CHAPTER -4

INTERNATIONAL COMMERCIAL ARBITRATION UNDER
INDIAN LAW

4.1 Introduction

Current Indian arbitration law, the Arbitration and Conciliation Act, 1996 (hereafter the Arbitration Act, 1996 or the Act, 1996), came into force in 25\textsuperscript{th} January 1996. This Act is a unification statute in the sense that it was intended to give effect to multiple international commitments undertaken by India, namely, the Model Law, 1985 (the ML, 1985), the New York Convention, 1958 (the NYC, 1958) and the like. The present Act, 1996 not only consolidate, but also to unify Indian Law both on Domestic and International Commercial Arbitration (ICA).\textsuperscript{1}

The existing Indian Law of arbitration deserves a detailed examination, firstly because the analysis of the ICA in India is not possible without an inclusive understanding of Indian Law of arbitration in general. Secondly, the Arbitration Act, 1996 not applies only to Domestic arbitration, but also to International arbitration taking place outside India, provided that the Act is chosen as the applicable law by the disputant parties. There are some other Acts of Indian Law, such as Indian Contract Act, The Foreign Awards (Recognition and Enforcement) Act, 1961 and etc., which are relevant to arbitration and particularly to international arbitration. The earlier Arbitration Act (the Arbitration, Act 1940) is also discussed, when appropriate. The Act of 1996 governs the enforcement of foreign court judgments and orders and arbitration awards as well as the procedure of executing enforcement orders of domestic as well as foreign sentences and arbitral awards. It is discussed in the Chapters on the enforcement of arbitral awards in India.

This Chapter is an extensive analytical examination of the present Indian Law of arbitration. It attempts to follow a comparative approach, emphasizing the similarities and differences between the Indian Law of arbitration and the Model

Law (the ML, 1985). This is not only because the ML can be regarded as a yardstick for assessing various national laws of arbitration, but also because Indian Law itself is mainly inspired by it. Since such inspiration has been made possible through the British legal system, comparison has also been made with the English Law of Arbitration, whose legal systems have developed in close contact with each other. Provisions of Indian Law regarding various kinds of arbitration, arbitration agreements, and arbitration tribunals as well as procedural and substantive laws of arbitration, and arbitral awards, among other, are discussed in this Chapter. The powers of the Court concerning arbitration in various stages, including vacation and enforcement, are mainly dealt with in the next Chapter.

4.2 The Statement of Objects and Reasons

The main objectives of the Arbitration and Conciliation Bill, 1995 as stated in the statement of objects and reasons are as follows:

“i) To comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

ii) To make provision for an arbitral procedure this is fair, efficient and capable of meeting the needs of the specific arbitration;

iii) To provide that the arbitral tribunal gives reasons for its arbitral award;

iv) To ensure that the arbitral tribunal remains within the limits of its jurisdiction;

v) To minimize the supervisory role of courts in the arbitral process;

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

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

viii) To provide that a settlement agreement reached by the disputants as a result of conciliation proceedings will have the same status and effect as an
arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and,

ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."²

The provisions enacted in the Arbitration Act, 1996 aim to achieve the above objectives but statement of objects and reasons which accompanies a Bill does not form part of the Act as passed by the legislature and it is not permissible to refer to it in interpreting the provisions of the present Act, 1996. In 1997, the Supreme Court (SC) in case State of Haryana v. Chanan Mal³ emphasis that the objects and reasons give an insight into the background as to why a particular provision was introduced. Though objects and reasons cannot be the ultimate guide in interpretation of statues, it often times aids in finding out what really persuaded the legislature to enact a particular provision. And also, the SC observed in Narain Khamman v. Parduman Kumar : “It is now well settled that though the statement of objects and reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, it is permissible to refer to the statement of objects and reasons accompanying a Bill for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sough to remedy.”⁴

Major thrust and legislative intent of the Act, 1996, as stated in the Objectives to the Arbitration and Conciliation Bill, 1995, is to reduce excessive judicial intervention due to which the earlier Arbitration Act, 1940 suffered serious infirmities. Section 8 (1) of the Act, 1996, therefore it make mandatory duty for the judicial authority i.e Court to stay legal proceeding if started, where the subject


⁴ Narain Khamman v. Parduman Kumar(1985)1 SCC,8 (para 12) , (Indian kanoon).
matter has already been referred to an arbitral tribunal. Similar provisions are made in connection with the New York Convention, 1958 (the NYC, 1958) and Geneva Convention, 1927 (the GC, 1927) under Sections 44 and 54 of the Act respectively.

The SC in its decision in *Food Corporation of India v. Indian Council of Arbitration*\(^5\) has pointed out that the legislative intent of the Arbitration Act of 1996 is to minimize the supervisory role of the court in arbitral process and expeditious appointment of arbiter so that all contentious issues may be decided by the process of arbitration without recourse to litigation.

Emphasizing the need for interpreting the provisions of the Act in the light of it objects and reasons, the Apex Court in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*,\(^6\) observed that the Act is meant to provide speedy and alternative solution of disputes so as to avoid protected litigation. The Court further held that though objects and reasons of an enactment cannot be the ultimate guide in interpretation of statutes but they do help in finding out the true legislative intent behind enacting a particular provision of the Act.\(^7\)

The SC has observed in *P.Anand Gajapati Raju v. P.C.G.Raju*\(^8\), the legislative intention of the Act has been provided in Sections 5&8 and such these Sections have been interpreted. In Section 5, the effort is to curtail judicial intervention and to give solution through less costly remedy, and in Section 8, arbitration has been made a compulsory step. Likewise in *Everest Lasson Ltd. v. Jindal Exports Ltd.*,\(^9\) the SC while underlining the object of the Act, 1996, has held that through alternative dispute resolution system, the dispute should be resolved quickly and with lesser costs. The legislative attitude of the people should also be curtailed.

\(^5\) AIR 2003 SC 3011, (Indian kanoon).
\(^6\) AIR 2001 SC 2291, (Indian kanoon).
\(^7\) *Bharat Singh v. New Delhi Tuberculosis Center*, AIR 1986 SC 842, (Indian kanoon).
\(^8\) AIR 2000 SC 539, (Indian kanoon).
\(^9\) AIR 2001 SC 356, (Indian kanoon).
4.3 Arbitration in India: General Features

It can be said that the thrust of the Act, 1996 is to encourage and facilitate arbitration. It introduces arbitration as a reliable method of dispute resolution, with binding and enforceable outcomes. It is presented as a regulated procedure that cannot be obstructed with dilatory tactics. For example, a challenge to the appointment of an arbiter cannot stop the proceedings, unless it is granted either by the arbitration tribunal or the Court. The Act also intends to limit court intervention in arbitration procedures. For instance, an arbitration tribunal decides about its own jurisdiction, without the possibility of court intervention, until the end of the arbitration proceedings.

4.3.1 Coverage

According to the Act of 1996, arbitration means any ‘Arbitration’ whether or not administered by permanent arbitral institution. The definition covers all kinds of arbitration conducted through any mode of arbitration but does not focus any light on the term arbitration itself. Further, the definition covers only part I of the enactment, though usually definitions cover whole of particular statute. In this Act, this is a novel experiment which confines the scope of definitions, perhaps to mitigate the disputes of interpretation, and them without enlarging the scope of confusion.10

The Act of 1996 has a comprehensive coverage, and applies to all kinds of arbitration in India. Article 2 of the Arbitration Act, 1996 provides that this law is applicable to any arbitration between persons of public or private law, irrespective of the nature of their legal relationship, provided the arbitration takes place in the India. In case of ICA taking place abroad, the law would be applicable, if the disputants have agreed to make their arbitration subject to the jurisdiction of the law. While the ML, 1985 applies only to International arbitration, the Act, 1996, following the English Arbitration Law of 1996, covers not only International arbitration, but also Domestic arbitration.

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The main focus of the Act, 1996 is ICA. Hence, it is very important to see how commercial arbitration is defined, under Indian Law. Practically, the Indian arbitration law does not provide exhaustive definition of expression ‘Commercial’. However, in ordinary parlance the expression “Commercial” means any activity involving commerce and trade and wherein nature of relationship is commercial.

The Apex Court in *Fetech Chand v. State of Maharashtra*,\(^{11}\) laid down definition of expression “commercial”-“Any service or activity which in modern business would be considered to be lubricant for the wheels of commerce is Commercial.”\(^{12}\)

In the view of the Foreign Awards (Recognition & Enforcement) Act, 1961 the term “Commercial” should be interpreted broadly having regard to a number of activities which are essential elements of modern international trade. The SC in *R.M.Investments & Trading Co. v. Boeing Co.*,\(^{13}\) has held that consultancy service are commercial nature. The court observed that consultancy services including managerial assistance and relevant information are being provided with the purpose to promote sale of Boeing aircrafts and as such are commercial activities in nature.

Thus, it can be said that the term “Commercial” has wide scope to include various activities pertaining to business and trade. The footnote annexed to Article 1(1) of the ML (1985) to reads as follows:

“The term commercial should be given a wide interpretation so as to cover matter arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature, include, but are not limited to the following transactions: any trade transactions for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring, leasing; construction of works; constructions; engineering; licensing; investment; financing; banking; exploitation agreement of concession; joint venture and other

\(^{11}\) AIR 1977 SC 1825, (Indian kanoon).

\(^{12}\) Ibid.

\(^{13}\) AIR 1994 SC 1136, (Indian kanoon).
forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road.”

This footnote was intentionally excluded from the main body of the ML (1985) because there was a serious concern that in adopting a precise definition for such an important and sensitive term, States, especially socialist and developing States, would lose the freedom to retain judicial control over essential State regulated objectives. The compromise was to include a footnote giving adopting States the freedom to retain control over essential activities while still encouraging the widest interpretation possible. Thus, the ML (1985) gives wide latitude to charter States to define those “Commercial” matters that would give rise to arbitration.

