The Arbitration and Conciliation Act, 1996

(Prepared by Chandrashekhar U, Senior Faculty Member, Karnataka Judicial Academy)

(Paper prepared by referring to various commentaries on Arbitration and Conciliation Act, 1996)

(As on 30.06.2022)

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THE ARBITRATION AND CONCILIATION ACT, 1996

Statement of Objects and Reasons

The law on arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said

UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

Preamble

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations

and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;

BE it enacted by Parliament in the Forty-seventh Year of the Republic of India as follows:—

PART – I
ARBITRATION

Chapter I
General Provisions

2. Definitions.—(1) In this Part, unless the context otherwise requires,—

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

Comments

Arbitration is one the oldest modes of dispute resolution and has long being favoured as an alternative litigation before traditional Courts. The role of arbitration as an alternative to litigation in State-controlled Court system is now well recognized and well established. The Core of arbitration is that the parties voluntarily agree to submit their disputes to be resolved by an independent and neutral third party of their choice whose decision on the dispute is binding on them.

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

(c) "arbitral award" includes an interim award;

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

(e) "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court;

(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) 2*** an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

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

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

Scope

(2) This Part shall apply where the place of arbitration is in India:

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

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

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

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

Construction of references

(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

(7) An arbitral award made under this Part shall be considered as a domestic award.

(8) Where this Part—

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

(b) in any other way refers to an agreement of the parties,

that agreement shall include any arbitration rules referred to in that agreement.

(9) Where this Part, other than clause (a) of section 25 or clause (a) of sub-section (2) of section 32, refers to a claim, it shall

also apply to a counterclaim, and where it refers to a defence, it shall also apply to a defence to that counterclaim.

Article 2(1)(a) of the 1996 Act replicates Article 2(a) of UNCITRAL model law which defines Arbitration to mean any arbitration whether or not administered by a permanent arbitral institution. 1940 Act did not contain any definition of Arbitration.

Choice of seat and venue

The parties have option of choosing a place of arbitration by agreement. In the absence of such an agreement, the Arbitral Tribunal has the default power to determine the place of arbitration having regard to the circumstances of the case including convenience of the parties. It requires confidentiality of proceedings conducted by the arbitrators.

Ad hoc arbitration refers to arbitration by an Arbitral Tribunal constituted by an agreement between the parties, which is not administered by an institution.

3. Receipt of written communications.—(1) Unless otherwise agreed by the parties,—

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

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business,

habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

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

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

4. Waiver of right to object.—A party who knows that**—**

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

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object. Refer the decisions in the case of **BSNL vs. Motorola India (P) Ltd. – (2009) 2 SCC 337, Union of India vs. PAM Development Pvt. Ltd. – (2014) 11 SCC 366, Bharat Broadband Network Ltd. vs. United Telecoms Limited – (2019) 5 SCC 755.**

5. Extent of judicial intervention.**—**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.

Where dual procedure exists, one under criminal law and the other under contractual law, invocation of the latter by the contracting party is proper. **Hindustan Petroleum Corp. Ltd. vs. Pinkcity Midway Petroleums – (2003) 6 SCC 503, Greaves**

Cotton Ltd. vs. IUnited Machinery & Appliances – (2017) 2 SCC 268, Bafna Motors Private Ltd. vs. Amanulla Khan – 2022 SCC Online Bom 994, Union of India vs. Dhirubhai D. Thumba & Co. and another – 2022 SCC Online Mad 750, Chintels India Ltd. vs. Bhayana Builders Pvt. Ltd. – (2021) 4 SCC 602. The latest decision is in the case of **Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd. – (2022) 1 SCC 131** to the effect that there should be minimum judicial interference.

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

CHAPTER II
Arbitration agreement

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

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

(3) An arbitration agreement shall be in writing.

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

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication 1[including communication through electronic means] which provide a record of the agreement; or

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

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

An agreement for arbitration, in either form must be in writing, and must satisfy the requirements of a valid arbitration agreement, that is, a binding obligation to refer current or future disputes to arbitration, as the mode of dispute resolution. Refer **Wellington Associates Ltd. vs. Kirit Mehta – (2000) 4 SCC 272 = AIR 2000 SC 1379, Jagadish Chander vs. Ramesh Chander – (2007) 5 SCC 719, BSNL vs. Telephone Cables Ltd., (2010) 5 SCC 213 = AIR 2010 SC 2671. Vidya Drolia vs. Durga Trading Corpn., – (2021) 2 SCC 1.** Existence of separate, different and independent contracts or transactions which are mutually exclusive of one another is *sine-qua-non* for applicability of Sec. 7(5) and the said provision will not apply to one single composite substantive transaction/contract *albeit* contained in separate documents between the same parties and in relation to the same subject matter- **B.M. Mohan Rao vs. Mohitshasm Complexes (P) Ltd. – 2019 SCC Online Kar 3491.** The latest decision is in the case of **UHL Power Co. Ltd. vs. State of H.P. – (2022) 4 SCC 116.**

In **State of U.P. vs. Tipper Chand – AIR 1980 SC 1522**, it is held that the contract contains a clause that the decision of the superintending engineer would be final, conclusive, and binding all parties with the respect to quality of workmanship, materials used on the work, or any other question with respect to the claim or right, arising out of the contract, etc. The Court held that the clause did neither contain an express arbitration agreement nor could such an agreement be spelt out by implication. The clause only vested the superintending engineer with the supervision over the execution of the work and administrative control over it. Refer the decision in the case of **B.P.Dasratharama Reddy complex vs. Government of Karnataka** reported in **(2014) 2 SCC 201.**

Two-Tier arbitration

A Two-tier arbitration process provides the availability of an internal appeal within the arbitral process. This reflects a commercial desire to maintain control over the arbitral process by ensuring that errors are corrected by a second stage review, so as to reduce the supervisory jurisdiction of domestic Courts. The review of the final award by the national Courts would be restricted to grounds usually relating to jurisdictional errors or procedural irregularities, or in some cases for violation of public policy. The State Courts would exercise a minimal level of control to ensure the procedural and jurisdictional integrity of the institutional arbitration which take place under their jurisdiction.

The concept of two-tier or appellate arbitration has gained ground in international arbitration institutions. Some of the institutions have incorporated an internal appeal in their rules, to correct errors of fact and law, which may have occurred in the award rendered in the first instance. The rules of the institution

would determine whether the provision of an internal appeal is optional or mandatory. The scope of appeal, whether it would be a full-blown review of the award on merits, or a limited review on a question of law will be as per the rules of the institution conducting the arbitration. The appellate tribunal conducts the hearing in accordance with the same procedural rules followed by the first tribunal, and then renders a final and binding award. In a two-tier arbitration, it is the second tier which would produce the final and binding award. The objective of providing an internal appeal or review of the award is to promote finality and restrict the parties to the arbitral process, and thereby limit the intervention by the state Courts.

Multi-tiered dispute resolution clauses provide for a step vise mechanism of resolving disputes or differences between the parties.

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

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

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

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

Section 8 of the 1996 Act has made some significant departures from the Model Law: First, Section 8 uses the term 'Judicial authority', in contradistinction with the term 'Court' used in Article 8 of the Model Law; second, and more significantly, the words 'unless it finds that the agreement is null and void, inoperative and incapable of being performed' in Article 8(1) of the Model Law, has been omitted from sub-section (1) of Section 8 of the 1996 Act. The omission of these words is significant, since the legislative intent is to vest jurisdiction in the arbitral tribunal to decide all issues and objections to jurisdiction. Section 16 empowers the tribunal to rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement.

Section 8 is couched in the form of a legislative command to a judicial authority to refer parties to arbitration if the dispute is

covered by a valid arbitration agreement. This provision is not subject to party autonomy.

Hindustan Petroleum corporation Ltd. vs. Pinkcity Midway Petroleum, (2003) 6 SCC 503: 2003 (2) Arb LR 666 (SC) : AIR 2003 SC 2881. Rashtriya Ispat Nigam Ltd. vs. Verma Transport Co. (2006) 7 SCC 275 : 2006 (3) Arb LR 210 (SC) : AIR 2006 SC 2800. See also **Sundaram Finance Ltd. vs. T. Thankam (2015) 14 SCC 444, 449, para 13 : 2015 (2) Arb LR 1 (SC) : AIR 2015 SC 1303; Magma Leasing & Finance Limited vs. Potluri Madhavilata (2009) 10 SCC 103 : 2009 (4) Arb LR 1 (SC) : AIR 2010 SC 488.** See also **Charanjit Kaur vs. S.R. Cable, 2009 (1) Arb LR 369 (MP) : AIR 2009 MP 66 : (2008) 4 MP LJ 221** held:

> "14. This Court in P. Anand Gajapathi Raju vs. P.V.G. Raju has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil Court, there is a clause for arbitration, it is mandatory for the civil Court to refer the dispute to an arbitrator."

The application for reference is required to be made not later than the submission of the first statement on the substance of the dispute, which would be like filing the written statement in a suit.

In **BPL Communications Ltd. vs. Punj Lloyd Ltd., 2004 (1) Arb LR 46 (Delhi), para 14 : (2003) 108 DLT 198 : 2004 (1) RAJ 256,** the Delhi High Court sets out the requirements for the exercise of jurisdiction under Section 8 as follows:

"(1) The provision of Section 8 is peremptory in nature, and is mandatory;

(2) The mandate of Section 8 can be invoked by a party to an action before a judicial authority by filing an application;

(3) The application invoking Section 8 may be filed in any action, not necessarily civil suits brought before 'a judicial authority', which does not necessarily imply a Civil Court established under the Civil Procedure Code, and a "Court" as defined by clause (e) of Section 2 of the Act;

(4) The application for referring the disputes to an arbitrator may be made by a party 'not later than when submitting his first statement on the substance of the dispute'. Before invoking the powers of the judicial authority under Section 8, the party applying, must not have submitted the statement on the substance of the dispute, in the proceeding in which application is filed, or in a proceeding between the parties to the arbitration agreement before a Court or judicial authority prior to the present action;

(5) Reference to an arbitrator under this provision can be made if the action before the judicial authority is a mater, which is 'the subject-matter of an arbitration agreement'. The subject-matter before a judicial authority must completely identify with the subject of the arbitration agreement. Reference of part of the

subject-matter of an action before the judicial authority to arbitration to which arbitration agreement applies, is not contemplated. If requirements of the ingredients of sub-section (1) of Section 8 are satisfied, the Court has no option or discretion, but it is mandatory for it to make reference of the subject-matter of the action before it to arbitration in accordance with the arbitration agreement;

(6) Parties to the action before judicial authority and the arbitration agreement should be the same;

(7) The application shall be accompanied by the original arbitration agreement or a duly certified copy thereof;

(8) The judicial authority will not refuse making a reference under Section 8, merely on the ground that a dispute about existence and validity of the arbitration agreement or jurisdiction of the Arbitrator has been raised since the Arbitrator would have jurisdiction to decide these objections under Section 16 of the Act. The judicial authority before making reference would have to be satisfied that the subject-matter of the action before it and the subject of the arbitration agreement are identical, and may examine the arbitration agreement and the subject-matter of the action before it for giving a finding in this regard;

(9) Unless the judicial authority before whom the application under Section 8 has been filed is a "Court", as defined within the meaning of Section 42 read with clause (e) of Section 2 of the Act, the judicial authority shall not entertain subsequent proceedings arising under the arbitration agreement by virtue of Section 42 of the Act;

(10) After a reference of the subject of arbitration made by the judicial authority to an arbitration under Section 8, nothing remains to be decided in the action." Refer **Hindustan Petroleum Corpn. Ltd., vs. Pinckcity Midway Petroleums, (2003) 6 SCC 503 : 2003 (2) Arb LR 666 (SC) : AIR 2003 SC 2881.**

The Apex Court in the case of **Rastriya Ispat Nigam Ltd. vs. Verma Transport Co., (2006) 7 SCC 275 : AIR 2006 SC 2800,** has held that mere opposing for interim prayer cannot be termed as waiver. By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceedings are not part of the main proceeding.

Photocopies of the lease agreements could be taken on record under Sec. 8 of Arbitration and Conciliation Act for ascertaining the existence of arbitration clause. **Bharat Sewa Sansthan vs. U.P Electronics Corpn. Ltd. – (2007) 7 SCC 737.**

In **Magma Leasing & Finance Ltd. vs. Potluri Madhavilata – (2009) 10 SCC 103,** it was held that Section 8 is in the form of legislative command to the Court and once the prerequisite conditions as aforesaid are fulfilled, the Court must refer the parties to arbitration. Also refer **Sundaram Finance Ltd. and another vs. T. Thankam – (2015) 14 SCC 444**. In case of dispute before the consumer forums, the Section 8 does not bar the jurisdiction of consumer forums. Consumer forums not bound to

refer the matter to arbitral tribunal. **Rosedale Developers Pvt. Ltd. vs. Aghore Bhattacharya and others, (2018) 11 SCC 337**.

Application for arbitration was moved after submission of first statement on the substance of dispute, but party which instituted civil suit did not object, held there was no bar preventing referral of dispute for arbitration. **P. Ananda Gajapathi Raju vs. P.V.G. Raju (2000) 4 SCC 539 = AIR 2000 SC 1886**. Also refer **Hema Khattar and another vs. Shiv Khera (2017) 7 SCC 716**.

The arbitration agreement cannot be invoked against persons who were not parties to the agreement. **Sandeep Kumar and others vs. Master Ritesh and others, (2006) 13 SCC 567**.

Complicated matters involving various questions and issues, if beyond purview of arbitration. Relegation to civil suit when warranted has been held in the case of **N.Radhakrishnan vs. Maestro Engineers, (2010) 1 SCC 72**.

The above decision has been distinguished in **Ranjit Kumar Bose and another vs. Anannaya Chowdhoury and another – (2014) 11 SCC 446** by stating that even if there is an arbitration agreement which is against to the provisions of special enactment which provides for bar of arbitration, then, Section 8 cannot be resorted to.

When there is conflict between 1996 Act and Section 8 of 2008 Act, the latter shall prevail to the extent of conflict. There is no arbitration clause between the parties. Provisions of 1996 Act, thus, held, will have no application. Therefore, reference to arbitral tribunal will be governed by 2008 Act that is Bihar Public Works Contracts Disputes Arbitration Tribunal Act 2008. **Bihar**

Industrial Area Development Authority vs. Ramkant Singh-(2022) 4 SCC 489.

If the first defence is not filed within the time stipulated by the statute, then, whether Section 8 petition is maintainable, has been held in the case of **SSIPL Lifestyle Pvt. Ltd. vs. Verma Apparels (India) Pvt. Ltd. and another – 2020 SCC Online Del 1667,** and it is further held that if written statement is not filed within the time stipulated then Section 8 application cannot be maintained.

Arbitration clause/agreement between corporate debtor and its creditor does not oust the jurisdiction of NCLT**. Tata Consultancy Services Ltd. vs. S.K. Wheels (P) Ltd. (Resolution Professional) -(2022) 2 SCC 583**.

In **Cox & Kings Ltd. vs. SAP India Pvt. Ltd. & another – 2022 SCC Online SC 570**, wherein, it is held that when there is a clause for amicable settlement, it has to be exhausted and then only they can have recourse under Section 11 of the Act.

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

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

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

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

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

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

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

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

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

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

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the

Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Section 9 confers vide ranging powers on the Court to order interim measures of protection which may be necessitated for preserving the assets from being frittered away or siphoned off during the pendency of arbitral proceedings, secure the evidence, issue directions qua third parties, order pre-award attachment, etc. It is in aid of and in furtherance of the arbitral process to make it effective.

The object of Section 9 is to empower the Court under the 1996 Act, to grant interim measures for the preservation, interim custody or sale of goods which are the subject matter of the arbitration agreement; secure the amount in dispute, order detention, preservation or inspection of a property which is the subject matter of the dispute in arbitration; authorize any person to enter upon a land or building; take samples, or pass such orders as may be necessary or expedient for the purposes of obtaining full information or evidence. The Court may appoint a receiver in respect of the property which is the subject-matter of the arbitration or pass such interim measures of protection as may be just and convenient.

Section 9 provides that the Court shall have the same power for making orders as it has for the purpose of, and in relation to any proceedings before it. Refer **Modi Rubber Ltd. vs. Guardian International Corporation, 2007 (2) Arb LR 133 (Del) : (2007) 141 DLT 822.** The substantive power conferred on the Court is given effect to by the procedural provisions contained in the CPC and the Evidence Act, 1872. The principles under Order XXXVIII Rule 39 of the CPC serve as a guidance for the exercise of power

under Section 9 of the 1996 Act. The source of power of the Court to grant interim relief is traceable to Section 94 read with Order XXXIX of the CPC, and in exceptional cases under Section 151 CPC. Refer **Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552** at para **192 : 2012 (3) Arb LR 515 (SC) : 2012 (8) SCALE 333.** The Limitation Act is applicable to arbitration proceedings as provided by Section 43 of the 1996 Act.

In **Adhunik Steels Ltd., vs. Orissa Manganese and Minerals Pvt. Ltd**., **N.N. Ojha vs. Prem Mehra, 2015 (1) Arb LR 252 (Delhi),** the Supreme Court held that the general rules which govern the grant of interim injunction are attracted while dealing with an application under Section 9 of the 1996 Act. It is a well-recognized principle that when power is conferred under a special statute on an ordinary Court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that Court would apply. The words "and the Court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" in Section 9 would indicate that the normal rules governing the Court for grant of interim orders would be applicable. The concept of *prima facie* case, balance of convenience, irreparable injury, and the concept of just and convenient must be taken into consideration while granting interim measures under Section 9 of the 1996 Act. Refer **Adai Mehra Production Pvt. Ltd. vs. Mr. Sumeet P. Mehra and Mr. Puneet P. Mehra, 2014 (1) Arb LR 46 (Bombay) : 2013 (3) ABR 1273.**

The silent features of interim measures of protection are:

1. An interim measure of protection pre-supposes the existence of a dispute, which is to be litigated or arbitrated.
2. Interim relief should normally be granted where it is necessary for the preservation of the assets of the party. The protection should be temporary in nature, till the final relief is granted by the tribunal. The interim relief should preserve the *status quo* till the final relief is granted.
3. The interim relief should not exceed the final relief claimed; it must be ancillary to, or in aid of the final relief.
4. In certain situations, it may be necessary for the Court to grant an interim measure *ex-parte,* prior to the issuance of notice. However, it must be followed by an *inter partes* order in compliance with the requirement of due process.
5. The Court may pass interim measures which may affect or compel third parties in control of the assets of a party to the arbitration proceedings, to comply with the provisional or interim measures.

2015 Amendment to Section 9

The 2015 Amendment has inserted two new sub-sections in Section 9 based on the recommendations of the 246th Law Commission Report. The newly inserted sub-section (2) of Section 9 provides that the arbitral proceedings shall be commenced within a period of 90 days from the date when a Court passes an interim order prior to the commencement of arbitral proceedings. The

legislative intent is to ensure that a party who obtains a favorable order under Section 9 does not unnecessarily delay in initiating the arbitral proceedings. Refer **Manbhupinder Singh Atwal vs. Neeraj Kumarpal Shah, (2019) 4 GLR 3229 : 2019 GLH (3) 234.**

Sub-section (3) provides that the Court will not entertain an application for interim relief under sub-section (1) after the arbitral tribunal has been constituted, unless the circumstances render the remedy under Section 17 as ineffective or inefficacious. This amendment is aimed at minimizing intervention by the Court after the arbitral tribunal is constituted. The 2015 Amendment Act has contemporaneously effected substantive amendments to Section 17 of the 1996 Act so as to empower the arbitral tribunal to exercise powers analogous to Section 9 by the Court.

Seat of arbitration – change of venue – if changes the seat of arbitration, held change of venue does not result in change of seat of arbitration. **BBR (India) Pvt. Ltd. vs. S.P.Singla Constructions Pvt. Ltd. 2022 SCC Online SC 642**.

Power of Court to pass interim orders and principles applicable, have been dealt with by the Apex Court by stating that the principles governing grant of interim injunction under Order 39 of CPC and Specific Relief Act would be applicable to exercise of power under Section 9 of the Act. **Aravind Constructions Co. (P) Ltd. vs. Kalinga Mining Corpn. (2007) 6 SCC 798**. Also refer **Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125**.

Factors to be taken into consideration for grant of interim injunction. Refer **Transmission Corpn. of A.P. Ltd. vs. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540**. Also refer

Hindustan Construction Co. Ltd. vs. Union of India, (2020) 17 SCC 324 = AIR 2020 SC 122.

Challenge to order of interim measures during the pendency of arbitration proceedings and the arbitration award came to be set aside by the Court, there is nothing to adjudicate legality of order granting interim measures. **National Hydro Power Corporation Ltd. vs. Patel Engineering Ltd. (2019) 13 SCC 629**.

CHAPTER III

Composition of arbitral tribunal

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.

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

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

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

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

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or 11

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];

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

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

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

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

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

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

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

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

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to 3[the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

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

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

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

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, 5[the Supreme Court or the person or institution designated by that Court] may appoint an

arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

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

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

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

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

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution

designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

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

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

In the case of **SBP and Company vs. Patel Engineering**, reported in **(2005) 8 SCC 618**, wherein, it is stated that the controversy with respect to nature of the power of the Chief Justice under Sec. 11 was referred to a 7 Judge Constitution bench in the above case, which overruled earlier decision in **Konkan Railways vs. Rani Construction** and redefined the nature of power under Sec. 11.

The scope of power under Sec. 11 was now held to be a Judicial power which could only be delegated to another Judge and not to any other institution. There should be valid arbitration agreement, and party to the arbitration agreement must make an application under Sec. 11 and that he has approached appropriate High Court.

Excepted matters

The Arbitrator / Tribunal has the jurisdiction to decide only those disputes which are covered by the arbitration clause in a contract. If any issue is specifically excluded from the purview of the arbitration clause, it will not be arbitrble, and is referred to as an "Excepted Matter". If there is a dispute between the parties on the issue of arbitrability, it will be decided by the Arbitrator under Sec. 16 which enshrines the *kompetenz kompetenz* principle. Refer the decision in the case of **Arasmehta Captive Power Company Ltd. and Another vs. Lafarge India Pvt. Ltd.** reported in **(2013) 15 SCC 414 = AIR 2014 SC 525.** Also refer **Mohammed Masroor Shaikh vs. Bharath Bhusan Gupta and others – (2022) 4 SCC 156.**

Sec. 11 not applicable to statutory arbitrations under special enactments such as Electricity Act, 2003. Refer the decision in the case of **Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. – (2008) 4 SCC 755 = AIR 2008 SC 1921.**

When there is serious allegation of fraud, same is not arbitrable. Refer the decision in the case of **N.Radhakrishnan vs. Maestro Engineers and Others** reported in **(2010) 1 SCC 72, Bharath Rasiklal Ashra vs. Gautham Rasiklal Ashra** reported in **(2012) 2 SCC 144 = AIR 2011 SC 3562**. The view taken in Radhakrishnan case supra has been diluted considerably after post amendment in the case of **Ayyasami vs. A.Paramashivam and Others – (2016) 10 SCC 386 = AIR 2016 SC 4675** by holding that mere allegation of fraud *simpliciter* is not a ground to nullify the effect of the arbitration agreement between the parties. This view has been affirmed by Apex Court in **Rashi Raza vs. Sadaf Aktar** reported in **(2019) 8 SCC 710**.

Sec. 11 cannot be invoked where the arbitration clause provides for institutional arbitration refer **(2014) 11 SCC 560** in the case of **Antrix Corporation Ltd. vs. Deva's Multimedia Pvt. Ltd**.

Sec. 11 cannot be invoked where an application for reference under Sec. 8 has been rejected by the Judicial Authority. Refer **Anil vs. Rajendra,** reported in **(2015) 2 SCC 583**.

Death of a party will not discharge the arbitration agreement. **Ravi Prakash Goel vs. Chandra Prakash Goel and Another (2008) 13 SCC 667.**

In case of International Arbitration, it is emphasized that the concern of the Court is to ensure neutrality, impartiality and independence of the third arbitrator is important. Choice of the parties has little, if anything to do the choice of the Chief Justice of India or his nominee. Refer **Reliance Industries Ltd. vs. Union of India – (2014) 11 SCC 576 = AIR 2014 SC 2342.**

When one of the parties agrees for seat of Arbitration at Delhi and therefore the proceedings for appointment of arbitral tribunal would lie with the Courts at Delhi. **Priya Malay Sheth vs. VLcc Health Care Ltd – 2022 SCC Online Bom 1137.** Also refer **decision in the case of Swadesh Kumar Agarwal vs. Dinesh Kumar Agarwal and Others** reported in **2022 SCC Online SC 556.**

Impact of Section 60(6) of the Insolvency and Bankruptcy Code on Section 11 of the Act, has been discussed in the case of

New Delhi Municipal Council vs. Vinosha India Ltd. – 2022 SCC Online SC 546.

Forfeiture of Right to Nominate

Parties are free to agree on a procedure for appointment of an Arbitrator or Tribunal for the adjudication of their disputes. However, if under an agreed procedure, a party fails to make the appointment within 30 days from the receipt of the request, or the two Arbitrators nominated by the respective parties, fail to agree on the name of a preceding arbitrator within 30 days from the date of their appointment, the default procedure under Sec. 11 can be invoked. Refer **Datar Switch Gears Ltd. vs. Tata Finance Company Ltd. (2000) 8 SCC 151, Bharat Sanchar Nigam Ltd. and Another vs. Motorola India Pvt. Ltd. (2009) 2 SCC 337 = AIR 2009 SC 357**. The above case has been affirmed in the case of **Punjaloyd Ltd. vs. Patronet MHB Ltd.** reported in **(2006) 2 SCC 638, (2013) 4 SCC 35, (2016) 230 DLT 235.**

In **Union of India vs. BESCO Limited – AIR 2017 SC 1628**, the Arbitration Clause provided that the sole arbitrator shall be a gazetted Railway Officer. The general conditions and special conditions of the contract specifically provided that in the event of any dispute or difference arising under the contract, the same shall be referred to a sole arbitrator or a person appointment by the general manager. When the authority fails to appoint arbitrator, it forfeits the right to make an appointment. In such circumstances, under Section 11(6) of the Act, the Chief Justice has power to appoint arbitrator. Also refer **(2014) 9 SCC 288, SLP (civil) No.12076/2019.**

The 2019 Amendment

The object of the amendment is to eliminate judicial intervention at the threshold, and confirm the power of appointment on the institution created by the Arbitration Council of India under Section 43-I of part 1-A of the Act, which will conduct the arbitration proceedings.

