Devi and Anr **Vs.** M. Manik Reddy and Ors

M.D. Army Welfare Housing Organisation Case

M.M.T.C. Limited **Vs.** Sterlite Industries (India) Limite

M/s Hyder Consulting (UK) Ltd **Vs.** Governor State Of Orissa through Chief Engineer

Madhya Pradesh Housing Board **Vs.** Progressive

Mahanagar Telephone Nigam Ltd. **Vs.** Canara Bank & Ors.,

Managing Director, Orissa State Cashewnut Development Corpn Ltd. **Vs.** Ramesh Chandra Swain Nav Bharat Construction Co. v. State of Rajasthan.

Marina Shiping World Corporation **Vs.** Jindal Exports

Marketing Federation of India Ltd

Mayavti Trading Pvt. Ltd. **Vs.** Pradyuat Deb Burman

Mohan LalKukreja **Vs.** Sunder Kukreja

Montana Developers Private Limited **Vs.** Aditya Developers and Ors

MorphenLaborateries Ltd. **Vs.** Morgan Securities,

MSP Infrastructure Ltd **Vs.** MP Road Development Corporation Ltd

Municipal Corporation of Delhi **Vs.** Delhi Municipal Corporation

MurlidharAgarwal and Anr. **Vs.** State of U.P. and Ors.

Mysore Cements Limited **Vs.** Svedela Barmac Ltd

N

N. Malhotra & Sons **Vs.** Airport Authority of India

N. Radhakrishnan **Vs.** Maestro Engineers

N.P. Lohia **Vs.** N.K. Lohia

Narayan Prasad Lohia **Vs.** NikunjKumar Lohia and Ors

Narayan Trading Co. **Vs.** Abcom Trading Pvt. Ltd.

National Ability S.A. **Vs.** Tinna Oil Chemicals Ltd.

National Aluminizirn Co Ltd **Vs.** Pressteel and Fabrications Pvt Ltd

National Building Construction **Vs.** Anita Electricals Pvt. Ltd.

National Highways Authority of India **Vs.** Gammon Engineers and Contractr Pvt. Ltd.

National Insurance Co. Ltd. **Vs.** Boghara Polyfab (P) Ltd.

National Insurance Company Limited **Vs.** M/S SA Enterprises

National Thermal Power Corporation **Vs.** Siemens Atkeinge sells chaft

National Thermal Power Corporation **Vs.** Singer Company.

Naval Gent Maritime Limited **Vs.** Shivnath Rai Harnarain

NCC Ltd. **Vs.** Indian Oil Corporation Ltd

NHAI **Vs.** Hindustan Construction Co. Ltd.

NHAI **Vs.** Shiva Tractor

NTPC **Vs.** Siemens

O

Of Vijay Karia & Ors **Vs.** Prysmian Cavi E Sistemi S.r & Ors

Oil & Natural Gas Corporation Ltd. **Vs.** SAW Pipes Ltd.

Oil and Natural Gas Commission **Vs.** Western Co of North America,

Oil and Natural Gas Corporation Ltd. **Vs.** Jagson International Ltd.

Olympic oil industries **Vs.** practical properties pvt ltd

Olympus Superstructures Pvt.Ltd **Vs.** Meena Vijay Khetan

ONGC **Vs.** Western Geo International Ltd.

ONGC **Vs.** SAW Pipes

Organizing committee Commonwealth **Vs.** Pico Deepali Overlay Consortium

P

P. Anand Gajapathi Raju & Ors. **Vs.** P.V.G. Raju & Ors

P. R. S. Stockbroker ltd. **Vs.** B. H. H. Security Private Lt

Panchu Gopal Bose **Vs.** Board of Trustees for Port of calcutta,

Pandurang Dhoni Chougule **Vs.** Maruti Hari Jadhav

Parmjeet Singh **Vs.** ICDS Ltd.

PEC Limited **Vs.** Austbulk Shipping SDN BHD

Picasso Digital Media Pvt. Ltd. **Vs.** Pick - A-Cent Consultancy Service Pvt. Ltd.

PotlabathuniSrikanth **Vs.** Shriram City Union Finance Ltd.

Prabhat Steel Traders Private Limited **Vs.** Excel Metal Processors Private Limited

Progressive Construction Ltd., **Vs.** Bharat Hydro Power Contraction Ltd.

Puneet solanki and another **Vs.** Sapsi electronics pvt ltd,

R

R. S. Jiwani **Vs.** Ircon International ltd.

R.M. Investment & Trading Co. (P) Ltd. **Vs.** Boeing Co

Raffles Design International India Private Limited & Ors. **Vs.** Educomp Professional Education Limited & Ors

Rajasthan State Road Transport Corporation & another **Vs.** Nandi Lal Sarasw

Rakesh Malhotra **Vs.** Rajinder Kumar Malhotra

Ram Lal **Vs.** Punjab State,

Rashmi housing Pvt. Ltd **Vs.** Pan India Infraproject

Rasiklal Ratilal **Vs.** Fancy Corporation Ltd

Reckitt Benckiser India) Private Limited **Vs.** Reynders Label Printing India Private Limited & Anr

Reliance **Vs.** Union of India

Renusagar Power Co Ltd. **Vs.** General Electric,

Rukmani Gupta **Vs.** Collector, Jabalpur,

S

S. K. Lakshminarayana **Vs.** Poonam Harish,

S. P. Singla Construction Pvt. Ltd. **Vs.** Government of NCT Delhi

S.S. Fasteners **Vs.** Satya Paul Verma,

Sai Babu **Vs.** M/S Clariya Steels Private Limited

Sakuma Exports Ltd **Vs.** Louis Dreyfus Commodities Suisse SA

Sangyong Engineering & Construction Co. Ltd. **Vs.** National Highways Authority of India

Sankar Sealing Systems (P) Ltd. **Vs.** Jain Motor Trading Co

Sasan Power Ltd. **Vs.** North America Coal Corporation India Pvt. Ltd

SaurabhKalani **Vs.** Tata Finance Ltd

SBP and Co. **Vs.** Patel Engg. Ltd

Seth ThawardasPherumal **Vs.** Union of India

Sheetal Maruti Kurundwade **Vs.** Metal Power Analytical (I) Pvt. Lt

Shri Lal Mahal Ltd. **Vs.** Progetto Grano Spa,

Simplex Infrastructure Limited **Vs.** Union of India

Sitanna **Vs.** Viranna,

Smt. Kalpana Kothari **Vs.** Smt. Sudha Yadav and ors

SohanLal Gupta **Vs.** Asha Devi Gupta

Sport Group (Mauritius) Ltd **Vs.** MSM Satellite (Singapore) Pte. Ltd.

SREI Infrastructure Finance Limited **Vs.** Tuff Drilling Private Limited

State of Bihar **Vs.** Bihar Rajya Bhumi Vikas Bank,

State of Himachal Pradesh **Vs.** Himachal Techno Engineers

State of Karnataka **Vs.** Prabhakar Reddy,

State of Orissa **Vs.** Asis Ranjan Mohonty,

State of U.P. **Vs.** Tipper Chand

State of Uttar Pradesh **Vs.** Allied construction

State of West Bengal **Vs.** Associated Contractors

State Trading Corporation India Ltd. **Vs.** Global Steel Holding Ltd.

Sterling General Insurance Co. **Vs.** planter Airwa

Subhash Projects and Marketing Ltd **Vs.** Assam Urban Water Supply and Sewerage Board 2003

Sukanya Holdings Pvt. Ltd. **Vs.** Jayesh H. Pandya and Anr.

Sundaram Finance Ltd. **Vs.** NEPC India Ltd

Sundaram Finance Ltd. **Vs.** P. Sakthivel and Ors

Sundaram Finance **Vs.** Abdul Samad & An

Surya Dev Rai **Vs.** Ram Chander Rai

Swiss Timing Limited **Vs.** Organizing Committee, Commonwealth Games 2010, Delhi,

Swiss Timing Ltd **Vs.** Commonwealth Games 2010 Organising Committee

Swiss Timing Ltd. **Vs.** Commonwealth Games 2010 Organising Committee

T

Taipack Ltd. **Vs.** Ramkishore Nagar Mal

Tarpore& Co. **Vs.** State of Madhya Pradesh,

TDM Infrastructure Pvt. Ltd. **Vs.** UE Development India Pvt. Ltd.

U

U.O.I. **Vs.** Sahreen Timber Construction

U.P. Jal Nigam **Vs.** Civil Judg

Umesh Goel **Vs.** Himachal Pradesh Cooperative Group Housing Society,

Union Of India **Vs.** Bharath Builders

Union of India **Vs.** East Coast Builders

Union of India **Vs.** Hardy Exploration & Production (India) Inc.

Union of India **Vs.** Banwarilal& Sons (P) Ltd.

United India Insurance Co. Ltd & An

United India Insurance co. Ltd and Anr **Vs.** Hyundai Engineering and construction co

V

Vedanta Ltd. **Vs.** Shenzen Shandong Nuclear Power Construction Co. Ltd

Venture Global Engg **Vs.** Satyam Computer Services Limited

Vessel MV Baltic Confidence **Vs.** State Trading Corpn of India

Videocon Industries Limited **Vs.** Union of India

Videocon Power Ltd. **Vs.**Tamilnadu Electricity Board.

Vinay Kumar **Vs.** Union Of India

Visa International Ltd. **Vs.** Continental Resources (USA) Ltd.,

Visa International Ltd. **Vs.** Continental Resources (USA) Ltd.

Vitol S.A **Vs.** Bhatia International Limited.

Voestalpine Schienen GmBH **Vs.** Delhi Metro Rail Corporation Ltd

W

Waterside worker foundation **Vs.** J W AlexenderLtd

Wind World (India) Limited and Ors. **Vs.** Enercon GmbH and Anr

Y

Yusuf Khan **Vs.** Prajita Developers Pvt. Ltd. and Ors

I | INTRODUCTION

Arbitration and Conciliation Act, 1996 (hereinafter Act) was a natural outgrowth of the process of economic liberalization . Arbitration fundamentally is a method of settlement of disputes by which litigants to the quarrel get the same resolved through third person called arbitrator without having recourse to a court of law. Arbitration as a method of settling dispute is gaining more and more importance today. Arbitration is getting worldwide recognition as an instrument for settlement of disputes. Almost all business transactions carry arbitration clauses. There is a trend world over, in particular among companies and corporate not to drag disputes into long drawn courtroom battles. There comes the significance of Arbitration, Mediation, Conciliation and such alternate disputes resolution mechanisms. Here is the added advantage of savings in time as well as the cost of proceedings. Moreover the parties settle the matter in a win- win spirit.

Historical Development :-

Arbitration is a mechanism of justice is as old as civilization. Forms differed as they must – from time to time and place to place. It was prevalent under the Roman Law and in the Greek civilization since the sixth century B.C. Disputes were settled by arbitration in Greece during the sixth century B.C. The nature of disputes included boundary fixation, title to colonies and land, assessment of damages that occurred due to hostile invasion, monetary claims between the states and religious matters. The settlement of controversies by arbitration is an ancient practice at common law. In its broad sense it is a substitution by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law, a domestic tribunal, as contradistinguished from a regularly organized court proceeding according to the course of the common law, depending upon the voluntary act of the parties disputant in the selection of judges of their own choice, its object is the final disposition, in a speedy and inexpensive way of the matters involved, so that they may not become the subject of future litigation between the parties[1].

[1]William Mack and William Benjamin (ed.). *Corpus Juris* , Vol.V, Butterworths and Co., London, 1916.

In England merchants have resorted to adjudication outside the Royal Courts from the first development of national and international trade. Already in the later middle ages, a solid connection between finance and commerce existed. Commercial transactions were commonly done on credit terms, such as bills of exchange, widely accepted at the seasonal fairs which brought together the trading community and provided the basis of this credit system. The character of the Royal Courts was not adapted initially to serve the needs of this trade and traders, firstly because the early courts were primarily interested in disputes over land and conduct detrimental to the King's peace, secondly because contracts, commercial credits and debts incurred abroad and owed by and to foreigners were almost wholly unenforceable, thirdly because the traditional court procedure lacked the much needed expedition that merchants, passing from fair to fair and so often changing jurisdiction, needed and fourthly because jurisdiction was ousted by the necessity of proving venue in England. Thus, the trading communities relied on special tribunals, i.e. the Courts of the Boroughs, of the Fair and of the Staple, in order to solve the controversies arising in the world of local and international trade. These courts were the predecessors of today's modern arbitral tribunals in that a predominant feature of their character was that law should be speedily administered in commercial causes, which in effect led also to a relaxation of the strict procedure in these Courts, and in that, according also to the nature of the dispute, commercial men were also elected to form part of the tribunal. By the eighteenth century arbitration was solidly entrenched as a means of alternative dispute resolution within which judicial intervention now extensively occurs because of the natural desire of the courts to keep all adjudications within their sphere, or the fear of the growth of a new system of law, but most importantly due to the fact that litigants in arbitrations needed the assistance of the courts who in turn exacted a price for the assistance offered.

Arbitration is not a new concept for India. It was prevalent at the Vedic times in India which can be traced from the Pradvivaca Upanishad. In India, the beginnings of arbitration are lost in the mists of time and no substantive records survive showing to what extent, and how, disputes were resolved in any such fashion. Nonetheless, the law and practice of private and transactional commercial disputes without court intervention, is rooted in the

haze of ancient history. Arbitration or mediation as an alternative to dispute-resolution by municipal courts has been prevalent in India from Vedic times. 'the earliest known treatise is the Brhadaranayaka Upanishad, in which sage Yajnavalkya refers to various types of arbitral bodies viz (i) the Puga—a board of persons belonging to different sects and tribes but residing in the same locality; (ii) the Sreni—an assembly of tradesmen and artisans belonging to different tribes but connected in some way with each other; and (iii) the Kula—a group of persons bound by family ties. Such bodies were known as Panchayats and their members were known as Panchas. Proceedings before these bodies were of informal nature, free from the cumbersome technicalities of the municipal law. Moreover, as the members of these bodies were drawn from the same localities and often from the same walk of life as the parties to the dispute, the facts and events could not be concealed from them. The decisions of these bodies were final and binding on the parties.[2] An aggrieved party could, however, go in appeal against the decision of the Kula to the Sreni; from the decision of a Sreni to Puga, and finally from the decision of Puga to the Pradvivaca. Though these bodies were non-governmental and the proceedings before them were of informal nature, their decisions were reviewable by municipal courts.[3]

In the absence of some serious flaws of bias or misconduct, by and large, the courts have given recognition and credence to the awards of the Panchayats. For instance, in *Sitanna* v. *Viranna*,[4] the Privy Council affirmed an award of the Panchayat in a family dispute, challenged after about 42 years. Sir John Wallis J stated the law in the following words:

> *Reference to a village panchayat is the time-honoured method of deciding disputes of this kind, and has these advantages, that it is generally comparatively easy for the panchayatdars to ascertain the true facts, and that, as in this case, it avoids protracted litigation which, as observed by one of the witnesses, might have proved ruinous to the estate. Looking at the evidence as a whole, their*

[2] Address to the Fifth International Congress by Dr. P.B.Gajendragadkar (a retired Chief Justice of India) on January 7-10, 1975, pp. B-13-14.
[3] Kane, *History of Dharmashastra*, Vol. III, 1946, p. 242 et seq.
[4] AIR 1934 PC 105, 107.

Lordships see no reason For doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there are no grounds for interfering with it.

These arbitral bodies dealt with a variety of disputes, such as disputes of contractual, matrimonial and even of a criminal nature. The Raja was the ultimate arbiter of all disputes between his subjects. However, with change in social and economic conditions with changing times, the functioning of such arbitral bodies became inadequate and outmoded, albeit in some form or other, even today, some variants of such arbitral bodies are prevalent in some rural and tribal areas in the country.

Indian Arbitration Act 1899

In the year 1899, the Legislative Council enacted the Indian Arbitration Act 1899 which came into force on 1 July 1899. This Act was substantially based on the British Arbitration Act of 1889 (52 & 53 Vict c 49). Though this was the first substantive legislation on arbitration, in India, its application was confined only to the Presidency towns viz, Calcutta, Bombay and Madras. It expanded the area of arbitration by defining the expression 'submission' to mean 'a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not'.

Prior to that, the expression 'submission' was confined only to 'subsisting disputes'. Thus, before this legislation, a contract to refer disputed matters to arbitration, was governed by three statutes—(i) the Indian Contract Act; (ii) the Code of Civil Procedure; and (in) the Specific Relief Act. In view of the provisions of the Contract Act and the Specific Relief Act, no contract to refer existing or future disputes to arbitration could be specifically enforced. However, a party who refused to perform was debarred from bringing a suit on the same subject. In this situation, by and large, the courts had to draw sustenance from the common law principles of English law, Consequently, the law of arbitration was far from satisfactory.

The working of the Arbitration Act 1899 presented complex and cumbersome problems, and judicial opinion started voicing its displeasure and dissatisfaction with the prevailing state of the arbitration law. In

DinkarRaiLakshmiprasad v. *YeshwantraiHariprasad*,[5] speaking for the Bombay High Court Rangneker J wistfully remarked:

This case is one more illustration of the state of doubt and uncertainty in which the law of arbitration undoubtedly lies, The framers of the Code in dealing with s 83, observed that the provisions of the Code of 1882 relating to arbitration had been transferred with certain modifications to a separate Schedule (Sch. 2) 'in the hope that on a distant date they may be transferred into a comprehensive Arbitration Act'. Unfortunately that hope has not yet been realised. I think it is high time that those responsible for legislation in this country should seriously consider the advisability of taking early steps to revise the law of arbitration.

Arbitration (Protocol and Convention) Act 1937

The Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 were implemented in India by the Arbitration (Protocol and Convention) Act 1937. India was a signatory to the clauses set forth in the First Schedule to this Act and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule to this Act. This Act was enacted with the object of giving effect to the Protocol and enabling the Convention to become operative in India. The preamble of this Act read :-

'Whereas India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule in respect thereof to contracts which are considered as commercial under the law in force in the provinces of India. And whereas it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said convention to become operative in British India, to make certain further provisions, respecting the law of arbitration".

This Act applied only to such matters that were considered 'commercial' under the law in force in India.[6] The operation of this Act was based on

---

[5] AIR 1930 Bom 98 at 105.

[6] Arbitration (Protocol and Convention) Act 1937, Sec. 2.

reciprocal arrangements and it mainly concerned itself with the procedure for filing 'foreign awards', their enforcement and the conditions of such enforcement.

The Arbitration Act Of 1940

The Arbitration Act (Act No 10 of 1940) purported to be a comprehensive and self-contained Code. It was the result of judicial reprimand as well as clamour of the commercial community, which led to the enactment of a consolidating and amending legislation viz, The Arbitration Act of 1940. The Arbitration Act, 1940 consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure 1908. It was also largely based on the English Arbitration Act of 1934 and came into force on 1 July, 1940.

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

The 1940 Act contemplates three kinds of arbitration: (1) arbitration without intervention of a Court[7], (ii) arbitration with intervention of a Court where there is no suit pending[8] (iii) arbitration in suits[9].

The Foreign Awards (Recognition And Enforcement) Act 1961 (Fare)

India was one of the signatories to the New York Convention of 1958. Mustill describes the New York Convention as 'the most effective instance

[7]Dealt with in Chapter II of the Arbitration Act 1940, which includes section 3 to section 19.

[8]Dealt with in chapter III which consists of only one section viz. section 20;

[9]Chapter IVof the Act

of international legislation in the entire history of commercial law'. The main object of this Act was to give effect to the Convention. It contained only 11 sections in addition to the text of the New York Convention reproduced in the Schedule as an appendix. In the landmark judgment in *Renusagar Power Co Ltd*. v. *General Electric*,[10] the Supreme Court said that the object of this legislation was to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration.

As a successor to the Geneva Convention, the New York Convention was aimed at energising and strengthening the machinery for settlement of the disputes emanating from agreements having a transnational character. It was meant to remove the existing deficiencies in the previous treaties, and not to demolish the mechanism for referral of disputes to arbitration arising out of such transactions. The New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce even though such an agreement does not lead to a foreign award, but the enforcement and recognition of the agreement will of course be subject to the limitations already spelt out.[11] For instance, in *Oil and Natural Gas Commission* v. *Western Co of North America*,[12] the Supreme Court compelled an Indian party which had contested enforcement of an arbitral award to pay up the undisputed portion of the award, though it disallowed the plea of the Western Co of North America for enforcement of the award.

The United Nations Commission On International Trade Law-Model Law

The UNCITRAL (United Nations Commission on International Trade Law) Model Law on arbitration and Model Rules on arbitration are also significant international instruments on arbitration. The UNCITRAL documents are state-of-the-art instruments. They codify the world consensus on arbitration at a later time than the New York Arbitration Convention, and despite the central presence and substantial contribution of the Convention

[10] AIR 1985 SC 1156

[11] *Gas Authority of India Ltd*. v. *SPIE Capag SA,* AIR 1994 Del 75, 90-91

[12] (1997) 1 SCC 496.

more accurately reflect the sophistication and the content of the world law on arbitration. Their integration into national law or into individual arbitral proceedings yields the full benefits of a contemporary regulatory framework on arbitration. Most national jurisdictions have modern arbitration statutes and are hospitable to arbitration. In fact, many states have espoused the deregulatory approach to arbitration. Generally, these national legal systems are just as supportive of arbitration, especially international commercial arbitration.[13]

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in December 1966 with the object of harmonising and promoting the law relating to international trade.[14] The Commission is composed of 36 member States chosen to represent the world's various geographical regions and its principal economic legal systems. This body has been described as 'the core legal body within the United Nations system in the field of International Trade Law, to co-ordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonisation of trade law'.[15] Furthermore, UNCITRAL encourages participation of interested observers in its work. Such observers, for instance, are United Nations member States, and international organisations.

Arbitration and Conciliation Act, 1996

Parliament enacted the Arbitration and Conciliation Act 1996 (hereinafter also referred to as 1996 Act) as a measure of fulfilling its obligations under the international treaties and conventions. The Act was drafted taking the UNCITRAL Model Law on International Commercial Arbitration and Conciliation Rules, as the basis. The emphasis under the Act has been to

[13] Thomas A. Carbonneau. *Cases and Materials on The Law and Practice of Arbitration*, Second edn, 2000, at p. 36 as cited in O.P. Malhotra and InduMalhotra, *Supra* note 2 at 16.

[14] General Assembly Resolution 2205, dated 17 December 1966 as cited in O.P. Malhotra and InduMalhotra, *Ibid* .

[15] General Assembly Resolution 40/70, GAOR Supp No. 53, A/40/53, p. 307 as cited in O.P. Malhotra and InduMalhotra, *Ibid*.

accord primacy to resolution of disputes through arbitration, and to reduce the intervention of the courts in such proceedings.[16] It came into force on the 25th day of January, 1996 and its notable features are that it minimizes judicial intervention and reduces the grounds of challenge to the award. The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law.

First, while the UNICITRAL Model Law was designed to apply only to international commercial arbitrations,[17] the 1996 Act applies both to international and domestic arbitrations.

Second, the 1996 Act goes beyond the UNICITRAL Model Law in the area of minimizing judicial intervention[18].

The 1996 Act, which is based on UNCITRAL Model Law on International Commercial Arbitration, was passed to fulfill this emerging need. In consequences there off, we now have an arbitration statutes that is better attuned to both domestic and international arbitration.

This is how the Supreme Court dwelled on the new Act :

> *To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalization policy of the Government, Indian Parliament was persuaded to enact the Arbitration & Conciliation Act of 1996 in UNCITRAL model and therefore in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of Arbitration & Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum*".[19]

[16] *A. Ramakrihsna* v. *Union of India* 2004 (3) Raj 554 (AP)

[17] Article 1 of the UNICITRAL Model Law

[18] S K Dholakia, 'Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003', *ICA's Arbitration Quarterly*, ICA, New Delhi, 2005 vol. XXXIX/No.4 at page 3. S K Dholakia is a Member of ICC International Court of Arbitration and Senior Advocate, Supreme Court of India

[19] *Konkan Railway Corporation* v. *Mehul Construction Co.*, 2000 (7) SCC 201.

Statement of Objects and Reasons :

The Statement of Objects and Reasons of the Act recognizes that India's economic reforms will become effective only if the nation's dispute solution provisions are in tune with international regime.

The Statement of Objects and Reasons set forth the main objectives of the Act as follows :

i. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

ii. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

iii. to provide that the arbitral tribunal gives reasons for its arbitral award;

iv. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

v. to minimise the supervisory role of courts in the arbitral process;

vi. to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

vii. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

Constitutional Validity of the Act :

According to Article 51 (d), the state has to endeavour to encourage settlement of international disputes by arbitration.[20] The constitutional validity of this Act has been upheld by the Supreme Court in *Babar Ali* v. *Union of India*.[21] In view of the judicial review being available for challenging the award in accordance with the procedure laid down in the Act, the Court said that there is no question of the Act being unconstitutional.

---

[20] MP Jain, Indian Constitutional Law, Wadhwa and Company- Nagpur, Fifth edn 2003, Reprint 2008, p-1394.

[21] (2000)2 SCC 178

PART 1

CHAPTER 1 | GENERAL PROVISION

Definitions :-

(1) In this Part, unless the context otherwise requires :-

a. "arbitration" means any arbitration whether or not administered by permanent arbitral institution;

b. "arbitration agreement" means an agreement referred to in section 7;

c. "arbitral award" includes an interim award;

d. "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

e. "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;

f. "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) 2*** 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;

g. "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

h. "party" means a party to an arbitration agreement.

2. This Part shall apply where the place of arbitration is in India :-

[Provided that 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 recognised under the provisions of Part II of this Act.]

3. This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

4. This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made there under.

5. Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto.

6. Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.
7. An arbitral award made under this Part shall be considered as a domestic award.
8. Where this Part :-

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.

9. Where this Part, other than clause (a) of section 25 or clause (a) of sub-section (2) of section 32, refers to a claim, it shall also apply to a counterclaim, and where it refers to a defence, it shall also apply to a defence to that counter claim.

Definition framed by the legislature can be divided into three main types :-

(a) Restrictive and Extensive Definitions :- The legislature has power to define a word even artificially. The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same.

(b) Ambiguous Definitions :- Although it is normally presumed that the Legislature will be specially precise and careful in its choice of language in a definition section, at times the language used in such a section may itself require interpretation

(c) Definitions are Subject to Contrary Context :- When a word has been defined in the interpretation clause, prima facie that definition governs whenever that word is used in the body of the statute. But where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definition given in an interpretation clause are, therefore, normally enacted subject to the qualification – 'unless there is anything repugnant in the subject or context' or 'unless the context otherwise requires'. Even in the absence of an express

qualification to that effect such a qualification is always implied. The onus to prove exclusion on the basis of these words is on the person alleging such exclusion. However, it is incumbent on those who contended that the definition given in the interpretation clause does not apply to a particular section t show that the context in fact so requires.

Section 2(1) opens with hese words unless the context otherwise requires:-

Meaning of Arbitration [S.2(1)(a)]

Section 2(1) (a) of Arbitration and Conciliation Act, 1996 covers any arbitration whether it is administered by any permanent arbitral institution or not. The only meaning that this definition attaches to arbitration is that it is not necessary that arbitration should be by any permanent institution of arbitration. It gives no meaning. It is a definition of inclusion only, namely all arbitration would be included weather by a permanent body or otherwise.

The word "Arbiter" was originally used as a non-technical designation of a person to whom controversy was referred for decision irrespective of any law. Subsequently the word "Arbiter" has been to a technical name of a person selected with reference to an established system for friendly determination of controversies, which though not a judicial process is yet to be regulated by law by implication. Arbitration is a term derived from the nomenclature of Roman law[1]. Arbitration' in the normal usage of the term means, 'reference of a dispute for adjudication to a neutral person chosen by the parties in dispute. As a means of resolving disputes it has been described as a 'proven, useful and well-understood method' whose 'social and commercial utility are obvious'. It is applied to an arrangement for taking, and abiding by judgment of a selected person in some disputed matter instead of carrying it to the established Courts of justice.

Shorter Oxford English Dictionary : "The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision[2]."

---

[1]See , Salil K. Roy Chowdhury and H.K.Saharay Arbitration Law p 3, (3rd edn), Eastern Law House.

[2] Shorter oxford English dictionary: (3rd. edition – 1996)

Black Law Dictionary : "Arbitration' means, a process of dispute resolution in which a neutral third party called arbitrator, renders a decision after a hearing at which both parties have an opportunity to be heard"[3]

Halsbury's Laws of England notes that the term arbitration is capable of being used in several sense and may refer to a number of different concepts[4]:-

> "It may either to a judicial process or to a non-judicial process. A judicial process is concerned with the ascertainment, declaration and enforcement of rights and liabilities as they exist, in accordance with some recognized system of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce, what in the arbitrators opinion ought to be a respective rights and liabilities of the parties, and such a function is non-judicial[5]. Conciliation is a process of persuading parties to reach agreement, and is plainly not arbitration; nor is the chairman of a conciliation board an arbitrator[6]."

Martin Donke : "Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal"[7]

Mark Huleatt James and Nicholas Gould : "Arbitration as a private of solving disputes which commences with the agreement of the parties to an existing or potential, dispute to submit that dispute for decision by a tribunal of one or more arbitrators"[8].

---

[3] Black's Law Dictionary, 6th edn. (1990), West Publishing Co., p.105.

[4]Halsbury 's laws of England: (4th. edn. butterworths 1991) para 601, 332

[5] See Waterside worker foundation V. J W AlexenderLtd. (1918) 25CLR 434 at 463 (Aust HC) approved in A. G. of Australia V.
R and Boiler Maker 's Society of Australia (1957) AC 288(1957)2ALL ER 45, PC

[6]Charls V. CadiffColliries Ltd (1928) 44 TLR 448, CA affd. Sub nom. Cited in ibid.

[7]Grand Hanessian& Lawrence W .Newman International Arbitration Checklists, 2nd Edition, United States of America, 2004

[8]Huleatt Mark & Gould Nicholas, International Commercial Arbitration Handbook: (London, LLP Limited & Business Legal Publishing Division, 1996).

Hirst LJ : Arbitration as a "procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the the role of a civil court of Law."[9]

"Arbitration is a substitution by consent of parties of a domestic tribunal in place of tribunals established by law. It is an alternative process to litigation. It does not replace the ordinary judicial machinery in all its aspects. It exists with the established judicial process. It may include provisions which are lawful, but it cannot oust the jurisdiction of court completely."[10]

"Arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties or appointed under statutory authority, for determination of the same. In a broad sense, it is substitution of ordinary judicial machinery by a mutually chosen tribunal i.e., an Arbitrator or an Arbitral Institution[11]".

Thus, Arbitration is a reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction. It is a method for the resolution of dispute outside the conventional courts of law, wherein the parties to the dispute submit it before a third party (adjudicator) which in turns reviews the case and gives a decision (Arbitral Award) that is binding for both sides and enforceable through a Court of Law.

Types Of Arbitration :-

Depending on the terms of arbitration agreement, the subject matter of the dispute in arbitration, and the laws governing such arbitrations, arbitrations can be classified into different types[12], such as

---

[9]OCallagahen v. Coral Racing Ltd ., 1998 per HIRST LJ. See also Fouchard Gaillard Goldman International Commercial Arbitration 1999 p.9 "

[10]Czamiknav V. Roth Schmidt and Co., [1922] 2 KB 478 (CA) as cited in H.K. Saharay, Law of Arbitration and Conciliation, Eastern Law House, Kolkata/New Delhi, 2001, p. 4.

[11]Jivaji Raja V. KhimijiPoonja& Company AIR 1934 Bom 476.

[12]InduMalhotraand O.P.Malhotra, The Law and Practice of Arbitration and Conciliation, 2nd Edn 2006.p115-129

Ad-hoc Arbitration : The Ad-hoc Arbitration is agreed to and arranged by the parties themselves without recourse to an arbitral institution. It is to get the justice, in the balance of the un-settled part of their dispute only. It may be either International or Domestic arbitration[13]. The essential characteristic of ad hoc arbitration is that it is independent of all institutions. The arbitration system selected or provided for in the agreement does not exist except in the context of the dispute between the parties. The arbitration system is activated if a dispute arises between the parties and one of them calls for arbitration or otherwise initiates the procedure in accordance with the terms of the arbitration agreement or, where appropriate, by some subsidiary rules that have been selected to apply to the arbitration.

Ad hoc arbitration is generally favoured where the parties are unable to agree on the arbitration institution. There are many reasons why particular institutions may or may not be acceptable to parties. Where parties have opposing views as to which institution to choose, ad hoc arbitration is often the compromise. From a more positive position, the parties may feel that ad hoc arbitration is preferable for their specific case. Parties can also favourad hoc arbitration where they wish to have control of the procedure and the mechanism rather than to be subjected to institutional administration or control.

A popular reason for ad hoc arbitration is that one party is a state or state-entity. Sovereign entities are often reluctant to submit to the authority of any institution, regardless of its standing; to do so would be to devalue or deny its sovereignty. This is due to a perceived partiality or non- neutrality of certain institutions or the place where the institution is located. Whilst this concern is totally unjustified, some states prefer to create a totally independent ad hoc mechanism, through which they can ensure the maximum degree of non-nationality and the least embarrassment to their sovereignty.

A perceived but not necessarily correct advantage of ad hoc arbitration is that, because the parties control the process, it can be less expensive than institutional arbitration. In fact this depends in each case and on how the institution charges for its arbitration service :

[13] Russell on Arbitration, 22nd edn,2003,p. 29,para 2-010

Institutional Arbitration: Institutional Arbitration is an arbitration conducted by an arbitral institution in accordance with the prescribed rules of the institution. In such kind of arbitration, there is prior agreement between the parties that in case of future differences or disputes arising between the parties during their commercial transactions, such differences or disputes will be settled by arbitration as per clause provide in the agreement and in accordance with the rules of that particular arbitral institution[14]. The arbitrator or arbitrators, as the case may be is appointed from the panel maintained by the institution either by disputants or by the governing body of the institution. The Arbitration and Conciliation Act, 1996 gives recognition and effect to the agreement of the parties to arbitrate according to institutional rules and subject to institutional supervision.

Every arbitration institution has its own special characteristics. It is essential that parties are aware and take account of these.[15] It is tied in with an understanding of the special requirements of different arbitration systems and rules. For example, how many arbitrators should there be? Different rules will make different provisions; in the absence of agreement by the parties some favour one, e.g. the LCIA; others favour different. There are similarly differences in other areas including; the right of the parties to select, nominate and appoint arbitrators; the degree of independence and neutrality required of arbitrators; the power of arbitrators to control the proceedings and in particular, to make orders concerning interim relief; and how the costs of the arbitration, especially the arbitrators' fees, are calculated.

Important differences also include the level of administration of the institution. For example, the ICC is heavily administered with the terms of

[14] Some of the leading Indian institutions providing for institutional arbitration are, The Indian Council of Arbitration (ICA), New Delhi, The Federation of Indian Chamber of Commerce and Industries (FICCI), New Delhi and The International Center for Alternative Dispute Resolution (ICADA). Some of the leading international institutions are The International Chamber of Commerce (ICC), Paris, The London Court of International Arbitration (LCIA), London and The American Arbitration Association (AAA). The World Intellectual Property Organisation (WIPO) is an agency of the United Nations, which is offering its services exclusively for the intellectual property disputes. WIPO is based in Geneva.

[15] Simpson, Thatcher & Bartlett (eds), International Arbitration Rules.

reference, fixing of times for the making of the award and scrutiny procedures being fundamental to the system. By contrast, after the appointment of the tribunal, the LCIA limits its administration to dealing with challenges to the arbitrators and to interceding to agree, collect and pay the fees of the arbitrators.