The Act, 1996 in Article 2(1) (f) defines ‘Commercial’ as “Disputes arising out of a legal relationship, whether contractual or not, considered as commercial under the law in force in India.” This Article is inspired by the definition of “Commercial” given by Article 1(1) of the ML (1985), while emphasizing issues particular to India. While the ML (1985) provides for the definition of the term ‘Commercial’ in a footnote for Article 2 of Indian Law, that is alien to the above drafting technique, defines the term extensively in a separate Article.

In the view of the SC of India the expression commercial as occurring in Section (2) (f) of the Act, 1996 and in Section (2) of the Foreign Awards (Recognition and Enforcement) Act, 1961 should be construed broadly having regard to manifold activities which are integral parts of international trade today and the aid can also be taken from footnote annexed to Article 1 of the ML (1985) for this purpose.

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17 Most legal systems do not rely on the use of footnotes for reading statutes.
4.3.2 International Arbitration under Indian law

Another serious problem related to the concept of arbitrability in International arbitration is defining what is meant by the term “International”. This warrants the attention for two main reasons. First, whether a dispute is arbitrable may be defined differently under either domestic or international rules of arbitration. As a result, a dispute which may be arbitrable under international arbitration rules may not be so under domestic rules. Second, in context of the Act of 1996, it follows that if a dispute was not considered “International,” then enforcement of foreign awards found in Part II under the Act of 1996 and select provisions of Part I would be inapplicable to an arbitral proceeding. Thus, how arbitration law defines an international dispute become important for disputants that seek to take advantage of ICA rules.

The ML considers an arbitration ‘International’ if:

a. The place of business of the disputants is in different States;

b. The place of arbitration is outside the State of which the disputants have their places of business;

c. The place where a substantial part of the obligations of the commercial relationship is to be performed is outside the State in which the disputants have a business;

d. The place with which the subject matter of the dispute is most closely connected is in a State other than the one in which the disputants have their places of business; or

e. The subject matter of the arbitration agreement is related to more than one State.

Thus, the ML focuses primarily on the place of the disputants, arbitration, or dispute. The Act of 1996 definition of what constitutes “International” is at variance with the ML, 1985. Section 2(1)(f) of the Arbitration Act, 1996 provides that;

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“An arbitration is international where at least one of the disputants is: (1) an individual who is a national of, or habitually resident in, any country other than India; or (2) a body corporate which is incorporated in any country other than in India; or (3) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (4) the government of a foreign country.” 21

It is a main feature of the Act, 1996 that it makes a crystal clear distinction between International and Domestic arbitrations. Overlooking such as distinction has been a shortcoming of most legal systems in the world, leading to a uniform treatment of both types of arbitration.22 The disputants to an ICA are permitted, under Article of the Act of 1996 to make the arbitration process subject to the Act. International arbitration is defined by the law as cases of arbitration where the subject-matter of the dispute is related to international trade, in one of the following ways: i) the principal business centre of the disputants are located in two different countries. While the wording of the ML revolves around the disputants “places of business”,23 Indian Law emphasizes their “principal business centre”, in order to distinguish between marginal and central business activities. If a party has several business centers, the centre that is close relevant to the dispute is regarded as his business centre. If a party does not have a business centre, his place of domicile is considered as his business centre. For instance, under the Act of 1996 definition, any commercial contract between an Indian national and a non-resident Indian habitually resident abroad or a foreign national automatically is considered “International” and subject to international arbitration standards regardless of whether the transaction was local in nature.24 By the same token, a foreign firm in India would not be subject-matter to International arbitration under the Act of 1996 whose ‘management and control’ is exercised within India.25 On the other hand, under the

21 Section 2(1)(f) of the Arbitration Act, 1996.
23 Article 1(3), the UNCITRAL Model Law on International Commercial Arbitration.
25 Ibid. (noting that another problem is that indicators used for determining what constitutes “management and control” remain unclear).
ML, the disputants has to expressly agree that the subject-matter of the dispute is connected to more than one State, if the arbitration is to be considered as international. However, Indian Law does not provide for a criterion to determine that the subject-matter of a dispute is linked to more than one State. By focusing on the status of the disputants, the Indian approach seems to ignore the disputants’ actual connections to international business and the forum related to that commerce. As a result, there is a serious danger that International arbitrations will be categorized arbitrarily potentially aggrieving a party wishing to arbitrate under international rules.

The ML’s approach should be adopted because of its focus on the substance of the commercial interaction reflects more accurately the commercial reality of the disputants and/or forum. The result would be a more predictable application of the rules to disputants seeking to take benefit of international arbitration rules in India.

Practically, if definitions of “International” and “Commercial” are combined, it can be seen that Indian Law provides for a comprehensive definition of ICA which covers arbitration in disputes concerning imports, foreign investment and contracts for construction, development or technology transfer, as well as Indian investment abroad, and the like. The comprehensive definition of ICA indicates the intention of the Indian Parliament to encourage foreign investment and international business through facilitating arbitration.

4.3.3 Definition of ‘Court’ in the Arbitration Act, 1996

The term of “Court” has neither been defined in the Code of Civil Procedure 1908 nor in the General Clauses Act. But the term of “Court” has been defined under Section 2(1) (e) of the Arbitration Act, 1996. The definition of Court given by the Act, 1996 has created a serious difficulty for the legal fraternity and also the business community. The matter has gone up to the Courts for interpretation and the decision has not been flattering for the legislative wing of the Government.

One of the chief objectives of the present Act, 1996 is to minimize the supervisory role of Courts in arbitral process. The best of intentions do not succeed in the lack of strong will to implement them and at times due to absence of foresight. The many cases were pending in the Courts for unreasonable periods of time. One of
the main reasons for this inexplicable and inordinate delay is the ambiguous of
definition to the term court and the way it has been defined in the present Act, 1996.
Some of cases are as follows:

a) Western Shipbreaking Corporation v. Clare Haven Ltd.26
b) Indian Telephone Industries Ltd., Naini, Allahabad v. District Judge,
Allahabad & Others.27
c) Managing Director, Sundaram Finance Ltd., Madras & Another v. G.
S.Nandakumar.28
d) National Thermal Power Corporation v. R. S. Avtar Singh and Company
&Another.29
e) Valliappa Software Technological Park Private Ltd., Bangalore v. C.
Sundaram & Others.30
f) Globsyn Technologies Ltd. v. Eskaaycee Infosys.31
g) State of Tamil Nadu, Rep. by Superintending Engineer, & Another v. R.
Sundaram & Another.32
h) Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co.
Ltd.33

According to Article 2 (c) of the ML, the term of “Court” means a main body
or a vital organ of the judicial system of a State. The equivalent provision in the
Arbitration Act, 1996 is Section 2(1) (e), which read as follows: ‘Court’ means 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.

27 AIR 1998 (3) Allahabad 313, (Indian kanoon).
28 AIR 2001 (3) ARBLR 37, 2001 INDLAW AP 66, (Indian kanoon).
29 AIR 2002 (3) ARBLR 8, 2002 (63) DRJ 211, 2001 INDLAW DEL 744, (Indian kanoon).
31 AIR 2004 (57) ARBLR 560, 2003 INDLAW AP 162, (Indian kanoon).
32 AIR 2006 (1) CTC 178, 2005 INDLAW MAD 579, (Indian kanoon).
33 AIR 2006 (11) SCC 521, (Indian kanoon).
Barring an insufficient cities where the High Court’s exercise Ordinary Original Civil Jurisdiction, all issues pertaining to arbitration have to be filed in the 'principal Civil Court of original jurisdiction in a district'. By definition this is the Court of the “District Judge” (hereafter DJ). Each civil court of a grade inferior to such principal Civil Court or any Court of Small Causes has been intentionally kept out by the legislature. This leaves the Court of the DJ and only this court to have jurisdiction over arbitration cases.

The definition of the term of court in the Act, 1940 is substantially different from the Arbitration Act, 1996. The equivalent meaning in the Arbitration Act, 1940 is Section 2 (C), which is as follows: "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21 include a Small Cause Court.

Owing to this new definition of the term “Court”, there is enormous load of work on the DJ, which was earlier (under Article 2 (c) of the Act, 1940) shared by other judges in the Civil Court. The experience of the last seventeen years (from the date of the Arbitration Act, 1996 came in to force) testifies it amply that the DJ is not able to earmark as much time as is expected to Civil issues like arbitration and the cases are simply piling up. It adds to inexplicable and inordinate delay and makes matters worse for the disputant parties. The DJ as the senior-most judge presides over of civil cases and as a matter of practice; it is also as the Sessions Judge when she preside over the criminal cases. The highest court in each district Judiciary is that of “District and Sessions Judge” (hereafter D&SJ). Most of the time of the D&SJ is earmark to Criminal matters because they are much more urgent than the civil matters like arbitration. Even with the best of intentions, the D&SJ is generally not able to devote enough time for arbitration cases which need in-depth

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34 Section 2(1) (e) of the Arbitration Act, 1996.
35 The Small Causes Court is responsible for adjudicating issues related to civil matters. The court is responsible for cases relating to property disputes (which relate to rent and leave and license), tax and other such cases. Family issues are not dealt by Small Causes Court.
36 Article 21 of the Arbitration Act, 1940 reads as: ‘Parties to suit may apply for order of reference. Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.’
study. To make the matter worse, each judge must complete a target of number of cases in a calendar year. Its performance is evaluated as per the number of cases decided. It finds it convenient to decide small and simple cases which do not require such in-depth study as the arbitration cases do. Thus, the arbitration subject matters keep pending and litigants have no action but to wait patiently. At times, disputant parties do choose for extra-legal methods to settle the dispute which is not a good practice for the society and the economy. It shows a bad picture to the Indian judicial system and erosion in faith starts taking place. It also compels national and foreign investors and business partners to perceive India as a place with the fatal disease of sluggish moving judiciary in practice. Therefore, there is an adverse effect on the business in particular and economy in general.