11-A. Power of Central Government to amend Fourth Schedule.—(1) If the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Fourth Schedule and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by the both Houses of Parliament.

12. Grounds for challenge.—(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; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

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.

Explanation 2.— The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

The Section 12 of the 1996 Act is modeled on Article 12 of the UNCITRAL Model Law, and Articles 11 and 12 of the UNCITRAL arbitration rules as revised in 2010.

Bias

Section 12 of the Act obligates an arbitrator to disclose in writing prior to his appointment, such facts which may give rise to justifiable doubts as to his independence or impartiality. The neutrality of an arbitrator is critical to the integrity of the dispute resolution process. Independence and impartiality are the hallmarks of an arbitration proceeding. It is a fundamental rule of a fair adjudicatory process that the arbitrator decides the dispute without bias.

Sub-sections (1) and (2) of Section 12 casts a statutory duty on the arbitrator to make a mandatory disclosure in writing of any circumstances which may give rise to justifiable doubts as to his independence or impartiality. This obligation is an ongoing obligation which continues throughout the arbitral proceedings. **V.K. Dewan & Co. vs. Delhi Jal board (2010) 15 SCC 717.** What the law stipulates as a disqualification is the existence of such facts and circumstances as are likely to give rise to justifiable doubts of

the independence and impartiality of the arbitrator. **Alcove Industries Ltd. vs. Oriental Structural Engineers Ltd., 2008 (1) Arb.LR 393 (Del) : ILR (2008) 1 Del 1113.** These obligations apply to all arbitrators, including party-nominated arbitrators.

In **Manak Lal vs. Prem Chand Singhvi, 1957 SCR 575 : AIR 1957 SC 425, Gajendargadkar, J.** speaking for the Court states:

> "It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

The rule against bias is one of the fundamental principles of natural justice, which applies to all judicial and quasi-judicial proceedings. Even though the relationship between the arbitrator and the parties is contractual in nature, the partiality of an arbitrator, would render him ineligible to conduct the arbitration. The genesis behind this rationale is that even when an arbitrator is appointed in terms of the contract between the parties, the arbitrator must remain independent of the parties. Also refer

Voestalpine Schienen GmbH vs. Delhi Metro Rail Corp. Ltd. (2017) 4 SCC 665 : 2017 (2) Arb LR 1 (SC) : AIR 2017 SC 939.

Test

The test of likelihood of bias is whether a party could justifiably have a reasonable apprehension that there are circumstances likely to affect the decision of the arbitrator. Suspicion of bias must be based on cogent material and reasonable grounds, and not the mere apprehension of a whimsical person. While determining a challenge to the bias of an adjudicator, it becomes necessary to consider whether there is a reasonable ground for assuming the possibility of bias which is likely to produce a reasonable doubt in the minds of the litigant, or the public at large, about the fairness in the administration of justice. Also refer **Manak Lal vs. Prem Chand Singvi & Ors. 1957 SCR 575 : AIR 1957 SC 425.**

After the 2015 Amendment, Section 12(5) prohibits the employee of one of the parties from being appointed as an arbitrator. In **BCCI vs. Kochi Cricket (p) Ltd**., this Court held that the provisions of the Amendment Act, 2015 (w.e.f. 23 October 2015) cannot have retrospective operation in the arbitral proceedings already commenced, unless the parties agree otherwise. **Rajasthan Small Industries Corporation Ltd. vs. Ganesh Containers Movers Syndicate (2019) 3 SCC 282 : 2019 (1) Arb LR 296 (SC) : 2019 (1) SCALE 670.** Also refer **Aravali Power Co. Pvt. Ltd. vs. Era Infra Engineering Ltd. (2017) 15 SCC 32 : 2017 (5) Arb LR 226 (SC) : AIR 2017 SC 4450.** Also refer **S.P. Singla Constructions Pvt. Ltd. vs. State of Himachal Pradesh & Ors., (2019) 2 SCC 488 : 2018 (6) Arb LR 355 (SC) : 2018 (15) SCALE 421.**

Independence and Impartiality

Section 12 uses the terms 'independence' and 'impartiality' disjunctively. The distinction between the two expressions is not defined in the Act. Independence is a situation of fact or Law, capable of objective verification, while impartiality is more a mental state, which will necessarily be subjective.

An arbitrator would be independent if he has no relationship, personal or pecuniary, with any of the parties to the arbitration before him, and yet may not be impartial.

Independence relates to the relationship between the arbitrator and the parties, whether professional, financial, business or otherwise. It indicates prior or current personal, social or business contract between them. The test is a subjective on which is inferred from the facts and circumstances surrounding the arbitrators exercise of the arbitral functions.

Impartiality

Impartiality is understood to be the relation between the arbitrator the subject matter of the dispute. The test of impartiality is whether the parties have a legitimate apprehension, or a reasonable doubt that the arbitrator may have a biased or prejudiced mind with respect to the disputes before him.

However, if an arbitrator develops an opinion about the case at an early stage in the proceedings, it would not constitute a case of partiality, even if he expresses such views.

Former Employee

Section 12(1) as it stood before the Amendment Act did not disqualify a former employee from acting as an arbitrator, provided there were no justifiable doubts as to his independence and impartiality.

A former employee may not be disqualified from being appointed as an arbitrator, and would not fall within the rigors of Section 12(5) read with Entry 1 of the Seventh Schedule. Entry 1 indicates that a person who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator.

In **State of Haryana vs. G.F. Toll Road Pvt. Ltd., (2019) 3 SCC 505 : 2019 (1) Arb LR 111 (SC) : 2019 (1) SCALE 134,** the Supreme Court held that the 1996 Act, prior to 2015 Amendment Act, a former employee was not disqualified from acting as an arbitrator, provided there were no justifiable doubts as to his independence or impartiality. In this case, an arbitrator who was in the employment of the State over 10 years ago, would make the allegation of bias clearly untenable. An arbitrator who has "any other" past or present "business relationship" with the parties is disqualified.

In **Ladli Construction Co. Pvt. Ltd. vs. Punjab Police Housing Corporation Ltd., & Ors., (2012) 4 SCC 609 : 2012 (1) Arb LR 503 (SC) : AIR 2012 SC 1508,** the arbitration clause provided that if disputes arose between the parties, it would be referred to arbitration by the chief engineer of the Punjab Police Housing Corporation. On the contract being terminated, the contractor made an application for appointment of an arbitrator in terms of the clause of the agreement. After the chief engineer

assumed office of the arbitrator, the contractor raised an objection stating that the appointment was not acceptable to him. In the application, no allegation of any bias or hostility was made against the named arbitrator. The award rendered by the arbitrator reveled that full opportunity was provided to the contractor to put forth his case. In these circumstances, the Court held that there is no justifiable circumstance which would enable the contractor to escape from the bargain made under the contract to have the disputes resolved through the agreed process. The parties were fully aware of the role, authority and position of the chief engineer. In this view of the matter, the parties stood bound by the contract, unless a good or valid ground was made for his exclusion.

In the decision in the case of **H.R.D. Corporation (Marcus Oil & Chemical Division) vs. GAIL (India) Ltd., (2018) 12 SCC 471**, it is held that the rendering of an award by an arbitrator in previous arbitration proceedings between the parties would not by itself be a ground of reasonable likely hood of bias unless it is shown that the substance lead to a fair minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind to the proceedings.

The arbitrator under the duties to disclose any potential conflict or interest, or circumstances which may raise doubts with respect to his impartiality and independence.

If arbitrator failed to disclose about his engagement as an adviser/technical expert in some other arbitrations of one of the parties, it can be treated as a ground which gives raise to justifiable doubt as held in the case of **Lacnco – Rani (JV) vs. NHAI** reported in **2017 (1) Arb LR 265 (Delhi).**

Where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in laws, is that the parties may after disputes have arisen between them, waive the applicability of Sec.12(5) by an express agreement in writing. **Ellora paper Mills Ltd. vs. State of Madhya Pradesh – (2022) 3 SCC 1.**

The legal representatives of the deceased party to the agreement have got right to represent the deceased and their petition for appointment of arbitrator can be entertained. Refer the decision in the case of **Priya Rishi Bhuta & Another vs. Vardhaman Engineers & Builders & others** reported in **2022 SCC Online Bom 1136.**

Burden of Proof

Burden of Proof is on the party who asserts that the arbitrator lacks requisite qualifications by adducing evidence.

13. Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(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.

Party Autonomy

Section 13(1) gives full effect to the principle of party autonomy on the procedure for challenging an arbitrator. The arbitral tribunal is the central institution in an arbitration proceeding for the impartial settlement of the disputes between the parties. The statute grants autonomy to the parties to agree on the procedure for challenging an arbitrator. The reasons for such challenge are laid down in sub-section (3) of Section 12 of the 1996 Act.

Limits to Party Autonomy

The autonomy of parties to choose a challenge procedure is subject to two restrictions viz:

(i) Section 13(1) states that the procedure chosen by the parties will be subject to the provisions of sub-section (4). Sub-section (4) of Section 13 states that if the challenge before the arbitral tribunal is unsuccessful, then the arbitral proceedings shall continue, and the arbitral tribunal shall make the arbitral award;

(ii) the procedure opted by the parties must be in conformity with the provisions of Section 18 of the 1996 Act, which embody the basic notions of fairness in treating the parties with equality and providing a full opportunity to present their case. Any procedure which is violative of Section 18 would render the award vulnerable to a challenge under Section 34 of the Act.

SECTION 13(3) and 13(4)

Continuation of Arbitration Proceedings during Pendency of Challenge

Unless the challenged arbitrator withdraws from his office, or the other party agrees to the challenge, the arbitral tribunal shall proceed to decide the challenge as per sub-section (3) of section 13. If the challenge is successful, the mandate of the arbitrator terminates. However, the termination of the mandate of the arbitrator would not result in termination of the arbitral proceedings. The arbitrator would be replaced by a substitute arbitrator under Section 15 of the Act.

If the challenge to the arbitrator before the tribunal is unsuccessful, the tribunal shall continue the proceedings as mandated by sub-section (4) of Section 13 and make the arbitral award. A party aggrieved by the rejection of the challenge cannot take recourse to the Court at the intermediate stage of proceedings.

The aggrieved party has a remedy only after the final award is passed, at the stage of filing objections under Section 34, as provided by sub-section (5) of Section 13 of the Act. **G.S. Developers & Contractors Pvt. Ltd. vs. Alpha Corp. Development Pvt. Ltd. & Anr. (2019) 176 DRJ 473 : (2019) 261 DLT 533.** The legislative intent is to obviate any delay in the conclusion of the arbitral proceedings and making of the final award.

Section 13(5)

Section 13(5) provides that the award made under Section 13(4) may be challenged in the application for setting aside the award under Section 34. Under the 1996 Act, no recourse is provided to the Court against the order rejecting the challenge on the grounds of lack of independence or impartiality, at the intermediate stage of the proceedings. This is in contrast with the Model Law which contemplates one appeal to the Court against the order of the arbitrator rejecting the challenge. The challenge on this ground can be maintained before the Court only at the stage of filing objections to the award under Section 34. Refer **Prem Kumar Gupta vs. IREO Waterfront Pvt. Ltd. & Anr., 2015 (5) Arb LR 530 (P&H) : (2015) 179 PLR 331**.

The legislative intent is clear that Parliament did not contemplate that there should be any judicial interference with the order of the tribunal on the ground of bias at an intermediate stage of the arbitration proceedings. The Act requires that the plea must be raised at the earliest point of time before the tribunal itself; if the tribunal rejects the challenge, the mandate of the statute is that the arbitration will proceed under Section 13(4), and the challenge can be made only at the post-award stage under Section 34. Refer

Progressive Career Academy Pvt. Ltd. vs. FIIT JEE Ltd., 2011 (2) Arb LR 323 (Del) (DB) : (2011) 180 DLT 714 : 2011 VIAD (Delhi) 283. Followed in SAIL vs. British Marine PLC, 2016 (6) Arb LR 183 (Delhi) : (2016) 234 (DLT) 99.

If a challenge is made to an arbitrator making allegations under Section 12 of the Act, which are rejected by the arbitrator under sub-section (4) of Section 13, the arbitrator will proceed in the matter, and make the award. The award may be challenged on the grounds contained in Section 34, including the ground that the award is contrary to the public policy of India. Since a remedy is provided under sub-section (5) of Section 13 to raise a challenge under Section 34 at the post award stage, a revision petition under Article 227 is not maintainable before the High Court. Refer **SBP & Co. vs. Patel Engineering Ltd. (2005) 8 SCC 618 : 2005 (3) Arb LR 285 (SC) paras 44 and 45 : AIR 2006 SC 450.**

In case the challenge is successful, and the arbitrator is removed from his office or the award of the tribunal rejecting the challenge is set aside by the Court under Section 34, then Section 13(6) provides that the Court has discretion to decide as to whether an arbitrator is entitled to any fees on the principle of *quantum meruit* or otherwise.

Refer **Swadesh Kumar Agarwal vs. Dinesh Kumar Agarwal, 2022 SCC Online SC 556.**

The order of the Commercial Court refusing into refer the party into arbitration is an appealable order under Section 37(1)(a) (as amended) and in view of availability of the statutory remedy, writ petition is not maintainable. **N.N.Global Mercantile (P) Ltd. vs. Indo Unique Flame Ltd. (2021) 4 SCC 379.**

14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—

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

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

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section(3) of section 12.

The provisions from Sections 12 to 15 form a complete scheme with the underlying objective of securing the sanctity and probity of the arbitration proceedings. The grounds for challenge under Sections 12 and 13 are different from the provisions of Section 14 of the Act. Section 12 deals with the grounds for challenging an arbitrator if circumstances give rise to justifiable doubts as to his impartiality and independence. If the appointment is challenged on the grounds indicated in sub-section (3) of Section 12, the remedy is provided under sub-section (2) of Section 13, which provides the procedure for challenging an arbitrator. If the challenge before the arbitral tribunal is unsuccessful, the

proceedings will continue, and the tribunal will proceed to make the award. There is no recourse to the Court at an intermediate stage of the proceedings. The legislative intent is clear that a challenge to the award on the grounds of bias, lack of independence, or impartiality, can take place before the Court at the Section 34 stage, and not prior thereto. Refer **Progressive Career Academy Pvt. Ltd. vs. FIIT JEE Ltd., 2011 (2) Arb LR 323 (Del) (DB).**

In contrast, a challenge under Section 14 for termination of the mandate of an arbitrator on the grounds mentioned in Section 14(1)(a) is made before the Court, to determine whether the arbitrator is *de jure* or *de facto* unable to perform his functions. The Act provides direct recourse to the Court under sub-section (2) of Section 14 at the intermediate stage of the proceedings. It is not necessary to go to the arbitral tribunal, if the grounds for failure or impossibility to act are made out. Refer **HRD Corporation (Marcus Oil & Chemical Division) vs. GAIL (India) Ltd. (2018) 12 SCC 471 : 2017 (5) Arb LR 1 (SC) : 2017 (10) SCALE 371.**

If a party fails to raise the challenge under Section 13(2) within 15 days of becoming aware of the constitution of the arbitral tribunal, or circumstances referred to in Section 12(3), could invoke Section 14 by contending that the arbitrator had become *de jure* unable to perform his functions. The width and amplitude of Section 14 is more comprehensive. The provisions of Sections 13 and 14 are not mutually exclusive. The Court recognised that if a challenge is unsuccessful under Section 13, the remedy would lie to the Court under Section 34. However, where a party had not filed an application under Section 13, it would not be precluded from raising the challenge under Section 14.

Section 14 is independent of Section 13. Section 14 provides for termination of the mandate of an arbitrator if he becomes *de jure* or *de facto* unable to perform his functions. The *de jure* inability would necessarily comprehend all conceivable legal shortcomings of the arbitrator, which would disqualify him from discharging the role of an arbitrator.

Section 28(3) mandates the arbitral tribunal to act in accordance with the terms of the contract. Section 28 is applicable to all stages of the proceedings before the arbitral tribunal, and not merely to the making of the award. The *de jure* or *de facto* inability of the arbitrator to perform his functions, or failure of the arbitrator to act without undue delay has to be viewed in the context of the agreement between the parties.

In **National Highways Authority of India vs. Sheladia Associates Inc., 2009 (3) Arb LR 378 (Del), para 32 & 37.** and **Cinevistaas Ltd. vs. Prasar Bharati, 2008 (4) Arb LR 112 (Del)**, the agreement stipulated that the proceedings would be conducted at Delhi. However, the arbitrator persisted on holding the proceedings at Bhuwaneshwar. The Court held that the action of the arbitrator would fall under failure to act in terms of the agreement without undue delay. The holding of proceedings at Bhuwaneshwar was contrary to the terms of the agreement, inspite of objections being raised by one of the parties. Section 14 was found to be attracted, and the mandate came to be terminated.

The proceedings under Section 14 of the Act are summary in nature. If the Court finds that the ground of *de jure* or *de facto* inability, or for other reasons the arbitrator fails to act without undue delay, the mandate shall stand terminated. However, if the

challenge is found to be frivolous and vexatious, the petition will be dismissed. Refer **National Highways Authority of India vs. K.K. Sarin, 2009 (3) Arb LR 241 (Del), para 34.**

SECTION 14(1)

De Jure Inability

The first ground refers to where an arbitrator becomes *de jure* unable to perform his functions. **Gurcharan Singh Sahney & Ors. Vs. Harpreet Singh Chhabra & Ors., 2016 (5) Arb. LR 65 (Hyderabad) (DB).** See also **Shyam Telecom Ltd. vs. ARM Ltd. 2004 (3) Arb LR 146 (Del).** The *de jure* inability referred to in clause (a) of Section 14(1) is the impossibility which occurs by operation of law, leading to his inability to function due to factors personal to the arbitrator. **Priknit Retails Ltd. vs. Aneja Agencies 2013 (2) Arb LR 35 (Del).**

Conflicting Views

There has been a divergence of views by various High Courts with respect to the remedies available to a party under Section 14, after raising an unsuccessful challenge to an arbitrator under Section 13 of the Act.

A single judge of the Delhi High Court in **Delhi State Industrial & Infrastructure Development Corporation Ltd. vs. Integrated Techno System Pvt. Ltd. and Anr., 2009 (2) Arb LR 493 (Delhi),** held that the mandate of an arbitrator cannot be terminated on the ground that he was acting in a biased manner, or that he was conducting the proceedings in an improper manner, or that he was not following the judicial discipline, or that he was acting arbitrarily under Section 14 of the Act. The High Court held that such grounds may be good grounds for challenging the award

under Section 34 but cannot be grounds for interference with the arbitral proceedings under Section 14.

However, another single judge of the Delhi High Court took a divergent view in **Raj Kumar Dua vs. Naresh Adhalakha, 2010 (3) Arb LR 301 (Delhi).** See also **Vilas Laxmanrao Kaware vs. Ganesh builders & Ors., 2005 (supp.) Arb LR 364 (Bom),** holding that there was no inconsistency in the remedies available to a party under Sections 12 and 13 on the one hand, and Section 14 on the other. The invocation of the remedy by a party does not restrict that party from invoking the other remedy as well.

Fails to Act without Undue Delay for Other Reasons

Section 14 would be attracted only if undue delay occurs. Sub-sections (1), (2) and (3) of Section 14 envisage a situation where the arbitrator may, on his own recuse himself on an objection being taken, or where both parties agree to terminate his mandate. Section 14(1) prescribes an automatic termination of the mandate of the arbitrator in the eventualities stated therein.

The parties may, by consent, extend the time for making the award, or by their conduct of participating in the arbitration proceedings, **Army Welfare Housing Organisation vs. Mathur & Kapare Associates Pvt. Ltd., 2017 (1) Arb LR 114 (Del),** or waive the stipulation of the period prescribed at the time of entering upon reference.

Post the 2015 amendment, Section 29-A of the Act has been incorporated which states that an award shall be made within a period of 12 months from the date of the tribunal entering upon reference. This provision was inserted with the intent of expediting the dispute resolution process, and avoidance of undue delay by

the arbitrator or tribunal. The parties may however, by consent, enlarge this period by a further 6 months. If the proceedings are even then not completed, a request would have to be made to the Court.

SECTION 14(2)

Appointment of Substitute Arbitrator

The 2015 Amendment to Section 14 clarifies that on the termination of the mandate of an arbitrator, a substitute arbitrator will be appointed. **Bharat Broadband Network Ltd. vs. United Telecoms Ltd., 2019 (3) Arb LR 1 (SC) : 2019 (6) SCALE 491 : 2019 (2) WLN 85 (SC) : AIR 2019 SC 2434.**

SECTION 14(3)

Withdrawal by Arbitrator, or by Agreement between Parties, would not Imply Admission of Guilt

If an arbitrator withdraws from office, or the parties agree to terminate the mandate of the arbitrator, either under Section 14 or 13(3), this would not imply the acceptance of any ground that may be raised under Section 12(3).

Regarding termination of mandate refer the latest decision of Delhi High Court in the case of **National Highway Authority of India vs. MEP Chennai Bypass Toll Road Pvt. Ltd. and Another** reported in **2022 SCC Online Del 1436**. Also refer **Ellora Paper Mills Ltd.** case which is already been stated under Section 12 of the Act.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in

section 13 or section 14, the mandate of an arbitrator shall terminate,—

(a) where he withdraws from office for any reason; or

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

(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 maybe 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.

SECTION 15(2)

Substitute Arbitrator

Sub-section (2) of Section 15 states that on the termination of the mandate of an arbitrator, a substitute arbitrator will be appointed in accordance with the rules applicable to the appointment of the arbitrator being replaced. **S.P. Singla Construction vs. Union of India, 2009 (1) Arb LR 1 (Del) : (2009) 156 DLT 625.** This would imply that the parties would follow the same procedure provided in the contract for appointment of the arbitrator, or the institutional rules of the body conducting the arbitration, or the statutory rules under which the arbitration is being conducted.

Sub-section (2) of Section 15 uses the word "shall" which indicates the legislative intent that the provision is mandatory in nature. The object of the 1996 Act is that in cases where the mandate of an arbitrator terminates for any reason, the substitute arbitrator must be appointed, so as to obviate any delay in the continuation of the arbitral proceedings. **Shailesh Dhairyawan vs. Mohan Balkrishna Lulla, (2016) 3 SCC 619 : 2015 (6) Arb LR 79 (SC) : 2015 (11) SCALE 684.**

In **ACC Limited vs. Global Cements Ltd., (2012) 7 SCC 71 : 2012 (3) Arb LR 329 (SC) : AIR 2013 SC 3824.** See also **N.B.C.C. Ltd. vs. J.G. Engineering Pvt. Ltd., (2010) 2 SCC 385 : AIR 2010 sc 640 : 2010 (1) SCALE 138,** the arbitration clause provided that if any question or difference or dispute arises between the parties at any time, then such dispute shall be referred either to Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision shall be final and binding on both the parties. When disputes arose between the parties, both the named arbitrators had expired. It was sought to be contended that the arbitration clause would not survive as the two named arbitrators were the only persons in whom the parties had reposed faith to adjudicate the disputes. The Court held that the mandate of Section 15(2) is that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically state the same. The legislative policy is to facilitate the parties to resolve their dispute by arbitration, and promote the efficacy of the arbitration clause, except if there is any prohibition or debarment contained therein.

Forfeiture of the Right to Nominate

In **SAP India Pvt. Ltd. vs. Cox & Kings Ltd., Commercial Arbitration Petition (Lodg.) No.351 of 2019, decided by the Bombay High Court on 30 April 2019,** the arbitration clause provided for adjudication of disputes by a three-member tribunal, where each of the parties would nominate one arbitrator, and the two arbitrators would appoint a third arbitrator. Disputes and differences arose between the parties. The petitioner invoked the arbitration agreement and nominated a retired judge as its arbitrator. The respondent, however, refused to nominate an arbitrator since it took the plea that the petitioner had played a fraud on the respondent by inducing it to enter into the agreement. In these circumstances, the petitioner approached the Court by filing an application under Section 11(6) of the Act. The Court appointed an arbitrator on behalf of the respondent. The two arbitrators appointed the presiding arbitrator. The tribunal entered upon reference. Subsequently, the arbitrator appointed by the Court on behalf of the respondent requested for recusal as he was appointed to a public office. The issue arose as to whether the vacancy was to be filled up by the respondent in terms of the arbitration agreement, or the appointment was to be made by the Court under Section 11(6) of the Act. The High Court held that since the respondent had initially refused to nominate the arbitrator, which led to the Court exercising its default power under Section 11, the right of the respondent to appoint the substitute arbitrator stood forfeited. **S.L.P. (Civil) No.12076 of 2019, which was dismissed by the Supreme Court vide Order dated 15 may 2019.** The phrase "according to the rules" in sub-section (2) of Section 15 would take within its ambit, the procedure followed under Section 11 for appointment of the substitute arbitrator.

SECTION 15(3)

Sub-section (3) of Section 15 of the 1996 Act provides that where the arbitral tribunal has been re-constituted, or a substitute arbitrator has been appointed, it is open to the re-constituted tribunal, or substitute arbitrator, to call upon the parties to explain in detail as to what had transpired during the previous hearings. It is left to the discretion of the re-constituted tribunal/substitute arbitrator to decide the extent to which the previous hearings are required to be re-heard **Atul R. Shah vs. V. Vrijlal Lalloobhai and Co., AIR 1999 Bom 67 : 1999 (1) Mh LJ 629 : 1998 (4) Bom CR 867.** The proceedings would continue from the stage where the mandate of the original arbitrator gets terminated and would not commence *de novo*.

A *de novo* trial would give an unnecessary opportunity to a dishonest litigant to obliterate the evidence already recorded, which may have been adverse to them.