An important advantage of institutional arbitration is that it avoids the discomfort of the parties and the arbitrators discussing, agreeing and fixing their remuneration. Most institutions have a mechanism for collecting from the parties the money from which the arbitrators will be paid and without directly involving the arbitrators. This means that the arbitrators are able to maintain a certain level of material detachment. This has the very definitive advantage of allowing the arbitrators to focus solely on the substance of the case rather than discuss with the parties a matter that is personal to them.

Statutory Arbitration: It is mandatory form of arbitration, which is imposed on the parties by operation of law. It is conducted in accordance with the provisions of an enactment, which specifically provides for arbitration in respect of disputes arising on matters covered by the concerned enactment byelaws or Rules made there under having the force of law. In such a case, the parties have no option as such but to abide by the law of land. It is apparent that statutory arbitration differs from the other types of arbitration for the reason that, the consent of parties is not necessary, it is compulsory form Arbitration and it is binding on the Parties as the law of land. As an example to it, Sections 24, 31 and 32 of the Defence of India Act, 1971 and Section 43(c) of The Indian Trusts Act, 1882 are the statutory provision, which deals with statutory arbitration. The provisions of Part I of The Arbitration and Conciliation Act 1996. In general apply to Statutory Arbitrations, except sub sec. (1) of Sec.40 of this Act providing that arbitration agreement shall not be discharged by the death of any party thereto; Sec. 41 of 1996 Act providing for the enforceability or otherwise of arbitration agreement to which insolvent is a party or is adjudged insolvent afterwards and Sec. 43 of 1996 Act providing for the applicability of the Limitation Act to arbitrations. But such of the provisions of Part I, which are inconsistent with the enactment or the rules of any particular statutory arbitration, shall not apply to that kind of Statutory Arbitration.

Fast Track Arbitration or Documents Only Arbitration : The Documents only arbitration is not oral and is based only on the claim statement and statement of defence, and a written reply by the claimant, if any. It also includes the documents submitted by the parties with their statements along with a list of reference to the documents or other evidences submitted by them. The written submission may take the form of a letter to the tribunal from the party or his representative, or may be a more formal document produced by lawyers. The parties may agree upon, or in default, the tribunal may adopt the procedure to resolve the dispute only on the basis of the documents submitted to the tribunal and without any oral hearing or cross-examination of the witnesses.

Look –Sniff Arbitration : Institutions specialised in special types of disputes have their own special rules to meet the specific requirements for the conduct of arbitration in their specialised areas. Look –Sniff Arbitration is a hybrid arbitration, and also known as quality arbitration. It is a combination of the arbitral process and expert opinion. On the bases of the evidence and inspection of goods or commodities that are subject matter of the dispute placed before the arbitrator, who is selected based on his specialised knowledge, expertise and experience in a particular area of trade or business, the arbitrator decides the dispute and makes his award. The award may relate to the quality or price of the goods or both. There is no formal hearing for taking evidence or hearing oral submissions. For example, Rules of the London Court of International Arbitration (LCIA) permit the arbitrator, on his own, to ascertain the quality of goods and their prevalent price.

Flip-Flop Arbitration : This type of arbitration has its origin in a United States arbitration case, which dealt with a baseball player. In such arbitration, the parties formulate their respective cases beforehand. They then invite the arbitrator to choose one of the two. On the evidences adduced by the parties, the arbitrator decides which submission is the correct submission, and then makes an award in favour of that party. After both parties have submitted their respective cases to the arbitrator, he makes an award either favoring the claimant of the respondent. He cannot pick and choose from a party's case. If a party inflates its claim, then it is possible that it will everything. This type of arbitration is also known as 'pendulum arbitration'.

Arbitration versus Court Litigation :- Arbitration is normally considered to have the following benefits as compared to court litigation:

(i) Party autonomy: 'Party autonomy' comprehends various options available to the parties with respect to the conduct of arbitration. It also gives the parties freedom from judicial intervention except where otherwise provided in the Act. The parties can select their own tribunal in accordance with the nature of the subject matter of the dispute.

(ii) Choice of venue: The parties have the option to choose a place of arbitration by agreement. In the absence of such agreement, the arbitral tribunal has the default power to determine the place of arbitration having regard to circumstances of the case, including the convenience of the panics. Notwithstanding the aforesaid powers of the parties and the tribunal to choose the place of arbitration, unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation amongst its members, for hearing witnesses, experts, or the parties, or for inspection of documents, goods or other property.[16] The choice of venue in places like London, New York and Geneva provides the advantage of holding the arbitral proceedings through highly organised institutions. This also facilitates the process of service, discovery and evidence of taking documentary and oral evidence. Arbitration also offers format and unofficial ways of dealing with 'discovery' that might not be possible in a state court. It may be noted that Part I of the Indian Act applies where the place of arbitration is in India. Therefore, the parties have to choose a place of arbitration anywhere in India if the arbitration is to be conducted in accordance with the provisions of Part I of the 1996 Act.[17]

(iii) Informal procedure: The 'arbitral tribunal' is required to conduct the arbitration proceedings in a judicial manner in accordance with the rules, where such rules are applicable or with the rules of natural justice. The procedure of conducting an arbitration is, however, flexible. The arbitral tribunal is not bound by the strict technical rules of the Code of Civil

[16] Arbitration and Conciliation Act, 1996, Section 20(3)
[17] Id., Section 2(2)

Procedure 1908 or of the Indian Evidence Act 1872. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. The procedure may be tailored to suit the nature of the particular dispute. For instance, short procedure arbitration on documents may be agreed by the parties. In default of agreement of the parties, the arbitral tribunal has the discretion to conduct the proceedings it considers appropriate. This power includes the power to determine the admissibility: relevance, materiality and weight of any evidence.[18]

(iv) Equal treatment: Arbitration promises a fair trial by an impartial tribunal. Furthermore, by virtue of an agreement between the parties at the beginning of the contractual relationship, arbitration offers a neutral venue and neutral substantive law. It also grants freedom to the parties to agree upon procedural rules and provide inputs into the selection of a tribunal with a particular background. This promises the prospect of an 'equitable play field.

(v) Expeditious and inexpensive process: Prima facie, arbitration promises the possibility of comparatively expedited proceedings. Once the proceedings conclude, there is the prospect of earlier enforcement of the award pursuant to domestic law as well as the international conventions and bilateral or multilateral treaties. Arbitration also holds out the promise of predictability of the costs and expenses particularly in the areas of jurisdictions. The object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Since it is conditioned by statutory provisions, it cannot be a cheap quick-fix solution to the complex disputes. Parties may have to look beyond the horizon of arbitration and seek for other techniques of speedy and economical settlement, although normally finality is not a feature of ADR. In arbitrations, particularly international commercial arbitrations, the fee and other costs of arbitration is rather prohibitive. Often there are inordinate delays in coming to the final conclusion of arbitrations because arbitrations are conditioned by statutory provisions.

[18]Id., Section 19

(vi) Confidentiality : Arbitration proceedings are private and, generally, are protected by laws of privilege and confidentiality. This is of great significance in commercially sensitive disputes involving, for instance, know- how, lists of clients, the development of business strategies and other commercially confidential matters. In certain types of disputes involving sensitive issues such as high-tech, intellectual property trade secrets etc. there is a presumption of confidentiality to arbitration proceedings and awards that may be of great importance.' Parties have the option of asking for a non-speaking award? The choice of venue and the choice of designating arbitrators also promise privacy and confidentiality of the proceedings and the award.

(vii) Arbitrator as amiable compositeur : The Act gives a large number of options to the parties and they can choose a resilient procedure rather than depending 'on the luck of the draw from a court list'. As the arbitration is consensual, the parties can choose the most suitable procedure.[19] Neither the parties, nor the tribunal are tied to inflexible rules of court.[20] In domestic as well as international commercial arbitrations, in a case where the parties have expressly so authorised the arbitral tribunal, it shall 'act as amiable compositeur and decide ex aequo et bono.[21]

(viii) Representation : There is more scope for representation by persons other than solicitors because the parties are neither bound to be represented by lawyers, nor are they prohibited from being represented by them. Apart from lawyers, they can choose any person to represent them before the arbitral tribunal. Particularly, they can engage persons possessing technical knowledge, skill, training and experience, in cases involving technical and scientific issues. This procedural resilience ensures speedier and less expensive resolution of the dispute.

(ix) Avoidance of uncertainties : Arbitration, when compared to court litigation, particularly in international commercial disputes, is more helpful in avoiding vagaries and uncertainties of foreign litigation. Such

[19]Id., Section 19(2)
[20]Id., Section 19(3)
[21]Id., Section 28(2)

uncertainties include whether a foreign court will assume jurisdiction to hear the case; the necessity for advice and representation by lawyers of that jurisdiction; the necessity for translation of documents and interpretation of evidence; exposure to technical and formal rules of procedure and evidence; and the risk of having a major international commercial dispute resolved by inexperienced and incompetent judges.[22]

(x) Enforcement of domestic award: The degree of rigidity in enforcing a decree as is the usual experience in court litigation, makes arbitration more attractive, particularly to the parties who want speedy and inexpensive justice. In the end the 'arbitral award' is ultimately worth only as much as the parties' ability to enforce its terms. Section 36 provides speedy machinery for enforcement of a domestic award enforceable in the same manner as if it were a decree of a court. In domestic arbitrations, it is much easier to enforce an arbitral award than a judgment of the court, particularly where the assets of the parties are, by and large, in one and the same jurisdiction.

(xi) Enforcement of foreign award: Chapters 1 and 2 of Pt II provide the machinery for enforcement of foreign awards. Chapter 1 deals with the New York Convention awards, while ch 2 deals with the enforcement of Geneva Convention awards. The enforcement under these provisions is speedier. For refusal to enforce a foreign award, s 48 (ch 1) requires a pasty against whom it is invoked to furnish to the court proof of existence of one or more conditions set forth in sub-s (1). The court also may refuse enforcement if it finds that any one of the conditions mentioned in sub-s (2) exists. Section 57 (ch 2) deals with the enforcement of the Geneva Convention awards.

Arbitration agreement [S. (2)(1)b] : "Arbitration agreement" means an agreement referred to in section 7. (For notes see under section 7)

Arbitral award [S. (2)(1)c] : "Arbitral award" includes an interim award. (For notes see section 31)

---

[22] Brown and Marriott, ADR Principles and Practice, Second edn. 1999, pp. 68-69, para 4-089

Arbitral tribunal [S. (2)(1)d] : Arbitral tribunal means a sole arbitrator or a panel of arbitrators. (For notes see section 10 and 11)

Court [S. (2)(1)e] : "Court" means—

(a) 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;

(b) 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.

This definition is result of amendment 2015. The amended law makes a clear distinction between an international commercial arbitration and domestic arbitration with regard to the definition of 'Court'. In so far as domestic arbitration is concerned, the definition of "Court" is the same as was in the 1996 Act, however, for the purpose of international commercial arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction. Accordingly, in an international commercial arbitration, as per the new law, district court will have no jurisdiction and the parties can expect speedier and efficacious determination of any issue directly by the High court which is better equipped in terms of handling commercial disputes.

The definition of Court in Section 2(1)(e) has been altered into two sub-parts. Part (i) includes cases other than international commercial arbitration and Part (ii) includes court for the purposes of international commercial arbitration.

It was held in S.M. Suparies vs. Karnataka Bank Limited[23] that District

[23] AIR 2011 Kar 38

Courts are deemed to be principal civil courts of original jurisdiction. The Principal Civil Judge of the District alone has jurisdiction to decide questions forming the subject-matter of arbitration and not any other judge.

In the matter of application for setting aside an award, it has been held that the Civil Court at Calcutta is not the Principal Civil Court of Original Jurisdiction for the city of Calcutta. It is a civil court of inferior grade. It does not come within the definition of Court. Only the High Court has jurisdiction to entertain application under the Act[24]. Thus, only a Principal Civil Court in a district having original jurisdiction and includes High Court having original jurisdiction can entertain questions involving arbitration.

The question then arises is can a Supreme Court be construed within the definition of "court"?

It was held in State of West Bengal v Associated Contractors[25], in no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e) and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, application will follow the first application made before either the High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

Scope of part I [Sec 2(2)] :

As per sec 2(2) of the Act this Part shall apply where the place of arbitration is in India Provided that 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 recognised under the provisions of Part II of this Act.

Prior to 2015 amendment Section 2 (2) of the Act read as follows: "This Part shall apply where the place of arbitration is in India". The amendment has now inserted a proviso to Section 2 (2) of the Act which

---

[24] Mohd Nasim Akhtar V Union of India, 2015 SCC online Cal 10443: AIR 2015 Cal 64
[25] (2015) 1 SCC 32: (2015) 1 SCC (Civ) 1

provides as under: provided that subject to an agreement to the contrary, the provisions of section 9 (Interim measures etc. by court), section 27 (Court assistance in taking evidence) 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.

Applicability of Part I :

The applicability of Part I is often questioned in international arbitrations. Where Part I applies, the Indian courts gain jurisdiction over matters such as interim injunctions, the appointment of arbitrators, challenges to the appointment of arbitrators and challenges to awards.

In Bhatia International vs Bulk Trading SA[26] the Supreme Court interpreted the legislature's intentions in drafting the act to mean that Part I applies to international arbitrations, unless excluded by the parties. The three-judge bench of the Supreme Court held as follows:

> *"To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."*

Following the judgment in Bhatia International, in Venture Global Engg v Satyam Computer Services Limited[27] the Supreme Court held that foreign awards can be challenged under **Part I** :

---

[26] (2002) 4 SCC 105
[27] (2008) 4 SCC 190

"On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in Bhatia International we agree with the contention of Mr K.K. Venugopal and hold that paras 32 and 35 of Bhatia International make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International."

The Supreme Court and various high courts used these judgments as binding precedent and settled case law[28]. The applicability of Part I to international arbitrations was again at issue before a larger bench in Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc (BALCO)[29]. The matter was brought before the Constitutional Bench of the Supreme Court. During the case, the court revisited the law laid down in Bhatia International and Venture Global. In BALCO the Supreme Court upheld the territorial principle and held that arbitrations which are seated outside India will not attract Part I. However, the court held that arbitrations – including international arbitrations – which are seated in India will be governed by Part I. The BALCO judgment applied prospectively (ie, to arbitration agreements signed after the BALCO judgment (September 6

[28] Videocon Industries Limited v Union of India (AIR 2011 SC 2040) and Sakuma Exports Ltd v Louis Dreyfus Commodities Suisse SA (2014 (4) SCALE 422).
[29](2012) 9 SCC 552

2012[30]). Therefore, all arbitration agreements entered into before September 6 2012 were still governed by Bhatia International.

In order to effectively resolve the difficulties posed by BALCO, the 2015 Ordinance has enlarged the scope of Section 2 (2) of the Act. In current legal scenario besides Section 27 and Section 37 (1) (a), Section 9 would also be applicable to the International Commercial Arbitration even if the seat of arbitration is outside India meaning thereby that a party to a Foreign Seated Arbitration can resort to the remedy available under section 9 of the Act and seek interim protection/relief against the opposite party. However, the advantage extended by the proviso to Section 2 (2) of the Act cannot be availed in case of each and every Foreign Seated Arbitration and the same could be availed only if the following conditions or qualifications attached to it are fulfilled :

i. There should be no agreement to the contrary meaning thereby that Section 9 of the Act would be applicable to a Foreign Seated Arbitration unless the intention of the parties is to expressly or impliedly exclude its applicability.

ii. An arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Ordinance. Hence, the award should fulfill the following criteria :

a) The award should either be New York Convention Award or Geneva Convention Award;

b) The award is made or to be made in such territory with which India has reciprocal arrangement in terms of Section 44 (b) and Section 53 (c) of the Act;

c) The award should fulfill the conditions for enforcement of foreign award laid down in Section 48 and Section 57 of The Act.

[30] Para 197, The judgment in Bhatia International, was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. has been rendered on 10-1- 2008 in terms of the ratio of the decision in Bhatia International. Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter

Receipt of Written Communications [Section 3]

(1) Unless otherwise agreed by the parties,-

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.

Section 3 of Act corresponds to section 42 of the Arbitration and Conciliation Act 1940and section 16(5) of English Arbitration Act, 1934. The self explanatory provision of section 3 of the Act provide for the modes of receipt of written communication to the parties of arbitration by arbitrator this section provides that the notice cannot served to the parties except manner provided under the provision of section 3 of the Act.

Waiver of Right To Object [section 4]

A party who knows that :-

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

This Principle is a direct consequence of the prohibition of inconsistent behavior which in turn is derived from the Principle of good faith and fair dealing. A party who has knowledge that any non-mandatory provision of

the applicable arbitration law or any requirement under the arbitration agreement has not been complied with must raise an objection without undue delay before it proceeds with the arbitration. Any objection which is raised at a later stage of the proceedings is regarded as inconsistent with its previous behavior because, given that party's knowledge of the non-compliance, its silence is regarded as a waiver of his right to object. In BSNL v. Motorola India Pvt. Ltd[31]. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party who knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellant. At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellant had not raised any such objections. The appellant therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived. On similar lines, the Supreme Court in J.G. Engineers Pvt. Ltd. v. Calcutta Improvement Trust held[32], inter alia, that Respondents not having taken the objection with regard to the non arbitrability of the claim before the arbitrator, or any objections that the claims were 'excepted matters', and having contested the claims on merits, is estopped from raising such an objection after having suffered the award.

The Delhi High Court, held in S.N. Malhotra & Sons v. Airport Authority of India[33] that;

Applying the test laid down in the aforesaid case and the statutory provisions referred to hereinabove, and also keeping in mind the fact that the respondent at no stage of the arbitral proceedings chose to raise a challenge to the assumption of jurisdiction by the arbitral tribunal on a matter falling in the category of "excepted matters" under Clause 25 of the agreement between the parties, we are of the considered view that the respondent is

[31]2008 (7) SCC 431
[32]AIR 2002 SC 766
[33]149 (2008) DLT 757 (DB)

now debarred from raising such a plea for the first time under Section 34 of the Act. A conjoint reading of Section 16(2) and Section 4 shows that an objection to the arbitrator having exceeded his jurisdiction falls in the category of case covered by Clause (b) of Section 4. The respondent knew that in respect of the non-compliance of any requirement under the arbitration agreement, it was free to raise challenge. It chose not to do so. As laid down in Narayan Prasad Lohia[34] if a party chooses not to so object there will be deemed waiver under Section 4. Lohia's case pertained to a statutory prohibition. In the present case, it is the requirement of a clause in an agreement which has not been adhered to. The respondent was all along aware of this non-compliance and participated in the proceedings without demur. The award in respect of the same is not to its liking. The challenge now sought to be raised by the respondent flies in the face of its tacit approval of the matter being dealt with by the arbitrator. Allowing the respondent to resile from his position at this stage without its laying any foundation for the challenge when it was free to raise the same, would be inequitable to say the least.

Extent Of Judicial Intervention [sec 5]

Not with standing any thing contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

This Section is analogous to Article 5 of UNCITRAL Model Law as well as the general principle as stated in Part 1 of the English Arbitration Act 1996. It defines the extent of judicial intervention in arbitration proceedings. It clearly brings out the object of the Act viz. to minimise judicial intervention and to encourage speedy and economic resolution of disputes by the arbitral process in cases where disputes are covered by an arbitration agreement. Part I, provides judicial intervention in following among other cases which can be drawn under three groups i.e. before, during and after arbitration.

Section 8 – Power to refer the parties to arbitration.

Section 9 – Power to make interim orders.

Section 11 – Appointment of arbitrator in certain events.

---

[34] (2002) 3SCC 572

Section 13 (5) - Procedure for challenging an arbitrator.

Section 14(2) - Power to decide on the termination of mandate of the arbitrator in the event of his inability to perform his functions.

Section 16 (6) - Competence of an arbitral tribunal.

Section 27 – Assistance in taking evidence.

Section 34 – Power to set aside an award.

Section 34(4) – Power to remit the award to the arbitration tribunal.

Section 36 - Enforcement of an award by way of decree.

Section 37 – Power to hear appeal only on certain specified matters.

Section 37(3) – Power of Supreme Court to hear appeal.

Section 39 (2) (4) – Power of the Court to order delivery of an award on payment of costs of the arbitration and also power to make orders in respect of costs in the absence of sufficient provision concerning them in the award.

Section 41(2) – Reference of a dispute to arbitration in insolvency proceedings.

Section 43(3) – Power of the court to extend time with respect a dispute which may become time barred.

The Supreme Court in Surya Dev Rai V. Ram Chander Rai[35] had observed as follows: "The parameters for exercise of jurisdiction under Article 226 or 227 of the Constitution cannot be tied down in a strait jacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be

[35] AIR 2003 SC 3044

cases where 'a stitch in time would save nine'. Thus, the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

Administrative Assistance [sec 6] ;

In order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Section 6 enables the parties and the arbitral tribunal to obtain administrative assistance in order to facilitate the conduct of arbitration proceeding. The arbitrators can take dministrive assistance in respect of acts of ministerial and clerical nature.

CHAPTER 2 | ARBITRATION AGREEMENT

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 [1][including communication through electronic means] 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.

An arbitration agreement is the foundation on which the jurisdiction of an arbitrator rests. The conception of Arbitration Agreement is spelled out in Section 2 (1) (b) of the Arbitration and Conciliation Act 1996 and Section 7 of the Arbitration and Conciliation Act 1996. These provisions are analogous to Section 2(a) of the old Act 1940[1] and Article 7 of UNCITRAL Model

---

[1] Section 2 in The Arbitration Act, 1940 Definitions: In this Act, unless there is anything repugnant in the subject or context,- (a) " arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named there in or not;

law[2].

To constitute an arbitration agreement, first of all there should be an agreement, that is, ad idem. An arbitration agreement like all other contracts must satisfy all the essential requirements of section 10 of the Indian Contract Act, 1872 i.e., the parties to the arbitration agreement must be competent to enter into a contract and the agreement should be made by the free consent of the parties.

Furthermore, the parties should have the intention of entering into a legally binding obligation. The Supreme Court in the case of *Visa International Ltd. vs. Continental Resources (USA) Ltd.* (2009) observed that In circumstances where the parties mutually consent to resolve the disputes through Arbitration and Conciliation, what is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties. In the case of Enercon (India) Ltd. vs. Enercon Gmbh & Anr. (2014) held that The Arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract. The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract.

---

[2] Article 7 – Definition and form of arbitration Agreement (1) "Arbitration Agreement" is 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 defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not defied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Agreement to be in writing :

An Arbitration Agreement shall be in writing. An oral agreement to submi9t a dispute to Arbitration is not binding .If the Agreement is in writing it will bind, even if some of its details are filed in by oral understanding[3]. Prior to the Act of 1996, though judicial opinion as to what is 'writing' was almost unanimous, there was some divergence on the questions whether the arbitration agreement was required to be 'signed by the parties'. This section 7 (3) and (4) now states the law with clarity leaving no room for speculation. This section explains how the agreement could be considered to be in writing. In the case of Ganga pollution control unit, *U.P. Jal Nigam* v *Civil Judge*[4], a letter was sent by one party to the other suggesting settlement of disputes, if any, through arbitration. The other party accepted the same. This exchange of letters was held to have constituted an Arbitration agreement under section [7 (4) (c)] of the Act. The object of Section 7 (4) (c) of the Arbitration and Conciliation Act 1996 is only to cover such circumstances where the inference can be made from the subsequent correspondence or even by conduct of the parties. The original agreement may not contain the stipulation of arbitration but still it could be inferred that in given set of circumstances the clause is in writing. The terms of an arbitration agreement may be collected from a series of documents. It is not necessary to constitute an arbitration agreement that its terms should be contained in one document. This section does not enjoin that the arbitration agreement should be signed by both the parties. If from the correspondence exchanged and the conduct of the parties, it is clear that the petitioner accepted the contract, he cannot deny the existence of the arbitration clause *U.P. Rajkiya Nirman Nigam Ltd., V. Indure Pvt., Ltd*[5]. For instance, where the tender of petitioner was accepted and a letter of intent was posted to him, a concluded contract came into existence. The mere fact that the formal contract was not signed would not relieve the parties of their obligations under the contract - *Progressive Construction Ltd., V. Bharat Hydro Power Contraction Ltd.*[6]

---

[3] *Banarasi Das* v *Cane Commr* AIR 963 SC 1417
[4] 2000 (3) AWC 2515
[5] AIR 1994 NOC 60
[6] AIR 1996 Del 92

No prescribed form of agreement :

In *Rukminibai* v *Collector, Jabalpur*[7], the Supreme Court laid down that an arbitration clause is not required to be stated in any particular form .If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or arbitrator has been used. Nor is it necessary that it should be contained in the same contract document. An arbitration clause may be incorporated into an existing contract by specific reference to it.

Reference to another document :

An arbitration agreement shall be deemed to be in writing if, "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".[8] The principle of an arbitration clause in contract by reference to another document containing an arbitration clause has been followed by the courts in India. The Landmark case in this connection is *Marketing Federation of India Ltd*[9]., where the Supreme Court said, "It is now well established that the arbitration clause of an earlier contract can, by reference, be incorporated into a later contract provided, however, it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated". This well established principle has now been given statutory recognition in Section 7 (5) of the Arbitration and Conciliation Act 1996 which mandates the following requirements to be fulfilled.

a. There is an express or implied reference in the main contract under which the dispute has arisen to the other document containing the arbitration clause.
b. Any words of incorporation are appropriate to encompass the arbitration clause.
c. The terms of the arbitration clause are appropriate to disputes arising under the contract into which it has been incorporated.

[7] AIR 1981 SC 479
[8] Section 7 (5) of The Arbitration and Conciliation Act 1996
[9] (1987) 1 SCC 615

An Arbitration agreement may be in the form of a separate contract or in the form of a clause in a normal contract. Section 16 (1) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and that a decision by the arbitral tribunal that the contract in null and void shall not ipso facto entail the invalidity of the arbitration clause. Nevertheless, if a contract is illegal and void, an arbitration clause which is one of the terms thereof is also illegal.

Disputes :

If one party asserts a right and the other repudiates the same that is a dispute. The meaning of the word 'dispute' is "a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other" - *Canara Bank and others V. National Thermal Power Corporation and another*[10]. The word 'dispute' has been used in this Section in contradistinction to the word 'differences' used in Section 2 (a) of the Arbitration Act, 1940. The word 'difference' is wider than the word 'disputes'. Mere differences between the parties would not be termed as a dispute for the purposes of this Section. The word 'difference' or the word 'dispute' has a particular meaning in the law of arbitration. A difference may be, for instance, regarding the meaning of a particular term in the contract. It may be that one party feels that he has performed the contract but the other party says that the real meaning of the contract is something else and what has been done is not the true performance of the contract. This then would be a difference. Under the law of arbitration, a dispute means that one party has a claim and the other party says, for some specific reasons that this is not a correct claim. This is a dispute. Difference indicates the working of the mind of a particular party with respect to certain matter. Dispute is more positive term; when such differences assume a definite and concrete form, they become dispute[11] . Reference can be made if there is a dispute, i.e. a assertion made by one party and rejected or denied by the other party and the reference has to be made in accordance with the provisions

[10] (2001) 1 SCC 43

[11] Ghulam Qadir V. State AIR 1972 J&K. 44

of the agreement - *Continental Construction Ltd., V. National Hydro electric Power Corp. Ltd*[12]. The repudiation by the other party may be either express or implied and may be by words or by conduct. Mere silence may amount to repudiation in an appropriate case. Whether in a particular cases a dispute has arisen or not has to be found out from the facts and circumstances of the case - *Inder Singh Rekhi V. DDA*[13].

Nature of Disputes :

Disputes which can be referred to Arbitration are:

a) Present or future disputes which are,
b) In respect of a defined legal relationship whether contractual or not.

Present or future disputes :

All matters of a civil nature with a few exceptions, whether they relate to present or future disputes, may form the subject of reference but not a dispute arising from and founded on an illegal transaction[14]. Though the existence of a dispute is essential to the validity of a reference to arbitration, an arbitration agreement may provide for a present or a future dispute. If the agreement relates to a present dispute it will generally amount to a reference but if it has been entered into merely to provide for any future dispute it is an arbitration clause.

The distinction between the 'existing' and 'future' disputes is of relevant significance. By agreeing to submit the disputes to arbitration, the parties agree to compromise their full claims to which they will be entitled in civil litigation. Therefore the 'submission agreement' is referred to as compromise an 'arbitration clause' as clause compromissoire. However, one thing is certain – that, if there is no dispute in existence, there can be no submission to arbitration. Though an agreement with respect to submission of disputes, 'which may arise' between the parties, may be the subject matter of an arbitration clause, it cannot be submitted to arbitration till it comes into existence. Thus, an existing or future dispute can be submitted to arbitration only after it has come into existence.

[12]1998 (1) Arb LR 534 (Del)
[13](1988) 2 SCC 338
[14]Haji Habib v Bhikhamchand AIR 1954

Defined legal relationship :

S. 7 (1) of the arbitration and conciliation act, 1996 requires that the disputes must be in respect of a defined legal relationship whether contractual or not. It follows that the dispute must be of a legal nature. Matters of moral or spiritual relations are not fit subjects for arbitration. The expression "Defined Legal Relationship" has been borrowed from the Model Law. Contractual relationships are those which arise out of contracts. Apart from a contractual legal relationship, an arbitration agreement may as well be in respect of disputes arising out of non contractual relationship. There are number of relationships which are legal such as a landlord and tenant, employer and employee, businessman and customer, employer/owner and contractor, partner and partner. These relationships are also contractual irrespective of the fact whether there exists a formal contract or not. The phrase "whether contractual or not" also covers disputes arising out of quasi contractual relationships, of the type contemplated by Section 70 of the Indian Contract Act. There are a large number of disputes which arises out of statutory relationships and the statutes provide for settlement of disputes by arbitration of the disputes arising under them. Non contractual legal relationship would generally arise from breach of statutory obligations. Apart from statutory relationships, there are tortuous relationships. Claims based on tort can be subject matter of arbitration, if arising out of, or in relation to, or in connection with, the contract - *BHEL V. Assam S. E. Bd*.[15] referred to U.*O.I. V. Sahreen Timber Construction*[16]. Cause of action arsing out of tort or under law of tort cannot be made the subject matter of an arbitration reference. A tort does not create a legal relationship, though it gives rise to a legal claim. A tort between persons already related may become referable if the relationship is of legal nature.

Arbitration Agreement and Reference :

The expressions "arbitration agreement" and "reference" have been separately defined. Explaining the purpose and effect of this scheme, the

---

[15](1990) 1 Arb. LR 335 Gau.
[16]AIR 1969 SC 488

Supreme Court observed:[17] (The term "reference" has not been defined in the new 1996 Act, but the statement continues to be valid as emphasising the distinction between an agreement for arbitration and a reference under it) :

> "The expression (reference) obviously refers to an actual reference made jointly by the parties after disputes have arisen between them for adjudication to named arbitrator or arbitrators, while the expression 'arbitration agreement' is wider as it combines two concepts, (a) a bare agreement between the parties that disputes arising between them should be decided or resolved through arbitration and (b) an actual reference of a particular dispute for adjudication to named arbitrator, In RUSSEL ON ARBITRATION[18] it has been stated that this term (arbitration agreement) covers both the concepts (a) and (b). If that be so it stands to reason that only when the arbitration agreement is of the former type, namely, a bare agreement, a separate reference to arbitration with fresh assent of both the parties will be necessary and in the absence of such consensual reference resort to Section 20 (dropped by the 1996 Act) will be essential[19] but where the arbitration agreement conforms to the definition given in Section 2(a) of 1940 Act [now S. 2(IXb) of 1996 Act] the party desiring arbitration can straightaway approach the arbitrator and resort to Section 20 of 1940 Act (now S. 8 of 1996 Act) is unnecessary because consent to such actual reference to arbitration shall be deemed to be there as the second concept is included in the agreement signed by the parties. The fact that differences or disputes actually arose subsequently would be inconsequential because the arbitration agreement as defined in Section 2(a) of 1940 Act (now S. 7 of 1996 Act) covers not merely present but future differences also."

This result is in conformity with the judgment of the Supreme Court in *Seth ThawardasPherumal* v. *Union of India*:[20]

[17] BanwariLalKotiya v. P.C. Aggarwal, (1985) 3 SCC 255, 260.
[18] 20th Edn., p. 44.
[19] This section provided the judicial machinery for bringing the arbitration agreement into action where a party was backing out from arbitration. Such order can now be sought under Sec. 8 of the Arbitration and Conciliation Act, 1996.
[20] (1955) 2 SCR 48 : AIR 1955 SC 468.

"A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of 1940 Act (now under Section 8, 1996 Act, to the judicial authority) and the recalcitrant party can then be compelled to submit the matter. In the absence of an agreement by both sides about the terms of reference, or an order of the court under Section 20(4) of 1940 Act (now Section 8 of 1996 Act) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."

The facts of *BanwariLal case*[21] were that there was dealing about shares between a Stock Exchange member and an outsider under which a sum of money had become due to the member. The parties signed the contract- notes on a prescribed form. The transaction was subject to the rules, regulations and bye-laws of the Stock Exchange, one of which provided for arbitration in such matters. The member appointed his arbitrator. The other refused to reciprocate. In such cases the rules provided for appointment by the Exchange. The latter accordingly appointed one. The other party participated in the proceedings under protest that he had not given his consent and, therefore, the award would not be binding on him. The Supreme Court came to the conclusion that no fresh consent was necessary on his part. He had consented to the rules and regulations which contained an elaborate machinery for submission. No fresh consent was necessary.

Clauses having effect of "Arbitration Agreement"

Whether a clause in a contract amounts to an agreement of arbitration depends upon its scope. In a case before the Supreme Court[22] a clause in a Government contract provided that the decision of the superintending engineer upon all questions relating to the contract shall be final and binding. An application was made under Section 20 of 1940 Act (now Sec. 8) to refer a dispute to arbitration on the basis that the above clause amounted to an agreement of arbitration. The Supreme Court rejected the contention.

Fazal Ali, J., observed:[23]

---

[21] (1985) 3 SCC 255.
[22] *State of U.P.* v. *Tipper Chand*, (1980) 2 SCC 341 : AIR 1980 SC 1522 : 1980 All LJ 749.
[23] *Id*. at 342

"Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. The purpose of the clause clearly appears to be to vest the superintending engineer with supervision of the execution of the work and administrative control over it from time to time."[24]

The court distinguished the case from some earlier rulings in which the clause in question provided that "in any dispute between the contractor and the department the decision of the chief engineer shall be final". The court said that this clause was correctly interpreted as amounting to an arbitration agreement.[25]

In another case,[26] a mining lease granted by the State carried a clause that disputes, if any, shall be decided by the lessor (in this case the Governor in whose name the lease was executed) and his decision shall be final. The Supreme Court held that this amounted to an arbitration agreement. **Desai, J, said** :

"Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise they would be referred to arbitration, then such an arrangement would spell out an arbitration agreement."

The court cited the following passage from RUSSEL ON ARBITRATION:[27]

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration."[28]

---

[24] To the same effect is *Governor-General* v. *Simla Banking and Industrial Co. Ltd*., AIR 1947 Lah 215 : 226 IC 444 where the clause was exactly the same.

[25] *Dewan Chand* v. *State of J&K*, AIR 1961 J&K 58 and *Ram Lal* v. *Punjab State*, AIR 1966 Punj 436.