The case *Indian Telephone Industries Ltd., Naini, Allahabad v. District Judge, Allahabad & Others*, 37 has been a landmark in the history of Indian arbitration. In 1997, just a year had passed since the present Act came into force, the issue of the definition of the term ‘Court’ came up in a landmark case (I.T.I. Case)38 before the Allahabad High Court. The High Court faced the challenging task of answering the basic question as to whether the term ‘Court’ as defined in the present Act includes the Court of Additional District Judge (hereafter ADJ) along with the Court of DJ or not. Further, if it did not include the Court of ADJ, whether the DJ could transfer an application filed in its Court with reference to arbitration matters under the Arbitration Act, 1996 to the Court of any of the ADJs as is done in usual course or not.

At least in 1998, the High Court has observed that the language of Section 2(e), defining the Court, left no choice for interpreting that the Court would also include the court of ADJ along with the Court of the DJ. By imagination the word “Court” could include not the Court of the ADJ. The Parliament made it plain and simple by using words and phrases like, “includes”, “means” and “does not include”. The Legislature had exhaustively explained the meaning of the term ‘Court’ in that the word “includes” is a term of enlargement while the word “means”

37 AIR 1998 Allahabad 313, (Indian kanoon).
is a term of restriction and when both the words “means” and “includes” are used together to define a thing, the intendment of the parliament is to supply restricted meaning to the term of the ‘Court’. The use of phrase “but does not include” further restricted the meaning of the term Court. Hence, it was not possible to relate any other meaning to the term ‘Court’ besides the obvious meaning of the Court of the DJ.

On the matter of the authority of the DJ to transfer the case to the Court of any of the ADJs, the Allahabad High Court held that Indian legislator in the scheme of the Act of 1996 prevented such a transfer on two counts. First, Section 42 of the present Act, 1996 prohibited such a transfer in the instant case and Secondly, the Court of ADJ was not the principal Civil Court of Original Jurisdiction the Calcutta High Court in _Kerventor Agro Ltd. v. Seagram Co. Ltd._, 39 observed that where the pecuniary jurisdiction of principal Civil Court of District i.e. the DJ in civil cases is limited to Ten Lakh Rupees and beyond that jurisdiction was vested in the High Court, the award in question being more than Ten Lakh Rupees, will be referred to High Court for being set aside.

The decision of High Court in I.T.I Case40 as a surprise and big shock to the entire legal fraternity and also to the business community. No one had expected that the jurisdiction of ADJ would be barred and merely the DJ exclusively would have jurisdiction over arbitration cases. The most recent obvious consequence would have been clogging the Court of the DJ and making all the Courts of the ADJ ‘arbitration-dry’. Legal specialists saw no point in taking the matter to the SC as the interpretation of the terms as per the Act of 1996 was crystal clear. There could have been no other interpretation and Justices in the I.T.I. case, wrote such a judgment that it left no scope for appeal.

### 4.3.4 Waiver of the Right to Object

Article 4 of ML (1985) clearly define the meaning of Waiver of the Right to Object which is reads as a party who knows that any provision of this Law from

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which the parties may derogate or 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
therefore, within such period of time, shall be deemed to have waived his right to
object. 41 For instance, on 25th May 1999, Arbitration Court attached to the
Hungarian Chamber of Commerce and Industry, Hungary in Sour Cherries Case
(Hungarian seller v. Austrian buyer) 42 has observed that a dispute arose between a
Hungarian seller and an Austrian buyer over a commercial contract for the purchase
and sale of sour cherries. Although the commercial contract did not contain a valid
arbitration clause, the arbitral tribunal found that it had jurisdiction to hear the issue.
This was because the Hungarian seller had submitted its claim to the arbitral tribunal
and the Austrian buyer, without stating any objection concerning jurisdiction, put
forward its defence. 43

The provision relating to Waiver of Objection by a party is newly
incorporated in the Indian Arbitration Act, 1996 as the earlier Arbitration Act, 1940
had no such analogous provision. The word waiver connotes voluntary and
international relinquishment of a known right or privilege by silence or by
conduct. 44

Where it appears to the arbitral that the party had actual or constructive
knowledge of the rights, facts or circumstances on which an objection could be
raised during the arbitral proceedings and the party still keeps quite and submits to
the proceedings and allows the award to be made, then it will be precluded from
raising such objection consequent to the filing of the award.

41 Article 4 of the Model Law on International Commercial Arbitration.
42 Case No. Vb/97142.
43 Schlechtriem, Peter, and Ingeborg H. Schwenzer. “Commentary on the UN Convention on the
[2005] Schlechtriem, Peter, and Ingeborg H. Schwenzer. “Commentary on UN Convention on
3a <http://www.cisg.law.pace.edu/cisg/biblio/dimatteo3.htmModel Law> or
<http://interarb.com/clout/clout266.htm> accessed date on (20/11/2012)
It would be worthwhile to state the facts of the decision of the SC in *State of Rajasthan v. Construction Company*,\(^{45}\) to understand the implications of waiver in arbitration award. In this case SC has observed:--where the appellant knowingly submits to the arbitration proceeding having full knowledge of the circumstance on which an objection could be filed but still refrains from doing so and takes a chance in the hope that decision may favourable to him, shall be deemed to have waived his right to protest and an objection raised subsequent to making of the award shall not affect the substance of arbitration.

The application of doctrine of waiver in case of international abandonment or relinquishment of a known right shall apply to proceeding before an arbitral tribunal (which includes a sole arbiter or an uneven number of arbiters), whether it may be relating to an irregularity in arbitral procedure\(^ {46}\) or objection as to authority of arbiter\(^ {47}\) or his award.

Under Article 4 of the Act, 1996, if a party to a dispute that is under consideration by an arbitral tribunal knowingly continues to proceed with the arbitration, despite the breach of any condition stipulated in the arbitration agreement or provided for in Indian Law where non-compliance is permitted by agreement, and fails to raise an objection, it shall be deemed to have waived his right to objection. The objection must be raised within the period agreed upon or, unlike the Act, 1996 in Article 4 of the ML, if there is no such agreement, within sixty days from the date it is deemed that is aware of it.\(^ {48}\) This means that no such objection may be raised in later stages of arbitration or in setting aside or enforcement proceedings. This is a reflection of a principle of good faith or the bona fides principle.\(^ {49}\) The legislature by devising this provision has intended to protect the arbitration from abuse, and to consolidate the arbitral award, while providing the disputants with the right to object to any breach of the arbitration agreement or the law.

\(^{45}\) AIR 1995 Arb.LR 1 (SC), (Indian kanoon).

\(^{46}\) Neelkanthan v. Superintending Engineer, AIR 1988 SC 2045, (Indian kanoon).

\(^{47}\) Punjab Electricity Board v. Ludhiana Steel, 1993 (1) Arb.LR 287(SC), (Indian kanoon).

\(^{48}\) This is not similar to Article 4, the UNCITRAL Model Law on International Commercial Arbitration.

This is, however, a contentious issue, particularly when a right guaranteed by the law is breached. It unduly widens the possibility of a waiver, contrary to the provisions of general rules. The question is whether a party’s silence regarding a violation of the law results in the waiver of his right of objection, no matter how gross is the violation. The above provision of Indian Law, however, specifies that the right to object can only be waived with regard to the rules from which the disputant parties may derogate, if they agree so. In other words, such a waiver does not cover a violation of mandatory rules of law. Moreover, it can be argued that if the inexplicable and inordinate delay in raising an objection was justified, the party maintains his right to object. Also, if an objection has been raised, but not accepted by the tribunal, or if a party has not taken part in the arbitration proceedings, or could not do so, he may raise an objection in later stages, such as in vacation or enforcement proceedings.

Practically, the principle of waiver would not apply in arbitration proceedings in the following circumstances:-

i. Where there is no arbitration agreement;

ii. Where the arbitration agreement or arbitration clause in the contract is void or voidable;

iii. Where a mandatory provision of law has been violated in the conduct of arbitration proceedings or making the award; and,

iv. Where there is inherent lack of jurisdiction, it cannot be cured by acquiescence or waiver.

4.4 Arbitration Agreements

Under the Act of 1940, arbitration agreements were legally valid, though there was not express provision as to their being binding. As mentioned before, this meant that the disputants could refer to arbitration the disputes about which there was an arbitration agreement, but the Act did not contain any Article preventing the


51 Union of India v. Rellia Ram, AIR 1936 SC 1685, (Indian kanoon).


court from considering such disputes. A main feature of the Act of 1996, however, is that it recognizes arbitration agreements as binding. Under Article 8(1) of the Act of 1996, “a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than when submitting his first statement on the substance of the dispute, refer the disputants to arbitration.” It is evident from various provisions of the present Act that it applies to voluntary arbitrations, that is, where there is an agreement as to referring any occurring dispute to arbitration, rather than compulsory arbitration which is provided for under some other statutes. And, the SC in Powertech World Wide Ltd. v. Delving International General Trading LLC 54 reiterated that if arbitration agreement ingredients are satisfied, there would be a binding agreement.

The Act of 1940 as well as the Act of 1996 recognizes both arbitration clauses and submission agreements as the legal basis for referring to arbitration disputes that may arise between two disputants in respect of their legal relationships, whether contractual or not. 55 It follows that the dispute must be of a legal nature. Issues of moral spiritual relations are not fit subject matter of arbitration. 56 Article 7(1) of the Act of 1996 provides that “In this Part, ‘arbitration agreement’ means an agreement by the disputants 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.”