The Karnataka High Court in the case of **Royal Orchid Hotels Ltd. vs. Rock Reality Pvt. Ltd.** reported in **ILR 2021 Kar 2373 = 2020 SCC Online Kar 3414** has held about effect of amendment to Section 11 under amendment Act 2015 and it is further held by referring to judgment of the **Apex Court in Mayavati Trading Pvt. Ltd., (2019) 8 SCC 714,** wherein, it was held that omission of Section 11(6A) would not be resuscitate the law that was prevailing prior to amendment Act of 2015, rather the entire scheme of 2019 amendment is to strengthen and deepen what was sought to be achieved by insertion of Section 11(6A), that i.e., to confirm power of Court to examination of existence of arbitration agreement, nothing more, nothing less by leaving all

other preliminary issues to be decided by arbitral tribunal; omission of Section 11(6A) will not alter this position in anyway which would be squarely applicable to the facts of the case.

In the case of **Jayesh H. Pandya and Another vs. Subhtex India Ltd. and Others – (2020) 17 SCC 383**, it is held that participation in the arbitration proceedings by the objecting party does not amount to waiver when the same is not voluntary. The essential element of waiver is that there must be voluntary intentional relinquishment of a right and voluntary choice is the essence of waiver.

CHAPTER IV
Jurisdiction of arbitral tribunals

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

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

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

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

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

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

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

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

Section 16 of the 1996 Act empowers the arbitral tribunal to rule on any objection that may be raised on its jurisdiction to adjudicate on disputes referred for arbitration. The two main bastions of the jurisdiction of the tribunal under Section 16 are (i) *kompetenz-Kompetenz,* i.e., the arbitral tribunal shall have the competence to rule on its own jurisdiction; and (ii) the doctrine of separability (or severability) of the arbitration agreement being a separate and autonomous agreement independent of the underlying substantive contract, which contains the commercial terms of the agreement between the parties. **Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan, (1999) 5 SCC 651, 662 : 1999 (2) Arb LR 695 (SC) : AIR 1999 SC 2102 : 1999 (3) scale 587 : (1999) 3 SCR 490.** Even if the underlying contract is held to be null and void, it shall not *ipso jure* invalidate the arbitration clause.

The jurisdiction of the tribunal under this section is not subject to party autonomy.

Doctrine of Kompetenz–Kompetenz

The doctrine of *"Kompetenz – Kompetenz"* is intended to avoid the arbitral process from getting thwarted at the threshold when a preliminary objection is raised by one of the parties to challenge the competence of the arbitral tribunal. It empowers the tribunal to make the first decision on the validity of the arbitration agreement and its jurisdiction over the arbitral proceedings. However, the decision of the tribunal on jurisdiction is not a final and binding decision.

The decision of the arbitral tribunal is subject to judicial review by the Court at the seat of arbitration. The laws of different jurisdictions, and rules of arbitration institutions, are at variance with respect to the stage at which the award on jurisdiction and validity of the agreement can be challenged. Article 16(3) of the Model Law states:

> "The arbitral tribunal may rule on a plea [that the arbitral tribunal does not have jurisdiction] …either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request within, thirty days after having received notice of that ruling, the Court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

Doctrine of Separability

As per the doctrine of Separability, the arbitration agreement is distinct in law and in existence from the underlying substantive contract in which it is embedded. It is considered to be autonomous and juridically independent from the substantive contract. The effect of this doctrine is that the arbitration agreement will ordinarily remain valid and binding, notwithstanding the invalidity, illegality, termination or repudiation of the underlying contract. The substantive contract contains the commercial terms of the contract between the parties, which stipulate the rights and obligations of the parties whereas the arbitration clause is the agreement between the parties regarding the mode of dispute resolution.

SECTION 16(1)

Section 16(1) provides that the arbitral tribunal is empowered to rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. Section 16(1) is an inclusive provision which would comprehend all jurisdictional issues, including limitation, res judicata, etc.

In **Renusagar Power Co. Ltd., vs. General Electric Co., (1984) 4 SCC 679 : AIR 1985 SC 1156 : (1985) 1 SCR 432,** the Supreme Court held that expressions such as 'arising out of', or 'in respect of', or 'in connection with', or 'in relation to', or 'in consequence of', or 'concerning', or 'relating to', in the contract, are of the widest amplitude and content, and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

In a recent decision rendered by a three-judge bench in **Bharat Petroleum Corporation Ltd., vs. Go Airlines India Ltd., (2019) 10 SCC 250 : 2019 (6) Arb LR 265 (SC) : 2019 (14) SCALE 269,** the respondent raised counter claims relating to CENVAT credit. The appellant filed an application under Section 16 contending that the counter claim raised by the respondent was beyond the scope and jurisdiction of the arbitrator, claim raised by the respondent was beyond the scope and jurisdiction of the arbitrator, since the demand for the CENVAT invoices was made only after the commencement of arbitration. The arbitrator allowed the application under Section 16 and held that the counter claim was beyond the scope and jurisdiction of the arbitrator. In appeal, the High Court set aside the order of the arbitrator and held that the arbitrator was not justified in rejecting the counter-claim at the threshold. Aggrieved, the appellant filed an SLP before the Supreme Court. A three-judge bench held that at the time of appointment of the arbitrator, the respondents had raised the basis for making the counter claim in the reply to the notice for appointment of arbitrator, even though it was not specifically stated about the CENVAT invoices. The Supreme Court upheld the judgment of the High Court that the arbitrator was not justified in rejecting the counter claim under Section 16 at the threshold on the ground of lack of jurisdiction, without adjudication on merits.

SECTION 16(1)(a) and (b)

Severabililty under Indian Law

Section 7(2) of the 1996 Act provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Section 16 gives statutory recognition to the doctrine of separability. An arbitration clause

though an integral part of the contract has an independent existence from that of the contract in which it is embedded. It is a collateral term of the contract, independent and distinct from the substantive terms.

Clause (a) of Section 16(1) provides that the tribunal may consider an arbitration clause to be an agreement independent of the other terms of the contract.

SECTION 16(2)

Section 16(2) mandates that a plea that the tribunal does not have jurisdiction, shall not be raised after the submission of the statement of defence. In **MSP Infrastructure Ltd. vs. Madhya Pradesh Road Development Corporation Ltd., 2015 (13) SCC 713 : 2014 (4) Arb LR 428 (SC) : AIR 2015 SC 710. Followed in Zee Sports Ltd. vs. Nimbus Media Pte. Ltd., 2017 (3) ABR 495,** the Court held that a party may raise jurisdictional objections under Section 16(2) before or at the time of submission of its statement of defence. If the objections are raised thereafter, it would be expressly prohibited since a party cannot belatedly question the jurisdiction after it has submitted its case on merits, led evidence and submitted arguments.

A party cannot be allowed to raise a belated plea of non-existence of the arbitration agreement, and lack of jurisdiction of the tribunal, before the Court at the post award stage, unless such plea had been raised before the tribunal under Section 16. In **Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy, (2007) 2 SCC 720 : 2007 (1) Arb LR 148 (SC) : AIR 2007 SC 817 : 2007 (4) SCJ 948.**

SECTION 16(3)

Order Accepting Plea of Lack of Jurisdiction – Appealable under Section 37(2)(A) of the Act

If a party challenges the jurisdiction of the arbitrator, either on the ground of lack of jurisdiction under sub-section (2) of Section 16, or on the ground of exceeding the scope of its authority, the arbitrator shall decide the objection as stipulated by sub-section (5) of Section 16. If the arbitrator rejects the challenge, it will proceed with the hearing, and make the award, which can be assailed under Section 34 of the Act after the proceedings have culminated in the arbitral award as per sub-section (6) of Section 16.

If the arbitrator however, accepts the plea of lack of jurisdiction under sub-sections (2) or (3), an appeal is provided by Section 3(2)(a) of the Act, **McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors., (2006) 11 SCC 181 : 2006 (2) Arb LR 498 (SC) : (2006) 6 SCALE 220.**

If an arbitrator rejects a claim or a counter claim as being non-maintainable by way of a partial award, a challenge to the same would be maintainable under Section 34 of the Act. In **National Thermal Power Corporation vs. Siemens Atkeingesellschaft, (2007) 4 SCC 451 : 2007 (1) Arb LR 377 (SCC) : AIR 2007 SC 1491,** a tribunal constituted under the ICC rules had passed a partial award holding that the counter-claim was not maintainable.

In **PSA Mumbai Investments Pvt. Ltd. vs. Board of Trustees of the Jawaharlal Nehru Port Trust & Anr., (2018) 10 SCC 525 : 2018 (5) Arb LR 195 (SC) : 2018 (11) SCALE 325,** an

appeal was filed under Section 37 before the High Court to challenge an order passed by the arbitrator accepting the plea of lack of jurisdiction under Section 16(2) of the 1996 Act. In this case, it was contended that there was no arbitration agreement in existence, since the parties had not executed the final concession agreement which contained the arbitration clause. The arbitrator accepted the plea of lack of jurisdiction. On an appeal being filed under Section 37 before the High Court, the learned single judge set aside the order of the arbitrator on the ground that the clause in the draft agreement would bind the parties. On appeal before the Supreme Court, the judgment of the single judge was set aside, and the appeal filed under Section 37 was allowed. The Court held that there was no agreement between the parties, and the negotiations which took place, were merely a prelude to the contract. Since the concessions agreement was admittedly not signed by the parties, it would not constitute a valid arbitration agreement.

SECTION 16(5)

Section 16(5) provides that the tribunal shall decide a plea referred to in sub-section (2) and (3), and where the tribunal makes a decision rejecting the plea, it may continue with the arbitral proceedings and pass the award. **McDermott International Inc. vs. Burn Standard Co. Ltd., (2006) 11 SCC 181 : 2006 (2) Arb LR 498 (SC) : (2006) 6 SCALE 220.** The only recourse available to a party aggrieved by the order of the tribunal rejecting the challenge to jurisdiction, is to raise it as a ground for setting aside the award under Section 34 of the 1996 Act.

SECTION 16(6)

The jurisdictional question is required to be determined as a preliminary issue. **Pandey & Co. Builders vs. State of Bihar & Anr., (2007) 1 SCC 467 : 2006 (4) Arb LR 192 (SC) : AIR 2007 SC 465.** The decision under sub-section (6) of the arbitral tribunal, rejecting the plea of lack of jurisdiction, is not an 'award' as held in *Triad India vs. Tribal Co-operative Marketing & Development Federation of India.* It is the arbitral award which would be the subject-matter of challenge under Section 34 of the Act, **2007 (1) Arb LR 327 (Del).**

The Hon'ble Apex Court in the decision **ONGC Ltd. vs. Discovery Enterprises Pvt. Ltd. and another** reported in **2022 SCC Online SC 522**, has come to conclusion that there was a fundamental failure of the first arbitral tribunal to address the plea raised by ONGC for attracting the group of companies doctrine. It has elaborately discussed about companies doctrine and necessity to above issue of discovery of inspection.

The Hon'ble Apex Court has discussed in the case of **ArcelorMittal Nippon Steel (India) Ltd. vs. Essar Bulk Terminal Ltd., (2022) 1 SCC 712**, has held that negative *Kompetenz-Kompetenz* is a sequel to the rule of priority in favour of the arbitrators, that is, the requirement of parties to an arbitration agreement to honour the undertaking to submit any dispute covered by such an agreement to arbitration. Further, this entails the consequence that the Courts are prohibited from hearing such disputes.

Disputes regarding existence of arbitration agreement itself, reference of such dispute to arbitration when warranted has been

discussed in the case of **Pravin Electricals Pvt. Ltd. vs. Galaxy Infra and Engineering Pvt. Ltd. – (2021) 5 SCC 671**.

When the claim is time bared such dispute not to be referred for arbitration by the Court. Ordinarily the issue of limitation which concerns 'the admissibility' of the claim, must be decided by the arbitral tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties. Refer the decision in the case of **BSNL vs. Nortel Networks (India) (P) Ltd. – (2021) 5 SCC 738 = AIR 2021 SC 2849.**

Also refer the decision in the case of **Bhaven Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. and Another** reported in **(2022) 1 SCC 75** regarding jurisdiction of arbitrator.

17. Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal,—

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

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

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

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

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid

purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

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

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

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

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

The power of the arbitral tribunal to grant interim relief during the subsistence of arbitration proceedings is central to the efficacy of the arbitral process, since it enables the parties to approach the tribunal, rather than seek judicial intervention by the Courts.

The 1996 Act

Section 17 provided that an arbitral tribunal, in exercise of its powers, could direct a party "to take any interim measure of protection" as it considered "necessary in respect of the subject-matter of the dispute" such as the detention, preservation, or

inspection of any property or thing which is the subject matter of the dispute in arbitration; or under sub-section (2) of Section 17 to order a party to provide security in connection with the measures under sub-section (1). The scope of the interim measures that could be granted under Section 17 was limited to the subject matter of the arbitration agreement.

The arbitral tribunal while granting interim measures was bound by the terms of the arbitration agreement or the rules of the institution which was conducting the arbitration proceedings. **Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, second edn., 2005, p. 152, para 4-031.**

The power to grant interim measures of protection under the 1996 Act was a limited one, confined to the issuance of orders/directions to parties to the arbitration. The jurisdiction of the arbitrator was confined to the agreement **Smt. Kanak vs. Uttar Pradesh Avas Evam Vikar Parishad, (2003) 7 SCC 693 : AIR 2003 SC 3894 : (2003) Supp. 3 SCR 232 : JT 2003 (9) SC 398 : 2003 (7) SCALE 157**, and could not pass orders beyond the subject matter of reference, **Sundaram Finance Ltd. vs. NEPC India Ltd., (1999) 2 SCC 479 : 1999 (1) Arb LR 305 (SC), para 12 : AIR 1999 SC 565**, or conflict with the provisions of any statute. **Ministry of Road Transport & Highways, Govt. of India vs. DSC Ventures Pvt. Ltd., 2015 (2) Arb LR 142 (Delhi) : (2015) 219 DLT 596.**

The scope of interim measures which could be granted under Section 17 as framed in the principal Act, are far more limited than Section 9, **Areeb Rolling Mills (P) Ltd. vs. NKGSB Co-operative Bank Ltd., (2013) 2 Mah LJ 424 : 2013 (2) Arb LR 14 (Bom).**

Given the lack of any suitable statutory mechanism for the enforcement of interim orders passed by the tribunal. In **Sundaram Finance Ltd., vs. NEPC India Ltd., (1999) 2 SCC 479 : 1999 (1) Arb LR 305 (SC) : AIR 1999 SC 565**, the Court opined that while Section 17 empowered the arbitral tribunal to pass interim orders, such orders could not be enforced as orders of a Court. On the other hand, Section 9 conferred the power on the Court to pass interim orders during the course of arbitral proceedings.

SECTION 17(1)

The interim measures ordered by the Court could have a far-reaching impact not only on parties to the arbitration agreement, but also on third parties. The measures ordered by an arbitral tribunal could be directed only to the parties to the arbitration agreement.

There were certain interim measures of protection which could be granted only by a Court of law, and not by the tribunal. For instance, a Court could authorise any person to enter upon any land or building in possession of any party, or authorise inspection and search of such property, while a tribunal had no such power. The tribunal under the unamended Section 17 had no similar power, including any directions to third parties, or direct pre-award attachment, and the like. The Court was conferred with vast powers for making orders for the purpose of, and in relation to any proceeding before it, while this power was not available to the tribunal.

The 2015 Amendment Act

The 2015 Amendment Act has made significant changes to Section 17 of the Act. The 2015 Amendment has vested the arbitral tribunal with wide powers to grant interim measures of protection which are *pari material* with Section 9, including ordering security of the amount in dispute, grant of injunctive orders, appointment of a receiver, to pass an order of attachment of a property, sale and any other orders as may be just and convenient. Section 94 of the CPC provides that in order to prevent the ends of justice from being defeated, the Court may direct a party to furnish security, or order attachment of a property.

Appointment of a Guardian

Section 17(1)(i) permits the arbitral tribunal to appoint a guardian for a minor person, or a person of unsound mind, upon an application made to it. However, such appointment is only for the purposes of the arbitral proceedings. This provision corresponds to Section 9(1)(i) of the 1996 Act.

Preservation, Custody, or Sale of any Goods

Section 17(1)(ii)(a) provides that an arbitral tribunal may grant any interim measure for preserving, providing interim custody, or selling any goods. However, such goods must from part of the subject-matter of the dispute. This provision corresponds to Section 9(1)(ii)(a) of the Act.

Power to Order Security

Under the unamended Section 17 of the 1996 Act, the arbitral tribunal was not conferred with the power to order a party to secure the amount in dispute.

Detention, Preservation or Inspection of Property/Thing

Section 17(1)(i)(c) empowers the arbitral tribunal to grant any interim measure for the detention, preservation or inspection of any property or thing, which forms the subject-matter of the dispute between the parties. This provision is akin to the power of the Court under Section 9(1)(ii)(c). A party may apply to the arbitral tribunal for an interim measure regarding an issue which may arise in the arbitration. An interim measure authorizing any person to enter upon any land or building in the possession of any party, or authorize the taking of samples, or taking inspection of a property, etc, as may be considered necessary or expedient for the purpose of obtaining full information or evidence may be granted.

Grant of Interim Injunctions

Section 17(1)(ii)(d) empowers the arbitral tribunal to grant or refuse interim injunctions under Section 17(1)(ii)(d) which is akin to the power of the Court under Section 9(1)(ii)(d) of the 1996 Act with respect to the power of the Court, to grant interim measures of protection.

This would, however, not imply that the arbitral tribunal has the jurisdiction to pass a decree of permanent prohibitory or mandatory injunction, or a decree of declaration of title of immovable property or make a declaration on the status of a person. **Shriram Transport Finance Co. Ltd. vs. Naduvacheri Balakrishnan and Ors., AIR 2017 Ker 252 : ILR 2017 (4) Kerala 413 : 2017 (3) KLJ 639.**

Appointment of a Receiver

Section 17(1)(ii)(d) provides that a party may apply to the arbitral tribunal for appointment of a receiver. In **Shankti International Pvt. Ltd. vs. Excel Metal Processors Pvt. Ltd., 2017 (3) Arb LR 388 (Bom) : 2017 (3) ABR 388,** the Bombay High Court held that the power of the arbitral tribunal to appoint a receiver under Section 17(1)(ii)(d) was akin to the powers of a civil Court under Order XL CPC. This empowers the tribunal to appoint a person to act as a receiver with respect to the dispute. Under this provision, a private person may be appointed to act as a receiver, with such powers as may be conferred upon the receiver by the civil Court. The arbitral tribunal however cannot utilize the Court receivers attached to the High Courts for enforcement of their orders or directions under Section 17.

SECTION 17(2)

Orders Passed under Section 17 – Appealable under Section 37(2)(b) of the 1996 Act

Under Section 17(1), the arbitrator has been invested with wide powers to grant interim measures of protection with respect to the subject-matter of the dispute. An order passed by the arbitral tribunal under Section 17(1) would be deemed to be an order of the Court. An order passed by the arbitral tribunal granting or refusing to grant an interim measure under Section 17 is not final, and appealable before the Court under Section 37(2)(b) of the Act.

Period of Limitation for Filing an Appeal under Section 37

The 1996 Act is a special enactment which has in some sections prescribed a specific period of limitation, such as Section 34(3) which provides a period of 3 months for filing objections to an

arbitral award, with a further 30-day period if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the period prescribed. The 1996 Act also prescribes a specific period of limitation in sub-sections (2) to (4) of Section 43 of the Act. The 1996 Act, however, does not prescribe the period of limitation for filing an appeal under Section 37 of the Act.

The Hon'ble Apex Court in the case of **Future Coupons Pvt. Ltd. and Others vs. Amazon.com NV Investments Holdings LLC and Others** reported in **2022 SCC Online SC 126** has held about the effect of the award of an Emergency Arbitrator and jurisdiction of an arbitral tribunal has been discussed and it is necessary to decide the same by arbitral tribunal.

CHAPTER V
Conduct of arbitral proceedings

18. Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present this case.

It is fundamental to fair procedure that both sides should be heard known as the *audi alteram partem* rule, i.e., 'hear the other side'. The principle of *audi alteram partem* is enshrined in Sections 18 and 34(2)(a)(iii) which has been considered to be a fundamental juristic principle of Indian law. **Associate Builders vs. DDA, (2015) 3 SCC 49 : 2014 (4) Arb LR 307 (SC) : AIR 2015 SC 620.**

These requirements have been described by various epithets, i.e., 'fundamental principles', 'rules of natural justice', 'due process', 'equality and fair trial', *audi alteram partem,* and the '*magna carta* of arbitral procedure'.

Non-derogable and Mandatory Provision

Section 18 is a mandatory provision, which is not subject to party autonomy, and is a non-derogable provision of the Act. The proceedings before the arbitral tribunal are quasi-judicial in nature and must be conducted in accordance with the principles of quasi-judicial in nature and must be conducted in accordance with the principles of natural justice and fair play, **Dewan Singh vs. Champat Singh and Others, 1969 (3) SCC 447 : AIR 1970 SC 967 : (1970 2 SCR 903,** after giving a full opportunity to the parties to present their case. **Srei Infrastructure Finance Ltd., vs. Tuff Drilling Pvt. Ltd., (2018) 11 SCC 470 : 2017 (6) Arb LR 430 (SC) : 2017 (12) SCALE 105.**

An arbitral tribunal is bound by the terms and conditions of the agreement between the parties, and the substantive and procedural law. The arbitrator has to give due regard to the relevant trade/commerce practices and usages, for a proper adjudication of the disputes. **Radha Krishna Films Ltd., vs. Jyoti Film Distributors Pvt. Ltd., 2011 (113) Bom LR 2028 : 2011 (5) Bom CR 391 : 2011 (4) ALLMR 633.** Though Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure or the Indian Evidence Act, yet the principles of natural justice and fair-play do apply even in such proceedings, as the tribunal decides the rights of the parties. It is the technical procedures which are not strictly applicable. However, the basic requirement of proof of documents, cannot be disregarded. The arbitrator needs to consider the basic principles of the Contract Act, for assessing the relief to be granted, including damages or compensation, and pass a reasoned award.

Rules of Natural Justice

Section 18 is a manifestation of the principles of natural justice which are not only mandatory, but also inherent in every judicial or administrative law, natural justice is a well-defined concept which comprises of two fundamental rules of fair procedure: that a man must not be a judge in his own cause: and that a man's defence must always be fairly heard. **Spackman vs. Plumstead District Board of Works(decision of house of Lords).** So, universal are the principles of natural justice that they are not confined to the exercise of judicial power. They apply equally to administrative power, and also to powers conferred on a private adjudicator under the contract.

Equal Treatment of Parties

Every arbitration statute recognizes the concept of 'party equality' in some form or another, and it forms a mandatory ingredient of the arbitral process.

The notion of party equality implies the right of each of the parties to be heard. This broad principle must permeate all stages of the arbitral process, from the constitution of the arbitral tribunal, till the making of the award.

In the absence of any agreement between the parties, it will be open to the tribunal to consider the provisions of Section 19 and lay down a procedure to be followed in the arbitration proceedings. The procedure adopted must be fair and just to both the parties, comply with the principles of natural justice, treat the parties impartially, and give them full and equal opportunity to present

their respective case. **Rotary Club of Delhi Midtown vs. Sunil K. Jain, 2007 (3) Arb LR 169 (Delhi).**

Under Section 19(1) of the Act, the arbitral tribunal is not bound by the technical rules of procedure, such as the Code of Civil Procedure or by the Indian Evidence Act; what is required of the arbitral tribunal is compliance with the principles of natural justice, and treat the parties impartially by giving them a full and equal opportunity to present their case.

Sub-section (3) of Section 19 confers the power on the arbitral tribunal to conduct the proceedings in the manner it considers appropriate. Sub-section (4) of Section 19 leaves it open to the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence, The arbitrator must deal with the oral and documentary evidence, and the terms of the contract while making his award.

Fair Trial

It is not only impartiality and absence of bias on the part of the arbitrator that is postulated in Section 18 of the Act, but an inviolable binding obligation to conduct a fair trial in the arbitration proceedings. Fair trial requires something more than treating the parties with equality. It contemplates providing each party a reasonable opportunity to present their case. Where a most crucial report which had a decisive effect on the issues involved in the proceedings, was withheld from them, but relief upon to pass the award by the arbitrator, it goes without saying that the procedure followed by him was clearly unethical and unsustainable. A party to the proceedings must know what is the evidence that has been given and he must also be given an opportunity to show why it is

not to be used against him. **Union of India vs. Bharath Builders and Contractors, 2012 (4) Arb LR 448 (Kerala) (DB) : 2012 (2) KLJ 781.**

Full Opportunity to Present the Case

Section 18 mandates fair trial by an impartial tribunal. Section 18 requires that apart from treating the parties with equality, 'each party shall be given a full opportunity to present his case'. Section 34(2)(a)(ii) states that where a party was not given proper notice of the appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present the case in the proceedings, the resulting award is liable to be set aside.

Right to be represented by a Legal Practitioner

The right of being heard is conferred on the parties by Section 24 of the 1996 Act. Arbitral proceedings being quasi-judicial in nature, the right of hearing includes the right to be represented by a legal practitioner. In **Faze Three Exports Ltd. vs. Pankaj Trading Co. & Ors., 2004 (2) Arb LR 163 (Bom) : 2004 (2) RAJ 573 (Bom).**

Proper Notice

It is evident that if a party is not aware that a hearing of the arbitration is going to take place, the arbitral proceedings cannot be properly conducted. Section 34(2)(a)(iii) provides that an arbitral award may be set aside if a party has not been given proper notice of the appointment of the arbitrator, or the time and venue of the hearing. Therefore, a party to the arbitral proceedings, must be given adequate notice of the appointment of the arbitrator, subject-matter of the dispute, time and venue of the proceedings, so as to enable them to:

(i) effectively prepare their case, and to meet the case of the opponent;
(ii) appear and participate in the hearings; and
(iii) make their representations.

Right to Appear throughout the Proceeding

A party has the right to be present throughout the arbitral proceedings, and the tribunal has no right to exclude any party at any stage of the proceedings, unless he does not wish to attend the proceedings of his own volition.

In an adversarial system, oral arguments are intended to enable a party to put up his case on the basis of the entire evidence on the record, on which the tribunal arrives at its decision. Denial of an opportunity to a party to address his arguments to the tribunal is apt to result in injustice and offend the requirement of equality of treatment and fairness and trial.

Oral Hearing

Whether the arbitrator should hold oral hearings for the presentation of evidence, or for oral arguments, or whether the proceedings should be conducted on the basis of documents and other materials, depends primarily upon the agreement of the parties, or in the absence thereof, the rules of the institution conducting the arbitral proceedings.

