Directorate of Distance Education
NALSAR University of Law, Hyderabad

Reading Material

Post-Graduate Diploma in

Alternative Dispute Resolution

1.3 Law of Arbitration and Conciliation in India

(For private circulation only)

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MODULE I

ARBITRATION AND ARBITRATION AGREEMENT

"I cannot emphasize too strongly to those in business and industry- and especially to lawyers- that every private contract of real consequence to the parties ought to be treated as a 'candidate' for binding private arbitration."[1]

Chief Justice Warren E. Burger

It has become a kind of norm in the present times for commercial contracts to have a provision providing for arbitration. Though the kind of success it is enjoying is a new phenomenon but the method exists since time immemorial. "Archaeologists have uncovered evidence of the use of arbitration in the ancient civilizations of Egypt, Mesopotamia, and Assyria. Arbitration was extensively used by the ancient Greeks and Romans and in a form substantially similar to that used today."[2] According to Gary Born the origin of arbitration can be traced to ancient mythology also.[3]

Development of Arbitration in India:

Arbitration in its essence means settlement of a dispute by peoples who are appointed by the parties to the dispute. It involves dispensation of justice through a private agency. This idea exists in India since ancient times. There were different institutions in ancient India which can be regarded as precursors of the modern day arbitration. Thus Yajanavalka mentions about three different types of "popular courts" namely, puga, sreni and kula involved in the settlement of disputes.[4] Narada also mentions such institutes.[5] Dr. P.V. Kane the author of monumental History of Dharamasastras, observes that the three institutes involved in settlement of disputes mentioned by ancient writers like Yajanvalka and Narada, were "practically arbitration tribunals." [6]Moreover the p*anchyat* system which has many similarities with arbitration has been an integral part of the Indian society since time

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1 See, *A History of Alternative Dispute Resolution: The Story of a Political Cultural, and Social Movement,* Quoted at p. 234.

2 http://robertmsmith.com/about-adr-arbitration-overview

3 Gary Born, International Commercial Arbitration, 2nd ed. Wolters Kluwer p. 7.

4 Law Commission of India 76 report on Arbitration Act 1940 available at http://lawcommissionofindia.nic.in/51-100/Report76.pdf visited on 20/12/2009 Also see O.P.Malhotra and Indu Malhotra, *The Law and Practice of Arbitration and Conciliation,* Butterworths, 2006, p.4

5 Ibid

6 P.V.Kane, *History of Dharamsastra*, Vol. (3) p. 280.

immemorial. P*anchyat* system is prevalent in villages which is a tribunal of five people. This system is so deeply entrenched in the Indian social fabric that it has been recognized by the Indian Constitution as one of the directive principles of state policy. Article 40 advises the State to "take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self- governments." Establishment of Panchyati Raj has been one of major goals of successive Indian governments in the recent past.

Thus the task of settlement of disputes in India since ancient time is not entrusted to judiciary only. The judicial organ of the government knows that arbitration is a very important limb of the machinery involved in settling the disputes.

The seeds of the modern arbitration law in India were sowed during the British rule. Initial endeavours were made in the years 1772, 1780, and1781.[7] The 1781 Act particularly provided that an award passed in an arbitration proceeding can be annulled only in the event of "gross corruption or partiality."[8] In the next century the arbitration law kept on developing slowly and steadily. The measure development was the Indian Arbitration Act 1899. This Act was a big stride in the development of arbitration law in India as it provided for arbitration without the intervention of courts, nevertheless it was restricted to the Presidency towns and in other parts its application was contingent upon notification by the local governments. [9]Although the Civil Procedure Act 1908, extended the scope of arbitration to the other parts of the country, that is, beyond the Presidency towns but it also did not give a comprehensive treatment to arbitration and the laws dealing with arbitration were relegated to the II Schedule.[10] It was the Indian Arbitration Act 1940 which for the first time gave a comprehensive treatment to the subject of arbitration in India. The 1940 Act was modelled on the English Arbitration Act 1934.[11] The 1940 Act provided for domestic arbitration only.
In the year 1937 the government had enacted Arbitration Protocol and Convention Act 1937. This was to give effect to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of foreign arbitral Awards 1927.[12]After becoming a signatory to the New York Convention the government enacted The Foreign Awards Recognition and Enforcement Act 1961, which provided for the enforcement of foreign arbitration awards.

After the liberalisation of the Indian economy in 1991, a need was felt to establish a new regime of arbitration. After opening the Indian economy to world market the economy started growing at a fabulous rate. Wherein in the 80s the economic growth rate was lingering

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7 Ibid
8 Ibid
9 Ibid
10 Ibid
11 Ibid
12 O P Malhotra and Indu Malhotra, *The Law and Practice of Arbitration and Conciliation,* Butterworths, 2006, p.11

around 2 to 2.5 % which sarcastically was termed as the Hindu growth rate, in the 90s it witnessed a 2 to 3 fold increase. A fast growing economy needs a speedy mechanism for the settlement of commercial disputes. The 1940 Act was too old to meet the demands of the new age. It was too dependent upon the courts as it required the help of courts at all the three stages of arbitration. On the other hand internationally arbitration was entering into the era of less judicial intervention and uniformity.[13]

These circumstances necessitated the enactment of a new arbitration law. In order to meet the demands of the new economic environment the government created The Arbitration and Conciliation Act 1996. This act is based on the UNCITRAL Model law.

Scheme of the Act:
The Act is divided into four parts.

Part I deals with those arbitrations where the seat of arbitration is in India. It includes domestic as well as international commercial arbitration. Sections 2 to 43 are in this part. According to Section 2 (2) Part I shall apply where the place of arbitration is in India.

Part II deals with the enforcement of foreign awards. Sections 44-60 are in this part. Sections 44 to 52 deal with New York Convention awards and 53 to 60 deal with Geneva Convention awards.

Part III deals with Conciliation. Sections 61 to 81 are in this part.

Part IV provides for supplementary provisions. Sections 82 to 86 are in this part.

What is Arbitration?
At the heart of arbitration lies the idea of achieving "justice with cooperation." [14] It was this idea of achieving justice in this innocuous manner which prompted Mahatma Gandhi the father of Indian nation to prefer arbitration over litigation in his legal career. Thus tells his biographer the story that how despite knowing that the law is in favor of his client he persuaded his client to opt for arbitration. [15]

According to Section 2 (1) (a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution." This is not a conceptual definition. Therefore

13 Krishna Sarma, Momota oniam et al, *Development and Practice of Arbitration in India-Has it Evolved as an Effective Legal Institution in India*, CDDRL Working Paper, Number 103, 2009, available at http://cddrl.stanford.edu visited on 21/07/2010.
14 M.Michel Gaudet quoted in The inaugural address by Shri K.R.Narayanan, in the ICCA Congress Series No. 10 (New Delhi) , see Albert Jan Van den Berg (ed.) Kluwer Law International, 2001, p. 6.
15 Ibid p. 7.

in order to have conceptual understanding of arbitration we need to refer to juristic definitions. Although there is no universal definition of arbitration but most of them do not differ in essence. We shall here consider a few of them.

According to Oxford Dictionary Arbitration means "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." In France arbitration is traditionally defined as, "a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more persons- the arbitrator or arbitrators- who derive their powers from a private agreement not from the authorities of a state and decide the dispute on the bases of such an agreement."[16] Christian Bühring-Uhle, Lars Kirchhoff and Matthias Scherer observe that arbitration "is a private process for the binding resolution of a dispute through the decision of one or more private individuals selected by the parties to the dispute."[17] In common law jurisdictions it is defined as "an effective way of obtaining a final and binding decision on a dispute or a series of disputes, without reference to a court of law."[18]

From these different definitions we can deduce two basic features of arbitration.

1. The contractual nature and
2. The Judicial nature.[19]

The first gives freedom to the parties, as contract springs from the autonomy of the contracting parties and the other one certainty, as it binds the disputing parties. These are the two primary reasons which inspire parties to refer a dispute to arbitration. The rest of the reasons may be put under the rubric of one or the other. The contractual nature of arbitration means that arbitration depends primarily upon the intentions of the parties. The judicial nature makes the decision binding and final. The judicial control needs to be minimized because it goes against the very nature of arbitration. If judiciary intervenes in arbitration it undermines the contractual freedom and the binding nature of arbitration.

International Commercial Arbitration

We can divide arbitration into two types- (i) Domestic Arbitration and (ii) International Arbitration. The distinction between the two is so significant that UNCITRAL Model Law is specifically created for international commercial arbitration.[20] Though the expression

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16 Emmanuel Gaillard and John Savage (ed.) *Fouchard, Gaillard, Goldman On International Commercial Arbitration*, Kluwer Law International, 1999 p. 9
17 Bühring-Uhle, Lars Kirchhoff, et al., *Arbitration and Mediation in International Business,* Kluwer Law International, 2006, p.30.
18 Supra note 7 at 2.
19 For further reading on contractual and judicial nature, see Gary B. Brown Supra note 2 and supra note 10.
20 Supra note 7 at 9.

domestic arbitration is not used in the Act it means arbitration where both parties are from India.

Apparently the meaning of word international seems very simple but it is not. There is no unanimity in its application. Redfern and Hunter the leading commentary on the subject of international arbitration informs us that there are three approaches prevalent with respect to the meaning of the word international in the field of arbitration. "The first depends on the nature of the dispute. The second depends on the nationality of the parties. The third approach, which is that of the Model Law, depends upon the blending of the first two, plus a reference to the chosen place of arbitration." [21] As our mandate is to deal with Indian law on arbitration, I would confine to Indian position in this respect.

International Commercial arbitration is defined in Section 2(1) of the 1996 Act, which reads, "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 or control is exercised in any country other than India; or
(iv) the Government of a foreign country.

Thus the Indian law adopts nationality based approach to define international arbitration. In this respect it deviates from the model law. Whether arbitration is domestic or international has important consequences. For example only in case of international commercial arbitration the parties have the freedom to select the substantive law of their choice while in domestic arbitration they do not have any choice. The substantive law of the land is mandatorily applicable in the latter case.[22] Similarly the ground of patent illegality for setting aside an arbitral award is applicable to an award passed in domestic arbitration not international arbitration.[23]

In *TDM Infrastructure Pvt. Ltd. v U E Development*[24] the Supreme Court had to decide whether the arbitration in the given case is international or not? Herein there was a construction agreement between TDM an Indian company and UE Development a subsidiary of a Malaysian company. An issue arose with respect to arbitrator's appointment. According

21 Ibid.
22 See Section 28.
23 See 34.
24 2008 (8) SCALE 576.

to Section 11 in case of domestic arbitration the power lies with the Chief Justice of High Court and in case of international arbitration with the Chief Justice of India. The Malaysian company made an application to the Chief Justice which was objected by the Indian Company on the ground that this is not the right forum since the arbitration is a domestic arbitration.

Therefore the Supreme had to determine whether the arbitration is international? U E Development argued that arbitration is international since it is a wholly owned subsidiary of Malaysian company as all its shareholders and directors are from Malaysia. Notwithstanding that the court held that it is not international arbitration as it refused to consider UE Development a foreign party, since it was incorporated in India. At that time the relevant provision i.e. Section 2 (1) (f) (iii) arbitration would be international if one of the parties is- "a company, or an association or a body of individuals whose central management and control is exercised in any country other than India."

The Court reasoned that by incorporating itself in India it must be considered an Indian party. The fear of the Court was that otherwise Indian parties would bypass Indian law to decide their disputes since according to Section 28 when both parties are Indian the substantive law for the time being in force in India is mandatorily applicable. On the other hand in international arbitration parties have freedom to choose the law of their choice. The Court observed that allowing two Indian parties to choose foreign law would be against public policy of the country as a dispute between Indian parties can be determined according to the substantive law of India only.

This line of reasoning is against international trends in this respect. It is common that at times foreign companies for the ease of business incorporate locally but essentially remain a foreign company which was the case with UE Development. This decision made clause 3 of Section 2 superfluous and was widely criticized. Unfortunately here even the legislature which is generally very pro arbitration failed as it adopted the above line of reasoning in the 2015 amendments and deleted the reference to "company" from the new provision.

Commercial Nature:
According to Section 2 (1) (f) for arbitration to be international commercial arbitration the transaction must be commercial in nature.

One of the early cases in this respect is *Kamani Engineering v Societe De Traction*. [25]The case involved a contract between Kamani Engineering an Indian company and Societe De Traction a Belgian company under which the Belgian company was to guide the Indian company about the technical know- how related to the electrification of overhead

25 AIR 19963, Bom. 114.

equipments for railway tracks. The parties had agreed to refer any dispute related to the contract to arbitration. Notwithstanding this the Indian company instituted a suit before the Indian courts. The foreign party contended before the Bombay High Court to decline the jurisdiction and refer the matter to arbitration in view of the arbitration agreement.

The Court rejected the request to refer the matter to arbitration because in its opinion the subject matter of the dispute was not commercial in nature and the obligation to refer the dispute to arbitration would arise only if the matter is commercial in nature in view of the reservation made by India. The Court observed that the agreement was akin to a service agreement like a solicitor client's agreement and there was no commercial activity involved.

This was a very restrictive approach on the part of the Court and it was narrowed down in subsequent cases.

Thus is *Indian Organic Company v Chemtex Fiber*[26] the Court laid down that an activity to be considered commercial it must be so under some specific provision of law. However later in European *Grain and Food Company* it overruled the decision and held that it is not necessary to point out a specific provision and an activity would be commercial if it is generally understood to be so. The same issue arose in *R M Investment Corporation v Boeing and company*.[27] There was a consultancy service agreement between them according to which R M Investment was to assist Boeing and Company in selling their aircrafts. The arbitration clause provided for arbitration under the rules of American Association of Arbitration.

Notwithstanding this when a dispute arose R M Investment Corporation filed a suit before the Calcutta High Court. The American company requested the Court to decline the jurisdiction and refer the matter to arbitration as provided under the agreement between the parties. The Court rejected the request on the ground that the consultancy service agreement is not commercial in nature. However in appeal the same Court overruled the decision and agreed to refer the matter to arbitration. An appeal was preferred before the Supreme Court by the Indian company against the decision of the said judgment of the Calcutta High Court.

In appeal it was argued by R M Investment's counsel that only mercantile contracts are commercial in nature i.e. there must be some and sale and purchase involved. Since the present agreement is only to assist Boeing and Company in selling their products it is not commercial in nature. But the Court rejected this narrow interpretation and the decision which was delivered 2 years after liberalization of the economic policies embraced a broad approach about what is to be considered commercial. The Court referred to the meaning of

[26] AIR 1978, Bom. 106.
[27] AIR 1994 SC 1136

the term commercial given by the same court in Atiabari Tea Compnay v State of Aasam way back in 1961 a couple of years before the *Kamani Engineering* case.

In Atiabari the apex Court had held that "*Trade and commerce do not mean merely traffic in goods, i.e., exchange of commodities for money or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities - too numerous to be exhaustively enumerated -* *which may be called commercial inter-course."*

The Court also referred to the meaning of the term contemplated under the UNCITRAL Model Law, which is quite similar to the meaning given by the Court in Atiabari's case. Ultimately the court considered the relationship between RM Investment and Boeing commercial in nature.

Role of Courts in Arbitration:
The role of arbitration and national courts is quite intriguing. It is true that arbitration needs autonomy but a complete exclusion of the role of courts would be counter- productive because arbitration "is dependent on the underlying support of the courts which alone have the power to rescue" it in certain situations.[28] The role envisaged for the courts is to be supportive towards arbitration.

This would require the judiciary to have faith in the process of arbitration. On the other hand the Indian Judiciary seems to be skeptical about it. The reason may be that arbitration is a private mechanism of dispensation of justice which is primarily if not singularly the duty of the judicial organ of the state. This lack of faith or skepticism is quite manifest in the following opinion of Justice R. C. Lahoti, a former Chief Justice of India, who in a special address delivered during a conference on new arbitration law and challenges before the legal community said:

"However justified be the need and reasons for the emergence of arbitral tribunals, they can be supplemental and not a substitute for the existing Court and justice delivery system. Though minimizing the supervisory role of courts in the arbitral process finds mention as one of the laudable objects and reasons behind the new Act, let us hope that the new arbitral tribunals do not become unbridled horses."[29]

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28 Alan Redfern and Martin Hunter, *Redfern and Hunetr on International Arbitration,* (Nigel Blackaby and others, eds, 5th edn, OUP 2009) p. 439.
29 Quoted in S.K.Dholkia, *Arbitration and The Supreme Court, in S.K.Verma and Kusum, (ed.) Fifty Years of The Supreme Court of India,* Oxford, 2000, p. 759.

It is this type of approach which was played a key role for the Indian courts to be interventionist especially under the 1940 Act. Lamenting upon this approach Justice D A Desai had famously stated in the *Guru Nanak Foundation* case that it has made the lawyers to laugh and the legal philosophers to weep. On the other hand the UNCITRAL Model Law has adopted the approach of minimal judicial interference or judicial minimalism. According to Article 5 of the Model Law, 'In matters governed by this Law, no court shall intervene except where so provided in this Law.'

In the words of Redfern and Hunter, "At first sight, this is a striking declaration of independence. Yet the Model Law does not seek to exclude the participation of what it calls the 'competent court' in carrying out 'certain functions of arbitration assistance and supervision'. On closer examination of the Model Law itself, it becomes apparent that, of its thirty-six Articles, no fewer than ten recognise a possible role for the 'competent court'. For example, Article 11 acknowledges that the help of the competent court may be necessary to constitute the arbitral tribunal; Article 13 acknowledges that the competent court may have to decide upon a challenge to an arbitrator if there are justifiable doubts as to that arbitrator's impartiality or independence; Article 16 acknowledges that a party to an international arbitration may apply to the competent court to review the decision of the arbitral tribunal on jurisdiction—in which case, it is the decision of that court (and not the decision of the arbitral tribunal) that is final and binding. The Model Law also acknowledges that the assistance of the competent court may be necessary in the taking of evidence, and that, in any challenge to the arbitral award, or to its recognition and enforcement, the judgment of the competent court will be decisive."[30] 7.06 2015 rnh.

As the Indian arbitration law is based on the Model Law, India has adopted the same approach. One of the main objects of the 1996 Act is to check the judicial interference in arbitration. Like the Model Law, Section 5 of the 1996 Act in very categorical terms says that "*Notwithstanding anything 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*." The approach followed is of minimal judicial interference so as to ensure the autonomy of arbitration. One must never lose sight of the fact that national courts do not require arbitration to exist but the converse is not true and it needs their support to exist.

Advantages of Arbitration:

Fast Settlement: The main reason to opt for arbitration especially in domestic disputes is the speed at which the matter can be decided. According to Section 29 the award is to be passed within a period of 12 months of referring the dispute to arbitration.

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30 Alan Redfern and Martin Hunter, *Redfern and Hunetr on International Arbitration,* (Nigel Blackaby and others, eds, 5th edn, OUP 2009) p.

Flexibility: In arbitration the parties have the freedom to select or enact the procedure to conduct the proceedings. This gives them the flexibility to tailor it to suit their needs.

Confidentiality: Disputes may involve certain details which parties would not want to come into the public domain or want to keep confidential. As arbitration unlike courts happen privately i.e. no outsider is allowed to witness the proceedings it enables such details to remain confidential.

Continuity of Role: Unlike national courts where judges are frequently transferred the same arbitrator or arbitrators would decide the matter unless removed or leaves in exceptional circumstances allegations of bias or he/she quits because of personal reasons like ill health etc. This enables the decision makers to have a better grasp over the dispute and improves the quality of the outcome.

Decision by Experts: Since in arbitration parties have the freedom to choose decision makers of their choice they will choose those who are experts in the required field. This enhances the chances of a better decision.

Disadvantages:

No Appeals: One of the very key features of arbitration is that it the award is final, which means there is no appeal which can be made against it even if the decision is wrong unless it is patently illegal. Mere wrong application of law or incorrect appreciation of evidence would not be sufficient to set aside an award or refuse recognition or enforcement. It is only in exceptional circumstances when an arbitral award would be set aside or refused recognition or enforcement.

Non –signatories: Arbitration is a voluntary process. Consent of the parties is a must. If one wants to be a party to arbitration as a claimant but was not a signatory to the arbitration agreement or is dragged into arbitration as a respondent cannot be allowed to be a party invariably except in cases where group of companies doctrine or where the corporate veil is lifted. In such cases the parent company can be made liable for the acts of a subsidiary company.

Limitations in Multi Party Disputes: Arbitration is inherently designed for a bi polar contest. When there are more parties than one on each side of the dispute it creates problems unless one party is entrusted to take the lead by others'. For example each party has a right to appoint an arbitrator if there are more parties claimant or respondent who how this right would be exercised is quite problematic. Therefore arbitration is suited to situations where there is one claimant and one respondent.

Limited Powers of Arbitration Tribunal: In comparison to national courts the powers vested in arbitrators are very limited.

Types of Arbitration:

Ad hoc Arbitration: Arbitration is said to be ad hoc when it is not only agreed to but also arranged by the parties themselves. The parties create the procedure to conduct arbitration proceedings also. If they fail to do so then it becomes the responsibility of the arbitration tribunal. This enables the parties to tailor the procedure to its needs. That is its main attraction. This flexibility is an advantage but one must not lose sight of the fact that it is not an easy thing to create the procedure. It requires a lot of expertise. However the trouble of creating the said procedure can be escaped by choosing the rules of an arbitral institution to govern the arbitration proceedings without submitting the arbitration to an institution.
The major disadvantage of ad hoc arbitration is that if the arbitration encounters some troubles especially because of non- cooperation of a party, the recourse to save arbitration is to be made to the national courts. This is problematic because parties had opted for arbitration as they did not want to go to courts. In India ad hoc arbitration is said be more prevalent than institutional arbitration.

Institutional Arbitration: When arbitration is conducted under the supervision of an institution in accordance with its rules of procedure it is termed as institutional arbitration. There are various institutions which administer arbitration proceedings. They have their own set of rules to conduct the proceedings. Some of the institutions prominent internationally are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), American Association of Arbitration (AAA) etc. As far as India is concerned some of the well- known arbitration institutions are The Indian Council of Arbitration (ICA) and Federation of Indian Chamber of Commerce and Industry (FICCI).

The biggest advantage of institutional arbitration is that parties are saved the trouble of framing the procedure of arbitration, since it would be conducted under the rules of the selected institution. Another advantage is the administrative support provided by the highly trained staff which these institutions have. Also they have good infrastructure to conduct the proceedings and list of competent arbitrators to choose from. Most importantly if arbitration encounters any problem there will be effective support from the institution to save it as they have their own internal mechanism to save arbitration without making recourse to the national courts. For example in the event of non- cooperation by a party to appoint an arbitrator or if emergency measures are to be taken even prior to the establishment of the tribunal the institution has mechanisms and rules to deal with such situations.

Institutional arbitration may be more expensive than ad-hoc arbitration but it offers a lot more facilities than the latter. Capturing the essence of both types of arbitration Garry Born observes that:

"Institutional arbitrations are conducted pursuant to institutional arbitration rules, almost always overseen by an administrative authority with responsibility for various aspects relating to constituting the arbitral tribunal, fixing the arbitrators' compensation and similar matters. In contrast, ad hoc arbitrations are conducted without the benefit of an appointing and administrative authority or generally pre-existing arbitration rules, subject only to the parties' arbitration agreement and applicable national arbitration legislation."[31]

Arbitration Agreement:

Arbitration agreement is the very foundation of arbitration. It is the very source of the powers of arbitrators. It determines the scope of their authority. As arbitration is a voluntary process there cannot be arbitration without there being an arbitration agreement.

According to Section 7(1) "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."

Thus an agreement whereby parties express their consent or intention to settle the dispute through arbitration is termed as an arbitration agreement. Arbitration being a voluntary/ consensual process the consent must be very clear if there is any doubt about the said consent/ intent the matter cannot be referred to arbitration. For example if the agreement provides the parties "may" refer the dispute to arbitration that would not be a competent arbitration agreement as the intention to opt for arbitration is ambiguous. On the other hand if parties say that the matter "shall" be referred to arbitration that would be a valid agreement. Therefore one must be very careful while drafting the arbitration agreement.

Also there must be no ambiguity about the identity of the parties to the arbitration agreement. If some of the parties to a dispute are not a party to the arbitration agreement they cannot be referred to arbitration. Only those who are a party to the arbitration agreement can be referred to arbitration.

Types of Arbitration Agreement:

According to Section 7 (2) arbitration agreement can be in the form of a clause in the main contract or it can be in the form of a separate agreement. The latter is called

31 Gary Born, International Commercial Arbitration, 2nd ed. Wolters Kluwer p. 168.

submission agreement. Generally arbitration agreements are in the form of a clause in the main contract.