It is obvious that when a dispute concerns non-contractual relationships, referral to arbitration can only be authorized in form of a submission agreement; as such an agreement cannot precede the dispute. Where the law has given jurisdiction to determine, certain matters to specified tribunals only, such matters cannot be referred to arbitration, e.g.:

a) Insolvency proceedings;
b) Probate proceedings;

54 AIR 2011(8) SC 107, (Indian kanoon).
55 Article 7(1), the Arbitration Act, 1996. This is the equivalent of Article 7(1) of the UNCITRAL Model Law on International Commercial Arbitration.
c) Suit under Section 92 of Code of Civil Procedure, 1908;\(^57\)
d) Title to immovable property in a foreign State;\(^58\)
e) Claim for recovery of Octroi duty;\(^59\)
f) Illegal transactions;
g) Matrimonial causes-except settlement of terms of separation or divorce;
h) Proceedings for appointment of guardian;
i) Lunacy proceedings;
j) Criminal proceedings;
k) Matters connected with Industrial disputes.\(^60\)

A serious difficulty in most States that their arbitration law has been inspired by the French legal regime requires the disputes referred to arbitration be specified in the arbitration agreement, otherwise the agreement is legally void. Such a requirement rules out the possibility of having an arbitration clause. In this system, court proceedings are considered as a better protection of the rights of the disputants, and arbitration is viewed with suspicion. Therefore, the disputants should not sign away their right to a court trial before they are fully aware of the dispute. An arbitration clause would give away the “right to a trial” beforehand, and was therefore long deemed illegal. Nevertheless, this has changed, and the amendment to

\(^{57}\) Section 92 of Code of Civil Procedure, 1908 reads as; - “Public charities. (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree-(a) removing any trustee;(b) appointing a new trustee;(c) vesting any property in a trustee;(d) directing accounts and inquiries; (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust; (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged; (g) settling a scheme; or (h) granting such further or other relief as the nature of the case may require. (2) Save as provided by the Religious Endowments Act, 1863, 20 of 1863.[Ins.by Act 2 of 1951, s.13.] [or by any corresponding law in force in a Part B State], no suit claiming any of the relief's specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.


\(^{60}\) The Industrial Disputes Act, 1947 carries its own machinery for settlement though arbitration.
the French law of arbitration in 1981 \(^{61}\) now authorizes arbitration clauses in commercial disputes.

It can also be added that the uncertainty involved in arbitration is not “unreasonable” or unnecessary uncertainty, that is, such uncertainty is usually inhered in any contract. Therefore, arbitration clauses should be allowed, as such uncertainties are permitted in legal and particularly commercial contracts.

In practice, many legal regimes have modified the requirement that the subject-matter of the dispute has to be specified in the arbitration agreement. They provide that submission agreements must specify the dispute to be referred to arbitration, while accepting arbitration clauses as valid, or requiring the dispute be specified when referred to arbitration.

Under Article 7(5) of the Act of 1996, it is regarded as a valid agreement to refer to arbitration, if a reference is made in a commercial contract to another document that contains an arbitration clause, on the condition that the reference is clear that the clause is considered as an integral part of the first contract. The decision of the SC in *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn Ltd.*, \(^{62}\) an example of arbitration agreement by reference to a document.

Regarding the interpretation of the applicability of an arbitration agreement in India, it can be argued that, following the English legal system, such interpretation is usually made on the basis of general rules. The first of such rules is that any interpretation should not divert from the expressed will of the disputants, and that preference should be given to declaration rather than indication. The second rule requires finding out the common intent of the disputants, when it is not expressly mentioned, taking into account the nature of the transaction alongside the customary practice and the principles of trust and faith. The third rule is that when doubt arises as to whether or not disputes, or a certain dispute, are to be referred to arbitration, the arbitration agreement should be interpreted as not referring those

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\(^{62}\) AIR 2006 SC 2422, (Indian kanoon).
disputes to arbitration. In other words, interpretation of arbitration agreements should be made on a strictly narrow basis. This rule is based on the general rule that any ambiguity should be interpreted to the advantage of the debtor. Referring to arbitration is, however, a procedural agreement for resolving disputes, and as such does not involve a debtor or creditor. Nevertheless, since recourse to arbitration is considered as an exceptional dispute settlement method, any doubt as to the applicability of an arbitration agreement should be interpreted as resolving the dispute through litigation.

4.4.1 Conditions of the Validity of an Arbitration Agreement

Section 7 of the present Arbitration Act, 1996 is on the pattern of Article 7 of the ML, which has been taken from Article II (1) of the NYC (1958). The Arbitration Act, 1940 also is not silent about the wording of an arbitration agreement.

Under Article 7(3) of the Act, 1996, arbitration agreements must be in writing, otherwise, they are not legally valid. The Arbitration Act, 1940 did not recognize oral arbitration agreement or awards. The present Act of 1996, however, makes it mandatory that all arbitration agreements must necessarily be in writing. Thus the court in Gopal Chand v. Madan Lal63, refused to recognize oral agreement and held that, “oral submission cannot be the basis of a suit”. And also, the SC in Nimet Resource Inc. & another v. Essar Steel Ltd.,64 reiterated that the arbitration agreement is treated as written, provided it is included in a written instrument duly signed by the disputants, or if it is included in correspondence between the disputants by way of exchange of letters, telegraphs or other new written forms of communication. This opens the way for broadening the concept of written form to cover modern means of communication (such as; Fax, Telex and E-Mail), whose use is growing with the expansion of E-Commerce.65

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64 AIR 2000 SC 3107 (Para 5), (Indian kanoon).
65 As a general rule, it is not necessary to accept an offer for arbitration by the same communication means through which the offer has been made. Thus, an offer made by e-mail can be accepted by ordinary mail.
A very recent means of written communication is sending messages by mobile phones; there is no reason to regard an arbitration agreement exchanged through such messages as invalid. Regarding the electronic exchange of written agreements, the exchanged written documents must be capable of being retrieved from the machine. In *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.*, it was held that arbitration agreement need not be in writing, signed by both disputants and the inference as to existence thereof could also be drawn from the acts of the disputant parties to the agreement by way of Exchange of Letters/Faxes, Email, etc., must contain the arbitration clause in the absence of any agreement held, not acceptable in view of there being no specific requirement under Section 7 to this effect.

It can be argued that, in the Indian legal system, a written agreement is required for the valid conclusion of an arbitration agreement, and is not merely the evidence of the existence of such an agreement. Probably that is why like the ML, 1985 that considers “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another” as a written arbitration agreement the Act, 1996, contain such a provision. Nevertheless, it can be argued that the Indian legislative has not had any objection to conceive of statements made by the plaintiff and the defendant to qualify as an arbitration agreement. Moreover, it may be argued that, following the legal practice in India, if the disputants during court proceedings agree to refer their dispute to arbitration, their agreement may be incorporated in a court decision, which without needing the signature of the disputants can be considered as a written valid arbitration agreement.

It should be mentioned that although an arbitration agreement, whether as an arbitration clause or a submission agreement, must be in writing, the main agreement need not to be written, if there is no such requirement under the law.

An agreement to refer to arbitration is valid, only if it is concluded between physical or legal persons who are legally competent to exercise their rights. Since

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66 AIR 2009, 2 SCC 134, (Indian kanoon).

67 It can be concluded that voice recorded arbitration agreements cannot be considered as valid, even if, later on, they appear in a printed form. This includes tape recording as well as voice mail.

68 Article 7(2), the UNCITRAL Model Law on International Commercial Arbitration.

69 Nevertheless, as a general rule, most types of commercial contracts must be in writing.
the Act, 1996 does not specify who is competent to exercise his or her rights, and to enter into an arbitration agreement, the question needs to be answered by reference to other pieces of Indian legislation. As touched upon before, for instance, the Contract Act precludes minors and those under guardianship (unless through their legal representative or guardian), the insane, bankrupts and, in some versions, the disabled and terminally ill to enter into any arbitration agreement. A serious difficulty with Indian Law is that, regarding foreigners, it does not indicate who has the capacity to enter into any arbitration agreement, nor does it make crystal clear which law applies in order to determine who is competent to conclude such agreements. Here again, it can be said that the existing law indicates the conditions to be met, if a foreigner is competent to be party to an arbitration agreement. Foreigners are competent to make an arbitration agreement on the basis of Indian Law, under the same circumstances that Indian can.

Although there is no particular rule for multi-party arbitration,70 such arbitration is allowed, under Indian law, as Article 7(1) of the Act, 1996 reads, “The term “Disputants to submit to the arbitration” shall mean, in the context of this law, the disputants to the arbitration even if they are multiple in number.” Similarly, there are neither doctrinal views by lawyers nor a provision in Indian Law on the issues of succession or assignment of the main contract, merger or acquisition of a party, non-limited partnerships, de facto companies, non-incorporated business associations, consortia, contractual joint ventures, integrated groups of firms controlled by a mother company. The same can be said about consolidation of arbitral proceedings.71 The succession of the main contract, all rights and obligations contained in it, including those created by the arbitration clause, are transferred to the succeeding company. Such a view is consistent with the view of the SC. For

70 Multi-party arbitration, i.e. arbitrations where on the side of the claimant or on the side of the respondent more than one party are involved, are very common in International Commercial Arbitration as, for instance, in international construction disputes. In practice, disputant parties rarely agree upon contractual provisions for multi-party arbitrations in their contracts. It is also interesting to note that arbitration rules which were in practice often agreed by disputant parties in their contracts as the Rules for the ICC Court of Arbitration or the UNCITRAL Arbitration Rules did not deal with this issue until the beginning 90ies. The same applies for national arbitration laws and also the UNCITRAL Model Law on International Commercial Arbitration 1985. See more; Melis, Werner. “Arbitration: Multiparty Arbitration as Defined in Different Arbitration Rules.” Croat. Arbit. Yearb. 17 (2010); 39-207.

instance, in 2007, in case *DHV BV v. Tahal Consulting Engineers Ltd.*\(^{72}\), Indian SC has observed- one of the component of a tripartite arrangement was a head-contract which contained arbitration clause. The question was that the applicability of the clause between the head–contract and sub-contractor. The head–contract specified certain specific obligations between the head-contractor and sub–contractors. It was also signed by head-contractor and sub-contractor. It was held that the arbitration clause had become applicable to disputes in respect of the specified obligations between the head-contractor and sub–contractors.