[26] *Rukmani Gupta* v. *Collector, Jabalpur*, (1980) 4 SCC 556. This was followed by the Orissa High Court in *Managing Director, Orissa State Cashewnut Development Corpn Ltd*. v. *Ramesh Chandra Swain*, AIR 1992 Ori 35 at 36-37.

[27] 19th Edn. at p. 59.

[28] Another case to the same effect, *Chief Conservator of Forests* v. *Rattan Singh*, 1966 Supp SCR 158: AIR 1967 SC 166.

A clause in a Government contract empowered the chief engineer to decide, among other things, claims arising out of or relating to the contract, the clause imparted finality to the chief engineer's decision. The Supreme Court said that although the clause did not postulate the chief engineer to decide the matters raised as an arbitrator, it nevertheless rendered the chief engineer as duty-bound to decide the claim raised by the contractor after hearing.[29]

A clause in an agreement between the parties was supposed to vest the Chief Engineer with supervision of execution of the work and administrative control over it. There was no mention of any dispute in the clause or of its reference. The court said that the clause was not capable of constituting an agreement between the parties as to justify reference to arbitration.[30]

Vague and Uncertain Clause :

A clause is an agreement for supply of goods provided that ''any dispute arising in relation to this agreement will be settled by arbitration of a neutral person agreed to by both". The court said that the clause was vague and uncertain in respect of its Language. The expression "neutral person agreed to by both" was not very clear because identification of a neutral person and how the parties were to develop a consensus as to him was not made clear. It might not have been the intention of the parties that resort to arbitration was the sole remedy. It only suggested that they could also resort to arbitration if they so wished. A general statement that all disputes would be referred to arbitration could not be regarded as an arbitration agreement within the meaning of the Act.[31]

Adoption of Arbitration Clause from Main Contract into Subcontract:

Where an arbitration clause contained in the main contract is adopted in a subcontract also by a clause declaring that this subcontract is being granted on the terms and conditions applicable to the main contract, it will not necessarily follow that the parties to the subcontract would also be bound

[29]*Nav Bharat Construction Co*. v. *State of Rajasthan*, (1996) 7 SCC 89.
[30]*State of Karnataka* v. *Prabhakar Reddy*, AIR 2004 NOC 71 (Kant).
[31]*Sankar Sealing Systems (P) Ltd*. v. *Jain Motor Trading Co*., AIR 2004 Mad 127 as cited in *Ibid*.

by the arbitration clause. For one thing, the parties are different and for another, the purpose of the contract being different, different kinds of disputes are likely to arise than those contemplated by the main contract.[32] Similarly, where a bill of lading was drawn out in terms of a charter party, it was held that the arbitration clause contained in the charter party did not become an integral part of the bill of lading.[33] In *Vessel MV Baltic Confidence* v. *State Trading Corpn of India*,[34] the Supreme Court examined the factors for considering whether a clause contained in a charter party agreement became incorporated by reference into a bill of lading. The court was of the view that if the reading of the clause into some other document would not create an absurdity, inconsistency or insensibility, the clause would apply to the bill of lading and the intention of the parties would be given effect to.

Attributes in Arbitration Agreement :

attributes which must be present for an agreement to be considered as an arbitration agreement are[35]:

1 The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.

2. That the jurisdiction of the tribunals to decide the rights must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration.

3. The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal.

4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.

5. That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

[32]*Haskins* v. *D.&J. Ogilive (Builders)*, 1978 SLT (Sh. Ct.) 64 as cited in Avtar Singh, *Law of Arbitration and Conciliation*, Eighth edn., Eastern Book Company, Lucknow, 2007, at p. 45.

[33] The Rena K, [[1978] 1 Lloyd's Rep 545 as cited in *Ibid.*

[34] (2001) 7 SCC 473.

[35]*K.K.Modi* v. *K.N. Modi,* AIR 1998 SC 1291

6. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

Power To Refer Parties To Arbitration Where There Is An Arbitration Agreement [Section 8]

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

(2) The application referred to in sub-section (*1*) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof :

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (*1*), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (*1*) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Essentials :

Section 8 of the Arbitration and Conciliation Act, 1996 provides that a judicial authority shall, on the basis of the arbitration agreement between the parties, direct the parties to go for arbitration. It also enlists conditions precedent, which need fulfillment before a reference can be made as per the terms of the 1996 Act.[1] In *P. Anand Gajapathi Raju & Ors. v. P.V.G.*

Raju & Ors[36]., while iterating the periphery of Section 8 of the 1996 Act, the Supreme Court said that "*The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.* Section 8 uses the expression - one of the parties or any parties claiming through or under him and - refer parties to arbitration. The expression - any persons clearly refers to the legislative intent of enlarging the scope of the words beyond - the parties who are signatories to the arbitration agreement.

Section 8 clearly stipulates that whenever a suit is filed in a civil court and the cause of action of said suit emanates from a contract in which the parties had voluntarily and willingly agreed to settle the dispute via arbitration, then, if the essentials of section 8 are met, it is the bounden duty of court to refer the parties to the arbitration.

The position of Section 8 of the act becomes further clear when it is compared with the Uncitral Model Law as section 8 of the act differs from Article 8 of model law. Article 8[37] enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 has made a departure which is indicative of the wide reach and ambit of the statutory mandate.

---

[36] (2000) 4SCC539.

[37] Article 8. Arbitration agreement and substantive claim before court (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his fi rst statement on the substance of the dispute, refer the parties to arbitration unless it fi nds that the agreement is null and void, inoperative or incapable of being performed. (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Scope of Enquiry :

Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find a place in section 8. This distinction dictates that the legislature has intentionally endowed less power on judicial courts with respect to section 8 applications to make sure the arbitration process is facilitated and unnecessary intervention by courts be avoided. In *N. Radhakrishnan V. Maestro Engineers*[38] case, even after finding that the subject matter of the suit was within the ambit of arbitration, the court refused to refer the dispute to arbitration by holding that once the contract is held to be void ab initio, the arbitration clause dies then and there. In *Swiss Timing Ltd v. Commonwealth Games 2010 Organising Committee*[39], the held that even if a criminal case is pending against a party, that in itself does not disentitle said party from taking recourse under section 8 and referred the dispute to arbitration. Relying on *Hindustan Petroleum Corpn Ltd v. Pinkcity Midway Petroleums*[40], where the court in para 14 observed that if in an agreement the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to arbitrator. In the said case, the existence of arbitral clause was not denied by either of the parties and hence in accordance with the mandatory nature of section 8, the court referred the dispute to arbitration. The court in held that, the law laid down in *Hindustan Petroleum* is correct law on the point and not the ratio of *Radhakrishnan's* judgment. Finally, In *A. Ayyasamy V. A. Paramasivam*[41], the court though accepting the fact that provision in section 8 is pre-emptive and mandatory in nature and hence the court should refer the dispute to arbitration when existence of arbitration clause is not disputed, went a step ahead and laid down certain exceptions to this rule. The court carved out exceptions on the basis of which a court can refuse to refer the dispute to arbitration even when essentials of section 8 are fulfilled.

[38](2010)1 SCC 72
[39](2014) 6 SCC 677
[40](2003) 6 SCC 503.

Exceptions :

1. Where court finds very serious allegation of fraud that makes a virtual case of criminal offence, or
2. Where allegations of fraud are so complicated that it becomes essential that such complex issues can be decided only by civil court on appreciation of voluminous evidence, or
3. Where serious allegations of forgery/fabrication of documents in support of the plea of fraud, or
4. Where fraud is alleged against arbitration provision itself, or
5. Where fraud alleged permeates the entire contract, including agreement to arbitrate where fraud goes to the validity of contract itself or contract that contains arbitration clause or validity of arbitration clause itself.

Factors are to be considered before entertaining an application under Section 8 of the 1996 Act :

- whether it can be made applicable to a civil dispute.

The Supreme Court while answering the aforesaid question in *H. Srinivas Pai and Anr. v. H.V. Pai (D) thr. L.Rs. and Ors*[42]., said that "*The Act applies to domestic arbitrations, international commercial arbitrations and conciliations. The applicability of the Act does not depend upon the dispute being a commercial dispute. Reference to arbitration and arbitability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute. There can be arbitration agreements in non-commercial civil disputes also.*"

- The presence of arbitration agreement

The presence of arbitration agreement is another pre-requisite for seeking a reference under Section 8[43]. Section 7 of the 1996 Act provides the diameter of the term "arbitration agreement". The importance of arbitration

[41](2016) 10 SCC 38.
[42](2010) 12 SCC 521.
[43]*Atul Singh and Ors. v. Sunil Kumar Singh and Ors.*, (2008)2SCC602.

agreement, for seeking a reference under Section 8, was emphasized by the Supreme Court in *Smt. Kalpana Kothari v. Smt. Sudha Yadav and ors.*[44] wherein the Court said that "*As long as the Arbitration clause exists, having recourse to Civil Court for adjudication of disputes envisaged to be resolved through arbitral process or getting any orders of the nature from Civil Court for appointment of Receiver or prohibitory orders without evincing any intention to have recourse to arbitration in terms of the agreement may not arise.*"

- validity of the arbitration clause

whether the validity of the arbitration clause can be disputed before the Court, in front of which an application for reference is made. The answer to the question was laid in the negative by the Supreme Court in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*[45]. The Court in this case held that if the existence of the arbitration clause is admitted, in view of the mandatory language of Section 8 of the Act, the courts ought to refer the dispute to arbitration. The Supreme Court, while raising a presumption for the validity of an arbitration clause in an agreement, in *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*[46], said that the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement.

- Same subject matter

Section 8 further mandates that the subject matter of the dispute is the same as the subject matter of the arbitration agreement. While articulating on this pre-requisite, the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*[47], said that "*The relevant language used in Section 8 is-"in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter'*

[44] (2002)1SCC203.
[45] (2003)6SCC503.
[46](2007)5SCC510.
[47](2003)5SCC531.

which the parties have agreed to refer and which comes within the ambit of arbitration agreement."

Interim measures, etc., By Court [Section 9]

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(*i*) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(*ii*) for an interim measure of protection in respect of any of the following matters, namely :-

(*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(*b*) securing the amount in dispute in the arbitration;

(*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(*d*) interim injunction or the appointment of a receiver;

(*e*) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (*1*), the arbitral proceedings shall be commenced within aperiod of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (*1*), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Section 9 of the Act is broadly based on Article 9 of Model Law and provides for the grant of interim measures by a court. Unlike Model Law, Section 9 provides for interim measures of protection not just before the commencement of arbitral proceedings and during the arbitral proceedings but also post the arbitral award has been rendered but prior to its enforcement. Where an order of interim relief has been granted by a court prior to the constitution of the arbitral tribunal, parties are required to initiate arbitral proceedings within a period of ninety days. Once arbitral proceedings have commenced, the parties would have to seek interim reliefs before the arbitral tribunal. A court would ordinarily not entertain a petition for interim reliefs in such a situation unless the party is able to prove the existence of circumstances that make a relief granted by an arbitral tribunal inefficacious. After an award has been rendered by the arbitral tribunal, the successful party may also choose to approach courts for interim reliefs to secure and safeguard the effectiveness of the arbitral award prior to its enforcement.

CHAPTER 3 | COMPOSITION OF ARBITRATIONAL TRIBUNAL

Number of Arbitrators [section 10]

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

Prior to the Arbitration and Conciliation Act 1996, the Arbitration Act, 1940 by virtue of its First Schedule provided :-

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.
2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire.

Thereafter, the UNCITRAL Model on International Commercial Arbitration came into being in 1985, Art. 10 of which says regarding the composition of an arbitral tribunal :-

1. The parties are free to determine the number of arbitrators.
2. Failing such determination, the number of arbitrators shall be three.

S.10 of the Act 1996 which is based on the spirit of the Article 10 of UNCITRAL Model provided the following with regard to composition of an arbitral tribunal :-

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in Sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

S.10 of the Act departs Model law in the sense that the default number of arbitrators (in case the arbitration agreement doesn't provide for the number of arbitrators) is one in our law while it is three according to the latter.

While sub-section (1) of section 10 provides that the parties are free to determine the number of arbitrators, provided that such number shall not be

an even number, the aim behind this provision is that arbitration proceedings may not be time consuming and costly.

The provisions of sub-section (2) of section 10, lay down that failing the determination referred to in sub-section (1), the arbitral Tribunal shall consist of a sole arbitrator. In this way sub-section (2) of section 10 ensures that failure to agree on the number of arbitrators does not vitiate the arbitration agreement. In *M.M.T.C. Limited* v. *Sterlite Industries (India) Limited*[1] the Supreme Court has held that an arbitration agreement specifying an even number of arbitrators cannot also be a ground to render the arbitration agreement invalid. The Supreme Court has further held that where the arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference, the requirement of sub-section (1) of section 10 is satisfied and sub-section (2) thereof has no application. In *Jagmesh Castor Industries* v. *Devi Leasing Co*[2]. both the parties had appointed one each arbitrator for themselves, and the third arbitrator was to be appointed. The third arbitrator, would perform as the presiding arbitrator. But the third arbitrator could not be appointed within thirty days. In this case, the Supreme Court held that due to non-appointment of third arbitrator, the arbitral proceeding and the award delivered by tribunal would not be ineffective and invalid.

Even number of arbitrator :

The words in the provision "the parties are free to determine the number of arbitrators" indicate that if they desire to exercise their option in favour of even number of arbitrators and agree to not to challenge the consequent award, the award rendered would be a valid and binding. The provision only gives a ground to either of the party in the event of appointment of even number of parties to object to such composition of the arbitral tribunal. A party has a right to object to the composition of the arbitral tribunal, if such composition is not in accordance with the Act. There is, however, no provision for the eventuality in case where the parties agree to even number. If neither of the parties challenge the composition then any challenge to the composition

[1] AIR 1997 SC 605
[2] AIR 1998 MP 42

must be raised by a party before the time period prescribed under the Act[3], failing which it will not be open to that party to challenge the award after it has been passed by the arbitral tribunal. The Act enables the arbitral tribunal to rule on its own jurisdiction[4]. A challenge to the jurisdiction of the arbitral tribunal must be raised, not later than the submission of the statement of defence even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. The Act recognises the right of both parties to choose the number of arbitrators. If the party wishing to exercise the right fails to exercise such right within the time frame provided then he will be deemed to have waived his right to so object.

In N.P. Lohia v. *N.K. Lohia*[5], The Appellant and the Respondents were family members who had disputes and differences in respect of the family businesses and properties. Thereafter, each party appointed one arbitrator and then took part in the arbitration process consisting of these two arbitrators (thus containing an even number of arbitrators). Later, an award was passed by this tribunal which was challenged by the Respondent before the single Judge of Calcutta High Court by way of an application to set aside this award.

One of the grounds in the afore-mentioned application was that the Arbitration was by two Arbitrators whereas under S.10 of the Act there cannot be an even number of arbitrators. It was contended that an arbitration by two arbitrators was against the statutory provision of the said Act and therefore void and invalid. It was contended that consequently the Award was unenforceable and not binding on the parties. These contentions found favour with the High Court which was pleased to set aside the Award. Later, an Appeal against this decision was also dismissed. Hence, an Appeal was filed with the Supreme Court. Hon'ble Court observed that It was held that S. 10 of the Act is a derogable provision (despite the word 'shall') and that the arbitral award can be set aside by the Court under S. 34(2)(a)(v) only under the circumstance when the composition of the arbitral tribunal or the

[3] Section 16 of 1996 Act.
[4] Ibid 16(2)
[5] (2002) 3 SCC 572

arbitral procedure was not in accordance with the agreement between the parties. Moreover, it was also held that an arbitral award can be challenged on the ground of composition of arbitral tribunal only when an objection is first taken before the Tribunal under S. 16(1) of the Act, and the Tribunal has rejected this objection . The judges were of the opinion that it amounts to a waiver of right under S. 4 of the Act if such an objection is not raised within the time period specified in S. 16(2).

Appointment Of Arbitrators [Section 11] :

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and -

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(5) Failing any agreement referred to in sub-section (*2*), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties, -

(*a*) a party fails to act as required under that procedure; or

(*b*) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(*c*) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision].

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to :-

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, [different High Courts or their designates, the High Court or its designate to whom the request has been first made] under the relevant sub-section shall alone be competent to decide on the request.

(12)

(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made

to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation :- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

Appointment of Arbitrator On Agreed Manner :

Sub-section (1) of section 11 ensures that there is no legislative discrimination of foreign nationals. It provides that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. However, the parties are free to agree that the nationals of certain States may not be appointed as arbitrators.

Sub-section (2) provides that the parties are free to agree on a procedure for the appointment of arbitrator or arbitrators. It may be read in conjunction with the general provisions of sub-sections (6) and (8) of section 2. The freedom of the parties is limited to the mandatory provisions of sub-section (6) of section 11. In *M/s, Ganesh Shankar Pandey & Co.* v. *Union of India and others*,[6] the Allahabad High Court has held that where there is no concluded contract between the parties, arbitration-clause cannot be invoked. The contract in this case related to conversion of 35 Kms. railway track from meter gauge to broad gange and the acceptance of bid was submission of bank and performance guarantee equivalent to 5% of construction cost by the contractor within fifteen days of issuance of letter of acceptance. Thus, deposit performance guarantee was a condition precedent before the final letter of acceptance and award of work to the bidder. As the petitioner had failed to submit performance guarantee there was no contract and so arbitration clause could not be invoked. The Kerala High Court has held in *M/s. Bel House Associates Pvt. Ltd.*v. *General Manager Southern*

[6] AIR 2004 Allahabad 26.

Railway, Chennai,[7] that under sub-section (2) of section 11, the parties are free to agree on procedure for appointing an arbitrator or arbitrators. Sub-section (6) applies to cases where an agreed procedure is contemplated in the appointment, whereas sub-section (5) covers the appointment of a sole arbitrator on notice being given by one of the parties and the other party failing to make appointment of arbitrator. In such cases, the appointments have to be made by the Chief Justice or the person designated by him. But in the case where the procedure for appointing an arbitrator had been agreed upon by the parties, the Chief Justice or his designate has to take necessary measures for appointment of arbitrator according to arbitration agreement.

Sub-section (3) provides supplementary rules in the event the parties fail to reach an agreement on appointment procedure. It provides that where the parties fail to reach an agreement in an arbitration to three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

Self-explanatory provisions of sub-section (4) provide that if the appointment procedure in sub-section (3) applies and a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon the request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

Sub-section (5) provides the procedure for the appointment of a sole arbitrator. It provides that failing any agreement referred to in sub-section (2), there is to be a sole arbitrator, the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court shall make the appointment at the request of either party *if* the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree. Like sub-section (4), no time-limit has been prescribed within which Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court should make the appointment.

[7] AIR 2001 Ker 163

In *Rajasthan State Road Transport Corporation & another* v. *Nandi Lal Saraswatj*[8] the Rajasthan High Court has held that section 11(5) of the Act deals with the procedure for appointment of arbitrator and making of request to the Chief Justice or his designate to take necessary measures for appointment of the arbitrator. But the order of the Chief Justice or his designate to take necessary measures is neither a judicial order nor a quasi judicial order and it is purely an administrative order. This provision is invoked when a party to the arbitration agreement fails to carry out his obligation to appoint an arbitrator.

When parties fails to came on Agreement (subsection 6, 6A & 6B) :

Sub section 6 discussed a situation where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure

Nature Of Function Discharged By The Court In Appointing The Arbitrator :

The new law (after amendment of 2015) makes it incumbent upon the Supreme Court or the High Court or person designated by them to dispute of the application for appointment of arbitrators within 60 days from the date of service of notice on the opposite party. As per the new Act, the expression 'Chief Justice of India' and 'Chief Justice of High Court' used in earlier provision have been replaced with Supreme Court or as the case may be, High Court, respectively. The decision made by the Supreme Court or the High Court or person designated by them have been made final and only an appeal to Supreme Court by way of Special Leave Petition can lie from such an order for appointment of arbitrator.

---

[8] AIR 2005 Raj 112

The question regarding nature of function of court in appointing the arbitrator came before court several times for judicial interpretation. To begin this legal voyage (before amendment of 2015), the decision of the Supreme Court in the case of [9]*KR Raveendranathan* seems to be a convenient starting point. A two judge bench of the Supreme Court referred to the Larger Bench the question 'whether the function of the Chief Justice or his designate, under sub-sections (4), (5) and (6) of section 11 to appoint an arbitrator or to secure the appointment of an arbitrator is of a judicial nature.' Subsequently, in another case the two judge bench of the Supreme Court referred the same question to the larger bench[10]. In the case of *Ador Samia Private Limited* v. *Peekay Holdings Limited* and Ors[11]. A Special Leave Petition under article 136 of the India Constitution was moved by the petitioner challenging an order of the Chief Justice of the Bombay High Court, given by him under Section 11(6) of the Arbitration and Conciliation Act, 1996. The issue of law which was involved was that whether an appeal lay under Article 136 of the Constitution from the order made by the chief justice of the High Court appointing an arbitrator. The two judge Supreme Court bench relied on a case of *Sundaram Finance Ltd*. v. *NEPC India Ltd*[12], where the orders under Section 11 of the Act were held as non-judicial orders. Hence, it was established that orders passed by the learned Chief Justice under Section 11(6) of the Act cannot be challenged under Article 136 of the Constitution of India because of the administrative nature of the order. The question of reconsideration of the decision in *Ador Samia's* case was brought up in the case of *Konkan Railways* v. *Mehuls Construction Ltd*[13]. where A three judge bench of the Supreme Court held that the order passed by the Chief Justice under Section 11(6) is administrative in nature and intervention by a court is possible in a case where the Chief Justice or his nominee wrongly refuses to make an appointment. The court observed that an analysis of different sub-sections of Section 11 indicates that use of the

---

[9] KR Raveendranathan v. State of Kerala, (1996) 10 SCC 35

[10] ICICI Ltd. v. East Coast Boat Builders & Engineers Ltd., (1998) 9 SCC 728.

[11] 1999 SCC 3246

[12] (1999)2 SCC 479

[13] (2000) 7 SCC 201

expression Chief Justice in preference to a Court, points out towards the administrative capacity of the Chief Justice so as to enable him to is act quickly. The constitutional bench in the case of *Konkan Railways Corporation Ltd. v. Rani Construction Pvt.*[14] held that all that the Chief Justice or his designate has to see in the request to make the appointment, the party has averred that adequate time period has passed and, ordinarily, correspondence between the parties annexed to bear this out. That the word "decision" is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated. The relevant extract of the judgment :

> *"As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the Arbitral Tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated."*

The supreme court in the case of *SBP and Co. v. Patel Engg. Ltd*[15] through six to one majority overruled the decision of the constitutional bench in *Rani Constructions* case. It was held that the power exercised by the Chief Justice of the High Court or Chief Justice of India under section 11(6) of the Arbitration and Conciliation Act, 1996 is not an administrative power. It is a judicial power. This implies that the court will appoint an arbitrator only if satisfies itself that all the conditions precedents to the initiation of the arbitration proceedings exists. The wordings of the section 11(6) of the Act has been severely mutilated. This decision discloses a clear delegation. It is implied that the legislature is aware that a judicial power cannot be delegated. To overcome this argument, the Supreme Court has held that here an

[14] (2002) 2 SCC 388
[15] (2005)8 SCC 618

'institution' can only mean a judge of the Supreme Court or any High Court. The relevant extract of the judgment is :-

> *"……only a Judge of the Supreme Court or a Judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a non-judicial authority cannot exercise judicial powers.* (Para 43)
>
> *Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution.…..."*(Para 46)
>
> *"The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power."*

Implementation of Amendment Act 2015 :

After *SBP & Co.* where It was held that while appointing an arbitrator under Section 11 of the Act, the court is entitled to decide the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of power under Section 11 the legal position was further expounded in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*[16]wherein the preliminary issues which may arise for consideration in an application under Section 11 were divided into three

[16] *(2009) 1 SCC 267*

categories: (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide. *SPB & Co. and Boghara Polyfab* widened the scope of enquiry under Section 11 to a large number of issues which could have been left to be decided by the arbitrator under Section 16 of the Act. The said decisions were widely criticised as being opposed to the principle of Kompetenz-kompetenz and contributing to delays in constitution of arbitral tribunals.

In the aforesaid context, the Law Commission of India in its 246th Report suggested the insertion of sub-section (6A) in Section 11 so as to restrict judicial intervention only to situations where the judicial authority finds that the arbitration agreement does not exist or is null and void. Pursuant to the recommendations of the Law Commission, Section 11(6A) was introduced.

subsection 6A- "The Supreme Court or, as the case may be, the High Court while considering any application under sub-section(4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

The Supreme Court in the case of *Duro Felguera, S.A*[17]. held that the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23.10.2015) has brought in substantial changes in the provisions of the Arbitration and Conciliation Act, 1996. After the Amendment Act 3 of 2016, as per the amended provision of sub-section (6A) of Section 11, the power of the court is confined only to examine the existence of the arbitration agreement. It further clarifies that the decision of appointment of an arbitrator will be made by the Supreme Court or the High Court (instead of Chief Justice) and under Section 11(7), no appeal shall lie against such an appointment. The relevant extracts of the judgment are :

"….The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP

[17] *Duro Felguera, S.A. v. Gangavaram Port Ltd.,* (2017) 9 SCC 729

and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267].This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected." (Para 59)

The Delhi High Court[18] has emphasized that the courts, while deciding an application for the appointment of an arbitrator must confine their enquiry to the existence of an arbitration agreement. The question of arbitrability of the issue would be decided by the arbitral tribunal and not the courts.

In *NCC Ltd. v. Indian Oil Corporation Ltd*[19]. The Delhi High Court analysed the effect of insertion of Section 11(6-A) and arrived at the correct conclusion (in authors opinion). The extract of the relevant portion is below:

"……To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that it is required to examine, is, as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which, involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in Subsection (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement, it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls

[18] *Picasso Digital Media Pvt. Ltd. v. Pick -A-Cent Consultancy Service Pvt. Ltd.*, 2016 SCC Online Del 5581.

[19] 2019 SCC Online Del 6964

within the realm of the arbitration agreement, then, the best course would be to allow the Arbitrator to form a view in the matter.

The Supreme Court, in *Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman*[20] while interpreting Section 11 of the Act, has held that as per the law prior to the 2015 Amendment Act, courts could go into whether there was accord and satisfaction of there being arbitrable dispute between the parties. However, this is now legislatively overruled. Section 11(6A) of the Act is now confined to the examination of only the existence of an arbitration agreement and is to be understood in the narrow sense.

Hon'ble Supreme Court once again in *Garwale Wall Ropes Ltd Vs. Coastal Marine Constructions and Engineering Ltd*[21]. Here, the issue was whether the arbitration clause present in an unstamped agreement could be considered as valid for the purpose of Section 11 of the Act. Answering this question in negative, the court held that unless it is stamped, the said arbitration agreement is not enforceable. The Court considered only 'existence' of arbitration agreement and not arbitrability of dispute. It made reference to Section 7 and concluded that since the agreement was unstamped it could not be enforced unless the penalty as per relevant stamp act was paid. The court went ahead and clarified the judgement in *United India Insurance Co. Ltd & An*[22]*r*. and said that 'existence' shall mean existence in policy and as a matter of law. This way Court did not encroach upon the jurisdiction of arbitral tribunal and confined as to existence of only arbitration agreement as per the law.

Qualification of Arbitrators :

The agreement executed by the parties has to be given great importance. An agreed procedure for appointing the arbitrators has to be given preference to any other mode for securing appointment of an arbitrator. If the procedure for appointment as agreed between the parties fails and an application is filed in court for appointment, the court cannot ignore provisions contained

[20] Civil Appeal No. 7023 of 2019

[21]. Civil Appeal No. 3631/2019 dated 10.04.2019.

[22] *United India Insurance co. Ltd and Anr v. Hyundai Engineering and construction co.*, Civil appeal no. 8146 of 2018 dated 21 August 2018.

in Clause (a) of Sub-section (8) of section 11 of the Act wherein it is specifically provided that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties[23].A clause in the agreement providing for settling the dispute by arbitration through arbitrators having certain qualifications or in certain agreed manner is normally adhered to by the courts and not departed with unless there are strong grounds for doing so. The appointment of an arbitrator can be challenged by a party on the ground that he does not possess the qualification agreed to by the parties and such challenge has to be brought within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the circumstance that he does not possess the necessary qualification.

Nationality of the Arbitrator :

Parties are free to agree to the nationality of the arbitrator. The word "may" in the Act confers a discretion on the Supreme Court or the person or institution designated by that Court[24]. It is not mandatory that the arbitrator should be of a nationality other than the nationalities of the parties to the agreement. The most quintessential element of international arbitration is an impartial, independent and neutral tribunal. Where impartiality and independence of the arbitrators is equated with direct relation to or bias towards one of the parties, neutrality is related to the nationality of the arbitrator. In international sphere, the "appearance of neutrality" is considered equally important, meaning an arbitrator is neutral if his nationality is different from that of the parties. Nationality generally, is not an issue if the parties have agreed to appoint an arbitrator of the same nationality as that of one of the parties but it has a different impact when national courts acts as the appointing authority.

The Supreme Court of India recently in *Reliance v. Union of India*[25] The court applied the same interpretation to the word "may" used in Section 11 (9) and held that is not used in the sense of "shall" and the provision is not

[23] Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703.
[24] Section 11 (9) of 1996 Act.
[25] Arbitration petition 2017 dated 31/03/2014

mandatory. It provides discretionary power to the appointing authority and it is not mandatory to appoint an arbitrator of different nationality. The Hon'ble Supreme Court of India ruled that in an international commercial arbitration if the two nominated arbitrators failed to reach a consensus on the appointment of the third/presiding arbitrator, considerations of neutrality and impartiality are of great significance. The Supreme Court observed that considerations of nationality were not mandatory while making a decision on the appointment of the third arbitrator.

Appointment By Arbitral Institution [Yet to be Notified] :

The amendment act introduces regulatory mechanism in the field of arbitration and provides for adding Part IA (Section 43A to Section 43M) to the Act, which makes provision of constitution of Arbitration Council of India ("Council"). The 2019 Amendment Act proposes an appointment procedure by arbitral institutions designated specifically by the Supreme Court in cases of International Commercial Arbitration and the High Court in the other cases wherever the Council has graded arbitral institutions. Alternatively, it provides for maintaining the panel of arbitrators by the Chief Justice of the concerned High Court for discharging function of the arbitral institutions.

These arbitral institutions shall be graded by ACI on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations. Other salient features of the arbitral institution include :

a. the proposed section 11 clarifies that in a situation wherein more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made shall be competent to appoint.

b. application made under this section shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

It is interesting to note that different institutions have different appointment procedures, empanelled arbitrators and the inter-play of how the choice of the institution may in future, have a significant impact in the choice of seats by

parties[26]. However, the sections of the 2019 Amendment Act that pertain to the appointment of arbitrators by arbitral institutions and any other changes made to the procedure under Section 11 of Arbitration Act have not yet been notified.

Challenge To Appointment Of Arbitrator :

An arbitrator is expected to be independent and impartial. If there are circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment.[27] Appointment of an arbitrator can be challenged only if :-

a. Circumstances exist that give rise to jus-tifiable doubts as to his independence or impartiality; or,

b. He does not possess the qualifications agreed upon by the parties[28].

The Act provides a form for disclo-sure in the new Fifth Schedule. Such disclosure is in accordance with internationally accepted practices to be made applicable for arbitration proceedings commenced on or after October 23, 2015. Non-disclosure can lead to serious consequences for the arbitrator, including termination of his/her mandate, even if he/she has not been assigned work or given remuneration by the concerned party[29].

In the Amendment Act, the legislators have listed scenarios in Seventh Schedule which may result in justifiable doubts as to the inde-pendence and impartiality of an arbitrator such as 'relationship with the parties, counsel or the subject matter of the dispute, such as that of the employee of one of the parties[30]'. This is an indicative list in addition to disqualifying situa-tions that have been affirmed by case law such as the holding of the Supreme Court that the arbitrator cannot be qualified to arbitrate if he is the part of the contract[31].The challenge to appointment has to be decided by the arbitrator

---

[26] Raj Panchmatia, Manvendra mishra & rajeswari Mukherjee *India : The Arbitration And Conciliation (Amendment) Act, 2019 – Entering A New Domain* Khaitan & company.

[27]Section 12(1) of the Act

[28]Section 12(3) of the Act

[29] *C & C Construction Ltd. v. Ircon International Ltd*., 2018 SCC Online Del 9240.

[30]Section 11(5) of the Act

[31]*Indian Oil Corporation Ltd*. v. *Raja Transport Pvt. Ltd*., (2009) 8 SCC 520

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 the arbitral award can be made to the court under Section 34 of the Act. If the court agrees to the challenge, the arbitral award can be set aside.[32] If a director of a private co. (which is already a party to arbitration agreement) is named as an arbitrator there would be a valid and reasonable apprehension of bias in view of his position and interest.[33]Mere empanelment or retired employee who have dealt with civil works contract, and have the necessary expertise, cannot lead to the conclusion that there are circumstances which could give rise to justifiable doubts as to their independence and impartiality.[34] The Supreme Court in the case of *Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation Ltd.* held that the fact that the proposed arbitrators being government employees/ ex-government employees was not sufficient in itself to make them ineligible to act as arbitrators, especially since they were ex-employees of public bodies not related to the Respondent.

Procedure for Challenging An Arbitrator :

Section 13 of the Act provides liberty to the parties to agree on a procedure for challenging an arbitrator. Section 13 provided the challenge procedure and stated that any challenge to an arbitrator must be brought within 15 days of becoming aware of the constitution of the arbitral tribunal or 15 days after becoming aware of any circumstance referred to in Section 12. The arbitral tribunal is required to decide on the challenge, if the arbitrator does not withdraw from his office or the other party does not agree to the challenge. In case of failure of challenge, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. Where such an award is made, the party challenging the arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act However, failure to make such challenge within the specified time period may be tantamount to deemed waiver under Section 4 of the Arbitration Act.

[32]Section 13(6) of the Act

[33]*Karishma MEP services* v. *KGS Milestone Construction Ltd.* 2016 (1) Arb. LR 2338 Madras

[34]*S. P. Singla Construction Pvt. Ltd.* v. *Government of NCT Delh*i 2015(1) Arb LR Delhi

Termination of Mandate Of An Arbitrator :

Section 14 of the Act provides that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator in the following circumstances :

(a) If he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) He withdraws from his office or the parties agree to the termination of his mandate

Section 15 provides additional circumstances under which the mandate of an arbitrator shall terminate. These include :-

(a) Where the arbitrator withdraws from office for any reason; or

(b) By or pursuant to agreement of the parties.

It is further provided that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed. The same rules shall be followed in appointing a substitute arbitrator which were applicable to the appointment of the arbitrator being replaced. Where an arbitrator is replaced, any hearing previously held may be repeated at the discretion of the arbitral tribunal, unless otherwise agreed by the parties. However, it is provided that an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the arbitral tribunal, unless otherwise agreed by the parties.

In *HRD Corporation v Gail (India) Ltd.*[35] the Supreme Court held that for any infraction of section 12(5) read with the Seventh Schedule of the amended Arbitration and Conciliation Act, 1996 (the "**Act**"), recourse to section 14 of the Act would be available and the court would have the power to terminate the mandate of the arbitrator in such cases. It clarified that this remedy would be available only with respect to the question as to whether the arbitrator was "ineligible" under any ground listed in the Seventh Schedule. As to the grounds relating to independence and impartiality listed in the Fifth Schedule, the Court held that the challenge procedure under section 13 of the Act would be the exclusive remedy.