Form of arbitration Agreement: The Act does not prescribe any particular form for an arbitration agreement apart from <u>that it must be in writing</u>. If it is not in writing it cannot be enforced. An oral agreement to refer a dispute to arbitration is not competent. Section 7 (4) mentions the above mentioned agreement is considered to be in writing if it is contained in:

a) a document signed by the parties;
b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

The Supreme Court has held that the "statement of claim and defence" mentioned in Section 7 (4) (c) need not be the statement of claim and defence filed before the arbitrator and could be a stamen of claim and defence in any suit, petition or application filed before any court.

An arbitration agreement can be entered into by incorporating it from some other contract. According to Clause (5) of Section 7 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.

Power to Refer Parties to Arbitration Where there is an Arbitration Agreement: Section 8

When parties enter into an arbitration agreement, there is a positive obligation on their part to refer a dispute related to the said agreement to arbitration. Similarly an obligation is on the part of the national courts to decline jurisdiction or to refuse to entertain a matter which is a subject matter of an arbitration agreement between same parties. The only situation where the court can refuse to do the same is if the arbitration agreement is if the court "finds that, prima facie no valid arbitration agreement exists."

However a court will refer the matter to arbitration only if a party to the agreement asks the court to refer the matter to arbitration. Also such an application must be accompained by the original arbitration agreement or a duly certified copy of the same. Furthermore such an application must be made by the said party before filing his first statement on the substance of the dispute. Failure to do the same would amount to a waiver and allow the court to proceed.

MODULE II

COMPOSITION OF THE ARBITRAL TRIBUNAL

Chapter III of the Arbitration and Conciliation Act, 1996 titled Composition of Arbitral Tribunal contains detailed provisions about the appointment and removal of arbitrators. This Chapter consists of the following six sections-

Section 10- Number of arbitrators,
Section 11- Appointment of arbitrators,
Section 12- Grounds for challenge of arbitrators,
Section 13- Procedure for Challenging appointment of arbitrator,
Section 14- Termination of the mandate of arbitrator,
Section 15- Appointment of substitute arbitrator.

Number of Arbitrators

Once the parties have decided to refer the dispute to arbitration the next step is establishment of the arbitration tribunal. According to Section 2 (1) (d) arbitration tribunal means a sole arbitrator or a panel of arbitrators.

An issue of fundamental importance here is the number of the arbitrators which shall constitute the tribunal. Section 10 which deals with the number of arbitrators recognises that the parties are free to determine the number. Nevertheless it provides mandatorily that such number cannot be an even number. This restriction is to avoid a dead lock in the decision making. Though it is parties freedom to fix the number of arbitrators however if they have failed to fix the number the according to Section 10 (1) the tribunal shall consist of a sole arbitrator.

The common practice in arbitration both nationally and internationally has been to appoint either three arbitrators, or a sole arbitrator in cases which are less complex. In a three member tribunal each party will appoint one arbitrator and the third arbitrator is appointed by the party appointed arbitrators. The third arbitrator is termed as presiding arbitrator. This process is reflected in the Indian Arbitration Act, governing the mode of appointment of arbitrators.[32]

The practice of appointing an odd number of arbitrators with two party-nominated arbitrators and one presiding arbitrator is widely accepted internationally – both in other jurisdictions as

32 Section11(3), Arbitration and Conciliation Act, 1996.

well as in the rules of international arbitral institutes, which occupy central commercial roles in the practice of arbitration.[33]

Indian Statute

Section 10 of the Arbitration Act stipulates the number of arbitrators to be appointed.

> "*10. Number of arbitrators*
>
> > *(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.*"

The Indian statute is more restrictive than the options available under the Model Law. However, the judicial pronouncement on the section have made the interpretation more fluid, and in some cases, expansive.

UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration which India draws heavily upon, reads as follows, in Article 10.[34]

> *"Article 10 – Number of Arbitrators*
>
> *(1) The parties are free to determine the number of arbitrators.*
>
> *(2) Failing such determination, the number of arbitrators shall be three."*

The UNCITRAL Model law therefore follows a two-step process flowing in a unilateral direction.[35] *Firstly*, the parties decide on how many ever arbitrators they want. This requirement is without reference to whether the number of arbitrators chosen is odd or even. *Subsequently*, if there is no agreement on the number of arbitrators, the appointing authority would mandatorily appoint three arbitrators.[36]

The official commentary to the UNCITRAL Model Law justifies its stipulation of the number three as it is the most common option chosen in international commercial arbitration.[37] The commentary also suggests that it also intends to motivate parties to

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33 Debroy, Bibek, *Strengthening Arbitration and its Enforcement in India*, NITI Aayog, available at https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

34 Article 10, UNCITRAL Model Law on International Commercial Arbitration.

35 Howard M. Holtzmann, Joseph E. Neuhaus, United Nations Commission on International Trade Law, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary*, 2011.

36 *Ibid.*

37 Official Text of the UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments adopted in 2006, available at https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

explicitly agree upon their choice of the number of arbitrators, by providing a mandatory alternative if they do not.[38] These two reasons definitely guide the current position of the Indian law, as well. The specific deviation in the Indian Statute has been to replace the three-member tribunal with a sole arbitrator, in case of a non-agreement between the parties.

Odd & Even Arbitrators

Though Section 10 as stated above makes it mandatory that that number shall not be a n even number, in *Narayan Prasad Lohia v Nikunj Kumar Lohia*,[39] wherein the parties had provided for a two member tribunal, the Supreme Court held that Section 10 was a derogable provision and allowed the enforcement of the award. The Court held that stipulation of the even number of arbitrators was not in violation of public policy, but in the event of an impasse, the arbitrators could agree upon a third, presiding arbitrator.[40]

It must be noted that the application of Section10(2) is not affected by the decision of the Court in *Narayan Prasad Lohia*, as the case referred to a situation where the parties agreed to two arbitrators, went through the entire proceedings, received an award, and then one party protested saying that the process was in violation of Section10(1). The Court therein held that the party which had acceded to the process for so long, had waived its right to object to the number of arbitrators. This case is an exception and the parties must be careful of the restriction imposed by Section 10 (1).

Appointment of Arbitrators

The Arbtiration Act allows the parties the freedom to decide the procedure of appointing the arbitrators that they seek to appoint.[41] However, in the absence of an agreement between the parties, there are specific instances and remedies that the Act provides. These are enlisted below and summarized in the flowchart below:

i) In an arbitration with three arbitrators, each party is to appoint one arbitrator, and the two appointed arbitrators are to appoint the third arbitrator who will act as the presiding arbitrator;[42]

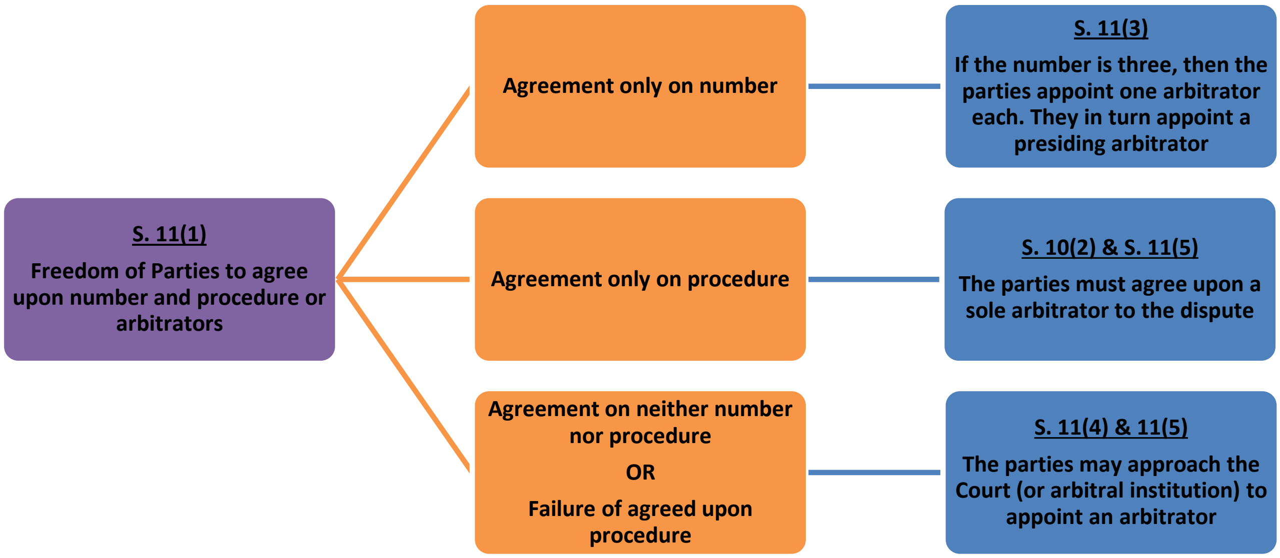
ii) In an arbitration with a sole arbitrator, the parties are to agree on the arbitrator;[43]

iii) If the parties have not specified the number of arbitrators, there will be a sole arbitrator, and the procedure mentioned just above will apply;[44]

38 *Ibid.*
39 AIR 2002 SC 1139.

40 *Ibid*.
41 Section 11(1), Arbitration and Conciliation Act, 1996.
42 Section 11(3), Arbitration and Conciliation Act, 1996.
43 Section 11(5), Arbitration and Conciliation Act, 1996.
44 Section 10(2), Arbitration and Conciliation Act, 1996.

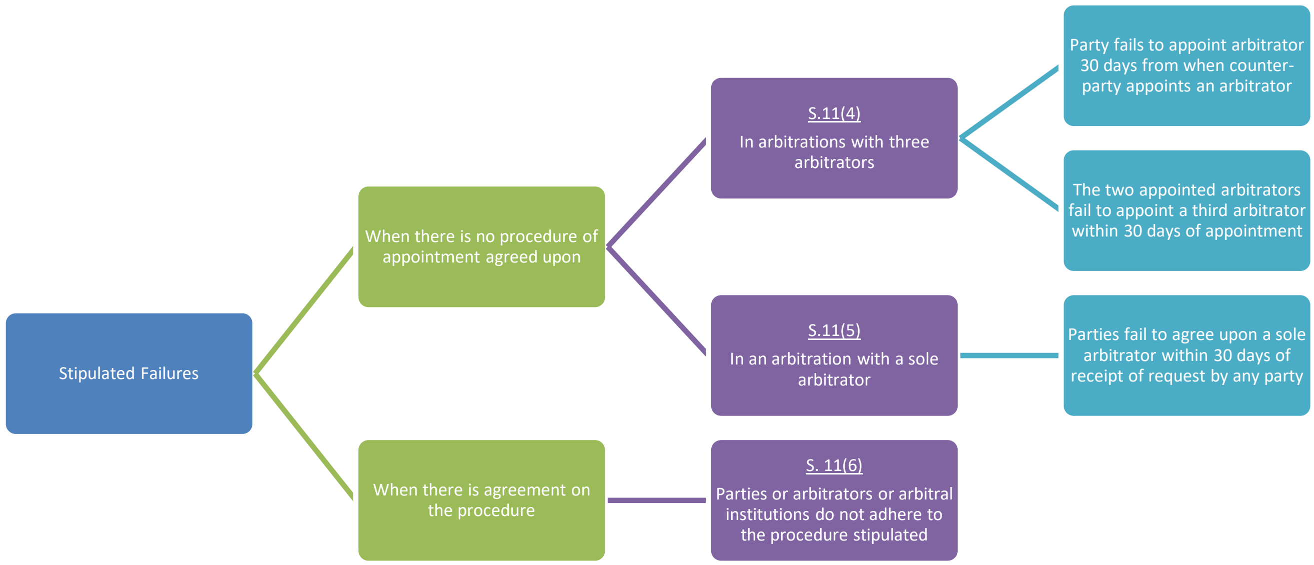
iv) If the default procedures in items (i) or (ii) fail, a party may request the relevant court (or arbitral institution pursuant to the 2019 Amendment, see below) to appoint an arbitrator.[45]



Stipulated failures

The Arbitration Act allows for the Appointing Authority to step into the appointment process when there are dysfunctions in the process. These are instances where the parties may request the court to intervene in the process to appoint an arbitrator. These are highlighted in the flowchart below.

45 Section 11(4) & Section 11(5), Arbitration and Conciliation Act, 1996.



It must be noted that in the case of no agreement between the appointed procedure, the Court has an active duty to appoint the requisite arbitrators. However, when a procedure is already agreed upon by the Parties, they are required to facilitate the appointment through the means that the parties have agreed upon.

Appointing Authority

The Appointing Authority refers to the authority that has the power to appoint the arbitrators when the parties cannot do it themselves. Important changes have been made in this respect in 2015 and then again in 2019.

2015 Regime – Court as the Appointing Authority

The Appointing Authority under the 2015 regime is laid out in Sections 11(5) of the Act. [46] The Appointing Authority for domestic arbitrations is the relevant High Court having jurisdiction over the dispute and the Supreme Court of India for an international commercial arbitration.

46 *S. 11(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 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].*

Under Section11(6-A), the Act also allowed the Supreme Courts and high courts to designate "persons or institutions" to appoint arbitrators. 47 This power has been used in *Sun Pharmaceutical case* the Supreme Court designated an arbitral institution to appoint an arbitrator.48

2019 Amendments – Arbitral Institutions

However, the 2019 Amendment has replaced the power of the Supreme Court and the High Court to appoint arbitrators, allowing arbitral institutions to appoint arbitrators, in international commercial arbitrations and domestic arbitrations respectively.49 These arbitral institutions must be pre-approved by the Arbitration Council of India.50

The High Court is required to appoint an arbitral institution within its jurisdiction and when no graded arbitral institutions are available in such jurisdiction, the Chief Justice of the High Court can maintain a set of empanelled arbitrators, who would perform discharge the functions of an arbitral institution in this respect.51

The Arbitral institution is required to designate an arbitrator, within thirty days of receiving a request to arbitrate.52 This is a welcome move, as arbitral institutions are commercially the most adept at streamlining the arbitral process. However, the coming into force of the 2019 Amendment is awaited.

Qualifications of the Arbitrators

The 2019 Amendment to the Arbitration Act introduced the qualifications for an arbitrator to be appointed and requires that the arbitrators who must be appointed be accredited with the

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47 *S. 11 (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.*

48 *Sun Pharmaceutical Industries Ltd., Mumbai v. M/S Falma Organics Limited Nigeria*, 2017 SCC OnLine SC 1200.

49 S. 11(5), Arbitration and Conciliation Act, 1996. "… *the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.*"

50 Section 10 of the 2019 Amendment Act, which provides this under Section 43I of the Arbitration and Conciliation Act 1996.

51 S. 11(3-A), Arbitration and Conciliation Act, 1996.
(*3-A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:*
Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.

52 Section 11(13), Arbitration and Conciliation Act, 1996.

Arbitration Council of India.[53] The qualifications of the arbitrator, and the general norms governing the accreditation process are detailed in the Eighth Schedule of the Arbitration Act, and are replicated below:

> "*Qualifications and Experience of Arbitrator*
> *A person shall not be qualified to be an arbitrator unless he—*
> *(i) is an advocate within the meaning of the Advocates Act, 1961 (25 of 1961) having ten years of practice experience as an advocate; or*
> *(ii) is a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949) having ten years of practice experience as a chartered accountant; or*
> *(iii) is a cost accountant within the meaning of the Cost and Works Accountants Act, 1959 (23 of 1959) having ten years of practice experience as a cost accountant; or*
> *(iv) is a company secretary within the meaning of the Company Secretaries Act, 1980 (56 of 1980) having ten years of practice experience as a company secretary; or*
> *(v) has been an officer of the Indian Legal Service; or*
> *(vi) has been an officer with law degree having ten years of experience in the legal matters in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector; or*
> *(vii) has been an officer with engineering degree having ten years of experience as an engineer in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector or self-employed; or*
> *(viii) has been an officer having senior level experience of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute;*
> *(ix) is a person, in any other case, having educational qualification at degree level with ten years of experience in scientific or technical stream in the fields of telecom, information technology, Intellectual Property Rights or other specialised areas in the Government, Autonomous Body, Public Sector Undertaking or a senior level managerial position in a private sector, as the case may be.*
>
> *General norms applicable to Arbitrator*
> *(i) The arbitrator shall be a person of general reputation of fairness, integrity and capable to apply objectivity in arriving at settlement of disputes;*
> *(ii) the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties;*

53 Section 43-I, Arbitration and Conciliation Act, 1996.

(iii) the arbitrator should not involve in any legal proceeding and avoid any potential conflict connected with any dispute to be arbitrated by him;

(iv) the arbitrator should not have been convicted of an offence involving moral turpitude or economic offence;

(v) the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards;

(vi) the arbitrator should possess robust understanding of the domestic and international legal system on arbitration and international best practices in regard thereto;

(vii) the arbitrator should be able to understand key elements of contractual obligations in civil and commercial disputes and be able to apply legal principles to a situation under dispute and also to apply judicial decisions on a given matter relating to arbitration; and

(viii) the arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication."

Grounds for Challenge and Challenge Procedure

Arbitration though a private mechanism but performs a very important function i.e. administering justice which must be fair and impartial. The arbitrator though is not a judge of a national court he does not possess the same powers but the function which he is to discharge is essentially the same- namely doing justice. One cannot be a judge in his own cause and therefore the arbitrator must be independent and impartial and if he has any link with the parties or the dispute which may give rise to suspicion about his independence or impartiality he must disclose the same to both the parties.

The Supreme Court in *International Airport Authority of India v K D Bali*[54] has stated that:

"It is well settled that there must be purity in the administration of justice as well as in administration of quasi-justice, as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it and was inn reality just; arbitrator must not do anything which is not in itself fair and impartial."

In streamlining the fairness of the arbitral process, the Act follows a threefold schema:

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54 AIR 1988 SC 1099.

1. The parties have the autonomy of appointing the arbitrators and the procedure of appointment and thus, may undertake their own background check, technical qualification check and agree on the procedure of appointment of these arbitrators
2. In the process of appointment, the arbitrators are required to disclose various circumstances which may lie within his own realm, in order to ensure that the parties are convinced of his independence and impartiality
3. If the parties become aware of any circumstances which raise questions about his independence and impartiality or if the bias of the arbitrator become evident, the parties may challenge the appointment of the arbitrator

These are identified in various parts of Section12 of the Act which identifies the process to challenge the appointment of an arbitrator. These are highlighted in turn.

Independence and Impartiality

The foundational principles of the entire appointment and challenge procedure is the principles of fairness of the arbitrator which may be understood through the independence and impartiality of the arbitrator. Thus, it is of essence to the parties that the arbitrator discharges his duties as an independent and impartial arbitrator. Although they are often used together in the arbitration context, the difference between the independence and impartiality of an arbitrator has been subtly identified by theorists. It has been said that "Independence and impartiality underpin the entire arbitral process", arbitrators and arbitral institutions should be ever vigilant in making sure that there is not the slightest appearance of bias on their part.[55]

The Bombay High Court in *Sheetal Maruti Kudundwade v Metal Power Analytical*[56] expounded that: "*Independence, therefore, as used in the statute means nothing more than deciding for oneself. Impartiality is lack of bias: the ability to decide without tilting to one side on considerations other than the merits of the case. Arbitral independence and impartiality is precisely this: to decide 'without fear or favour, affection or ill-will', words familiar to us all.*"

Independence refers to the lack of any objective, tangible relationship between any of the parties and the arbitrator. This is usually enquired through the form of a negative checklist of interactions that may exist between the parties. The most influential of these lists has been the International Bar Association's guidelines on the independence and impartiality of arbitrators. These guidelines have influenced the Fifth and Seventh Schedules of the Indian Arbitration Act, which are discussed below.

55 Shore Laurence, *Disclosure and impartiality: An arbitrator's responsibility vis-a-vis legal standards*, Dispute Resolution Journal.
56 2017 SCC Online Bom 251.

Impartiality on the other hand, refers to a subjective test, which is a test of the bent of mind of the arbitrator and a possible pre-disposition in the mind of the arbitrator. This is manifested by the previous conduct of the arbitrator in similar situations, or arbitrations with similar parties. Some examples include whether the arbitrator has professed views about the subject matter of the arbitration, whether the arbitrator often awards the costs to the party who loses the substantive dispute, etc.

The Supreme Court while looking at the extremely delicate situation of the appointment of an individual from an organisation as an arbitrator clarified the balancing exercise that it would have to consider while examining independence and impartiality of the arbitrator. The Supreme Court held:

> "*The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.*

Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

> *The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person.*"[57]

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57 *Indian Oil Corporation Ltd. v. Raja Transport (P.) Ltd.,* (2009) 8 SCC 520.

However, if the employee wrote a letter contemplating against the appointment of some other arbitrators so as to strategically benefit a party, she is not impartial, atleast as far as that case is concerned.[58] While there is a very fine line of distinction between the two concepts, they are mostly studied together, and there is a double requirement of both independence and impartiality of the arbitrator in most arbitral systems across the World.

Standard of Proof

It must be noted that there are several standards of proof in order to understand the lack of independence and impartiality of an arbitrator, which may be observed on a spectrum, ranging from a likelihood of bias to a proof of actual bias across the World.

The UNCITRAL Model Law, and in turn the Indian Arbitration Act use the standard of "*justifiable doubts as to the independence and impartiality"* of an arbitrator.[59] Thus, it must be noted that the party seeking to challenge the arbitrator need not prove that the arbitrator is biased with a *malafide* intent; nor prove that the arbitrator in fact has a definite lack of independence or impartiality, but that it is reasonable and justified for them (as a reasonable party) to believe that the arbitrator <u>*may be*</u> biased.

Circumstances levying doubts

The 1996 Act in its original form allowed parties to raise a challenge against an arbitrator whenever there were "any circumstances likely to cause justifiable doubts" about the independence and impartiality of the arbitrator. However, the act did not provide any examples or instances of such instances. The current form of the Act resolves that confusion through the amendments made in 2015 to the Act by introducing three statutory stipulations:

i. <u>Section 12(1)(a):</u>

"12 (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances —

> *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; "*

ii. <u>Explanation 1 to Section 12(1):</u>

"Explanation 1 — The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator."

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58 *Bharat Sanchar Nigam Limited v Motorola India Pvt. Ltd.*, (2008) 3 Arb LR 354.

59 *See* Article 12(1), UNCITRAL Model Law on International Commercial Arbitration, 1985; Section 12(1), Arbitration and Conciliation Act, 1996.

Thus, the Arbitration Act takes a leaf out of the International Bar Association's Guidelines on the Conflict of Interests and provides a set of instructive circumstances which may lead to justifiable doubts. There are 34 circumstances which are elaborated in the schedule based on six stipulated categories and one categories of miscellaneous categories. The Fifth Schedule is replicated below:

"The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

> ***Arbitrator's relationship with the parties or counsel***
>
> *1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
>
> *2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
>
> *3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
>
> *4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.*
>
> *5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
>
> *6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
>
> *7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*
>
> *8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
>
> *9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*
>
> *10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.*
>
> *11. The arbitrator is a legal representative of an entity that is a party in the arbitration.*
>
> *12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*
>
> *13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.*

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Previous services for one of the parties or other involvement in the case

20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

Relationship between an arbitrator and another arbitrator or counsel

25. The arbitrator and another arbitrator are lawyers in the same law firm.

26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.
28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

Relationship between arbitrator and party and others involved in the arbitration
30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.
31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

Other circumstances
32. The arbitrator holds shares, either directly or indirectly, which by reason of number or de-nomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.
33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.
34. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term "affiliate" encompasses all companies in one group of companies including the parent company.
Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."

iii. <u>Section 12(5) and the Seventh Schedule</u>

The Seventh Schedule also stipulates that there is a sub-set of these circumstances which may be viewed as more *prima facie* problematic than the other circumstances. These circumstances not only raise justifiable doubts about the impartiality of an arbitrator, but also render the arbitrator ineligible for appointment at the outset. The Seventh Schedule is replicated below:

> ***"Arbitrator's relationship with the parties or counsel***
> *1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
> *2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
> *3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
> *4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.*
> *5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
> *6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
> *7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*
> *8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
> *9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*
> *10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.*
> *11. The arbitrator is a legal representative of an entity that is a party in the arbitration.*
> *12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*
> *13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.*
> *14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.*
>
> ***Relationship of the arbitrator to the dispute***
> *15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.*
> *16. The arbitrator has previous involvement in the case.*

> ***Arbitrator's direct or indirect interest in the dispute***
> *17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.*
> *18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.*
> *19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.*
>
> *Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.*
>
> *Explanation 2.—The term "affiliate" encompasses all companies in one group of companies including the parent company.*
>
> *Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."*

It must be noted that the Fifth and Seventh Schedules are influenced by the International Bar Association Guidelines on Conflicts of Interest. The Orange List which is a larger list of circumstances which *may* raise concerns about the arbitrator, and hence may be waived by the parties is encapsulated in the Fifth Schedule. The Red List which contains a much more likely set of circumstances impugning the independence and impartiality of arbitrators is encapsulated in the Seventh Schedule.[60]

Obligation of disclosure & timing

As detailed above, the first mechanism to ensure fairness is the process of disclosure by the Arbitrator of any circumstances that arise in any of the three statutory sections – 12(1)(a), the Fifth Schedule and the Seventh Schedule. The obligation of disclosure is a continuing obligation that exists throughout the entire process of the arbitration. As per Section 12(2), the arbitrator *shall* disclose any of these circumstances, *at any time throughout the arbitral process* and *without delay*.[61]

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60 IBA Guidelines on Conflict of Interest, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918; Law Commission of India, Report No. 246 on the Amendments to the Arbitration and Conciliation Act, 1996, available at http://lawcommissionofindia.nic.in/reports/Report246.pdf.
61 Section 12(2), Arbitration and Conciliation Act, 1996.