The arbitrator has to give sufficient advance notice of any hearing, or any meeting of the tribunal for the purpose of inspection of the documents, goods or other property. The arbitrator is bound to conduct the arbitration proceedings fairly as spelt out by sub-sections (1) and (2) of Section 24 of the Act.

Opportunity to Present Evidence

The requirement that each party should be given a full opportunity to present his case, applies equally both to the presentation of evidence and addressing arguments. Section 24(1) gives the choice to the parties to decide whether to hold oral hearings for presentation of evidence and for oral arguments, or whether the proceedings should be conducted on the basis of documents and other material. The mode and manner of adducing documentary and oral evidence can also be agreed upon by the parties. The parties, by an express and irrevocable agreement, can validly exclude the right to adduce any evidence at all, on some or all of the disputed issues. However, to show that the parties intended to give up their right to adduce evidence, very cogent and clear wording is required. **Ritchie vs. W Jacks and Co., (1922) 10 Lloyd's LR 519, 524 (CA).**

The Madras High Court in the case of **Chennai Metro Rail Ltd. vs. Joint Venture M.s, Transtonnelstroy-afcons JV and others** reported **2021 SCC Online Mad 5609** has discussed above extension of time and its effect. Also refer **Ssangyong Engi. and Construction Company Ltd. vs. NHAI – (2019) 15 SCC 131**.

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.

Arbitration being a consensual mode of dispute resolution, the tribunal owes its legal sanction to the contract between the parties. The tribunal exercises quasi-judicial powers and is empowered to resolve the disputes between the parties and pass a binding and enforceable award. The arbitral tribunal is bound by the terms and conditions of the contract between the parties **Secretary, Irrigation Department, Govt. of Orissa & Ors. vs. G.C. Roy, 1992 (1) SCC 508 : 1992 (1) Arb LR 145 (SC) : AIR 1992 SC 732.** Party autonomy is subject to the mandatory or non-derogable provisions of the 1996 Act and must be conducted in accordance with the rules applicable to the substance of the dispute as per clause (a) of Section 28(1) of the 1996 Act.

Applicability of Code of Civil Procedure, 1908

Section 19 of the 1996 Act marks a departure from the provisions of Section 41 of the 1940 Act insofar as the applicability of the provisions of the CPC is concerned. **Jet Airways (India) Pvt. Ltd. & Anr. vs. Subrata Roy Sahara & Ors., (2011) 113 (6) Bom LR 3835 : (2012) 2 ABR 855.** While Section 19 provides that the arbitral tribunal shall not be bound by the provisions of the CPC, Section 41 of the 1940 Act stated that the provisions of the CPC shall apply to all proceedings before the Court and to all appeals under the 1940 Act.

The Code of Civil Procedure and the Evidence Act are not strictly applicable to arbitral proceedings, yet the tribunal may take guidance from the settled principles evolved under these statutes. The Delhi High Court in **Bharat Heavy Electricals Limited vs. Silor Associates, S.A. Delhi High Court, CM(M) 1084/2013, judgment dated 11th October 2013,** held that while the arbitral tribunal is not bound by the provisions of the CPC, its underlying principles based on fundamental jurisprudence, which ensure justice and fair play, must be followed by the arbitral tribunal. The requirement of complying with the principles of justice and fair play permeate the scheme of Section 19 of the Act.

The provisions of Sections 19(1), (3) and (4) indicate that though the arbitral tribunal is not bound by the strict technicalities of the CPC and the Evidence Act, **State of Orissa vs. Samantary Constn. Pvt. Ltd. & Ors., 2016 (4) SCJ 133; 2015 (9) SCALE 685,** it is not precluded from adopting the principles enshrined in these statutes which have been judicially evolved over a period of time. The legislative intent is not to constrain the arbitral proceedings by the rigidity of the Evidence Act or the CPC. **Mahanagar Telephone Nigam Limited & Ors. vs. Anant Raj Agancies Pvt. Ltd., 2017 IIIAD (Delhi) 357.**

Proceedings under Sections 9, 27 and 36 – CPC Applicable

Under the 1996 Act, recourse is taken to the provisions of the CPC for proceedings before the Court in various circumstances, such as: for obtaining interim measures from the Court under Section 9. Refer to **Brick Steel Enterprises vs. The Superintending Engineer, PWD Salem, 2006 (5) CTC 519 : (2007) 1 MLJ 488;** for seeking the assistance of the Court in

taking evidence under Section 27; for enforcement of the award under Section 36. Undoubtedly, the CPC would be applicable to proceedings before the Court.

Appeals under Section 37 of the Arbitration Act – CPC Applicable

Section 19(1) is concerned only with the proceedings before the arbitral tribunal; it has no application to the appellate proceedings under Section 37 before the civil Court. **I.T.I. Ltd., vs. Siemens Public Communications Network Ltd., (2002) 5 SCC 510 : 2002 (2) Arb LR 246 (SC) : AIR 2002 SC 2308 : (2002) 3 scr 1122.**

Upon termination of the arbitral proceedings, the provisions contained in the CPC are applicable to all Court proceedings arising therefrom, including appeals filed under Section 37 of the Act. **Srikumar Textiles (P) Ltd., vs. Sundaram Finance Ltd., 2008 (1) Arb LR 217 (Mad).**

Proceedings under Section 34 – CPC not Applicable

The grounds for challenging an award under Section 34 are narrow and such an application must be filed before a Court as defined under Section 2(1)(e) of the Act. In **Emkay Global Financial Services Ltd. vs. Girdhar Sondhi, (2018) 9 SCC 49 : 2018 (5) Arb LR 1 (SC) : AIR 2018 SC 3894,** the Supreme Court held that in a Section 34 application, there is no requirement for framing of issues or leading oral evidence, as the proceedings before the Court under Section 34 are summary in nature. However, if there is any material not contained in such record, which are relevant to the determination of issues arising under Section 34 of the Act, it may be brought to the notice of the Court by way of

affidavits filed by both parties. The cross-examination of witnesses deposing by way of affidavits is impermissible. Any new document, or a new plea, cannot be entertained in an application under Section 34, nor would adducing oral evidence be entertained. **Sandeep Kumar vs. Dr. Ashok Hans and Anr., 2004 (3) Arb LR 306 (Delhi).** If it were to be allowed, it would enlarge the scope of a restricted provision, which is alien to arbitration proceedings. Parties are only permitted to file documents, which formed part of the record of the arbitrator. **Brick Steel Enterprises vs. The Superintending Engineer, PWD Salem, 2006 (Suppl) Arb LR 360 (Mad).**

Evidence Act

Section 19(4) states that the tribunal may conduct the proceedings in the manner it considers appropriate, including the power to determine the admissibility, relevance, materiality, and weight or any evidence.

Even though the arbitral tribunal is not bound by the provisions of the Indian Evidence Act, 1872, the tribunal is required to follow the principles judicially evolved and settled. If there is no agreement between the parties as to the procedure to be followed, it is for the arbitral tribunal to determine whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, materiality and weight of any evidence. **Steel Authority of India Ltd. vs. Salzgitter Mannesmann international GmBH, 2012 (2) Arb LR 296 (Delhi).**

A division bench of the Punjab and Haryana High Court in **Punjab State Industrial Development Corporation Ltd., vs. Sunil K. Kansal, 2013 (1) Arb LR 327 (P&H) (DB),** held that the

evidence to be recorded by the tribunal is not expected to be in accordance with the provisions of the Indian Evidence Act, 1872. The tribunal can adopt a procedure which is fair, equitable and reasonable as it may consider appropriate. If the tribunal finds that evidence is required on certain questions of fact, or of mixed questions of fact and law, it shall permit the parties to furnish evidence by affidavits, and if demanded, permit the deponents of such affidavits to be cross-examined. In the absence of an agreed procedure, the proceedings before the arbitral tribunal are to be governed by the provisions of the Act.

Non-granting of opportunity to cross-examine in the witness is not a ground to set aside the award when the parties have agreed for procedure before the arbitrator. **Jagjeet Singh Lyallpuri vs. Unitop Apartments & Builders Ltd. (2020) 2 SCC 279.**

The Hon'ble Supreme Court in the case of **Gujaraj State Disaster Management Authority vs. Aska Equipments Ltd. – (2022) 1 SCC 61** has emphasized above pre-deposit of 75% of the amount in terms of the award shall be made when there is a challenge of award passed under MSMED Act, 2006. It is mandatory. The Court has no discretion to reduce.

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 anyplace it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

In the theory and practice of international arbitration, the leitmotif of arbitration is party autonomy on the composition and jurisdiction of the arbitral tribunal, the governing law of the contract, the curial law which governs the conduct of arbitral proceedings, and the seat of arbitration.

The "seat" of arbitration is a juridical concept. It has been said that an arbitration finds its juridical 'home' in the seat of arbitration, and the jurisdiction of the seat over the arbitral process is primary, while the jurisdiction of all other states must be deemed to be secondary. The Courts at the seat of arbitration exercise exclusive supervisory jurisdiction with respect to the conduct of arbitration, except where parties have made an express choice of a different *lex arbitri.* The seat of arbitration will determine the curial and substantive law which governs the conduct of the arbitral proceedings.

The seat of arbitration has a significant bearing on determining the curial law of the arbitration. The legal consequences of determining the juridical seat or place of arbitration is determinative of the curial law of the arbitration, and the supervisory role of the Court at the seat of arbitration, which will entertain the applications and appeals during the pendency of arbitral proceedings.

The choice of seat is predominantly based on considerations such as neutrality and impartiality of the judicial system, availability of provisional remedies to preserve the *status quo,*

speedy judicial mechanisms for appointment and replacement of arbitrators, Court assistance in enforcing interim orders, and similar other features, which would facilitate and aid the arbitral process; the arbitration law at the seat; the track record of the national Courts in enforcing agreements to arbitrate and enforcement of arbitral awards. The judicial system at the seat must be neutral, efficient, and free of corruption.

The 1996 Act

Section 20 of the 1996 Act, with minor cosmetic changes, is almost a verbatim adoption of Article 20 of the Model Law. The 1996 Act does not use the term "seat" of arbitration but uses the term "place" of arbitration in Section 20. The term "place" connotes the "seat" of arbitration, and has been used as such in Sections 2(2), 20, 28(1) and 31(4) of the Act.

Section 20 applies to arbitrations under Part I of the Act, where the place/seat of arbitration is in India. Section 2(2) provides that Part I of the 1996 Act shall apply where the place of arbitration is in India.

SECTION 20(1)

Section 20 of the 1996 Act provides the mode and manner of fixing the 'place' or 'seat' of arbitration. Sub-section (1) incorporates the principle of party autonomy on the choice of the place/seat of arbitration, which is evident from the words "parties are free to agree on the place of arbitration". The freedom to agree on the seat or place of arbitration has to be exercised out of two or more Courts of competent jurisdiction as per Section 2(1)(e) of the Act. Refer to **Gopal Singh vs. Ashok Leyland Finance Ltd., 2009 (4) Arb LR 477 (Del) : (2009) 164 DLT 471.** The significance of

the place of arbitration when determined by the parties is that in principle, the arbitral proceedings including the hearings, or other meetings, will be conducted at the seat of arbitration.

Decision under Section 20 not an Award, hence not Appealable

The decision made by an arbitral tribunal on the 'seat' or 'place' of arbitration under Section 20 is not an interim award and cannot be challenged under Section 34 of the Act.

SECTION 20(3)

BALCO Overruled Bhatia & Venture Global

The judgments in *Bhatia International and Venture Global* had erroneously held that the non-derogable provisions of Part I would be applicable also to foreign seated arbitrations. Consequently, the provisions of Section 9 would be applicable to foreign seated arbitrations. In *Venture Global,* the Court took the view that a challenge could be entertained against a foreign award under Section 34 in Part I of the Act. **Venture Global Engineering vs. Satyam Computer Services Limited, (2008) 4 SCC 190 : 2008 (1) Arb LR 137 (SC) : AIR 2008 SC 1061.** The *Bhatia* judgment, as well as the cases following it, were widely regarded as problematic and discordant with the internationally recognised principle of 'territoriality'.

A five-judge constitution bench in *BALCO* overruled the decisions in *Bhatia* and *Venture Global* and held that the 1996 Act is based on the *territoriality principle* or the 'seat theory', by which the seat of arbitration establishes jurisdiction of the Court which will exercise supervisory jurisdiction over the arbitral proceedings.

The constitution bench in *BALCO* drew a distinction between the "seat" and "venue" of arbitration under sub-sections (1) and (2) of Section 20, and sub-section (3) of Section 20, respectively. Where the place of arbitration is in India, the parties are free to agree on any "place" of "seat" within India. On the failure of the parties to do so, the authority lies with the tribunal to choose a place/seat under Section 20(2) of the Act. Section 20(3) of the Act gives discretion to the parties to fix a convenient "venue" for the parties to conduct the hearings.

Post – BALCO, Judgments have Followed the Principle of Implied Exclusion where a Foreign Seat is Designated in the Arbitration Agreement

In **Reliance Industries Ltd. vs. Union of India, (2014) 7 SCC 603 : 2014 (2) Arb LR 423 (SC) : AIR 2014 SC 3218 : 2014 (7) SCALE 401,** the parties by a final partial consent award agreed that the juridical seat or legal place of arbitration shall be London. Once the parties had consciously agreed that the juridical seat of the arbitration would be London, the arbitration would be governed by the laws of England, and it was no longer open to contend that the provisions of Part I of the 1996 Act would also be applicable to the arbitration agreement.

In a sequel to the earlier judgment rendered in **Union of India vs. Reliance Industries Ltd., (2015) 10 SCC 213 : 2015 (5) Arb LR 255 (SC) : 2015 (10) SCALE 149,** a two-judge bench of the Court directed that the last paragraph of the BALCO judgment is to be read with two caveats, that where the Court comes to a determination that the juridical seat is outside India, or where a law other than Indian law governs the arbitration agreement, Part I of the 1996 Act, would stand excluded by necessary implication. It

is only those cases in which the agreements stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian Law, would continue to be governed by the Bhatia judgment.

In **Sakuma Exports Ltd. vs. Louis Dreyfus Commodities Suisse, (2015) 5 SCC 656 : 2014 (2) Arb LR 14 (SC) : 2014 (3) Bom CR 768,** the contract was made specifically subject to the Rules of the Refined Sugar Association in London. The disputes arising under the contract were to be referred to the Refined Sugar Association for settlement. The English Law was the governing law of the contract; the seat of arbitration was London; the dispute resolution clause provided that the dispute shall be settled according to the laws of England, and all proceedings shall take place in England. On the basis of these provisions, it was held that the parties had by the terms of their agreement, impliedly excluded the provisions of Part I of the Indian Arbitration Act.

Can Two Indian Parties Choose a Foreign Seat for Arbitration?

An "international commercial arbitration" has been defined by Section 2(1)(f) to mean an arbitration relating to commercial disputes between an individual, body corporate or association, where at least one of the parties belongs to a country other than India. Nationality is therefore an important determinant in an international commercial arbitration. Section 2(2) states that Part I shall apply where the place of arbitration is in India.

Section 28(1)(a) states that in an arbitration governed by Part I of the Act, the arbitral tribunal "shall" decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. Section 28(3) states that the arbitral tribunal, while making the award, shall take into account

the terms of the contract and trade usages applicable to the transaction.

In the **BALCO judgment, (2012) 9 SCC 552, para 118 : 2012 (3) Arb LR 515 (SC) : 2012 (8) SCALE 333**, the constitution bench held that Section 28 makes a distinction between purely domestic arbitrations and international commercial arbitrations having its seat in India. In an arbitration under Part I of the Act, Section 28(1)(a) would apply which makes it imperative for the tribunal to decide the dispute by applying the Indian substantive law applicable to the contract. This provision would have an overriding effect over any other provision to the contrary in the agreement.

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.

The 1996 Act

Section 21 is of crucial significance since it fixes the date of commencement of the arbitral proceedings. It states that the arbitral proceedings commence on the date on which the request for reference of disputes to arbitration is received by the respondent. The date of commencement of the arbitration is of significance for the purpose of deciding whether the claims raised in the arbitration are barred by limitation or not. **State of Goa vs. Praveen Enterprises (2012) 12 SCC 581 : 2011(3) Arb LR 209 (SC) : AIR 2011 SC 3814.**

Section 21 is applicable to arbitrations falling under Part I of the 1996 Act. There is no corresponding provision in Part II of the 1996 Act with respect to the commencement of arbitral proceedings under the New York and Geneva Conventions. **Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. (1999) 9 SCC 334 : AIR 1999 SC 3923 : 1999 (6) SCALE 441.**

Commencement of an Arbitral Proceeding

The arbitration would commence as soon as the request for reference of the dispute to arbitration is received by the respondent. The notice invoking arbitration is a written communication which initiates the arbitration proceedings.

An English decision rendered in **Blackpool Borough Council vs. F. Parkinson Ltd. 58 Build LR 85,** states that in the notice invoking arbitration:

> *"in the absence of any requirements contained in the arbitration agreement, there are no specific requirements as to the form of the notice. It is often simply in the form of a letter from the proposed claimant to the proposed respondent. Provided the notice is obviously clear about who is being asked to do what, the giving of a notice addressed to a proposed arbitrator and merely copied to the other party to the arbitration would be sufficient. It is not unusual to impose a time limit for compliance, failing which, an application can be made to the Court to have the arbitrator appointed."*

Condition Precedent for Commencement of Arbitration

The arbitration agreement, or some institutional rules, may specifically provide the manner of commencement of arbitral proceedings. For instance, it may require some antecedent step to be taken prior to commencement of the proceedings.

Occasionally, the arbitration clause may stipulate a condition precedent, prior to the commencement of arbitration. If the parties have agreed to such a condition, prior to initiation of arbitration, then the arbitration may not be deemed to have commenced till the antecedent step is fulfilled. **National Highways Authority of India vs. Progressive Constructions Ltd., Delhi High Court, 2015 (5) Arb LR 71 (Del).**

A party which seeks to invoke the arbitration proceedings without complying with the condition precedent may find that the commencement is premature.

In a multi-tier arbitration, the arbitration agreement may stipulate conciliation or adjudication of a claim by a dispute resolution board, or expert, before referring the same to arbitration, such as in FIDIC contracts. In such a case, the date on which the conciliation fails, or the date on which the conciliator, or the expert, or the dispute resolution board renders its finding, shall become the relevant date for the purposes of ascertaining the commencement of the period of limitation for raising the claim. **National Highways Authority of India vs. Progressive Constructions Ltd., Delhi High Court, 2015 (5) Arb LR 71 (Del).**

Notice of Reference to Arbitration

Unless otherwise agreed between parties, the 'request' or 'notice' or 'demand' under Section 21 of the Act is a mandatory requirement, without which the arbitral proceedings cannot commence. **M/s. Oval Investment Pvt. Ltd. & Ors. vs. M/s. Indiabulls Financial Services Ltd. & Ors. (2009) 112 DRJ 195 : (2009) 165 DLT 652.** The notice ensures that the procedure agreed between the parties for appointment of an arbitrator/tribunal, is followed.

Limitation for Raising a Claim

The object of Section 21 is to fix the date of commencement of arbitral proceedings. In **Milkfood Ltd. vs. GMC Ice Cream (P) Ltd., (2004) 7 SCC 288 : 2004 (1) Arb LR 613 (SC) : AIR 2004 SCC 3145 : (2004) 1 RAJ 684,** the Supreme Court held that the date of commencement of the arbitration proceedings for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to arbitrations, as it applies to proceedings in Court. Sub-section (2) of Section 43 provides that for the purposes of the said Section, and the Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21.

Limitation for Counterclaim

The limitation for a counter-claim has to be strictly construed in accordance with Section 43(1) of the Act read with Section 3(2)(b) of the Limitation Act, 1963 as held in **Voltas Limited vs. Rolta India Limited. (2014) 4 SCC 516 : 2014 (1) Arb LR 343 (SC) : AIR 2014 SC 1772.** Where the respondent refers a specific

dispute to arbitration and raises counterclaim(s), the relevant date for computing the period of limitation would be the date on which the request for arbitration would be the relevant date has been made.

The Bombay High Court in case of **Choudhari Food Industries vs. Ahmed Nagar Goad and Processing Co-operative Federation Ltd.** reported in **2021 SCC Online Bom 1542**, has discussed about limitation for filing an application under Section 11(6) of the Act.

22. Language.—(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

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

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

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

The language to be used in the arbitral proceedings plays a significant role in the efficiency and fairness of the procedure, particularly in the context of international commercial arbitrations. The language(s) of the arbitral proceedings may be mentioned in the arbitration agreement itself, or later agreed upon by the parties,

or even left to be determined by the arbitral tribunal. Where the arbitration agreement specifies that the arbitration is to be conducted in accordance with particular institutional rules, the tribunal will regulate the procedure in accordance with those rules. Generally, the rules give the power to the arbitral tribunal to determine the language subject to the agreement of the parties. **See, for instance, Article 19 of the UNCITRAL Arbitration Rules.**

23. Statements 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.

(2-A) 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.

Section 23 is one of the procedural provisions which pertains to the filing of the statements of claim and defence, counterclaim or set-off. This provision is subject to party autonomy. It also makes provision for amendment of the pleadings and filing of supplementary statements. It gives the parties the necessary liberty to adjust their pleadings to suit the needs of the particular dispute referred to arbitration. In matters concerning procedure, a rigid approach may not be conducive to the basic object of arbitration, i.e., an expeditious resolution of disputes; on the other hand, a liberal interpretation of the procedural rules may adversely affect the fairness of the proceedings.

SECTION 23(1)

Failure to File Statement of Claim under Section 25(a)

In the event the claimant fails to file the statement of claim within the time provided by the tribunal, or even the extended period, the arbitral tribunal may under Section 25(a) of the 1996 Act, terminate the proceedings. However, if sufficient cause is made out by the claimant, there would be no need to terminate the proceedings. Even if there was termination of proceedings, such termination is erroneous and is required to be recalled. **Bharat Heavy Electricals Ltd. vs. Jyothi Turbopower Services P. Ltd., 2017 (1) Arb LR 289 (Mad) (DB) : (2016) 4 CTC 1.** The tribunal does not lack jurisdiction to re-call its earlier order of termination of proceedings. The phase "shall terminate" in Section 25(a) should be read as "may terminate". If the provisions of Section 25(a) are read to mandatory, it would defeat the other provisions of the Act viz, Sections 18, 19, 23(1) and 32(2) of the 1996 Act. **N. Jayalaxmi vs. R. Veeraswarmy, 2004 (1) Arb LR 31 (AP) : 2003 (6) ALT 186 : 2003 (5) ALD 776.**

Statement of Defence

Section 2(9) states that where a reference is made to a claim, it would also apply to the defence and counterclaim. It provides that where Part-I [other than Sections 25(a) and 32(2)(a)] refers to a claim, it 'shall also apply to a counterclaim' and where it refers to defence, 'it shall also apply to a defence to that counterclaim'.

Determination of Issues

An issue means a point in question, framed on the basis of the pleadings between the contesting parties. Issues are framed in respect of those factual allegations which are either denied or not admitted by the other party. **Fateh Muhammad vs. Imam-ud-Din, AIR 1921 Lah 360 : (1920) 2 Lah LJ 188 : 68 Ind Cas 106.**

SECTION 23(2)

Set-off

A set-off is the right to adjust the claim made by the claimant, against the rights or dues claimed by the respondent. It is a cross claim, which partly offsets the original claim. It is the extinction of the debt, in which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors for one another.

If a set-off is claimed, the whole of it must be claimed, or else, a suit for the balance will be hit by Order II, Rule 2 of the CPC. **O. II. Rule 2(3) disentitles a plaintiff from suing for a relief if the plaintiff is entitled to more than one relief in respect of the same cause of action but omits to sue for all such reliefs.**

The arbitrator cannot use his personal knowledge of facts of disputes which is not part of record, to decide disputes, however, he can certainly use his expertise in technical knowledge or general knowledge about particular trade in deciding dispute. **P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594 = AIR 2012 SC 1866**.

24. Hearings 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:

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.

Hearings and Proceedings before the Arbitrator

The provisions of Section 24 reflect the principle of *audi alteram partem* which is fundamental to the principles of natural justice. **Sarat Kumar Dash and Ors. vs. Biswajit Patnaik and Ors., 1995 Supp (1) SCC 434 : (1994) Supp 5 SCR 223 : 1994 (5) SCALE 81.** Sections 23 and 24 of the 1996 Act specifically provide for giving a full opportunity of hearing to both sides before the award is passed. **Vinay Kumar Kohli vs. UOI, 2003 (1) Arb LR 340 (MP) : AIR 2003 MP 1 : 2002 (2) MP LJ 239.** It ensures that both parties are given an equal opportunity of presenting their respective cases before the tribunal, which would enable arriving at a just and fair award.

The 1996 Act

Section 24 is designed to deal with procedural issues as to whether there will be any oral hearing, or the tribunal will proceed only on the basis of documents or other materials, with the consent of the parties. A proceeding based only on documents and other material may be less expensive and more expeditious than oral hearings.

SECTION 24(1)

Procedure

The basic object of arbitration law is to resolve disputes expeditiously in a cost-effective manner. The tribunals frequently follow the procedure similar to that adopted in Court proceedings. In India, the Courts adhere to the principles prescribed in Orders

IX to XIII of the Code of Civil Procedure, 1908. The words 'oral argument' under Section 24 is intended to cover arguments, not only on the substance of the dispute but also on procedural issues.

Documentary Evidence

i) Production of Documents

Normally, in litigation before the Courts, facts are proved by direct testimony of witnesses, and documentary evidence is also adduced during and through the oral testimony itself (or sometimes through evidence by way of affidavit). However, in domestic or international arbitrations, evidence on issues of fact is almost invariably contained in documents. Thus, presentation of documents rather than oral testimony is considered easier and more expeditious.

ii) Translation

If the documents are not in the language of the arbitration, it is usually necessary to provide translations of such documents. As far as possible, the parties should submit such translations to the arbitral tribunal jointly as 'agreed translations'. The most convenient practice is that in the first instance, the document in the original language is included, along with the translation in the language of the arbitration. If the correctness of the translation is disputed, then each party's version may be produced with the original documents.