[35] Civil Appeal No. 11126 of *2017*

CHAPTER 4 JURISDICTION OF ARBITRATION TRIBUNAL

Competence of arbitral tribunal to rule on its jurisdiction [Section 16] :

1. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, :-

   a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

   b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

3. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

4. The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

5. The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

6. A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

The matter of jurisdiction of arbitral tribunal contained in s.16 of the Arbitration and Conciliation Act, 1996 corresponds to Art.16 of the UNCITRAL Model Law and also to Art.21 of the UNCITRAL Arbitration Rules. here was no provision under the Arbitration Act of 1940 which allowed the Arbitral Tribunal to make a decision on its own jurisdiction and it was the job of the court to decide on the jurisdiction of the arbitral tribunal. But

under Section 16 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal has been granted the power to make a ruling on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation Act states that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement.

Competence-Com-petence :

Section 16 of the Arbitration and Conciliation Act incorporates the principle of *competence-com-petence*. The competence-com-petence' principle is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national Courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal's jurisdiction. Under Section 16 of the Act, an Arbitral Tribunal has competence to rule on its own jurisdiction, which includes ruling on any objections with respect to the existence or validity of the arbitra-tion agreement. The doctrine of *'competence-com-petence'* confers jurisdiction on the Arbitrators to decide challenges to the arbitration clause itself. *In Olympus Superstructures Pvt.Ltd* v. *Meena Vijay Khetan*[1], it has been held that under the Arbitration and Conciliation Act, 1996, the arbitral tribunal is vested with power under s.16(1) to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement. The arbitration clause which forms part of the contract and any decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from clause (b) of section 16(1) which states that a decision by the arbitral tribunal that the main contract is null and void shall not entail ipso jure the invalidity of the arbitration clause[2]. In *S.B.P. and Co. v. Patel Engineering Ltd. and Anr.*[3],the Supreme Court has held that where the Arbitral Tribunal was constituted by the parties without judicial intervention, the Arbitral Tribunal could determine all jurisdic-tional issues by exercising its powers of compe-tence-competence under Section 16 of the Act.

---

[1](1999)5 SCC 651

[2] i*bid*

[3]2005 (8) SCC 618

Issue of limitation :

The term jurisdiction derives its meaning from the context in which it is used. The Indian Act provides the tribunal with the power to pass a ruling on any issue that is related to its jurisdiction. In *Pandurang Dhoni Chougule v. Maruti Hari Jadhav*[4] the Court held that plea of limitation is an issue that goes to the root of the matter and affects the jurisdiction of the tribunal conducting the proceedings. Applying the rationale in a case, the Bombay High Court determined that while ruling on the issue of limitation, the tribunal shall be ruling on its jurisdiction. The English Act restricts the principle of *Kompetenz-Kompetenz* by using the term 'substantive' jurisdiction. However, the Indian Act has no such restriction and provides for wider amplitude as it reflects tribunal's power to determine any issue relating to its 'own' jurisdiction. Further, it has been held in the case of *Union of India v. East Coast Builders*[5] that guidance should not be taken from the English Act when the Indian Act expressly deviates from it. Therefore, issue of limitation must be construed as an issue of jurisdiction as provided under section 16(1) of the Indian Act.. In the case of *National Thermal Power Corporation v Siemens Atkeinge sells chaft*[6] it was reasoned that any refusal to go into the merits of the claim lies within the realm of jurisdiction. Like any other issue of jurisdiction, the issue of limitation is decided without going into the merits of the particular claim. In other words, while determining the issue of limitation, the tribunal enquires only into the fundamental facts such as when the claim arose and the time period which has lapsed and nothing more.

Recently, the Indian Supreme Courtin *M/s Indian Farmers Fertilizers Co-operative Limited v. M/s Bhadra Products*[7] restricted the scope of section 16 (1), declaring that issue of limitation is not covered under the primitive sense of the term 'jurisdiction'. It is important to distinguish matters of jurisdiction from that of the merits of claims, as the former goes to the root of the dispute and absence of the same can render the ultimate decision null and infructuous. While relying heavily on English jurisprudence, the Court

[4]*AIR 1966 SC 153*
[5]1998 (47) DRJ 333
[6](2007) 4 SCC 451
[7]*Civil Appeal No. 824 of 2018*

in *Bhadra Products* gave a very narrow interpretation to the term 'jurisdiction'. It was held by the Court that similar to the Arbitration Act, 1996 ["the English Act"] matters of only substantive jurisdiction such as the validity of arbitration agreement and/ or of arbitral tribunal and arbitrability of disputes shall be considered within the scope of section 16(1) of the Indian Act.

Objection on Jurisdiction :

Section 16(2) of the Arbitration Act states- a plea that the tribunal does not have jurisdiction must be raised no later than submission of the statement of defence. Section 16(3) states- a plea that the tribunal has exceeded the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings. However, under Section 16(4), the tribunal has the power to admit a later plea if it considers the delay justified.An objection to the jurisdiction of the tribunal can be raised by making an application to the tribunal under Section 16 of the Arbitration Act. In *M/s MSP Infrastructure Ltd v MP Road Development Corporation Ltd*[8] the Supreme Court of India elaborated on the scope of Section 16 of the Arbitration Act and held that all objections to the tribunal's jurisdiction must be made by no later than submission of the statement of defence. If a challenge is made to the jurisdiction of the tribunal under Sections 16(2) and 16(3), the tribunal will decide on its jurisdiction under Section 16(5).

If the tribunal rejects the challenge under Section 16(5) and continues with the proceedings and makes an arbitral award, a party can apply to the courts for a ruling on the jurisdiction of the tribunal while challenging the award under Section 34 of the Arbitration Act.As well as, if the tribunal concludes that it does not have jurisdiction, then it is open to the aggrieved party to go on appeal to the relevant court under Section 37(2)(a) of the Act. in *NTPC v Siemens*[9] it was held that *In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from Sub-section (6) of Section16*

[8]Civil Appeal 10778 of 2014
[9]AIR 2007 SC 1491

that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided.

Interim measures ordered by arbitral tribunal [section17] :

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal :-

1. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
2. for an interim measure of protection in respect of any of the following matters, namely :-

a. the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

b. securing the amount in dispute in the arbitration;

c. the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

d. interim injunction or the appointment of a receiver;

e. such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the court."

Arbitral Tribunal at the request of a party, may order the other party to take such interim measures of protection as it may deem necessary in respect of subject matter of dispute. Interim Measures are granted during the pendency of arbitration proceeding of a dispute and are usually in the form of injunctions, specific performance, pre-award attachments etc. By definition, 'interim reliefs' are temporary or interim in nature and are granted in advance of the final award of the dispute by the arbitral tribunal. Another thing that is significant to note is that the tribunal can order to discontinue a thing for the protection of subject matter. The use of the word 'injunction' is calculatingly discouraged and avoided because the power to issue injunction concerns to realm of the court[10]. Section 17(1) provides that the tribunal can issue orders to provide for protection of subject matter at the request of parties. A party may apply to the arbitral tribunal for such procedural, evidentiary, conservatory or interim measures during the arbitral proceedings or at any time after the making of the arbitral award. The only condition is that a party should apply to arbitral tribunal before the award is enforced in accordance with section 36.

Reliefs :

An interim measure of protection can be sought in respect of any of the following matters, namely:- a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; b) Securing the amount in dispute in the arbitration[11]; c) The detention[12], preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter

[10] Anand Prakash v. Asstt. Registrar Co -operative Societies, AIR 1968 All 22.
[11] *Intertole ICS (Cecons) O & M Company v. NHAI* (2013) ILR 2 Delhi 1018
[12] *Arun Kapur v. Vikram Kapur and Ors.* 2002 (61) DRJ 495

upon any land or building in the possession of any party, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; d) Interim injunction or the appointment of a receiver[13]; e) Such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient.

In *Wind World (India) Limited and Ors.* v. *Enercon GmbH and Anr*[14] court held that an arbitral tribunal, under Section 17 of the Act, has no jurisdiction to pass interim measures against a third party.. In *M.D. Army Welfare Housing Organisation Case*[15] observed that though section 17 of the Act provided the arbitral tribunal a power to pass interim orders, but the same could not be enforced as an order of a Court.

Question of parallel application under section 9 as well as under section 17 :

"The Court can exercise power under section 9 to grant interim measures even during the pendency of application under section 17 before the arbitral tribunal. Remedy available to a party under section 17 is an additional remedy and is not in substitution of section 9[16].

Appeal from order under section 17 :

Sub-section 2(b) of section 37 provides that an appeal shall lie to a court from an order of an arbitral tribunal granting or refusing to grant an interim measure under section 17. However this provision does not override the provisions of article 133 of the constitution of India and an appeal will lie to the Supreme Court if the provisions of article 133 are otherwise complied with.

Enforceability of an interim measure granted by arbitral tribunals :

Section 17 of the Act clarified that an order of the tribunal would be enforceable like an order of the court in case of interim reliefs granted by

[13]*Baker Hughes Singapore Pte v. Shiv-Vani Oil and Gas Exploration* Arbitration Petition No. 1127 OF 2014
[14]2016 SCC
[15]AIR 2004 SC 1344
[16](Atul Ltd Vs Prakash Industries Ltd, 2003(2) RAJ 409

arbitral tribunals. Post the 2015 amendment, Section 17 allows the interim orders passed by the tribunal to be treated at par with the orders of the court and shall be enforced in the same manner but in no scenario can the arbitrator be regarded as a court of law. When implying the above, if any party breaches to comply with the order of the tribunal whether or not a contempt proceeding be initiated by the arbitrator, answering this question in *Alka Chandewar v. Shamshul Ishrar Khan*[17] The Supreme Court canvassed an interpretation whereby the arbitration tribunal was brought within the ambit of both Contempt of Courts Act, 1979 and Order 39 Rule 2A Code of Civil Procedure, 1908. It stated that the arbitral tribunal need not turn to the High Court every time for contempt of its orders. Section 17 ensures a right to the parties to approach the arbitral tribunal rather than awaiting enforcement orders from the Court. However in the case of *Sundaram Finance Ltd. vs. P. Sakthivel and Ors*[18] wherein it was stated that even though the tribunal is empowered to provide interim measures, it cannot in any event enforce it on its own, thus, necessitating knocking the doors of the District Court. The Madras High Court here reiterated the fact that what is to be performed by the Court here was a pure ministerial act and thus no judicial order was warranted from the District Court for implementing the interim order passed by the tribunal under section 17 of the Act and since such interim order is appealable in view of section 37(2)(b) of the act there is a built in safeguard also.

Principle of Civil Procedure Code :

In *Yusuf Khan v. Prajita Developers Pvt. Ltd. and Ors*[19].the Bombay High Court observed that while exercising powers under Section 17 and more particularly Section 17(1)(ii)(b) of the Act, i.e., the principles laid down in the CPC for the grant of interlocutory remedies must furnish a guide to while determining an application under Section 17 of the Act. the Delhi High Court[20], in observing the similarity between the objects of Sections 9(1)(ii)(b)

[17]2017 SCC Online SC 758

[18]2018 SCC Online Mad 3080

[19]Arbitration Petition No. 1012 of 2018, (judgment dated 25 March 2019 of the Bombay High Court)

[20]Shailendra Bhadauria and Ors. v. Matrix Partners India and Ors. 2019 (1) ABR 788

and 17(1)(ii)(b) of the Act with that of Order XXXVIII Rule 5 of the CPC, held that the arbitral tribunal and court, while granting interim reliefs under the said provisions of the Act, must be satisfied that it is "necessary" to pass order to secure the amount in dispute.

CHAPTER 5 CONDUCT OF ARBITRAL PROCEEDINGS

Equal Treatment of Parties [section 18] :

The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present its case[1]. The failure of an arbitrator to give a party, a proper opportunity to set matters right has been held to be a serious error in law[2]. Where the arbitrator received fresh evidence after conclusion of the hearing and also acted upon it without giving the parties to opportunity to be heard upon it, this amounted to a procedural mishap, entitling the party to seek setting aside[3].

Determination of Rules Of Procedure [Section 19] :

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Arbitral Tribunal is not bound by the CPC or the Indian Evidence Act, 1872[4]. In arbitration proceeding though strict provisions of evidence Act and Code of Civil Procedure 1908 are not applicable and though arbitral tribunal is not bound by Evidence Act and Code of Civil Procedure, the

[1]Section 18 of the Act
[2]Diamond lock v lying Investment 60 Building LR 112
[3]Fairclough Building v Vale of Veloir 55(66) Building LR 74
[4]Ibid.

arbitral tribunal is bound to consider the basic principal of Evidence Act and Code of Civil Procedure to follow the principal of natural justice[5]. In Hindustan Shipyard Limited Vs. Essar Oil Limited and Ors[6]. the Andhra Pradesh High Court has categorically stated that parties are free to agree on the procedure to be followed by the Arbitral Tribunal. When such procedure is not fixed, the Arbitral Tribunal has to follow the statutory procedure; it means it has to weigh the entire evidence on record properly and that it has to come to a just conclusion within the parameters of the dispute. It has been held that the principles of natural justice, fair play, equal opportunity to both the parties and to pass order, interim or final, based upon the material/ evidence placed by the parties on the record and after due analysis and/or appreciation of the same by giving proper and correct interpretation to the terms of the contract, subject to the provisions of law, just cannot be overlooked. The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the Arbitral Tribunal. The Arbitral Tribunal has complete powers to decide the procedure to be followed, unless parties have otherwise agreed upon the proce-dure to be followed[7].The Arbitral Tribunal also has powers to determine the admissibility, rele-vance, materiality and weight of any evidence[8]. By virtue of section 19(4) of The Act, the admissibility, relevance and materiality of evidence are matters which are within the exclusive jurisdiction of the arbitral tribunal unless otherwise agreed by the parties. Therefore, the law contemplated under section 19(4) of The Act imposes a duty on the arbitral tribunal to determine the admissibility and weight of evidence of the documents adduced by both the parties. In Hindustan Shipyard Limited vs Essar Oil Limited[9] the Allahabad High Court opined that where the parties have not agreed to any specific procedure, the arbitral tribunal has to follow the statutory procedure, which means it has to weigh the entire evidence on record properly and come to a just conclusion within the parameters of the dispute.

[5]Rashmi housing Pvt. Ltd v. Pan India Infraproject 2015(2) Arb. LR 265 (Bombay)
[6] 2005 (1) ALT 264
[7]Section 19(3) of the Act
[8]Section 19(4) of the Act
[9] [2005 (1) ALD 421]

Place of Arbitration [section 20] :

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing winners, experts or the parties, or for inspection of documents, goods or other property.

Place of arbitration will be decided by mutual agreement. However, if the parties do not agree to the place, the same will be decided by the tribunal considering the circumstances of case including convenience of the parties. Section 20(3) enables the arbitration tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

Seat verses Venue :

Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc[10]. consolidating the doctrine of seat and venue under the 1996 Act, the court clarified that the term "place" used in Sections 20(1) and (2) would connote "seat" and the term "place" used in Section 20(3) would connote "venue". Reading Section 2(2) with Section 20, the Court inevitably concluded that the Act has no extraterritorial application. The Court was conscious of the fact that the legislation being seat-centric, parties will be rendered remediless in case they want to secure the assets of the party against which a claim lies, by filing an application under Section 9. However, making available the remedy of Section 9 to parties who have chosen the seat to be outside would involve interpreting Section 9 in a manner that it was never intended to be. Any other interpretation being conferred on Section 9 would only amount to judicial overreach and therefore the court rightly stated that such errors, if any, are matters to be redressed by the legislature.

[10](2012) 9 SCC 552

In CVS Insurance and Investments vs. Vipul IT Infrasoft Pvt. Ltd[11]. In the case, the Delhi High Court gave the ruling that there shall be only one seat of arbitration though venues may be different and where the arbitration seat is fixed only such court shall have an exclusive jurisdiction. The Bench referred to Supreme Court's verdict in the case of Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors[12] wherein the Apex Court ruled that Section 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20 (3), the word "place" is equivalent to "venue". In this case it was further held that the moment the seat is designated, it is akin to an exclusive jurisdiction clause.

In *Union of India v. Hardy Exploration & Production* (India) Inc. (2018) , The place of arbitration was to be agreed upon between the parties. It had not been agreed upon and in case of failure of agreement, the Arbitral tribunal was required to determine the same taking into consideration the convenience of the parties – the determination shall be clearly stated in the form and contents of award Place of Arbitration. It was observed that determination signifies an expressive opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The agreed upon place is the seat if no conditions are imposed. If a condition precedent is attached to the term "place", the condition has to be satisfied only then the place becomes seat.

Commencement of Arbitral Proceedings [Section 21] :

Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

A party commences an arbitration proceeding by issuing a notice in written to the other party of its intention to refer the matter to arbitration. Unless otherwise agreed by the parties, Arbitration proceedings are deemed to be commenced on the date on which the respondent receives such notice from the claimant.

---

[11] Arb. P. 09/2017

[12] (2017) 7 SCC 678

Notice and Calculation of limitation period :

In Alupro Buildings Systems Pvt Ltd Vs. Ozone Overseas Pvt Ltd[13], has given a much needed interpretation and clarity to the object and purpose of issuing the notice under Section 21 of the Arbitration and Conciliation Act (hereinafter referred to as the Act) holding that the provisions under Section 21 of the Act are mandatory in nature and cannot be dispensed with and forms the preceding act in initiation and reference of the disputes between the parties . It was further held that the provisions of Section 21 are not limited only for the purpose of determining limitation and a party cannot straight away file a claim before the Arbitrator without issuing the notice under Section 21 of the Arbitration and Conciliation Act. The date of the reference of the disputes to arbitration under Section 21 shall be the date from which the limitation will start running for the purposes of computation of limitation under Section 43(2) of the Act. The Court held that in the absence of an agreement to the contrary, notice under Section 21 of the Act by the Claimant invoking the arbitration clause, preceding the reference of disputes to arbitration is mandatory.

Language [Section 22] :

(1) The parties are free to agree upon the language or languages to is used in the arbitral proceedings.

(2) Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the languages agreed upon by the parties or determined by the arbitral tribunal.

Under section 22 (1) 1996 Arbitration Act, both the parties are free to agree upon the used in the arbitration proceedings. Failing and agreement

[13]2017 SCC Online Del 7228

refereed to in section 22(1), the arbitrator/ arbitral tribunal shall determine the language or languages to be used in the arbitration proceedings. Further under section 22(4) of the Act, the arbitrator/ Arbitral tribunal any order that any documentary evidence shall be accompanied by a transaction into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of Claim And Defence [Section 23] :

(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2A) The respondent, in support of his case, may also submit a counterclaim or plead a set-off ,which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

[(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment.][14]

Section 23(1) of the Act deal with the provisions in relation to filing of statement of claim and statement of defence Section 23(1) of the Act, focuses on two important points: Firstly, the time for filing the Statement of Claim by

[14]Amendment Act 2019

the Claimant and Statement of Defence by the Respondent shall be decided either by the Parties i.e. Claimant and Respondent or the arbitral tribunal and secondly, both the Parties have to file their respective Statement, within the time frame agreed upon by the parties/ determined by the arbitral tribunal. Section 23(3) of the Act and submits that the additional claims in the pending arbitration can be added, modified changed and there is no bar in including new claims in the pending Arbitration. Section 23(2A) provides claim or defense can be amended or supplemented at any time.

Once having raised nine claims before the first arbitrator, the respondent was not entitled to raise any additional claims before the second arbitrator since the second arbitrator was appointed to continue the arbitration which was pending before the first arbitrator. However, the claims which were subsequently raised pertain entirely to the construction work in question and are not outside the ambit of the arbitration clause. In the statement of claims initially filed before the first arbitrator, the respondent had expressly reserved his right to file additional claims. We do not, therefore, see any reason to hold that the respondent was not entitled to file further claims before the second arbitrator[15]. However where the amendment was such that it had changed the nature of the dispute, the Supreme Court held[16] that it should not have been allowed. the order granting amendment was quashed.

Sub clause 4 has been added to the Section by amendment of 2019 which requires statement of claim and defence to be completed within a period of 6 months from the date of constitution of the Tribunal. However, the said provision does not deal with counter-claims and the defence thereto, nor rejoinders and sur-rejoinders in some cases. Further, in cases where parties wish to split the liability and quantum claims, it will need to be seen how the same can be implemented under the new framework.

Hearings and Written Proceedings [Section 24] :

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials :

[15]State of Orissa v. Asis Ranjan Mohonty, (1999) 9 SCC 249
[16] Bharat cooking ltd v Raj Kishor (2000)9 SCC 3577

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held :

Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument 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.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

The duty to afford a hearing to a party is a duty lying upon everyone who decides anything in judicial or quasi judicial capacity[17]. After submission of pleadings, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be an oral hearing or whether proceedings can be conducted on the basis of doc-uments and other materials. However, if one of the parties requests the Arbitral Tribunal for a hearing, sufficient advance notice of hearing should be given to both the parties. Unless one party requests, oral hearing is not mandatory. In this section a proviso has been introduced by the Amendment Act 2015 on the conduct of 'oral proceedings' and furnishing of 'sufficient cause' in order to seek adjournments. the arbitral tribunal at least, hold oral hearings for the presentation of evidences or for oral arguments on a day-to-day basis, and not grant adjournments unless reasonable cause is given. The amended provision has also made a room for the tribunal to impose costs including exemplary costs in case the party fails to provide sufficient reasoning for the adjournment sought. Subsection 3

[17] Vinay Kumar v Union Of India 2003 (1) Arb LR 426

requires All documents, statements and required information supplied, and application made to the arbitral tribunal by the one party shall be communicated to the other party and any evidentiary document or expert report on which an arbitral tribunal can rely in making it decision shall also be communicated to the parties. A party to the proceeding must know what is the evidence that has been given and he must also be given an opportunity to show why it is not to be used against him[18].

Default of a Party [Section 25] :

Unless otherwise agreed by the parties, where, without showing sufficient cause :

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant 3 and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

If there is no contrary agreement between the parties according to section 25, if claimant without providing sufficient cause fails to communicate his statement of claim to the tribunal, the arbitral tribunal can terminate the proceedings with immediate effects. But it is not the same in case of respondent if he fails to communicate his statement of defence, the arbitral can continue the proceedings without treating that failure in itself as an admission of alienations by the claimant.

[18] Union Of India v Bharath Builders 2012 (4) Arb LR

The Hon'ble Supreme Court recently in Srei Infrastructure Finance Limited v. Tuff Drilling Private Limited[19],held that the arbitral tribunal has power to recall its order terminating the proceeding under Section 25(a) of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court held that the scheme of Section 25 of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be permitted to be filed even after the time as fixed by Section 23(1) has expired. Thus, even after passing the order of terminating the proceedings, if sufficient cause is shown, the claims of statement can be accepted by the arbitral tribunal by accepting the show-cause and there is no lack of the jurisdiction in the arbitral tribunal to recall the earlier order on sufficient cause being shown.

Expert Appointed By Arbitral Tribunal [Section 26] :

(1) Unless otherwise agreed by the parties, the arbitral tribunal may :-

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

There was no provision as regards 'expert evidence' in the Arbitration Act, 1940 (Act No. 10 of 1940). Section 26 of the 1996 Act corresponds to Article 26 of the UNCITRAL Model Law and it deals with the power of an arbitral tribunal to appoint one or more experts and refer to them specific

[19] Civil Appeal No. 15036 of 2017

issues for opinion, however, the parties to the arbitration can exclude the power and discretion conferred to the tribunal by virtue of Section 26 of the 1996 Act. Section 26 of the 1996 Act provides for the duties and the rights of the parties when expert is appointed. Sec.26 lays down provision about appointment of expert by the arbitral tribunal for the purpose of obtaining expert evidence on the matters in issue. It empowers the arbitral tribunal to appoint one or more experts to take their reports on specific issues relating to the matter before it. However, the reports of the experts are merely advisory in nature. The experts only provide assistance to the arbitral tribunal in matters in which their reports are sought for coming to a decision by the arbitral tribunal.

Sub-section (1) Clause(a) vests the arbitral tribunal with the power to order a party to provide the necessary information as to a matter to the experts. Moreover they can order a party to produce relevant documents, goods or other property for inspection, instruction of the expert. Sub-section (2) that the expert may participate in an oral hearing if the parties so request for interrogating and testifying expert evidences, affirms the Principle of Natural Justice as embodied in Sec.18 of the Act. Sec. 23(3) provides that if the parties so requests, the expert shall make any documents available to the parties for their examination on which the expert report is relied.

In Girdhari Lal v Kameshwar Prasad[20], it was stated by the court that even though the provisions of Sec. 45 of the Evidence Act may not be applicable in the literal sense in an arbitral proceeding but the pith and substance of the principles contained therein about obtaining the opinion of the persons especially skilled in science or art are the relevant factors. Normally the expert has to give his opinion before the arbitrator or the court and he must be allowed to be examined and cross- examined by the respective parties.

Court Assistance In Taking Evidence [Section 27] :

(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

[20] [AIR 1989 All 210]

(2) The application shall specify :-

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,—

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

(6) In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Section 27 prescribes a procedure to enable parties to take assistance of the court in support of arbitration proceedings. This section deals with applications for court assistance in taking evidence in arbitration proceedings. The tribunal, or a party with the approval of the tribunal, may apply to the court to seek such assistance. However, before applying to a court or allowing for an application to be filed before a court, the arbitral tribunal is required to apply its mind and cannot act mechanically[21]. In addition to allowing court

[21] Hindustan Petroleum Corporation v. Ashok Kumar Garg, 2007 (1) ARBLR 368 (Del).

assistance in taking evidence, Section 27(5) covers non-compliance with any order of the court/tribunal, refusal to give evidence, and contempt of the tribunal as well as any other default like refusal to produce documents directed to be produced, refusal to allow inspection of properties, etc. as per section 27(4) upon an application under Section 27 being allowed by the arbitral tribunal, the court is empowered to issue the same 'processes' as it may issue in suits before it.

In Rasiklal Ratilal v. Fancy Corporation Ltd[22] the High Court of Bombay discussed the scheme of Section 27 of the 1996 Act. The High Court observed that an application under Section 27 ought to contain (i) the names and addresses of the parties and arbitrators, (ii) general nature of claim and reliefs sought, (iii) evidence to be obtains such in details.

Powers Exercised By Courts Under Section 27 :

The High Court of Bombay has explained this in the case of National Insurance Company Limited v. M/S SA Enterprises[23] that, the legislative purpose of Section 27 is to ensure that parties do not suffer due to the inherent limitations of a tribunal, as tribunals do not have the power to issue witness summons or compel the attendance of a witness or production of documents, etc. Bombay High Court, in Montana Developers Private Limited v Aditya Developers and Ors[24]. has explained the role of the Court in dealing with an application under section 27 of the Arbitration and Conciliation Act 1996 for issuance of witness summons and production of documents. Honble court held that, courts are not empowered to adjudicate upon the validity of an order passed by an arbitral tribunal under Section 27. Further, the Court held that when an arbitral tribunal or a party to the arbitral proceedings files an application seeking assistance under Section 27 in pursuance of an order passed by an arbitral tribunal, the Court cannot go into the merits of such an application and/or the order itself.

Contempt Mechanism Under Section 27(5) :

The Delhi High Court in the case of India Bulls Financial Services Limited

[22] (2007) 5 AIR Bom. R 617.
[23] 1544 OF 2015
[24] Arbitration Petition (L) No. 680 of 2016 pronounced on 22 July 2016

vs. Jubilee Plots and Housing Private Limited[25]. held that orders obtained by the petitioner from the arbitral tribunal under Section 17 of the Act are enforceable under Section 27(5) of the 1996 Act. It would appear from these cases that the remedy available to an aggrieved party in a case of violation of the order of the arbitral tribunal by the other party is to seek the permission of the arbitral tribunal to make a representation to the court to impose such punishment as would have been warranted for contempt of court. Further, once the court receives such a representation from the arbitral tribunal, the court is competent to deal with such non-complying party as if it were in contempt of an order of the court. This could either be under the provisions of the Contempt of Courts Act, 1979 or under Order 39 Rule 2A of the CPC, which provides for consequences of disobedience or breach of injunction. However, In Alka Chandewar v. Shamshul Ishrar Khan[26], the single judge bench of the Bombay High Court took a much narrower view and barred the utilization of Section 27(5) to punish the contempt of an order passed under Section 17 of the Act. Here, it was held by the court that Section 27(5) of the 1996 Act could only be used by the tribunal to make a representation to the court for contempt if a party violates the orders passed by the arbitrator in respect of taking evidence (and not for violation of other orders, such as orders for interim measures that may be passed by the tribunal under Section 17 of the Act. The Honorable Supreme Court in a special leave petition[27] set aside the decision of Bombay High Court and ruled that the arbitral tribunal has special powers under 27(5) to punish for its contempt. Court stated If the provision is read in a literal manner then the arbitral tribunal has power to punish for non appearance, contempt or any other default and further the court stated "in consonance with the modern rule of interpretation of statutes, the entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal are toothless".

[25] 453/2009 (Delhi High Court, Aug. 18, 2009)
[26] (2016) 1 Mah LJ 52 (Bom.).
[27] Alka Chnadewar v. Shamshul Ishrar Khan CIVIL APPEAL NO.8720 OF 2017, MANU/SC/0818/2017

CHAPTER 6 MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS

Making Of The Arbitral Award :

Making of arbitral award is the last stage in the arbitral proceedings. The decision taken by the majority of the members of the tribunal will be expressed in the form of the award[1]. The tribunal can render the interim award [2]provided, if the tribunal deems it necessary, otherwise, the tribunal may render directly the final award[3]. The act permits the arbitral tribunal to encourage the parties to arrive at a settlement and if the parties have agreed for a settlement then, the same can be incorporated in the award by the arbitral tribunal[4].The act mandates the tribunal to specifically state that, it is an award made by the tribunal on the basis of the agreed terms of the parties.[5]

In the process of domestic arbitrations in India, the applicable law is the law of India. This is a mandatory requirement under the Indian Arbitration Act and cannot be contracted out of by the parties[6]. For international arbitrations with a seat in India, the arbitral tribunal shall follow the laws the parties have agreed to apply to the substance of their dispute.[7]The designated law or legal system applying to the substance of the dispute is to be construed, unless expressly agreed otherwise, as referring to the substantive law of that country and not its conflict of laws rules[8].In the absence of any agreement between the parties as to the applicable law, the arbitral tribunal shall apply the laws that it considers to be appropriate and relevant to the dispute[9].

If the parties expressly agree, the arbitral tribunal may make a determination *ex aequo et bono*, deciding the dispute in light of general

[1] Refer S. 29 of Arbitration and Conciliation Act 1996
[2] S 31 (6) Ibid
[3] SS 35, 30 and 32 Ibid
[4] S 30 Ibid
[5]S 31, Ibid.
[6]S 28(1)(a), Ibid.
[7]S 28(1)(b)(i), Ibid.
[8]S. 28(1)(b)(ii), Ibid.
[9]S. 28(1)(b)(iii), Ibid.

notions of fairness, equity and justice as opposed to the strict rule of law[10]. Furthermore, the arbitral tribunal may decide the applicable law by using the terms of any contract between the parties, taking into account the usages and trade practices applicable to that contract[11]. It is understood that such terms and usages are not in conflict with the mandate of the Indian Arbitration Act, India's public policy and the law applicable to the substance of the dispute.

Making of arbitral award is not solo process but it is the result of systematic arbitration procedure which stared from stay of legal proceeding by referring the dispute for arbitration by court if there is element of arbitration agreement exists. In domestic arbitration the courts can refer the parties to arbitration if the subject matter of the dis-pute is governed by the arbitration agreement. Section 8 of the Act provides that if an action is brought before a judicial authority, which is subject-matter of an arbitration, upon an application by a party, the judicial authority is bound to refer the dispute to arbitration. It is important to note that the above applica-tion must be made by the party either before or at the time of making his first statement on the substance of the dispute and the applica-tion shall be accompanied by a duly certified or original copy of the arbitration agreement. The amended section 8narrows the scope of the judicial authority's power to examine the prima facie existence of a valid arbitration agreement, thereby reducing the threshold to refer a matter before the court to an arbitra-tion for purposes of arbitrations commenced on or after October 23, 2015.More importantly, taking heed from the judg-ment of the Supreme Court in Chloro Controls[12], which effectively applied only to foreign-seated arbitrations, the definition of the word 'party' to an arbitration agreement has been expanded under the Amendment Act to also include persons claiming through or under such party.

Thus, even non-signatories to an arbitration agreement, insofar as domestic arbitration or Indian seated ICA, may also participate in arbitration proceedings as long as they are proper and necessary parties to the agreement[13]

[10]S. 28(2), Ibid.
[11]S. 28(3), Ibid.
[12]Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641
[13]Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531

Rules Applicable To Substance Of Dispute [Section 28] :

(1) Where the place of arbitration is situate in India, :

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration, :-

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

Section 28 of the Arbitration and Conciliation Act, 1996 deals with the Rules applicable to the substance of dispute. Before amendment under Section 28(3), the Tribunal was bound to decide the dispute in accordance with the terms of contract and also take into account the trade usage applicable to the transaction.Now after the amendment to the section, the Tribunal while deciding and making an award will take into account the terms of the contract and trade usage applicable to the transaction.

Therefore, under the unamended Section 28(3), the scope for the Tribunal to make liberal interpretation of the Contract was unavailable. Resultantly, the scope of the Tribunal to interpret a term of the Contract, was

also limited. The Tribunal could at best, interpret the terms of the Contract taking into consideration the intent of the parties and the trade usage applicable to the transaction. In *ONGC vs. SAW Pipes*[14], , the Hon'ble Supreme Court held that any Award passed by the Tribunal which goes against the terms of the Contract are violative of Section 28(3) of the Arbitration and Conciliation Act, 1996, and was a ground to set aside the Award under section 34. To overcome this anomaly, the Law Commission, in its 246th Report, observed as follows:

"The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in ONGC vs. Saw Pipes Ltd, (2003) 5 SCC 705

The Hon'ble Supreme Court in *HRD Corpn. v. GAIL (India) Ltd*[15]., held as follows:

"18. Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC Ltd. v. Saw Pipes Ltd. has been expressly done away with. So has the judgment in ONGC Ltd. v. Western Geco International Ltd. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Co. Ltd. v. General Electric Co. where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar. "Justice or morality" has been tightened and is now to be understood as meaning only

[14] (2003)5 SCC 705
[15] (2018) 12 SCC 471

basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. DDA. Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."

Therefore, now the power of the Tribunal to interpret the terms of the Contract are widened and the Tribunal can interpret the terms not only taking into consideration the intention of the parties but also looking into the trade usage and construe the same in a prudent and reasonable manner. The shift from 'in accordance with' to 'take into account' has provided certain flexibility to the Tribunal.

Decision Making By Panel Of Arbitrators [Section 29] :

(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

(2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Time limit for Arbitral Award [Section 29A] :

(1) [16][The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (*4*) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (*4*) of section 23].

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be

[16] Subs. by Act 33 of 2019, s. 6, for sub-section (1) (w.e.f. 30-8-2019).

entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (*3*), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period :

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application :

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

Section 29A of the requires an arbitral tribunal to render an award within 12 months, which may be extended up to 18 months with the consent of the parties from the date on which the tribunal is constituted On a failure to do so, the tribunal loses its mandate and the parties are required to approach the courts for extension of the time limit beyond 12 months or 18 months, as the case may be. If the mandate of the tribunal is terminated in accordance with Section 29A, the tribunal becomes *functus officio* not only with respect to the claim filed.