Further, the Arbitrator is also required to disclose if he does not have the adequate time and professional bandwidth to devote sufficient time over the next twelve months and to complete the arbitration within a twelve-month time period. [62] This obligation too persists throughout the arbitral and a disclosure must be made without delay when an impending circumstance arises.

Challenging an Arbitrator's appointment

The Arbitration Act identifies that an arbitrator may be challenged:

i. If there are doubts leading to the independence and impartiality of the arbitrator[63]

ii. If the arbitrator does not have requisite qualifications, as agreed upon by the parties[64]

Procedure of challenge

Section 13 lays out in lucid detail, the procedure for the challenge of an arbitrator. Initially, it must be stated that the Parties have full discretion over deciding over the process of challenge of an arbitrator.[65] The rest of the section highlights the process which takes place when there is no such agreement.

> *"(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.*
>
> *(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*
>
> *(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.*
>
> *(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.*
>
> *(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."*

62 Section 12(1)(b), Arbitration and Conciliation Act, 1996.
63 Section 12(3)(a), Arbitration and Conciliation Act, 1996.

64 Section 12(3)(b), Arbitration and Conciliation Act, 1996.
65 Section 13(1), Arbitration and Conciliation Act, 1996.

Judicial analysis of a Challenge

It might be interesting to note that although there is a stipulation in terms of the schedule, the Courts tend to investigate the legitimacy of each challenge. Therefore, while the Fifth Schedule prescribes a situation which generally causes doubts in the minds of arbitrating parties about the independence and impartiality of an arbitrator, the Court may be called upon to rule whether there is in fact such a situation of reasonable apprehension, and not one where the parties have made a far-stretch to hinder the process.

Courts often look at the following factors while analysing the challenge made.

i) <u>Proximity</u>

The proximity of the relationship between the arbitrator and the parties is a consideration that is considered by the court.

Proximity maybe considered either through the number if appointments made, the recent appointments made by the same party or its affiliates, and the relationship between the parties in the foreseeable time before the current circumstance.

Further, a relationship which is remote, or extremely long before the impugned circumstances, could dissuade a tribunal.

ii) <u>Duration of the association</u>

The long- or short-term nature of the association between the party and the arbitrator may be of critical importance to adjudging the independence of the arbitrator.

An association that spans a longer period of time often leads to a presumption that the arbitrator may not make an unbiased decision regarding the party.

iii) <u>Possibility of re appointments</u>

The court might also consider whether the party re-appoints the arbitrator, either in his capacity of an arbitrator or as a consultant. For instance, empanelled counsel, consultants of a particular firm could come under question for the possibility of the impartiality of their decision.

In certain industries, which pick arbitrators from a limited pool, the arbitrators might be dependent on the bigger market players due to the economic realities. Such a relationship could also raise questions about their impartiality, and certainly their independence.

Termination of the Mandate of the Arbitrator

The mandate of the arbitrator is mandatorily terminated if:

i) The arbitrator is unable to perform his functions due to legal or practical reasons[66]
ii) The arbitrator withdraws or resigns from his office[67]

66 Section 14(1)(a), Arbitration and Conciliation Act, 1996.

iii) The arbitrator fails to act without undue delay[68]

iv) If the parties stipulate that his term has concluded[69]

v) The Court decides to terminate the mandate of the arbitrator, because of a controversy arising from a challenge to his impartiality or independence.[70]

Appointment of a Substitute Arbitrator

Section 15 also stipulates that when a substitute arbitrator is appointed in the place of an arbitrator whose term has been terminated, the substitute arbitrator is naturally to be appointed in line with the procedure for appointing an arbitrator for the first time.[71]

"15. Termination of mandate and substitution of arbitrator.—

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal"

The appointment of a substitute arbitrator needs to be in line with the arbitration agreement between the parties.[72] The Court has intervened into the process of re-appointment only when the efficiency of the process is affected due to the actions of the Parties. The Supreme Court laid down in *Yashwith Construction P. Ltd vs Simplex Concrete Piles India Ltd*[73] that since arbitration was a creature of consent, if the appointment of the arbitrator is done according to the terms of the Agreement, the Court will not intervene in an application made under §11 for appointment of the arbitrator by the Court.

However, the Supreme Court held that Section 15(2) meant only that the appointment of the replacement arbitrator must be made in compliance with the original agreement or clause that relates to the appointment of the arbitrator at the "*initial stage.*" Thus, if the initial appointment was not made based on §11(6), there is no requirement to seek appointment under §11(6) for the substitute arbitrator and whichever party had the power to appoint the arbitrator as per the agreement could do so.

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67 Section 14(1)(b), Arbitration and Conciliation Act, 1996.
68 Section 14(1)(a), Arbitration and Conciliation Act, 1996.
69 Section 15(1)(b), Arbitration and Conciliation Act, 1996.
70 Section 14(3), Arbitration and Conciliation Act, 1996.
71 Section 15(2), Arbitration and Conciliation Act, 1996.
72 *State of Haryana v G. F. Toll Road (P.) Ltd.,* (2019) 3 SCC 505.
73 Special Leave Petition (Civil) 11279 of 2006.

However, this has led to the question of what the exact scope of the phrase *"rules that were applicable to the appointment of the arbitrator"* is. Does every case of a substitute arbitrator appointment have to happen through the procedure anointed by the parties, even if the Court has already stepped into the process to appoint an arbitrator?

The dominant view has been to state that the decision in *Yashwith* applies solely to the situations where the arbitrator was to be appointed by one of the two parties.[74] Therefore, the phrase not only includes provisions in the arbitration agreement, but also refers to others including recourse to court under Section 11. Thus, if the rules applicable to the initial arbitrator itself, was a §11 application, the substitute arbitrator would also have to be appointed under another §11 application. This interpretation has been favoured both by the Allahabad High Court[75] and the Calcutta High Court.[76]

Thus, the position remains:

a. When the arbitrator has been appointed by the Parties under the rules prevailing in their agreement, then a substitute arbitrator is to be appointed according to the same procedure followed by the parties.
b. Where the original arbitrator has been appointed by a court pursuant to Section 11(6) of the Act, the appointment of a replacement arbitrator shall be made in accordance with the rules applicable at the initial stage, i.e. by invoking Section 11(6) of the Act. The parties do not need to start fresh by following the arbitration clause process for naming an arbitrator.

Separability of the Arbitration Agreement:

Doctrine of separability has played a huge role in the development of arbitration. In the absence of this doctrine it would be easy to frustrate arbitration by questioning the validity of the main agreement which contains the provision for arbitration. In our law this doctrine is enshrined in Section 16 (1) (a) and (b). According to Clause (1) (a) of the said provision "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and as per clause (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.

The doctrine of separabilty means that the agreement to arbitrate the dispute is separate from the main contract in which it is contained. It is considered an agreement having separate legal existence. The natural consequence of this is that even though the main or the principal agreement may be legally ineffective, the agreement to arbitration will not be impeached

74 *See ACC Limited v Global Cements Ltd.*, Special Leave to Appeal (Civil) No(s).17689/2012.
75 *Tirath Sumer Kumar v. Rakesh Kumar Mishra and others*, Arbitration Application No. 16 of 2015.
76 *Ramjee Power Construction Ltd vs Damodar Valley Corporation* on 5 February, 2009, AP No. 606 of 2008.

because of this. Being an autonomous agreement it is considered to have a separate legal existence which makes it immune from the infirmities of the main agreement. Thus provides art. 16 (1) of the Model law that "A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." In the similar vein describes justice Schwebel this concept as " When the parties to an agreement containing an arbitration clause, enters into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement."

This is of immense significance for ensuring the effectiveness of the arbitration agreement and hence the development of arbitration because it enables the arbitration to proceed even though the validity of the main agreement is challenged which may happen or happens quite frequent, in order to scuttle the process of arbitration. I suspect but for this doctrine international commercial arbitration would have reached the advanced level it has today.

Consider in contrast to this the traditional view in this respect, which propound that" by the sheer logic the arbitration clause must fall along with the underlying commercial contract, which is either non-existent or illegal." Thus in a famous ICC arbitration (No. 1110) in the year 1963, where the contract was alleged to be purchased by bribery, the sole arbitrator, observed that, such a dispute is not arbitrable saying that the parties to such a contract has forfeited the right to ask for the machinery of justice. Thus the doctrine of separability is a great saviour of arbitration in cases wherein the validity of the primary agreement is challenged as in such case the argument is that there is no occasion to arbitrate.

The French case of *Gosset v Carapelli* is considered the pioneering case with respect to the doctrine of separability. In this case Carapelli sought to enforce an Italian award in France. Gosset argued that the award should not be enforced because the underlying sale contract was null and void because of violation of French import regulations, which in turn supposedly rendered the arbitration clause contained in the sales contract invalid.

The Court held that in matters of international arbitration agreement concluded separately or included in the legal act to which it is related always has, except in exceptional circumstances a complete judicial autonomy excluding it from being affected by an eventual invalidity of that act.

Fiona Trust case is another good example of this. In this case the contract was alleged to be procured by bribery and one party challenged the arbitration on the ground that had it been known to them that the agreement is purchased through bribes, they would not have entered into the agreement and hence arbitration. The Court of Appeal and House of Lords held that the arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to arbitration agreement. In particular the Court observed had it been that the consent to arbitration is procured through bribes the result of the case would have been different.

The notion of separability may be a legal fiction but is of great practical relevance. Thus in *S.M.S. Tea Estates Pvt. Ltd. v Chandamari Tea Co. Pvt. Ltd.*[77] where there was an arbitration agreement in an unregistered lease deed though required to be compulsorily registered as per Section 49 of the Registration Act 1908 was considered to survive for the purpose of referring the dispute to arbitration on the basis of combined reading of Section 49 and doctrine of separability as enshrined under Section 16 (1) (a). According to the relevant Act only the lease deed is required to be registered not the arbitration agreement. Though the arbitration agreement survived but the arbitrator would not be able to rely upon the said lease deed since it was not registered.

Consequences of Separability:

(i) Makes the arbitration agreement immune from the infirmities of the main contract.
(ii) It creates the foundation for the doctrine of competence – competence.
(iii) Makes the main contract immune from invalidity of arbitration agreement.
(iv) In the context of international commercial arbitration enables to subject the main agreement and the arbitration agreement to different laws.

Competence –Competence: This principle means that like courts the arbitration tribunal also has the power to decide their own jurisdiction. In simple words it is the competence of the tribunal to decide its own competence. Under Indian law this doctrine is enshrined in Section 16 of the Act. According to Section 16 (1) "The tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement."

This doctrine is a great saviour of arbitration as in the absence of the same it would be easy to frustrate arbitration by challenging the jurisdiction of the tribunal. Such dilatory tactics can seriously undermine the efficacy of arbitration. Empowering the tribunal to deal with such challenges and making it immune from the interference by the courts at this stage enables the arbitration to function smoothly.

However this doctrine does not mean that the arbitration tribunal is the final decision maker with respect to its jurisdiction. The ultimate decision is made by the courts only but under our law if the tribunal rejects the challenge to its jurisdiction the aggrieved party has to wait for

77 2011 (4) Arb LR 265 (SC)

the final award and challenge it before the court under Section 34 on the ground of lack of jurisdiction. There is no possibility of an interim challenge as is provided under the

UNCITRAL Model Law

Under the Model Law the tribunal can pass an interim award on its jurisdiction and the aggrieved party can challenge the same before the relevant court, without waiting till the final award on merits. On the other hand if the tribunal accepts the jurisdictional challenge the decision is not an award but an order and can be challenged under Section 37 (2) (a) of the 1996 Act.

Time of Objection:

According to Section 16 (2) objection that the tribunal lacks jurisdiction shall be raised before the respondent files the statement of defence and as per clause (3) any objection of exceeding the jurisdiction by the tribunal shall be raised as soon as such matter which is alleged to be beyond the scope of tribunal's mandate is raised before the tribunal. However the tribunal has the power to condone the delay in raising the jurisdictional challenge whether of lack or excess if it finds that there were justifiable reasons for the delay.

The interlink between Separability and Competence –Competence:

It is remarkable here that the tribunal does not get the power to decide its own jurisdiction just because the two agreements are separate. This power lies with them because of the concession made by the national legal systems. Nevertheless the principle of Competence-Competence cannot stand without the idea of separability at the first place. Because if the infirmity or invalidity of the main agreement it is allowed to contaminate the secondary agreement that is the agreement to arbitrate, the later would fall along with the former hence no occasion for the tribunal to decide its jurisdiction. Thus the concept of seprability is of immense significance for the principle of competence- competence.

Both these concepts emanate from the idea of autonomy of the two contracts i.e. the principal contract and the contract to arbitrate. Separability is the substantive aspect of autonomy while competence – competence the procedural. Separability enables the tribunal to deal with any dispute over the existence or validity of the main agreement, while Competence-Competence, enables them to rule on any question relating to their jurisdiction. Both collectively ensure the effectiveness of the arbitration agreement.

Interim Relief under the Indian Arbitration & Conciliation Act

Arbitration, as a method of dispute resolution, is based on party autonomy. This concept of party autonomy allows parties to adopt procedure that they think suits their dispute, while also allowing for flexibility. However, this arbitral process is also accompanied by certain procedural safeguards such as interlocutory or interim measures that safeguard parties during the pendency of proceedings.

It has been observed that parties often engage in dilatory tactics to delay proceedings or prejudice rights of opposite parties by inter alia dissipating assets or interfering with the functioning of bodies. (In case of a company where both parties are stakeholders). In such a situation, the final relief granted by a tribunal may be rendered nugatory or meaningless unless the arbitral tribunal or court is able to safeguard the rights of parties during the pendency of the arbitral proceedings. Therefore, in the intervening period between juncture at which the 'dispute' arose (in certain circumstances even before the commencement of arbitration) and till the execution of the award, certain interim measures may be necessary to protect a party's rights and ensure that justice is done.

The nature of interim relief sought by the parties may vary based on the facts and circumstances of the dispute. In certain situations, the effective provision of interim reliefs may involve directions to third parties also. The following text hopes to clarify the regime governing interim measures in Indian Arbitration.

Interim measures in arbitration

The Arbitration and Conciliation Act, 1996 ('the Act'), which was formulated on the basis of UNCITRAL Model Law on International Commercial Arbitration, 1985, provides for interim measures under Sections 9 and 17 by courts and arbitral tribunals respectively. Under S. 9, parties can approach the courts for interim relief, while under S. 17, they must approach the arbitral tribunals themselves.

Reliefs under Section 9

Court is empowered to grant interim measures under section 9 in the following circumstances:

a. Before the tribunal has been constituted.
b. After the award has been made and prior to its enforcement.

Furthermore, courts are also empowered to grant interim measures in the course of the arbitral proceedings, after the constitution of the tribunal, when an interim measure granted by the tribunal would not be efficacious.[78] While deciding an application for grant of interim stay in such cases, courts can make an assessment according to the relevant facts and circumstances with precision including instances like the lethargic manner of arbitrators in granting interim reliefs in respect of assets rendering the remedy inefficacious.[79]

78 Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd., 2017 SCC OnLine Del 7226 (para 25, 27)

79 SREI Equipment Finance Limited (Sefl) v. Ray Infra Services Private Limited & Anr., 2016 SCC OnLine Cal 6765.

Additionally, a court in India can pass orders for interim measures of protection even if the place or seat of arbitration is outside India.[80] However, this can be done unless the parties have agreed otherwise and entered into a different agreement.[81]

It is important to note that section 9 does not prescribe any particular standards for grant of interim reliefs by court. Some courts have, however, applied standards under the Code of Civil Procedure, 1908 (“CPC”) such as Order XXXVIII and Order XXXIX.

Courts have held that standards prescribed in the CPC would not be applicable to proceedings under Section 9 of the Act. It has further been laid down that if a party can merely show that it has a good case on merits, it would be likely to succeed.

However, the extent to which provisions of the CPC would apply to proceedings under section 9 of the Act still remains unsettled owing to difference of opinions rendered by courts in India.

There are generally two lines of approach that has been followed by courts in India: an exclusive approach and an inclusive approach. The former line of reasoning provides that every provision in the CPC cannot be rigorously put into place to defeat the grant of relief provided under Section 9 of the Act. Whereas the latter line of reasoning argues that proceedings under Section 9 of the Act are similar to proceedings under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 of the CPC and consequently the principles contained therein would have to be considered for the grant of interim reliefs.

Interim Measures by an Arbitral Tribunal under Section 17

The power of an arbitral tribunal to grant interim measures is provided under section 17 of the Act. The following are certain reliefs that may be granted by an arbitral tribunal as per section 17:

a. Securing the amount in dispute in the arbitration;[82]
b. The detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration;[83]
c. Interim injunctions and the appointment of a receiver;[84] and
d. any other interim measure which is just and convenient.

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80 Arbitration and Conciliation Act 1996, Section 2(2).
81 Ibid.

82 Intertole ICS (Cecons) O & M Company v. NHAI (2013) II Delhi
83 Arun Kapur v. Vikram Kapur and Ors. 2002 (61) DRJ 495
84 Baker Hughes Singapore Pte v. Shiv-Vani Oil and Gas Exploration Arbitration Petition No. 1127 OF 2014 (Bombay High Court); Indiabulls Financial Services Ltd.v. Jubilee Plots and Housing OMP.Nos. 452/2009 (Delhi High Court).

However, section 17 does not grant an arbitral tribunal the authority to pass interim measures against a third party.[85]

Standards Applicable to the grant of interim reliefs by the Arbitral Tribunal under

Section 17

As discussed earlier, courts in India have been cautious from importing principles contained in Order XXXVII Rule 5 and Order XXXIX Rule 1 & 2 to the grant of interim reliefs under section 9. Following cases discuss the issue regarding standards to be applied while deciding a case for grant of interim relief.

In *Intertole ICS (Cecons) O &M Company v. NHAI*[86], it has been held by the Delhi HC that an arbitral tribunal would have to ascertain whether the petitioner has made out a case as per Order XXXVIII Rule 5, prior to granting an interim relief furnishing security for the amount claimed.

Who can apply for interim measures?

Any party to the arbitration agreement can make an application for interim measures in the course of the arbitral proceedings. However, once the award has been rendered, only the successful party is entitled to seek the enforcement of such an award. Thus, the successful party can proceed to the court under section 9 of the Arbitration & Conciliation Act, 1996 ("Act") for protection in terms of Section 9 (ii) of the Act.

This is owing to the fact that section 9 envisages an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for securing the property for the benefit of the party which seeks enforcement of the award. In this context, the Bombay High Court in the case of ***Wind World (India) Ltd. v. Enercon GmbH and others 2017 SCC OnLine Bom 1147*** (para 18) has observed that:

"If an application is made at the instance of such an unsuccessful party under section 9, there will not be any occasion to grant any interim measure which will be in the aid of the execution of the arbitral Award as such a party will not be entitled to seek enforcement under section 36."

Enforceability of an interim order granted by a Court

Courts are empowered to enforce the interim reliefs granted by it as any other order of the court. In cases where there is any willful non-compliance/disobedience of the judgment/order, parties have the right to initiate contempt proceedings for civil contempt

85 MD. Army Welfare Housing Organisation v. Sumangal Services (P) Ltd, (2004) 9 SCC 619.
86 Intertole ICS (Cecons) O & M Company v. NHAI (2013) ILR 2 Delhi 1018

under Section 2 (b) of the Contempt of Courts Act, 1971. The parties that have willfully refused to comply can be punished with the maximum punishment as provided in terms of Section 12 of the Contempt of Courts Act, 1971.

Enforceability of an interim measure granted by an arbitral tribunal

Though, the arbitral tribunal has the power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted resulted in doubts being case over efficacy of the arbitral process in India.

Some of the cases dealing with enforcement of interim measures have been discussed below: The Delhi High Court in Sri Krishan v. Anand[87], has held that any person failing to comply with the order of the arbitral tribunal under Section 17 would be deemed to be "*making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings*" under Section 27 (5) of Act, as it being the only mechanism for enforcing its orders. Hence, such a party failing to comply the orders would be in contempt of court. Furthermore, it has also been held that has held that an order passed by an arbitral tribunal that is subsequently upheld by a court in an appeal filed under Section 37 of the Act, would be enforceable as an order of the court.[88]

However, after the enactment of Arbitration and Conciliation Amendment Act, 2015 ("Amendment Act"), it has been now provided under section 17 that an order of the tribunal would be enforceable like an order of the court in case of interim reliefs granted by arbitral tribunals. Additionally, the SC has held that the non-enforcement of interim relief granted by an arbitral tribunal can be seen as triable offence, as it would amount to contempt of court [89].This applies only to arbitrations that commenced post October 23, 2015 (i.e. the date of commencement of the Amendment Act) as language of section 26 of the Amendment Act stipulates that "*nothing in the Amended Act, shall apply to 'arbitral proceedings' commenced as per Section 21 of the Act, before the commencement of the Amendment Act*."

87 (2009) 3 Arb LR 447 (Del); Indiabulls Financial Services v. Jubilee Plots, OMP Nos 452-453/2009
88 BPTP Limited v. CPI India I Limited and Ors. 2015 (4) Arb LR 410 (Delhi).
89 Alka Chandewar v. Shamshul Ishrar Khan 2017 SCC OnLine SC 758

MODULE III

CONDUCT OF ARBITRAL PROCEEDINGS

Equal Treatment of Parties

*"**18. Equal treatment of parties.-** The parties shall be treated with equality and each party shall be given a full opportunity to present his case."*

Section 18 states that the parties to an arbitration must be meted out equal treatment and also equal opportunity to present their case before the arbitral tribunal. In other words, section 18 provides principle of natural justice, that an arbitral tribunal should treat the parties with equality and provide equal opportunities for presentation, prosecution, defence and interim application in respect of the case. Principles of justice and fair play must be applicable during the entire process of an arbitration.

On number of occasions, the Hon'ble Supreme Court acknowledged the aforesaid principle and said that the arbitral tribunal should create confidence, not only by doing justice between the parties, but also by creating a feeling that justice appears to have been done.[90]

Expression "equal treatment of parties"- connotation of

The expression "equal treatment of parties" denotes that arbitral tribunal is required to follow the principle of natural justice and fair play while conducting arbitral proceedings. It is necessary that the parties must be given full and equal opportunity to put up their contentions. According to Russell,[91] "*once the arbitrators enter into a 'reference' they virtually become judges in the cause to act impartially. They must observe in their proceedings the ordinary rules of administration of justice*".

The Apex court is of the view that "*once the arbitrator enters in an arbitration, he must not be guilty of any act which can be construed as indicative of partiality or unfairness."*[92]

Arbitrators to render equal opportunity to the parties

In the absence of fairness and equal opportunity to the arbitrating parties and making of arbitral award, it will not only defeat the very substratum of the arbitration but also make such arbitral award unsustainable in the eyes of law. Arbitrator occupies the position as a

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90 *Vengamma v Kesanna*, AIR 1953 SC 21, 22-23; *N.K. Ahammad v. Madras State Housing Board*, (1979) 1 MLJ 185: *K.V. George v. Secy. To Government, Water and Power Dept., Trivandrum*, AIR 1990 SC 53*: A.K. Kraipak v. Union of India*, AIR 1970SC 150.

91 On Arbitration, 20th Edn. P. 233.

92 *International Airport Authority of India v K.D. Bali*, AIR 1988 SC 1099.