On the other hand, multi-party arbitration, whether they involve one contract with multiple disputants or multiple contracts as well as multiple disputants, has complexities that need to be attended to. General rules of Indian private or company laws provide tools necessary for making a legal decision, when such issues are involved.

Allowing all legal persons of public and private law to enter into an arbitration agreement means that the Act, 1996 does not prohibit public bodies to conclude such agreements. However, the question may arise as to whether public bodies can enter into an arbitration agreement, without obtaining State authorization. In other words, who is a competent public body to enter into an arbitration agreement? As a matter of fact, referring to arbitration disputes to which a public body is a party has sometimes been in question in India. The objection to the competence of public bodies to enter into arbitration agreements was grounded on a concern for the prejudice that it might have on the sovereignty of the State. In India, the government or any governmental department cannot enter into any agreement for arbitration, unless a special consent is given by the government authorizing the relevant department to enter into such an agreement. It is well settled legal position that the Government contract must satisfy the mandatory condition of Article 299 of the Constitution of India, 1950.\(^{73}\) It is undoubtedly true that if the Government arbitration agreement has not been executed in accordance with the mandatory

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\(^{72}\) AIR 2007 SC 3113, (Indian kanoon).

\(^{73}\)Article 299 in The Constitution Of India 1950: “All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize”.

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requirement of aforesaid Article, then it cannot be enforced by or against the Government. Thus, it is clear that Article 299 of the Constitution of India, 1950 authorizes the Government of India /the State Government to enter into contract for any purpose subject to the mode and manner provided for it in Article 209 of the Constitution of India, 1950. A contract is binding on the Government of India if the undermentioned conditions are satisfied:

1. It must be expressed to be made by President or by the Governor of the State as the case may be.
2. It must extend on behalf of President or the Governor as the case may be.
3. Its execution must be by such person and in such manner as the President or Governor may direct or authorize.

The Apex Court in *Bihar EGF Cooperative Society v. Sepahi Singh* observed that failure to comply with these mandatory conditions nullifies the contract and such contract will be void and unenforceable. Hence, there is no question of estoppels or ratification of the provisions of Article 299 (1) of the Constitution of India (1950). It is to be noted that under Chapter IV of the Indian Partnership Act, 1932, namely, Sections 18, 19 & 22 emphasize that if the arbitration agreement is executed by one of the partners of company; it is binding on all partners. In *Union of India v. A.L.Rallia*, the SC reiterated that the valid arbitration agreement signed by partner binding all.

An arbitration agreement is invalid, if it is about disputes that are not arbitrable under Indian Law. Article 2 of the Act, 1996 implies that almost any dispute arising from legal relationships between persons can be resolved by arbitration. It does not matter what the nature of the legal relationship is. Both private and public entities can resort to arbitration. This is much wider than the scope of arbitrability under the Act, 1940. In other words, ‘one may refer to arbitration any dispute whether it is contractual or non-contractual.

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74 Article 209 in The Constitution of India 1950: The contractual liability of the state under Constitution of India, 1950 is the same as that of an individual under ordinary law of contracts.
76 AIR 1977 SC 2149, (Indian kanoon).
77 AIR 1963 SC 1985, (Indian kanoon).
As seen, in the question of arbitrability, an issue of public policy is involved. Issues connected to public policy cannot be subject to arbitration. For instance, the matters subject to the statutory rules about expropriation of private property, foreign businesses or foreign investment cannot be referred to arbitration. Under Indian Law, this restriction is primarily expressed in terms of prohibition of referring to arbitration those disputes that cannot be subject to reconciliation or compromise. This is rooted in the British rule. The Indian rule is comparable to the previous English law, according to which issues related to public policy as well as personal status could not be subject to compromise, and hence could not be referred to arbitration.

Excluding from arbitration issues that cannot be subject to compromise has given rise to some difficulties, since “there is not a total identity between matters which can be subject to compromise, and arbitral matters.” For instance, it has been argued that disputes in administrative contracts cannot be subject to compromise, while the Act, 1996 permits referring them to arbitration.

The thrust of Indian Law of arbitration is the autonomy of arbitration clauses, in the sense that even if the main contract proved to be invalid, the arbitration clause can still be valid. The autonomy of arbitration clauses is a fundamental principle without which referral to arbitration will be unreliable. Article 16(1) of the Act, 1996 reads: “An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of arbitration clause.” This is similar to Article 16(1) of ML (1985) and the English Arbitration Law, 1996.

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79 Because of the need to carry out its functions, government, via its branches, will embark upon different activities which inevitably will invite the interplay of its branches and the private sector. These branches otherwise known as administrative agencies assist government to properly take its tasks of service provision among other things. It is therefore while these agencies carry out their functions that they use the law of administrative contracts to their ends. The ends are public services, the means administrative contracts. If this is so, administrative contracts are contracts under the strict sense of the law but only an” administrative” one. See more: Wakene, Wondwossen. “The Law of Administrative Contracts”, Teaching Material, Sponsorship of the Justice and Legal System Research Institute, (2009), 3.
4.5 Arbitration Tribunal

The arbitral tribunal is the creature of an arbitration agreement by disputant parties. It is open to the disputants to confer upon it such authorities and powers and prescribe such procedure for it to follow, as they think fit, so long as they are not opposed to law. The arbitration agreement has to be in conformity with the mandatory rule of law. According of the SC decision in Irrigation Deptt, Govt of Orissa v. G.C. Roy, the arbitral tribunal must also act and make its award in accordance with the general law of the land and the agreement.

Article 10 of the Arbitration Act, 1996 provides that the arbitration tribunal must be constituted according to the arbitration agreement. Following Article 10 of the ML (1985), the number of arbiters can be determined by the disputants, but if they fail to do so, the number will be three. It would have been better if the law, rather than mentioning number three, would have mentioned odd number, in order to cover disputes in which there are more than two disputants. It is undoubtedly true that there is no limit on the number of arbiters, but the total should be odd and manageable to have a possible result. But there is some exemption such in Contracts (Regulation) Act, 1952 which adopted the By-Laws of East Indian Cotton Association for arbitral purposes where in Even number of arbiters is permitted and this shall be valid under Sub-Section 2 of Section 3 in Chapter II of aforesaid Act.

In other words, the law should have left open the possibility of appointing a tribunal consisting of more than three people, in multiple-party disputes, where there is no agreement as to the number of the arbiters. The Indian Law of arbitration, however, goes beyond the ML, and requires that the number of arbiters must not be even. The Arbitration Act, 1996 revoked the provision of the old Indian Law (the Arbitration Act, 1940) that required the appointment of an Umpire by such

81 Sub-section 2 of Section 3 in Chapter II of the Arbitration Act, 1996 reads as: “The Commission shall consist of not less than two, [but not exceeding four] members appointed by the Central Government …”
82 Sometimes an arbitration panel includes an umpire. The umpire generally does not actively participate in the proceeding unless the other members of the panel are unable to reach a decision in the case. In that situation, the umpire frequently becomes the sole decision maker.
arbiters. Experience shows that arbitral proceedings involving an even number of arbiters is mostly time consuming and is not economical.\textsuperscript{83}

4.5.1 Appointment Procedure

Under Article 10(1) of the Arbitration Act, 1996, the procedure for selecting the arbiters is agreed on by the disputants. However, if there is no agreement on such a procedure, where only one arbiter must be appointed, upon the request of one party, the Chief Justice\textsuperscript{84} (or his nominee) will appoint the arbiter.\textsuperscript{85} Where three arbiters must be appointed, each party will select one arbiter, and the third arbiter who will act as the chairman of the tribunal will be selected by the first two arbiters. In this case, if a party fails to appoint his arbiter, within thirty days of a request made by the other party, or if the first two arbiters fail to select the third one, within thirty days of their appointment, the appointment will be made by the Chief Justice or any institution designated by him.\textsuperscript{86} This is exactly what is prescribed by Article 11(3) of the ML except in a word. The SC in the case \textit{Konkan Railway Corp Ltd v. Rani Construction (P) Ltd.}\textsuperscript{87}, has observed: “... The Act (The Arbitration and Conciliation Act, 1996) and the Model Law are not identically drafted. Under Section 11 the appointment of an arbiter, in the event of a party to the arbitration agreement failing to carry out his obligation to appoint an arbiter, is to be made by, “the Chief Justice or any person or institution designed by him”; under Clause 11 of the Model Law it is to be made by a Court.”

Following Article 11(4) of the ML, the Indian Law provides that if the procedure agreed upon for the appointment of the arbiters is not observed by a party, or if both disputants cannot reach an agreement expected of them on the procedure, or if the two appointed arbiters cannot agree on a necessary issue, or even if a third party fails to carry out a responsibility assigned to it, the Chief Justice or any institution designated by him, upon the request of a party, initiate the required


\textsuperscript{84} Chief Justice of High Court in case of domestic arbitration and Chief Justice of India where the arbitration is of international.

\textsuperscript{85} Article 10(1), Arbitration Act, 1996.

\textsuperscript{86} Article 11(5) of Arbitration Act, 1996.

\textsuperscript{87} AIR 2002 SC 778, (Indian kanoon).
procedure or take the action, unless the arbitration agreement provides another way of doing so.\textsuperscript{88} The Chief Justice (or his nominee) in his intervention shall take into consideration the law and the disputants’ agreement; and his final decision is not subject to appeal.\textsuperscript{89} Article 11(2) of the Act, 1996 implicitly allows the disputants to confer the right to appoint an arbiter on a third party. Some legal regimes do not allow such a possibility.

In general, Indian Law set the criteria for being appointed as an arbiter. It provides that minors and those who are under guardianship or debarred from exercising their civil rights because of criminal conviction or misdemeanour considered as a breach of honour or trust, or those who are declared bankrupt cannot serve on an arbitration tribunal, unless rehabilitated. Although no specific qualification is legally required for being an arbiter, legal training and experience, as well as professional expertise, may be regarded as a plus in being appointed as an arbiter.