Evidence of Witnesses

Generally, the evidence of witnesses is usually taken in the presence of, and under the personal direction and superintendence of, the arbitrator. However, in the interest of saving time, the parties may choose to file written affidavits on oath by their

respective witnesses. Witnesses may also be examined through commissions. After a witness is sworn or affirmed, he/she is examined first by the party calling him. This is known as examination-in-chief or direct examination. It should be remembered that witnesses must speak to facts, not to opinions, inferences or beliefs. The object of this examination is to get from the witness, all material facts within his/her knowledge relating to the party's case.

Inspection of the Subject-Matter

The arbitral tribunal is the master of its procedure. Subject to the provisions of Part I, and the agreement of the parties, the tribunal has wide powers to conduct the proceedings in the matter it considers appropriate, including the power to 'determine the admissibility, relevance, materiality and weight of any evidence'. **Section 19(3) and (4) of the Arbitration and Conciliation Act, 1996.** In exercise of these powers, the tribunal may inspect the subject-matter of the dispute; and it may require the parties to produce the subject-matter of the dispute for examination. In case of doubt, the tribunal may, in accordance with the provisions of Section 27, apply to the Court for assistance in taking evidence in relation to the subject-matter of the dispute.

Burden of Proof

The burden of proof is on the person who wishes to adduce such evidence. **Section 104 of the Indian Evidence Act, 1872.** In particular, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon such person. **Section 108 of the Indian Evidence Act, 1872.** This practice is also recognised under the UNCITRAL Rules. **Article 27 of the UNCITRAL Arbitration Rules.**

The tribunal adheres to the 'balance of probabilities' as the standard of proof. This standard is in contraction with the standard applicable to criminal cases where guilt is required to be proved 'beyond all reasonable doubt'.

SECTION 24(3)

Opening Statement

In some jurisdictions, it is customary before hearing to apprise the arbitral tribunal of the respective positions of the parties, as indicated from their pleadings and evidence. "The proceedings will usually begin with an opening statement from the claimant, and then possibly a short opening statement from the respondent, although this is often dispensed with. Opening statements will usually address specifically the key documents and evidence relied upon and set out the party's arguments and the case it will seek to establish in the course of the reference. However, lengthy opening statements, reading aloud from large number of documents should be discouraged." **Russell on Arbitration, twenty-third edn., 2007, p. 262, para 5-198.**

Closing Submissions

At the end of the hearing, the parties may make closing submissions, summing up their respective cases with the aid of the evidence in hand, and by rebutting the case of the opposite party. A common practice which is adopted in arbitrations is to exchange post-hearing written submissions, and such written submissions may replace oral closing submissions.

The appeal against the order passed under Section 24 of the Act is not maintainable in Section 4 of Karnataka High Court Act

1961 as held in the decision **Union of India vs. Eagle MPCC – 2019 SCC Online Kar 1189.**

Application of production of documents and order passed therein by the arbitrator there cannot be interfered by the High Court by way of writ when alternative remedy is provided under Section 37. **Radiant Info Systems Ltd. vs. Karnataka SRTC Ltd., 2018 SCC Online Kar 1209**.

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 3[and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited].

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

The 1996 Act

Section 25 confers a default power on the arbitral tribunal to ensure that the arbitral proceedings continue without unnecessary

and unwarranted delay. This provision can be invoked where the default occurs without sufficient cause.

"Sufficient Cause"

The expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended. This provision gives sufficient discretion to the arbitral tribunal to apply the law in a judicious manner, while assuring that the purpose of enacting such law does not get frustrated. The party should show its *bona fide* that it had taken all possible steps within its power and control and had approached the tribunal without any unnecessary delay. The test whether or not a cause is sufficient is to see whether it could have been avoided by the party by the exercise of due care and attention. **Balwant Singh vs. Jagdish Singh (2010) 8 SCC 685 : AIR 2010 SC 3043 : 2010 (6) SCALE 749.**

SECTION 25(a)

Default of the Claimant

Section 25(a) pertains to a situation where the claimant, without showing sufficient cause, fails to communicate his statement of claim to the arbitral tribunal. However, the statement of claim is to be distinguished from the 'request for arbitration' as required by Section 21. Section 21 constitutes the first step for commencement of arbitration. This happens when the request for reference to arbitration is received by the respondent. The claim statement, on the other hand, is a pleading, which must be in accordance with the requirements of sub-section (1) of Section 23. The claim statement must set forth the facts supporting the claim,

the points at issue, and the relief or remedy sought. The statement of claim should be communicated within the time agreed upon by the parties, or as determined by the arbitral tribunal.

Effect

Section 25(a) deals with the eventuality where the claimants have defaulted in submitting their statement of claim within the period prescribed by the tribunal. Section 25(a) fails to state as to what effect such termination will have on the rights of the parties. The 'power to terminate' is enshrined in Section 25 of the Act.

Whether an Order of Termination under Section 25(a) can be Challenged under Section 34 or under Article 226?

There was a dichotomy of judicial dicta on whether an order of termination of the arbitral proceedings under Section 25(a) would be deemed to be an 'award', amenable to a challenge under Section 34, or the order could be challenged under writ jurisdiction.

A single judge of the Bombay High Court in **M/s. Anuptech Equipments Pvt. Ltd. vs. M/s. Ganpati Co-op. Housing Society Ltd. 1999 (3) Arb LR 231 (Bom) : AIR 1999 Bom 219 : 1999 (2) Mh LJ 161 : 1999 (2) Bom CR 331,** took the view that if the arbitral proceedings are terminated under Section 25(a) by an order of the arbitral tribunal on account of failure to file the statement of claim without sufficient cause, it would be an order under Section 32(2)(c) of the Act. Such an order would not be amenable to a challenge under Section 34 which provides a remedy only with respect to an award. There is no remedy provided under the Act to challenge an order passed under Section 25. The High Court took the view that an arbitral tribunal under the 1996 Act can be said to

be a 'person' against whom a writ would lie under Article 226 of the Constitution, as the tribunal discharges inherent judicial functions of the State, and by virtue of Section 36, the award is deemed to be an enforceable decree. Since the statue provides no remedy to an aggrieved person, the Court can exercise its extraordinary jurisdiction under Article 226 of the Constitution.

SECTION 25(b)

Default of the Respondent

In the absence of an agreement by the parties, Section 25(b) requires the respondent to submit the statement of defence, as required by sub-section (1) of Section 23. The statement of defence should be submitted within the time agreed upon by the parties, or as fixed by the arbitral tribunal.

SECTION 25(c)

Default of a Party to Appear or Produce Evidence

After completion of pleadings, the parties are required to adduce the documentary evidence. In case a party to the arbitral proceedings, without showing sufficient cause, fails to appear at an oral hearing, or produce documentary evidence, Section 25(c) empowers the arbitral tribunal to continue with the proceedings, and make the award on the basis of the evidence before it. **M/s. Auto Craft Engineers vs. Akshar Automobiles Agencies Pvt. Ltd., Arbitration Petition Nos. 556/2014 & 680/2014, decided by Bombay High Court on 29 July 2016.** The 'failure to produce documentary evidence' presupposes that the party was required to do so within a specified period of time, which was reasonable, and in accordance with the fundamental principles of fair trial. **Section 18 of the Arbitration and Conciliation Act, 1996.**

Procedure before Passing an Ex Parte Award

An *ex parte* award simply means an award passed in the absence of the other party. **Sangram Singh vs. Election Tribunal, Kota, AIR 1955 SC 425 at 431 : (1955) 2 SCR 1.** In an *ex parte* proceeding, the tribunal can proceed with the case, if the respondent remains absent on successive dates without sufficient cause, and despite notice by the tribunal.

Application for recall of Orders, the Delhi High Court by referring to decision of other High Courts allowed the application thereby orders were recalled. Refer the decision in the case of **Union of India vs. Delhi State Consumer Co-operative Federation Ltd. – 2022 SCC Online Del 1377.**

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.

The 1996 Act

Section 26 of the 1996 Act empowers the arbitrator to appoint one or more experts to report on specific issues to be determined by the arbitral tribunal. Section 26 with minor variations replicates Article 26 of the Model Law.

The autonomy of parties is of manifest importance in domestic as well as commercial arbitrations. This permeates through the provisions of all three sub-sections of Section 26, which are prefaced with the phrase "unless otherwise agreed by the parties". The provisions of this section are non-mandatory. The parties may, by agreement, determine whether an expert is required to be appointed in the arbitral proceedings. This may be done either in the arbitration clause, or the agreement to submit disputes to arbitration, or by following standard rules of a particular trade, or an arbitral institution.

The Apex Court had appointed in the case of Kocchi Cricket case that Section 87 (proposed amendment Act) would be contrary to the object of the 2015 Amendment Act, the same was enacted. The Court's directive must always bind unless the conditions on which it is based or so fundamentally altered that under altered circumstances such decision could not have been given the effect of amendment relating to proceedings prior to 23.10.2015, has been discussed in the case of **Hindustan Construction Company Ltd.**

& Another vs. Union of India & Others, (2020) 17 SCC 324. Also refer **Union of India vs. Parmar Construction Company – (2019) 15 SCC 682.**

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.

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

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

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on

the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

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

Section 27 of the 1996 Act is based on Article 27 of the Model Law. Article 27 of the Model Law provides for Court assistance in taking evidence. The arbitral tribunal on its own motion, or a party with the approval of the tribunal, may request the Court for assistance in taking evidence. The Analytical Commentary to the UNCITRAL Arbitration Rules states that the competent Court "is not necessarily the one designated pursuant to Article 6 since its competence may be based, for example, on the residence of the witness to be heard or the location of the property to be inspected". **A/CN 9/264, Art. 27, para 5.**

An arbitral tribunal being a private forum for dispute resolution has limited powers to enforce its interim orders, directions, or decisions, including production of evidence, summoning of a witness, or production of a document. The tribunal cannot compel a **third** party to produce evidence.

The power under Section 27 is normally invoked in respect of third parties who could be witnesses required to be examined in relation to a fact in issue between the parties before the arbitral tribunal, or persons who are in possession of documents, the production of which would be necessary, as the document is relevant to determine a fact in issue.

It is clearly provided in the Arbitration and Conciliation Act, 1996, that an arbitral tribunal can take help of experts in terms of Section 27 of the Act. **Sime Dirby Engg. SDN BHD Vs. Engineers India Ltd., (2009) 7 SCC 545.**

Section 27(5) empowers the tribunal to make representation to the Court for contempt of its interim orders. **Alka Chandewar vs. Shamshul Ishrar Khan, (2017) 16 SCC 119**.

Arbitrator cannot invoke Sections 340 and 195 CRPC as arbitrator cannot be termed a Court within the meaning of Section 195 CRPC. **Manohar Lal vs. Vinesh Anand, (2001) 5 SCC 407 = AIR 2001 SC 1820.** Refer **Delta Distilleries Ltd. vs. United Spirits Ltd. – 2014 1 SCC 113 = AIR 2014 SC 113** to the effect that Section 27(2)(C) is wide enough to cover not only witnesses, but also parties to the proceedings.

CHAPTER VI

Making of arbitral award and termination of proceedings

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 aequoet bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

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

The substantive law which will govern the adjudication of dispute is determined by Section 28 of the 1996 Act, which applies to both domestic and international arbitrations under Part I of the 1996 Act, where the place or seat of arbitration is in India. Section 28 is in two parts: Section 28(1)(a) pertains to domestic arbitrations, while Section 28(1)(b) pertains to 'international commercial arbitrations' seated in India.

Section 28 applies to both domestic and international arbitrations, where the place or seat of arbitration is in India. Section 2(2) states that part I of the Act shall apply where the place of arbitration is in India. Conversely, the provisions of Section 28 would not be applicable to foreign-seated international commercial arbitrations.

The provisions of Section 28 are non-derogable and mandatory. This would be evident from sub-section (6) of Section 2, which states that parties, or the arbitral institution designated by them, may determine various issues as provided in Part I, except Section 28. The provisions of Section 28 are not subject to party autonomy, and non-derogable in nature.

Legislative intent is that Indian parties should not be allowed to contract out of Indian Law. This is part of public policy of the country. **TDM Infrastructure (P) Ltd. vs. UE Development India (P) Ltd., (2008) 14 SCC 271**.

Award to be in accordance with terms of the contract. **ONGC vs. Saw Pipes Ltd.**

In **Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125 = AIR 2007 SC 2563**, it is held that the Court not bound by arbitrator's ruling unless it bars either party from raising the plea in that behalf.

Freedom of parties to choose Law Governing substantive contract/disputes autonomy of the parties in such a case to choose the Governing Law is well recognized in Law. **Sasan Power Ltd. vs. North American Coal Corpn. (India) (P) Ltd., (2016) 10 SCC 813**.

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.

The 1996 Act

Section 29 is concerned with multi-member arbitral tribunals and determines the decision-making process of an arbitral tribunal. This provision is subject to party autonomy. The section is prefaced by the phrase "unless otherwise agreed by the parties", which indicates that the provision is non-mandatory in nature. The parties are given the autonomy to determine a procedure of their own. **N.S. Nayak and Sons vs. State of Goa and Ors., (2003) 6 SCC 56 : 2003 (3) Arb LR 109 (SC) : 2003 (4) ALT 26 (SC).** In arbitral proceedings with more than one arbitrator, the parties have the first option to agree on how a binding decision is to be made. For this purpose, the parties may either themselves decide the procedure, or may authorize the arbitral tribunal to do so. If there is an agreement between the parties regarding the procedure to be followed, the arbitral tribunal has to follow the decided procedure. **N.S. Nayak and Sons vs. State of Goa and Ors., (2003) 6 SCC 56 : 2003 (3) Arb LR 109 (SC) : 2003 (4) ALT 26 (SC) at para 14.**

29-A. Time limit for arbitral award.—2[(1)The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

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

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

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

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

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

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

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

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

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

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

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

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

29-B. 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.

The 2015 Amendment Act gives statutory recognition to Fast Track arbitration as an expeditious mode of dispute resolution by the insertion of Section 29B.

As trade, investment and private business have grown exponentially throughout the world, dispute resolution systems are faced with newer challenges of meeting time and cost-effective modes of dispute resolution. The recent trend of resorting to Fast Track forms of arbitration in certain kinds of disputes, which are based on documentary evidence, have helped in meeting these challenges by expeditiously resolving disputes in a time bound manner with lower costs of arbitration.

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

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

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

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

The 1996 Act

Section 30 pertains to an arbitral award, passed on agreed terms, during the course of settlement. An arbitral tribunal is fully empowered to record a settlement between the parties settling their disputes, and to pass the arbitral award on agreed terms. Once an arbitral award on agreed terms is made, it shall have the same status and effect as any other arbitral award made on the substance of the disputes. There is no distinction between an arbitral award on agreed terms, or an arbitral award made on the substance of the dispute. The executing Court cannot go beyond the agreed terms on the basis of which the award was made under Section 30 of the Act, otherwise it would render the scheme of the Act unworkable. **Morepen Laboratories Ltd. vs. Morgan Securities & Credits Pvt. Ltd., 2008 (3) Arb LR 283 (Del) (DB) : 2008 (105) DRJ 408.**

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

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

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

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

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

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

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

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

(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

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

1. Subs. by Act 3 of 2016, s. 16, for clause (b) (w.e.f. 23-10-2015).
2. Subs. by s. 16, ibid., for sub-section (8) (w.e.f. 23-10-2015).
3. Ins. by s.17, ibid. (w.e.f. 23-10-2015).

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

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

Explanation.—For the purpose of clause (a), "costs" means reasonable costs relating to—

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

(ii) legal fees and expenses,

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

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

Arbitration is a creature of consent. The arbitration agreement is the core of any arbitration proceeding. It delineates the disputes to be submitted for resolution and is the foundation of the tribunal's authority to resolve the disputes submitted to it for adjudication.

The arbitral award is the keystone of the arbitral process. It is the duty of the tribunal to render a valid and enforceable award, whether arising from the contract between the parties, or under rules chosen by the parties. The tribunal must comply with the mandatory requirements concerning the form and content of the award to ensure its enforceability.

In an international commercial arbitration, the award must include the mandatory provisions of the *lex arbitri* (law of the seat) as well as the applicable procedural laws.

Section 31 of the 1996 Act which deals with the Form of the Award replicates Article 31 of the Model law. The Model Law states that the award must be in writing, signed by the arbitrator or arbitrators or at least a majority of them. It must be reasoned, unless the parties have agreed otherwise. It must indicate the date when it was pronounced, as also the place/seat of arbitration.

Formal Requirements of an Award

Parties

The award must specifically name the parties for purposes of identification in the award. **Gabela vs. Aris (Owners), (1927) 29 Lloyds Rep 289.** The expression 'parties' has been defined in Section 2(1)(h) to mean 'a party to an arbitration agreement'. For a detailed discussion, refer to the commentary under Section 2(1)(h).

Recitals

The recitals of the award, as a common practice, must contain:

(i) The Particulars of the arbitration agreement between the parties;
(ii) The mode of appointment of the arbitral tribunal;
(iii) the disputes referred to arbitration;
(iv) the seat or place of the arbitration;
(v) if the parties have agreed that the procedure should be on documents only, without a hearing, the same has to be mentioned in the award;
(vi) the governing law of the contract;
(vii) the curial law of the arbitration.

The recitals are not a substantive part of the award. **Kaffeehandelsgesellschaft KG vs. Plagefim Commercial SA**

(1981) 2 Lloyd's Rep 190. The recitals are to be distinguished from the reasons. The reasons are the basis of the award. Any error, omission or incorrect statement in the award, will make it vulnerable to a challenge as being inconsistent with the mandate of Section 31(3) which states that 'the arbitral award shall state the reasons upon which it is based'.

Time Limit for the Award

Prior to the insertion of Section 29A by the 2015 Amendment, the 1996 Act did not prescribe any time limit for making the award.

The 2015 Amendment Act inserted Section 29A, which now prescribes a statutory time limit for making the arbitral award, i.e., 12 months from the date on which the arbitral tribunal enters upon reference. This period can be extended by consent of parties by a further period of 6 months. However, if any further extension is required, it would require an application being made to the Court under sub-section (4) of Section 29A.

Award must be Certain and Capable of Performance

The award must be clear and unambiguous, within the confines of the terms of reference. The award must be consistent in all parts, and not ambiguous or contradictory, especially when several issues or disputes have been raised for determination. The arbitral tribunal should give a decision on all the issues referred for adjudication and not exceed the scope of the arbitration agreement. **A.E. Farr Ltd. vs. Ministry of Transport, (1960) 1 WLR 956; (1960) 3 All ER 88.** While awarding relief, the award must clearly spell out the rights, entitlements, and liabilities of the parties. The Courts frown on uncertain awards, which create difficulty in determining what exactly has been decided. The general rule *certum est quod certum reddi potest,* which means that the meaning

is certain, if it is capable of being made certain, applies to arbitral awards as well. An award is uncertain if it is not in a form which can be enforced as a decree of the Court. For instance, if the award states the liability, but does not specify the amount, **Oricom Waren GmbH vs. Intergraan NV (19687) 2 Lloyd's Rep 82,** it will be defective and unenforceable. Likewise, the amount of damages awarded should be stated with precision, so as to be capable of ascertainment. **Cremer vs. Samanta and Samanta, (1968) 1 Lloyd's Rep 156.** An award lacking in finality is vulnerable to a challenge for setting aside. The Courts lean towards a construction that the award is certain. **Union of India vs. Jai Narain Misra, (1969) 2 SCR 588 : AIR 1970 SC 753.**

Award must be Complete

The award must be complete and final on all the issues referred to arbitration. It should not leave any issue to be decided in future, or by another person. Failure of the tribunal to decide all the issues, leaving some issues to be decided in future, would render the award liable to be set aside on the ground of uncertainty.

Award should be Enforceable

For an award to be valid and binding, it should be capable of enforcement as a decree of the Court under Section 36 of the Act. For instance, where an award deals with liability, but not with quantum, or it purports to award a sum of money without stating what the sum is for, or without giving sufficient details to enable the sum to be calculated from the materials on record, would be an incomplete and inchoate award.

In **Union of India vs. G.S. Atwal and Co., (1996) 3 SCC 568 : AIR 1996 SC 2965 : (1996) 2 SCR 940 : 1996 (2) SCALE 447,** the Supreme Court held the award was liable to be set aside as being unenforceable since the arbitrator had exceeded his jurisdiction, by making an award giving a lump sum amount on all the issues, and awarded interest, by making an award giving a lump sum amount on all the issues, and awarded interest, without even a claim being made for it.

SECTION 31(7)

Interest

Interest is defined as the return or compensation for use or retention of a sum of money belonging to, or owed by one person to another. **32 Halsbury's Laws of England para 106 (4th Ed., 1980).** In commercial transactions, the tribunal while awarding compensatory interest must keep in view that the purpose is to compensate the successful party who has been unjustifiably deprived of the use of money, of forgone the return on investment, which he is legitimately entitled to, and has a right to be compensated by the award debtor for the period of deprivation.

Section 28(3) of the 1996 Act provides that 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. An award which is contrary to the terms of the contract between the parties, would be opposed to public policy. The arbitrators are bound by the terms of the contract, and it is the primary duty of the arbitrators to enforce the agreement between the parties. If the arbitral tribunal grants interest contrary to the terms of the contract, it would be violative

of Section 28(3) of the Act. **O.N.G.C. vs. Saw Pipes (2003) 5 SCC 705 : 2003 (2) Arb LR 5 (SC), para 73 : AIR 2003 SC 2629.**

Position under the Arbitration Act, 1940

The 1940 Act did not contain any provision empowering an arbitrator to grant interest on the award. Section 29 of the 1940 Act however conferred power on the Court to award interest from the date of decree, at such rate as was deemed reasonable, to be paid on the principal sum adjudged by the award and confirmed by the decree. Section 2(C) of the 1940 Act defined "Court" to mean a civil Court having jurisdiction on the subject matter of the reference, as if the same had been the subject-matter of a suit.

The power of the Court to award interest was provided by Section 1 of the Interest Act, 1839 and Section 34 of the CPC. Section 34 empowered the Courts to grant interest on money decrees. Section 1 of the Interest Act, 1839 laid down the modalities for awarding interest by Courts. Neither of these statutes were however applicable to arbitration.

One of the earliest decisions on awarding interest was rendered in the case of **Seth Thawardas Pherumal vs. Union of India, (1955) 2 SCR 65 : AIR 1955 SC 468** under the 1940 Act. The Court took the view that the arbitrator does not have the power to award interest *pendente lite* under Section 34 of the CPC, or under the Interest Act, 1839 because an arbitrator was not a 'Court' within the meaning of CPC, or the Interest Act, 1839.

After the Interest Act, 1978 came into force, a three-judge bench in **Executive Engineer Irrigation Galimala vs. Abhaduta Jena, (1988) 1 SCC 418, para 4 : (1988) 1 SCR 253 : AIR 1988 SC 1520,** ruled that an arbitrator had no power to award interest,

in the absence of an agreement between the parties, which empowered the arbitrator to award interest; or, if there was a trade usage having the force of law; or, if there are any other provisions in the substantive law of the contract, enabling the award of interest. In cases arising after the commencement of the Interest Act, 1978 an arbitrator had the same power as the Court, to award interest up to the date of reference of the dispute to arbitration. The Court however noted that neither the Interest Act, 1839 nor the Interest Act, 1978 provided for award of *pendente lite* interest. The Court held that the power to award interest *pendente lite* was under Section 34 of the CPC, in so far as the Courts are concerned. It would be applicable to arbitrations where the matter was referred by the Court to arbitration, since an arbitrator would have all the powers of the Court in deciding the dispute. Section 34 CPC would not otherwise apply to arbitrations, as arbitrators are not 'Courts' within the meaning of Section 34 CPC. The power to award interest in other cases would be under the Interest Act 1978 since the expression "Court" was defined to include an arbitrator.

In **The Board of Trustees for the Port of Calcutta vs. Engineers-de-Space-Age, (1996) 1 SCC 516 : AIR 1996 SC 2853 : 1995 (7) SCALE 274,** the contract contained a specific prohibition stating that no claim for interest would be entertained by the commissioners with respect to any money or balance owing to any dispute between the parties, or with respect to any delay by the commissioners in making interim or final payment. A two-judge bench of the Court held that even though the said term in the contract prohibited the commissioner's from entertaining any claim for interest, it would not prohibit the arbitrator from awarding interest. The Court followed the principle enunciated in the G.C. Roy case (supra) that a person who has a legitimate claim is

entitled to payment within a reasonable time, and if the payment is withheld beyond reasonable time, he can legitimately claim to be compensated for that delay. The Court adopted a strict construction of the contract and held that the prohibition from paying interest would be applicable only to the commissioner. Once the matter goes to arbitration, the discretion of the arbitrator is not stifled by such a term in the contract, and the arbitrator would be entitled to consider the question of grant of interest *pendente lite,* and award interest if the claim was found to be justified.

In **Madnani Construction vs. Union of India, 2010 (1) SCC 549 : AIR 2010 SC 383 : 2009 (14) SCALE 399,** a two-judge bench considered the grant of pre-reference interest under the Interest Act, 1978 in an award passed under the 1940 Act. The Court followed a strict construction of the contract and held that the contract did not contain any prohibition to grant interest on the arbitrator. The award of interest by the arbitrator was upheld.

The two-judge bench in **Union of India vs. Krafters Engg. & Leasing (P) Ltd., (2011) 7 SCC 279 : 2011 (3) Arb LR 153 (SC) AIR 2011 SC 2620 : 2011 (7) SCALE 705,** held that where the parties had agreed that no interest shall be payable, the arbitrator could not award interest on the amount awarded. However, if the agreement between the parties is silent on grant of interest, and the claimant makes a claim for interest, the arbitrator would have the power to award interest *pendente lite.* The Court followed the decision of the constitution bench in *G.C. Roy* (supra) and held that it must be presumed that interest was an implied term of the agreement between the parties. In the absence of any specific

prohibition in the contract to claim interest, the arbitrator was free to award interest.

In **State of Orissa vs. B.N.Agarwala, (1993) 1 SCC 140 : AIR 1993 SC 2521 : (1993) 105 (3) PLR 37 : 1992 (3) SCALE 229,** the Court held that the arbitrator had the jurisdiction to award interest for the pre-reference, *pendente lite,* and post award period under the Interest Act, 1978.