Judge and he is bound to follow the principle of natural justice. During the course of arbitral proceedings, the arbitrator must provide equal opportunity to both the parties and to present their 'cause' and non *ex parte* arbitral proceedings is desirable.[93]

A party should not be examined in absence of another

It is not permissible to examine one party in the absence of another. Thus, there is no *ex parte* arbitration as such.[94] It is the fundamental principle of natural justice that no order should be passed without hearing both the parties in arbitration. No one should be condemned unheard rather unilaterally.[95] Where it is found that the arbitral proceedings per arbitrary, unfair and were not based on principle of natural justice, the arbitral award is liable to be set aside.[96]

Section 18 reflects principles which are well established by Constitutional Law

Section 18 shows principles which are otherwise well settled by the jurisprudence developed by the Apex Court in the context of the Constitutional and Administrative laws. There will be no distinction between quasi-judicial function and administrative function for purpose of application of rules of natural justice. *In D.K. Yadav vs J.M. Industries* the Apex Court has held that there can be no distinction between a quasi-judicial function and administration function for the purpose of principles of natural justice. The aim of both administrative enquiry as well as quasi-judicial enquiry is the same that is to arrive at a just decision and if the rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice it is difficult to see why it should not applied to quasi-judicial enquiry and not to administrative enquiry.

Article 14 of the Constitution of India, 1950 is the basic law of land and its preamble enshrines the concept of equality and rule of natural justice. It is a protection against arbitrariness and in case of arbitrary action it is liable to be dismissed. In *Maneka Gandhi VS Union of India* [97] the Apex Court propounded a new concept of equality that "*Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.*" The arbitral tribunal is under statutory obligation to abide by the principal of equality and not be followed to discriminate the parties arbitrating before tribunal. It means the parties are entitled to be given a full of opportunity to put up their point of arguments and must be allowed to submit materials in support of their contention.

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93 *Vengamma v Kesanna*, AIR 1953 SC 21.
94 *Ibid*.
95 *Commissioner Wealth Tax v. Jagdish Prasad*, (1995) 211 ITR 472 (Pat.)
96 *Union of India v. Hindustan Development Corporation*, AIR 1994 SC 988.
97 AIR 1978 SC 597

Arbitral award must be based on evidence.

Supreme Court in *Municipal Corporation v. Jagannath*[98], has ruled and reiterated that it is not permissible for the arbitral tribunal to proceed with personal knowledge. Tribunal has to rely on evidence/documents submitted before them by the parties. Though, the arbitrators are appointed by the parties but they should not present themselves as advocates for the parties who has appointed them. Thus, the arbitrators must give full and reasonable opportunity to the other party to present this case. All arbitrating parties must be examined in presence of all the arbitrators or at least in presence of majority of arbitrators.

Determining Rules of Procedure

Rules of procedure of the arbitration proceedings imply the legal principles that govern the process and conduct of arbitration. The Code of Civil Procedure, 1908 and the Evidence Act, 1862 are not binding upon the process of arbitration. This restriction cannot be extended to execution proceedings. Similarly, the restriction on application of Code of Civil Procedure, 1908 is only till the point of passing of award, post this phase, the Code is applicable. The parties have the complete independence to determine the procedural rules of the arbitration process, failing which the arbitral tribunal determines appropriate rules applicable to the process of arbitration. Section 19 deals with the determination of rules of procedure as:

*"**19. Determination of rules of procedure.**—(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 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."

When the parties fail to determine the rules of procedure, the arbitrator may limit the evidence based upon the requirements of a case and the court in such situations shall not intervene. The court should be slow to interfere with the orders of the arbitrator in terms od determining procedure when the parties have not defined the procedure on their own.[99] An arbitrator may order for filing of pleadings, or for discovery or inspection of documents. However, despite the non-applicability of the Evidence Act, 1862, the arbitral tribunal shall follow the ordinary rules of evidence and deliver the award based on merits of the case, which in no way shall be deemed to be miscarriage of justice.

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98 AIR 1987 SC 2316
99 *Carlisle Place Investments v Wimpey Construction,* (1980) 15 Building LR 109

Seat of Arbitration

The Arbitration and Conciliation Act, 1996 grants the authority to the parties to decide the place where the arbitration proceedings shall be held by virtue of the arbitration agreement. When the arbitration agreement does not prescribe a place, the arbitral tribunal fixes the place of arbitration. The arbitral tribunal shall then consider factors like the circumstances of the case and the convenience of the parties to appear before it. But if the agreement gives the arbitrator absolute discretion to fix such place or places as the venue of the arbitration as he thinks fit, neither side will be entitled to raise any objection in respect of it, apart from other implications, such as failure of natural justice.[100]

*"**20. Place of arbitration**.—(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 witnesses, experts or the parties, or for inspection of documents, goods or other property."

The seat of arbitration is an important concept in arbitration proceedings. Unless already agreed between the parties, the law governing the arbitration proceedings (also referred to as curial law) shall be the law of the seat of arbitration.[101] So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate.[102] The arbitral procedure including the constitution of the arbitral tribunal is decided either as per the will of the parties or by the law of the country in which the arbitration takes place (seat).

Seat theory is defined as, *"The concept that an arbitration is governed by the law of the place in which it is held, which is the "seat" (or "forum" or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration."*[103]

The Hon'ble Supreme Court in BALCO Judgment (*Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc*)[104] held that for the purpose of Section 2(1) (e) of the 1996 Act, the courts at the seat of the arbitration do not have exclusive jurisdiction. Instead,

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100 *President of India v Kesar Singh,* AIR 1996 J&K 113 at p. 116
101 *Union of India v. McDonnell Douglas Corporation* (1993) 2 Lloyd's Rep 48
102 *Union of India v Hardy Exploration and Production India (INC)* AIR 2018 SC 4871
103 Blackaby, Nigel, Redfern And Hunter on International Arbitration, Oxford, New York, Oxford University Press, 2009
104 (2012) 9 SCC 552

two courts have concurrent jurisdiction: (1) the court which is amenable to the seat of the arbitration and (2) the court within whose jurisdiction the cause of action arises.

BALCO judgment further clarified that the rule regarding prospective effect was applicable only to the finding that Part I of the Arbitration Act, 1996, is applicable only to all the arbitrations which take place within the territory of India, and not to other ratio laid down in BALCO.

The Hon'ble Supreme Court, in the case, *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc (Supra),* has provided a detailed clarification in terms of "place", "seat", "situs", "venue". The place agreed between the parties to conduct the arbitration proceedings under the arbitration agreement shall be the seat of arbitration. Similarly, seat of arbitration shall be decided by the arbitrator in the absence of the contract between the parties in relation to the same. However, when the arbitral tribunal meets at any place for consultation among its members, hearing witnesses, expert or parties or for inspection of documents, goods or other property, that shall be deemed to be venue of arbitration.

In the case, *Shin Satellite Public Co. Ltd. v Jain Studios Ltd.,*[105] one of the parties to the arbitration submitted that the matter should be referred to arbitration either in London or Singapore where other arbitrations were already in progress concerning the same parties but the arbitration agreement provided Delhi as the place for arbitration. Hence, the court disallowed the request as Delhi was pre-decided by the parties as the venue and the part of the agreement was enforceable.

When the arbitral tribunal decides the venue of arbitration, the same cannot be construed as an award by the arbitrator and neither an interim award and therefore it cannot be appealed in the court.[106]

Commencement of Proceedings

The commencement of arbitral proceedings is a significant step in the process of arbitration. It identifies the existence of a dispute between the parties and the reflects the decision of one party to refer that dispute to arbitration in the terms of their arbitration agreement. The real significance is the legal consequences attached to the commencement of the arbitration. Most important is the fact that it stops the limitation period from running which otherwise, if exceeded, would limit or preclude the exercise of rights. The parties can agree mutually through the agreement when the arbitration proceedings shall be deemed to commence and the related steps which mark the commencement of proceedings.

105 (2006) 2 SCC 628

106 *Sanshin Chemicals Industry v Oriental Carbons and Chemicals Ltd,* (2001) 3 SCC 341

The arbitral proceedings commence as soon as a request is made by any one of the party to the arbitration agreement to another party for referring the existing dispute to arbitration.
Section 21 of the Arbitration and Conciliation Act, 1996 defines the aspects related to commencement of arbitral proceedings. The relevant section is reproduced below:

*"**21. Commencement of arbitral proceedings**- 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."*

1. ***Determination of date of commencement***

As discussed above, the determination of the date of commencement of arbitral proceedings is necessary for deciding the limitation. It is at the option of the parties to decide and determine the date of commencement of the proceedings. In the absence of any agreement which specifically deals with the aspect of date of commencement of arbitral proceedings, Section 21 provides that such date shall be the date on which request is received by one party from the other to make a reference of the dispute to arbitration. Hence, the date of commencement on the service of notice to refer the dispute to arbitration by one party to another becomes relevant only when no other time has been already agreed by the parties.

Under Section 21 of the Arbitration and Conciliation Act, 1996, the date of service of notice to appoint an arbitrator will not be deemed to the date of commencement of proceedings.

2. ***Determination of notice of arbitration***

A notice of arbitration can be limited to a brief reference to the claim and the relief that has been sought by the party serving the notice from the another party. Its main purpose is to inform the respondent that arbitration proceedings have been started and a claim will be submitted.[107] The complete statement of claim mentioning the entire details of the existing dispute and the complete claim sought along with the grounds for seeking such claim will be required only at a later stage of the arbitration proceedings after the tribunal is appointed and such tribunal directs filing of such statement of claim after such appointment.

The question with respect to commencement of proceedings lies with the arbitral tribunal and is dependent upon the fact whether proper notice to refer the existing dispute to arbitration has been given by one party to another. As per the case, *Secur Industries Ltd v Godrej & Boyce Mfg Ltd*,[108] in case of a statutory tribunal functioning under a special Act, it will also be for the tribunal to decide whether a notice of the kind contemplated under Section 21 is a pre-condition to the exercise of its jurisdiction.

107 Anirban Chakraborty, *Law & Practise of Alternative Dispute Resolution in India*, First Edition, 2016, LexisNexis
108 (2004) 3 SCC 447 at p. 452

In the case, *Taylor Woodrow Construction Ltd. v RMD Kivikform Ltd*,[109] the claimant wrote a letter the defendant asking whether the defendant was wishing to rely on arbitration agreement or agreeable to the matter being litigated, the court said that such communication did not constitute an agreement for commencement of arbitration proceedings.

3. Limitation period for commencement of arbitration proceedings

As per Section 43(1),[110] the Limitation Act 1963 applies to all proceedings under the Arbitration and Conciliation Act, 1996 just as it applies to proceedings in the Indian courts, except to the extent expressly excluded by the Arbitration and Conciliation Act, 1996. Any arbitration proceedings commenced after the limitation period (three years from the date on which the cause of action arose) will be time barred.

The arbitration agreement may prescribe the limitation period within which some step shall be taken to refer the future disputes to arbitration otherwise the party shall loose it's right to raise its claim under the arbitration agreement. However, the Court may, in the interest of justice, extend such time period even when the time period mentioned under the arbitration agreement has expired if under the circumstances of the case, undue hardship would otherwise be caused.[111] In *Sterling General Insurance Co. v. Planters Airways*,[112] 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.[113]

An application for extension of time under Section 43(3) can be made to the court even after the time mentioned in agreement to refer the case for arbitration has ended however such application should be forwarded only before any step is taken to begin the arbitration proceedings and not thereafter.[114]

Further, if the court sets aside an arbitral award, the limitation period for proceedings including arbitration proceedings shall exclude the date of commencement of such proceedings till the date of passing of such order for setting aside the arbitral award in respect of the dispute.[115]

4. Limitation for counterclaim

In the case, *Voltas Ltd v Rolta India Ltd*,[116] the arbitration clause was invoked by the appellant and the arbitrator was appointed a few years after the dispute arose. The respondent

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109 2009 Bus LR 292 (TCC); 2008 EWHC 825
110 The Arbitration and Conciliation Act, 1996
111 Section 43(3), Arbitration and Conciliation Act, 1996
112 1SCC. 1975, 603
113 Consolidated Investment v. Saponaria Shipping, LR 16 The Virgo Case, 1978, 2
114 Dr. Murlidharan E, venkataraman V. Co. and Another, AIR Mad. 40 DB, 2009
115 Section 43(4), Arbitration and Conciliation Act, 1996
116 (2014) 4 SCC 516

filed counterclaim only after filing its statement of defence before the arbitrator. The counterclaim was filed three years after the cause of action arose. The counterclaim could not become time-barred because the respondent has crystallised his claim. The court said that saving of claim was restricted to the amount claimed in the notice. The additional amount claimed in the counterclaim was not saved from time-bar.

Language of Arbitration Proceedings

The language of the proceedings is to be indicated by the parties under their agreement. If the parties fail to define the language of the arbitration proceedings in the agreement, the arbitral tribunal has the authority to define the language of the arbitration proceedings. The language decided for the conduct of arbitration proceedings, either mutually through the agreement or by the arbitral tribunal, shall be applicable to any written statement of either party, any hearing, arbitral award, decision and any communications by the arbitral tribunal. The arbitral tribunal may, at its discretion, order the documents filed it in any other language to be translated in the language decided for the conduct of arbitration proceedings. The relevant section of the Arbitration and Conciliation Act, 1996 is reproduced below:

*"**22. Language.-** (1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.*
(2) Failing an agreement referred to in sub-section (1), the Arbitral Tribunal shall determine the language or languages to be used in 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 language agreed upon by the parties or determined by the Arbitral Tribunal."

*5. **Parties' choice of language***

It is at the option of the parties which language they shall choose for the conduct of arbitration proceedings. This option even extends to choosing more than one language as the language for the conduct of arbitration proceedings. Party autonomy is important in choosing the language in arbitration proceedings as the choice of language affects the parties' position in the proceedings and the expediency and costs of the arbitration. The parties also have the option to decide the documents that shall be filed and in which language. The parties can further decide the language of written statements, hearings, arbitral award, etc. to be distinct or similar. They may exclude certain document to be filed in any particular chosen language also.

The parties may, under the agreement also waive their right to choose the language of arbitration.

Pleadings

The pleadings in the arbitration proceedings are in the form of statement claim which is filed by the claimant and the statement of defence which is filed by the respondent on the instructions of the arbitral tribunal. The claimant has to file the statement of claim indicating the facts supporting his claim, the points which led to the issue(s) in question and the relief that the claimant seeks from the arbitral tribunal against the respondent. The parties may also agree through the arbitration agreement upon the particulars that shall be mentioned in the statement of claim or defence. The respondent on being served with the statement of claim has to state his defence in respect of the points that are mentioned in the statement of claim. The parties may, through the arbitration agreement, agree to choose any other method of bringing the issue(s) under dispute to the notice of the arbitral tribunal. The time for filing papers may be fixed under the arbitration agreement else the arbitral tribunal decides the time of filing the respective statements by the claimant and the respondent. If the claimant fails to submit the statement of claim within the time stipulated under the agreement or as decided by the arbitral tribunal, the arbitral tribunal may terminate the proceedings. However, if the respondent fails to file the statement of defence within the time frame provided by the arbitral tribunal, the tribunal may continue with the proceedings but such failure shall not imply admission of allegations of the claimant by the respondent. Section 23[117] relates to the filing of statement of claim and defence as:

*"**23. Statement of claim and defence.**- (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."

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117 The Arbitration and Conciliation Act, 1996

1. *Amendment, counter-claim and set off*

The parties may during the course of arbitration proceedings amend or supplement their respective statement of claim or defence. The same can be restricted to a definite timeline if the parties have agreed upon it in the arbitration agreement. However, the arbitral tribunal also have the power to restrict filing of the amendment or supplement with the statements if it considers it inappropriate to allow the amendment or supplement due to the delay in making it.

Section 23 (2-A) enables the respondent to file a counter-claim or plead a set off from the arbitral tribunal. However, the respondent shall be able to file a counter-claim or plead set off the claim only when the same is allowed under the arbitration agreement signed by the parties. The duty upon the arbitral tribunal to adjudicate the counter-claim or set off is imposed only when the same falls under the scope of the arbitration agreement.

The arbitral tribunal should receive the counter-claim as a part of the pleadings of the parties and take the same into account while deciding the case on its merits. It was held in the case *Punj Sons (P) Ltd v National Aluminium Co. Ltd.,* [118] that the arbitral tribunal shall not refuse to admit the counter-claim by simply stating it to be outside the agreement or reference.

A counter-claim can be raised directly before the arbitrator. In the case *State of Goa v. Praveen Enterprises,*[119] it was held that the view is incorrect which purports that a counter-claim which is not raised before the claimant or not raised in reply to the application served under section 11 cannot be presented before the arbitral tribunal. Further, the court in *Jeypore Sugar Co. Ltd v. Laxmi Organic Industries Ltd.,* [120] held that the arbitral tribunal is bound to entertain the counter-claim and decide the same by stating reasons.

2. *Documentary evidence*

The parties shall submit all the relevant documents substantiating their claim or defence along with their statement of claim or defence respectively. They may also add reference to such other documents and evidence which they reserve the right to submit at the later stage if the proceedings shall so require in order to bring those documents or evidences to the notice of the arbitral tribunal.

3. *Filing of additional claims*

In the case, *State of Orissa v. Asis Ranjan Mohanty,*[121] initially the claimant raised a claim of a lesser amount before the respondent but before the arbitrator he increased the claim amount. The arbitrator refused to consider the revised claim of higher amount. The arbitrator

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118 AIR 1999 SC 1547; 84 Cut LT 754
119 (2012) 12 SCC 581
120 AIR 2016 NOC 288 (Mad)
121 (1999) 9 SCC 249

was later substituted. The claimant again raised the claim of higher amount before the new arbitrator. The claimant reserved the right to file subsequent claims in the first statement of claim and hence the subsequent claims were not outside the ambit of arbitration. The subsequent claims were held to be competent but the arbitrator was the authority to decide the maintainability of those claims based on merits. Lack of bona fides cannot be inferred from the mere act of considering such claim. Further in the case, *H.L. Batra & Co v. State of Haryana*,[122] it was held that the additional claims filed before the new arbitrator did not have the effect of increasing the reference scope.

In the case, *Jayashree Patnaik v. Urban Coop Bank*,[123] it was held that any amendment which is done through clarification of existing pleadings is different from introducing any new cause of action. A writ was filed against permission of the amendment because a new cause of action was being substituted. On facts, however, the grant of permission was only to enable the claimant to include the guarantee offered by two of the opposite parties. A claim was already there against them. The facts sought to be introduced was only of the nature of clarification of the please that were raised in the written statement. This was held not equal to setting up of a new cause of action.

Where the nature of the amendment is such that it drastically changes the nature of the dispute, the same cannot be allowed. The same was held in the case, *Bharat Coking Coal Ltd v Raj Kishore Singh*,[124] wherein the Hon'ble Supreme Court quashed the order granting amendment and all other interim orders which were based on the amendment petition.

Hearings

The Arbitral tribunal shall decide whether to conduct oral hearings for presentation of evidence or for oral arguments or whether proceedings shall be conducted on the basis of evidence produced in the form of documents or other materials, unless the parties agree otherwise in the arbitration agreement. The arbitral tribunal has to allow oral hearing if any party requests the same at an appropriate stage of the proceedings unless the parties have agreed that no oral hearing shall take place in case of a dispute that is referred to arbitration.

Section 24[125] deals with hearings and written proceedings:

*"**24. Hearing and written proceedings.-** —(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:*

122 (1999) 9 SCC 188

123 (2003) 3 RAJ 117 (Ori)

124 (2000) 9 SCC 174

125 The Arbitration and Conciliation Act, 1996

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."

1. ***Oral Hearing***

In the case, *Henry Sotheran v. Norwich Union Life Insurance Society,*[126] the arbitrator directed that oral hearing could take place at the request of either party but although one such party made such request, the arbitrator passed the award without complying or conceding to the request. The court held that this conduct was clear misconduct as an arbitrator. The court further held that each party has a right to present their part of the case and when one such party makes a request for oral hearing then he is entitled to it and the arbitrator must offer him such hearing.

As far as it is practicable, the arbitral tribunal shall hold oral hearings for the presentation of evidence or for oral arguments which take place on a day-to-day basis. The arbitral tribunal shall not grant any adjournments unless any sufficient cause is provided by the party seeking such adjournment. However, in the absence of sufficient cause, the arbitral tribunal may impose costs, even exemplary costs on the party seeking such adjournment.

The law on oral hearings is clear since the case *Damodar Prasad Gupta v. Saxena & Co.,*[127] in which it was observed that if the parties to the dispute are deprived of the right to a reasonable notice of the time and place of the hearing, to be heard or to present their evidence before the arbitrators, the court shall set aside the award on the grounds of misconduct even in the absence of any improper intention on the part of the arbitrator, unless there is any contrary statute or the contract or agreement is contrary in this regard. The court also held that the absolute right to be heard is subject to any contrary agreement which stipulates clearly and unequivocally that the arbitrator may proceed in the absence of the parties or that

126 (1992) 31 EG 70
127 AIR 1959 Punj 476

he may or may not hear witnesses, or that he may give his award without due enquiry. When the arbitrator does not exceed the authority granted to him by the agreement within the jurisdiction so conferred, his award is valid and binding as the judgment by a court of law.

2. ***Notice to parties***

As discussed above, the parties should be given sufficient advance notice of any meeting for inspection of documents, goods or other property materially relevant for the dispute. The other party shall be communicated of every statement, document or other evidences produced before the arbitral tribunal. Similarly, any expert report or evidentiary documents upon which the arbitral tribunal shall rely while passing the award shall be communicated to the other party.

Arbitrators will generally fail in their clear duty and be guilty of misconduct, if they do not secure for each party an opportunity to present his case. Their first duty, therefore, is to give notice of time, date and place of meeting to the parties,128 to enable them to appear before the arbitral tribunal and present their case.129 If the arbitrator takes evidence or hears arguments in the absence of one of the parties without having given due notice of the time and place for the meeting, he is guilty of misconduct.130 An award would not be binding upon the parties if the arbitral tribunal do not give notice of the date of hearing to the parties.131

The arbitral tribunal can only use those documents and materials presented before it to decide the case on merits of which both the parties are aware of and sufficient time and opportunity is given to such opposite party to counter such evidence. Neither party can convince the arbitral tribunal to rely upon that piece of evidence to pass the award which is not brought in the knowledge of the other party or such party was not given chance to resist such evidence. Private communications with the arbitral tribunal are not encouraged by any party. It is a prudent course to make a rule of handling over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion is made to him without giving information of it to the other side.132 It was held in the case *Harvey v Shelton,133*in every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice in

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128 *Phagwara Coop Union v. Indian Engg Coop Society,* (1972) 74 PLR 724; *Lakshminarayana v Ramachandra,* AIR 1919 Mad 1029 at p. 1033

129 *Pursottam Das Narain Das v Louis Dreyfus & Co,* AIR 1920 Cal 386: ILR 47 Cal 29; *Pratap Singh v Krishanprasad & Co,* AIR 1932 Bom 68

130 *Joshi Damordarji v Joshi Ramnath,* AIR 1916 All 278; *Ghisalal Sohanlal v Ram Pershad Moti Lal,* AIR 1953 Ajm 58; *Jose Antao R Carvalho v C.S. Raje,* AIR 1976 Goa 56.

131 *Manni v Ram Charan Lal,* 1944 All WR (R) 270

132 *Cursetji Jehangir Khambatta v W. Crowden,* ILR (1894) 18 Bom 299 at p. 211

133 (1844) 7 Beav 455 at p. 462

whatever form, whether in the regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the judge, which means are not known to the other side.

Default of a Party

*"**25. Default of a party.**—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 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."

1. ***Failure to submit claim***

The arbitral tribunal shall terminate the arbitration proceedings on the failure of the claimant to submit claims and the reference of the dispute to the arbitral tribunal shall be dismissed. In the case, *LT Office Charifien Des Phosphates v Yamashita Shenon Steam Ship Co,*[134] a provision of this kind empowering the arbitrator to dismiss claim for failure to pursue cannot be given retrospective effect unless there is a clear and express intendment to that effect. The presumption against retrospectivity and the procedural exception to it rest on consideration of fairness.

In the case, *Anuptech Equipements (P) Ltd v Gangpati Coop Housing Society Ltd*,[135] it was held that the decision passed by the arbitral tribunal on failure of the claimant to submit statement of claim is an order of termination of proceedings. The court demarcated the difference between an order and an award in this case. An order under the section is a termination of proceedings without any decision on merits. An award, on the other hand, is the termination of proceedings after considering merits of the matter under dispute.

In the case, *Senko Engg Ltd v State of Bihar*,[136] it was held that any decision to the effect of improper termination of proceedings shall be challenged under the writ jurisdiction of high court under article 226 of the Constitution of India, 1950.

134 (1993) 3 WLR 266 (CA)
135 AIR 1999 Bom 219
136 AIR 2004 Pat 33

*2. **Failure to submit defence***

As already discussed above, if the respondent fails to submit the statement of defence the proceedings shall not be terminated. In fact the proceedings shall continue on the failure of the respondent to submit his defence. The arbitral tribunal in such cases pass an award based on the material(s) produced before it. The failure to submit the defence, however, shall not be treated as an admission of allegations by the respondent.