This provision is the contribution of 246th law report but if one try to trace, Rule 3 of the First Schedule[17] under the Arbitration and Conciliation Act, 1940 prescribed a time limit of 4 months to render the award, after the tribunal had entered into reference to render the award. The court had the discretion to extend this time, and no upper limit was prescribed for the same under the 1940 Act. No doubt that in the context of efficacy and to timeline the arbitration procedure it may be a good step but in authors opinion it oppose the fundamental concept of party autonomy and will invite controversy.

Commencement of Initial Period :

The aforesaid period is to be calculated from the date of reference means when notice of appointment is received by the arbitrator. As per 2019 amendment said period shall be reckoned from the period of completion of the pleadings. Such period of 12 months can be further extended by the consent of both the parties for 6 months i.e. effectively 18 months.

Time Period For Moving To Court For Extension Of Time :

In case the award is not made within the abovementioned time period then both parties (through joint application) or either of the parties can file an

[17] Rule 3: The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

application for extension of the time period for making or passing of award. Such an application can be filed within reasonable period from either before or after the expiry of 12 months (in case other party doesn't give consent for extension of the time period) or 18 months

Section 29A uses mandatory terms such as an award shall be made, and mandate of the arbitrator shall terminate. The only semblance of party autonomy in this provision is sub-section (3) that allows the parties to extend the time period by 6 months, after the expiry of 12 months. Neither the parties, nor the tribunal, have the power to extend the time limit beyond the statutory period of 18 months. Hence, they are compelled to approach the courts to seek an extension. The wording of this section indicates that it is of a mandatory nature.

Consequences To Failure Of Subsection (1) or (3) :

Section 29A (4) provides that mandate of arbitrator shall terminate unless the period of delivery of award is extended by the court if the parties are able to show sufficient cause.

In *Chandok Machineries v. SN Sunderson & Co*[18]., a valid award was challenged for being issued after the expiry of the 12 months limit. The petitioner had delayed the proceedings at various junctures and also refused to give consent for extension of time to render the award, under Section 29A(3). The Delhi High Court laid to rest several important issues in this context. Even though there was no written application for extension of time under Section 29A, the court deemed it fit to exercise its powers under Section 29A(4) and place the burden on the petitioner to show why the time limit should not be extended by the court. 72 The ambit of Section 29A(4) was expanded by ruling that such application need not only be in writing, but can also be made orally. Further, the court clarified that after extension of time by the court under Section 29A(4), any proceedings undertaken by the tribunal after the expiry of the statutory time limit, will stand validated.

[18] 2018 SCC OnLine Del 11000

Limited power of court :

Section 29A(5) provides that the Court may only grant an extension of the time under Section 29(4) when it is satisfied that there exists *sufficient cause* and on such terms and conditions as may be imposed by the Court. sufficient cause has also been used in Section 5[19] of the Limitation Act, 1963 Given the similarity with the proceedings under this sub-section, Courts may turn to judicial decisions on S. 5 for guidance. Documents and evidences are in arbitration proceeding is voluminous is held sufficient cause in the case of *International Trenching Pvt. Ltd v. Power Grid Corporation of India*[20]. On the other hand *in Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private limited*[21] where it was argued that , arbitrator has deliberately decided to postpone the award to prevent any inconsistent award being passed if a similar arbitration proceeding is going on however the proceeding may be distinct and will have no bearing on the award not regarded as sufficient cause.

While extending the period under sub-section 4, it shall be open to the court to substitute one or all of the arbitrators. In *Olympic oil industries v. practical properties pvt ltd*,[22] where Arbitral tribunal were responsible for delay and in *FIITJEE Ltd.v. Dushyant Singh and anr*,[23] where the conduct of arbitrator was contrary to basic principles of law, the Courts have granted substitution of arbitrator.

Enquiry under Section 29A is limited to examining the issue of expeditious hearing of arbitration and nothing more. It cannot be use for Section 12, 13 or for challenging the impartiality of the Tribunal[24].

---

[19] Extension of prescribed period in certain cases. -Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. [20] 2017 SCC Online Del 10 801.

[21] 2018 SCC OnLine Del 12466

[22] 2018 SCC online Del 8887

[23] 2018 SCC OnLine Del 13157

[24] Puneet solanki and another v. Sapsi electronics pvt ltd, 2018 SCC OnLine Del 10619

Fast Track Procedure [Section29B] :

1. Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).
2. The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
3. The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1) :-

   (a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

   (b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

   (c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

   (d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

4. The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
5. If the award is not made within the period specified in sub-section *(4)*, the provisions of sub-sections *(3)* to *(9)* of section 29A shall apply to the proceedings.
6. The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties

The 2015 Amendment Act also introduces a fast-track arbitration procedure to resolve disputes provided that such option is exercised prior to or at the time of appointment of the arbitral tribunal. Section 29B has inserted to facilitate an expedited settlement of dis-putes based solely on documents subject to the agreement of the parties. The tribunal for this purpose consists only of a sole arbitrator who shall be chosen by the parties.[25] For this purpose the time limit for making an award under this section has been capped at 6 months from the date the Arbitral Tribunal enters upon the reference. [26] Parties can before constitution of the Arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure.[27] Under the fast track procedure, unless the parties otherwise make a request for oral hearing or if the arbitral tribunal considers it necessary to have oral hearing, the Arbitral Tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing.[28] In a fast-track proceeding under section 29B(6) the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties. Whereas in ordinary proceedings according to section 11(14), the rules for the payment of costs to the arbitral tribunal, shall be determined by the High Court, as the rates are provided in the Fourth Schedule of the Act.

Settlement [Section 30] :

(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

[25]Section 29B(2) of the Act
[26]Section 29B(4) of the Act
[27]Section 29B(1) of the Act
[28]Section 29B(3) of the Act

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Settlement during Arbitration :

Section 30 confers on the arbitral tribunal the authority to encourage settlement of disputes with the agreement of the parties and for that purpose, it authorises the tribunal to use mediation, conciliation or other procedures during the arbitral proceedings for settlement of disputes. Where the settlement is reached during the course of arbitral proceedings, the arbitral award shall be made on the agreed terms and it shall have the same status as arbitration award on the substance of the dispute or the difference.

It is permissible for parties to arrive at a mutual set-tlement even when the arbitration proceedings are going on. In fact, even the tribunal 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 arbi-tral award on agreed terms, which is called consent award. Such arbitral award shall have the same force as any other arbitral award[29].Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbi-tral Tribunal can, with the express consent of the par-ties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

Settlement Award :

From a juxtaposition of s 2(e) and s 30, it would appear that the settlement award shall be enforced in the same manner as if it were a decree made by a court having jurisdiction to decide questions forming the subject-matter of the arbitration if the same had been the subject-matter of the suit. Section 30 has been designed to encourage settlement of a dispute, with the agreement of the parties by alternative methods of dispute resolution by using 'mediation', 'conciliation' or 'other procedures', at any time during the

[29]Section 30 of the Act

arbitral proceedings.[30] The settlement arrived at between the parties will be recorded by the arbitral tribunal 'in the form of an arbitral award on agreed terms'.[31] The award on agreed terms shall be made in accordance with s 31 stating that it is an 'arbitral award"[32] and such award shall have 'the same status and effect as any other arbitral award on the substance of the dispute'.[33] Such award shall be enforceable under s 36 'in the same manner as if it were a decree of the court'.[34]

Form and Contents Of Arbitral Award [Section 31] :

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section *(1)*, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may

[30] The Arbitration and Conciliation Act 1996, S. 30(l).
[31] Ibid.,S. 30(2).
[32] Ibid., S. 30(3).
[33] Ibid., S. 30(4).
[34] See para (1)30-11

include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

1. [(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation :- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]

2. [(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.]

Explanation :-For the purpose of clause *(a)*, "costs" means reasonable costs relating to :-

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

A decision of an Arbitral Tribunal is termed as an *'Arbitral Award'*. An arbitral award includes interim awards. But it does not include interim orders passed by arbitral tribunals under Section 17. An arbitrator can decide the dispute only if both the parties expressly authorize him to do so. The decision of the Arbitral Tribunal will be by majority.

Section 31(1) states that the Arbitral Award shall be in writing and signed by all the members of the tribunal. Sub section (3) requires that It must state the reasons for the award, unless the parties have agreed that no reason for the award is to be given. The Award should be dated and the place where it is made should be mentioned (i.e. the seat of arbitration). According to subsection (6) A copy of the award should be given to each party. Arbitral Tribunals can also make interim awards. In *IFFCO v. Bhadra*

Product[35]*s* the jurisdiction to make an interim award is left to the good sense of the Arbitral Tribunal, and that it extends to "any matter" with respect to which it may make a final arbitral award. Further, the expression "matter" is wide in nature, and subsumes issues at which the parties are in dispute. Therefore, any point of dispute between the parties which has to be answered by the Arbitral Tribunal can be the subject –matter of an interim award. Further, an interim award is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage

Interest and cost of arbitration :

The interest rate payable on damages and costs awarded, as per the 2015 Amendment Act section 31(7)(b) shall, unless the arbitral award otherwise directs, shall be 2 percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

In the case of *Vedanta Ltd. vs. Shenzen Shandong Nuclear Power Construction Co. Ltd*[36] The Hon'ble Supreme Court commenced its decision by elaborating the definition of the term 'interest'. The court held that,

"*'Interest' is defined as "the return or compensation for the use or retention by one person for a sum of money belonging to or owned by any reason to another". In essence, an award of Interest compensates a party for its forgone return on investment, or for money withheld without a justifiable cause."*

The Hon'ble Court established that section 31(7) of the Act has two parts. The sub section (a) deals with interest rate imposed by the Tribunal for the period of pre-reference and during pendent lite of the dispute. This power of the Tribunal shall be subject to any agreement between parties wherein they may agree in advance to prohibit this power of the Tribunal to impose interest for these periods during the dispute. The court emphasized on the phrase "*Unless otherwise agreed by the parties"* in the provision of the aforementioned subsection while interpreting the sub-section.

[35] Appeal (C) No.13264 of 2018

[36] Civil Appeal No. 10394 of 2018

However, the Hon'ble Court also noted that the second part of Section 31(7) i.e. clause (b) deals with interest rate imposed by the Tribunal for the post-award period. This period kicks off from the date of passing of the final award by the Tribunal and continues till the actual date of realization of this award. Interestingly, the Hon'ble Court noted that this particular sub-section lacks party autonomy and cannot be subjected to any prior agreement between the parties in this regard. The apex court also highlighted the absence of the phrase "*Unless otherwise agreed by the parties"* in this particular sub-section which is present in the preceding sub-section (a) of 37(1).

The Hon'ble Court categorically held that the power of an arbitrator to award interest in an arbitration proceeding must be exercised reasonably. The apex court held that:

"On the one hand, the rate of Interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature."

Honble Supreme Court in the matter of *Chittaranjan Maity vs. Union of India* [37] held that under the provisions of Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 when parties have agreed under the terms of the agreement that interest shall not be payable, the Arbitrator cannot award *pendente lite* interest i.e. interest between the date on which the cause of action arose till the date of the award. Supreme Court in the Case of *M/s Hyder Consulting (UK) Ltd v. Governor State Of Orissa through Chief Engineer*[38], held that In section 31(7), the Parliament has deliberately used the word "sum" to refer to the aggregate of the amounts that may be directed to be paid and not merely the "principal sum" without interest.

Pursuant to the246 Law commission recommendation, sub-section 31(8) of the Act was amended in 2015. The phrase "*unless otherwise agreed by the parties*" was deleted from sub-section 31(8) and arbitral tribunals were given the power to fix arbitration costs in accordance with the newly introduced Section 31A. It was clarified that for the purposes of Section 31A, "*costs*" would *inter alia* mean reasonable costs relating to the fees and expenses of the arbitrators.

[37] (2017) 9 SCC 611

[38] CA 3148 of 2012 Judgment dated 25 November 2014

The Delhi High Court in the case of *National Highways Authority of India v. Gammon Engineers and Contractor Pvt. Ltd*.[39] interpreted sub-section 31(8) of the amended Act and this time held that "*costs*" under sub-section 31(8) and Section 31A of the Act are the costs that are awarded by an arbitral tribunal as part of its award in favour of one party to the proceedings and against the other. Deletion of the words "*unless otherwise agreed by the parties*" was found to only signify that the parties, by an agreement, cannot contract out of payment of "*costs*" and "*denude*" the arbitral tribunal of its power to award "*costs*" of arbitration in favour of the successful party. With respect to fixing of fees by the arbitral tribunal, the Court held that an arbitral tribunal is bound by the arbitration agreement between the parties, which is the source of its power.

Regime for Costs [Section 31A] :

(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine :-

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation :- For the purpose of this sub-section, "costs" means reasonable costs relating to :-

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs, :

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

[39] 2017 SCC OnLine Del 10285

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including :

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay :-

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Cost of Arbitration :

The explanation defining the term 'costs' for the purpose of this sub-section has been added. The circumstances which have to be taken into account while determining the costs have been laid down in the sub-section (3) of (Section 31 A). This provision has been added to determine the costs incurred during the proceedings including the ones mentioned under Section 31(8) of the Act. Cost of arbitration means reasonable cost relating to fees and expenses of Arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other

expenses in connection with arbitral proceedings. The tribunal can decide the cost and share of each party. The regime for costs has been established which has applicability to both arbitration proceedings as well as the litigations arising out of arbitration. important aspect of the Section is that it clarifies that the power to award costs is independent of the Code of Civil Procedure, 1908. Hence, these issues relating to costs are to be decided notwithstanding provisions in the Code of Civil Procedure, 1908 which may go against Section 31A.

In the case of *Sheetal Maruti Kurundwade vs. Metal Power Analytical (I) Pvt. Ltd. and Ors* (2017), a petition was filed by one of the parties under Section 9, 12(3) and 12(5) while alleging that the presiding arbitrator appointed was previously briefed by the counsel of the other side in a different case, and so the appointment was contrary to the 1996 Act. The Bombay High Court did not entertain the petition and dismissed it on the basis of there being no "foundation in fact or law". The High court stated that the petitioner completely ignores Section 31A and so failed to award the costs on the respondent to the petition. The court could not have left the parties to bear their own costs without recoding reasons therefore as required under Section 31A(2)(b).

Termination of Proceedings [Section 32] :

1. The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where -
   a. the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
   b. the parties agree on the termination of the proceedings, or
   c. the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
3. Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

Section 32 of Act provides for the termination of arbitral proceedings. Subsection 1 provides that The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2) where subsection 2 describes three eventualities- withdrawal of claim by claimant, agreement of parties for the termination of the proceedings, or where the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Following are the situations when proceedings terminate :

- Default of the claimant – s. 25(1)(a) &(c)
- Settlement – s. 30
- Final award – s.32(1) & s. 35
- Tribunal order – s. 32(2) o Failure of parties to make advance payment – s.38
- The situation where court terminates the proceedings under section 29 A.

Distinction between termination of Arbitral proceedings under Section 25 and Section 32 of the Arbitration Act, 1996 :

Supreme Court in *SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited*[40] where the issue involved was whether the arbitral tribunal which had terminated arbitral proceedings under Section 25(a) of the Arbitration Act due to non-filing of claim by the claimant, had any jurisdiction to consider an application for recall of its order terminating the arbitration proceedings upon sufficient cause being shown by the claimant. In the said judgement, the Supreme Court held that the arbitral tribunal had jurisdiction to recall its order of terminating the arbitration proceedings under Section 25 of the Act.

However, The Supreme Court in the case of *Sai Babu v. M/S Clariya Steels Private Limited* [41] held that once the sole arbitrator terminates the arbitration proceedings under Section 32(2)(c) of Arbitration and Conciliation

[40] [(2018) 11 SCC 470],

[41] (decided on May 1, 2019),

Act, 1996 ("Arbitration Act"), the same cannot be subsequently recalled. The primary concern here was whether the arbitrator had the jurisdiction to recall the arbitration proceedings terminated under Section 32(2)(c) of the Arbitration Act. The Supreme Court was of the opinion that the eventuality as envisaged under Section 32 of the Arbitration Act would arise only when the claim is not terminated under Section 25(a) of the Arbitration Act. Therefore, once the mandate of the arbitral tribunal is terminated with termination of arbitral proceedings, the arbitrator does not have the authority to recall the proceedings terminated under Section 32 of the Arbitration Act.

Correction and Interpretation of Award; Additional Award [Section 33] :

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

Section 33 of the Arbitration & Conciliation Act, 1996, is similar to Section 152 of the Code of Civil Procedure, 1908 as the latter provision also speaks of correction of judgments or decrees or orders on account of clerical or arithmetical mistakes or errors arising from accidental slip or omission. Section 33 of the A & C Act essentially is in two parts. One part speaks of and deals with what is known as an additional award on account of the arbitral tribunal omitting to deal with certain claims which have been made before it and which aspect is the subject matter of Section 33(4) of the A & C Act, 1996 with the related sub-sections being sub-sections (5) to (7) of Section 33 of the A & C Act, 1996.

Once there is an additional award, it is considered as a separate award, and there is no merger of the award already passed for some claims with the additional award. The later additional award is given by law a status of an 'additional award'. When there is correction to the award, arithmetical or clerical, the original award passed merges in the corrected award and hence, the period of limitation necessarily and only starts by applying the doctrine of merger from the receiving of the corrected copy of the corrected/amended award.

Section 34(3) of the A & C Act, 1996 on literal reading provides that the period of three months commences, for filing of the objections, from the date of "disposal" by the tribunal of an application made under Section 33 of the A & C Act, 1996. It is pertinent to mention that whereas the first part of Section 34(3) of the A & C Act, 1996 talks of three months period for filing of objections from receiving of the arbitral award, the later part of Section

34(3) of the A & C Act, 1996 talks of commencement of period, not from receiving of the copy of the amended award pursuant to allowing an application under Section 33 of the A & C Act, 1996 but from the date of disposal of the application filed under Section 33 of the A & C Act, 1996. It is beyond debate that objections to an arbitral award are to be filed only after receiving the copy of the award and this is obviously because it is only when the award is read and understood, can the grievance be found on account of a particular issue being decided in a particular manner[42]. What requires emphasis is that an award has necessarily to be read before the period of limitation can be said to have commenced for filing of objections to an award and for which there has to be available a copy of the award.

[42] Shivam Goel https://tilakmarg.com/opinion/section-33-of-the-arbitration-additional-award/

CHAPTER 7 | RECOURSE AGAINST ARBITRAL AWARDS

Application for Setting Aside Arbitral Award :

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if :-

(a) the party making the application [1][establishes on the basis of the record of the arbitral tribunal 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 :

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

---

[1] Subs. by Act 33 of 2019, s. 7, for "furnishes proof that" (w.e.f. 30-8-2019).

(b) 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.

[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.]

3[(2A) 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 :

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

arbitral

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal :

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the

proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (*5*) is served upon the other party.]

The arbitration award made by the arbitral tribunal is open to challenge on the grounds mentioned in section 34 of the 1996 Act. Section 34 provides for the manner and grounds for challenge of the arbitral award. Section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and the scope of the provisions for setting aside the award is far less than it was under the Sections 30 or 33 of the 1940 Act. In *Municipal Corp. of Greater Mumbai v. Prestress Products (India)*, the court held that the new Act was brought into being with the express Parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.

The Supreme Court in *Oil and Natural Gas Commission* v. *Western Company of North America*[2], while dealing with the arbitration Act, 1940, said that till an award is transformed into a judgment it is lifeless from the point of view of its enforceability. This is because of the fact that only after the court passes a decree and judgment in terms of the award, it gets an independent life But under the present Act, no such decree from the court is necessary. The award can be enforced in the same manner as if it were a decree of the court. This is only after the expiry of the term for making an application to set aside the arbitral award or after the refusal of application, if made.

---

[2] (1987) SCR 1024.

In *S.S. Fasteners* v.*Satya Paul Verma*,[3] it has been held that an aggrieved party can file an application for setting aside the award only under the relevant provisions of the Act. He cannot file a separate suit challenging the validity of the award, which had assumed the status of a civil court decree. Under the Code of Civil procedure there is a presumption that the award is valid in existence and is passed by a court of competent jurisdiction after following the due procedure.[4] Similarly, in *BhanwarlalBhandari* v. *Universal Heavy Mechanical Lifting Enterprises*[5] it was held that under an award is set aside in appeal or in revision, even if erroneous it is binding on the parties. It is to be remembered that even thoughfor the purpose of enforcement the award is deemed as the decree of the court; it is in fact not the judgment or decree of the court in the exercise of the judicial power of state.[6]

Sec. 34 provides that a court on certain grounds specified therein may set an arbitral award side. The grounds mentioned in Clause (a) to Sub-Sec. 2 of Sec. 34 entitles the court to set aside an award only if the parties seeking such relief furnishes proof as regards the existence of the grounds mentioned therein.

Furnishes Proof :

In the aforesaid case, an award was passed against the Respondent by the Sole Arbitrator. The award was challenged by the Respondent under Section 34 of the Act before the District Court of Delhi, which was rejected in view of the exclusive jurisdiction clause. In Appeal, the High Court of Delhi referred back the parties to the District Judge, to first frame issues and then decide on evidence, including the opportunity to cross examine witnesses who give depositions. The question before the Supreme Court was whether there is any requirement to lead evidence in an application to challenge an award under the Act? The Supreme Court interpreted the words "furnishes proof" appearing in Section 34(2)(a) and referred to the Arbitration and Conciliation (Amendment) Bill of 2018, being Bill No.100 of 2018, which provides for an amendment to Section 34(2)(a) of the principal Act, and

[3] AIR 2000 Punj&Har. 301.

[4] The Code of Civil Procedure 1908, Order 21, Rule 24.

[5] AIR 2000 Punj&Har. 301.

[6] *G.C. Kanungo* v. *State of Orissa* (1995) SCC96.

proposes substitution of the words "furnishes proof that", with "establishes on the basis of the record of the arbitral tribunal that".

In view of the above, the Supreme Court concluded that :

"An application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties."

The Grounds Under Section 34(2) :-

Incapacity of Parties :

As a general rule, any natural or legal person, who has the capacity to enter into a valid contract, has the capacity to enter into an arbitration agreement. The lack of capacity is ground for objection to an arbitration agreement or an arbitration award. This incapacity may be in the form of incapacities like infancy; it may be incapacity by personal law. These incapacities strike at the root of one's claim to an arbitral award. An arbitral award which is a result of such arbitration agreement which is invalid under the law governing minors ought to be set aside.

Arbitration Agreement not Valid :

If the arbitration agreement does not exist or there is such an agreement but is invalid, the tribunal will have no jurisdiction on the dispute submitted to it. It will be a case of patent lack of jurisdiction which cannot be conferred on the arbitral tribunal by the agreement of the parties.[7] In the absence of any existing valid agreement, there can be no valid agreement. *Taipack Ltd.* v.*Ramkishore Nagar Mal*[8] is an example where there was an agreement for the sale and purchase and there was also an arbitration clause, but in the

[7] *Tarpore& Co.* v. *State of Madhya Pradesh*, (1994) 3SCC 521 at 530
[8] 2007 (3) Arb. LR 402 (Del).

purchase order itself made it clear that the arbitration clause was not operative, than it could not be said that there was an arbitration agreement between the parties, and hence the award could not be upheld.

Non-Compliance of Due Process :

Section 34 (2) (a) (iii) provides that the party making the application not being given proper notice of appointment of arbitrator or of proceedings or otherwise unable to present his case is a ground for the setting aside of arbitral award. For proper management of arbitral proceeding, a party must give notice of appointment of arbitrator to the other party, while the arbitrator must give notice of the date, time and place of the arbitration proceeding to the parties. This would constitute sufficient compliance of the requirement of notice.[9] Any proceeding in which a party is unable to present in the arbitration will militate against the mandate of section 18 of the Act which requires that a party shall be treated with equality, and each party shall be given equal opportunity to present his case. If the party to the terms of contract has not been impleaded as a necessary party to the arbitral proceedings, such proceedings and the resulting award will have no force of law.[10] Likewise, if a party has been treated with bias or has not been afforded full opportunity to present his case, the award will be liable to be set aside for lack of due process.

Lack or Excess of Jurisdiction :

An award may be set aside if it deals with a dispute not contemplated by, or, not falling under the terms of submission to the agreement and also may be set aside if it contains decision on matters beyond the scope of submission because in this case the arbitrator will do something which the parties never authorized him to do or legal regime does not permit. The arbitral tribunal cannot act arbitrarily, irrationally capriciously or independent of the contract; its sole function is to arbitration, according to the terms of the contract. In *Union of India* v.*Banwarilal& Sons (P) Ltd.*[11] where the arbitrator relied upon the evidence of lay person, failed to apply the correct

[9]*SohanLal Gupta* v. *Asha Devi Gupta* (2003) 7 SCC 492.
[10]*Hindustan Shipyard Ltd.* v.*Essar Oil Ltd.* 2005 (1) Arb. LR 454 AP.
[11] (2006) 5 SCC 304.

principles of evaluation but took the relevant document and other factors into account, the Supreme Court held that award vitiated and liable to be set aside.

Improper Composition of Arbitral Tribunal :

If the appointment of the arbitral tribunal is not in accordance with the arbitration agreement, the arbitration proceedings will be invalid and the resulting award will be liable to be set aside as nullity. Arbitral tribunal is competent to rule on its own jurisdiction including ruling on any objection with respect to the existence or the validity of the arbitration agreement.[12] If any of the parties to the arbitral agreement questions the jurisdiction of arbitral tribunal, and the same is rejected by the tribunal, such party may not approach the court at the time, but on this ground,a party can make an application for the setting aside of the arbitral award. But after the verdict of Supreme Court in the *SBP Co.* v. *Patel Engineering Company*,[13] if the chief justice of India and chief justice of high court exercise their power, it will not be open for the arbitral tribunal to decide its own jurisdiction. It implies that the chief justice will appoint arbitral tribunal after deciding the validity of the arbitration agreement and that would be final. So, in this condition this ground will not be available with the party for the setting aside of arbitral award. In *Narayan Prasad Lohia* v. *NikunjKumar Lohia and Ors*[14] the Supreme Court observed that :

> The opening words of section 34(2)(a)(v) make it very clear that if the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement as in conflict with the provisions of this Act" would only arise if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a

[12] Arbitration &Concilition Act, 1996. Section 16.
[13] (2005)8 SCC 618.
[14] AIR 2002 SC 1139

case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I which the parties cannot derogate.

In other words, even if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the arbitral tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure. If there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure and the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provisions of part I of the Act.

Subject Matter of the Dispute not Capable of Settlement by Arbitration [section 34(2)b] :

The subject matter of the dispute should be capable of settlement by arbitration. It means that disputes can lawfully be referred to arbitration. Whether a dispute can be referred to arbitration is usually set up as defence to the enforcement of arbitral agreement or the award, because all matters are not capable of settlement by arbitration. As a matter of general law, certain matters are reserved for traditional litigation by courts alone. Such matters include the matters where the type of remedy required is not one which an arbitral tribunal is in power to grant.

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Limited and others*[15], the court observed that the well-recognised examples of non-arbitrable disputes are :

[15] (2011) 5 SCC 532

i. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

ii. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

iii. guardianship matters;

iv. insolvency and winding-up matters;

v. testamentary matters (grant of probate, letters of administration and succession certificate); and

vi. eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

In *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak*[16], serious allegations of fraud were held by the Court to be a sufficient ground for not making a reference to arbitration. The aforesaid judgment was followed by this Court in *N. Radhakrishnan v. Maestro Engineers and Others*[17], while considering the matter under the present Act. In that case, the respondent had instituted a suit against the appellant, upon which the appellant filed an application under Section 8 of the Act. The applicant made serious allegations against the respondents of having committed malpractices in the account books, and manipulation of the finances of the partnership firm. This Court held that such a case cannot be properly dealt with by the arbitrator, and ought to be settled by the Court, through detailed evidence led by both parties. When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. In *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*[18] and *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*[19] held that allegations of fraud are not a bar to refer parties to a foreign-seated

[16] AIR 1962 SC 406
[17] (2010) 1 SCC 72
[18] 2014 (6) SCC 677.
[19] AIR 2014 SC 968.

arbitration and that the only exception to refer parties to foreign seated arbitration are those which are specified in Section 45 of Act, i.e. in cases where the arbitration agreement is either (i) null and void; or (ii) inoperative; or (iii) incapable of being performed. Thus, it seemed that though allegations of fraud are not arbitrable in ICAs with a seat in India, the same bar would not apply to ICAs with a foreign seat. In *A. Ayyasamy v. A. Paramasivam & Ors*[20], the Supreme Court observed that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non- arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of

[20] (2016) 10 SCC 386.

adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public for a, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected. Law of limitation under. In the same vein, the Supreme Court in *Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr*.[21], has held that an appointed arbitrator can thoroughly examine the allegations regarding fraud.

Public Policy :

In India, the doctrine of public policy, as evolved by the common law codes in U.K. has been codified in Sec. 23 of Indian Contract Act, 1872.[22] Under Arbitration & Conciliation Act 1996, it is also codified as a ground for setting aside an arbitral award. But, neither Indian Contract Act, 1872, nor the Act define the expressing public policy, or opposed to public policy. This expression has been defined by court time to time. An award contrary to the substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract would be patently illegal and opposed to the public policy of India. If it affects the rights of the parties, it would be open to interference by the court under Sec. 34 (2) of the Act of 1996[23] This assumes importance in the light of the fact that it is a major ground for refusing the enforcement of awards without insisting upon the proof from the opposite party.

---

[22] Indian Contract Act, Sec. 23

[23] *Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation* (2006) 4 SCC 445

Deciding the question as to whether the award could be set aside, if the arbitral tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties, the Supreme Court in the case of *Oil & Natural Gas Corporation Ltd.* v. *SAW Pipes Ltd.*[24]observed in relation to public policy :

There are two schools of thought – "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of the "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well- established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Jansonv. Driefontein Consolidated Gold Mines Ltd.*:[25] "*Public Policy is always an unsafe and treacherous ground for legal decision"*. That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson* v. *Mellish*[26] described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you."

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

The Supreme Court in *MurlidharAgarwal and Anr.* vs. *State of U.P. and Ors*.[27], while dealing with the concept of 'public policy' observed :

[24] AIR 2003 SC 2629
[25] (1902) AC 484, 500
[26] (1824) 2 Bing 229, 252
[27] MANU/SC/0391/1974

> Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

On this aspect, eminent Jurist & Senior Advocate Late Mr. NaniPalkhivala while giving his opinion to '*Law of Arbitration and Conciliation' by Justice Dr. B.P. Saraf and Justice S.M. Jhunjhunuwala*, noted :

> I am extremely impressed by your analytical approach in dealing with the complex subject of arbitration which is emerging rapidly as an alternate mechanism for resolution of commercial disputes. The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to Section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct errors of law in the award.

I welcome your view on the need for giving the doctrine of "public policy" its full amplitude. I particularly endorse your comment that Courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice.

If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India.

Result would be - award could be set aside if it is contrary to :

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality, or
(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience

of the Court. Such award is opposed to public policy and is required to be adjudged void.

The Amendment Act 2015 has added an explanation to Section 34 of the Act. In the explanation, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81; or (b) it is in contravention with the funda-mental policy of Indian law; or (c) it is in contraven-tion with the most basic notions of the morality or justice. It clarifies that an award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence[28].

The 2015 Amendment Act clarifies under proviso to section 34(2A) of the Act. that an award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence. A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law (Explanation 2 to section 48 of the Act.), and unless absolutely necessary, the courts should not go beyond the record before the arbitrator in deciding an application for setting aside an award[29]. The principles laid down by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority*[30] provides guidance as to what constitutes 'public policy' under the Act. In *Associate Builders,*

Hon'ble Supreme Court has held that :

a) a decision which is based on no evidence or which ignores vital evidence would be perverse and contrary to the fundamental policy of Indian law which is a facet of Public Policy of India under Section 48(2)(b) - (para 29 to 31).

b) if an arbitral award is without any acceptable reason or justification it would shock the judicial conscience and would consequently be contrary to Justice and as such refused enforcement (para 36).

The Amendment Act 2015 has also introduced a new section providing that the award may be set aside if the court finds that it is vitiated by patent

[28] Proviso to section 34(2A) of the Act

[29] *Emkay Global Financial Services Ltd. v. Girdhar Sondhi,* (2018) 9 SCC 49.

[30] (2015) 3 SCC 49

illegality which appears on the face of the award in case of domestic arbitrations. For ICA seated in India, 'patent illegal-ity' has been keep outside the purview of the arbitral challenge[31]. A challenge under this section can be filed only after providing prior notice to the opposite party as per subsection 5 of section 34, but this procedural provision has been held to be directory, and not mandatory, in nature[32]. The Supreme Court, in the case of S*angyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[33], interpreted the post-2015 Amendment Act grounds for challenge of an arbitral award under Section 34 of the Act and the grounds for refusal of enforcement of an arbitral award under Section 48 of the Act. The Supreme Court has held that the ground of "patent illegality" is available only for challenge of domestic arbitral awards under Section 34 of the Act.

Scope And Purpose :

The Supreme Court in *G. Ramchandra Reddy and Co.* v. *Union of India*[34] and in *Madhya Pradesh Housing Board* v. *Progressive*[35] while dealing with the Arbitration Act and considering to principal to challenge the arbitral award has reiterated the following points :

(a) the reappraisal of the evidence by court is not permissible. An award of an arbitrator need to be read as a whole to find out the implication and meaning thereof of the reasons. The court however does not sit in appeal over the award.

(b) The interference where reasons are given would still be less, unless there exist a total perversity and or the award is based on a wrong proposition of law.

(c) Even if two views are possible on a interpretation of central clause, that would not be justifiable in interfering with the award specially when the view so taken is possible one[36]. But the interpretation of the clause which is wholly contrary to law should not be upheld by the court.

[31] Section 34(2A) of the Act

[32] *State of Bihar v. Bihar Rajya Bhumi Vikas Bank,* (2018) 9 SCC 472.

[33] Civil Appeal No. 4779 OF 2019

[34] (2009) 6SCC 414

[35] (2009) 5SCC 678

[36] *State of Uttar Pradesh* v. *Allied construction* (2003) 7 SCC 396

(d) The jurisdiction of the court to interfere with an award made by an arbitrator is limited unless there is an error apparent on the face of an award and/or jurisdictional error and/or legal misconduct.

(e) The wrong point of law and apparent, improper and incorrect finding of facts which are demonstratable on the face of the material on record may be treated as grave error and /or legal misconduct.

The scope of section 34 of Arbitration and Conciliation Act 1996 is limited to the stipulations contained in section 34(2) of the Act. The expression " recourse to a court against an arbitral award" appearing in section 34(1) of the 1996 Act cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award[37]. The jurisdiction of court to interfere with an award of the arbitrator is always statutory. Section 34 is of mandatory nature, and an award can be set aside only on the court finding the existence of the grounds enumerated therein and in no other way. The words in section 34(2) that an Arbitral award can be set aside by the court only if are imperative and take away the jurisdiction of the court to set aside an award on the ground other than those specified in the section. The court is not expected to sit in appeal over the finding of the Arbitral Tribunal or to re-appreciate evidence as appellate court. the observation of Supreme Court in the case of *P. R. S. Stockbroker ltd.* v. *B. H. H. Security Private Ltd.* is apposite in this regard the relevant portion is reproduce as under[38]:

"A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act. Therefor in the absence of any ground under section 34(2) of the Act, it is not possible to reexamine the facts to find out whether a different decision can be arrived at".