A three-judge bench in **Tehri Hydro Development Corporation Ltd. vs. Jai Prakash Associates Ltd., (2012) 12 SCC 10 : 2012 (4) Arb LR 88 (SC) : AIR 2013 SC 920,** was considering a contract which contained an express prohibition on payment of interest to the contractor for delay in payment, either interim or final, for works done, or on any amount lying in deposit by way of guarantee. On the interpretation of such a clause which contained an express contractual bar, the Court took the view that this would bar payment of interest on the *pendente lite* period. However, with respect to the post award period, it would stand on a somewhat different footing. The Court followed the decision in B.N. Agarwala (supra) and held that in a situation where the award passed by the arbitrator granting post award interest is not modified by the Court, the effect would be as if the Court itself had granted interest for the post award period.

The most recent judgment delivered under the 1940 Act is **Reliance Cellulose Products Ltd. vs. ONGC Ltd., (2018) 9 SCC 266 : 2018 (4) Arb LR 276 (SC) : AIR 2018 SC 3707 : 2018 (9) SCALE 88,** wherein the Court held that under the 1940 Act, an arbitrator had the power to grant pre-reference, *pendente lite,* and future interest under the Interest Act, 1978.

SECTION 31(7)(a)

"Unless Otherwise Agreed by the Parties"

The Court in **Sayeed Ahmed & Co. vs. State of U.P., (2009) 12 SCC 26 : 2009 (9) SCALE 261 : (2009) 11 SCR 841,** held that under that under the 1996 Act the entire regime on payment of interest had undergone a sea change. Section 31(7) of the new Act uses the words "unless otherwise agreed by the parties" which makes it clear that the arbitrator is bound by the terms of the contract for award of interest from the date of cause of action till the date of the award. Where the contract contained a clause that no interest shall be payable, the arbitral tribunal cannot award interest from the cause of action to the date of the award. A provision in the contract barring payment of interest will operate only till the date of award, and not thereafter. With respect to interest for the post-award period, the Court held that if the award has not directed payment of interest, the amount awarded shall carry interest at the rate of 18% p.a. (as it stood prior to the 2015 amendment).

In **Sree Kamatchi Amman Constructions vs. The Divisional Railway Manager (Works), Palgat, (2010) 8 SCC 767 : 2010 (3) Arb LR 442 (SC) : AIR 2010 SC 3337,** clause 16(2) of the General Conditions of Contract expressly stipulated that no interest will be payable upon the earnest money, the security deposit, or the amounts payable under the contract. The Court held that the arbitrator is bound by the terms of the contract insofar as award of interest from the date of cause of action to the date of the award is concerned.

The issue whether an arbitration clause can completely prohibit the arbitrator from awarding *pendente lite* interest came up

for consideration in **M/s. Raveechee and Co. vs. Union of India, (2018) 7 SCC 664 : 2018 (4) Arb LR 2013 (SC) : AIR 2018 SC 3109.** The contract between the parties contained a clause which stated that "*No interest will be payable upon... amounts payable to the Contractor under the Contract*". The Court held that a claimant is entitled to interest not merely as compensation for damages but for being denied the use of money due to him. In this case, the Court took the view that the liability for *pendente lite* interest does not arise from any term of the contract, but on the losses or damages due to the claimant.

SECTION 31(7)(b)

Interest for the Post-Award Period

Section 31(7)(b) deals with the award of interest during the post-award period, i.e., from the date of award till the date of realization. Clause (b) of Section 31(7) in contrast with clause (a), is not subject to party autonomy and does not give parties, the option to contract out of interest being awarded for the post-award period. **D.S.A. Engineers, Bombay vs. Housing & Urban Development Corporation Ltd., 2008 (4) Arb LR 347 (Del) (DB).** The phrase "unless the award otherwise directs" used in Section 31(7)(b) indicates that the award is given precedence over the statutory rate prescribed. The statutory rate operates as a default clause, in the absence of any interest being awarded by the arbitrator, for the post award period. **Morepen Laboratories Ltd. & Ors. vs. Morgan Securities & Credits Pvt. Ltd., 2008 (3) Arb LR 283 (Del) (DB) : 2008 (105) DRJ 408.** Clause (b) is mandatory in nature, and states that if the award is silent on interest from the date of award till the date of payment, then the statutory rate of interest which is 2% higher than the current rate of interest shall

be applicable. The statutory rate of interest for the post-award period would operate automatically if the default clause applies.

In **Hyder Consulting (UK) Ltd. vs. State of Orissa – (2015) 2 SCC 189,** it is held that the post award interest is not granted and award is silent then by applying Section 31(7)(b) statutory interest at 18% would be payable to awardee. Refer latest decision in the case of **Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation – 2022 SCC Online SC 549** to the effect that when current interest and post award interest can be granted.

In the case of **UHL Power Company Ltd. vs. State of Himachal Pradesh – (2022) 4 SCC 116,** it is held that post award interest on the interest amount awarded that is compound interest, reiterated, is grantable by arbitral tribunal and the observation regarding the contrary came to be set aside.

Also refer the decision of Karnataka High Court in the case of **S. Balaji vs. Outback Adventure – 2021 SCC Online Kar 15151**.

In the case of **Union of India vs. Manraj Enterprises – (2022) 2 SCC 331**, it is held that when contract does not provide for payment of interest then the arbitral tribunal independently of the contract and on equitable grounds and/or to do justice cannot award interest *pendente lite* or future interest.

Interest on delayed payments grantable when the contract permits it, even though this space earmarked for filling rate of interest might be left black in the said document. Refer **Oriental Structural Engineers (P) Ltd. vs. State of Kerala (2021) 6 SCC 150**.

Whether Compound Interest can be Awarded ?

Compound interest refers to a method of charging interest where interest is computed not only on the principal, but also the accrued interest.

Principle of Appropriation

In a case when money is received by the decree holder towards payment of the amount awarded, the principle which is followed is that the money is first appropriated towards the interest component, and after that is satisfied, towards payment of the capital. **Bharat Heavy Electrical Ltd. vs. R.S. Avtar Singh and Company, 2013 (1) SCC 243 : AIR 2013 SC 252 : 2012 (10) SCALE 61.**

The same is a well-settled principle which was laid down by the Privy Council in **Meka Venkatadri Appa Row Bahadur Zemindar Garu & Ors. vs. Raja Parthasarthy Appa Row Bahadur Zemindar Garu, AIR 1922 PC 233 : 1921 (33) CLJ 447 : (1921) 40 MLJ 549.** A five-judge bench of the Privy Council, vide its judgment dated 9 March 1921, held that a creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or the cheque by which the money is proffered. If he accepts it, he would then be bound by the appropriation proposed by the debtor.

This principle was later reiterated in **Rai Bahadur Seth Nemichand vs. Seth Radha Kashan, AIR 1921 PC 26 : 1921**

MWN 411, wherein, it was held that when money is received without a definite appropriation on one side or the other, the rule is well settled that in ordinary cases that the money is first applied to payment of interest, and when that is satisfied, to payment of the capital amount. The rationale underlying this principle is that a debtor cannot be allowed to take advantage of his default, to deny the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless the provisions of Section 59 of the Indian Contract Act, 1872 were attracted, or there was a separate agreement between the parties in that regard.

The principle set out in the aforesaid judgments has been consistently followed by the Supreme Court. **Leela Hotels vs. Housing and Urban Development Corporation Ltd., (2012) 1 SCC 302 : 2012 (1) Arb LR 73 (SC) : AIR 2012 SC 903.**

SECTION 31(8)

Costs

Section 31(8) of the 1996 Act, sets out a regime for awarding costs by an arbitrator or arbitral tribunal with respect to any arbitration proceeding under the 1996 Act.

'Costs' refer to expenses of litigation, prosecution, or other legal transaction, especially those allowed in favour of one party against the other. **Black's Law Dictionary, 7th ed. (1999), 350.** In the context of arbitration, 'costs' refer to the expenses incurred in the arbitration, and compensation for loss of use of money by the award-holder. Such costs can be divided into two main groups – arbitration costs and legal costs.

31-A. Regime for costs.—(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908 (5 of 1908), shall have the discretion to determine—

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, "costs" means reasonable costs relating to—

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

(ii) legal fees and expenses;

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

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

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

In order to provide for a comprehensive regime of costs for arbitration as well as related litigation in Courts, the Law Commission suggested the insertion of Section 6A to the 1996 Act. The proposed Section 6A was modeled on Rule 44 of the English Civil Procedure Rules, 1998. According to the Law Commission, the proposed amendment would further the spirit of the decision of the Supreme Court in **Salem Advocate Bar Association, T.N. vs. Union of India (2005) 6 SCC 344 : AIR 2005 SC 3353 : 2005 (3)**

Arb LR 81 (SC), and empower arbitral tribunals and Courts to award costs on the basis of "rational and realistic criteria".

Discretion to Fix Costs

Under Section 31A(1), arbitral tribunals and Courts have the discretion to ascertain costs with respect to arbitral proceedings and Court proceedings relating to an arbitration under any provision of the 1996 Act, respectively. **Delhi Metro Rail Corporation Ltd. vs. Voestalpine Schine GMBH, (2018) 250 DLT 239 : 2018 VIIAD (Delhi) 362.** Pertinently, while the erstwhile Section 31(8)(a) used the term "costs of an arbitration", the new provision only uses the term "costs".

The Explanation to Section 31A(1) retains the meaning ascribed to 'costs' under the erstwhile provision – Explanation to Section 31(8). For the purposes of Section 31A, the term 'costs' refers to reasonable costs relating to:

- the fees and expenses of the arbitrators, Courts and witnesses,
- legal fees and expenses,
- any administration fees of the institution supervising the arbitration,
- any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award. **Ethos Limited vs. Geofin Investment Pvt. Ltd. [OMP (Comm) No.249/2018- Delhi High Court.**

The only difference between the earlier provision under Section 31(8) explaining the meaning of costs and the Explanation to Section 31(A)(1) is the insertion of the word "*Court"* in clauses (i) and (iv). The expression "…fees and expenses of…Courts…"

presumably refers to Court fee. Similarly, any other expenses incurred in connection with Court proceedings would also have to accounted for while calculating costs.

SECTION 31A(2)

Incorporation of Rule – 'Costs Follow the Event'

Section 31A(2)(a) specifically incorporates the general rule of 'costs follow the event' by providing that the unsuccessful party would be required to bear the costs of the successful party. **Delhi Metro Rail Corporation Ltd. vs. Voestalpine Schine GMBH, (2018) 250 DLT 239 : 2018 VIIAD (Delhi) 362.** However, the discretion of Courts and arbitral tribunals to depart from the general rule in appropriate cases is given recognition in Section 31A(2)(b) of the amended Act. In cases where a Court or an arbitral tribunal chooses to depart from the general rule, it would have to record its reasons for doing so in writing.

SECTION 31A(3)

Parameters for Fixing Costs

An arbitral tribunal or Court, as the case may be, has to account for the following parameters enumerated in Section 31(A)(3) while exercising discretion to determine costs in an arbitral proceeding:

- the conduct of all the parties;
- whether a party has succeeded partly in the case;
- whether the party has made a frivolous counterclaim leading to delay in the disposal of arbitral proceedings; and
- whether any reasonable offer to settle the dispute is made by a party, and refused by the other party.

The specific inclusion of the conduct of all parties as a circumstance to be considered by an arbitral tribunal or an arbitrator while ascertaining costs would tend to discourage parties from engaging in improper or bad faith conduct. An arbitral tribunal or an arbitrator while accounting for the conduct of parties in ascertaining costs must account for a number of factors. Such factors would include:

- whether a party indulged in excessive document disclosure or requested for excessive documents;
- whether a party engaged in falsification of submissions or evidence of witnesses or experts;
- whether a party acted aggressively.

The conduct of parties prior to the commencement of the arbitration might also be relevant. Instances of such conduct might include but not limited to:

- whether arbitration could reasonably have been avoided;
- whether a party threatened to proceed with litigation;
- whether a party engaged in parallel Court proceedings in contravention of the arbitration agreement;
- whether a party interfered with the other party's business interests.

The use of the word "*inclusive*" in Section 31A(3) makes it clear that the above-mentioned parameters are not exhaustive, and an arbitral tribunal or Court, as the case may be, is required to take into consideration "*all the circumstances*" of the case, while determining the costs payable.

32. Termination of proceedings.—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

The 1996 Act

The arbitral proceedings under Part-I commence as provided in Section 21 and terminate when the arbitral tribunal makes the final award under Section 31. Section 32 pertains to the termination of the arbitral proceedings, which would serve three purposes, viz, to provide guidance in the last phase of arbitral proceedings; it would signify the termination of the mandate of the tribunal on the making of the final award **Sundaram Finance Limited vs. Abdul Samad and Ors., (2018) 3 SCC 622 : 2018 (2) SCALE 467 : 2018 (4) SCJ 515 : AIR 2018 SC 965 : 2018 (128) ALR 744 : 2018 (3) ALD 79;** it provides certainty with respect to

the point of time when the arbitral proceedings stand terminated. This is of crucial significance since the period of limitation for filing objections under Section 34 commences from the date on which the party has received the arbitral award.

Termination of Arbitral Proceedings

Arbitral proceedings terminate in the following eventualities:

(i) when the final arbitral award is passed [Section 32(1)];

(ii) if the claimant withdraws his claim [without any objection] under Section 32(2)(a);

(iii) if the parties agree to the termination of the proceedings [Section 32(2)(b)]

(iv) if the arbitral tribunal finds that the continuation of proceedings has become unnecessary or impossible [Section 32(2)(c)] **M/s. Jindal Financial & Investment Services vs. Prakash Industries Ltd. & Anr., 2003 (1) Arb LR 313 (Del) : 2002 (63) DRJ 82.**

The arbitral proceedings could also terminate in the following situations:

(i) Default of the claimant to submit the statement of claim under Section 25(1)(a) **S.P. Singla Constructions Pvt. Ltd. vs. State of Himachal Pradesh, 2019 (2) SCC 488 : 2018 (6) Arb LR 355 (SC) : 2018 (15) SCALE 421.**

(ii) Settlement by the parties under Section 30(2).

(iii) Failure of both parties to make advance deposits under the 2nd proviso to Section 38(2).

After the proceedings are terminated in any one of the above-mentioned circumstances, the arbitral tribunal becomes *functus officio.* The expression *functus officio* is of Latin origin which implies that once an arbitrator has made and published the final award, his authority is exhausted, and he becomes *functus officio,* and can do nothing more in respect of the subject-matter of the arbitration. **John E. Williams vs. Agnes M. Richey, 948 A. 2d 564 (D.C. 2008).**

Part Termination under the Second Proviso to Section 38(2)

It is permissible for the tribunal under the second proviso to Section 38(2) to terminate a part of the proceedings if the fee fixed by the arbitral tribunal is not paid by both parties in respect of the claims or counterclaims.

Final Award

Section 2(1)(c) defines an 'arbitral award' to include an interim award. A preliminary or interim award itself can be a final award if the issues covered by it are finally decided. The arbitral tribunal may decide some issues by an interim award and leave the other issues to be decided later. The award will be final with respect to the issues decided by the interim award. The tribunal cannot entertain a second reference, and make a further award with respect to the issues which have been finally decided and disposed of by the interim award **Nalini Mohan vs. Malda Co-op Society, AIR 1957 Cal 23 : 1956 (97) CLJ 146;** the tribunal becomes *functus officio* with respect to the issues finally disposed of by the award. The award cannot thereafter be modified or amended by the tribunal.

Whether a Settlement Agreement Amounts to an Award under Section 32

Under sub-section (2) of Section 30, if during the course of the arbitral proceedings, the parties settle their disputes, and a request is made by the parties, which is not objected by the arbitral tribunal, the settlement could be recorded in the form of an arbitral award. The award would then be deemed to be a decree of the Court. However, an out-of-Court settlement between the parties does not stand on the same pedestal. **M/s. Jindal Financial & Investment Services vs. Prakash Industries Ltd. & Anr., 2003 (1) Arb LR 313 (Del) : 2002 (63) DRJ 82.**

A settlement agreement arrived during conciliation under Section 73 has been attributed with a high degree of sanctity by Parliament, placing it at par with an arbitral award on agreed terms. The conciliation proceedings terminate upon the settlement agreement being signed by all the parties, which is enforceable as an arbitral award under Section 30 of the 1996 Act. **Futuristics Offshore Services & Chemicals Ltd. vs. O.N.G.C. Ltd. decided by the Bombay High Court on 28.09.2012 in Arbitration Application No.168/2012.** The conciliated agreement duly signed by the parties has the status and effect of an arbitral award under Section 74 of the 1996 Act, **Haresh Dayaram Thakur vs. State of Maharashtra & Ors., (2000) 6 SCC 179 : AIR 2000 SC 2281,** by a deeming fiction that a settlement agreement shall have the same effect as if it is an arbitral award on agreed terms under Section 30 of the 1996 Act. It is trite law that when a legislative fiction is enacted by the legislature, full force and effect has to be given to the legislative fiction.

33. Correction and interpretation of award; additional award.—(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

Section 33 extends the mandate of the arbitral tribunal after the making of the award, for the limited purpose of clarification or rectification, which may help to prevent the continuation of disputes, or even proceedings for setting aside the award. The first possible measure is to correct any error in computation, or any clerical, typographical or any other error of a similar nature, either upon the request by a party, or on its own initiative. The second possible measure is to give an interpretation on a specific point, or part of the award if agreed by the parties. The third possible measure is to make an additional award as to any claim presented in the arbitral proceedings but omitted from the award. For instance, omission to decide whether interest is to be awarded when claimed by a party.

Section 33 is akin to the provisions of Section 152 of the C.P.C., under which the Court has the power to correct clerical, or arithmetical errors in judgments, decrees or orders, or errors arising from any accidental slip or omission. **NTPC Ltd. vs. Marathon Electric Motors India Ltd., (2012) 194 DLT 404 (DB).**

The Extended Slip Rule

Section 13(d) of the 1940 Act enabled the arbitral tribunal to 'correct in an award any clerical mistake or error arising from any accidental slip or omission'. Similarly, Section 57 of the English Arbitration Act, 1996 empowers the arbitral tribunal to correct an award to remove any clerical mistake or error arising from an accidental slip or omission. Evidently, both the statutes accentuate the phrase 'accidental slip or omission'. However, this phrase does not find place either in Article 33 of the Model law, or in Section 33 of the 1996 Act. Both the provisions use the wording 'any computation errors, any clerical or typographical errors or any other errors of a similar nature'. These words are wide enough to comprehend an 'accidental slip or omission' in the award.

In **McDermott International Inc. vs. Burn Standard Co. Ltd., (2006) 11 SCC 181 : 2006 (2) Arb LR 498 (SC) : 2006 (6) SCALE 220,** the arbitral tribunal passed a partial award determining the jurisdictional issue. On one of the claims made by the petitioner, an application was filed under Section 33 of the Act alleging that certain claims made by them had not been dealt with, and/or omitted from consideration by the arbitrator in the partial award. The respondent company raised an objection with respect to the application filed by the petitioner under Section 33 contending that there was no provision for making a partial award. The objection on the maintainability proceeding under Section 33 of the Act was rejected. The tribunal made an additional award with respect to the remaining claims, which were affirmed by the Court.

Errors on Substance of Award cannot be Rectified

An arbitral tribunal cannot review the award on merits. The arbitral tribunal is conferred with limited jurisdiction under Section

33. **M/s. Chandi Construction Co. Ltd. vs. Executive Engineer & Ors., 2013 (4) Arb LR 69 (P&H) : (2013) 171 PLR 313.**

The jurisdiction of the arbitral tribunal to correct errors in the arbitral award is confined only to 'any clerical or typographical errors or any other error of a similar nature occurring in the award'. **Section 33(1)(a) of the Arbitration and Conciliation Act, 1996.**

SECTION 33(5) &(6)

Time-Limit for Making Additional Award

The arbitral tribunal is required to make the additional award within 60 days from the receipt of the request from a party. There may, however, be circumstances, in which, for good reasons, it may not be possible for the arbitral tribunal to make the additional award. For instance, preparation and making the additional award would require consultation with the arbitrators. Further, it may require taking additional evidence, and hearing arguments afresh. In order to enable the parties to prepare and present their case, it may be necessary to provide sufficient time for the said purpose. For all these reasons, it may be essential to extend the time limit beyond the prescribed statutory time limit. To meet such a contingency, Section 33(6) permits the arbitral tribunal to extend the time beyond the prescribed time limit of 60 days. No limit on the extended time has, however, been prescribed. It is to be noted that in making the additional award, the arbitral tribunal has to comply with the procedural formalities of making the award.

The jurisdiction of arbitrator to correct, interpret and amend an arbitral award has been stated in the case of **Centrotrade**

Minerals and Metals Ink. vs. Hindusthan Pvt. Ltd., (2006) 11 SCC 245.

CHAPTER VII
Recourse against arbitral award

34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which

contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

Scheme of the 1996 Act

Section 34 of the 1996 Act is modeled on Article 34 of the UNCITRAL Model Law, with minor contextual variations. The avowed object of the legislature is to curtail judicial intervention in the arbitral process. **Municipal Corpn. Of Greater Mumbai vs. Prestress Products (India), 2003 (2) Arb LR 624, 631 (Bom) : 2003 (3) Bom CR 117.** The approach of the Court when dealing with a challenge to an arbitral award under Section 34, has to reflect the consciousness of the legislative intent to restrict and curtail the extent of judicial intervention in arbitral proceedings and enforcement of awards. **Vijaya Bank vs. Maker Development Services, 2001 (3) Bom CR 652 : 2001 (4) ALL MR 143 : (2001) 103 (4) Bom LR 459.**

The 1996 Act provides for limited judicial intervention, which is of a supervisory nature, to ensure that the award is not vitiated by procedural irregularities, lack of due process, jurisdictional errors, or is not contrary to the public policy of India. The Act does not permit a re-look at the substantive reasoning on the merits of the award, as the object of arbitration is to avoid re-litigation of an arbitral award at the enforcement stage. The scope of judicial review of the substantive reasoning in the award, which refers to the evaluation of the factual and legal position, is to limit review, and ensure one-stop adjudication.

The jurisdiction of a civil Court under Section 34 is a supervisory jurisdiction and not an appellate jurisdiction over the arbitral award. **J.G. Engineers Pvt. Ltd. vs. Union of India, (2011) 5 SCC 758 : 2011 (2) Arb LR 84 (SC) : AIR 2011 SC 2477.** The scheme of the provision aims at keeping the supervisory role of the Court at a minimal level. **McDermott International vs. Burn Standard, (2006) 11 SCC 181 : 2006 (2) Arb LR 498 (SC) : (2006) 6 SCALE 220.** A Court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. The Court must not re-appreciate the evidence as a first appellate Court from a trial Court decree. **Sutlej Construction Ltd. vs. Union Territory of Chandigarh, (2018) 1 SCC 718 : 2018 (4) Arb LR 210 (SC) : 2017 (14) SCALE 240.** In the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision could be arrived at. **P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594 : 2011 (4) Arb LR 128 (SC) : AIR 2012 SC 1866.** The grounds are exhaustive. None of these grounds permit a review on the merits of the decision rendered by an arbitrator. The burden of proof rests on the party raising objections for setting aside the award.

The filing of an application containing a concise statement of the material facts and grounds is necessary for the matter to be subjected to judicial scrutiny under Section 34. **Patel Engineering Co. Ltd. vs. Konkan Railway Corporation, (2009) 3 Arb LR 752 (DB) (Bom).** The question as to what constitutes 'material facts' in relation to the challenge of an award, was considered by the Supreme Court in **Bijendra Natha vs. Mayank Srivastava – (1994) 6 SCC 117 = AIR 1994 SC 2562**, wherein, it was held that the word "material facts" shows that the facts necessary to formulate a

complete cause of action must be stated. Under clause (a) and (b) of Sec 34(2), material facts and grounds need to be stated in the petition. The only difference between Sec. 34(2)(a) and (b) is regarding the burden of proof.

Section 34 applicable only to Domestic Awards

Section 34 empowers the Court for setting aside an arbitral award, in a domestic arbitration. Sec. 2(2) states that this Part shall apply where the place of arbitration is in India. Thus, Section 34 is the power of Court to set aside than awards made by an arbitrator/tribunal where the place (i.e. judicial seat) of arbitration is in India.

Proceedings under Section 34 are summary in Nature

Given the legislative policy to provide and expeditious and binding dispute resolution process, with minimal Court intervention, the proceedings under Sec. 34 are summary in nature. **Fiza Developers & Inter-Trade P. Ltd vs. AMCI (I) Pvt. Ltd., (2009) 17 SCC 796.** The objections are to be decided on the basis of affidavits filed by the parties. Issues are not required to be framed. The scheme and provisions of the Act, disclose two significant aspects, i..e. minimal interference by the Courts and expeditious disposal of disputes. Sec. 5 contains the prohibition that no judicial authority shall intervene except where so provided in the Act. The Scope of enquiry under Section 34 is restricted to a consideration whether any of the grounds mentioned in Section 34(2), 13(5) or 16(6) are made out for setting aside the award. The grounds for setting aside the award are specific. The applicant must plead the facts necessary to make out the ingredients of any of the grounds in Section 34, to establish that the award is liable to be set aside. The burden of proof is on the person making the

application. **The above decision also throws light on the aspect that non-filing of written statement will not exonerate the responsibility of the party to prove the ingredients of Section 34.**

The exercise of the power to set aside the arbitral award is not by way of a roving enquiry. The Court can rely on the material that was placed and exhibited before the arbitrator. Such summary proceedings are only with reference to the pleadings and evidence placed before the arbitral tribunal, and the grounds specified under Sec. 34(2) of the Act. **Tata Hydro-Electric Power Supply vs. Union of India (2003) 4 SCC 172 = AIR 2003 SC 1581**. Followed in **Satyam Computer Services vs. Venture Global Engineering – (2008) 4 SCC 190.**

Scope of Jurisdiction under Section 34

The 1996 Act has brought about a significant change which requires an arbitrator to give in support of an award. A mere statement of reasons does not satisfy the requirement of Section 31(3) of the Act, 1996. Reasons must be based upon the materials submitted before the arbitrator and statement of reasons is a mandatory requirement.