The provision which applies to filing of statement of claim shall also apply to filing of counter-claim.[137] In the case, *Grangeford Structures v S.H.,*[138] the respondent displayed his intention to file a counter-claim in front of the arbitrator and the arbitrator allowed a fixed time period to him to file such counter-claim. The party could not file the counter-claim within such time period allowed to him and sought adjournment of hearing for grant of extended period. The arbitrator refused adjournments and the respondent walked out as a symbol of protest. The arbitrator passed an award as per the material available with him and such award was in the favour of the claimant. The respondent challenged such award on the ground that the arbitrator acted unreasonably. The court upheld the arbitral award as the arbitrator has the power to set a reasonable time-limit for filing the claim and had jurisdiction to continue the proceedings even in the absence of the respondent.

*3. **Failure to appear***

The arbitral tribunal has the power to continue the proceedings and to give its award where a party fails to appear at an oral hearing, or fails to produce documentary evidence.

Expert Appointment

The arbitral tribunal may appoint one or more experts for a report on some specific issues which have to be determined but this appointment is subject to any agreement between the parties to the dispute. The arbitral tribunal may direct the parties to provide the expert with any piece of information or material relevant for him to provide his opinion including any relevant documents, goods or other property for his inspection. The expert shall be permitted to participate in the arbitration proceedings to enable the parties to raise questions from him, if any, and to produce witnesses to testify on he points in issue. The expert shall be allowed to attend the proceedings on the request of either party or when the arbitral tribunal considers it necessary unless there is an agreement to the contrary between the parties. The expert has to make available the material for inspection of the other party on the basis of which he formulated the report. Section 26[139] deals with appointment of an expert by the arbitral tribunal:

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137 Section 2(9), the Arbitration and Conciliation Act, 1996
138 (1990) 2 IR 251
139 Arbitration and Conciliation Act, 1996

*“**26. Expert appointed by arbitral tribunal.**—(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.”

Court’s Assistance in Taking Evidence
The arbitral tribunal may seek assistance from the court in obtaining evidence. The tribunal may do so on its own motion or when such request is made by wither party. In the case, *Delta Distilleries Ltd v United Spirits Ltd,*[140] it was held that court’s assistance for obtaining evidence is sought with respect to any person who does not cooperate with the arbitral tribunal, be it a witness or a party to the proceeding himself.

The application for seeking court’s assistance shall specify the names and addresses of the parties to the proceedings, nature of claim and the relief that is being sought through such proceedings, name and address of any party or person to be heard as a witness, or of expert witness and a statement of the subject-matter of the testimony required giving the description of any document to be produced, or of any property that needs to be inspected. Section 27[141] deals with court’s assistance in taking evidence as follows:

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

140 (2014) 1 SCC 113
141 The Arbitration and Conciliation Act, 1996

(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."
In the case, *Sime Darby Engg SDN, BHD v Engineers India Ltd,*[142] it was held that an arbitrator can take assistance from an expert under the provisions of section 27.

1. ***Orders by court***

If the court is competent to do so, then it may order that the evidence shall be produced directly before the arbitral tribunal. It will issue the same process as it issues in the suits before it to the witnesses. The processes that the arbitral tribunal may issue are also defined under the abovementioned section to include:

a. Summons for the examination of witnesses,
b. Commissions for the examination of witnesses, and
c. Summonses for the production of documents.

2. ***Disobedience of Court's orders***

If any person disobeys the order of the court in the manner of failing to attend as required, refuse to provide evidence or commit any default of the orders of the court, then such person is guilty of contempt of the arbitral tribunal. In such a case, if the arbitral tribunal represents such disobedience before such court then the court shall deal with such person in the same manner as if the person had disobeyed the orders of such court in a suit before it.

In the case, *Harinarayan G. Bajaj v Sharedeal Financial Consultants (P) Ltd,*[143] an order rejecting an application for taking evidence of certain documents was held to be neither an interim nor final award. It was passed in the course of continuing proceedings and could be challenged only at the time of challenging the final award. The court held that every order is not in the nature of arbitral award.

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142 (2009) 7 SCC 545
143 AIR 2003 Bom 296

Time Limit for Arbitral Award

The Arbitration and Conciliation (Amendment) Act, 2015 inserted Section 29A for expediting the time duration of arbitration proceedings and to prevent unnecessary delay in passing the arbitral award. The arbitral tribunal shall pass the award within 12 months from the date such tribunal is made reference of the dispute.[144] The arbitrator shall be removed from the arbitral tribunal under the said section upon failure to proceed expeditiously in the adjudication process.[145]

The period of 12 months has to be reckoned from the date of first reference which is when notice of appointment is received by the arbitrator. The arbitral tribunal is entitled to additional fees if it passes the award within 6 months of reference of dispute.[146] This period can be extended by the parties for another 6 months. If the award is not passed within such extended period also then the court may, upon application by party (ies) extend the time period on existence of sufficient cause when such application is made before the expiry of the abovementioned period. The court may impose additional terms and conditions while granting such extension.

The court may terminate the mandate of the arbitrator if no application for extension has been made by the parties. However, upon granting extension the court may also consider if the delay is due to the default of the arbitrator and in such situations the court may order reduction in the arbitrator's fee. The court may also substitute the arbitrator in the arbitral tribunal. In such a situation, the proceedings shall continue from the stage already reached and on the basis of the material and evidence available on record and the newly constituted arbitral tribunal shall be expected to have received such material and evidence. The court may also impose actual or exemplary costs upon the parties under this section on account of delay.

The court shall dispose the application made for extension of time period expeditiously and shall endeavour to do so within sixty days from the date of service of notice on opposite party.

Fast Track Arbitration

The concept of fast track arbitration came through the recommendations of 246th Law Commission Report, which purported the idea of speedy proceedings. Following these recommendations, the Amendment Act of 2015 was enacted which inserted section 29B[147] and brought in the concept of fast track arbitration in India.

144 Section 29-A (1), the Arbitration and Conciliation Act, 1996
145 NCC v. Union of India, 2018 SCC Online Del 1269
146 Section 29-A (2), the Arbitration and Conciliation Act, 1996
147 The Arbitration and Conciliation Act, 1996

The fast track arbitration provides for the appointment of sole arbitrator by the parties. The award shall be made within a period of six months from the date the arbitral tribunal enters upon the reference. Upon failure of the tribunal to pass the award within six months, the provisions of section 29A shall apply here, i.e. ordinary arbitral proceedings. The fees payable under fast-track arbitration to the arbitrator and the manner of payment of such fees shall be such as may be agreed between the arbitrator and the parties. The hearing through oral proceedings is generally not relied upon in the fast-track arbitration process unless the parties apply to the arbitral tribunal to conduct oral hearing. Without such reference, hearing is majorly done through written submissions by the parties to the dispute. Section 29B is reproduced below:

*"**29B. Fast track procedure**.—(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."

1. ***Application for fast-track arbitration process***

Parties to an arbitration agreement can apply for fast track arbitration before the appointment of arbitration tribunal by the parties or at the time of the appointment of arbitration tribunal by the parties.

This has to be submitted in writing by the parties that they want to be governed by the fast-track arbitration procedure. They shall also agree for the appointment of sole arbitrator.

2. ***Procedure of fast-track arbitration***

The dispute shall be decided through written submissions, with the use of documents, submissions provided by the parties and there shall be a sole arbitrator depending on the interest of the parties and relying on his skill and efficiency. Oral hearings are not used in the fast-track arbitration process unless the same is requested by any party to the dispute.

The tribunal shall seek to dispose off the dispute in a speedy manner but all the technical formalities of the arbitration process shall be adhered to by the tribunal and the parties. The award shall be passed within six months from the date the tribunal takes notice of the case and if such award is not passed within the time prescribed then the procedure for extension of time provided under 29A is followed which is another extension period of six months. The authority of the arbitrator shall terminate if before the lapsing of the six month time period the Court has not extended the period.

Upon delay in the proceedings due to the errors committed by the arbitrator which results in grant of extension of time, the court may order reduction in fees paid to the arbitrator. While extending the period, the Court can substitute the arbitrator and is such a thing happens the proceedings shall continue from the stage it has already reached, and the arbitrator shall be deemed to have the knowledge of the evidence and material already presented.

Rules Applicable to Substance

*"**28. Rules Applicable to Substance of Dispute.-** (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 authorized it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

In arbitration proceedings which are not international commercial arbitration, i.e., which are domestic arbitrations, the applicable law upon the dispute shall be the substantive law of India.[148] The award of an arbitrator cannot be opposed to the law of India or to the precedents set by Indian courts merely because it was an arbitrator who granted such an award. Section 28 is held to be imperative in nature. The intent of the legislature in enacting Section 28 is that the nationals of India shall not derogate from Indian law under the garb of arbitration. The law of India is a part of public policy of the country and hence protected under arbitration also.[149]

The language employed by Section 28 clearly states that where place of arbitration, which implies the procedural law that shall govern the arbitration, is Indian law ("Seat"), the substantive law which shall govern such arbitration proceedings shall also be Indian law. When the procedural law is Indian law parties to the arbitration agreement are free to determine rules in consistence with the Indian law. Therefore procedural and substantive laws go hand in hand. The parties cannot derogate from it in view of Section 2(6). Only exception is when there is International Commercial Arbitration where jurisdiction of two or more courts of different countries over the subject matter of dispute, parties may chose procedural law of one country and substantive law of another country. However as per the Act if procedural laws of India are chosen, it will be considered as Domestic Award even if substantive law of India is not applied. However that shall be proceeded on careful analysis of both countries laws regulating Arbitration.

The Amendment Act of 2015 amended section 28(3), which stipulates that the Tribunal will take into account the terms of the contract and trade usage applicable to the transaction while deciding and making an award. The amended section 28(3), the Tribunal was granted scope to make liberal interpretation of the contract which did not exist under the unamended section. The unamended section only granted scope to the tribunal to interpret the terms of the contract in consideration with the intention of the parties and trade usages applicable to the transaction. In the case, *ONGC vs. SAW Pipes*,[150] 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. Hence, any attempt of the arbitral tribunal to go beyond the terms of the contract shall be a ground for setting aside the award, which could be reasonable

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148 NTPC v Singer Co., (1992) 3 SCC 551
149 *TDM Infrastructure (P) Ltd v UE Development (P) Ltd, (*2008) 14 SCC 271
150 (2003) 5 SCC 705

in other scenarios. Hence the 246th Law Commission Report aimed at overruling the effect of ONGC (supra) judgement which finally brought in the amendment to section 28(3).

Decision by Tribunal

*"**29. Decision making by panel of arbitrators.**— (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."

1. ***Majority decision***

Even number of arbitrators shall not be appointed to constitute the arbitral tribunal.[151] In case of three arbitrators, each party shall appoint one arbitrator and these two arbitrators shall appoint the third arbitrator which shall act as the presiding arbitrator. The presiding arbitrator shall sit throughout the arbitration proceedings in the presiding capacity. The decision, thus coming from such arbitral tribunal, shall be a majority decision. However, the parties may agree that the decision shall be made in any other manner.

2. ***Procedural questions***

The parties may decide that the matters in relation to procedure of the arbitration proceedings shall be decided by the presiding arbitrator, if there are more than one arbitrator. In such a situation, the members constituting the arbitral tribunal must also agree and authorise the presiding arbitrator to do so.

3. ***Disagreement in the arbitral tribunal***

When the arbitral tribunal is unable to agree upon the same point and is unable to make an agreed award, the decision has to be made by a majority of all the members of the arbitral tribunal. However, each arbitrator should have the opportunity to change the other's mind in case of disagreement. When the parties select the forum of joint arbitrators for resolution of their existing dispute they are entitled to receive an award which is a result arrived at after discussion between the arbitrators. The arbitrators must act together. All the arbitrators must be present in each hearing and the witnesses shall be examined by each arbitrator as the resolution of the dispute is referred to all the arbitrators who constitute the arbitral tribunal and then they shall pass an award by mutually assisting each other in arriving at a just decision.[152]

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151 Section 10(1), the Arbitration and Conciliation Act, 1996

152 Russel, Arbitration, 20th Edn., 1992

MODULE IV

ARBITRAL AWARD

What is an award?

An arbitral tribunal pronounces numerous decisions during the course of its proceedings. These decisions are mainly divided into two categories: 'Orders' and 'Awards'. It is very important to define what an award is. While an award deals with substantial issues which resolve the issues in dispute, an order resolves the procedural issues which play a secondary role in the arbitral process.153 An award determines an issue of substance finally. It cannot be revisited or reversed and has *res judicata* effect.*154* An award however can be challenged in a court of law. An order on the other hand may be of an interim nature, and can be revisited or changed by the tribunal. An order cannot be challenged before a court unlike an award. This is to ensure independence of arbitration tribunal.155

Section 2(1) (c) of the Arbitration and Conciliation Act, 1996 defines 'arbitral award' as including interim award. Article 1(2) of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 defines an 'arbitral award' as an award given by arbitrators appointed for a particular case, as well as one given by permanent arbitral bodies. These definitions do not provide any conceptual clarity on what an award really is.

In *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Ltd,156* the Supreme Court has explained the characteristic features of award without giving a definition of the same. I this case the parties had provided for a two tier arbitration mechanisms i.e. an appeal can be made to another tribunal if a party is not satisfied with the decision of the first tribunal. The issue before Court was whether the decision of the first tribunal is an award? In the process the court mentioned that an award has the following features:

"(i) An award is made by the arbitrators; (ii) An award resolves a dispute; (iii) An award is a binding decision; and (iv) An award may be partial."157

These features are drawn by the Court from a well- known decision of the French Supreme Court, wherein the French court has given a proper definition of the term award, which is as follows: *decisions made by the arbitrators which resolve in a definitive manner all or part of*

153 Nigel Blackaby, Constantine Partasides, et al., *'Redfern and Hunter on International Arbitration',* Kluwer Law International (6th Edn.), (Chapter 9: Award, pp. 501-68)
154 *Union of India vs. Pramod Gupta,* (2005) 12 SCC 1.
155 Emmanuel Gaillard and John Savage, *'Fouchard Gaillard Goldman on International Commercial Arbitration',* Kluwer Law International (Part 4: Chapter IV- The Arbitral Award)
156 (2017) 2 SCC 228.
157 *M/S. Centrotrade Minerals and Metal Inc v Hindustan Copper Ltd.* AIR 2017 SC185 para11.

the dispute that is submitted to them on the merits, jurisdiction or a procedural matter which leads them to put an end to the proceedings."158

Form and Content of Arbitral Award

Section 31 of the Arbitration and Conciliation Act, 1996 prescribes the form and contents of arbitral awards. The elements of Section 31 will be discussed below.

1. **Form and Content Requirements**

The Act does not prescribe any form for an award. The purpose of an award is to render a decision and any form of words that expresses a decision is sufficient, without the need to adopt a specific format.159 For example, an award in the form of a request to pay has been interpreted as an order to pay.160 However, there is a distinction to be made between a letter containing a proposal from the Tribunal and an award itself, the former will only be treated as a proposal.161

According to *O.P. Malhotra on Law and Practice of Arbitration and Conciliation* (hereinafter O.P. Malhotra), the following substantive requirements emerge upon a synthesis of judicial decisions:

(1) "[An] award must contain reasons, except if there is an agreement to the contrary;
(2) award must be certain (not uncertain and vague162) and capable of performance;
(3) completeness of award (leaving no part of the tribunal's function for others to complete);
(4) award must be enforceable;
(5) award must not be contrary to the public policy of India."163

Notwithstanding this, there exists no requirement for an award to contain recitals that demonstrate that the conditions for its validity have been satisfied.164 The arbitral tribunal is bound to pass a final award in relation to all disputes raised by the parties in the terms of reference.165

158 *Group Antoine Tabet v Republique du Congo* [2102] Rev Arb 88, Claire Pauly, *Defining Arbitral Awards': Supreme Court Weighs in*' *<www.lexology.com/library/detail.aspx?g=ad516f19-3a48-419c-b142-48c0a6940913> accessed on 23//04/201*.
159 Subhas Projects and Marketing Ltd v. Assam Urban Water Supply & Sewerage Board, AIR 2003 Gau 158. Shapoorji Dallonji & Co. P. Ltd v. Housing & Urban Development Corpn Ltd, 2001 Supp Arb LR 194.
160 Smith v. Hartley, (1851) 10 CB 800.
161 Lock v. Vulliamy, (1833) 5 B & Ad 600.
162 Hooghly River Bridge Commissioner v. Bhagirathi Bridge Construction Co., (1996) 2 Arb LR 104.
163 O.P. MALHOTRA & INDU MALHOTRA, OP MALHOTRA ON LAW AND PRACTICE OF ARBITRATION AND CONCILIATION,1116 (2014). [*hereinafter* O.P. MALHOTRA]
164 ANIRUDH WADHWA & ANIRUDH KRISHNAN, JUSTICE R.S. BACHAWAT'S LAW OF ARBITRATION & CONCILIATION, 1630 (2018). [*hereinafter* BACHAWAT]
165 *Id*. at 1632.

2. **Writing and Signing Requirements**

Section 31(1) clearly mentions that an award must be made in writing and must subsequently be signed by all members of the tribunal. Section 31(5) also requires that a signed copy of the award be delivered to each party. An award is considered to be made when it has been signed by the arbitrators and consequently it cannot be said that the Act recognises oral awards.[166] This does not mean that oral awards are illegal, but that they cannot be enforced under the scheme of the Act. This reflects a shift from the Arbitration Act, 1940 which also recognised an oral award as being enforceable as a judgement.[167] According to Section 22(3) of the Arbitration and Conciliation Act, 1996, the award must be written in the language in which the arbitral proceedings have been conducted in.

Notwithstanding the generality of Section 31(1), Section 31(2) of the 1996 Act also recognises awards that are signed by the majority of the tribunal, and not just those signed by the entire tribunal in all cases with more than one arbitrator on the tribunal. Such a 'majority award' must also state reasons for *why* any arbitrator's signature has been omitted. Majority awards will be considered valid provided that all arbitrators were present at all points in time during the hearing and took part in all deliberations.[168] A combined reading of sub-sections (1) and (2) of Section 31 therefore reveals that an 'arbitral award' is an award made in writing and signed by a majority of all members of the arbitral tribunal, along with reasons for the omissions of any signatures.[169]

A dissenting opinion would not be considered an arbitral award in the language of the 1996 Act and hence does not have any of these formal requirements. Where a majority award however is not dated or does not contain signatures of the tribunal or reasons for the omission of such signatures, then it cannot be termed as an award and is liable to be set aside under S34(2)(a)(v).[170] The Andhra Pradesh High Court, while justifying this pposition had suggested these requirements under Section 31 are "to be necessarily taken as mandatory rather than directory, [and not merely as a] ministerial [act] or an empty formality".[171]

3. **Reasoned Award**

Section 31(3) does require a Tribunal to state the reasons upon which its award is based unless the parties have reached an agreement to the contrary or if the award is on agreed

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166 *Id.* at 1633.
167 Amir Bibi v. Arokiam, AIR 1919 Mad 1113.

168 Government of India, BSNL v. Acome, (2007) 2 Arb LR 90, 101 upheld on appeal in Government of India, BSNL v. Acome (2008) 4 Arb LR 418 (Del-DB-DB).
169 Arbitration and Conciliation Act, S. 31(2), (1996); BACHAWAT *supra* note 6 at 1634
170 MTNL v. Siemens Public Communication Network Ltd.., (2005) 1 Arb LR 369.
171 Transmission Corporation of Andhra Pradesh Ltd. v. Galada Power and Telecommunication Ltd., (2007) 1 Arb LR 447.

terms as per Section 30.[172] In *State of Kerala v Somdatt Builders,* the Supreme Court noted that the contents of Section 31(3) are not an 'empty formality' and was intended to guarantee fair and genuine consideration by the tribunal.[173] The Act stresses on the importance of reasons in an award because it ensures that arbitral tribunals do not act capriciously by requiring them to justify the conclusions that they reach which impact the rights and interest of a party.[174]

However, an arbitrator is not required to write a detailed judgement as would be required of a court of law.[175] There is no expectation for an arbitrator to deal with every point of law that has been raised or even set out every process of reasoning.[176] The requirement to state reasons is not the same as a requirement to deliver a detailed judgement.[177] The reasons stated may be short but must demonstrate that the arbitrator has not acted irrelevantly, irrationally, capriciously or unreasonably.[178]

It is suggested that the term 'reason' is "a ground or motive for a belief or a course of action, statement in justification or explanation of belief or action".[179] Not every justification qualifies as a 'reason'.[180] Only those justifications that are rational and provide sufficient grounds as an explanation can meet this requirement.[181] One way of understanding 'reasons' is as "links between materials on which certain conclusions are based and the actual conclusions."[182] To illustrate, in *Soorajmull Nagarmull v. Jute Corporation of India Ltd*,[183] the award only narrated the facts and gave the conclusions of the arbitrator without stating any reasons. Since the 'links' of reasons were not contained therein, the award was held not to be a speaking award. As Justice Endlaw of the Delhi High Court explains:

"What has to be examined is, whether the arbitrator saying that "the claim is rejected because it is not in accordance with the agreement" or that "it has not been established" fulfils the requirements of law of the award stating reasons on which it is based. In my view, these expressions cannot constitute foundation or explanation and do not enable inferences to be drawn and do not make the phenomenon of rejection of claim intelligible and thus

172 State of Kerala v. Somdatt Builders Ltd., (2005) 4 Ker LT1 (SN), S.
173 State of Kerala v Somdatt Builders Ltd, (2009) Arb LR 13 SC.
174 BACHAWAT *supra* note 6 at 1630
175 *Id.*
176 *Id*.
177 Delhi Development Authority v. Uppal Engineering Construction Co., ILR (1982) 1 Del 713.
178 Govt of NCT of Delhi v. Ved Prakash Mehta, 2005 (Suppl) Arb LR 170, 173.
179 BACHAWAT *supra* note 6 at 1640.

180 Bharat Engineering Enterprises v. Delhi Deveopment Authority, 2006 (Suppl) Arb LR 129, 132.
181 Chairman of the Board of Trustees of the Port of Vishakhapatnam Port Trust v. Gurcharan Singh, (2004) 1 Andh LT 195 (DB).
182 Union of India v. Mohan Lal Kapoor, (1973) 2 SCC 836.
183 Soorajmull Nagarmull v. Jute Corporation of India Ltd.,(2001) 1 SCC 61.

cannot be held to constitute "reasons". They are at best conclusions based on reasons, which the award does not state."[184]

Where reasons are required to be stated but the tribunal fails to meet this requirement, the award will be set aside and can be remitted to the tribunal to state reasons for its decision.[185] It may at this stage be relevant to consider the requirement of a statement of reasons in the context of the Supreme Court's decision in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Limited.*[186] The Supreme Court upheld the validity of a two-tier appellate arbitration mechanism in deference to party autonomy. The decisions raises interesting questions as to whether the appellate arbitral tribunal is required to reconsider the decision of the first award's reasons on each claim; or if it is sufficient to reverse the decision on the basis of its own independent reasoning. It has been argued that the second alternative is preferable where the appellate tribunal may rely on its own independent reasoning to reverse the decision of the previous tribunal.[187]

4. Dates concerning Awards

Section 31(4) requires an award to state the date on which it was made i.e. the date of signing the award. This feature may be relevant in two situations: first, where the date is relevant to calculate post award interest which is highlighted by Section 31(7)(a). Second, it may be relevant when there are contractual time limits to the conduct of arbitration proceedings.

Unless the parties make an application to set aside an award under Section 34, the award becomes binding on the parties on the expiry of three months of the date of receipt of the award. Section 31(5) requires that the tribunal communicate the award to both parties. The limitation period to challenge the award starts running from this date of communication.

5. Interest and Costs

Section 31(7) of the 1996 Act contains an omnibus provision that empowers the tribunal to award interest both subsequent and prior to the reference to arbitration. Section 31(7)(a) covers interest for the pre-award period at a *reasonable rate* and is subject to the agreement of the parties to the contrary. Section 31(7)(b) which deals with post-award interest does not give the parties the option to contract out of the imposition of such interest. Unless the award of interest is found to be unwarranted for specified reasons, the general rule is that courts must not interfere with the interest rates awarded by the tribunal.[188] The Supreme Court and lower courts have however started interfering with interest so awarded on grounds of justice and equity.[189] In *McDermott International v. Burn Standard Co. Ltd*. the Supreme Court

184 Jai Singh v. Delhi Development Authority, (2008) 3 Arb LR 667.
185 G.DG. Corporation v. Raj Bhalla, (2007) 1 Raj 298 (Del).
186 Centrotrade Minerals & Metal Inc. v. Hindustan Copper Limited , (2017) 2 SCC 228.
187 BACHAWAT *supra* note 6 at 1653.
188 Union of India v. Bakshi Steel Ltd., (2005) 3 Arb LR 74, 80.
189 Krishna Bhagya Jala Nigam v. G. Harishchandra Reddy, AIR 2007 SC 817.

observed that a tribunal exercises discretion in three respects when it comes to awarding interest as regards:

"(i) at what rate interest should be awarded;

(ii) whether interest should be grante don the whole or part of the award money; and

(iii) whether interest should be awarded for the whole or any part of the pre-award period."