---

[37] *GayatriBalaswamy* v. *ISG Novasoft technology* 2015(1) Arb. LR 354 (Madras)

[38] Reported in Indiakanoon.org, judgment dated 14 oct 2011

Scope of Interference :

The scheme and provision of the 1996 Act disclose two significant aspects relating to courts *vis-à-vis* arbitration. The first is that there should be minimal interference by court in matters relating to arbitration and second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal. Section 5 of the 1996 Act provides that notwithstanding anything contained in any other lawfor the time being enforce, in matters governed by part I of the 1996 Act, no judicial authority shall intervene except where so provided in the 1996 Act. Section 34 of the Act makes it clear that an arbitral award can be set asides on the grounds enumerated in sub-section 2 of section 34 and on no other ground.

The Supreme Court held that the courts may examine the question for consideration, by bearing three factors in mind[39] :-

The first is that the 1996 Act is a special enactment and section 34 provides for a special remedy.

The second, is that the arbitration award can be set aside only upon one of the grounds mentioned in sub-section 2 of section 34 of the Act.

The third is that proceedings under section 34 require to be dealt with expeditiously.

Under Section 34 of the Act court does not review, re-appreciate or re adjudicate the merits of the decisions rendered by the arbitral tribunal insofar as the ground of public policy is concerned, it is limited to fundamental policies of Indian law, justice morality or patent illegality[40].

It is settled law that interpretation is a matter which falls within the purview of the arbitral tribunal and the court will not interfere therewith except where the interpretation rendered is so perverse or absurd that it was not possible for any person with a rational mind to have taken the view taken by the arbitral tribunal.[41]

---

[39]*Fiza Developer and Inter Trade Pvt. Ltd.* v. *AMCI Ltd*. AIR 2009 Sc (Supp) 2398
[40]*BWL* v. *Union Of India* 2016 (30 Arb LR 432 Delhi
[41]*J & K Power Development Corporation* v. *KJMC Global Market Ltd*. 2016(3) Arb LR 338 Delhi

The arbitral tribunal is the final arbiter of the disputes between the parties referred to it.[42]

A finding pertaining to a finding of fact being perverse or sans any evidence cannot be a precedent for it all depends on the material before the arbitrator. At base is: has the arbitrator taken a view which is plausible. if the court finds so, nothing beyond has to be seen by the court.[43]

The award is not open to challenge on the ground that the arbitral tribunal has reached a wrong conclusion or that the interpretation given by the arbitral tribunal to the provisions of the contract is not correct.[44]

It is settled law that appreciation of evidence and returning a finding on a question of fact lies within the domain of the arbitrator. But a fact returned by an arbitral tribunal can be challenged on the limited ground of either perversity or ignoring material evidence.[45]

Arbitration is intended to be a faster and less expensive alternative to the court. If this is intention and expectation than the finality of arbitral award assumes much importance. The remedy provided under section 34 is in no sense an appeal.The language of section 34 is unambiguous and plain. The use of word only if by the legislation suggests a positive mandate that award can be set aside by the court if it is satisfied about the existence of any of the grounds set out in sub section (2) and no other ground.[46]

It is settled law that award is not open to challenge on the ground that the arbitral tribunal is reached at wrong conclusion or that the interpretation given by tribunal to the provisions of the contract is not correct.[47]

The court cannot correct an error and cannot make an award under section 34 of the Act. The court has no power to allow the claims made by the claimant which were rejected by arbitral tribunal.[48]

[42]*Organizing committee Commonwealth* v. *Pico Deepali Overlay Consortium*, 2016(2) Arb LR 209 Delhi
[43]*Mohan LalKukreja* v. *Sunder Kukreja* 2016(3) Arb LR 259 Delhi
[44] Supra 84
[45]*NHAI* v. *Hindustan Construction Co. Ltd.* 2016 (2) Arb LR 1 Delhi
[46]*NHAI* v. *Shiva Tractor* 2016(1) Arb LR 338 Alahabad
[47]*AVR India Private Ltd*. v. *Deepak Narang* 2016 (1) Arb LR 481
[48]*BMA Commodity Pvt. Ltd*. v. *KaberiMondal*, 2015(2) Arb LR 81 Bombay

A decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in court of law.[49]

Principle of severability :

The court while setting aside an arbitration award under section 34(2) of the Act can apply principle of severability to the awards which are severable. It is well settled that technical objections and grounds cannot be permitted to impede the cause of interest of justice. The court would mould procedure to ensure substantial justice to all parties concerned[50]. Hence, bad part of award can be severed from good part and bad part can set aside. It is not necessary to set aside entire award. Where however bad part of award is so intermingled and interdependent upon the good part of award that is not possible to sever the award in such cases it may not be possible to set aside the award partially and whole award has to be set aside.[51]

Writ Petition not Maintainable :

Remedy available to petitioner is to challenge finding by filling application under section 34 of the Act, after final award rendered by Arbitral Tribunal and writ petition not maintainable. Writ petition is not maintainable and remedy of the petitioner is to challenge the finding on the present issues and to file an application under section 34 of the Act only after final award is rendered by the arbitral tribunal[52].In*TamilnaduElectricity Board* v. *Sumathi*[53], it is clearly held that it is not as if the jurisdiction of the High Court under article 226 of the Constitution is barred but the jurisdiction was liable to used only where the negligence was apparent and there was no dispute on the account and further where there was a breach of article 21 of the Constitution.

[49]*ONGC* v. *Western Geo International Ltd*. 2014(4) Arb LR 102 SC
[50]*Angle Infrastructure Pvt. Ltd.* v. *Ashok Manchanda*, 2016(2) Arb. LR 394 (Delhi)
[51]*R. S. Jiwani* v.*Ircon International ltd*. 2010 (3) RCR 147
[52]*National Building Construction* v. *Anita Electricals* Pvt. Ltd. 2003 (3) Arb LR
[53] AIR 2000 SC 1603

CHAPTER 8 | FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

Finality of Arbitral Awards [Section 35] :

Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

Finality of Award :

The finality of arbitral awards in an arbitral proceeding is subject to Part VIII of The Arbitration and Conciliation Act 1996. An award becomes final it prevents the successful party from subsequently raising a claim on which he has succeeded. Likewise, it prevents the loosing party from raising the issue on which it has lost 'just because he believes that on the second occasion he may have a more sympathetic tribunal, more convincing witnesses, or a better advocate.[1] Thus, Section 35 provides that an arbitral award shall be final and binding on the parties and persons, claiming under them respectively. An award can be challenged under section 34 of the Act otherwise it is final and becomes decree of court under section 35 and no objection of jurisdiction on ground of no arbitration agreement can be raised in execution.[2] After commencement of arbitral proceedings if parties enter into an agreement or settlement, not in the form and manner provided under section 35 of the 1996 Act, it does not amount to an award and does not foreclose doors for the award forever.[3]

In *Cheran Properties Limited v. Kasturi and Sons Limited*[4], the Supreme Court interpreted provisions regarding execution of awards under the Arbitration and Conciliation Act, 1996. on of the issue before Supreme Court was Whether an arbitral award is binding on a third party (i.e. Cheran) who is not a signatory to the arbitration agreement? The Supreme Court explained that Section 35 of the A&C Act2 states that an arbitral award is

[1]Mustin and Boyd, Commercial Arbitration, second edn,1989,p413.

[2]*R. K. Textiles* v. *Sulabh Textiles Ltd.*, 2003(1) Arb LR 303 Bombay

[3]*Jindal Financial and Investment Services* v. *Prakash Industries Ltd*. 2003(1) Arb. LR 313

[4]Civil Appeal Nos. 10025-10026 of 2017.

"binding on the parties and persons claiming under them". The expression "persons claiming under them" is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. This expression was held to widen the net to include those who claim under the award, irrespective of whether such person was a party to the arbitration agreement or the arbitral proceedings.

Enforcement [Section 36] :

(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (*2*), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (*3*), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (*2*) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing :

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

Enforcement :

Enforcement is normally a judicial process which either follows or is simultaneous to recognition and gives effect to the mandate of the award. The purpose of enforcement is to act as a sword in that the successful party requests the assistance of the court to enforce the award by exercising its

power and applying legal sanction should the other party fail or refuse to comply voluntarily[5].Enforcement means the using the legal measures to push the party who is made liable in the arbitral proceedings, to carry out the award. Yet the definition of enforcement is not given in the Act but the manner in which it should be enforced is given in section 36.

Pre requisite Conditions :

An award holder would have to wait for a period of 90 days after the receipt of the award prior to applying for enforcement and execution. During the intervening period (A further period of 30 days may be granted by a court upon sufficient cause being shown for condonation of delay), the award may be challenged in accordance with Sec-tion 34 of the Act. After expiry of the aforesaid period, if a court finds the award to be enforceable, at the stage of execution, there can be no further challenges as to the validity of the arbitral award. Prior to 2015 amendment Act, an application for setting aside an award tantamounted to a stay on proceedings for execution of the award. However, by virtue of the Amendment Act, 2015 a party challenging an award would have to move a separate application in order to seek a stay on the execution of an award.[6]

Stamping and Registration :

Section 35 of the Indian Stamp Act 1899 provides for stamping of arbitral awards with specific stamp duties and Section 35 provides that an award which is unstamped or is insufficiently stamped is inadmissible for any purpose, which may be validated on payment of the deficiency and penalty (provided it was original). Issues relating to the stamping and registration of an award or documentation thereof, may be raised at the stage of enforcement under the Act. In *M. Anasuya Devi and Anr v. M. Manik Reddy and Ors*[7]. The Supreme Court had also observed that the requirement of stamping an award and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the act. Under Section 17 of the Registration Act, 1908 an award has to be compulsorily registered if it affects immovable property, 8 failing which, it shall be rendered invalid.

[5] Julian D M Lew Loukas A MistelisTefanM Kroll. *Comparative International Commercial Arbitration.* Kluwer Law Publication First Indian Reprint 2007, New Delhi.
[6] Section 36 (2),(3) of the Act
[7] . (2003) 8 SCC 565

Defect of automatic stay and effect of Amendment Act, 2015 and Amendment Act 2019 :

Automatic stay was the major defect in the enforceability of the arbitral award under Section 36 of the Act towards speedy enforcement which was amended by 2015 Act. After amendment, a separate application would have to be filed seeking for a stay on the enforcement of the arbitral award. If the court is satisfied that a stay should be granted it could do so by requiring the award debtor to provide suitable security or make a deposit in court.

In *BCCI vs Kochi Cricket Pvt. Ltd*[8]. the Supreme Court held that the award holders could finally get the benefit of money deposits or security furnished by award debtors once the award was challenged under Section 34, though after furnishing bank guarantees to the court. It was held that generally the 2015 amendments applied prospectively i.e. only to all arbitrations and court proceedings filed after 23 October 2015. However, in so far as the amendment to Section 36 was concerned, these would apply retrospectively to even such court proceedings that were filed before 23 October 2015.

In 2019, by Section 13 of the Arbitration and Conciliation (Amendment) Act, 2019, Parliament inserted Section 87 of the Act which read as,

Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall :

a) not apply to :

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.

[8] MANU/SC/0256/2018 : (2018) 6 SCC 287

As instant outcome of the Section 87, amendments made by the Amendment Act, 2015 has been put away. And will now not be applicable to Section 34 petitions filed after 23 October 2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23 October 2015. This would mean that in all proceedings which are ongoing, despite the fact that Section 34 proceedings have been initiated only after 23 October 2015, yet, the old law would continue to apply and there will be an automatic stay on enforceability of arbitral awards on filing an application under Section 34 of the Act.

In *Hindustan Construction Company Limited and Ors vs UOI*,[9] the Hon'ble Supreme Court held that, Section 87 of the Act (2019 Amendment) reverses the beneficial effects of the 2015 Amendment Act which remedied the original mischief contained in the Arbitration Act, 2019 the issues before the Supreme Court were as follows :

(a) Whether the introduction of the 2019 Amendment removes the very basis of the decision of the Supreme Court in BCCI v. Kochi Cricket?

(b) Whether the insertion of Section 87 of the Arbitration Act and deletion of Section 26 of the 2015 Amendment is violative of Article 14, Article 19(1)(g), Article 21 and Article 300A of the Constitution of India?

On first issue, in the Judgment, the Supreme Court has held that introduction of Section 87 by the 2019 Amendment which has the effect of reinstating the concept of "automatic stay" on the operation of arbitral awards where a petition under Section 34 of the Arbitration Act challenging an arbitral award was pending on the Cut Off Date, is directly repugnant to the decision of the Supreme Court in *BCCI v. Kochi Cricket* and the object of the 2015 Amendment. Therefore, Section 15 of the 2019 Amendment removes the basis of the judgment in *BCCI v. Kochi Cricket* by omitting Section 26 of the 2015 Amendment from the very day it came into force. Since this is the provision that has been construed in *BCCI v. Kochi Cricket*, the fundamental prop of the said judgment has been removed by retrospectively omitting Section 26 of the 2015 Amendment altogether from the very day when it came into force.

[9] 3 MANU/SC/1638/2019

On second issue, The Supreme Court also held that the insertion of Section 87 in the Arbitration Act places the amendment to Section 36 of the Arbitration Act brought in by the 2015 Amendment on a *"backburner"*. Interestingly, the Supreme Court also observed that the insertion of Section 87 in the Arbitration Act resulting in resurrection of an automatic stay qua the arbitral awards against which a petition under Section 34 was pending as on the Cut-off Date, has led to refund applications being filed in cases where payments were made pursuant to orders granting a conditional stay on such arbitral awards.

Meaning of As If the Award were a Decree of the Court :

The expression 'decree' has been defined in s 2(2) of the Code of Civil Procedure in the following words

'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within s 144, but shall not include :-

(a) any adjudication from which an appeal lies as an appeal from an order, **OR**

(b) any order of dismissal for default.

Explanation:-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

It may be noted that under 1996 Act the word which have been used is "as if decree" of court, an award cannot equated to a decree of the court, commenting upon the words 'as if decree' of court Lakshman J noted[10]:-

> "the words 'as if' demonstrate that award and decree or order are two different things. The legal fiction is created for the limited purpose for enforcement as a decree. The fiction is not intended to make it a decree for all purposes under the statutes, weather central or state."

[10]*Parmjeet Singh* v. *ICDS Ltd*. AIR 2007 SC 168

In *DhirendraBhanuSanghvi*v.*JCDS Lid, Bombay,*[11] a Division Bench of the Bombay High Court said that in construing the words 'as if it were a decree of the court', the court must be guided by the substance of the matter, and not merely form. The substance of the matter is that when an award is made, it is enforceable in exactly the same manner as a decree and is as binding and is as conclusive as any ordinary decree. If a question arises between the parties, the award can be called in aid to prevent agitation of the question, which has already been decided by the award. There is, therefore, hardly any distinction of substance between an award which has the force of a decree under s 36, and the decree passed by the court. Once an arbitral award has become final and binding upon the person or persons claiming under and bound by the award, the award is impressed with the character of a decree and can be enforced under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the court. Hence, for the purpose of execution, the award itself is to be treated as a decree of the court.[12]

Execution of Decree :

The parties to an arbitration agreement impliedly promise to one another to perform a valid award.[13] If the award is not performed by the losing party; the successful claimant can enforce it 'in the same manner as if it were a decree of the court', under .the Code of Civil Procedure 1908. An arbitral award 'represents an agreement made between the parties, and is more and no less enforceable than any agreement made between parties'.[14] Section 35 of this Act provides that subject to the provisions of Pt I 'an arbitral award shall be final and binding on the parties and persons claiming under them respectively.' Section 36 further provides, 'where the time for making an application to set aside the arbitral-award under s 34 has expired, or such application having been made, it has been refused, the award shall be

[11] 2003 (3) Arb LR 82, 87 (Born) (DB). The court was dealing with a case under s 9(2) of the Insolvency Laws (Arnendrnent) Act 1978.

[12] *M Banerjee and Sans* v. *MN Bhagabati* 2002 (3) Arb LR 131, 139 (Gau)The Arbitration and Conciliation Act 1996, S. 30(l).

[13] *Purslow* v. *Baily* (1704) 2 LdRaym 1039; *Bremer Oeltransport GmbH* v. *Drewry* [1933] All ER 851; *Bloemen (FJ) Pty Ltd* v. *Gold Coast City Council* [1973] AC 115, referred to by Mustill and Boyd, Commercial Arbitration, Secondedn, 1989, p 417.

[14] *Bremer Oeltransport GmbH* v. *Drewry* [1933] All ER 851, referred to by Bernstein, Handbook of Arbitration Practice, fourth edo, 2003, p 388, para 2-943.

enforced under the Code of Civil Procedure 1908, in the same manner as if it were a decree of the court'. The Parliament has provided this summary procedure for excluding court intervention at the enforcement stage, because most of the objects of arbitration would be defeated if a claimant who succeeds in an arbitration has again to stand in the queue of litigants seeking to enforce their agreements. Therefore, unlike the Arbitration Act 1940, the Act of 1996 dispenses with the requirement of a judgment and decree being passed in terms of the award. The award becomes enforceable as if it were a decree if no challenge is preferred against it within the time prescribed for making a challenge or, when upon a challenge being preferred, it has been dismissed. The fact that an arbitral award is enforceable as if it were a decree, does not render the arbitral proceedings as proceedings in a suit. Nor does it render an arbitration a suit. All that this section provides is that for the purposes of enforcement, an arbitral award can be enforced as if it were a decree.[15]

It is not possible to resists the enforcement of an award under the 1996 Act by saying that the award has not been converted into decree and the decree has not been attached to the application for execution. The award has now to be enforced under the CPC in the same manner as if were the decree of the court. For execution of an arbitral award the procedure as laid down in Order XXI of the CPC has to be followed. Order XXI of the CPC lays down the detailed proce-dure for enforcement of decrees. The principles governing execution of decree and orders are dealt with in sections 36-74 and order 21 of the code. It is pertinent to note that Order XXI of the CPC is the longest order in the schedule to the CPC consisting of 106 Rules. Where an enforcement of an arbitral award is sought under Order XXI CPC by a decree-holder, the legal position as to objections to it is clear. At the stage of execution of the arbitral award, there can be no challenge as to its validity[16].The court executing the decree cannot go beyond the decree and between the parties or their representatives. It ought to take the decree

[15]*SaurabhKalani* v. *Tata Finance Ltd* 2003 (Supp) Arb LR 217, 238 (Born).

[16]*VasudevDhanjibhaiModi* v. *Rajabhai Abdul Rahman*, 1970 (1) SCC 670; *BhawarlalBhandari* v. *Universal Heavy Mechanical Lifting Enterprises*, 1999 (1) SCC 558

according to its tenor and cannot enter-tain any objection that the decree was incorrect in law or in facts. All proceedings in execution are commenced by an application for execution.[17] Execution is the enforcement of a decree or order by the process of the court, so as to enable the judgement-creditor to recover the fruits of the judgment passed in his favour. The decree to be executed must be a subsisting decree. Section 36 lays down the provisions of the code relating to execution of decrees shall also apply to execution of orders.

Executing Court :

The definition of a court in S. 2(1) *i.e.* the principal civil court of original jurisdiction is determinative of the proper court to institute execution proceeding under section 36. The proper court of enforcement of an award is the court which has power under 34 for setting aside an award. The proper court also means that the court which would have the ordinary jurisdiction to entertain a suit relating to the subject matter of arbitration agreement. On a reading of Ss. 36 and 49, it held that for purpose for sec 36, a court does not refer to a court under S. 2(1) e and can be any court having territorial jurisdiction in relation to a property or the persons against whom the decree is sought to be enforced.[18]The Delhi Court, speaking through ENDLAW J commented as follows[19]:-

> "The definition in S. 2(1) e are, unless the context otherwise requires, the word court is used in this section only in the context of, by a legal fiction, making the award executable as decree of the court within the meaning of CPC. The word court therein is used to describe the manner of enforcement is that as a "decree of Court" and not in context of providing for the court which will have territorial jurisdiction to enforce the award".

The court referred to in section 36 of 1996 Act is the court as defined under section 2(1) e of the Act and, thus, in unmistakable terms refers to a District Court, but not the character of a grade inferior to the principal civil

[17]Rule 10 of the CPC

[18]*Daelim industrial co.* v.*NumaligarhRefinary Ltd.*(2009) 3 Arb LR 581

[19]*Ibid.*

court of original jurisdiction[20]. Enforcement of a decree could take place only before a court within whose jurisdiction the judgement debater or their properties are located.[21]

The law relating to the power of an executing court under the provisions of s 47 of the Code of Civil Procedure 1908, is well settled. The difficulty is not with regard to the principles of law, but with regard to the application of such principles. In view of the clear language of s 47 of the CPC, it has always been understood that while the executing court cannot go behind the decree to determine its legality, objections regarding the validity of the decree has to be decided in an execution proceeding. However, such objections must appear on the face of the record and cannot be left to be determined by a long drawn process either of evidence or reasoning. The same principles of law would undoubtedly apply to the execution of an award under s 36 of the Act. As s 34 of the Act has enumerated specific grounds on which an application for setting aside of an award may be filed, any such objection to the award on the grounds enumerated in s 34 cannot be allowed to be agitated or re-agitated while resisting the execution of the award.[22]

From the relevant provisions of the CPC,[23] it would appear that the court which can entertain a suit with respect to the subject-matter of the dispute in arbitration alone can exercise the executing power. This is implicit in the language of s 36itselfin *ICDS Ltd.* v. *Mangala Builders Pvt Ltd*,[24] the Karnataka High Court has held that a right to enforce the award arises only after the period for setting aside the arbitral award under s 34 has expired or such an application, having been made, is rejected. In other words, the court executing the decree has to satisfy itself, before entertaining the application for execution that, the period for setting aside the award has expired or such an application having been made, has been refused. It follows

[20]*PotlabathuniSrikanth* v. *Shriram City Union Finance Ltd.*, 2016 (1) Arb. LR 362 Hyderabad
[21]*State Trading Corporation India Ltd.* v. *Global Steel Holding Ltd*. 2015(2) Arb LR 401 Delhi
[22]*Subhash Projects and Marketing Ltd* v. *Assam Urban Water Supply and Sewerage Board* 2003 (Supp) Arb LR 382 (Gau) (DB).
[23] See the Code of Civil Procedure 1908, Ss. 14, 15-20 and 38.
[24] AIR200lKant364.

that inferentially, the court that can exercise the power under s 34 of the Act can alone entertain the steps to enforce the arbitral award. It means that the 'court' as understood in s 34 has alone the jurisdiction to entertain the enforcement of the arbitral award. Here the subject-matter of the dispute in arbitration admittedly, was within the jurisdiction of the principal district judge, Mangalore. Therefore, the execution petition before the second additional civil judge (senior division), Mangalore was not maintainable.

In *Engineering Project (India) Ltd* v. *Indiana Engineering Works Put Ltd*,[25] the respondent filed an application under s 34 of the Act for setting aside the award before the Principal City Civil Court, Ranchi. During the pendency of that application, with oblique motive to confine jurisdiction to courts in New Delhi, the petitioner filed a petition before the High Court of Delhi for execution of the award purporting to be under s 36 of this Act read with 0 XXI r1 of the Code of Civil Procedure 1908. This petition asserted that the petitioner (judgment debtor) had addressed numerous communications to the respondent (decree holder), asking the respondent to furnish an unconditional acceptance of the award, and a receipt of payment in full and final settlement of the respondent's claim. A single judge of the Delhi High Court dismissed the petition, holding that a parry cannot be permitted to abuse judicial process by filing a frivolous petition in order to invoke territorial jurisdiction of a particular court and thereby oust jurisdiction of all other courts, and the petition purporting to be under sec. 36 has been filed in order to unfairly take advantage of the provisions of sec. 42 of the Act. Thus, a dispute created by the petitioner of its own making is to be made the subject matter of the present petition. Since the application for setting aside the award had been filed by the respondent before the City Civil Court Ranchi, the award will not be executable till the disposal of that application.[26]

All that the execution court can do is to look into the terms of the award and enforce it; it cannot go beyond the award.[27] For the purpose of

[25] 2004 (2) Arb LR 539 (Del).

[26] The court distinguished the decision of the Supreme Court in *National Aluminizirn Co Ltd* v.*Pressteel and Fabrications Pvt Ltd* (2004) 1 SCC 540.

[27] *S. K. Lakshminarayana* v. *Poonam Harish,* 2015 (6) Arb. LR 133 Karnataka

S. 36 the court could not called upon to go behind the awarded amount and deal with the process by which it was recovered.[28] And execution cannot resisted on the ground that should have been raised at the stage of challenge under section 34.[29] The only permissible scope of challenge available at the stage of execution is if it can be shown that the court passing the decree inherently lacked jurisdiction.[30]

Procedure in Execution :

Section 51 to 54 talks about procedure in execution or mode for execution. Section 51gives the power to court to enforce the decree in general. This section defines the jurisdiction and power of the court to enforce execution. Application for execution of decree under this section may be either oral (order 21 rule 10) or written (order 21, rule 11). Party has to choose the mode of implementation of decree. Court may execute decree as per the choice prayed by the decree-holder or as court may thinks fit.

General mode of Executing Decree :

(a) By delivery of any property specifically decreed. Property may be movable or immovable/

(b) By attachment and sale of the property or by sale without attachment of the property under clause (B) of section 51 it is within the power of court to attach the property if it is situated within its jurisdiction.

(c) Court can execute decree by mode of arrest and detention no execution of decree by arrest or detention of judgement-debtor unless reasonable opportunity is given in the form of show cause notice as why he should not be imprisoned.

(d) It can be executed by appointing a receiver. Within the purview of this section it is permissible to appoint decree-holder himself as the receiver of the judgment-debtors land.

(e) Clause (e) is the residuary clause and comes into play only when the decree cannot be executed in any of the modes prescribed under clause (a) to (d).

[28] *Supra* 96
[29] *MorphenLaborateries Ltd.* v. *Morgan Securities*, 2008 (3) Arb LR 383 Delhi
[30] *Municipal Corporation of Delhi* v. *Delhi Municipal Corporation* (2008) 5 RAJ 404 Delhi

Procedure for execution in decree against property

The execution of a decree against property of the judgment debtor can be effected in two ways :-

i. Attachment of property; and

ii. Sale of property of the judgment debtor

The courts have been granted discretion to impose conditions prior to granting a stay, including a direc-tion for deposit. The amended section also states that where the time for making an application under sec-tion 34 has expired, then subject to the provisions of the CPC, the award can be enforced[31]. Also, the mere fact that an application for setting aside an arbitral award has been filed in the court does not itself render the award unenforceable unless the court grants a stay in accordance with the provisions of sub-section 3, in a separate application. It is the discretion of the court to impose such condi-tions as it deems fit while deciding the stay applica-tion[32].

Attachment of Property :

'Attachable property' belonging to a judgment debtor may be divided into two classes :

i. moveable prop-erty and

ii. Immoveable property.

If the property is immoveable, the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such a transfer or charge. The order must be proclaimed at some place on or adjacent to the property and a copy of the order is to be affixed on a conspicuous part of the property and upon a conspicuous part of the courthouse[33]. Where an attachment has been made, any private transfer of property attached, whether it be movable or immovable, is void as against all claims enforcea-ble under the attachment[34].

[31]Section 36(1) of the Act
[32]Proviso to Section 36(3) of the Act
[33]O.XXI R.54 of the CPC
[34]Section 64 of the CPC

If during the pendency of the attachment, the judg-ment debtor satisfies the decree through the court the attachment will be deemed to be withdraw[35]. Otherwise the court will order the property to be sold[36].

Sale of attached property :

Order XXI lays down a detailed procedure for sale of attached property whether movable or immovable. If the property attached is a moveable property, which is subject to speedy and natural decay, it may be sold at once under Rule 43. Every sale in execution of a decree should be conducted by an officer of the court except where the property to be sold is a negotiable instrument or a share in a corporation which the court may order to be sold through a broker.[37]

Payment under a decree :

Payment under a decree can be made by deposit into the court whose duty it is to execute the decree, or send to that court by postal money order or through a bank; or out of court, to the decree holder by postal money order or through a bank or b any other mode wherein a payment is evidenced in writing; or otherwise, as a court which made a decree, directs.[38]

Decreetal Amount Includes Costs :

The award of cost is dealt with under section 35 of the Code of Civil Procedure. This section provides that the award of costs shall be in the discretion of the court, and the court shall have the full power to determine by whom or out of what property and to what extent such costs are to be paid. Sub-section (2) of section 35 provides that where the court directs that any cost shall not follow the event, the court shall states his reasons in writing.

Limitation for Execution :

Article 136 of the schedule to the limitation Act, 1963 provides limitation of twelve years for the execution of any decree (other than a decree granting

[35]0.XXI R. 55 of the CPC
[36]0.21 R. 64 of the CPC
[37]Order 21R.76 of the CPC
[38] Order 21 Rule 1 of CPC

a mandatory injunction) or order of any civil court. Time begins to run when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made or delivery in respect of which execution is sought, takes place. The Supreme Court in *M/s Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society,*[39] observed that the Limitation Act 1963 applies to arbitrations. The limitation period for enforcement of such an award is twelve years.

Completion of Enforcement :

The enforcement of an award is complete only when it has been enforced under CPC in the same manner as if wee a decree of court.[40]

[39] (2016) 11 SCC 313)

[40] *Paradise Hotel* v. *Airport Authority of India Ltd.* (2002)4 RAJ 670 Guj

Appealable Order [Section 37] :

1. Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely :-

a. refusing to refer the parties to arbitration under section 8;

b. granting or refusing to grant any measure under section 9;

c. setting aside or refusing to set aside an arbitral award under section 34.

2. Appeal shall also lie to a court from an order of the arbitral tribunal :-

a. accepting the plea referred to in sub-section (*2*) or sub-section (*3*) of section 16; or

b. granting or refusing to grant an interim measure under section 17.

3. No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Appeals against interim orders :

Appeals against interim orders Sub-section 1(a) of section 37 provides that an appeal shall lie from the order of the court granting or refusing to grant any measure under section 9. The appeal shall lie in the same court to which appeal lies from the original decrees. Sub-section 2(b) of section 37 provides that an appeal shall lie to a court from an order of an arbitral tribunal granting or refusing to grant an interim measure under section 17.

Hon'ble Bombay High Court in the case of *Prabhat Steel Traders Private Limited vs. Excel Metal Processors Private Limited* [1], held that a non-signatory to the arbitration agreement can challenge the interim measures granted by an arbitral tribunal under section 17 of the Act. Court observed that the expression "party" is absent in section 37 of the Act makes the legislative intent clear that the said expression "party" is deliberately

[1] Arbitration Petition Nos. 619/2017 on 31st August, 2018

not inserted so as to provide a remedy of an appeal to a third party who is affected by any interim measures granted by the arbitral tribunal or by the Hon'ble Court in the proceedings filed by and between the parties to the arbitration agreement.

Appeal against order under Section 34 :

Against the order passed under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside or refusing to set aside an arbitral award, the only Appeal lies under Section 37 of the Arbitration and Conciliation Act 1996 before the Hon'ble High Court. In *G. Shivramkrishna Vs. M/s Isgec Covema Limited*[2] NCLAT observed that , As per Article 116 of the Limitation Act 1963, which is under the Second Division Appeal, the period prescribed is 90 days to file Appeal before the High Court from any Decree/Order. Against the order passed under Section 34 of the Arbitration and Conciliation Act, 1996

The Amendment Act has widened the ambit of appeal by including the order refusing to refer the parties to arbitration under Section 8 of the Act. Appeal shall also lie to a court from an order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16;

Appeals under Section 37(2) :

Section 37(2) of the A&C Act prescribes that appeals shall lie for orders passed by the Arbitral Tribunal either accepting the plea referred to in Section 16(2) or 16(3) or granting/refusing to grant an interim measure under Section 17. Though there is no prescribed limit for filing an appeal under this provision, but the The Limitation Act, 1963 section 43(1) is applicable to arbitrations as it applies to the proceedings in court. The Act stipulates that the period of limitation for filing an appeal shall be as prescribed under the Schedule.

The Bombay High Court in *Oil and Natural Gas Corporation Ltd. v. Jagson International Ltd.*[3], held that since the schedule does not provide for the limitation period for filing an appeal under section 37, the Limitation Act is not applicable to such appeal.

---

[2] 93(IBC)62/2020

[3] AIR 2005 Bom 335

Second Appeal :

No second appeal shall lie from an order passed in appeal under this Section but nothing in Section 37 shall affect or take away any right to appeal to the Supreme Court.

Maintainability Of Writ Petitions :

Supreme Court in the case of *Deep Industries Limited v Oil and Natural Gas Corporation Limited and Anr*[4] has clarified the issue of maintainability of writ petitions against orders passed by the relevant jurisdictional court under Section 37 of the Arbitration and Conciliation Act 1996 (Act).

The Supreme Court concluded that since Article 227 is a constitutional provision, it will not be hit by the non obstante clause contained in Section 5 of the Act. Whilst petitions under Article 227 would be maintainable against order granting or rejecting reliefs under Section 37, only those orders should be interfered with which are patently lacking in inherent jurisdiction.

The Supreme Court was of the view that the Act being a self- contained code, envisages speedy disposal of all matters covered by it, therefore, if petitions under Article 226 / 227 of the Constitution are entertained against the orders passed in appeals under Section 37, the entire arbitral process would be derailed. The Supreme Court was however of the view that though petitions can be filed under Article 227 against orders passed in appeal under Section 37 of the Act, the High Court should be extremely circumspect in interfering with the same.

[4] (Civil Appeal 9106 of 2019 decided on 28 November 2019)

Deposits [Section 38] :

(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (*8*) of section 31, which it expects will be incurred in respect of the claim submitted to it :

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (*1*) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share :

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

Section 38 of the act talks about deposits to be made as cost of arbitration. It states that the arbitral tribunal may-fix the amount of the deposit or supplementary deposit as an advance for the costs which it expects will be incurred in respect of the claim submitted to it. If there is a counter-claim that has been submitted to the arbitrat tribunal, it may fix separate amount of deposit for the claim and counter claim.

Lien On Arbitral Award And Deposits As To Costs [Section 39] :

(1) Subject to the provisions of sub-section (*2*) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

(2) If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application

in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(3) An application under sub-section (*2*) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application.

(4) The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

Section 39 of the Arbitration and Conciliation Act, 1996 deals with lien i.e a right to keep possession of property belonging to another person until a debt owed by that person is discharged, on arbitral awards. It says that the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

Arbitration Agreement Not To Be Discharged By Death Of Party Thereto [Section 40] :

(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

Provisions In Case Of Insolvency [Section 41] :

(1) Where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall

be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (*1*) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

Jurisdiction [Section 42] :

Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

In *Sundaram Finance v Abdul Samad & An*[1] a two Judge bench of the Hon'ble Supreme Court of India (Supreme Court) has clarified the anomaly with regard to the appropriate jurisdiction for enforcement of an arbitral award. The Supreme Court has held that enforcement of an Arbitral Award under the Arbitration and Conciliation Act, 1996 (Act) may be filed in any jurisdiction in the country, for execution, where such decree is capable of being executed and there is no requirement of obtaining a transfer of the decree from the court which has jurisdiction over the arbitration proceedings.

[1] Civil Appeal No 1650 of 2018),

Court stated that Section 42 of the Act deals solely with jurisdiction for filing an application under Part I of the Act and not enforcement of the award, as made clear by Section 42 of the Act. Section 32 of the Act states that arbitration proceedings are terminated by the final arbitral award and thus the application of Section 42 of the Act during enforcement of an arbitral award, was not possible.

In view of the mandate in Section 42[2], once a petition under Part-I of the Act pertaining to an arbitration agreement is carried to a particular court and such court entertains it and there is no objection as to its jurisdiction, all subsequent petitions under Part–I of the Act of 1996 pertaining to the same arbitration agreement have to be carried only to such court. Section 42 covers not only particular arbitral reference, but the arbitration agreement itself. Further, Sections 8 and 11 of the Act are beyond the purview of Section 42.