The arbitral tribunal is the sole judge of the quality as well as the quantity of the evidence, and it is not for the Court to take upon itself, the task of being a judge on the evidence adduced before the arbitrator. **Veda Research Laborataries Ltd. vs. Survi Projects – 2013 (2) Arb LR 16 (Del) (DB).** Unless there is a plain perversity appearing on the face of award, there is little scope for interference- **NHAI vs. Oriental Structural Engineers Pvt. Ltd. – Gammon India Ltd.** Under the 1996 Act, an arbitrator is required to decide

the counter-claim, and give reasons for his decision -**K.V. George vs. The Secretary to Government, Water and Power Project Department, Trivandrum – (1989) 4 SCC 595.**

If the award of the issues/matters beyond the scope of arbitration clause which was invoked, as the matters in question pertained to another distinct agreement, arbitration clause in which later agreement was not invoked, then, such invocation is not permissible. **Indian Oil Corporation Ltd. vs. Shree Ganesh Petroleum Rajgurunagar – (2022) 4 SCC 463**.

The 2015 Amendment Act

Pursuant to the recommendations in 246th Report of the Law Commission as the Supplementary to the 246th report, the 2015 Amendment Act has brought about four significant amendments to Section 34;

i) Explanation to Sec.34(2)(b)(ii) has been substituted with Explanation 1;
ii) Explanation 2 has been inserted to Section 34(2)(b);
iii) Section 34(2A), along with a *proviso*, has been inserted;
iv) Section 34(5) and (6) have been inserted.

The first significant amendment was the substitution of the Explanation to Section 34(2)(b) (ii) with Explanation 1. The object of the 2015 Amendment was to provide a restrictive meaning to public policy in both domestic arbitrations and India-seated international arbitrations, in conformity with the interpretation given by the Court in Renusagar Power Plant Co. Ltd., vs. General Electric Co. wherein, the Court had held that an award would be contrary to public policy if its enforcement would be contrary to:

1) Fundamental policy of Indian law; or

2) The interest of India; or

3) Justice or morality.

The Law Commission went a step further and recommended that an award ought to be set aside on the ground of public policy under Section 34 "only if" it is opposed to the "fundamental policy of Indian Law" , or is in conflict with the "most basic notions of morality or justice".

The second significant amendment effected concerned the term "fundamental policy of India", which had been widely construed by a three-Judge Bench in **Oil and Natural Gas Company vs. Western Geco International – (2014) 9 SCC 263 : AIR 2015 SC 363,** merely a month after the publication of the 246th report. In **Western Geco (supra),** the Court permitted a review of the award on merits by applying the Wednesbury's Rule to Arbitral Awards.

Explanation 2 has been inserted to do away with the consequences of the Judgment in **Western Geco (supra)** wherein, the term "fundamental policy of Indian Law" had received an expansive interpretation **– 2019 (8) SCALE 41.**

POWER TO SET ASIDE AWARD UNDER SECTION 34(1):

Section 34(1) provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3). The jurisdiction of the Court under Section 34 is limited. The Court does not act as a Court of Appeal – **Associate Builders vs. DDA (2015) 3 SCC 49 : AIR 2015 SC 620**, or subject the award to a review on merits. It must not re-assess the material placed before the Arbitrator. It cannot correct errors of the Arbitrators; nor can it

remand the matter back to the Arbitrators for fresh adjudication – **Radha Chemicals vs. Union of India, Civil Appeal No.10386/2018** dated 10th October 2018. It can only set aside the award, leaving the parties free to begin the arbitration again if so desired – **International Inc. vs. Burn Standard Company Ltd., (2016) 11 SCC 181**.

JURISDICTIONAL ERRORS:

Section 28 is a mandatory and non-derogable provision which provides in sub-section (1) that Arbitral Tribunal shall decide the dispute in accordance with the substantive law in force in India. Section 28(3) further states that the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction- **J.G.Engineers Pvt. Ltd., vs. Union of India, (2011) 5 SCC 758 : AIR 2011 SC 2477.**

The role of an Arbitrator is to arbitrate within the terms of the contract. An arbitrator has no power apart from what the parties have conferred under the contract, and accordingly, he cannot travel beyond the contract; if he does so, an award passed by him could be without jurisdiction – **Rashtriya Chemicals and Fertilizers Ltd., vs. Chowgule Brothers and Others, (2010) 8 SCC 563 : AIR 2010 SC 3543.**

The Arbitrator appointed by the parties is the final Judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him – **Swan Gold Mining Ltd., vs. Hindustan Copper Ltd., – (2015) 5 SCC 739.**

In **MSK Projects (I) JV Ltd., vs. State of Rajasthan, (2011) 10 SCC 573 : AIR 2011 SC 2979,** the Court held that if an

Arbitrator commits an error in the construction of a contract, that is an error of jurisdiction; if he wanders outside the contract and deals with the matters not allotted to him, he commits a jurisdictional error. The ambiguity of an award can, in such cases, be resolved by admitting extrinsic evidence.

RE-APPRECIATION OF EVIDENCE NOT PERMISSIBLE:

Arbitration, whether domestic or international, is a consensual adjudication by a Tribunal constituted by the parties themselves. Except in cases suffering from gross error, the Court would not set aside an award under challenge.

The Arbitral Tribunal is the master of evidence. If the findings of fact are based on an appreciation of the evidence and the materials on record, as well as on an interpretation of the relevant provisions of the contract, which are neither perverse, nor contrary to the evidence or against public policy, it would not be open for the Court to scrutinize the award under Section 34 as if it were sitting in appeal. **Associate Builders vs. DDA.**

The underlining object is to provide finality and encourage resolution of disputes by the arbitral tribunal having consensual jurisdiction. The Court while considering the challenge to an award, does not sit in appeal over the findings and decision of the arbitrator by re-assessing or re-appreciating the evidence. **Kwality Mfg.Corp.vs. Central Warehousing Corp., (2009) 5 SCC 142, P.R.Shah, Shares and Stock Brokers vs. B.H.H. Securities Pvt. Ltd., (2012) 1 SCC 594 : AIR 2012 SC 1866.**

If Plausible View – No Interference:

The consideration of the contract falls within the jurisdiction of the Arbitrator. If two interpretations are possible, and the view taken by the Arbitrator is a plausible one, the Courts would usually not interfere with the view taken by the Arbitrator – **NHAI vs. Gammon India Ltd., 2015 (5) Arb LR 28 (Cal).**

The principle that when two views are possible, and the Arbitrator takes a plausible view is not an inflexible rule. The principle cannot be applied mechanically. Ref. **NHAI vs. progressive – MVR (JV) (2018) 14 SCC 688 : AIR 2018 SC 1270.**

The Court while considering a challenge to an award should not sit in appeal over the decisions and the findings of the Arbitrator, unless, construction of the contract is such that no reasonable person would adopt – **NHAI vs. ITD Cementation India Ltd., (2015) 14 SCC 21. Also Ref. earlier decision also in Rashtriya Ispat Nigam Ltd., vs. Diwan Chand Ram Saran, (2012) 5 SCC 306.**

Court must not substitute its decision for the Award:

The Arbitrator is the sole Judge of the quality as well as quantity of the evidence. It may be possible that on the same evidence, the Court might have arrived at a different conclusion than the one arrived at by the Arbitrator, but, that by itself is no ground for setting aside the award. The Court should approach an award with a desire to support it, if it is reasonably possible, rather than destroy it by calling it illegal. **Municipal Corporation of Delhi vs. Jagan Nath Ashok Kumar and another, (1987) 4 SCC 497.**

Perverse Award:

Another irregularity which can vitiate an award, is if the award is perverse, which would be covered under the Head `*Patent Illegality'*. If the Arbitrator ignores the substantive law in force in India and passes an award, this would cause miscarriage of justice, and would be liable to be set aside under Section 34(2)(b)(ii) of the Act.

The expression `*Perverse'* refers to findings which are not supported by the evidence on record, or against the Law or suffer from the vice of procedural irregularity. **Gaya Din vs. Hanuman Prasad, (2001) 1 SCC 501 : AIR 2001 SC 386.** Unless it is found that some relevant evidence has not been considered, or that certain inadmissible material has been taken into consideration, the finding cannot be said to be perverse. **Sumitomo vs. ONGC, (2010) 11 SCC 296 = AIR 2010 SC 3400.**

If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material, or if the finding so outrageously defies logic so as to suffer from the vice of irrationality, then, the finding is rendered infirm in law. **Excise and Taxation Officer vs. Gopinath and Sons, (1992) Suppl. (2) SCC 312.**

If the award is contrary to the terms of the contract or statutory provisions of law, it would be perverse and cannot stand the test of judicial scrutiny. By way of illustration, if the award is passed on a claim which is clearly barred by limitation, it will be contrary to the provisions of law, and as such, an award cannot be sustained. **H.P.C.L vs. Batli Bol Environmental Engineers Ltd., and another, 2008 (1) Arb LR 166 (Bom).** An Arbitrator cannot

ignore the law or misapply it, nor can he act arbitrarily, irrationally, capriciously or independent of the contract while passing the award. **P.Radhakrishnan Murthy vs. NBCC Ltd., (2013) 3 SCC 747 : AIR 2013 SC 1904.**

Any order made in conscious departure of pleadings and law is a perverse order. **M.S.Narayana Gouda vs. Girijamma, 1976 (2) Kar.LJ 254, Shailendra Pratap and another vs. State of U.P., (2003) 1 SCC 761, Arul Velu and another vs. State, (2009) 10 SCC 206.** If a decision is arrived on no-evidence, or evidence which is thoroughly unreliable, and no reasonable person would act upon it, the order would be perverse; but, if there is some evidence on record which is acceptable, and could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse, the findings would not be interfered with. Ref. **AIR 1999 SC 677.**

Furnishes Proof (Section 34(2)):

The party challenging the award under Section 34(2)(a) has to discharge the burden of proof by adducing sufficient and credible evidence to substantiate the existence of any one of the grounds mentioned in above said section.

This interpretation of furnishing `*Proof*' under Sec.34 would not entail leading of evidence and cross-examination of witness afresh. The grounds of challenging the award are to be established by cogent and credible oral and documentary evidence on record in the arbitration proceedings. If evidence is to be lead afresh, at the post-award stage, it would defeat the very purpose of arbitration, and would militate against the legislative policy of minimal judicial intervention embodied in Sec.5 of the Act. The term `*Proof*' at

Sec.34 stage, would have to be interpreted in the context of the infirmities with respect to the arbitral award.

In a recent judgment delivered by three-judge Bench in **Hindustan Construction Co. and another vs. Union of India and Others, 2019 (16) SCALE 823** the Court has over-ruled the judgment in **Fiza Developers** which provided for framing of issues and application of Order 14 Rule 1 CPC.

2019 Amendment Act:

The 2019 Amendment Act has replaced the words `Furnishes proof' with the phrase `establishes on the basis of the record of the Arbitral Tribunal'. This amendment upholds the decision in **Emkay Global Finance Services Ltd., vs. Giridhar Sondhi, (2018) 9 SCC 49** and clarifies that in an application for setting aside arbitral award, the parties may, only use the evidence and material that was before the Arbitrator, and no further material may be adduced before the proceedings in Court.

Section 13(5) and 16(6) provide two additional grounds for setting aside an arbitral award.

Incapacity of the parties:

Section 34(2)(a)(i) provides an arbitral award may be set aside by the Court, if the party making the application for setting aside the award establishes that a party to the award was under some incapacity to enter into the arbitration agreement on which the award is based.

Incapacity in Section 34(2)(a)(i) covers legal or physical incapacity which renders a party unable or incompetent to present their case such as mental incapacity, minority and such like

circumstances. **Ramnik Mohanlal Chowda and Others vs. Suresh Gianchand Kumar in AP No.37/2018 dated 22nd October 2018 by the Bombay High Court.** This section deals with incapacity in law, as opposed to incapacity to perform obligations under a contract. It does not comprehend incapacity on account of entanglement in bureaucratic red-tape.

SECTION 34(2)(a)(ii)

Arbitration agreement is not Valid under the law to which it is subjected or the law in force:

Arbitration being a private consensual adjudication, the jurisdiction of the arbitral tribunal to adjudicate emanates from the arbitration agreement. If the arbitration agreement is not valid under the governing law of the contract, or the law of the seat of arbitration, then, the awards will be liable to be set aside on this ground. It will be case of lack of jurisdiction, which cannot be conferred on the tribunal by acquiescence or agreement of parties. **Tarapore and Co. vs. State of Madhya Pradesh – (1994) 3 SCC 521**. (Officers are requested to read Commentary and case laws under Sec. 16 of the Act)

SECTION 34(2)(a)(iii)

Non-compliance with procedural due process

Above section provides that third ground for setting aside an award. A party challenging the arbitral award on this ground should establish from the record of the arbitral proceedings, that the party was;

i) Not given proper notice of the appointment of the arbitrator; or

ii) He was otherwise unable to present his case.

In **Ssangyong Engineering & Construction Company Ltd vs. National High Authority of India – (2019) 15 SCC 131 = AIR 2019 SC 5041,** it is held that minimum requirement of fair hearing is essential. The above decision also lays down that, party must make out grounds provided under Sec. 34 in order to succeed.

The first requirement of the rule of *audi alteram partem* is that the persons who are likely to be directly affected by the decision or proceedings, should be given adequate notice of the proceedings by the party initiating arbitration proceedings so that they may be able to effectively contest the case. A combined reading of Sections 18 and 34(2) (a) (iii) will provide a valid ground for setting aside the award, if notice of appointment or of the arbitral proceedings, has not been served on any of the parties. Refer the decision in the case of **Godrej Properties and Investments Ltd. vs. Tripura Constructions, Mumbai, 2003 (2) Arb LR 195.**

SECTION 34(2)(a)(iv)

The Article provides that an award may be set aside or remitted if it deals with a dispute not contemplated by, or not falling under the terms of submission to arbitration. This would be a case of lack of jurisdiction. Arbitrator cannot undertake upon himself jurisdiction, over a question which on the true construction of the contract, was not referred to him because he cannot widen the area of his jurisdiction. **Associated Engineering Company vs. Govt. of A.P – AIR 1992 SC 232, MMTC vs. Vedanta Limited, (2019) 4 SCC 163 = AIR 2019 SC 1168.**

Excepted matters:

Section 34(2)(a)(iv) of the Act of 1996 states that an arbitration award may be set aside by the Court if the arbitral award deals with a dispute not covered by the terms of the submission to arbitration, or contains a decision on matters beyond the scope of the submission to arbitration. The *proviso* incorporates the doctrine of separability, which provides that if the decision on matters submitted to arbitration can be separated from other issues, only a part of the arbitral award which contains decisions on matters not submitted to arbitration, may be set aside. **Visa Steel Ltd. vs. Durgapur Projects Ltd., (2012) 2 Cal LT 285 (HC).**

This provision is based on Article 34(2)(a)(iii) of the UNCITRAL Model Law which states as under:

> "(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside."

Section 28(1)(a) of the Arbitration Act states that the arbitral tribunal "shall" decide the dispute submitted to arbitration, in accordance with the substantive law for the time being in force in India. The tribunal is mandated to decide the dispute in accordance with Section 28(3) which provides that the arbitral tribunal shall, in all cases, take into account, the terms of the

contract, and trade usages applicable to the transaction. Section 28 is a mandatory and non-derogable provision of the Act. Section 2(6) states that Section 28 is not subject to party autonomy. The arbitral tribunal owes its jurisdiction to the agreement between the parties.

In **J.G. Engineers Pvt. Ltd. vs. Union of India, (2011) 5 SCC 758 : 2011 (2) Arb LR 84 (SC) : AIR 2011 SC 2477**, the Court held that an award adjudicating claim which are "excepted matters" excluded from the scope of arbitration would violate Section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award by allowing or granting a claim, which is contrary to the terms of the contract, would violate Section 34(2)(b)(ii) read with Section 28(3) of the Act.

In cases of excepted matters, it would be a jurisdictional error **Steel Authority of India vs. J.C. Budharaja, Govt. and Mining Contractor, (1999) 8 SCC 122 : AIR 1999 SC 3275 : 1999 (5) SCALE 351 : (1999) Supp 2 SCR 155,** if the arbitrator allows a claim prohibited by the contract, and the Court may justifiably set-aside the award. If the arbitrator ignores specific terms of the contract, and awards an amount, despite the prohibition in the agreement, the resulting award, being arbitrary, capricious and without jurisdiction will be a nullity. **Grid Corpn. Of Orissa Ltd. vs. Balasore Technical School, 2000 (9) SCC 552, 557 : AIR 1999 SC 2262 : 1999 (2) SCALE 327.** An award made without jurisdiction, the principles of waiver and acquiescence will have no application because there is no estoppel against a statute. **MD, Army Welfare Housing Organisation vs. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619 : 2003 (3) Arb LR 361 (SC) : AIR 2004 SC 1344.**

Reference to arbitration can be with respect to all disputes between the parties in respect of specific disputes. Where 'all disputes' in the arbitration agreement are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings. Where the reference to arbitration is to decide specific disputes enumerated by the parties/appointing authority, the arbitrator's jurisdiction is circumscribed by the terms of reference, and the arbitrator can decide only those disputes referred to. **State of Goa vs. Praveen Enterprises, (2012) 12 SCC 581 : 2011 (3) Arb LR 209 (SC) : AIR 2011 SC 3814 : 2011 (7) SCALE 131.**

In **Union of India vs. Varindera Constructions Ltd. & Ors., 2018 (7) SCC 794 : AIR 2018 SC 2961 : 2018 (10) SCJ 661,** a construction contract was entered into between the parties. Clause 19 of the contract provided that no escalation, reimbursement whatsoever shall be made to the contractor-respondent for increase in wages of labour. Clause 6.3 provided that the contractor-respondent shall have no claim if on account of a local factor and/or regulation, he is required to pay wages in excess of minimum wages. The Court held that in the presence of such clauses, which the respondent voluntarily agreed before accepting the contract, no departure could be allowed. The respondent cannot claim reimbursement of excess of minimum wages. If a departure was allowed from the terms and conditions of the contract, it would destroy the basic purpose of the contract.

The issue as to the arbitrability of the claim can be raised at any stage of the proceedings, i.e., while making reference to arbitration, during the course of arbitral proceedings, or at the Section 34 stage. **Bangaigaon Refinery & Petrochemicals Ltd.**

vs. G.R. Engineering Works Ltd., 2015 (3) Arb LR 395 (Gauhati) : AIR 2015 Gau 57.

SECTION 34(2)(a)(v)

Composition of Tribunal or Procedure Contrary to Part I or Agreement

The fifth ground for setting aside an award is set forth in Section 342)(a)(v). An arbitral award may be set aside by the Court if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or the non-derogable provisions of Part I of the Act.

If the composition of the arbitral tribunal or the procedure is not in consonance with the agreement of the parties, or the statutory procedure provided in Part I of the Act, the award will be void and liable to be set aside being a nullity incapable of enforcement. The composition of the arbitral tribunal, and reference of the dispute, has to be consensual, and not a unilateral reference by one party alone, to which the other party does not consent.

Section 13(5) specifically provides that the challenge on the grounds of independence or impartiality of the arbitrator, or that the arbitrator does not possess the qualifications agreed by the parties, may be considered at the Section 34 stage. **Bharat Heavy Electricals Ltd. vs. C.N.Garg and Ors., 2000 (3) Arb LR 674 (Delhi) : 2001 (3) RCR (Civil) 56.**

Where the Agreement is in Conflict with a Non-derogable Provision of Part I

Section 34(2)(a)(v) provides that an arbitral award may be set aside by the Court if the agreement was in conflict with a non-

deragable provision of Part I of the Act. The 1996 Act contains certain provisions which are mandatory in nature and are not subject to party autonomy. These provisions cannot be waived by the parties.

Stage at which Plea to be Raised

The object and scheme of the Act is to secure an expeditious resolution of disputes. Where such a plea is raised, it must do so at the threshold before the arbitral tribunal, so that remedial measures may be taken, and time and expense involved in the hearing before the tribunal is avoided. If the plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.

The plea that the arbitral tribunal does not have jurisdiction, including that the tribunal is not properly constituted, shall be raised not later than the submission of the statement of defence. However, under Section 16(4), the tribunal may admit a later plea if it considers the delay to be justified.

SECTION 34(2)(b)

The remaining two grounds for setting aside an arbitral award are contained in Section 34(2)(b), which provides that an arbitral award may be set aside by the Court, "only if the Court finds" that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

The jurisdiction to set aside an award where the subject-matter of the dispute is non-arbitrable, or the award is in conflict with the public policy of India, can be exercised by the Court *ex officio.*

The 2015 Amendment Act has inserted two new Explanations 1 and 2 to Section 34(2)(b)(ii). These Explanations have been inserted pursuant to the recommendations of the Law Commission in order to restrict the scope of "public policy".

SECTION 34(2)(b)(i)

The Subject-Matter of the Dispute is not Arbitrable

Where 'the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force' in India, the award will be a nullity. In principle, *any* dispute should be just as capable of being resolved by a private arbitral tribunal, as by the judge of a traditional Court. However, as arbitration is a private proceeding with public consequences, some types of disputes are reserved for traditional Courts, whose proceedings are in the realm of a right *in rem,* or a public right. It is in this sense that they would not be 'capable of settlement by arbitration'. The municipal law of each country would decide which matters may or may not be resolved through arbitration in accordance with its own political, social and economic policy. Whether or not a particular type of dispute is 'arbitrable' under Indian law, is in essence, a matter of public policy of that State. Public policy varies from country to country, and indeed, changes

from time to time. The categories of disputes that may fall outside the domain of arbitration are indicated hereinafter.

SECTION 34(2)(b)(i)

Arbitral Award is in Conflict with the Public Policy of India

The expression 'public policy' is not capable of a precise definition, because public policy varies from jurisdiction to jurisdiction, depending on changing morals, political perceptions, and economic conditions. Public policy varies with the social and cultural concepts of different nations. It also varies from time to time and from generation to generation in each nation. It has been diversely described by judges and jurists. Some have described it as being vague and unsatisfactory, 'a treacherous ground for legal decision,' 'a very unstable and dangerous foundation on which to build until made safe by decision'.

Scope of Public Policy in India

The concept of 'public policy', of course, is not immutable. By its very nature, 'public policy' is not susceptible to a plain meaning by the Courts. Public policy is a dynamic concept that evolves continually to meet the changing needs including political, social, cultural, moral and economic dimensions.

The doctrine of public policy is a branch of common law, and just like any other branch of common law, it is governed by precedent; the principles have been crystallised under different heads, and though it is permissible for Courts to apply them to different situations, the doctrine should only be invoked in clear and incontestable cases of harm to the public. **Gherulal Parakh vs. Mahadeodas Maiya & Ors., (1959) Supp 2 SCR 406 : AIR 1959 SC 781.** Public policy connotes some matter which concern

public good and public interest. **ONGC vs. Saw Pipes, (2003) 5 SCC 705 : 2003 (2) Arb LR 5 (SC) : AIR 2003 SC 2629 : (2003) 3 SCR 691.** The duty of the Court is to expound, and not expand the doctrine of public policy.

The Courts should use circumspection in holding a contract as void against public policy, and should do so, only when the contract is incontestable, and inimical to public interest. The doctrine should be invoked only in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds. **Gulabchand Gambhirmal vs. Kudilal Govindra, AIR 1959 MP 151 (FB) : 1959 JLJ 78 : 1960 MPLJ 334.**

Evolution of Public Policy through Landmark Judgments of the Supreme Court

Section 34(2)(b)(ii) provides that an arbitral award may be set aside by the Court if it is "in conflict with the public policy of India". The Explanation clarifies that for the avoidance of any doubt "an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81". In other words, an arbitral award is liable to be set aside if it is "induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the Act". **MMTC vs. Vedanta Limited, (2019) 4 SCC 163 : 2019 (2) Arb LR 58 (SC) : AIR 2019 SC 1168 : 2019 (4) SCALE 391.**

The doctrine of public policy is of wide amplitude and is governed by precedents. Public policy in the context of Section 34 has been defined neither in the Act nor in the Indian Contract Act of 1872.

A two-judge bench of the Supreme Court in ***Ssangyong Engineering & Construction Co.*** case was considering a challenge to an award rendered in an international commercial arbitration seated in India in light of the changes introduced in Section 34 by way of the 2015 Amendment.

The Court held that fundamental changes have been introduced in Section 34 – the expansion of "*public policy of India"* in the *Saw Pipes* case and *Western Geco* case has been done away with, and a new ground of 'patent illegality' with inbuilt exceptions has been introduced. The amended Section 34, including the Explanations added, would apply only to applications made to the Court on or after 23 October 2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that.

Regarding the ground of 'patent illegality', refer the decision in the case of **Mumbai International Airport Ltd. vs. Airports Authority of India – 2022 SCC online Del 672 (para 29)**

SECTION 34(3)

Sub-section (3) to Section 34 fixes the time-limit for making a challenge to an arbitral award as 3 months from the date on which the party has received the award; or, if a request has been made under Section 33 for correction/interpretation of the award, from the date on which the request has been disposed of. The proviso to Section 34(3) states that if the Court is satisfied that the applicant was prevented by "sufficient cause" from making the application within the prescribed period of 3 months, the Court may entertain the application within a further period of 30 days, but not thereafter. **State of Arunachal Pradesh vs. Damini Construction**

Co., (2007) 10 SCC 742 : 2007 (1) Arb LR 399 (SC) : (2007) 3 SCR 416.

The words 'but not thereafter' in the proviso emphasize the mandatory nature of the time-limit provided in sub-section (3) of Section 34. **State of Maharashtra vs. Hindustan Construction Co. Ltd., 2010 (2) Arb LR 1 (SC) : (2010) 4 SCC 518 : AIR 2010 SC 1299 : 2002 (2) WLN 81 : 2010 (3) CTC 452.** The statute confers a discretion on the Court to condone the delay only to the extent of 30 days if sufficient cause is made out. The discretion cannot extend beyond the period of 30 days even if sufficient cause is made out. **State of Himachal Pradesh vs. Himachal Techno Engineers, (2010) 12 SCC 210 : (2010) 8 SCR 1025 : 2010 (7) SCALE 516.** This is made explicit by the words 'but not thereafter'.

The Apex Court in the case of **Mahindra and Mahindra Financial Services Ltd. vs. Mahesh Bhai Tinabhai Rathod and others – (2022) 4 SCC 162**, has reiterated that if a petition is filed under Section 34 beyond the prescribed period of three months, the Court has the discretion to condone the delay only to an extent of thirty days, provided sufficient cause is shown. Further Section 5 of the Limitation Act is not applicable to condone the delay beyond the period prescribed under Section 34(3).