Section 31A of the 1996 Act now provides that costs shall be fixed by the arbitral tribunal. An order on costs within the arbitral award is recognised by Section 31(8) of the 1996 Act. While leaving room for the tribunal to exercise discretion in determining costs, the general rule laid down in Section 31-A(2) is that the unsuccessful party bears the costs of the successful party. This is an adoption of the *costs follow the event* rule.[190]

Correction and Interpretation of Arbitral Award

1. **Interpretation of Awards – Presumption of Certainty**

Questions as to the interpretation of an award arise in two separate scenarios under the 1996 Act. First, they may arise as questions of judicial interpretation at the stage enforcement or stay thereof. Second, they may arise when a request is made to the tribunal itself under Section 33 of the Act regarding the interpretation of a specific point or part of the award already rendered. The tribunal is bound to provide such an interpretation when requested within 30 days of receiving such a request.[191] Such a request must be made, with the consent of, and request to the other party.[192]

According to the 1996 Act, an award can be set aside for vagueness or uncertainty only if the ground can be brought under Section 34(2). If a fair and reasonable interpretation of the terms of an award by a person of common understanding can comprehend its meaning, an award is not uncertain.[193] Simply showing that an award is capable of more than one interpretation does not meet this threshold. The reason for this preference of a 'sensible construction' of awards is that awards are often drafted by commercial men and not lawyers.[194] The court begins with the presumption that the award is certain, preferring a liberal and favourable interpretation, in line with the arbitrator's real intention.[195] It is for the person challenging the award to demonstrate that it is uncertain.[196] The requirement of certainty follows because there should be no reasonable doubt as to the nature and extent of the duties imposed on the parties.

190 BACHAWAT *supra* note 6 at 1749.
191 Arbitration and Conciliation Act, S. 33(2) (1996).
192 *Id.* at S. 33(1)(b).
193 BACHAWAT *supra* note 6 at 1661.
194 Wearing (UK) Ltd. v. Administrataro Gerai, (1983) 1 LLOYD'S R 44.
195 BACHAWAT *supra* note 6 at 1664.
196 Union of India v. Jai Narain Misra, (1969) 3 SCR 588.

2. Correction of Awards

A tribunal is not permitted to add to, alter or rectify its award once an award is made, except as specified under Section 33(1)(a) and Section 33(3) because it is then *functus officio*. Under Section 33(1)(a) an arbitrator is empowered to make limited corrections (pertaining to computation errors, clerical or paragraphical errors, or other similar errors). Corrections falling within the same scope can be made by the tribunal on its own initiative within 30 days of making the award under Section 33(3). These corrections are made in the form of additional awards which the tribunal is empowered to make under Section 33(4), within 60 days of receiving such a request for correction.[197]

Types of Awards

The Arbitration and Conciliation Act, 1996 contemplates the following types of awards:

1. Final Award

A final award is contemplated under Section 35 of the Arbitration and Conciliation Act, 1996. The end product of the arbitral process is a decision in the form of an award that is final and binding on the parties to the proceedings. The objective of instituting arbitration proceedings is to secure a decision that finally resolves the dispute between the parties. Consequently, once a final award is passed this objective is met and the arbitration proceedings are terminated with the mandate of the tribunal becoming *functus officio* according to Section 32(1). However, there is no internationally accepted definition of the term ‘award’.

2. Additional Award

An additional award is provided for under Section 33(4) of the Arbitration and Conciliation Act, 1996. In the absence of an agreement to the contrary, a party upon giving notice to the other party may in 30 days of receiving the award, make a request to the arbitral tribunal to make an additional arbitral award. The purpose of this additional award is to finally decide claims that were presented during proceedings, but are omitted in the award. If the tribunal considers such a request to be justified, it shall make the additional award within 60 days of receiving such a request.[198] A tribunal is also empowered to extend the period of time within which the additional award must be passed, if necessary. The rules contained in Section 31 pertaining to the form and contents of arbitral awards shall be applicable to any additional award as well.

3. Interim Award

Section 2(1)(c) of the Arbitration and Conciliation Act, 1996 which defines the term ‘arbitral award’ states that it includes an interim award. Section 31(6) empowers a tribunal to make an interim arbitral award on any matter on which it may make a final award.

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197 Arbitration and Conciliation Act, S. 33(5) (1996).

198 *Id.* at S. 33(5)

The Supreme Court of India noted in *McDermott International Inc v. Burn Standard Co. Ltd.* while clarifying the meaning of the term 'interim award' has noted that the 1996 Act nowhere uses the term 'partial award' and only refers to 'interim or final award'.199 However the court further clarified that the two terms mean one and the same:

"An interim award in terms of the said provision 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. … If the partial award answers the definition of the award, as envisaged under Section 2(1)© of the 1996 Act, for all intent and purport, it would be a final award… [W]e are of the opinion that an [interim award] is final in all respects with regard to disputes referred to the arbitrator which are subject matter of such award. We may add that some arbitrators instead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of the award is not changed."

O.P Malhotra on Law and Practice Arbitration and Conciliation (3rd Edition) however reaches a different conclusion in respect of the meaning of the term 'interim award' based on the language of Section 31(6). It suggests that an interim award is one where interim relief can be granted to the party requesting such relief upon a tentative determination of the rights of the parties to the dispute by the tribunal.200 In other words, an interim award must be made in respect of claims or counter claims which have been the subject matter of the disputes referred to the arbitral tribunal.201 However, in other cases it has been suggested that an interim order of injunction cannot be held as an interim award.202 The conclusion that an interim award deals with the final determination of a substantive right of one party over another, also finds favour with the editors of Justice Bachawat's authoritative commentary on the 1996 Act.203

4. Consent Award

Section 30 of the Act provides that if the parties to the arbitration settle their disputes during the course of arbitration proceedings then, upon a request by the parties, and where not objected to by the tribunal, the terms of settlement shall be recorded in the form of an arbitral award. The phrase "not objected to by the tribunal" has been lifted from Article 30 of the UNCITRAL Model Law. Holtzmann & Neuhaus write that this phrase was included because arbitrators should not be forced to attach their signatures to a settlement agreed by the parties,

199 McDermott International Inc v. Burn Standard Co. Ltd., (2006) Arb LR 498, 521.
200 LR's of Late Mohandas v. A.D.J., No. 3, Jodhpur & Ors., 2010 (4) Arb LR 172.
201 O.P. MALHOTRA *supra* note 5 at 117.
202 Union of India v. East Coast Boat Builders & Engineers AIR 1999 Del 44, 47.
203 BACHAWAT *supra* note 6 at 1685.

since such a settlement may be against public policy, in contravention of laws including conceptions of justice and fairness.[204]

Recourse against Award

Application for Setting Aside Arbitral Award: Section 34

An arbitral award is final and binding on the parties.[205] Thus, it is not intended to be a mere proposal as to how the dispute might be resolved, nor is it intended to be the first step on a ladder of appeals through national courts.[206] The application for setting aside under Section 34 of the Arbitration and Conciliation Act, 1996 constitutes the exclusive recourse to a court against an arbitral award. In this sense, it is the only means for actively attacking an arbitral award.[207] An application for setting aside— or a challenge— is not intended to afford a review of the merits of the tribunal's decision, and is thus distinct from an appeal.[208]

Section 34— much like the rest of the Arbitration and Conciliation Act, 1996— is based heavily upon the UNCITRAL Model Law on International Commercial Arbitration.[209] It provides the following grounds for setting aside an award:

(i) An award may be set aside where a party was under some **incapacity**;

(ii) An award may be set aside where **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;

(iii) An award may be set aside where 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;

(iv) An award may be set aside where 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;

(v) An award may be set aside where the **composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement** of the parties;

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204 HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW, 835 (1995).

205 Section 35, Arbitration and Conciliation Act, 1996.

206 'Chapter 10. Challenge of Arbitral Awards', in Blackaby Nigel, Constantine Partasides, et al., Redfern and Hunter on International Arbitration (Sixth Edition), 6th edition (© Kluwer Law International; Oxford University Press 2015) p. 569.

207Anirudh Wadhwa and Anirudh Krishnan, 'Justice RS Bachawat's Law of Arbitration & Conciliation', by, LexisNexis, 6th Ed., at p. 1795.

208 Chapter 10. Challenge of Arbitral Awards', in Blackaby Nigel , Constantine Partasides , et al., Redfern and Hunter on International Arbitration (Sixth Edition), 6th edition (© Kluwer Law International; Oxford University Press 2015) p. 569.

209 Preamble to the Arbitration and Conciliation Act, 1996; Nakul Dewan, 'Arbitration in India: An Unenjoyable Litigation Jamboree', Asian International Arbitration Journal, Kluwer Law International, Volume 3 Issue 1 p. 100.

(vi) An award may be set aside where the **subject-matter of the dispute is not capable of settlement by arbitration** under the law for the time being in force;

(vii) An award may be set aside where the arbitral award is **in conflict with the public policy of India**.

According to Section 34(2)(b)(i) of the Act, an arbitral award may be set aside where its subject matter is not '*arbitrable*'. The Supreme Court has delineated the contours of what subject-matter is arbitrable in the celebrated case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*[210]:

*"Generally and traditionally all disputes relating to **rights in personam** are considered to be amenable to **arbitration**; and all disputes relating to **rights in rem** are required to be adjudicated by **courts and public tribunals**, being unsuited for private arbitration.*"[211]

Thus, disputes containing the following subject-matters are unsuitable for arbitration:

(i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;[212]

(ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights;[213]

(iii) Guardianship matters;[214]

(iv) Insolvency and winding up matters;[215]

(v) Testamentary matters (grant of probate, letters of administration and succession certificate;[216]

(vi) Eviction or tenancy matters governed by special statutes;[217]

(vii) Matters related to mortgage;[218]

(viii) Cases arising out of Trust Deed and the Trust Act[219] (In Vimal Shah & Ors. v. Jayesh Shah & Ors., the Supreme Court has held that disputes arising out of Trust Deeds and the Indian Trusts Act, 1882 also cannot be referred to arbitration.)

(ix) Select intellectual property right disputes.[220]

(x) Serious and complex— rather than simple— allegations of fraud.[221]

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210 (2011) 5 SCC 532.
211 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
212 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
213 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
214 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
215 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
216 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
217 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
218 *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, (2011) 5 SCC 532.
219 *Vimal Shah & Ors. v. Jayesh Shah & Ors.*, (2016) 8 SCC 788.
220 *Indian Performing Right Society Limited v. Entertainment Network,* (2016) SCC OnLine Bom 5893.
221 *A Ayyasamy Vs. A Paramasivam & Ors.,* (2016) 10 SCC 386.

(G) An award may be set aside where the arbitral award is in conflict with the public policy of India:

Under the 1940 Act an award could be set aside on, amongst others, the ground of an error of law on the face of the Award.[222] In 1996, Parliament intended to make the scope of review narrower by restricting the challenge to only a situation where the award was "in conflict with the public policy of India".[223] This was in line with the international position embodied in the UNCITRAL Model Law.[224]

There has been much debate upon the meaning of the term 'public policy'. The term 'public policy' was not defined under the 1996 Act, or in any other statute. In fact, in many cases, the Supreme Court has itself accepted that the term 'public policy' is an'unruly horse' and an 'untrustworthy guide'.[225] However, uncovering its meaning is essential to understanding the scope for a party to challenge an arbitral award under Section 34.

In the lead-up to the enactment of the 1996 Act, the Supreme Court in *Renusagar Power Co. Ltd v. General Electric*[226] received the opportunity to elaborate on what would amount to a conflict with the 'public policy of India'. The Supreme Court held that the term 'public policy' must be interpreted narrowly. According to the Court, an award could be set aside if it was against:

- (i) Fundamental policy of Indian law; or
- (ii) The interests of India; or
- (iii) Justice or morality.
- (iv)

The Court also clarified that an award cannot be set aside merely on its merits. Even though this judgment dealt with the enforcement of a foreign award pursuant to Section 7(1) (b)(ii) of the Foreign Awards (Recognition and Enforcement) Act 1961, it set the tone for a narrow interpretation of the 'public policy' ground with the enactment of the 1996 Act.

For the first few years after the 1996 Act, the approach of Courts in India to awards was deferential.[227] For instance, in *Vijaya Bank vs. Maker Development Services Pvt. Ltd.,*[228] a Division Bench of the Bombay High Court held that a mistake in the application of the substantive law of India would not render the award one in conflict with the public policy of India under Section 34(2)(e)(ii) of the 1996 Act.

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222 Section 30, Arbitration Act, 1940.
223 Darius Khambata, 'Kick-Starting Arbitration In India', NALSAR ADR Review, Volume 1 (2012), p. 32.
224 Article 34, UNCITRAL Model Law on International Commercial Arbitration,1985.
225 *P. Rathinam v. Union of India*, (1994) 3 SCC 394.
226 AIR 1994 SC 860.
227 *Olympus Superstructure v. Meena Khetan*, AIR 1999 SC 2102; *Narayan Lohia v. Nikunj Lohia*, AIR 2002 SC 1139.
228 (2001) 3 Bombay Cases Reporter 652.

However, all of this changed with the Supreme Court's infamous decision in *ONGC v. Saw Pipes Ltd.*[229] The Supreme Court took a contrary approach to that of *Renusagar,* and held that the term 'public policy' could not be interpreted narrowly.

The facts of this dispute were as follows: ONGC wanted pipes to case the tubes of its oil wells. It floated a tender. Bids were called for. The pipes were to be supplied on or before certain dates. Liquidated damages were payable @ 1% of contract price per week of delay subject to a ceiling of 10%. ONGC was entitled to deduct this amount from the bills for price of material submitted by Saw Pipes. Saw Pipes delayed delivery of the pipes till well after the due dates. ONGC deducted large amounts from Saw Pipes' running bills. Saw Pipes made a claim for recovery of these amounts from ONGC. ONGC opposed. The matter was referred to arbitration.

The arbitral tribunal held that ONGC had failed to prove it had suffered loss as a result of the delays in delivery. Hence ONGC was not entitled to the liquidated damages and could not have made any deductions from the running bills. The arbitral tribunal followed the principles enunciated in a series of Supreme Court judgments viz. that the sum specified in the contract as liquidated damages was not payable as compensation, unless it was impossible for the Court to assess compensation; and the sum was a genuine pre-estimate of losses and not a penalty.

The tribunal's award— and its finding on liquidated damages— was challenged under Section 34 by ONGC. When the challenge was escalated to the Supreme Court, the Court effectively reconsidered the ratio of the aforesaid Supreme Court judgments and restated what in its opinion was the correct law of liquidated damages. Having engaged in such reinterpretation the Supreme Court then held that the Award on its face was erroneous with regard to a proposition of law. The Supreme Court referred to various judgments under the Arbitration Act 1940 and before, which held that a patent error of law on the face of the award and which formed the basis of the award could result in an award being set aside. The Supreme Court applied this test to the award before it, held that the law as to liquidated damages had not been correctly applied by the Arbitral Tribunal and proceeded to consequently set aside the award.

Therefore, a new head called 'patent illegality' was added under the grounds for 'public policy' challenges. The Court further clarified that:

(i) the illegality should not be of a 'trivial nature',
(ii) the illegality should strike the 'root of the matter'.

229 (2003) 5 SCC 705.

The Supreme Court's decision in *Saw Pipes* triggered scathing criticism from Indian as well as foreign lawyers and academics.[230] They have remarked that the judgment's introduction of the 'patent illegality' ground has been used routinely to challenge arbitral awards, giving rise to tremendous litigation contrary to the spirit of minimal judicial intervention embodied both in the UNCITRAL Model Law and in the 1996 Act.[231] They have also commented that *Saw Pipes* undermines the finality of arbitral awards, and has thus obscured the difference between a challenge and an appeal.

Eminent Senior Advocate Fali Nariman commented that the judgment "*virtually set at naught the entire Arbitration and Conciliation Act of 1996… If Courts continue to hold that they have the last word on facts and on law— notwithstanding consensual agreements to refer matters necessarily involving facts and law to adjudication by arbitration— the 1996 Act might as well be scrapped… The Division Bench decision of the two Judges of the Court has altered the entire road-map of Arbitration Law and put the clock back to where we started under the old 1940 Act.*"[232]

Similarly, the Law Commission, in its 246th Report opined on *Saw Pipes'* expansion of the public policy ground of the judgment in the following terms: "*After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.*"[233]

In a subsequent decision in the case of *McDermott International Inc. v. Burn Standard Co. Ltd.*, the Supreme Court extended the boundaries of interference by including within 'public policy', two further heads i.e. whether the reasons are vitiated by perversity in evidence in contract and whether the award is vitiated by internal contradictions. The terms "*perversity*" and "*internal contradictions*" are undefined terms giving licence to a series of challenges.
More recently, a three-judge Bench of the Supreme Court in *ONGC v. Western Geco*[234] further expanded the scope of 'public policy' by including the principles of *Wednesbury* unreasonableness as a ground to set aside an award. The Court held:

"*No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of*

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230 Law Commission of India, 'Supplementary to Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996, "Public Policy': Developments post-Report 246", (February 2015).
231 Anirudh Wadhwa and Anirudh Krishnan, 'Justice RS Bachawat's Law of Arbitration & Conciliation', by, LexisNexis, 6th Ed., at p. 2415.
232 Fali S. Nariman, *Legal Reforms in Infrastructure*, Speech delivered in Delhi on 2nd May 2003.
233 246th Report of the Law Commission of India (2014), ¶ 3.
234 (2014) 9 SCC 263.

reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge… [I]f on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away..."

Seeking to undo the negative effects of the burgeoning ground of 'public policy' and to limit the scope of judicial intervention arising under the 'patent illegality' test, the legislature made significant changes to Section 34 in 2015. The term 'public policy' has now been defined under the 2015 Amendment. The Amendment provides differing definitions of what constitutes a 'conflict with the public policy of India' for awards arising out of international commercial arbitrations and awards arising out of arbitrations other than international commercial arbitrations:

<table>
<tr><th>INTERNATIONAL COMMERCIAL ARBITRATION AWARDS</th><th>OTHER AWARDS</th></tr>
<tr><td colspan="2">An award is in conflict with the public policy of India:
i) If it was induced or affected by fraud or corruption,[235]
ii) If it contravened the fundamental policy of Indian law,[236]
iii) If it was in conflict with the most basic notions of morality or justice.[237]</td></tr>
<tr><td>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.[238]</td><td>An award may also be set aside if it 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 re-appreciation of evidence.[239]</td></tr>
</table>

According to the Law Commission, the differential treatment of these two category of awards awards is justified by the fact that "[t]*he legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration*".[240]

[235] Explanation 1 to Section 34(2)(b)(ii).
[236] Explanation 1 to Section 34(2)(b)(ii).
[237] Explanation 1 to Section 34(2)(b)(ii).
[238] Explanation 1 to Section 34(2)(b)(ii).
[239] Section 34(2A).
[240] 246th Report of the Law Commission of India (2014), ¶ 34.

Thus, the 'patent illegality' test is no longer applicable to international commercial arbitrations, and has been reduced in its scope in domestic arbitrations.[241] Across the board, the level of judicial intervention has thus been minimized by virtue of the 2015 Amendment. The positive effect of the 2015 Amendment to the 'public policy' ground has been emphasized by the Supreme Court in its May 2019 decision in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*.[242] In its decision, the Court held that "The expansion of "*public policy of India" in ONGC Ltd. v. Saw Pipes Ltd. ["Saw Pipes"] and ONGC Ltd. v. Western Geco International ["Western Geco"] has been done away with… Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter* ***but which does not amount to mere erroneous application of the law****… it is also made clear* ***that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award****. [emphasis added]*".

Enforcement: Section 36

Enforcement of an award is the most significant step for a party. This is what will enable them to realize the fruits of their sustained efforts. According to Section 36 an award is to be enforced in the same manner as if it were a decree of the Court. This is a legal fiction created for making the process of enforcement smooth. This does not mean that an award is a decree of a court but merely for the limited purpose of enforcement it is to be treated like a decree of a court.

Place of enforcement: There were divergent views expressed by various High Courts with respect to the place of enforcement. Some were of the view that since an award is a decree there is a need to get a transfer decree from the court which has jurisdiction over the matter and then it can be enforced by the court at the place where the respondent has assets. On the other hand many High Courts were of the view that there is no need for a transfer decree and an award can be directly enforced by the court at the place where the respondent has assets. In a recent judgment the Supreme Court in *Sundaram Finance Ltd. v Abdul Samad & Anr*[243] stated that the former view is bad in law and the latter view is correct i.e. there is no need for a transfer decree.

241 Devitre, 'The 2015 Amendment to the Arbitration and Conciliation Act, 1996: A Critical Analysis', TDM Special Issue on "International Commercial and Investment Disputes in and with India", Vol. 15 Issue 2 (2018), p. 13.
242 Civil Appeal No. 4779 of 2019.
243 (2018) 3 SCC 622

Time for Enforcement:

Under Clause 3 of Section 34 an application for setting aside can be made within a period of 3 months from the date on which the party making the application had received the award. Once that time period is elapsed party can approach for the enforcement of the award. On the other hand if an application has been made by an aggrieved party challenging the award filing of such an application would not automatically render the award unenforceable unless the court grants an order of stay on a separate application.

DEPOSITS: S. 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 share 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.

The modern practice in various arbitral tribunals seems to have inspired this provision wherein the arbitral tribunals require the parties to make an advance deposit for the costs of arbitration. The arbitrator nowadays secures his fees through this medium by demanding deposits or payments on account with the tribunal. Power is thus conferred upon the arbitral tribunal to cover its costs by calling in advance the parties to deposit the anticipated costs in respect of the arbitration of the claim submitted. Such costs have now been provided for under Section 31A of the Act, which substituted the erstwhile section 31(8) through the Amendment Act of 2015.

1. **Tribunal to fix amount of deposit**

As stated above, the arbitral tribunal is empowered to call for advance deposits of money to cover the costs of arbitration. In order to exercise this power judiciously, the question of deposit and its quantum should be discussed not only amongst the members of the tribunal but with the parties to the arbitration as well.[244] It will thus require the parties to deposit in advance the costs of arbitration as referred in Section 31A of the Act. Moreover, a separate

244 O. P. MALHOTRA & INDU MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 1283 (LexisNexis Butterworths) (2nd ed. 2006).

amount of deposit will be fixed by the tribunal if a counter-claim has been submitted by the respondent in response to the claim of the claimant. The best course for the arbitrator is to make a record about his fees and the reasons thereof, in the record of the proceedings itself within the knowledge of both the parties and if he fails to do so, he will be involved in defending himself against the allegation of misconduct, if raised.[245]

2. **Failure of a party to pay fees**

The amount of deposits under this provision towards the claim and the counter-claim shall be paid in equal shares by the parties in advance. If either of the parties refuses to pay or is unable to pay, the other party is permitted to deposit the share of the defaulting party and the arbitral tribunal shall debit the amount, after determination of costs under section 31A, at the time of making the award. If a party decides not to pay the share of the defaulting party, the arbitration proceedings will cease to proceed and as a result the tribunal may be forced to suspend or terminate the proceedings.[246] If the arbitral tribunal suspends the proceedings with the purpose of providing the parties an opportunity to reconcile their positions with respect to the payments between themselves, but the matter becomes impasse, it may terminate the proceedings. The tribunal after terminating the proceedings becomes *functus officio,* in respect of the claim or the counter claim, as the case may be.[247] After termination of the proceedings, the accounts shall be rendered by the tribunal to the parties of the deposit received and shall return any unexpended balance to the parties.[248]

S.39. LIEN ON ARBITRAL AWARD AND DEPOSITS AS TO COSTS:

(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.

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245 Jeewan Industries Pvt. Ltd. v. Haji Bashiruddin Madhusudan Dayal, AIR 1975 Del 215 (DB).

246 Eacom's Control (India) Ltd. v. Bailey Controls Co., (1998) 74 DLT 2138 (Del.).

247 *Supra* note 1, at p.1284.

248 P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 766 (Wadhwa and Co., Nagpur) (6 ed. 2006).

(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.