More importantly, Sex or Nationality cannot be a reason for precluding somebody from serving on a tribunal, unless the disputants have agreed so, or it is required by law. In other words, while the disputants to an arbitration agreement can agree on precluding the appointment of arbiters on the basis of Nationality and Gender, the law does not stipulate such a restriction. Allowing women and particularly foreigners to act as arbiters significantly facilitate international arbitration in India, because foreign disputants may prefer to appoint non-Indians as arbiters. It should, however, be noted that Article 11(1) of the Act, 1996 implicitly recognizes restricting the appointment of foreigners as arbiters, if both disputants agree upon such a restriction. For instance, the SC in \textit{Malaysian Airlines System BHD v. Stic Travels (P) Ltd.},\textsuperscript{90} has held that under Section 11(9) of the present Act, 1996 objection as to the Nationality of arbiter is a mandatorily considerable factor to be viewed and the court is bound to appoint an arbiter of nationality of either of the party. In the present case the court observed that while nationality of arbiter is a matter to be kept in view, it does not follow from Section 11(9) of the

\textsuperscript{88} Article 11(2) of Arbitration Act, 1996.

\textsuperscript{89} Article 11(3) of Arbitration Act, 1996.

\textsuperscript{90} AIR 200 (8) Sc 145, (Indian kanoon).
Act that the proposed arbiter is necessarily disqualified because he belongs to the nationality of one of the disputants. The word “May” is not used in the sense of “Shall”. The provision is not mandatory rule. In case the party, who belongs to a nationality other than that of the proposed arbiter, has no objection the Chief Justice of India (or his nominee) can appoint an arbiter belonging to a nationality of one of the disputants. In case there is objection by one party to the appointment of an arbiter belonging to the nationality of the opposite party, the Chief Justice of India (or his nominee) can certainly consider the objection and see if an arbiter not belonging to the nationality of either party can be appointed.

In this respect, Indian Law significantly follows from the ML, 1985. The only limitation that can be regarded as legitimate by the ML, 1985 is nationality. Unfortunately there is no provision even case law about appointment of a women arbiter in India. The legal restrictions stipulated in some legal regimes for and the authority and power of the disputants to restrict the membership of a tribunal to a particular Sex can be attributed to the origin of religious rules especially in the Muslim States.

Under the Indian Law, when appointed to conduct the arbitration procedure, the arbiter(s) must express their acceptance of their position in writing. However, neither does the ML, of which Indian Law of arbitration is a close copy, contain any provision about the acceptance of a position as an arbiter in writing. More importantly, Article 12(3) of the Act, 1996 provides that, when accepting the position, an arbiter must reveal any circumstances which may “give rise to doubts as to his independence or impartiality.” If such circumstances arise after the appointment or during the arbitration proceedings, the arbiter must “take the initiative in notifying the same to the disputants to the arbitration and other arbiters.” The need for revealing circumstances that prejudice the impartiality of the arbiters is also stipulated in the ML and even in English law.

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91 Article 11(1), the UNCITRAL Model Law on International Commercial Arbitration.
92 Under Shari’a law, in almost it’s all versions, arbitrators should have the same characteristics as judges have. This means, they have to be “male, of age, wise, free, Muslim and fair”.
93 Article 12(1), the UNCITRAL Model Law on International Commercial Arbitration.
It may be considered as a shortcoming of the Indian Law of arbitration that it does not specify different types of facts that may be regarded as affecting the impartiality of an arbiter. This can be compared, for instance, with the USA Uniform Arbitration Act (2000), which provides some examples of such facts, that is, a personal or financial interest in the outcome of the proceedings, an existing or past relationship with a party, witness, counsel, or another arbiter. Such a shortcoming, however, can be attributed to the fact that India has very recently joined the club of the most arbitration friendly jurisdictions, and may be dealt with in near future, as the US has adopted the above provisions as late as the year 2000. It can also be concluded that after the issuance of an arbitral award, and even before the completion of challenging or enforcement of the award, establishing any relationship between an arbiter and a party would not affect the validity of the award.

4.5.2 Challenging the Appointment of an Arbiter

The old topic of revoking the authority of an arbiter and seeking his removal has been given a new jargon, namely, challenging the arbiter. Precisely, Section 12 of the Arbitration Act, 1996 provides the reasons before and after the appointment of arbiter(s) which lead a party to challenge it. This part of the Indian Law of Arbitration is analogous to Section 11 of the Act, 1940 and mainly similar to what is expressed under Articles 12 of the ML, 1985.

The appointment of an arbiter cannot be objected, “Unless there appear circumstances giving rise to serious doubt and suspicion concerning his impartiality or independent functioning.” Moreover, under Article 12 (3) of the Act, 1996, a party that has appointed an arbiter, or participated in his appointment cannot challenge his appointment, unless the reasons for having serious doubt about his impartiality and independence have been known after his appointment.

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94 Section 12(a) (1)-(2), the US Uniform Arbitration Act of 2000.
96 Article 12(3) (a) of the Arbitration Act, 1996.
97 The Act, in this regard, follows Article 12(2), The UNCITRAL Model Law on International Commercial Arbitration.
One difference between the ML and Indian Law is that the former, but not the latter, specifies an arbiter’s lack of qualifications agreed by the disputant parties as a ground for challenging him.\(^98\) It can be argued, nevertheless, that the ground may be a basis for challenging an arbiter, under the Indian Law too, although not being provided for expressly.

It is to be noted that the Arbitration Act, 1940 does not have any provision about qualification for the appointment of an arbiter. Whereas Section 12 (3) of the Arbitration Act, 1996 clearly provides the appointment of an arbiter may be challenged if he does not possess the requisite qualification agreed to by the disputants. Because in the field of arbitration it was realized that the number of disputes could not be resolved due to lack of requisite qualification, expertise and experience in that particular subject which is in dispute such as mining, manufacturing, engineering and blasting and the like thus an arbiter is required to have specific knowledge in field relating to issue of the dispute in hand. In other words, an arbiter should be well versed in field concerning the issue of the dispute.

In Anuptech Equipment Pvt. Ltd. v. Ganpati Cooperative Housing Society Ltd.,\(^99\) the Bombay High Court has held that if the appointed arbiter does not possess the qualifications agreed to by the disputant parties in the arbitration agreement, his very appointment is void \textit{ab initio} and the arbitration proceedings would be totally null and void and any order passed by him, e.g., terminating arbitration proceedings for default of a party in filing claim statement, would be a nullity.

Section 13\(^100\) of the Act, 1996 is analogous to Section 30\(^101\) and Section 34\(^102\) of Arbitration Act, 1940. Also, this Section is based on Article 13 of ML.

\(^{98}\) Article 12(2), the UNCITRAL Model Law on International Commercial Arbitration.

\(^{99}\) AIR 1999 Bom.219, (Indian kanoon).

\(^{100}\) Article 12(2), the Arbitration Act, 1996 reads as; 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 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
13(2) of the Arbitration Act, 1996 provides that a challenge to the appointment of an arbiter must be made in writing to the tribunal, within fifteen (15) days from the date that the applicant has become aware of the reasons for challenging the arbiter. If the concerned arbiter does not accept to withdraw from the tribunal, the tribunal itself will decide about the application.

Article 13 of the Arbitration Act, 1996 provides that the arbitration proceedings do not stop, if there is a submission, whether to the tribunal or to the court, challenging an arbiter. However, if the challenge is accepted, the proceedings or the award made by the tribunal are considered as legally void. The Indian legislature’s intention has been to facilitate arbitration, and to obstruct dilatory tactics that might be followed by one of the disputants through challenging the appointment of the arbiters. Nevertheless, such a provision has some drawbacks. It might cause a waste of time and money, if the challenge is granted.

The possibility of the inability of an arbiter to pursue his duties or to cause an inexplicable and inordinate delay in the proceedings is foreseen by Indian Law. Article 14 of the Arbitration Act, 1996, reads: upon the request of a party, if “an arbiter is unable to carry out his responsibility, fails or causes break in the arbitration proceedings and is unwilling to resign from his office and the disputants have not agreed upon his removal, the chief justice of the competent court may issue 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.

101 Article 30 of the Arbitration Act, 1940 reads as; Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely :-(a) that an arbitrator or umpire has mis-conducted himself or the proceedings. (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35; (c) that an award has been improperly procured or is other-wise invalid.

102 Article 34 of the Arbitration Act, 1940 reads as; Power to stay legal proceedings where there is an arbitration agreement. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced. And still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

103 This is similar to Article 13 of the UNCITRAL Model Law on International Commercial Arbitration.
orders terminating his assignment. It has been argued that the decision of the court in such a case, unlike a successful challenge to an arbiter in the court, does not lead to the invalidity of the proceedings or nullity of the award, if it has been made before the court decision. The Indian Law, however, should be criticized for not containing an explicit provision similar to Article 14 (2) of the ML. According to this Article, if an arbiter withdraws from his office, or if a party agrees to terminate an arbiter’s mandate, this does not imply that the ground for challenging him is accepted either by him or by the relevant party. The existence of such provision can be regarded as creating peace of mind for the arbiters to cease their functions. It may be asked whether provisions regarding challenging an arbiter are mandatory rules, or the disputants are allowed to agree upon different rules for challenging arbiters. While the spirit of the law points to the autonomy of the disputants, particularly with regard to the procedural law of arbitration, specifying the above rules amounts to providing for mandatory rules.