Confidentiality Of Information [Section 42A] :

Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentially of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

This clause is inserted by amendment Act, *2019* which pertains to confidentiality of information and imposes an obligation on the parties to maintain the confidentiality of the arbitral proceedings. It encapsulates one exceptional situation in which disclosure shall be permissible –for the purpose of implementation and enforcement of the award.

Protection Of Action Taken In Good Faith [Section 42 B] :

No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

Section 42B also inserted by amendment Act, 2019 to protect an Arbitrator for acts and/or omission done during the arbitration proceedings i.e. the arbitrator shall not be subject to a suit or other legal proceedings for

[2] *Dalim Kumar Chakraborty V. Gouri Biswas*, APO No. 33 of 2018, order dated 16-02-2018]

any action or omission done in good faith in the course of arbitration proceedings.

Limitations [Section 43] :

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted

Section 43 of the Arbitration and Conciliation Act, 1996 is analogous to Section 37 of the Arbitration Act, 1940. Applicability of Limitation Act,1963 for arbitrations seated in India is specifically provided in Section.43 of the Act. To determine the limitation of a dispute, the Limitation Act, S.43 and S.21 of the Arbitration and Conciliation Act should be read together. This is because, S.21 defines the commencement of Arbitration proceedings and S.43 provides for the applicability of Limitation Act for arbitration proceedings. If an arbitration is not commenced, by issuing a notice for arbitration within the limitation period from the date of accrual of right to sue, then the claim will become a time barred claim.

Section 43(1) provides that for the purposes of Part I, arbitration proceedings are similar to court proceedings, therefore, Section 43(1) makes provisions of the Limitation Act, 1963 applicable to arbitration proceedings in the same manner as they apply to the proceedings of a court.

Date of Commencement :

Section 43(2) provides that for the purposes of this section and the Limitation Act, 1963 arbitration shall be deemed to have commenced on the date referred in Section 21. The date, on which the cause of arbitration accrued, the period of limitation begins to run[3]. The claim made by the claimant is the accrual of the arbitration cause[4]. The needless communication or reminders cannot postpone this accrual of cause of action nor stop the limitation period to begin not even if there is no mention of limitation period in arbitration clause.

Extension of Time Section 43(3) :

Confers power on the court to extend the period up to a proper and reasonable periods the justice of the case may require. Section 43(3) is invoked where an arbitration agreement to submit further disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused. *In Sterling General Insurance Co.v planter Airways*[5] Case it was held that the expression 'undue' in undue hardship means something which is not permitted by the conduct of the claimant or is very much disproportionate to it. Undue should not be taken in the sense of excessive because it simply means undeserved or unmerited.[6]

Exclusion of Time Section :

Section 43(4) provides that where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration

---

[3] *Panchu Gopal Bose V. Board of Trustees for Port of calcutta,* AIR, 1994, 1615.
[4] *Inder Singh, Rakhi V. Delhi Development Authority,* AIR SC, 1988, 1007.
[5] 1SCC. 1975, 603
[6] *Consolidated Investment v. Saponaria Shipping, LR 16 The Virgo Case,* 1978, 2

and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

Condonation of Delay :

Condonation of Delay in filing an application to set aside an award invoking Limitation Act is not permissible in Law. In the case of *State of Himachal Pradesh Vs Himachal Techno Engineers* [7] Supreme Court of India held that S.5 of the Limitation Act is not applicable to petitions under S.34 of the Act, since the Act provides for a special limitation. Supreme Court of India in Simplex Infrastructure Limited case[8] , dealt with the issue of condoning the delay in challenging an arbitration award under section 34 of the Arbitration and Conciliation Act, 1996 and the possible application of Sections 5 & 14 of the Limitation Act. In the said Judgement, Supreme Court of India held that the High Court erred in condoning the delay of 131 days on the ground that Union of India by mistake filed the application in the wrong forum and further delay was caused due to administrative difficulties, since Section 34 specifically provides a limitation of 3 months with a concession of 30 days' delay on sufficient reasons and not thereafter, to challenge an award.

[7] (2010)12 SCC 210

[8] *Simplex Infrastructure Limited Vs Union of India* (2019)2SCC455

CHAPTER 11 | INTERNATIONAL COMMERCIAL ARBITRATION

International Commercial Arbitration :

International commercial arbitration (ICA) is defined in section 2(1)(f) of the 1996 Act.

"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;

Thus, under Indian law, an arbitration with a seat in India, but involving a foreign party will also be regarded as an ICA, and treated akin to a domestic arbitration, hence subject to Part I of the Act. Where an ICA is held outside India, Part I of the Act would have no applicability on the parties but the parties would be sub-ject to Part II (enforcement of certain foreign award) of the Act.

Ambrose Bierce defines 'International Commercial Arbitration' as 'the substitution of many burning questions for a smoldering one'[1]. In the picturesque language of Nani Palkhiwala, 'International Commercial Arbitration' 'is a 1987 Honda car, which will take you to the same destination with far greater speed, higher efficiency and dramatically less fuel consumption'.

[1] Justice J. S.Verma (former Chief Justice of India), New Dimensions of Justice, Article 'Courts and the Arbitral Process', ch. 17, 12

The term 'commercial' finds no definition in the 1996 Act7 ; however, this term finds explanation in a footnote of the UNCITRAL Model Law on International Commercial Arbitration and since, the Model Law finds mention in the Preamble annexed to the 1996 Act, the same can very well be used for guidance.8 The Supreme Court of India in the case of *R.M. Investment & Trading Co. (P) Ltd. v. Boeing Co*[2]., held that the word 'commercial' should be interpreted in the widest terms possible, so far as the law in regards to arbitration is concerned

Scope of Section 2 (1) (f) (iii) was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*[3], wherein, despite TDM Infrastructure Pvt. Ltd. having foreign control, it was concluded that *"a company incorporated in India can only have Indian nationality for the purpose of the Act"*. Thus, though the Act recognizes companies controlled by foreign hands as a foreign body corporate, the Supreme Court has excluded its application to companies registered in India and having Indian nationality. Hence, in case a corporation has dual nationality, one based on foreign control and other based on registration in India, for the purpose of the Act, such corporation would not be regarded as a foreign corporation. In *M/s. Larsen and Toubro Ltd. SCOMI Engineering BHD v.Mumbai Metropolitan Region Development Authority*[4] where the Indian company was the lead partner in a consortium (which also included foreign companies) and was the determining voice in appointing the chairman and the consortium was in Mumbai, the Supreme Court held that the central management and control was in India.

As per section 2(e), 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.

---

[2] 1999) 5 SCC 108,

[3] 2008 (14) SCC 271.

[4] , 2018 SCC OnLine SC 1910.

The parties are free to agree on a procedure for appointing the arbitrator(s). Further they may move according to section 11(6) but if it fails than party may request to court. In case of an ICA, the application for appointment of arbitrator has to be made to the Supreme Court and in case of a domestic arbitration, the respective High Courts having territorial jurisdiction will appoint the Arbitrator. The 2015 Amendment Act also empowers the Supreme Court in an India-seated ICA to examine the existence of an arbitration agreement at the time of making such appointment.

Choice Of Place :

There is a freedom of choice in the law governing international arbitration. When express agreement doesn't exist, presumption is that the parties intend the curial law (procedural law or lex fori) 43 to be the law of the 'seat of arbitration'. The 'proper law' implies law by which parties intended to be governed and when intention is not express or implied or inferred from circumstances then law with which there is closest and most real connection.

Importance Of Seat :

The seat of arbitration (also called place of arbitration) refers to the legal rather than physical location of the arbitration, whereas 'venue' is where the hearing physically takes place[5].

Section 28 (1)(b), 1996 Act in international arbitration provides :

- the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
- any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
- failing any designation of the law under section 28(1)(a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

[5] Clayton Utz A Guide to International Arbitration 2nd edn.

In case of an ICA seated in India, the grounds on which an arbitral award can be challenged has been narrowed. Section 34 petitions to be filed directly before the High Courts in case of ICA seated in India. The 2015 Amendment Act, in the amendment to Section 34 of the Act (which deals with challenge of an arbitral award with a seat in India) also specifies that the ground of 'patent illegality' is not available as a ground for setting aside an arbitral award in international commercial arbitrations. Rest of the provisions are almost same as enforcement of domestic arbitral awards in India.

PART II

CHAPTER 12 | ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Effective enforcement of an arbitration award is the prime indicator for the success of any arbitral process. In India, Part II of the Indian Arbitration and Conciliation Act of 1996 provide the law governing the enforcement of foreign awards in India. Under the Arbitration and Conciliation Act, 1996 there are two avenues available for the enforcement of foreign awards in India, viz., the New York Convention (Sections 44 to 52) and the Geneva Convention (Sections 53-60).

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention"). If a party receives a binding award from a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India, the award would then be enforceable in India.

Definition [Section 44] :

In this Chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 :-

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the central government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

Section 44 is based on Article I and II (1) and (2) of New York Convention and section 2 of Foreign awards (Recognition and Enforcement Act) 1961. The Convention set forth in First Schedule refers to the New

York Convention. Under Article I (3) of the Convention, a member State when signing, ratifying or acceding to the Convention or even notifying extension under Article X is permitted to make two reservations. Firstly, a member State may declare that it will only recognize or enforce awards made in another member State on the basis of reciprocity. Secondly, it may also declare that it will apply the provisions of the Convention for recognition and enforcement only if the differences between the parties arise out of legal relationships, whether contractual or not, which are considered 'commercial' by the State making the declaration. A reciprocity reservation permits a member State to declare that it will recognize and enforce awards applying the Convention only if the awards are made in another member State. However, section 44(b) of the Act requires the Central Government of India to issue a notification in the Official Gazette recognizing a reciprocating territory. Therefore, an award made in a non-notified Convention country will not be considered as a 'foreign award' within the meaning of section 44 of the Act and shall not be recognized and enforceable under the Act.

Thus, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such country would be enforcea-ble in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies. In the case of *Bhatia International v. Bulk Trad-ing,*[1] (*"Bhatia International"*) the Supreme Court expressly clarified that an arbitration award not made in a convention country will not be consid-ered a foreign award

Part II of the Act deals with enforcement of "Foreign Awards". Thus in order to determine enforceability under Part II it is of paramount importance to understand what short of arbitral awards falls within the ambit of expression "Foreign Awards".[2] Delhi High Court approved six conditions in effect on the scope of section 44 :

(i) arbitral award

---

[1]AIR 2002 SC 1432

[2]J.R.S. Bachawat. *Law of Arbitration and Conciliation* 5th edition Reprint 2012, Lexis Nexis Butterworth Wadhwa Nagpur

(ii) difference between parties

(iii) arising out of legal relationship

(iv) considered as commercial

(v) in pursuance of agreement in writing to which New York Convention applicable

Difference between parties :

While the mere making of a claim does not constitute a dispute, a dispute is deemed to exist once it can be reasonably inferred that a claim is not admitted[3]. Negotiation and discussion surrounding the issue are key indicators of existence of a dispute. A failure of duly make a payment under a contract constitutes a dispute or differences between the parties[4].

Legal Relationship :

The Arbitration and Conciliation Act, 1996 requires that the dispute must be in respect of a defined legal relationship whether contractual or not. It follows that the dispute must be of a legal nature. Matters of moral or spiritual relations are not fit subjects for arbitration. If a contract is not enforceable for want of legal relationship, the question of arbitration in respect of such a contract would not arise. The word ''defined'' would signify the known categories of legal relationships and also the upcoming categories. If the matter or transaction is outside the known categories of relations under which legal rights or liabilities are likely to be created, it would not be an arbitrable matter.[5]

The Supreme Court[6] has underlined the role of courts in preventing attempts to defeat objectives of statutory provisions. Where such attempts are made the courts have to rise to the occasion and put such interpretations as fulfil statutory objectives, cut short procedure and lend support to the true intention of the parties as discernible from their clear arbitration agreement.

---

[3]*Collins (Contractors) Ltd*. v. *Baltic Quay Management Ltd*. (2004) EWCA Civ. 1757

[4]*Exfin Shipping Ltd*. v. *TolaniShiping Co*. 2006All ER

[5] As to the arbitrability of the dispute see the decision of the Supreme Court in *ICICI Ltd.* v. *East Coast Boat Builders and Engineers Ltd*., (1998) 9 SCC 728.

[6]*Ethiopian Arilines* v. *Stic Travels (P) Ltd*., (2001) 7 SCC 454.

Considered as Commercial :

The meaning of "commercial" is important as it determines the extent to which the scope of international arbitration would he covered under the 1996 Act. International disputes that fall outside the definition of "commercial" would not be arbitrable.[7] Too narrow a definition would lead to main foreign awards not being enforced. Too broad a definition wrests from state control important state objectives.

But what is "commercial?"[8] Both the Model Law and 1996 Act take similar approaches but differ slightly in practice. Model Law Art. I applies to 'international commercial arbitration." Interestingly, the Model law provides a working definition but does so only in footnote to Article I.[9]The footnote to Article I states :

The term commercial should be given a wide interpretation so as to cover matter arising from all relationships of a commercial nature whether contractual or not. Relationships of a commercial nature, include, but are not limited to the following transactions: any trade transactions for the supply or exchange of goods and services: distribution agreement; commercial representation or agency; factoring, leasing: construction of works; constructions; engineering; licensing; investment; financing; banking; exploitation agreement of concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air sea, rail, or road.[10]

This footnote was intentionally excluded from the main body of the Model Law because there was a concern that in adopting a precise definition for such a sensitive and important term. Countries, especially socialist and developing countries, would lose the freedom to retain judicial control over essential state regulated objectives. The compromise was to include a footnote giving adopting countries the freedom to retain control over essential activities while still encouraging the widest interpretation possible. Thus the

[7]*Id*. at 135.
[8]*Ibid*.
[9]*Ibid*.
[10]UNCITRAL Model Law on International Commercial Arbitration and Conciliation, Footnote to Art.1 (1985).

Model Law gives wide latitude to charter countries to define those "commercial" matters that would give rise to arbitration.

The 1996 Act Sec. 2(1)(1) defines "commercial" as 'disputes arising out of a legal relationship, whether contractual or not, considered as commercial under the law in force in India." No mention is made of the Model Law Article I footnote stated above. This is significant considering that the 1996 Act is substantially based on Model law. The omission may have been the Indian legislature's attempt at giving courts discretion to decide the definition of "commercial." This would allow the courts to narrow or broaden their definition according to their needs.

Previously, the court made a distinction between a contract for the transfer of services and a contract for the sale of goods - of which only the latter was considered "commercial" in nature. For instance, a contract for technical assistance does not involve the direct participation of profits between the parties and is therefore not "commercial." But, the court took a big step forward in *R.M. Investment and Trading Co*. v. *Boeing Co*.[11] where the court held that "commercial must he given a tide interpretation consistent with the purpose of the New York Convention and to promote international trade and commercial relations.[12] Significantly, the court also referenced Model Law Article I footnote and said that guidance could be taken from its wording.[13]

However, in that same decision, the court left the question of whether the distinction between a contract for transfer of services and a contract for sale of goods is valid. It is not yet clear that a contract for a transfer of services (i.e. technology exchange. technical support. etc.) would be arbitrable under the 1996 Act. Some have called for inclusion of such services to the meaning of "commercial" since these services can be traded just like a contract for sale of goods. In *Indian Organic Chemical limited* v.*ChemtexFibres Inc*. the Bombay High Court held that there must be some legal provision in the agreement which specifies or indicates or provides for recognition of legal relationship as commercial.[14]

[11] AIR 1994 SC 1136.
[12] *Ibid*.
[13] *Ibid*.
[14] AIR 1978 Bom 106

Thus far the court has maintained a broad definition of "commercial", in line with internationally accepted standards of the term and should continue to do so.

Thus, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied[15] :-

(i) the award passed should be an arbitral award,

(ii) it should be arising out of differences between the parties;

(iii) the difference should be arising out of a legal relation-ship;

(iv) the legal relationship should be considered as com-mercial;

(v) it should be in pursuance of a written agreement to which the New York Convention applies; and,

(vi) the foreign award should be made in one of the afore-mentioned 47 countries

The definition of 'Foreign Award' for the purposes of the Geneva Convention (1927) as contained in this Section differs from the foreign award as defined in Section 44 under the NYC (1958). The differences may be stated as follow :

Foreign Award : Difference between New York Convention and Geneva Convention

Section 44 of the New York Convention,1958	Section 53 of the Geneva Convention,1927
The words 'arising out of legal relationships, whether contractual or not' asused in Section 44.	Section 53 failed to utilise these words, instead of this it use "relating to mattersconsidered as commercial".
The definition of 'Foreign Award' as givenin Section 44 under the NYC (1958) beginswith the *non–obstanate clause i.e.*, 'underthe context otherwise requires'.	But Section 53 is devoid of this beginning.
Section 44 insists that the agreement mustbe in writing	Section 53 simply talks of agreementsimpliciter, omitting the words 'in writing'.

[15] *National Ability S.A.* v. *Tinna Oil Chemicals Ltd.,* 2008 (3) ARBLR 37

Enforcement Of Foreign Awards :

The Supreme Court in *Fuerst Day Lawson ltd. a Jindal Exports Ltd.*[16] laid down that there are two stages in enforcement of foreign award.

Stage 1- the court would make an, inquiry' into enforceability of the Award; and.

Stage 2- the court holds that the Award is enforceable.

If the conditions for enforcement are fulfilled and the Court is satisfied about enforceability of a foreign award is deemed to be a decree of that court and must be executed as it is."[17] In other words a foreign award cannot be executed as a decree unless and until an application for enforcement thereof is made and the Court satisfied that the foreign award is enforceable.[18]

Since, an award is not enforceable till such time it is executed as decree, which happens following the procedure specified in sec 46-49, it cannot be said that the party against whom damages have been awarded by arbitrator owes the other party a debt at a stage prior to fulfillments of requirements of section 46-49. Moreover, before an award obtains the force of law, the other party should be given an opportunity to contest the enforcement of award. In the word of Delhi High Court, it is mandatory for party seeking enforcement of an award to move an application before the competent civil court wherein the opposite party could raise objection to the enforcement of a foreign award. Even if no such objection is raised the court has the obligation to examine and decide whether the conditioned mentioned in section 48(2) of the Arbitration Act is satisfied. Only where the court is so satisfied that the award is enforceable in India than only the said award would be deemed as decree of court.[19]

Power of judicial authority to refer parties to arbitration [Section 45] :

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred

[16] (2001)2 Arb LR1
[17] *Videocon Power Ltd.* v.*Tamilnadu Electricity Board*. (2005) 3 Arb LR 399 (Mad)
[18] *Goldcrest Exports* v. *Swissoen : N.V..*, (2005)35) (rI l.R56: (200.) I Born (R22.5.
[19] *Marina Shiping World Corporation* v. *Jindal Exports* (2005) 4 RAJ 510

to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, [unless it *prima facie* finds][20] that the said agreement is null and void, inoperative or incapable of being performed.

Judicial Authority's Power To Refer Parties To Arbitration :

Section 3 of the repealed 1961 Act empowered the court to stay the legal proceeding unless the court was satisfied that the agreement was null and void, inoperative or incapable of being performed. Under section 45 of the 1996 Act which adopts Article II of NYC there is no mention of power to stay the proceeding. Instead, it is made obligatory on the court, at the request of one of the parties to the agreement to refer the parties to arbitration except on the grounds of invalidity etc. of the agreement as stated above, 'if any party to a submission made in pursuance of an agreement' to which NYC applies commences any legal proceeding against the other party to the agreement.

A judicial authority under Section 45 of the Act has been authorized to refer those parties to arbitration, who under Section 44of the Act have entered in an arbitration agreement. The Section is based on Article II (3) of New York Convention and with an in-depth reading of the Section 45 of the Act, it can be clearly understood that it is mandatory for the judicial authority to refer parties to the arbitration. The use of word shall makes it obligatory on the court to refer the parties for arbitration in the legal proceedings initiated by a party to the arbitration agreement provided the conditions specified therein are fulfilled

Distinction between Section 8 and Section 45 :

Section 8 and Section 45 of the Act, both pertaining to court referring disputes to arbitration, vary with regards to the threshold of discretion granted to the courts. The primary distinction appears to be that Sec-tion 8 of the Act leaves no discretion with the court in the matter of referring parties to arbitration whereas Section 45 of the Act grants the court the power to refuse a reference to arbitration if it finds that the arbi-tration agreement is null and void, inoperative or incapable of being performed.[21]

[20] Subs. by Act 33 of 2019, s. 11, for "unless it finds" (w.e.f. 30-8-2019).
[21] 2005 (3) ArbLR 1

The Supreme Court in *World Sport Group (Mauritius) Ltd* v. *MSM Satellite (Singapore) Pte. Ltd.*[22] has opined that no formal application is necessary to request a court to refer the matter to arbitration under Section45 of the Act. In case a party so requests even through affidavit, a court is obliged to refer the matter to arbi-tration with the only exception being cases where the arbitration agreement is null and void, inoperative and incapable of being performed, thus limiting the scope of judicial scrutiny at the stage of referring a dis-pute to foreign seated arbitrations.

Thus, though Section 8 of the Act envisages the fill-ing of an application by a party to the suit seeking reference of the dispute to arbitration, Section 45 needs only a '*request*' for that purpose.

Further, Section 45 can only be applied when the matter is the subject of a New York Convention arbitration agreement, whereas Section 8 applies in general to all arbitration clauses falling under Part I of the Act. In *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc. &Ors.*[23], the Supreme Court has held that the expression *'person claiming through or under'* as provided under Section 45 of the Act would mean and include within its ambit multiple and multi-party agreements. Hence even non-signa-tory parties to some of the agreements can pray and be referred to arbitration.[24]

The Delhi HC, in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*[25]*.*, relying on Chloro Controls, upheld the impleadment of a non-signatory to the arbitration agreement in an SIAC arbitration. The Supreme Court, in the case of *Reckitt Benckiser India) Private Limited v. Reynders Label Printing India Private Limited & Anr*[26] held that a non-signatory without any causal connectionwith the process of negotiations preceding the arbitration agreement cannot be made party to

[22] *Swiss Timing Limited* v. *Organizing Committee, Commonwealth Games 2010, Delhi, 2014 (6) SCC 677*
[23] 2013 (1) SCC 641
[24] Nisith Desai Associates *InternationalCommercial Arbitration aw and recent development* 2020 www.nisithdesai.com
[25] 2017 SCC OnLine Del 11625.
[26] *Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors*., CIVIL APPEAL NOS. 6202-6205 OF 2019.

the arbitration. Importantly, it has also ruled that circumstances and correspondence post execution of an arbitration agreement cannot bind a nonsignatory to the arbitration agreement.

When Foreign Award Binding [Section 46] :

Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

Binding nature of foreign award :

Section 46declares that a foreign award shall be treated as binding on persons between whom it was made. This is applicable, as specified in the section itself, to foreign award which would be enforceable in accordance with the conditions laid down in section 48 of the Act. At the threshold it is important to note that in the proceeding under ss 46 to 49 of this Act, the enforcement has necessarily to be between the parties to the award. In *Fargo Freight Ltd.* v.*The Commodities Exchange Corporation* dealing with a petition for enforcing an English Award under ss 46 to 49 of this Act the Supreme Court said :

In such proceedings serious disputes regarding the liability of third persons to pay up cannot be decided because these provisions do not permit court to decide such disputes with third parties in such proceedings. Once a dispute arises involving a third party in enforcement proceedings the court should direct the petitioner to have the dispute decided by a competent court in an appropriate proceeding. The provisions of part II of this Act do not permit Courts to decide such disputes with third parties in such proceedings.

Evidence [Section 47] :

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court -

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (*1*) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.:- In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.

Section 47 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court (a) original award or a duly authenticated copy thereof; (b) original arbitration agreement or a duly certified copy thereof; and (c) any evidence required to establish that the award is a foreign award. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court. Section 47 of the Act provides that the word "shall" be produced before the court, at the time of the application for enforcement of the foreign award. However, *in PEC Limited v. Austbulk Shipping SDN BHD*[27] the Supreme Court of India interpreted that the word "shall" appearing in Section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as "may". It further observed that such an interpretation would mean that a party applying for enforcement of the award need not necessarily produce before the court a document mentioned therein "at the time of the application". Nonetheless, it further clarified that such interpretation of the word "shall" as "may" is restricted "only to the initial stage of the filing of the application and not thereafter."

[27] (Civil Appeal No. 4834 of 2007) decided on 14 November 2018,

Conditions For Enforcement Of Foreign Awards [Section 48] :

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that :

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; **or**

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; **or**

(c) the award deals with a difference 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 :

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; **or**

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that :-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; **or**

(b) the enforcement of the award would be contrary to the public policy of India.

[*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.]

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (*e*) of sub-section (*1*) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Once an application for enforcement of a foreign award is made, the other party has the opportunity to file an objection against enforcement on the grounds recognized under Section 48 of the Act. These grounds include:

Invalidity of the Arbitration Agreement [Clause 1(a)] :

The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Supreme Court of India in *National Thermal Power Corporation* v. *Singer Company*[28] has held-*A foreign Award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitration*.

[28](1992) 3 SC 551: 1993 AIR SCW 131: AIR 1993 SC 998 (1011).

Violation of Due Process [Clause 1(b)] :

The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case. Ground (b) has sanctioned the application of standards of due process under the law of India. It deals with the fundamental principle of procedure and requires fair hearing. Supreme Court of India in *Singer Company's* case has held,A foreign Award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that there was no due compliance with the rules of fair hearing.

Excess of Authority [Clause 1(c)] :

Ground (c) lays down the rule that enforcement of a foreign award may be refused if the respondent can prove that the award deals with a difference 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. Supreme Court of India in *Singer Company's'*[29]case has held that a foreign award could not be enforced in India if it is proved by the party against whom it is sought to be enforced that the award has exceeded the scope of the submission to arbitration.

Irregular Composition [Clause 1(d)] :

Ground (d) lays down the rule that enforcement of a foreign Award may be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

The Award is not binding or Set Aside [Clause 1(e)] :

Ground (e) lays down the rule that enforcement of a foreign award may be refused if the respondent can prove that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that Award was made. Supreme Court of India in *Singer Company's*[30] case has held- *A*

[29]*National Thermal Power Corporation* v. *Singer Company,* (1992) 3 SCC 551: 1993 AIR scw 131 AIR 1993 se 998 (1011).

[30]*National Thermal Power Corporation* v. *Singer Companu,* (1992) 3 see 551: 1993 AIR sew 131:AIR 1993 se 998 (1011

foreign Award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that Award was made.

Subject-matter of the difference is not capable of settlement [Clause 2(a)] :

Ground (1) of subsection 2 lays down the rule that enforcement of a foreign award may be refused if the respondent can prove that the subject-matter of the difference is not capable of settlement by arbitration under the law of India.

Contrary to the public policy of India [Clause 2(b)] :

The term *"public policy"*, as mentioned under Section 48(2)(b), is one of the conditions to be satisfied before enforcing a foreign award. The Supreme Court, in *Renusagar Power Co. Ltd. v. General Electric Co*[31]*.*, held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of India; or (ii) the interest of India; or (iii) justice or morality.

In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,[32] it was held that enforcement of a foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

The expression "fundamental policy" of Indian law refers to the principles and the legislative policy on which Indian statutes and laws are founded i.e., the basic and underlying rationale, values and principles which form the bedrock of Indian laws.[33] In *Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Ltd.*[34], court observed that, If a foreign award fails to determine a material issue which goes to the root of the matter, or fails to deal with a claim or counter-claim in its entirety, the award may shock the

[31] (1994) 2 Arb LR 405.
[32] 2013 (8) SCALE 480.
[33] *Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, (2017) 239 DLT 649
[34] (2019) 261 DLT 201

conscience of the court and may be set aside on the ground of violation of the public policy of India, in that it would then offend a most "basic notion of justice" in this country.

The explanation 1 to Section 48 of the Act, provides that, for the avoidance of all doubts on the point 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 of the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

In the case of *Vijay Karia & Ors v. Prysmian Cavi E Sistemi S.r & Ors*[35] the Supreme Court recently held that Courts should refuse the enforcement of foreign arbitral awards only in exceptional cases of a blatant disregard of Section 48 of the Act. The Supreme Court further held that a violation of Rule 21 of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 would not constitute a violation of the fundamental policy of Indian law under Section 48(2)(b)(ii). The Supreme Court held that the fundamental policy refers to refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts.

Adjournment of Enforcement [Section48 (3)] :

Section 48(3) provided that if an application for the setting aside or suspension of the award has been made to a competent authority, the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

section/ 48 (1)(e) of the Arbitration Act read with section/ 48(3) of the Arbitration Act makes it clear that the 'competent authority' in section/ 48(3) is the authority of the country of origin, where the award has been made, and not the executing court in India. In *Naval Gent Maritime Limited v. Shivnath Rai Harnarain*[36] court held that it may be reasonable to adjourn enforcement proceedings if a challenge has been made by an award debtor

[35]Civil Appeal No. 1544 and 1545 of 2020
[36](2009) SCC Online Del 2961

in the country where the award has been made. However, courts may direct a deposit of security while the execution proceedings are kept in abeyance.

Enforcement of foreign awards [Section 49] :

Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

Section 49 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court. Once the award has survived the challenge and the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court. After this it can be executed under Order XXI of the Code of Civil Procedure, 1908 in the same manner as a decree from an Indian court. Where the subject matter of the foreign award is money, the Commercial Division of any High Court in India where assets of the opposite party lie shall have jurisdiction. In case of any other subject matter, the Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have the jurisdiction.

Appealable orders [Section 50] :

(1) [Notwithstanding anything contained in any other law for the time being in force, an appeal][37] shall lie from the order refusing to—

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Under Section 50 of the Act, an appeal can be filed by a party against the orders passed under Section 45 and Section 48 of the Act. However, no second appeal can be filed against the order passed under this Section. The Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd*[38]

[37]Subs. by Act 33 of 2019, s. 12, for "An appeal" (w.e.f. 30-8-2019).
[38](2005) 7 SCC 234.

held that these orders are only appealable under Article 136 of the Constitution of India, 1950, and such an appeal is filed before the Supreme Court.

The Supreme Court in *Fuerst Day Lawson Limited v Jindal Exports Limited*[39] which dealt with the issue as to whether an order though not appealable under section 50 of the Act would be subject to appeal under the letters patent of the High Court. Supreme Court held *that no letters patent appeal* will lie against an order which is not appealable under Section 50 of the Arbitration and Conciliation Act, 1996.

Stamping and registration :

As far as foreign awards are concerned, the Delhi High Court *in Naval Gent Maritime Ltd* v. *Shivnath Rai Harnarain (I) Ltd*.,[40] observed that a foreign award would not require registra-tion and can be enforced as a decree, and the issue of stamp duty cannot stand in the way of deciding whether the award is enforceable or not. A similar approach was adopted by the Bombay High Court in the cases of *Vitol S.A* v. *Bhatia International Limited*.[41] A similar princi-ple has been set out by the High Court of Madhya Pradesh in *Narayan Trading Co.* v *Abcom Trading Pvt. Ltd.*[42]

[39][2011] 8 SCC 333
[40]174 (2009) DLT 391
[41]2014 SCC OnLineBom 1058
[42]2012 SCC OnLine MP 8645

CHAPTER 13 | GENEVA CONVENTION AWARDS

Geneva Convention Awards :

The Geneva Convention Awards is incorporated under the 1996 Act in s. 53; section 57 lays down the conditions for enforcement of award. Accordingly a foreign award may be enforceable under Chapter II Part II of the Act, if it satisfies the conditions.

As per the Geneva Convention, "**foreign award**" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924, :

a. in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

b. between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

c. in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter, an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in any country in which it was made.[1]

Refer to Arbitration :

Under sections 54 of the 1996 Act a judicial authority is required to refer the parties to arbitration if it is satisfied about the validity of the agreement. The section is attracted only if there is an actual reference to the arbitration.

[1] Section 53

Nature of Award :

Section 55 provided that the nature of award shall be binding. Section 55 of the Act provides that an award which satisfies the conditions of enforceability mentioned under section 57 of the Act is enforceable and is to be treated as binding for all purposes and also on persons as between whom it was made. It may be relied upon by the parties in any legal proceedings in India. Any references to enforcing a foreign award shall be construed as including references to relying on an award.

Procedure for Enforcement :

Section 56 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court (a) original award or a duly authenticated copy thereof; (b) evidence proving that the award has become final and (c) evidence to prove that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto and that the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court.

The conditions for enforcement of a Geneva Convention award are found under Section 57. They are as follows- A foreign award will be enforceable only if :-

1. The arbitration agreement by which the dispute is submitted to arbitration has been found to be valid when tested against the law governing its enforcement and recognition.
2. The subject-matter of the dispute pursuant to which the award was passed is subject-matter that is capable of being resolved by arbitration under Indian law.
3. The manner in which the tribunal was set up or the manner in which the proceedings were conducted was in keeping with the terms of the agreement between the parties or is in conformity with the law chosen to govern the arbitration proceedings.

4. The award has attained finality, which means the validity of the award is no longer open to challenge.
5. The enforcement of the award will not be opposed to the public policy of India.
6. The award has not been annulled in the country where it was made.
7. The party against whom the award was passed was given a fair opportunity to present his case before the arbitral tribunal. He must have been properly informed of the conduct of the proceedings and have been given a reasonable amount of time to prepare his case.
8. The decisions contained in the award is made on a question or a dispute that has been correctly placed before the tribunal. The tribunal must have arrived at a decision concerning only those issues which were submitted to it for its decision.

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Enforcement of Award :

As per section 58 of the Act if a court decides to uphold the foreign award and enforce it then it shall be deemed to be a decree of the court. The Arbitration Act and interpretations by the Supreme Court provide that every final arbitral award is enforced in the same manner as if it were a decree of the court and as per section 59 of the Act appeals may lie against the order refusing to refer the parties to arbitration under section 54; refusing to enforce a foreign award under section 57. Generally, no second appeal shall lie from the order passed in the appeal under section 58 but right to appeal to Supreme Court is not barred.

Appealable orders [Section 59] :

(1) An appeal shall lie from the order refusing :-

(a) to refer the parties to arbitration under section 54; and

(b) to enforce a foreign award under section 57, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Saving [Section 60] :

Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

PART III

CHAPTER 14 | CONCILIATION

UNCITRAL Model Law on arbitration and Rules on Conciliation were both made in the context of growing international trade and commercial relations against the back-drop of liberalization, privatization and globalization. UNCITRAL Rules on Conciliation of 1980 adopted by the General Assembly of the United Nations stated at the very outset that the General Assembly recognized *"the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations" and that adoption of uniform conciliation rules by "countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.*" However, the Indian Arbitration and Conciliation Act in substantially adopting the UNCITRAL Model Law and Rules on international commercial arbitration and conciliation, has also covered "the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation."

The procedure of conciliation laid down in Part III of the Act reflects the following broad principles :

1) non-adversary nature of conciliation proceedings - there is no claimant or plaintiff in conciliation proceedings,

2) voluntary nature of proceedings - any party can commence and discontinue the proceedings,

3) flexible procedure - the conciliator has the discretion to adopt any procedural law to ensure speedy and inexpensive conduct of proceedings, and

4) decisions are recommendatory - disputes are settled by mutual agreement and not by imposed decisions.