Delivery of Arbitral Award must be Effective

The period of limitation would commence only after there is a valid delivery of an arbitral award. Sub-section (5) of Section 31 provides that a signed copy of the award shall be delivered to each party. The service of the award on the party is not a matter of mere formality, but a matter of substance. The receipt of the arbitral award by a party sets in motion the period of limitation for filing

objections under sub-section (3) of Section 34 of the Act. Furthermore, the arbitral proceedings shall be terminated by the final award. The delivery of the arbitral award to the party must be effective, as it is required to be delivered to each party to the arbitral proceedings.

Section 14 of the Limitation Act Applicable to Proceedings under Section 34

Section 14 of the Limitation Act provides for exclusion of time spent in prosecuting a legal remedy before a wrong forum. It is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. Section 43 of the 1996 Act states that the Limitation Act, 1963 shall apply to arbitrations, as it applies to proceedings in Court. The Courts have held that Section 14 of the Limitation Act would be applicable to a petition under Section 34 of the 1996 Act. **Simplex Infrastructure Ltd. vs. Union of India, (2019) 2 SCC 455 : 2018 (6) Arb LR 344 (SC) : AIR 2019 SC 505 : 2015 (15) SCALE 590.**

The Apex Court in the case of **Huda vs. Mehta Construction Company – (2022) 5 SCC 432** in order condone the delay if sufficient cause is shown and the reason assigned is delay in receipt copy of award, and order to refusing to condone the delay is held to be not correct.

It is not permissible for the Court to re-appreciate the evidence to calculate the damages as established by respondent and modify the award of damages. It is not open to the Court in this proceeding to modify the arbitral award. The impugned award to the extent that it wrongly determines the damages is liable to set aside. If there is **no quantification** of loss if any suffered and failure to consider the running bills, held that the award being

without basis, deserved to be set aside**. Aneja Constructions (India) Ltd. vs. Grim – Tech Projects (India) (P) Ltd., 2022 SCC Online Del 452**.

When the claim is non-arbitrable/ being barred by limitation, adjudication by arbitration as supposed to by Court in a Section 11 proceeding, there exists arguable case. The non-arbitability and claim being time barred can be raised before the arbitrator. **Mohammed Masroor Shaikh vs. Bharat Bhushan Gupta and Others – (2022) 4 SCC 156**.

Also refer **Indian Oil Corporation Ltd. vs. Shree Ganesh Petroleum, (2022) 4 SCC 463**.

In the decision **Welspun specialty solution Ltd. vs. ONGC Ltd., (2022) 2 SCC 382**, wherein it is held about scope of interference under Sections 34 or 37 of the Act.

In the decision in the case of **Ratnam Sudesh Iyer vs. Jackie Kakubhai Shroff – 2022 4 SCC 206**, the Hon'ble Apex Court has held about interpretation of Section 34 regarding breach of Fundamental Policy of Indian Law as per pre-2015 amendment.

SECTION 34(4)

Remission of the Award

Sub-section (4) of Section 34 replicates the substance of Article 34(4) of the Model Law with minor contextual variations. Under the 1996 Act, the Court may either reject the objections and uphold the award; or, if the objector is able to make out the grounds enumerated in sub-section (2) of Section 34, set aside the award; or, remit the award under Section 34(4) to give the tribunal an opportunity to resume the proceedings, or take such other

action, which will eliminate the grounds for setting aside the arbitral award. **R.S. Jiwani vs. IRCON International Ltd., 2010 (1) Arb LR 451 (Bom) (FB) : 2010 (1) Bom CR 529 : 2010 (1) Mh LJ 547.** The Court while deciding a petition under Section 34 cannot correct errors of the arbitrator **McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors., (2006) 11 SCC 181 : 2006 (2) Arb LR 498 (SC), para 54 : (2006) 6 SCALE 220,** or substitute its decision for that of the arbitrator. It can only set aside the award, either wholly, or in part, if it is severable, and leave the parties free to seek their remedies in accordance with law.

In the case of **DDA vs. Eros Resorts and Hotels Ltd., 2022 SCC Online Del 978**, the Delhi High Court has held that the underline purpose behind the limited scope to interfere under Section 34 is to make arbitration process more responsive to the present day need of expedited dispute resolution mechanism. Also refer **Reliance Securities Ltd. vs. Priya Bratta Choudary** reported in **2022 SCC Online Kar 713**.

Remission of matter to arbitrator under Sec. 34(4) i.e. for elimination of grounds for setting aside the award. Held cannot be permitted in absence of findings on the contentions issued. Finding on issue is necessary. **I-Pay Clearing Services (P) Ltd. vs. ICICI Bank Ltd. – (2022) 3 SCC 121.**

Once the High Court appoints arbitrator and arbitrator passes award, the aggrieved party arbitration tribunal to decide the very same claim. Forum shopping not permitted. **M.P. Housing and Infrastructure Development Board vs. K.P. Dwivedi, 2021 SCC Online SC 1171**.

Whenever there is award of excess amount beyond the period of contract, if proper reasons are assigned, then the arbitrator is justified in awarding so. **State of Hariyana vs. Shiv Shankar Construction Company and Another, (2022) 3 SCC 109**.

CHAPTER VIII
Finality and enforcement of arbitral awards

35. Finality of arbitral awards.—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

Registration of award when compulsory. The arbitral award declaring transfer of title to transferee, such award held is compulsorily registrable. **Ramesh Kumar vs. Furu Ram – (2011) 8 SCC 613**.

36. Enforcement.—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the Court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject

to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

Provided further that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all Court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or Court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).

Enforcement of arbitration award against a non-signatory to arbitration agreement. The term persons claiming under them binds other parties who claim under them, includes cases of devolution and assignment of interest. **Cheran Properties Ltd. vs. Kasturi and Sons Ltd., (2018) 16 SCC 413**.

In **Project Director, NHAI vs. M. Hakeem and another, (2021) 9 SCC 1,** it is held that Court exercising power under Section 34 has no power to modify. It also throws light on the jurisdiction of Court to deal with the petition under Section 34 of the Act.

CHAPTER IX
Appeals

37. Appealable orders.—(1) 2[Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a Court from an order of the arbitral tribunal**—**

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court.

The right of appeal is a creature of statute; there is no inherent right to appeal against a decision of a Court **Union of India vs. Mohindra Supply Co., (1962) 3 SCR 497, 506 : AIR 1962 SC 256 : 1962 (2) SCJ 179 : 1962 (2) AnWR 63,** nor is it a right in common law. It is a substantive right conferred by statute and not a mere matter of procedure. The right of appeal is a vested right to enter the superior Court, which accrues to the litigant from the date the *lis* commences. The vested right of appeal can be taken away only on the repeal of the statue, not otherwise. **Garikapatti Veeraya vs. N. Subbiah Choudhry & Ors., 1957 SCR 488 : AIR 1957 SC 540.**

Appealable Orders under Section 37

The Arbitration and Conciliation Act, 1996 is a procedural law, which governs the conduct of domestic arbitrations and international arbitrations having the seat in India. Section 37 provides that an appeal shall lie from the orders specified therein and from none other.

Appeal can be Filed by a Party/Third-Party

A stranger to an agreement would not be a party to the arbitral proceedings before the tribunal and cannot file an application under Section 17 seeking interim measures of protection. However, a third-party is not precluded from challenging an order passed by the tribunal by filing an appeal under Section 37, if aggrieved by such an order.

The term “party” is absent in Section 37 of the Act, which makes the legislative intent clear that the remedy of an appeal is available to a third party, who is affected by any interim measures granted by the tribunal, or by the Court. For instance, there is a

possibility of collusive proceedings being filed by parties, which may adversely affect the interest of third parties. In **Prabhat Steel Traders Pvt. Ltd. vs. Excel Metal Processors Pvt. Ltd., Arbitration Petition No.619/2017, decided by Bombay High Court on 31 August 2018,** the Bombay High Court held that it would be unreasonable to expect an affected third party to object to such an order at the post-award stage when the award is brought for execution.

A third-party may be allowed to file an application against an order of the arbitral tribunal, if the tribunal passes an order which seriously affects the rights, title, interest of a third party. The Bombay High Court in **Smt. Prema Amarlal Gera vs. The Memon Corporative Bank Ltd. & Anr., 2017 (2) Arb LR 354 (Bom) : 2017 (2) Bom CR 800 : 2017 (5) AIR BomR (NOC 29) 9,** entertained a petition under Section 34 filed by an aggrieved third-party who was not a party to an arbitration agreement as the arbitrator had allowed the third-party to intervene in the arbitral proceedings and made an award affecting the rights of such third-party. The Court held that if a person is wrongly impleaded as a party to an arbitration proceeding and is aggrieved by an arbitral award, he can file an application under Section 34.

The 2015 Amendment

Section 37 was amended by the Arbitration and Conciliation (Amendment) Act, 2015. The remedy of appeal lies to a Court authorized by law to hear appeals from original decrees of the Court passing the order. Section 37(1) specifies the orders passed by a judicial authority or Court, which are appealable:

(i) An order refusing to refer the parties to arbitration under Section 8. Section 37(1)(a) has been inserted by the 2015 Amendment Act whereby an appeal can be filed only against an order refusing to refer the parties to arbitration under Section 8. Conversely, an appeal is not maintainable from an order referring the parties to arbitration under Section 8.

(ii) An order granting or refusing to grant any interim measure under Section 9.

(iii) An order setting aside or refusing to set aside an arbitral award under Section 34 of the Act.

The 2019 Amendment Act

The Arbitration Act is a self-contained code specifying the orders that can be appealed against. No recourse can be taken to the Commercial Courts Act to read in an additional appeal. The High Level Committee was constituted by the Ministry of Law and Justice to recommend legislative changes to the 1996 Act, suggested an amendment to Sections 37 and 50 so as to remove any ambiguity. The Committee recommended the insertion of a non-obstante provision in sub-section (1) of Section 37 to read as:

> "notwithstanding anything contained in any other law an appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order…"

Scope of appeal

Section 37 provides an appeal "to the Court authorized by law to hear appeals from original decrees of the Court passing the order".

The phrase "(and from no others)" in sub-section (1) of Section 37, is a legislative device used to clearly indicate that no appeal shall lie against any other order under Section 37, **Vidyacharan Shukla vs. Khubchand Baghel, AIR 1964 SC 1099, 1109 : (1964) 6 SCR 129.** The right to appeal is not an inherent right of a litigant, but is conferred by statute. It cannot be extended by implication.

Limitation for Filing an Appeal under Section 37

The appeal contemplated by Section 37 can be filed only against the orders specified therein, 'and from no others'.

Section 37 of the 1996 Act does not prescribe any period of limitation for filing an appeal. Section 43 of the 1996 Act states that the Limitation Act 1963 shall apply to arbitrations, as it applies to proceedings in Court. The Limitation Act does not contain any specific provision for filing an appeal under the Arbitration Act.

Section 2(j) of the Limitation Act states that the period of limitation prescribed for any suit, appeal, or application by the schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of the Act.

Article 116 of the Schedule to the Limitation Act pertains to appeals under the CPC where the appeal is to the High Court from

any order, the period of limitation is 90 days. This would include an order under Section 37(2)(a) and (b) of the Arbitration Act, 1996.

In **Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department & Ors., (2008) 7 SCC 169 : 2008 (2) Arb LR 139 (SC) : 2008 (6) SCALE 748,** the Supreme Court has relied on the constitution bench decision in *Vidyacharan Shukla (supra)* and held that appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 will be governed by Article 116 of the Schedule to the Limitation Act.

The Commercial Courts Act, 2015 was enacted to provide a speedy disposal of high value commercial disputes. Arbitration disputes were brought within the purview of this Act. The Act provided for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 for adjudicating commercial disputes.

Section 10 of the Commercial Courts Act, 2015 confers jurisdiction on the Commercial Courts with respect to arbitration matters. Section 10(2) pertains to domestic arbitrations, and states that all applications or appeals arising out of such arbitrations shall be heard and disposed of by the Commercial Division of the High Court.

Section 13(1-A) of the Commercial Act, 2015 provides that an appeal from the judgment of a Commercial Court at the level of a District Judge exercising original civil jurisdiction, or the Commercial Division of a High Court, will lie to the Commercial Appellate Division of that High Court within a period of 60 days from the date of the judgment or order under challenge.

The proviso to section 13(1-A) states that an appeal shall lie under Section 37 of the Arbitration Act, 1996 from the orders passed by a Commercial Division or a Commercial Court, to the Commercial Appellate Division of the High Court. In **Kandla Export Corporation & Anr. vs. OCI Corporation & Anr. (2018) 14 SCC 715 : 2018 (1) Arb LR 613 (SC) : 2018 (2) SCALE 368,** the Supreme Court observed that the specific incorporation of Section 37 of the 1996 Act, in the proviso to Section 13(1) of the Commercial Courts Act was done *ex abundanti cautela,* to clarify that the appeal would henceforth lie to the Commercial Appellate Division.

Interim Award/Ex-parte Award Appealable under Section 37

Section 34 provides recourse to an aggrieved party for setting aside an arbitral award. An arbitral award has been defined to include an "interim award" under Section 2(1)(c) of the 1996 Act. It would also include an *ex parte* award under Section 25(C), a corrected or additional award under Section 33.

Appeal by a Third Party – Whether Maintainable?

The issue whether an appeal filed by a third party, who is not a signatory to the arbitration agreement, or a party in the arbitration proceedings, is maintainable came up for consideration in **Prabhat Steel Traders Pvt. Ltd. vs. Excel Metal Processors Pvt. Ltd. Arbitration Petition No.619/2017, decided by Bombay High Court on 31 August 2018,** before the Bombay High Court. The Court held that even a third party who is directly or indirectly affected by any interim measure granted by the arbitral tribunal, will be entitled to take recourse to the remedy of an appeal under Section 37 of the Act. It was noted that the expression "party" is

absent in section 37 of the Act, which is indicative of the legislative intent that whosoever is affected by any interim measure granted by the arbitral tribunal, or the Court, may prefer an appeal. For instance, the possibility of collusive proceedings could not be ruled out, which may impact the interest of a third party. The Court rejected the contention that a third party can file a civil suit to challenge the order passed in an arbitral proceedings.

Maintainability of More than One Appeal under Section 37

The issue whether more than one appeal may be filed under Section 37, arose before a full bench of the Delhi High Court in **NHAI vs. Oriental Structural Engineers Ltd. – Gammon India Ltd. (JV) 2013 (1) Arb LR 362 (Del) FB) : AIR 2013 Delhi 67 : (2012) 193 DLT 15 : 2012 (132) DRJ 769.** The Court at the stage of admission issued a limited notice *qua* certain claims and rejected the petition regarding other claims. It was held that there is no bar from filing an appeal qua the grounds where the notice was refused since it would amount to an order "refusing to set aside an arbitral award" under Section 34.

Ad hoc interim stay granted by the Supreme Court extended by six weeks. The applicability of Section 37 or Article 136 Constitution has been discussed in the decision in the case of **Mulk Raj Chhabra vs. New Kenilworth Hotels Ltd., (2000) 9 SCC 546 = AIR 2000 SC 1917**.

The maintainability of appeal under 37 is grounds available are not made out, the aggrieved has to approach the Court under Section 37. **Hindustan Copper Ltd. vs. Nicco Corporation Ltd., (2009) 6 SCC 69**.

When there is a long delay without justifiable explanation, the delay cannot be condoned in view of Section 13 of Commercial Courts Act. **State of Maharashtra vs. Borse Bros. Engineers and Contractors (P) Ltd., (2021) 6 SCC 460**. Also refer **Union of India vs. Varindera Construction Ltd., (2020) 2 SCC 111**.

When the parties failed to appear when the appeal was called, then appeal has been dismissed for default. It cannot be disposed of on merits. **Navnirman Development Consultants (India) (P) Ltd. vs. District Sports Complex, Pune, (2017) 8 SCC 603**.

Regarding interest during appeal period, refer **Union of India vs. M.P. Trading and Investment Rac Corporation Ltd., (2016) 16 SCC 699**.

Non-joinder of parties in appeal, when not fatal. Though the award binds other parties and some of them file appeal, it was not necessary for such parties in appeals even though they may be affected by the award. **Hindustan Vidyut Products Ltd. vs. Delhi Power Company Ltd., (2014) 13 SCC 662**.

CHAPTER X
Miscellaneous

38. Deposits.—(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

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.

(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.

40. Arbitration agreement not to be discharged by death of party thereto.—(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.

41. Provisions in case of insolvency.—(1) Where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver

adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively –

Further, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction – Also, an application under Section 9 may be preferred before a Court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) – Thus, Section 42 not rendered ineffective or useless.

The moment the seat is designated, it is akin to an exclusive jurisdiction clause. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in Courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of the Code of Civil Procedure be attracted. (Para 46). **BGS SGS Soma JV vs. NHPC, (2020) 4 SCC 234**. Also refer a decision in the case of **Transparent Energy Systems (P) Ltd. vs. Chettinad Cement Corpn. Ltd., 2017 SCC Online Kar 4461 = (2018) 1 KCCR 851**.

Since, arbitration proceeding has been conducted within jurisdiction of Raichur Court which had been validly conferred exclusive jurisdiction by the contract and which has jurisdiction as per Section 20 CPC, and is subordinate to High Court of Karnataka which entertained application under Section 11 of 1996 Act, award cannot be challenged before a Court subordinate to High Court of Bombay – Exercise of jurisdiction by Court subordinate to High

Court of Bombay shall be against provisions of Section 42 of 1996 Act – Civil Procedure Code, 1908. **Bhandari Udyog Ltd. vs. Industrial Facilitation Council, (2015) 14 SCC 515 = AIR 2015 SC 1320**. Also refer State of **West Bengal vs. Associated Contractors, (2015) 1 SCC 32 = AIR 2015 SC 260**.

42-A. Confidentiality of information.—Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentially of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award**.**

1. Ins. by Act 33 of 2019, S. 9 (w.e.f. 30-8-2019).

42-B. Protection of action taken in good faith.—No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

43. Limitations.—(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship

would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963),for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

The period of limitation of three years will be counted from the expiry of refusal to reply appointment of arbitrator within thirty days of invoking arbitration by notice which in this case is 14.03.2019. The present petition filed on 24.05.2019 as such there no delay. **Huawei Telecommunications (India) Co. (P) Ltd. vs. WIPRO Ltd., 2022 SCC Online Del 195**. Also refer **NHAI vs. M.Hakim (2021) 9 SCC 1**; **Silpi Industries vs. Kerala State Road Transport Corporation, 2021 SCC Online SC 439; Union of India vs. Vedanta Ltd., (2020) 10 SCC 1.**

For extension of limitation period for invoking arbitration claims. Refer **Geo Miller & Co. (P) Ltd. vs. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643 = AIR 2019 SC 4244**.

PART II
ENFORCEMENT OF CERTAIN FOREIGN AWARDS

CHAPTER I
New York Convention Awards

44. Definition.—In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on

differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

45. Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908),a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, 1[unless it prima facie finds] that the said agreement is null and void, inoperative or incapable of being performed.

1. Subs. by Act 33 of 2019, s. 11, for "unless it finds" (w.e.f. 30-8-2019).

2. Subs. by Act 3 of 2016, s. 21, for the Explanation (w.e.f. 23-10-2015).

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 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.

47. Evidence.—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court**—**

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.—In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court.

48. Conditions for enforcement of foreign awards.—(1) Enforcement of a foreign award may be refused, at the request of

the party against whom it is invoked, only if that party furnishes to the Court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

1. Subs. by Act 3 of 2016, s. 22,for the Explanation (w.e.f. 23-10-2015).
2. Subs. by Act 33 of 2019, s. 12, for "An appeal" (w.e.f. 30-8-2019).

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

50. Appealable orders.—(1) 2[Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the order refusing to**—**

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48,

to the Court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

51. Saving.—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

52. Chapter II not to apply.—Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

CHAPTER II
Geneva Convention Awards

53. Interpretation.—In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,**—**

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

54. Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence

of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

55. Foreign awards when 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 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.

56. Evidence.—(1) The party applying for the enforcement of a foreign award shall, at the time of application produce before the Court**—**

(a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.—In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit

on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court.

1. Subs. by Act 3 of 2016, s. 23, for the Explanation (w.e.f. 23-10-2015).

2. Subs. by s. 24,ibid., for the Explanation (w.e.f. 23-10-2015).

57. Conditions for enforcement of foreign awards.—(1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that—

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) the enforcement of the award is not contrary to the public policy or the law of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2) Even if the conditions laid down in sub-section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that**—**

(a) the award has been annulled in the country in which it was made;

(b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is aground, other than the grounds referred to in clauses (a) and (c) of sub-section (1) and clauses (b) and (c) of sub-section (2)entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

58. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

59. Appealable orders.—(1) An appeal shall lie from the order refusing—

(a) to refer the parties to arbitration under section 54; and

(b) to enforce a foreign award under section 57,

to the Court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

60. Saving.—Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

PART III
CONCILIATION

61. Application and scope.—(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

62. Commencement of conciliation proceedings.—(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings, shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

63. Number of conciliators.—(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

64. Appointment of conciliators.—(1) Subject to sub-section (2)—

(a) in conciliation proceedings, with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,—

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

65. Submission of statements to conciliator.—(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation.—In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

66. Conciliator not bound by certain enactments.—The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908)or the Indian Evidence Act, 1872 (1 of 1872).

67. Role of conciliator.—(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of

the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

68. Administrative assistance.—In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

69. Communication between conciliator and parties.— (1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

70. Disclosure of information.—When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

71. Co-operation of parties with conciliator.—The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

72. Suggestions by parties for settlement of dispute.— Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

73. Settlement agreement.—(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement

agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement.—The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

75. Confidentiality.—Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

76. Termination of conciliation proceedings.—The conciliation proceedings shall be terminated—

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

77. Resort to arbitral or judicial proceedings.—The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

78. Costs.—(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1), "costs" means reasonable costs relating to—

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

(b) any expert advice requested by the conciliator with the consent of the parties;

(c) any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68.

(d) any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

79. Deposits.—(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-Section (2) of Section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

80. Role of conciliator in other proceedings.—Unless otherwise agreed by the parties,—

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

81. Admissibility of evidence in other proceedings.— The parties shall not rely on or introduce as evidence in arbitral or

judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,—

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

PART IV
SUPPLEMENTARY PROVISIONS

82. Power of High Court to make rules.—The High Court may make rules consistent with this Act as to all proceedings before the Court under this Act.

83. Removal of difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall made be after the expiry of a period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each Houses of Parliament.

84. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

85. Repeal and savings.—(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act,1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,—

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

86. Repeal and saving.—(1) The Arbitration and Conciliation (Third) Ordinance, 1996 (Ord.27 of 1996) is hereby repealed.

(2) Notwithstanding such repeal, any order, rule, notification or scheme made or anything done or any action taken in pursuance of any provision of the said Ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act.

87. Effect of arbitral and related Court proceedings commenced.—Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—

1. Ins. by Act 33 of 2019, s. 13 (w.e.f. 30-8-2019).

(a) not apply to—

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (23rd October, 2015);

(ii) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such Court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to Court proceedings arising out of or in relation to such arbitral proceedings.

THE FIRST SCHEDULE
(See section 44)
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
ARTICLE 1

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether

contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless in finds that the said agreement is null and void, inoperative of incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply—

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that—

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters

submitted to arbitration may be recognised and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right the may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31st December, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 1X

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:—

(a) with respect of those articles of this Convention that come within the legislative jurisdiction of the federal

authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) with respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) a federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:—

(a) signatures and ratifications in accordance with article VIII;

(b) accessions in accordance with article IX;

(c) declarations and notifications under articles I, X and XI;

(d) the date upon which this Convention enters into force in accordance with article XII;

(e) denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article XIII.

THE SECOND SCHEDULE
(See section 53)
PROTOCOL ON ARBITRATION CLAUSES

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law .Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under mentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7applies to such denunciation.

THE THIRD SCHEDULE
(See section 53)
CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS

ARTICLE 1.—(1) In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses opened at Geneva on September 24th,1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

(2) To obtain such recognition or enforcement, it shall, further, be necessary:—

(a) that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or *pourvoi* en *cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

ARTICLE 2.—Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:**—**

(a) that the award has been annulled in the country in which it was made;

(b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present

his case; or that, being under a legal incapacity, he was not properly represented;

(c) that the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

ARTICLE 3.—If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is aground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

ARTICLE 4.—The party relying upon an award or claiming its enforcement must supply, in particular:—

(1) the original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made;

(3) when necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph (1) and paragraph (2) (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

ARTICLE 5.—The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

ARTICLE 6.—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923.

ARTICLE 7.—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall have been ratified.

It may be ratified only on behalf of those Members of the League of Nations and Non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

ARTICLE 8.—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

ARTICLE 9.—The present Convention may be denounced on behalf of any Member of the League or Non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be inconformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present Convention.

ARTICLE 10.—The present Convention does not apply to the colonies, protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such colonies, protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration

addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the colonies, protectorates or territories referred to above. Article 9 hereof applied to such denunciation.

ARTICLE 11.—A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations of every Member of the League of Nations and to every Non-Member State which signs the same.

THE FOURTH SCHEDULE
[See Section 11(14)

Sum in dispute	**Model fee**
Up to Rs.5,00,000	Rs.45,000
Above Rs.5,00,000 and up to Rs.20,00,000	Rs.45,000 plus 3.5 per cent. of the claim amount over and above Rs.5,00,000
Above Rs.20,00,000 and up to Rs.1,00,00,000	Rs.97,500 plus 3 per cent. of the claim amount over and above Rs.20,00,000
Above Rs.1,00,00,000 and up to Rs.10,00,00,000	Rs.3,37,500 plus 1 per cent. of the claim amount over and above Rs.1,00,00,000
Above Rs.10,00,00,000 and up to Rs.20,00,00,000	Rs.12,37,500 plus 0.75 per cent. of the claim amount over and above Rs.1,00,00,000
Above Rs.20,00,00,000	Rs.19,87,500 plus 0.5 per cent. of the claim amount over and above Rs.20,00,00,000 with a ceiling of Rs.30,00,000