4.5.3 Arbiters’ Responsibility

As seen before, the arbiters must accept their position in writing. This requirement indicates the contractual nature of the relationship between the arbiters and the disputant parties, under Indian Law. This means that by accepting their post in writing, the arbiters commit themselves to go through the arbitral procedure, follow the requirements of the arbitration agreement, and finally issue an award. It can be said that, by accepting their post, the arbiters create legal responsibility for themselves not only to follow the rules set in the arbitration agreement, but also to comply with Indian Law of arbitration at large. For instance, they are obliged to declare any circumstance that might prejudice their impartiality or independence. Arbiters may be liable for their actions or omissions, as judges are. Hence, they may also be liable to compensation, if they are guilty of fraud or gross negligence giving rise to losses for any of the disputants. Although there is no provision to such effect in Indian Law, such liability may be concluded from the general principles of law in India. Nevertheless, it may be possible for the arbiters to have immunity from liability, as rules of many arbitration institutions contain an immunity clause.

104 This is similar to the situation foreseen in Article 14(1) of the UNCITRAL Model Law on International Commercial Arbitration.
excluding the liability of their arbiters or staff for their acts or omissions in connection with settling disputes.

4.5.4 Jurisdiction of the Arbitral Tribunal

The jurisdiction in context to tribunal consists in and is confined to the reference made by the disputants to the tribunal to decide the contentious issues forming the dispute between the disputants. In *International Pharmaceuticals v. Union of India*,\(^{105}\) the Delhi High Court observed that the legislative intention is manifest in view of the enactment of Chapter IV and Section 16 of the Act of 1996 to have the disputes between the disputants adjudicated by arbitral forum expeditiously.

The expression used in Section 16 (1) of the Act, 1996 that “*Arbitral Tribunal may rule on any objections with respect to the existence or validity of the arbitration agreement*” shows that the Arbitral Tribunal’s authority under Section 16 of the Act, 1996 is not confined to the width of its own jurisdiction, but goes to the very root of its own jurisdiction and there is no impediment in contending before the tribunal that it had been wrongly constituted.\(^{106}\)

Article 16 of the Arbitration Act, 1996 provides that it is within the competence of an arbitration tribunal to decide about any objection to its lack of jurisdiction, and to “the non-existence or invalidity or the irrelevancy of the arbitration agreement to subject matter of the dispute.” Such objections must be raised before a period of time set for the submission of a defence, as agreed upon between the disputants or decided by the arbitration tribunal. The participation of one party in the process of appointing the tribunal does not deprive that party from raising the above objections.\(^{107}\) Any other objection alleging that an issue raised by one party during the course of the arbitration proceedings is not covered by the arbitration agreement must be made immediately. Nevertheless, any delayed objection may be considered by the tribunal, if it holds that the reasons for such a

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\(^{105}\) AIR 1998(3) R.A.J. 248(Del.), (Indian kanoon).


\(^{107}\) Article 14(2) of the Arbitration Act, 1996.
delay are justifiable. Under Article 16 (5), the arbitration tribunal must decide about the objections to its jurisdiction, the non-existence, invalidity or the irrelevancy of the arbitration agreement to the dispute either before or jointly with deciding on the dispute itself.

This part of the Indian Law of arbitration is analogous to Section 13 of the Act, 1940 and mainly similar to what is expressed under Articles 16 of the ML. More importantly, Indian Law diverges from the ML on the issue of recourse to the court for objecting to the tribunal’s decision on its own jurisdiction. Under Article 16(3) of the ML, a request to the court can be made within thirty days of the tribunal’s informing the disputants of the rejection of their objection to its jurisdiction. The Court decision shall be subject to no appeal. However, Indian Law does not provide for such a possibility, and the disputants can request the competent Court to decide on the matter only after the issuance of the final award, through applying for its annulment. India, like the ML, does not explicitly mentions whether the irrelevancy of the arbitration agreement to the dispute as one of the issues to be decided by the tribunal or not.

One may say that Indian Law provides an arbitration tribunal with excessive power and authority, since it allows the tribunal to rule on its own jurisdiction without any possibility of appeal. Any external intervention to the tribunal’s decision concerning its competence to consider a dispute must be delayed until the award on the merit of the dispute is issued by the tribunal. Nevertheless, it can be argued that the power vested in the tribunal in this regard is not excessive, and is mainly intended to prevent a party from obstructing the arbitration proceedings, since, as said before, it is ultimately possible to request the setting aside of an award through the court. Furthermore, it is a general principle of law known as Kompetenz-Kompetenz theory (or Compétence de la Compétence) that arbitration tribunals as well as Courts determine their own jurisdiction. As a matter of fact, although the previous Indian authority for considering arbitral awards, the court, never examined the subject-matter of a dispute, it did make the necessary investigation to ensure that the arbiters had not exceeded their powers. There is no reason to expect the present competent courts, under of the Arbitration Act, 1996 do otherwise.

The old Indian Law of arbitration, that is, the Act, 1940, provided that the court could at any stage of an arbitration procedure raise the issue of the tribunal’s lack of jurisdiction. This could be done not only at the request of one of the disputants, but also on the Court’s own motion. This was regarded as the excessive power of the courts at the expense of contractual obligations of the disputants involved. However, it is the intention of the present Indian Law of arbitration to limit the possibility of judicial intervention to challenging the arbitral award merely after its issuance. The only problem is that when, after the issuance of the award, the court decides that the arbitral tribunal did not have jurisdiction, this means that a considerable amount of time and money spent by the disputants and the arbiters is wasted. Given the policy of facilitating arbitration, however, such a problem is worthy of toleration.

The question might arise as to what would happen, if the tribunal decides that it does not have jurisdiction to decide on a dispute. Such a possibility is not very likely, as arbiters would be ending their own job and going against the intention of the disputants to see their dispute ended. However, it is still a possibility that needs to be dealt with, and stipulated through law provisions. The Indian Law is not explicit on such occasion, but it can be argued that such a decision would be final and subject to no appeal, and that the court would not be able to rule on the contrary, as it has been said about the English law of arbitration.

4.5.5 Power to Enforce Orders for Interim Measures

Section 17 is based on Article 17 of the ML, 1985 and it is analogous to Section 27 of the Act, 1940. Under Article 17 of the Act, 1996, the arbitration tribunal has also some enforcing power, if the disputants have an agreement to this effect. This is mainly when a party fails to execute orders of the tribunal to take interim measures. Such measures, under Article 17(1), can be in the form of an attachment or appropriate security to cover the cost of some other measures required by the tribunal or conservatory orders with regard to perishable goods. The arbitration tribunal has the authority and power, upon the request of one party, to grant permission to the other party to take necessary steps for the execution of its orders, without prejudice to the party’s right to resort to the court for an order and its execution.
It is well settled legal principle that the arbitral tribunal / court which has jurisdiction to make final order, even in lack of expressed provision can make interim order as well. Thus, the arbitral award includes an interim award. In cases, *Union of India v. East Coast Boat Builders & Engineers Ltd.*, 109 and *United India Insurance Co. Ltd. v. Kumar Texturisers*,110 the High Court has observed that in the Arbitration Act, 1996 though the term arbitral award has been defined but definition is only an inclusive definition, that is to say, the arbitral award includes an interim award. Thus, the arbitral tribunal is competent to order interim measures to the disputants which originate from an agreement *i.e.*, between the disputants, but the arbitration tribunal is not competent to order interim measures to effect the right of a party who is not a party to such agreement.

An interim order /measures must determine some part of the dispute referred to arbitration. It cannot deal with any other matter. The Allahabad High Court in case *Anand Prakash v. Asstt Registrar Co-Operative Societies* held that an award of stay or an injunction pending determination of dispute is foreign to concept of interim award.111 The Co-operative Societies Act, 1912 does come within the purview of the Arbitration Act.

The position under the Act, 1940 was that a party could commence proceeding in court by moving an application under Section 20 for appointment of an arbiter and simultaneously it could move an application for interim relief under the Second Schedule read with Section 41(b)112 of the Act, 1940. The Act, 1996 does not contain a provision similar to Section 20113 of the old Act, 1940. Nor is Section 17 similar to Section 41(b) and the Second Schedule to the old Act, 1940.114

109 AIR 1999 (2) R.A.J. 221(Del.) , (Indian kanoon).
110 AIR 1999 (2) R.A.J. 225(Bom.) , (Indian kanoon).
112 Section 41 of the Arbitration Act, 1940 reads as; Procedure and powers of Court. Subject to the provisions of this Act and of rules made there under-(a) the provisions ..........(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court: Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.
113 Article 20 of the Arbitration Act 1940 reads as; Application to file in Court arbitration agreement. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference
Under Section 17 the interim measure ordered by the arbitral tribunal are subject to the rules stated therein to arbitration agreement of the disputant parties. However, Section 17 does not confer power on the arbitral tribunal; to enforce its orders. However, Section 37 (2) of the Act makes provision that an order to tribunal whether granting or refusing to grant interim measures is appealable to a court, thus interim measures are subject to judicial consideration. There is also no bar to seek judicial enforcement of the interim measures under Section 9 of the Arbitration Act, 1996. It is submitted that the scope of interim measures which can be granted under Section 17 are very limited in comparison with the interim measures which may be granted by the Court.  

4.6 Arbitration Procedure

It was the Act of 1940 that for the first time set procedural rules for arbitration in India. Under the Act, there must have been oral hearings; the disputant parties had the right to legal representation; and it was possible to call a witness, who could be fined, if he failed to attend a hearing. Cross-examination, by the leave of arbiters, and appointment of umpire was also allowed. The disputants could agree to empower arbiters to act as amiable compositeur. Unless agreed otherwise, the award must have been issued within a period after the request for arbitration was made to the competent court. The replacement of the Act of 1940 with the Act of 1996 introduced a set of procedural rules more in line with the rules accepted by the rest of the world. These rules are analyzed in the following Sections.

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has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.


4.6.1 Procedural law of arbitration

The Procedural law (or *lex arbitri*) is only one fraction of legal norms which are applicable and used during arbitration proceedings by the arbitral tribunal. The *lex arbitri* as part of arbitration which it comes to such a complex subject as regulation of arbitral proceedings. It may be classified as below:

a) Internal Procedural Law: A body of rules which relates to the internal conduct of arbitration proceedings and governs relations between disputant parties and disputants and arbiters.

b) External Procedural Law: A body of law which regulates the relationship between tribunal and national courts in cases of recognition and enforcement of the award or other procedural matters like as interim measures or challenge of arbiters.