1. Lien of the Arbitrator

The arbitral tribunal has the power to exercise lien on the arbitral award for any unpaid costs of arbitration. This is a method through which the arbitrator secures the payment of the unpaid costs of arbitration. He may refuse to file his award till his fees and charges are paid.249 An arbitrator's lien may cover not only his fees but also his out of pocket expenses such as the cost of hiring a room, cost of travel and cost of secretarial assistance.250 This right is however, subject to two elements, namely:

i. Party autonomy- An arbitration agreement by the parties to the contrary;
ii. Court intervention

The liability of the parties to pay the fee of the arbitrators and the cost of arbitration is joint and several, i.e. each party is liable to pay the entire unpaid costs of arbitration not merely of the arbitrator whom he himself appointed. It is however advisable that the tribunal demarcates the costs of the award payable by each party. A further direction can also be given that if the successful party takes up arbitration, he shall be reimbursed by the other party for which the other party is liable under the award.251

2. Party Autonomy

The remuneration to be paid to the arbitrator may be decided upon by the parties in the agreement itself. In absence of such an agreement, the parties are deemed to have an implied promise to pay the arbitrator reasonable remuneration.252 The parties can also provide for the lien of the arbitrator on arbitral award and any unpaid cost of arbitration.253 If such a provision is in contravention of the provisions of this section, the former shall prevail over the latter.

3. Intervention by the court

The arbitral tribunal can exercise lien on any 'unpaid costs of arbitration' incurred by it. However, if a party feels that the costs of arbitration demanded by the tribunal are unreasonably exorbitant or unwarranted, it may make an application to the court for directions to deliver the award. On receiving such application, the court will order the

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249 Daya Singh Mangharam v. Charandas Mathuradas, AIR 1940 Sind 144.
250 Government of Ceylon v. Chandris, (1963) 2 QB 327.
251 O. P. MALHOTRA & INDU MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 1286 (LexisNexis Butterworths) (2nd ed. 2006).

252 P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 767 (Wadhwa and Co., Nagpur) (6 ed. 2006).
253 *Supra* note 8.

applicant to deposit the entire amount of costs (as demanded by the tribunal) to the court. The court will thereafter hold inquiry into the matter, and after due analysis, order the party to pay the tribunal due amount out of the deposit received and the balance amount be returned to the party. However, in a case where the parties have fixed the fees demanded by the tribunal under a written agreement, the provisions of S.39 (2) will not be applicable.

4. Delivery of the Award

The arbitral tribunal may notify the parties of the award being ready for delivery subject to the payment of its fees. Either or both the parties are entitled to take up the award on payment of the fees. Where the party taking the award is not liable under its terms to pay the fees, he is entitled to recover all the costs imposed under the award, including the fees of the tribunal. If the award is taken by neither of the parties, the tribunal may have no sanction but to sue for its fees. After the arbitral award has been made, the tribunal shall deliver a signed copy of it to each party.254

Deposit of Monetary Sums

5. Costs of arbitration, fees and charges

The costs of arbitration have been provided for under Section 31A of the Act, which substituted the erstwhile section 31(8) through the Amendment Act of 2015.

The arbitrator cannot be compelled to act without the payment of his fees. The demand of advance fees by the arbitrator will not count as misconduct unless the demand is excessive. There is no bar with respect to fees being demanded at an earlier stage.255 However, if the arbitrator takes money from one of the parties and does anything else before making the award, the court will set aside the award; but if he receives fees from both the parties, by their mutual agreement, he does not commit any misconduct.256

Where the arbitrator lacks jurisdiction on account of lack of qualification and the want of jurisdiction is known to him and, to his knowledge, not known to the party appointing him, is not entitled to any remuneration.257 Also, when the arbitrator has been appointed by a party and fees decided beforehand, it is contrary to the arbitrator's quasi-judicial status for him to bargain unilaterally for his fees.258

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254 O.P. MALHOTRA & INDU MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 1287 (LexisNexis Butterworths) (2nd ed. 2006).

255 State of Orissa v. S.B. Joshi, AIR 1983 Ori 125.

256 Union of India v. J.P. Sharma, AIR 1982 Raj 245.

257 R. S. BACHAWAT, JUSTICE BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 927 (Wadhwa & Co., Nagpur) (3 ed. 1999).

258 P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 777 (Wadhwa and Co., Nagpur) (6 ed. 2006).

Effect of Death of a Party
S.40. DEATH OF A PARTY:

(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.

An arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of a person.[259] The aim of this section is to keep arbitration agreements alive even after the death of the signatories to the agreement. The dispute does not end with end with the life of any one member.

1. **Legal Representatives**

The term 'legal representatives' has been defined under Section 2(1) (g) of the Act. He is 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.

2. **Legal Representatives to be brought on record**

It is the duty of the arbitrator to serve notice on the legal representatives of the deceased parties calling upon them to appear before him, and to continue with the reference. The question whether a legal representative of a deceased party is entitled to enforce the contract will depend upon whether the right dealt with in reference is merely of a personal nature or is one which survives to the legal representative.[260]

If a party dies before the hearing is concluded, the legal representatives are not bound by the award unless notice of the reference is given to all of them. There is no valid award unless the legal representatives are parties to the reference and this is done by giving notice to them.[261] But where hearing has concluded before the death of the party and the arbitrators

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259 R. S. BACHAWAT, JUSTICE BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 930 (Wadhwa & Co., Nagpur) (3 ed. 1999).
260 Perumalla Satyanarayana v. Perumalla Venkata Vengayya, ILR (1903) 27 Mad 112.
261 Binayakdas Acharya Chowdhury v. Shashi Bhusan Chowdhury, AIR 1922 Cal 226.

are only left with delivering the award, principle of *nunc pro tunc* applies and award made without bringing his legal representatives is valid.[262]

3. **Effect on operation of other law**

Though according to Section 40 (1) an arbitration agreement is not discharged by the death of any party to the agreement but according to Clause (3) this provision will not have effect if by the operation of any other law such a right of action is extinguished.

Recognition and Enforcement of Foreign Arbitral Awards

Recognition

The term 'Recognition' would mean taking formal cognizance of an award, it is usually understood to be used as a defensive process. In common parlance, it arises when parties approach a Court for a remedy with respect to a dispute which has already been decided upon by an arbitral tribunal. There are two possible situations to be considered in this context. The first is where all the issues between the parties have been decided previously. In such a case 'Recognition' operates as *Res Judicata* for the parties, to not raise the same issues again. The second, where all issues have not been decided previously. In this scenario, it plays the role of 'issue estoppel' and bars those issues which have been decided previously but allows those to be decided which were not raised earlier.[263]

'Recognition' acts as a preliminary to enforcement, an award can only be enforced if it is recognised. It is used as a bar against fresh proceedings to an already announced award. The major objective for any party seeking only the 'Recognition' of an award would be to rely on the same in Court proceedings. It can be for the purposes of defence, set off, etc. It is imperative to note that the choice of Court is not in the hands of the said party, but the one where proceedings against the party are brought. This makes the recognition of a foreign award more important.[264]

Enforcement

The act of enforcement goes beyond recognising the award in terms of its legal force. It requires the Court to exercise proper legal sanctions for the implementation of the award. Any Court will pass the enforcement of an award when it considers it to be binding between both the parties. It is a subsequent effect of 'recognition' of an award.

The mechanism of enforcement is used as a tool to direct the other party. The sanctions issued by the process of enforcement can be with respect to individuals or corporations. In

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262 Harikrishna Mitra v. Ramgopal Mitra, 14 CWN 759.
263Alan Redfern & Martin Hunter, Redfern & Hunter on International Arbitration, 504 (6th edition, Kluwer LawInternational, 2015)
264Id.

case of individuals, they can involve seizing of property, etc. In case of corporations, it can involve elements like the seizure of assets, etc.

It is imperative to note the location in case of enforcement. At times the party seeking to enforce the award has a choice as to the country or state where the award may be enforced. In other cases, where for example – a corporation has its assets in a particular country only, then the award needs to be enforced in the same place as well.[265]

The primary distinctions between recognition and enforcement can be summarised as follows: -

Recognition	Enforcement
- It is the initial act of legally recognising the force and effect of the award. - It is used by parties who want to use the legal validity of the award in Court proceedings.	- It acts as the final sanction in response to the non-performance of an award. - It is used as a measure to ensure compliance of the other party.

Recognition and Enforcement of Certain Foreign Awards

Foreign Award:

§44 of the Arbitration and Conciliation act, 1961 defines 'Foreign Award' in the context of the New York Convention, 1958. The constituent elements of the definition are:

a) *"Unless the context otherwise requires;*
b) *Foreign award means an arbitral award on differences between persons arising out of legal relationships, whether "contractual" or not;*
c) *Considered "Commercial" under the law in force in India;*
d) *Made on or after 11th October, 1960:*
    i. *In pursuance of an agreement in writing for arbitration to which the New York Convention, 1958 applies; and*
    ii. *In one of the territories to which reciprocal provisions apply, as per notification of the Central Government in the Official Gazette."*[266]

[265]Id.at 568.
[266] These six conditions were upheld by the Delhi High Court in *National Ability S.A. vs. Tinna Oil and Chemical Ltd.,* (2008) 3 Arb LR 37.

The current position has now been settled by the set definition that an award shall be foreign award, if decided outside India, irrespective of whether Indian law is used or not would constitute a foreign award provided two conditions are met: -

a. The agreement should be in writing to which the New York Convention applies. As stated in the Act '*in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies.'*
b. It should be in one of the territories where it has been notified by the Central Government in the Official Gazette that the New York Convention applies to the said territories. As stated in the Act *'in one of such territories as 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 said Convention applies.'*

1. **The Writing Requirement**

Section 44 uses the specific phrase stating, *'in pursuance of an agreement in writing'.* The guidelines with respect to what constitutes 'writing' were laid down in the case of ***Smita Conductors Ltd. v. Euro Alloys Ltd.***[267] The following conditions were laid down: -

a. The arbitration agreement needs to be signed by the parties.
b. The arbitration agreement/clause to be contained in an exchange of letters or telegrams.

Therefore, the aforesaid conditions are to be met to consider an agreement to be in writing in the said case.

Power of judicial authority to refer parties to arbitration [S. 45]

The section operates notwithstanding anything contained in Part I of the Arbitration and Conciliation Act, 1996 or in the Code of Civil Procedure, 1908. The section says that when any matter covered by Section 44 (above) comes before the court in respect of which the parties have made an arbitration agreement, and if a party to the agreement makes a request, the court shall refer the parties to arbitration. The court may not order such reference if it finds the agreement to be null and void, inoperative or incapable of being performed.[268]

Binding force of foreign award [S. 46]

46. When foreign award binding. - 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

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267Smita Conductors Ltd. v. Euro Alloys Ltd.(2001) 7 SCC 728.

268*Societe Commerical De Coreales and Financiers v. State Trading Corporation*, AIR 1998 Guj 94, The new 1996 Act became applicable because no proof was offered to show that the arbitration agreement was null andvoid, hence suit liable to be stayed.

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.
In order to make the above provisions really effective, Section 46 declares that any foreign award which would be enforceable under the Act shall be treated as binding for all purposes on the parties to the agreement. It can be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in India. A reference to enforcing a foreign award would include a reference to relying on an award.

Explaining the scope of the set of provisions from Sections 46 to 49, the Supreme Court, in the case of ***Fuerst Day Lawson Ltd. v. Jindal Exports Ltd,*** observed as follows:[269]

(a) Under the old Act, after making an award and prior to its execution, there was a procedure for filing and making the award a rule of court, i.e. a decree. Since the object of the new Act is to provide speedy and alternative solution to the dispute, the same procedure cannot be insisted upon under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the suffering of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of a foreign award.

(b) A party holding a foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Section 47 to 49. In one proceeding there may be different stages. In the first stage the court may have to decide about the enforceability of the award having regard to the requirement of the provisions.

(c) Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award a rule of court/decree again. If the object and purpose can be served in the same proceedings, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from the objectives contained in para 4 of the Statement of Objects and Reasons. Sections 47 to 49 and the scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution could not be permitted to convert as an application under Section 47 is technical. For enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take execution thereafter. In one proceeding the court enforcing a foreign award can deal with the entire matter.

269*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd*., (2001) 6 SCC 356: AIR 2001 SC 2293: 2001 Lab IC 1073. The Court relied on *Thyssen StahlunionGmbh v. Steel Authority of India Ltd*., (1999) 9 SCC 334.

(d) Even otherwise, this procedure does not prejudice a party in the light of what is stated in *Thyssen* judgement. If the argument advanced on behalf of the respondent is accepted, the very purpose of the Act in regard to speedy and effective execution of foreign award will be defeated.[270]

(e)

Matters of evidence [S.47]

The party seeking enforcement of a foreign award has to produce at the time of the application the following document:

1. the original award or its copy which is duly authenticated in the manner required by the law of the country in which the award was made;
2. the original agreement of arbitration or duly certified copy;
3. such evidence as is necessary to be proved that the award is a foreign award.

Where the award is in any other language than English, an English version would have to be produced. The version should be certified as correct by a diplomatic or consular agent, of the country to which the party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

An award made in Ukraine after the break-up of the USSR was held to be a foreign award. Ukraine was a part of the territories of the USSR which was recognised by India as reciprocating territory and continued to be so even after its political separation, though there was no separate notification recognising it as a reciprocating country. The notification applicable to the USSR would remain applicable to all break-away territories.[271] The arbitration had to be in accordance with the laws of Ukraine. There was the allegation that those laws were not followed. As to this the court said that the burden of proof was on the party making such allegations and that burden was not discharged. The fact that the arbitrator was the high-ranking officer of the foreign country would not render the enforcement of his award in India to be against the public policy of India.

An award may be recognised, without being enforced; but if it is enforced, then it is necessarily recognised. Recognition alone may be asked for as a shield against re-agitation of issues with which the award deals. Where a court is asked to enforce an award, it must

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270The Bombay High Court followed this approach in *Euro-Asia Chartering Corporation Pvt. Ltd. v. Fortune International Ltd.,* AIR 2002 Bom 447 and held that a foreign award which is certified and attested as final
can be put into enforcement without taking out any proceedings for determination of its enforceability.

271 *Transocean Shipping Agency (P) Ltd. v. Black Sea Shipping*, (1998) 2 SCC 281: AIR 1998 SC 707. The decision was under the Foreign Awards (Recognition and Enforcement) Act, 1961. The original agreement was substituted by a new agreement and, therefore, it was held that the dispute would have to be resolved in accordance with the requirements of the new agreement.

recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.[272]

Process of Enforcement:

India is a signatory to both the New York Convention and the Geneva Convention. By virtue of this if an award is made in a country which is recognised by India to be convention country, then the said award is enforceable in India.

Enforcement of a foreign award is a two-step process in India: -

(1) Firstly, an application is made to the Court under Section 47 of the Act by the party seeking enforcement. This application is made along with meeting the evidentiary requirements of Section 47.
(2) Lastly, a decree is passed by the Court under Section 49 if the Court renders the award enforceable.

Conditions for Enforcement of Foreign Awards [Section 48]

This section can be traced to Article 36 of the UNCITRAL Model Law, which is considered an adoption of Articles V and VI of the New York Convention, 1958. It provides for certain grounds which can be invoked to resist the enforcement of a detrimental award. The onus is upon the party resisting enforcement on these grounds to prove to the court that the conditions contained within the provision are met. However, when it comes to grounds contained under Section 48(2), the court may find *ex officio* evidence to refuse enforcement. Section 48 contains the following exhaustive grounds:

- the parties to the agreement were subject to some incapacity;
- the arbitration agreement is invalid as per the law which the parties have sought to apply to their contract;
- the party seeking to vacate the award was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case due to some other reason;
- the arbitral award deals with a difference not contemplated or does not fall within the terms of the arbitration agreement or the award is beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the procedure adopted during the proceedings was not in accordance with the agreement of the parties and failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award is yet to become binding on the parties;

272*Brace Transport Corporation of Monrovia v. Orient Middle East Limes Ltd.,* 1995 Supp (2) SCC 280: AIR 1994 SC 1715.

- the award has been set aside or suspended by some competent authority of the country in which, or under the law of which, the award was made;
- the subject matter of the impugned dispute is not capable of being settled by arbitration under the laws of India; or
- the enforcement of such arbitral award would be contrary to public policy.

As is reflected from the use of the words '*may be used'*, the courts have discretionary power to refuse to enforce a particular award. These decisions are usually taken on the particular factual background of the case at hand. Nevertheless, these grounds are to be narrowly construed by courts and courts are not permitted to carry a second review of the merits of the given award. This is due to the prevailing policy objective under the Arbitration Act, which is that of giving effect to the finality of arbitral awards. For the same reason, the enforcing court may not enquire into questions such as whether the arbitral tribunal applied the law correctly, or whether it applied the correct law.

This provision can be said to have two broad objectives. First, it seeks to ensure that awards that suffer from procedural defects and deficiencies do not get enforced. Second, it aims to maintain the particular interests of India, by ensuring that the arbitral award is not contrary to public policy or the law of the country.

It must be kept in mind that the refusal of the court to enforce the award does not make the award itself a nullity. The party seeking to enforce the award is within its rights to take the award for enforcement in another country. This may lead to a more favourable result. For example, if the enforcement was refused on public policy grounds, another country may have a different social setup and may choose to enforce the same award.

Procedural Defects

The first four grounds contained in Section 48(1) all deal with procedural infirmities. These are (i) incapability of either party or invalidity of the agreement, (ii) failure to comply with arbitral procedure, (iii) defects pertaining to jurisdiction, and (iv) improper constitution of arbitral tribunal or failure to adopt correct procedures. An important consideration in this regard is the principle of *double exequatur*. This requires the courts which are enforcing the award to give effect to the authority of courts situated at the venue of the arbitration proceedings. This principle aims to minimize the possibility of repeated litigation on the same issue. Thus, in case these procedural defects have been invoked before the courts of the venue of arbitration, and have been rejected, the party against whom the award is being enforced may not reagitate the same issue.

I. Incapacity of Parties

This ground is invoked when one of the parties to the arbitration agreement does not have the requisite authority to enter into a valid contract as per the law applicable to the contract. In that sense, it could refer to lack of authority with a corporate entity to enter into an arbitration agreement, or incapacity by way of infancy or insanity for a natural person.

II. Invalidity of Arbitration Agreement

The court may refuse to enforce an award if the arbitration agreement is not valid under the law to which the parties have subjected the contract, or under the law of the country where the arbitration award was made. An example would be an award rendered by an arbitrator in a case where the parties have not entered into an agreement to arbitrate at all. Similarly, a party may have signed an arbitration agreement which is inoperable or ambiguous. The validity of the agreement is to be assessed on the basis of the law that the parties have subjected the contract to. In case no such indication has been made, the formal requirements under the law of the place of the arbitration are to be used.

III. Non-Compliance of Due Process

This ground seeks to ensure that the arbitration was conducted while giving due attention to procedural fairness. In particular, it looks at whether the parties received adequate notice of the arbitration, the appointment of an arbitrator, or whether the parties were able to present their case before the tribunal. This ground is considered to be slightly more expansive than the others, in the sense that it is based on principles of natural justice. Nevertheless, while assessing whether such principles are in place, the tribunal is not required to adhere to one particular procedure for conducting the arbitration, such as the one usually followed by domestic courts. It is sufficient if the parties were given a reasonable opportunity to present their case.

In ***Minmetals Germany GmbH v. Ferco Steel Ltd.,***[273] the losing party sought to invoke this ground is English courts on the basis that the arbitral tribunal had obtained evidence by way of its own investigation. The court rejected this argument, since that party had been given the opportunity by the arbitral tribunal to present any objections it may have had to this procedure, however it had refused to do so.

Similarly, the requirement of granting proper notice is considered indispensable for the conduct of a fair hearing. It must be noted that there is no strict understanding of what

273 Minmetals Germany GmbH v. Ferco Steel Ltd [1999] 1 All ER (Comm.) 315,330-1, Yearbook Commercial Arbitration, Vol. XXIV-1999, 739.

constitutes such notice, however it is commonly assumed that information pertaining to the venue of the hearings, appointment of an arbitrator, time of proceedings etc. are of great relevance. This information must be made in a timely and appropriate manner. This ensures that the rights of the parties to present their case are not prejudiced. The court must make a decision in this regard on the basis of the facts and circumstances within which the parties have been situated, such as the usual practice within their respective industries or trade sectors.

Similarly, parties must be made aware of the evidence that the opposite party is relying on, and whether it is being considered by the arbitrator. There may be other situations as well which may prohibit one party from being able to present their case, such as interference by the opposite party. In ***Renusagar Power Co. Ltd v. General Electric Co.,***[274] the Supreme Court found that the principle of granting a fair hearing had not been violated, since the party making the allegation had been granted a sufficient opportunity to present their case, yet had chosen to not do so. Thus, this provision only covers situations where one party has been unable to present their case due to a reason that is not within their control.

IV. Exceeding Jurisdiction

This provision covers two situations. First, where the arbitrators have exceeded their authority granted to them under the arbitration agreement in making the award. Second, where the arbitrators have exceeded their authority only in some respects but not others. In this case, the court may sever the operative provisions of the award from the remaining part. This is based on the understanding that arbitration is a creature of consent, and the powers of the arbitrators are not unlimited, but in fact limited by the agreement between the parties.

V. Improper Composition or Procedure

In making a determination under this provision, courts must first turn to the method of conducting the arbitration which has been prescribed in the agreement of the parties. In case such an agreement is missing, the court must look to the rules governing the conduct of arbitration in the laws of the forum state. Thus, if the arbitration agreement requires the two parties to commonly decide on the appointment of an arbitrator, and this was not carried out, this particular ground would be available to the other party. Nevertheless, if the aggrieved party takes part in the arbitration even though the proper procedure has not been followed, it is considered to have waived this ground.

VI. Non-Binding Awards

274 Renusagar Power Co. Ltd v. General Electric Co.1994 Supp (1) SCC 644.

Courts may refuse to enforce the award if any of the following three conditions are present: (i) the award is yet to become binding on parties, (ii) award has been suspended by a competent authority in the country where the award was made, and (iii) award has been set aside by a competent authority in the country where the award was made.

The laws of the country in which the award was made have to be considered in determining whether the award has become binding. The Supreme Court, in ***ONGC v. Western Co. of North America,***[275] noted that an award may become binding at the moment it is made, or when certain conditions (such as time period) have been met. For example, the law of the country where the award has been made may require that a local court confirm such award prior to its enforcement. If such condition has not been met, the court may refuse to enforce that award.

VII. Non-Arbitrability of Dispute

Courts in India may refuse to enforce the award if it concerns a subject matter that is considered inarbitrable in India. A dispute can also be considered non-arbitrable because of deficiencies in the contract. While courts in India have yet to pronounce a formal list of grounds under this provision, an analogy may be drawn to the laws promulgated by various states in the United States. There, various state laws have stringent requirements that prohibit the arbitration of certain consumer or labour related disputes.

VIII. Conflict with Public Policy of India

The provision has two separate grounds – 'public policy' *and* 'law of India'. Thus, courts have the power to look at policy principles that do not necessarily relate to the violation of laws in India. The provision also contains a particular instance, i.e. where the making of the award was induced by fraud or corruption.

In the landmark case of ***Renusagar Power Co.,***[276] the Supreme Court posited that enforcement could be denied on the ground of public policy if the enforcement would be contrary to (i) fundamental policy of Indian law, (ii) interests of India, or (iii) justice and morality. In subsequent decisions, the Court has reiterated that the ground of public policy ought to be narrowly construed, in order to give full effect to the principle of promoting arbitration.[277]

275 ONGC v. Western Co. of North America AIR 1987 SC 674.
276 Renusagar Power Co. Ltd v. General Electric Co.1994 Supp (1) SCC 644.
277 Shri Lal Mahal Ltd. v. Progetto Grano Spa, 2013 (3) Arb. LR 1 (SC).

Recently the Delhi High Court pronounced a very important judgment about public policy in *Daiichi Sankyo v Malvinder Mohan Singh and Others*.[278] The matter involved a dispute related to a share purchase and subscription agreement, whereby Daiichi had purchased the entire shareholding of Indian Pharmaceutical giant Ranbaxy Pvt. Ltd, owned by the respondents. The Indian Company was selling drugs in the US as well. It was facing serious enquiry from the relevant US authorities for fabricating data about the quality of its drugs. This information was concealed by the respondent from the claimant. Subsequent to the deal the enquiry became well known and the value of the Indian company slumped in the marked. *Daiichi* refered the matter to arbitration and alleged fraud and claimed damages. An award of 3500 Cr. Rupees was passed against the respondents.

The respondents resisted the enforcement before Delhi High Court on the basis of violation of public policy. The argument was that there was no fraud and also the tribunal was wrong in calculating the damages. Furthermore the claim of Daiichi was barred by law of limitation. Enforcing such an award would be contrary to the public policy of India. The Court rejected all the said arguments and said that none of them would amount to violation of public policy as far as enforcement of foreign awards is concerned. It stated that arbitration tribunal is the final decision maker with respect to questions of fact and appreciation of evidence.

However the Court accepted that enforcing the award against some of the respondent who were minors would be violation of public policy as protection of minors is a fundamental principal on which Indian law is based. Thus it is very clear that the concept public policy is to be applied very narrowly with respect to refusing enforcement of foreign awards.