Definition of Conciliation :

The term conciliation is not defined in the Act. However, conciliation is a confidential, voluntary and private dispute resolution process in which a

neutral person helps the parties to reach a negotiated settlement. Conciliation means ''the settling the disputes without litigation''. It is a process in which independent person or persons are appointed by the parties with mutual consent by agreement to bring about a settlement of their dispute through consensus.It has been derived from the word '*concile*.' Conciliate and reconcile are both employed in the sense of uniting men's affections but under different circumstances.

As per Oxford Dictionary, conciliation means; 'The action of stopping someone from being angry.' Wharton's law lexlcon[1], defines conciliation as "the settling of dispute without litigation." Mizley & Whiteley have also defined Conciliation as "settling of. disputes without Litigation" in their Law Dictionary[2]

Conciliation vis-à-vis Arbitration :

While arbitration is considered private when compared with the court system, conciliation is even more private than arbitration. As litigation and arbitration are both means of adjudication, the judge and the arbitrator render their verdicts and impose them on the parties. While the parties to an arbitration proceeding are given considerable freedom in terms of deciding the venue, date, arbitrator, etc., they have no control over the decision making process except in the case of award on agreed terms[3]. In contrast, parties to a conciliation proceeding have the privilege to negotiate and arrive at an amicable settlement with the assistance of a conciliator in a less formal setting.

Secondly, while section 7(2) requires that an arbitration agreement be in writing, there is no such express provision regarding conciliation in the Act. However, this does not hold much relevance as the process of conciliation commences with the written offer and acceptance to conciliate by the parties[4]. Conversely, in arbitration, even in the absence of a prior written agreement, if the parties appoint the arbitrator and proceed with arbitration, the requirement of section 7(2) is taken as complied with.

---

[1] P. 227 (14th ED) 1937 Indian Reprint - 1993.
[2] 75 (8th edn. 1970).
[3] Section 30 of the Act
[4] Section 62 of the Act stipulates that a conciliation proceeding shall commence only when a written invitation issued by one party to commence conciliation is accepted by the other party

Thirdly, section 30 of the Act permits the parties to engage in conciliation process even during the course of arbitral proceedings. They may do so suo motu or under the directions of the arbitrator. In case the conciliation concludes successfully, the arbitrator is to record the settlement in the form of an arbitral award. Such an award, which is prepared on agreed terms, is given similar status to that of any other award. However, section 77 of the Act bars any arbitral or court proceedings in respect of a dispute which is the subject matter of conciliation proceedings[5]. This essentially means that during arbitral or court proceedings, the parties are encouraged to initiate conciliation proceedings, but once conciliation proceedings commence, they are barred from initiating arbitration or approaching the court. Clearly, the purpose of sections 30 and 77 of the Act is to encourage parties to resort to nonformal conciliation proceedings in preference to the formal court and arbitral proceedings[6].

Process of Conciliation :

Commencement Of Conciliation Proceedings [Section 62] :

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings, shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

The conciliation process commences when the disputing parties agree to conciliate and a neutral conciliator is appointed. The party initiating

[5] Section 77 of the Act
[6] PSA Legal vol vii August 2010

conciliation sends a written invitation to conciliate to the other party briefly identifying the subject matter of the dispute. Conciliation proceedings commence when the other party accepts in writing the invitation to conciliate.

Part III of the Arbitration and Conciliation Act, 1996 does not envisage any agreement for conciliation of future disputes. It only provides for an agreement to refer the disputes to conciliation after the disputes have arisen.[7]

Number of conciliators [Section 63] :

(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

There shall be one conciliator, but the parties may by their agreement provide for two or three conciliators. Where the number of conciliators is more than one, they should as a general rule act jointly.

Appointment of conciliators [Section 64] :

(1) Subject to sub-section (*2*) :-

(a) in conciliation proceedings, with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular, :-

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person :

[7] Visa International Ltd. v. Continental Resources (USA) Ltd., AIR 2009 SC 1366

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator and in conciliation proceedings with two conciliators, each party may appoint one conciliator. The parties may also request any institution or person to recommend suitable names of conciliators or directly appoint them and such person or institution while discharging this responsibility should have regard to aspects as are likely to secure the appointment of an independent and impartial conciliator.

Submission Of Statements To Conciliator :

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation :- In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

The conciliator may request each of the parties to submit a brief written statement describing the general nature of the dispute and the points at issue, with a copy to the opposite party. At any stage of the conciliation proceedings

the conciliator may request a party to submit to him such additional information as he deems appropriate. The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872)[8].

Role of Conciliator [Section 67] :

(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The 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 the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore

Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Section 67(4) specifically enables the conciliator to "make proposals for settlement of the dispute … at any stage of the conciliation proceedings."

[8] Section 66

Settlement Agreement :

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

A settlement agreement is an agreement drawn out by a conciliator, when he sees that there is possibility of amicable compromise between the parties. A conciliator assists the parties to amicably settle the disputes between them. When it appears to the conciliator that there exist elements of a settlement, which may be acceptable to the parties, he is supposed to formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

The conciliator, on the basis of his notings during the conciliation proceedings and also on the basis of the written statements and the documentary evidence of the parties, draws up the terms of settlement agreement. The same is then forwarded to the parties for their comments, if any, and if necessary a reformulated settlement agreement is prepared on the basis of such comments.[9]

[9] P.C .Markanda, *Law Relating to Arbitration and Conciliation: Commentary on the Arbitration and Conciliation Act, 1996*, LexisNexis Butterworths Wadhwa, Nagpur, Seventh Edition (2009)

According to Section 73 (3) of the Arbitration and Conciliation Act, 1996, the settlement agreement signed by the parties is final and binding on them and the persons claiming under them. It follows, therefore, that a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. This type of an agreement has the legal sanctity of an arbitral award under Section 74 of the Act.

The Supreme Court in the case of *Haresh Dayaram Thakur* v. *State of Maharashtra*[10] has held as that the requirement of a conciliator is to assist the parties to settle the disputes amicably. If the conciliator is of an opinion that there exists an element of settlement between the parties then he can draw up an agreement under the provisions of Section 73 of the Act. while dealing with the provisions of Sections 73 and 74 of the Abbitration and Conciliation Act of 1996 in paragraph 19 of the judgment as expressed thus the court held that -

" From the statutory provisions noted above the position is manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. For this purpose the conciliator is vested with wide powers to decide the procedure to be followed by him untrammeled by the procedural law like the Code of Civil Procedure or the Indian Evidence Act, 1872. When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that their exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. Under Sub-section (3) of Section 73 the settlement agreement signed by

[10] (2000) 6 SCC 179

the parties is final and binding on the parties and persons claiming under them. It follows therefore that a successful conciliation proceedings comes to end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74".

Furthermore, in the case of *Mysore Cements Limited* v. *Svedela Barmac Ltd*[11]., the Apex Court followed and reiterated its stand as taken by them in *Haresh Dayaram Thakur* case, the settlement agreement comes into existence under Section 73 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act. If a settlement agreement comes into existence under Section 73 satisfying the requirements stated therein, it gets the status and effect of an arbitral award rendered by the arbitral tribunal under Section 30 of the Act. It was further held that mere substantial compliance with Section 73 is not sufficient; all the statutory requirements must be complied with.

Status and Effect Of Settlement Agreement [Section 74] :

The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

The settlement agreement drawn up in conciliation proceedings has the same status and effect as if it is an arbitral award in the case of *Anuradha SA Investments LLC & Anr*. v *Parsvnath Developers Limited & Ors* The Court had the opportunity to deal with the enforcement of a Settlement Agreement as an Award. The respondents had challenged the maintainability of the petition on the ground that the Settlement Agreement is not an agreement under Section 73 of the Act, or as a result of the conciliation proceeding under Part III of the Act. They further contend that they have not received the authenticated copy of the Settlement Agreement and that the said agreement is insufficiently stamped. The Court observed that under :

[11](2003) 10 SCC 375

"Section 74 a settlement agreement would have the status and effect "as if it is an arbitral award"; thus by legal fiction, a settlement agreement arrived at during the conciliation proceedings and authenticated by the conciliator has been provided the same status and effect as an arbitral award. In other words, the settlement agreement can be enforced as an arbitral award and it is not necessary for a party to institute fresh proceedings for obtaining a decree in terms thereof. However, it does not mean that the settlement agreement ceases to be an agreement voluntarily entered into between the parties and becomes an arbitral award; it merely has the status and effect of an award under the Act. The settlement agreement continues to be an agreement and would require to be stamped as such."

It further held that :

"it is well settled that a legal fiction cannot be extended beyond the purpose for which it is created. Section 74 of the Act creates a legal fiction to elevate the status and effect of a settlement agreement under Section 73 to an award. The purpose is clearly to enable enforcement of such agreements as an arbitral award without further adjudicatory process. The legal fiction cannot be extended to other statutes."

Confidentiality [Section 75] :

Not with standing anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Termination of conciliation proceedings :

The conciliation proceedings shall be terminated :-

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; **or**

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; **or**

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; **or**

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

A successful conciliation proceeding concludes with the drawing and signing of a conciliation settlement agreement. The signing of the settlement agreement by the parties, on the date of the settlement agreement terminates conciliation proceedings. That apart, any party may terminate conciliation proceedings at any time even without giving any reason since it is purely voluntary process. The parties can terminate conciliation proceedings at any stage by a written declaration of either party. A written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, also terminates conciliation proceedings on the date of such declaration.

CHAPTER 15 | ARBITRATION AND RECENT ISSUES

I. THE ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2019 :

The Arbitration & Conciliation (Amendment) Act, 2019 ("the 2019 Amendment"), which amends the Indian Arbitration & Conciliation Act, 1996 ("the Act"), came into force with effect from 9 August 2019. All Sections have come into force from 30 August 2019 (except for Sections 2, 3, 10, 14 and 16 which are yet to be made effective).

Arbitral Institution :

Section 1(ca) has been introduced to define an 'arbitral institution' as an arbitral institution designated by the Supreme Court or a High Court under the Act.

Appointment of Arbitrators under Section 11 :

The Amendment Act has modified Section 11 of the Arbitration Act relating to appointment of arbitrators by courts pursuant to an application by a party. The amendment allows the Supreme Court (in cases of international commercial arbitrations) and the High Courts (in cases of other arbitrations) to delegate appointment of arbitrators to arbitral institutions graded by the Council or in its absence, a panel of arbitrators. Such appointment of arbitrator must be completed within 30 days from the application being made by the parties. Further, the arbitral institutions or panel of arbitrators have the power to determine the fees of the arbitrators, subject to the rates specified in the Fourth Schedule of the Arbitration Act.

Arbitration Council of India :

The amendment act introduces regulatory mechanism in the field of arbitration and provides for adding Part IA (Section 43A to Section 43M) to the Act, which makes provision of constitution of Arbitration Council of India ("Council"). The Council shall take necessary measures to promote and encourage arbitration, mediation, conciliation and other alternative dispute resolution mechanism and for that purpose frame policy guideline for the

establishment, operation and maintenance of uniform professional standard in respect of matters relating to arbitration.

The Council of India shall frame policy for grading the arbitral institutions and shall make policies guidelines etc. to ensure satisfactory levels of arbitrations and conciliations.

Grading of Arbitral Institutions and Arbitrators :

The Council will make grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations, in such manner as may be specified by the regulations under the Act. The qualifications, experience and norms for accreditation of arbitrators will be such as specified in the Eighth Schedule to the Act.

Timelines under the Amendment Act :

- **Completion of pleadings :** Section 23 has been amended to state that the statement of claim and defence must be completed within a period of six months from the date the arbitrator or all the arbitrators (as the case may be) received notice, in writing, of their appointment.
- **Arbitral award :** In cases other than international commercial arbitration, the award will be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings. In the case of international commercial arbitrations, the award may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings.
- **Extension of time :** Where an application for extension of time is pending, the mandate of the arbitrator will continue till the disposal of the said application.

Amendment to Section 17 :

Amendment to Section 17 provides that arbitral tribunal shall have no power to pass any interim measures after making the award. In such a situation, interim protection can be sought only from the court.

Amendment to Section 34 :

Amendment to Section 34 clarifies that at the stage of challenging the award, court will not see any material other than record of the arbitral tribunal. This amendment shall help in cases where the courts in some part of the country record evidence at the stage of petition under Section 34 of the Act. Now Act provides that recording of evidence is not permissible.

Amendment to Section 37 :

In Section 37 of the principal Act, expression "Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie……" has been incorporated in Section 37 (1). This is aimed restricting the scope of appeal and preventing courts from exercising power under any other provision of law for the time being in force against any orders (appealable or not in terms of Section 37 of the Act) that may be passed in relation to the arbitration proceedings.

Amendment to Section 45 :

Section 45 of the Act, under Part II (power of Courts to refer the matter to arbitration unless it finds that the arbitration agreement is null and void, inoperative and incapable of being performed) has been amended to substitute the words "unless it finds", with the words "unless it prima facie finds".

Application of the Arbitration and Conciliation (Amendment) Act, 2015 :

It has been clarified that unless the parties otherwise agree, the amendments made to the Act by the Arbitration and Conciliation (Amendment) Act, 2015 will not apply to the arbitral proceedings which commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 i.e., October 23, 2015. This overrules the position laid down by the Supreme Court in *BCCI v. Kochi Cricket Private Limited*

II. Enforcement Of Non Conventional Awards :

In India, arbitration is governed by the Arbitration and Conciliation Act 1996 (the 1996 Act). Part II of the 1996 Act governs the enforcement of certain foreign awards pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)

and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (the Geneva Convention).

Section 44 of the 1996 Act defines a 'foreign award' (New York Convention awards) as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after 11 October 1960 :

1. in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies; and
2. in one of such territories as the central government, being satisfied that reciprocal provisions made may, by notification in the *Official Gazette*, declare to be territories to which the said convention applies.

Under s44, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied :

1. the legal relationship between the parties must be commercial;
2. the award must be made in pursuance of an agreement in writing; and
3. the award must be made in a convention country.

Similarly, s53 of the 1996 Act, which deals with Geneva Convention awards, also defines a foreign award as an award passed in relation to commercial matters in one of the territories that the central government, being satisfied that reciprocal provisions have been made, may, by notification in the *Official Gazette*, declare to be territories to which the convention applies.

For an award from a foreign territory to be enforceable in India under the 1996 Act, it has to be from a country that has been notified by the Indian government. However, to date, the list of countries that have been notified by the central government (India) is quite minimal. Therefore, enforcing awards passed in a non-convention country in India is a question of considerable importance.

Enforcing a foreign judgment or a foreign award has always been a contentious issue across the globe. More so because concepts of reciprocity of recognition of judgments and awards have become fundamental in determining the enforceability of a judgment or an award. Indian law also

has provisions for dealing with this in the statutes governing civil procedures and arbitrations.

At this stage, however, it would be desirable to compare foreign judgments with foreign awards and bear in mind the difference between them. No doubt, both of them create new obligations. The judgment of a foreign government is a command of that government that has to be obeyed within the territorial limits of that government's jurisdiction. On the principles of comity, it is, therefore, accorded international recognition, provided that it fulfills certain basic requirements. A foreign award, on the other hand, which is founded on a contract of the parties and is not given the status of a judgment in the country in which it is made, cannot claim the same international status as the act of a foreign government.

Awards passed in reciprocating territories have provisions for enforcement, but the law in India suggests *prima facie* that awards passed in non-reciprocating territories may not be enforceable.

Practice and Procedure :

An arbitral award that does not satisfy the requirements of Part II under the 1996 Act is not a 'foreign award' for the purposes of enforcement under the 1996 Act, even though it is made outside India. However, as per the judgment of the Supreme Court of India in *Bhatia International Ltd* v. *Bulk Trading SA* [2002], it appears that an award passed in an international commercial arbitration in a non-convention country, though not enforceable under Part II, would be treated as a domestic award and would be enforceable under the provisions of Part I of the 1996 Act. The strength of this contention can be derived from the fact that the Supreme Court made certain observations with respect to international commercial arbitrations taking place in non-convention countries. Relying on s2(f) of the 1996 Act, which defines international commercial arbitration, the Supreme Court was of the opinion that the definition makes no distinction between international commercial arbitration taking place in India or outside India. The Court was also of the opinion that awards under Part II related to awards passed in the convention country, for which an enforcement mechanism was duly provided. Therefore, to that effect, Part I would not apply to such foreign awards. However, for

all other awards, whether domestic or foreign awards passed in non-convention countries, provisions of Part I would continue to apply and hence enforcement mechanisms as envisaged under Part I would be equally applicable to awards passed in non-convention countries.

Paragraph 23 of the judgment reads :

'As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians and (b) international commercial arbitrations. As set out hereinabove international commercial arbitrations may take place in India or outside India. Outside India an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act, however, only classifies awards as "domestic awards" or "foreign awards". MrSenadmits that provisions of Part II makes it clear that "foreign awards" are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings, which take place in a non-convention country, are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part II. An award passed in an arbitration, which takes place in India, would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking an award passed in an arbitration, which takes place in a non-convention country, would not be a "domestic award". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration, held in a non-convention country, is also considered to be a "domestic award".'

This judgment suggests that an award passed in a non-convention country would be treated as a domestic award and is therefore enforceable under Part I of the 1996 Act. It is noteworthy that in cases of international commercial arbitration, held outside of India in a non-convention country, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.

That being so, the next question is, what is the procedure and mechanism for enforcing such an award in India?

Part I of the 1996 Act provides, in s34, the process of setting aside an award. Under s34, an application for setting aside an award may not be made after three months from the date on which the party making the application received the award. The time frame of three months may be further extended by 30 days if the court is satisfied that sufficient cause existed for the applicant not being able to move the application within the stipulated three-month period. If, however, no such application is filed for setting aside the award under s34, as per s36 of the 1996 Act, the award shall be enforced under the Code of Civil Procedure (CPC) 1908 as if it were a decree of the court.

CPC 1908 Order XXI prescribes the manner in which the decree may be executed by the decree holder against the judgment debtor. Therefore, by legal fiction, an award can be enforced as a decree of the court on expiry of 90 days (unless another 30 days is granted as sufficient cause).

However, it is clear from the mandatory language of s34 that an award, when challenged within the stipulated time, becomes unexecutable. There is no discretion left with the court to pass an interlocutory order in regard to the award, except to adjudicate the correctness of the claim made by the applicant. However, it would be pertinent to bear in mind that the procedure for enforcement of the award is applicable only when Part I is held to be applicable to the arbitration. In the event that the governing law of the arbitration, by implication or by express provision, bars the application of Part I, the procedure for the enforcement of awards would be to file a suit on the award and the judgment obtained thereon.

It is of utmost importance that in such a case, where the award is made in a non-convention country and to which the provisions of Part I do not apply :

1. the award must have been made under an arbitration agreement;
2. the arbitration was conducted in accordance to the agreement;
3. the award is made pursuant to the provisions of the agreement, and is valid according to the *lexfori* of the place where the arbitration was conducted and where the award was made; and

4. the award has attained finality.

As per the decision of the Supreme Court in *Badat& Co*v.*East India Trading Company* [1964], an award passed in a foreign country can afford a cause of action only when it is final, ie a judgment based on the award as per the law of the country where the award was passed has been rendered. By itself, the award cannot give rise to any fresh cause of action. This would mean that the observation in *Bhatia*, regarding the enforcement of non-convention country awards, cannot be relied on.

In the event that these conditions are satisfied, a suit on the said award may be filed in India for enforcement of the same.

In view thereof, it appears that the following conclusions may be drawn in this regard :

In case of a foreign judgment from a non-reciprocating country, it can be enforced only by filing a suit upon the judgment. The party is left with the option to sue on the basis of the foreign judgment or on the original cause of action in the domestic court or both. The resultant decree would thereafter be executed in India. Where a suit on a foreign judgment is dismissed on merits, no further application shall lie for the execution of such foreign judgment as it had merged in the decree which dismissed such suit for execution. In an event a decree is passed in favour of the party filing such a suit for enforcing the foreign judgment, it may proceed to execute it. Finally, -

1. an award passed in an arbitration held in a non-convention country under the law of that country will not be a 'foreign award' within the meaning of Part II and therefore cannot be enforced under the provisions of Part II;
2. an award passed in an arbitration held in a non-convention country, under that country's laws and without an implied or express exclusion of the 1996 Act, may be enforced in India as an domestic award under the provisions of Part I of the 1996 Act in view of the judgment in *Bhatia*; and
3. an award passed in an arbitration held in a non-convention country, under that country's laws and where the arbitration agreement excludes

the applicability of the 1996 Act either by implications or expressly, may be enforced in India by means of filing a suit on the said award and the judgment obtained thereon.

Limitation :

Article 101 of the Limitation Act 1963 provides for the period of limitation for suits upon a foreign judgment as 'three years from the date of the judgment'. As per the Limitation Act 1963, the period of limitation for the execution of a decree, so passed, (other than a decree granting a mandatory injunction, in which case, it is three years) is 'twelve years from the date of the decree'.

III. Enforcement of Emergency Arbitration :

Emergency arbitration, like any other arbitration, is 'a creature of consent'; hence, the arbitrator derives their power from the agreement to arbitrate. As the subsequent discussion will elaborate, few courts have enforced emergency arbitrators' decisions, thus meriting consideration of the nature of this mechanism. Constitution of the arbitral tribunal can be a lengthy process, and a party might need emergency relief before the tribunal is constituted. However, it should be noted that access to an emergency arbitrator is not intended to preclude recourse to national courts for interim relief. the emergency arbitrators' decision ought to be recognized as an award finally disposing of the claim presented before it, remaining so until the same has been referred to the arbitral tribunal/national court for any challenge/ review. The emergency arbitration mechanism serves the important purpose of addressing urgent conservatory relief. The main role of Emergency Arbitration comes into play in a situation, when there is no arbitral tribunal in place or in a situation where sufficient time would be wasted in setting up one, depending upon the requirements of an arbitration agreement or the institutional rules.

Emergency arbitrator and Indian Legal frame work :

Indian law, as of now, does not expressly recognize Emergency Arbitration. However, in the 246th Report of the Law Commission2 recommendations have been made to the Government of India, to amend

the Arbitration and Conciliation Act, 1996 by including Emergency Arbitrator in the definition of Arbitral Tribunal under Section 2(1)(d) of the Act. Unfortunately, the said amending Act of 2015 did not accept the recommendation of the Law Commission.

Enforcement of a foreign seated award in India is highly unlikely as the enforcement shall only be recognized under Part II of the Arbitration and Conciliation Act, 1996. In accordance with the decision laid down by the Supreme Court of India in *BALCO* v. *Kaiser Aluminum Technical Services*[1], the powers of Indian courts are prospectively excluded to grant interim relief in relation to foreign seated arbitrations.

However, India's approach towards an Emergency Award order is that of ancillary enforceability. Judicial decisions concerning emergency arbitration are scant. In the leading cases of *HSBC* vs. *Avitel*[2] and *Raffles Design International India Private Limited &Ors.* v.*Educomp Professional Education Limited &* the Bombay High Court and the Delhi High Court respectively, have emerged as the torch bearers wherein interim reliefs were granted by the Courts in sync with the order of the Emergency Arbitrator. However, a glaring difference between both of these orders is the fact, whether the ratio of BALCO applies to the said cases or not.

HSBC* v. *Avitel* :** The case involved an arbitration agreement in which the parties reserved their right to seek interim reliefs before the national Courts of India, even though the Arbitration was conducted outside the country. The parties resorted to EA seated in Singapore, where a favorable order was given to the party who sought to enforce the same in India. The Bombay High Court while upholding the award of the Emergency Arbitrator and granting interim relief observed[3] that the '*...**petitioner has not bypassed any mandatory conditions of enforceability.' since it was not trying to obtain a direct enforcement of the interim award. It is germane to note that the subject agreements were entered into between the parties prior to the BALCO judgment, thus the ratio decidendi of BALCO did not apply to this case.

[1](2012) 9 SCC 552
[2]No. 1062/2012 dated January 22nd, 2014.
[3] 2014 BOM 367

***Raffles Design International India Private Limited &Ors*.v. *Educomp Professional Education Limited &Ors* :**[4] The case involved an arbitration agreement which was governed and construed in accordance with the laws of Singapore. The parties resorted to EA seated in Singapore, wherein an interim order was passed, which was later enforced in the High Court of the Republic of Singapore. The party who obtained the favorable order later filed an application under the amended Section 9 of The Arbitration and Conciliation (Amendment) Act, 2015 seeking interim reliefs alleging that the other party is acting in contravention to the orders passed in the Emergency Award. The Delhi High Court while allowing the maintainability of such petitions highlighted the relevancy of the amended Section 2(2) of the Act. The proviso to Section 2(2) of the amended act has widened the ambit of the powers invested in the Court to grant interim reliefs, as Section 9 shall now apply to international commercial arbitrations, even if the place of arbitration is outside India. It is germane to note, that the subject agreements were entered between the parties after the BALCO judgment. The main matter is yet to be decided on merits by the Delhi High Court.

It is needless to say that Emergency Arbitration has become critically important in the past few years and has gained momentum. Despite various challenges, most importantly enforceability of Emergency Award, Indian Arbitration Institutions as well as Indian Courts have been seen adopting the concept. However, for a more logical utilization of the new recourse available for obtaining in interim relief, recognition of Emergency Arbitration in Indian laws is indispensable.[5]

IV. Indian Parties Choosing Seat Outside India-Legality :

Part I of the Act provides that it will only be applicable where the place of arbitration is India, therefore an arbitration seated abroad between two Indian parties would not be a domestic arbitration under Part I of the Act.[6] Section 2(f) of the Act defines International Commercial Arbitration‘ as arbitration relating to disputes that arise out of a legal relationship where one

[4] 2016 DEL 4636

[5] Astha Chawla *Emergeny Arbitration Indian Perspective* lexisnexisindia.wordpress.com

[6] Arbitration and Conciliation Act, No. 26 of 1996.s.2(2).

of the parties is not Indian[7]. An arbitration thus, does not become international just because it is seated outside India. Therefore, an arbitration between two Indian parties, seated outside India would not be considered an international commercial arbitration under the provisions of the Act. The Supreme Court of India has repeatedly held that Part I of the Act does not apply to international commercial arbitrations seated outside India and if parties choose a foreign seat of arbitration and a foreign law as their law of arbitration, then the intention is to exclude Part I of the Act[8]. This has been reinforced by the Amendment, whereby barring Sections 9, 27 and 37, Part I has expressly been made inapplicable to international commercial arbitrations seated outside India. Next, we must consider whether Part II of the Act would be applicable in such an event. An award which results from such an arbitration will be considered a foreign award' under Part II of the Act. Applicability of Part II is solely based on the seat of arbitration and whether the seat is located in a country which is a signatory to the New York Convention and been notified by the Central Government in the Official Gazette. Once this criterion is fulfilled, Part II would apply and the foreign award' from such an arbitration would be recognised and enforced in India. The major risks that two Indian parties take while arbitrating their disputes outside India is that, (i) they may not have recourse to the Indian courts under Section 9, 27 and 37, as they are not covered under the definition of an international commercial arbitration and nor are they governed by Part I of the Act, and (ii) the foreign award may be open to resistance under Part II of the Act as being against public policy of India. The Act does not envisage a situation

[7]Section 2(f), Arbitration and Conciliation Act, 1996 provides that- 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, a 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.

[8]*Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 S.C.C 552 (India); *Videocon Industries Ltd.* v. *Union of India and Anr.*, (2011) 6 S.C.C 161 (India).

where two Indian parties can choose a seat for their arbitration outside India. This anomaly could have been removed by the Amendment by broadening the definition of International Commercial Arbitration', to include an arbitration seated abroad. The Indian judiciary has been faced with this dilemma for some time and has been unable to give a clear answer. This issue came up before the Supreme Court of India in *Atlas Exports Industries* v. *Kotak and Company*[9]. In *Atlas Exports*, the issue raised was that the *award should have been unenforceable inasmuch as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Indian Contract Act, 1872*.' The contention raised was that the contract was opposed to public policy as it implicitly excluded the remedy available under Indian law and compelled two Indian parties to have their disputes arbitrated by foreign arbitrators. Section 28 of the Indian Contract Act, 1872 provides that agreements in restraint of legal proceedings are void; the Supreme Court held that this case would be covered by the exception to Section 28 which excludes arbitration agreements from its purview. The court went onto hold that *merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement*[10]. Thus, the arbitral award arising out of a foreign-seated arbitration between Indian parties was held to be not unenforceable or opposed to public policy.The precedential value of this finding is only that of an *obiter dicta* and, therefore, has not been followed by many courts. Before this question could be re-examined, by any other court, the Supreme Court in *TDM Infrastructure (P) Ltd*. v. *UE Development India (P) Ltd*. held that the intention of the legislature behind Section 28 of the Act, is that Indians should not be permitted to derogate from Indian law by agreeing to conduct arbitration outside India with foreign substantive law, as this is against the public policy of India.[11] Section 28 of the Act provides for the rules on which the Tribunal would decide a matter, if the arbitration is seated in India. The Court added a corrigendum in *TDM* to the effect that any findings/observations made hereinbefore were only for

[9](1999) 7 S.C.C 61 (India).
[10]*Ibid*.
[11](2008) 14 S.C.C 271 (India).

the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose. It is noteworthy that in *TDM,* a single bench of the Indian Supreme Court (designate of the Chief Justice of India to decide application under Section 11 of the Act) did not consider the earlier judgment of *Atlas Exports*, which was delivered by a two-judge bench. Since then various High Courts have taken different positions on this issue. In *Sasan Power Ltd.* vs. *North America Coal Corporation India Pvt. Ltd*., the Madhya Pradesh High Court upheld an arbitration agreement where two Indian parties had chosen a foreign- seated arbitration. The Court followed the decision in *Atlas Exports* and permitted the Indian parties to arbitrate outside India, and held that if the seat is in a country which is a signatory to the New York Convention, then Part II of the Act would be applicable. The agreement cannot be held to be null and void because the parties had opted for a foreign-seated arbitration. The High Court further held that where two Indian parties had willingly entered into an agreement in relation to arbitration, the contention that a foreign-seated arbitration would be opposed to public policy was untenable. The court reasoned that where parties, by mutual agreement, had decided to resolve their dispute by arbitration and chosen a seat of arbitration outside India thenin view of the provisions of section 2(2) read with Section 44 of the Act, Part II of the Act would govern the proceeding rather than Part I. The High Court of Bombay in *M/s. Addhar Mercantile Private Limited* v. *Shree Jagdamba Agrico Exports Pvt. Ltd.* has taken a contradictory view on the same issue[12]. The arbitration clause in *Addhar Mercantile* provided that the arbitration could be seated in India or Singapore and English law was to apply. The appellant argued that since both the parties were Indian, they could not be allowed to derogate from Indian law and that the arbitration clause should be interpreted to mean that the arbitration be seated in India. The respondent refuted this argument on the grounds that parties had agreed to the seat of arbitration to be at Singapore and English Law to apply. The High Court in this case followed *TDM* and held that Indian nationals were not allowed to derogate from Indian law. It is noteworthy that the High Court

[12]Arb.App. No. 197 of 2014 and Arb.Pet. 910 of 2013Jun.12, 2015 (Bombay High Court) (India).

did not consider the rider in *TDM*, which limited its application, or *Atlas Exports*. This question also came up before the High Court of Delhi in *Delhi Airport Metro Express Pvt. Ltd.* v. *CAF India Pvt. Ltd*[13]. The High Court, unfortunately, skirted around this issue by holding that one of the defendants, a Spanish entity, continued to remain a party to the arbitration under the agreement, making it an international commercial arbitration and not an arbitration between two Indian parties. The argument that two Indian parties choosing a foreign seat is contrary to Section 28 of the Act is untenable, as Section 28 becomes applicable only when the arbitration is seated in India. The question is not whether two Indian parties may choose a foreign law as their substantive law, but whether they can choose a seat of arbitration outside India and whether this choice would not be against the public policy of India. In the absence of any legislative clarification, the Supreme Court in an appropriate case, will have to authoritatively rule on this contentious issue to avoid further confusion.

Recently, the Delhi HC, in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*[14]. after relying on the decision of the Madhya Pradesh High Court in Sasan Power Limited vs. North American Coal Corporation (India) (P) Ltd Sasan Power, and Atlas Exports ruled that there is no prohibition in two Indian parties opting for a foreign seat of arbitration. The Delhi HC decision to re-affirm that two Indian parties can seat their arbitration outside India is yet another testament to pro-arbitration approach of Indian courts, with the Delhi HC leading the charge.

V. Arbitrability of oppression and mismanagement cases :

A landmark judgment on this issue was delivered by the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra*[15], wherein the court held that disputes regarding oppression and mismanagement cannot be arbitrated, and must be adjudicated upon by the judicial authority itself. However, in case the judicial authority finds that the petition is mala fide or

[12] Arb.App. No. 197 of 2014 and Arb.Pet. 910 of 2013Jun.12, 2015 (Bombay High Court) (India).
[13] 2014 (4) Arb.L.R. 273 (Delhi).
[14] . 2017 SCC On Line Del 11625
[15] (2015) 2 Comp LJ 288 (Bom).

vexatious and is an attempt to avoid an arbitration clause, the dispute must be referred to arbitration.

Investment Arbitration :-

Investment Arbitration generally arises out of Investment treaties that are entered into by the foreign investors and the Host States, with a view to make an investment by one party in the business ventures of the other. As a usual way of practice, a majority of Investment Arbitrations are treaty based which are governed by either Bilateral or Multilateral Treaties. Essentially, International Investment Arbitration adopts the body of procedure and enforcement from International Commercial Arbitration and applies the same to disputes between foreign investors and host states.

International Arbitral Awards and Indian Judiciary :-

The Delhi High Court's in *Union of India v. Khaitan Holding* marks upon issues related to arbitration under an international investment treaty. the Court declined to grant the anti-arbitration injunction against India at the interim stage. It held that the tribunal has the power to determine whether Khaitan Holdings was a genuine investor in Loop. Accordingly, the Court decided not to interfere with the ongoing arbitral proceedings at this stage and ruled that anti-BIT arbitration injunctions should be granted only in rare and compelling circumstances. However, it was opposite to the assumption of the Calcutta High Court in *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures*[16]. It was the first Indian case to deal with investment arbitration. It concerned a request for an anti-arbitration injunction by the Kolkata Port Trust, preventing Louis Dreyfus from continuing proceedings against it before an investment arbitral tribunal constituted under the India-France BIT. The court granted the injunction, observing that the Kolkata Port Trust had been wrongly identified as a Respondent in the arbitration since only the Republic of India was a party to the arbitration agreement in the BIT. Interestingly, the application for this anti-arbitration injunction was made under Sec. 45 of the Act. When justifying its power to issue an anti-

[16] http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/

arbitration injunction, in this case, the court simply *assumed* that the Act applied to this investment arbitration, just like it does to foreign-seated commercial arbitrations. It, therefore, discussed the position on anti-arbitration injunctions under Sec. 45 (as applied to commercial arbitrations) and held that it would interfere in foreign-seated investment arbitrations in rare circumstances only, applying the same standard it applies when considering interference in commercial arbitrations under this section.

Dr. Mayank Pratap holds a Ph D from Banaras Hindu University. Dr. Pratap was awarded Senior Research Fellow from UGC to undertake his Doctoral Research in the area of Arbitration from Banaras Hindu University. Currently Dr Pratap is Assistant Professor in Law School BHU and member of various Arbitration Institutions. He has 15 publications to his credit. His areas of interest include Arbitration and Corporate Laws.

Publisher :**Aditi Publication**
Near Ice Factory, Shakti Sound Service Lane,
Kushalpur, Raipur, Chhattisgarh INDIA,
Mobile. 94252 10308

ISBN
9 788193 710067