Adjournment of Decision to Enforce Award

Section 48(3) provides that if an application for setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of Section 48(2), the court may adjourn its decision on the enforcement of the award. On the basis of an application made by the party claiming enforcement, the court may also order the opposite party to provide security for costs.

The party claiming such adjournment is required to furnish documentation showing that it has made a suitable application before the competent authority. This discretion of the court to stay the enforcement is to be utilized extremely sparingly.

Process of Enforcement

As per Section 49, if the court is satisfied that the arbitration award is enforceable, the award is deemed as a ‘decree of the court’. It must be noted that this process is governed by the Limitation Act, 1963, as per which a party must seek enforcement of a foreign award within

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three years of it becoming binding under the law of the country where the award was made.[279]

Appealable Orders

As per Section 50(1), an appeal shall lie to the court authorized to hear such appeals from an order of the court refusing to refer parties to arbitration under Section 45 and from a refusal to enforce the award under Section 48. Section 50(2) provides that there is no option for a second appeal from the decision of the appellate court under Section 50(1). However, this does not prevent the party from appealing to the Supreme Court.

279 Article 137, Limitation Act 1963.

MODULE V

CONCILIATION

Introduction

Conciliation is a mode of dispute resolution which is considered as an alternative to litigation and arbitration. It is a process wherein an independent third party called a conciliator is appointed to persuade the parties to reach a settlement.

The appointment of the conciliator can be done in two ways:

1. By mutual agreement between the parties, pursuant to Section 62 of the Arbitration and Conciliation Act, 1996.
2. By court, through reference under Section 89 of the Code of Civil Procedure, 1908.

Definitions of Conciliation

There is no clear definition for conciliation under the Indian laws. Conciliation is neither defined under the Arbitration and Conciliation Act, 1996 nor the Code of Civil Procedure, 1908.
Wharton's Law Lexicon defines Conciliation as "the settling of disputes without litigation."[280]

The Halsbury Laws of England defines conciliation by drawing a comparison between arbitration and conciliation as follows:

"The term 'arbitration' is used in several senses. It may refer 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 arbitrator's opinion ought to be the respective rights and liabilities of the parties, and such a function is non-judicial. 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."[281]

Distinction between Conciliation, Arbitration and Judicial Settlement

Section 89 of the Code of Civil Procedure, 1908 refers to several modes of dispute resolution such as conciliation, arbitration, judicial settlement etc. There are several differences in the manner in

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280 Wharton, J. J. S. (John Jane Smith), 1816 or 1817-1867. The Law Lexicon, Or, Dictionary of Jurisprudence: Explaining All the Technical Words And Phrases Employed In the Several Departments of English Law, Including Also the Various Legal Terms Used In Commercial Transactions, Together With an Explanatory As Well As Literal Translation of the Latin Maxims Contained In the Writings of the Ancient And Modern Commentators. Littleton, Colo.: F.R. Rothman, 1987.

281 Halsbury, Hardinge S. G, and of C. J. P. H. Mackay. *Halsbury's Laws of England*. London: LexisNexis, 2008. Print.

which these mechanisms function. The difference between conciliation, arbitration and judicial settlement are mentioned below.

Distinctions	**Conciliation**	**Arbitra**	**Judicial Settlement**
Nature of Process	Evaluative	Private Adjudic	
Governing Statute	Arbitration and Conciliat Act, 1996	Arbitrat and Concilia Act, 199	Code of Civi Procedure, 1
Name of the Adjudic Authority/Neutral Party	Conciliator	Arbitrat	Judge
Role of the Neutral Party	Evaluative	Adjudic	Adjudicatory
Mode of Dec Reached	Settlement Agreement	Award	
Enforceability	Binding only if the settle is reached and reduced writing in the settlement agreei signed by both the parties.	Binding	Binding

Advantages of Conciliation over Arbitration and Judicial Settlement

Conciliation has a number of advantages over Arbitration and Judicial Settlement, some of these advantages are:

1. The active presences of a neutral and experienced person who shall actively suggest possible solutions to the problems on the table while evaluating the costs and the risks associated with the dispute.
2. Efficiency in time and cost due to the nature in which the proceedings are conducted.
3. Confidentiality plays a huge role and is agreed upon by the parties to the dispute as well as the conciliator. Parties prefer this mode of resolving disputes as they can be assured of discretion no matter what the outcome of the process.
4. The option of choosing a conciliator is left to the parties. The parties are free to choose the conciliator who shall best fit the dispute.

While Arbitration proceedings are comparatively technical and expensive. A reference can be made to a case where the Supreme Court held that "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal more effective and speedy for resolution of disputes avoiding procedural claptrap and this led to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in the courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the court been clothed with 'legalese' of unforeseeable complexity"

Conciliation is suitable alternative to the conventional formal justice system. However, opting for conciliation does not devoid a party of abiding to any sort of legal framework. If parties opt to use this method of dispute resolution they must sign a formal agreement to conciliate. A advantage of opting for conciliation proceedings is that though the amicable settlement in conciliation could not be reached then the evidence collected during the conciliation cannot be disclosed in any other form of proceedings that may succeed. This protection has been mentioned in The Arbitration and Conciliation Act.

Why Conciliation is not used frequently in the International Context?

The general accord is that conciliation has not satisfied the desires for its founding fathers. While conciliation has demonstrated fruitful now and again[282], for example Jan Mayen and the East African Community case, there are a few reasons with respect to why other dispute settlement mechanisms are favoured over conciliation.

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282 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

The principal reason might be that gatherings have other, progressively compelling, fora for settling disputes accessible to them. This besides relies upon the kind of contention present in the question. When managing a minor dispute for which case would demonstrate excessively exorbitant or strategically harming, conciliation presents itself as a fitting instrument. In any case, it might be that immediate reciprocal dealings would be quicker, more practical, and more straightforward. The foundation of a conciliation commission requires some serious energy: chiefs should be designated, gatherings between the gatherings must be set up, and so forth. All things considered, to warrant the complex authoritative nature of conciliation, parties would not really observe the advantage in looking for conciliation for minor questions. Then again, significant disputes between States require political and lawful expert with the end goal for them to be settled. Binding decisions and compliance mechanisms are required all things considered, and political authority must be available in any event to guarantee consistence. Conciliation, be that as it may, offers none of these viewpoints.

At the finish of conciliation procedures, the commission issues non-binding suggestions. Their non-binding nature, combined with the way that by and large conciliation is discretionary, might be another motivation behind why parties look for different instruments. The achievement of conciliation in the Jan Mayen case[283] is regularly credited to the way that the two gatherings delighted in a genial relationship and wanted a sped up result without the danger of building up a point of reference that would tie them later on. The non-binding nature of the proposal and the discretionary idea of conciliation were not issues for this situation, as rebelliousness with the suggestion would have harmed strategic relations. Where parties to a dispute abhor a solid political relationship, restricting results are wanted so as to guarantee consistency and to guarantee that the component is viable. Moreover, non-binding strategies of any sort will demonstrate pointless except if the two parties consent to them. All things considered, the for the most part discretionary nature of conciliation might be a solid explanation behind its rare use.

Further reasons, for example, an absence of disputes between parties to bargains which contain conciliation or settlements which farthest point the debates under which conciliation may emerge, may likewise be legitimate.

Be that as it may, while the previously mentioned reasons might be demonstrative of the inconsistent work of conciliation, it is contended that its limited use is one of its points of interest. The recurrence of the work of conciliation isn't significant as it goes about as a preventive component which depends on its minor nearness. Sir Ian Sinclair has expressed that "[…] Incomprehensibly, the less they are used the more compelling they will be"[284]. He contended that conciliation need not be utilized to be viable, as through its joining into arrangements and shows it

283 "Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen" (1981), Reports of International Arbitral Awards Volume XXVII

284 I M Sinclair "*The Vienna Convention on the Law of Treaties*" (Manchester University Press 1973)

goes about as a keep an eye on the activities of States. This contention may clarify the proceeding with joining of conciliation into present day arrangements and shows.

Background of Law of Conciliation in India

The UNCITRAL Model Law on International Commercial Conciliation defines "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons "the conciliator" to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

The UNCITRAL Perspective

Conciliation, unlike Litigation and Arbitration is a unique form of dispute resolution. This procedure has no systematic procedure for dispute resolution. It is more voluntary and less binding. Conciliation as understood is that its use depends on the agreement of the parties, where either of them may withdraw from the proceedings at any point of time such withdrawal is a part of the process and can be exercised even if the parties have an agreement to conciliate or have a conciliation clause in the contract.

There is no stage in a conciliation proceeding where there is any binding commitment on the part of the parties to the dispute; compliance with the settlement reached at the end of the proceedings is also purely voluntary. Therefore, it is not binding on the parties and the implementation of it purely depends upon the good faith of the parties.

Conciliator plays an important role in this process. The conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role.[285] The goal of the conciliator is to encourage the parties to settle on their own. The conciliator can help each party to appreciate better the difficulties perceived by his opposite number, so that they both corporate towards a mutually accepted resolution of their dispute.

The procedure as discussed under these rules, is that the conciliator may first, bring the parties together, despite this not being necessary always. At time, the parties themselves come together or do so through their representatives. Once the parties have come together, the conciliator would set the agenda and the lay the ground rules for the procedure. A vital role of the conciliator is to collect

285 http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf – Concepts of Conciliation and Mediation and their differences.

and communicate information between the parties while respecting the confidentiality. This relay of information between the parties will help them gain a better understanding of the other side's position in the dispute. This helps the parties explore option and various possibilities in the given circumstances to mutually settle their differences. The exploring of what is acceptable to both parties in their own accord, with the assistance of the mediator makes conciliation different from other modes of dispute resolution.[286] It is necessary for the parties to this process to remember that there are no winner and losers in. In order for a settlement to happen, both parties will believe they are winners in this process.[287]

Another characteristic that distinguishes conciliation from its counter parts is that aspect of withdrawing from the process at any period of time. In simple words, any step in this process is not binding on the parties.

Conciliation is fast and less expensive method of dispute resolution that Arbitration. While, arbitration is itself a faster and less expensive method dispute resolution as compared to Litigation. Conciliation as a process requires less capital to be invested in the process. Usually, there is only one conciliator as compared to arbitration where there are three arbitrators. Three arbitrators are generally used to avoid partiality and allow for parties to choose one arbitrator each. In conciliation, it is more desirable for only conciliator as it allows for easy flow of the process with the exchange of information. It further allows for the conciliator to better understand the dispute and the positions of the parties. Not only does this reduce costs but also is more conducive to promote consensus and compromise among the parties.

The costs are also significantly less as compared to other two processes due to procedural relaxations. Conciliation does not require a strict procedure to be followed, in fact this mode of dispute resolution allows for the parties and the conciliator to follow a method that is best suited to them and to expedite the procedure in the most efficient manner possible. This procedure is beneficial for disputes where neither arbitration nor litigation can aid and assist in resolving the dispute.

Conciliation under the Arbitration and Conciliation Act, 1996

Application and Scope of the Act

Part III of the Arbitration and Conciliation Act, 1996 applies to the following[288]:

i. conciliations arising out of contractual disputes,

ii. Conciliations arising out of other legal disputes.

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286 See Report of the Secretary General: Conciliation of International Trade Disputes, A/CN.9/167. Also see Report of the secretary general : commentary on the revised draft of UNICITRAL conciliation rules.

287 Bryson, Neutral ground: mediation and the legal profession in Victoria, 58 Law Inst. J. 1445, 1445 (1984)

288 Section 61 (1), The Arbitration and Conciliation Act, 1996

Part III of the Arbitration and Conciliation Act, 1996 shall not apply to disputes that cannot be submitted to conciliation, because they are prohibited by any law for the time being in force in India.[289]

Appointment of Conciliators

Number of Conciliators

There shall be one conciliator to conduct the conciliation proceedings.[290] However, parties can also enter into an agreement to appoint two or three conciliators.[291] If the parties are appointing more than one conciliator, all the conciliators should act jointly, as a general rule.[292]

Manner of Appointment

While appointing the Conciliator/Conciliators, the parties may consider the following rules:[293]

i. If there is only one conciliator for the conciliation proceeding, the parties may together appoint the sole conciliator.
ii. If there are two conciliators for the conciliation proceeding, then each party may appoint one conciliator.
iii. If there are three conciliators in a conciliation proceeding, 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.

The parties can also take the assistance of a suitable institution or person in the appointment of conciliators in two ways:[294]

i. The parties may request the institution or person to recommend the names of individuals to act as conciliators; or
ii. the parties may agree that the appointment of one or more conciliators is to be made by such institution or person directly.
iii. While recommending or appointing individuals to act as conciliators, the institution or person shall have regard to securing the appointment of an independent and impartial conciliator with respect to a sole or third conciliator.[295] The advisability of appointing a conciliator of a nationality other than the nationalities of the parties should be taken into account.[296]

289 Section 61 (2), The Arbitration and Conciliation Act, 1996
290 Section 63, The Arbitration and Conciliation Act, 1996
291 *Ibid*
292 *Ibid*
293 Section 64 (1), The Arbitration and Conciliation Act, 1996
294 Section 64 (2), The Arbitration and Conciliation Act, 1996
295 *Proviso* to Section 64 (2), The Arbitration and Conciliation Act, 1996
296 *Ibid.*

Role of Conciliator

Independence and impartiality – The conciliator should be independent and impartial.[297] He should not be biased or prejudicial towards any party to the dispute. The conciliator should maintain a neutral stand throughout the conciliation proceedings.

Fairness and justice – The conciliator should be guided by principles of objectivity, fairness and justice.[298] The conciliator shall take into consideration, the following aspects of the dispute[299]:

- rights and obligations of the parties to the dispute;
- trade related aspects which govern the transactions and business of both parties;
- the situations and circumstances surrounding the dispute, including any previous business relationship between the parties.

The conciliator is not bound by the following , but may also take into consideration, the following aspects of the dispute:

- Circumstances of the case,
- Wishes the parties may express,
- Request by any party to make oral statements
- Need for speedy settlement of the dispute

Disclosure of Information and Confidentiality - The conciliator should disclose the factual information concerning the dispute, which is given by a party to the dispute.[300] The disclosure should be made to the other party, to give him a fair opportunity to present his explanations.[301] receives any information about any fact relating to the dispute from a party, he should disclose such information to the other party. The purpose of this provision is to allow the party to present an explanation which he might consider appropriate.

Initiating proposals for settlement – The conciliator may, at any stage of the conciliation proceedings, make proposals for settlement of the dispute. The proposal does not have to be in writing.[302] There is also need to provide statement of reasons with the proposal.[303]

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297 Section 67(1), The Arbitration and Conciliation Act, 1996
298 Section 67(2), The Arbitration and Conciliation Act, 1996
299 *Ibid*
300 Section 70, The Arbitration and Conciliation Act, 1996
301 *Ibid*
302 Section 67(4), The Arbitration and Conciliation Act, 1996
303 *Ibid*

Principles of Procedure

Confidentiality – All matters relating to the conciliation proceedings should be kept confidential by the parties and the conciliator.[304] Confidentiality also needs to be maintained with regard to the settlement agreement, except when the disclosure is necessary for implementation and enforcement of the settlement agreement.[305]

In a situation, where a party gives any information to the conciliator during the proceedings on the condition that it should be kept confidential, then the conciliator should not disclose any such information to the other party[306].

Disclosure of information[307] – When the conciliator receives any information about any fact relating to the dispute from a party, he should disclose such information to the other party. Th purpose of this provision is to allow the party to present an explanation which he might consider appropriate.

Cooperation of the parties with the conciliator[308] – The parties should operate with the conciliator in good faith. The must submit any written materials, provide evidence and attend meetings when the conciliator requests for them.

Rules of procedure[309] – The conciliator is not bound the rules contained in the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. The conciliator should not ignore the principles of natural justice. This principle of natural justice require for the both parties to be heard in the presence of each other.

Admissibility of evidence in other proceedings[310] – The parties cannot rely on or introduce evidence in arbitral or judicial proceedings in respect of the following matters:

I. Views expressed or suggestions made by other part in respect of a possible settlement of the dispute
II. Admissions made by the parties in the course of the conciliation proceedings
III. Proposals made by the conciliator
IV. The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

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304 Section 75, The Arbitration and Conciliation Act, 1996
305 *Ibid*
306 Section 70, The Arbitration and Conciliation Act, 1996
307 Section 70, The Arbitration and Conciliation Act, 1996
308 Section 71, The Arbitration and Conciliation Act, 1996

309 Section 66, The Arbitration and Conciliation Act, 1996
310 Section 81, The Arbitration and Conciliation Act, 1996

Place of the meeting[311] – The parties have the freedom to assign a place where the meetings with the conciliator are to be held. Where there is no such agreement, the place of meeting will be fixed by the conciliator after consultation with the parties. However, it is necessary for the circumstances of the conciliation proceedings to be considered.

Communication between conciliator and parties[312] – The conciliator may invite the parties to meet him or may communicate together or with each of them separately.

Procedure of Conciliation

Commencement of conciliation proceedings[313] – The conciliation proceedings are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of the dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If the party rejects the invitation to the conciliation proceeding then there will be no conciliation. If one party sends the invitation to conciliate to the other party and does not receive a reply within 30 days from the date he sends the invitation or within such period of time as is specified in the invitation, he may elect to treat this as rejection of the invitation to conciliate. If he so elects he should inform the other party in writing.

Submission of statements to conciliator[314] – The conciliator may request the parties to submit a brief written statement. The statement should mention the general nature of the dispute. Parties must send a copy of the statement to each other. The conciliator may also seek a statement from the parties regarding their position, facts and the grounds. Further, appropriate documents and evidence can supplement the same. The party submitting such evidence must also send a copy of the same to the other party.

Conduct of conciliation proceedings[315] – The conciliator may invite the parties to meet him which he may communicate orally or in writing. It is his decisions as to communicate with the parties together or separately. Considering the circumstances of the case at hand, the express wishes of the parties and the need to settle the dispute in a speedy manner, the conciliator shall exercise the freedom given to him to execute the process in a manner he considers appropriate[316].

Administrative assistance[317] – The parties can seek administrative assistance for the conduct of conciliation proceedings. Accordingly, the parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.

311 Section 69(2), The Arbitration and Conciliation Act, 1996
312 Section 69(1), The Arbitration and Conciliation Act, 1996
313 Section 62, The Arbitration and Conciliation Act, 1996
314 Section 65, The Arbitration and Conciliation Act, 1996
315 Section 69(1), The Arbitration and Conciliation Act, 1996
316 Section 67(3), The Arbitration and Conciliation Act, 1996
317 Section 68, The Arbitration and Conciliation Act, 1996

Settlement

Settlement of disputes[318] – The role and the duty of the conciliator is to assist the parties to reach an amicable settlement in the dispute. He may at any stage of the conciliation make proposals for the purpose of settlement. Such proposals nee not be in writing and need not be accompanied by a statement of reasons. Each party may submit to the conciliator the suggestions for the settlement of the dispute[319].

When the conciliator feels at any point of time there are elements of a settlement that are likely to be accepted by the parties, he shall formulate the terms and conditions of possible settlement and submit it to the parties for any inputs. Considering the inputs and observation from the parties, the conciliator may reformulate the agreements and structure a possible settlement.

If the parties reach an agreement then the parties will draw up and agreement and shall be signed by the parties. If the parties request, the conciliator shall assist the parties in drawing up of the settlement agreements. Once the parties have signed the agreement, it becomes final and binding on the parties and persons claiming under them respectively. The conciliator shall authenticate the agreement and provide a copy of the document to both parties[320].

The conciliator shall draw up the settlement agreement in front of the parties and shall be signed accordingly. The section clearly required that in order to be binding and to have the status of an arbitral award, it must be signed by the parties.

Status and effect of settlement agreement – This section provides that the settlement agreement shall have the same status and effect as an arbitral award on agreed terms under Section 30. This means that it shall be treated as a decree of the court and shall be enforceable as such.

The Supreme Court has emphasized the need for complete compliance of the provisions. A mere substantial compliance may not be enough. The agreement must satisfy the essential pre-requisites of Section 73 for it to get the status of an Arbitral award under Section 74 and for being enforced as a decree of the court under Section 36.[321]

Restrictions on role of conciliator

There are two restrictions on the role of the conciliator in the proceedings:[322]

318 Section 67(4), The Arbitration and Conciliation Act, 1996
319 Section 72, The Arbitration and Conciliation Act, 1996
320 Section 73, The Arbitration and Conciliation Act, 1996
321 Mysore Cements Ltd V Svedela Barmac Ltd. (2003) 10 SCC 375

322 Section 80, The Arbitration and Conciliation Act, 1996

I. Clause (a) – Section 80 prohibits the conciliator to act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute which is subject of the conciliation proceedings.
II. Clause (b) – Section 80 prohibits the parties to produce the conciliator as a witness in an arbitral or judicial proceedings.

Termination of Conciliation proceedings

There are four ways when a termination of conciliation proceedings[323]:

I. The conciliation proceedings terminate with the signing of the settlement agreement by the parties. The date of termination of conciliation proceedings is the date of the settlement agreement.
II. The conciliation proceedings shall be terminated when the conciliator declares in writing that further efforts in conciliation are no longer justified. The date of the declaration is the date of the termination of the proceedings.
III. The conciliation proceedings can be terminated by the written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated. In this instance, the date of declaration is the date of termination of the proceedings.
IV. The conciliation proceedings are terminated when a party declares in writing to the other party and conciliator that the proceedings are terminated.

In a case before the Supreme Court, the facts of the case were such that a conciliator drew up the settlement agreement himself in secrecy and sent the same to the court in an envelope. The court to which the envelope was sent to refused to entertain the objections against the settlement. The Supreme Court held that the conciliator had committed an illegality. The Bombay High Court was incorrect in confirming the settlement agreement received from the conciliator. The court then set aside the settlement agreement.

The reasoning given by the court was that the settlement agreement is required to be signed by the parties, whereas in this case the settlement was filed in the court without the signature of the parties.

"From a reading of Section 61, 64, 67, 69, 70, 72-77 and 30 of the Arbitration and Conciliation Act, it 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 procedures to be followed by him untrammelled by the procedural law like the Code of Civil Procedure and the Evidence Act. When the parties are able to resolve the dispute between the, by mutual agreement and it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties he is to proceed accordance with the procedure laid down in Section 73, formulate the

323 Section 76, The Arbitration and Conciliation Act, 1996

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 the parties is final and binding on the parties and 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. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74[324]"

Resort to arbitral or judicial proceedings

The thumb rule[325] is that parties cannot initiate arbitral or judicial proceedings during the conciliation proceedings in respect of a dispute which is the same subject-matter as the conciliation proceedings. There are only exceptional circumstances where a party can initiate such proceedings to preserve his rights.

Costs

This term means all reasonable costs relating to[326]:

I. The fee and the expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties.
II. Any expert's advice as requested by the conciliator along with the consent of the parties.
III. Any assistance provided pursuant to appointment of conciliators and any administrative process.
IV. Any other expenses that may have incurred in connection with the conciliation proceedings and the settlement agreement.

The conciliator is the person who fixes the costs of the conciliation proceedings upon their termination and provides a written notice of the same to parties.

Deposits

The conciliator may estimate the costs likely to be incurred during the proceedings and may direct each party to deposit a fraction of the amount equally[327]. During the conciliation proceedings, the conciliator may require additional deposits from each party. If such deposits are not made in 30 days of issues the notice to the same, then the conciliator may suspend the proceedings or terminate it by making a written declaration of the same.

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324 Haresh Dayaram Thakur v. State of Maharashtra, (2000) 6 SCC 170
325 Section 77, The Arbitration and Conciliation Act, 1996
326 Sections 78, The Arbitration and Conciliation Act, 1996
327 Section 79, The Arbitration and Conciliation Act, 1996

The difference

On reading the provisions of The Arbitration and Conciliation Act, 1996 and the UNCITRAL model laws, the primary understanding is that in the role of the mediator is less pre-active than of a mediator[328]. A mediator is to only facilitate the process and assist the parties in identifying the issues and guide them to a settlement. However, the conciliator can provide proposals for settlement, and formulate the terms of the settlement.

Reading the position of a Mediator in the United States, portrays the role of a mediator to be much more pro-active in terms of bringing out a settlement. Sometimes, even in the United Kingdom, the 'Advisory, Conciliation and Arbitration Service'(ACAS) defines conciliation similar to the stance that the US takes. ACAS defines conciliation as "The practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator." It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The words 'conciliation' and 'counselling' have disappeared from the United States of America[329]. In place of the word 'conciliator', the term 'mediator' has been used to define a neutral person who takes a pro-active role.

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[328] Concepts of Conciliation and Mediation Their Differences – Justice M. Jagannadha Rao (http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf)

[329] The 'New" Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001