Practically, the distinction between procedure and substance law has not always been recognized in the law of arbitration. For in instance in case *Union of India v McDonnell Douglas* arbitrable tribunal recognized that procedural law forms a separate part of the law that governs arbitration:

“The fact that the law of India is the proper law of the arbitration agreement does not, however, necessarily entail that the governing the arbitration proceedings themselves is also the law of India, unless there is in that agreement some effective express or implied term to that effect. In other words, it is, subject to one proviso, open to the parties to agree that their agreement to arbitrate disputes will be governed by one law, but that the procedures to be adopted in any arbitration under that agreement will be governed by another law.”

Article 19 (2) of the Act of 1996 is most liberal part in the context of modern arbitration law which allows the disputant parties to an arbitration agreement to choose the law applicable to their disputes. Specifically regarding the arbitration

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procedure, Indian Law of arbitration provides that the procedure of arbitration must be agreed upon by the disputant parties to the arbitration. It also permits the disputant parties to subject the arbitration procedure to the rules and regulations adopted by an arbitration organization or centre in India or abroad. That means when the law allows the disputant parties to choose the procedure, either party may authorize a third party, which may be any arbitration organization or centre based either in India or abroad, to choose such procedure. For instance, in *Aurohill Global Commodities Ltd. v. Maharashtra Stc Ltd.*,\(^{119}\) Articles 19&20 of the arbitration agreement stated that all disputes arising in connection with their agreement will be resolved by arbitration locally under the British rules of arbitration.

In the absence of any agreement between the disputants regarding the arbitration procedure, the tribunal itself, while taking account of the Act of 1996, can adopt the suitable arbitration procedure.\(^{120}\) While Indian Law is explicit about the possibility of adopting procedural rules established by an international or Indian arbitration institution, adopting procedural law of a foreign State is implicitly recognized. In this regard, Indian Law exactly follows the pattern set by Article 19 (2) of the ML, 1985. It explicitly provides that the power conferred upon the arbitral tribunal in conducting the arbitration includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Nevertheless, the arbiters have an authority and power to do so subject to not undermining the right of defence. As a general rule, it is accepted that arbiters are not bound by restrictive rules on the administration of justice, as judges are.

As noted earlier, the Arbitration Act of 1996 can also be chosen by the disputants as the applicable law to arbitration outside India. The question might arise, however, as to which law applies to the procedural details not specified by the Act, for instance, about the details of a valid summons. Would it be the national law at the seat of arbitration or Indian Law? It may be said that if the disputants agree on Indian Law as a whole as the applicable law, the details as determined by Indian

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\(^{119}\) AIR 2007 SC 2706, (Indian kanoon)

\(^{120}\) Article 16, the Arbitration Act, 1996. This is, to a large extent, similar to Article 19 of the UNCITRAL Model Law on International Commercial Arbitration.
Law applies to the arbitration procedure. Otherwise, the law of the forum country will be applicable.

4.6.2 Date, Place and Language

‘The commencement of the arbitration is the first formal step that a claimant must take and in many regards is the most important.’121 The authors of this quote highlight that the claimant will therefore have to “consider the content of the notice of commencement and the time when that notice needs to be served.”122

Section 21 of the Act, 1996 is modelled on Article 21 of the ML, it provides as to when the arbitral proceeding are to commence and it also provides a maximum freedom to the disputants to decide upon the date, in respect of particular dispute, when to being the arbitral proceeding. If the disputants could not agree on date of commencement of arbitration proceeding in respect of a dispute, the arbitral proceedings are deemed to begin on the date on which request to refer the particular dispute to arbitration is received by the respondent. An application containing request to begin arbitral proceedings must clearly mention date on which a request has been made. This Section is of close related to Section 3 and the savings provision in Section 85(2) (a), it is the running period of limitation.123

Section 21 provides that arbitral proceeding in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. It is, therefore, clear that the date commencement of arbitration proceedings should be deemed to commence from the date of service of a notice for appointment of an arbiter and not from the date when the request is received by the respondent for initiating action for arbitration, has found place in Milk food Ltd. v. G.M.C. Ice Cream (P) Ltd.,124 Thus by interpretation above case, the SC has preferred the date of commencement of the arbitration proceedings from the date of notice served to respondent instead of the date of receipt of the notice by respondent, though in Section 21 of the Arbitration

122 Ibid.
124 AIR 2004 SC 3145, (Indian kanoon).
Act, 1996, it is clearly mentioned that commencement of proceedings shall be treated from the date of receipt of such notice by the respondent.

The determination of place of arbitration plays a key role in the arbitral process.\textsuperscript{125} So, it is necessary for the disputants to provide for an express choice of the seat of arbitration in their agreement, or after a specific controversy has arisen.\textsuperscript{126} Under Article 20 of the Act, 1996, the disputants to an arbitration agreement are a maximum free to agree on the place of arbitration as the venue of arbiter is to be fixed by the disputants by mutual consent. However, if they fail to do so, the tribunal can decide on the place of arbitration, while taking into account the convenience of the disputants and the circumstances of the case. Some commentators strongly argue that the arbitration tribunal’s choice of the place of arbitration is not as wide as that of the disputants. Hence, arbiters cannot choose a place outside India, unless it is approved by the disputants. It is also worth mentioning that if the disputants have chosen the arbitration rules of an arbitration centre, this does not necessarily indicate that they have agreed that the place of arbitration to be where the arbitration centre is located. The choice of the place of arbitration may have significant legal implications, since if the disputants have not agreed on the law of arbitration, the law of the place applies to the case. Consequently, the arbitral award will be subject to the judicial review in the country where it is made, and the country’s procedural law on issues such as arbitrability and international public policy may be applicable to the arbitration. Even if the disputants have agreed on the law of arbitration, in some cases the law of the seat of arbitration might still be relevant.

Under Indian Law, irrespective of the choice of the place, the arbitration tribunal has the authority “to convene in any place it deems appropriate to undertake any arbitral procedure, such as the oral hearing of the disputants to the dispute, witnesses or experts, the sighting of documents, the viewing of merchandise or property, the conducting of deliberations amongst its members, or otherwise.”\textsuperscript{127}


\textsuperscript{126} Ibid.

\textsuperscript{127} Article 20(3) of the Arbitration Act, 1996. Indian law provisions regarding the place of arbitration are equivalent to Article 20 of the UNCITRAL Model Law on International Commercial Arbitration.
This is because, in certain circumstances, it might be more effective to conduct some parts of the proceedings somewhere other than the seat of arbitration. For instance, inspections have to be carried out where the goods or properties are located or some witnesses or expert might not be available in the place of arbitration.

Where the convenience of the disputants was ignored by the tribunal in fixing the venue of the tribunal, it was held by the Allahabad High Court as equivalent to the breach of natural justice in the case of *U.P. Forest Corporation v. Vishwa Nath Goshwami*.\(^\text{128}\) The disputants and subject matter of the dispute were situated at Almora whereas the venue of the arbitral tribunal was fixed Lucknow in above case. To facilitate the convenience of the disputants, the venue of the arbitral tribunal may be challenged and this will not come under of category of misconduct. It is in the best discretion of the arbiters to visit the home of a sick witness to obtain his evidence as well as to refuse to visit the home of a sick witness for recording his evidence. It will not be treated as misconduct.\(^\text{129}\)

The issue of determination of language(s) as such especially becomes significant in subject matter of ICA. Article 22(1) of the Act, 1996, while requiring (mostly in) English as the official language of the State to be used in arbitration, respects the contractual nature of arbitration, by allowing the disputant parties or the tribunal to choose the language they prefer.

The language of the proceedings is to be indicated by the disputants under their agreement, failing which the arbitral tribunal will determine the language of its proceedings. The language so selected is to apply to any written statement of a party, any hearing and any arbitral award, decision and any communication by the tribunal. The arbitral tribunal may order that documents filed before it shall be translated into that language.\(^\text{130}\)

The provision contained in Section 22 of the present Act, 1996 is to make the Act applicable to International arbitration, because it involves languages of different

\(^{128}\) AIR 1985 ALL 351, (Indian kanoon).

\(^{129}\) S.S.Misra. 2010, op.cit., 141.

\(^{130}\) Article 22(4) , the Arbitration Act, 1996. This is similar to Article 22, the UNCITRAL Model Law on International Commercial Arbitration.
States. The earlier Arbitration Act, 1940 did not contain any provision dealing with languages.

4.6.3 Time-Schedule

Time schedule is vital for a judicial system like India which suffered from the fatal disease of sluggish moving in practice. The India judicial system is impaired by inexplicable and inordinate delays. Many a time parties suffer because their disputes are not settled in a rational time. The emergence of time schedule has light a fresh hope.

Arbitration agreement may even contemplate reference of a time –barred claim. A policy of insurance required the assured to refer the matter to arbitration within twelve months of the company’s disclaimer. The assured it after twelve months and yet the reference was held to be binding. Under Section 25(3) of the Indian Contract Act of 1872, a time-barred claim can, therefore, validly from the subject matter of reference. A distinction, however, is to be made between an arbitration agreement entered into about a time-barred claim and a reference made on the basis of an arbitration clause after the expiry of the period of limitation. In the latter case no reference can be made as the right to claim cease to subsist and the relief with respect to the dispute has become time-barred.

Ruby General Insurance Co Ltd. v. Peare Lal Kumar is a typical case of its kind. In this case, Punjab High Court has emphasized “…but where there is no specific reference of time-barred claim the arbiter can reject a claim on the ground that it is time-barred. And also, in the case of Sarkar & Sarkar v. State of W.B., the Calcutta High Court in 1992, has observed whether the claim is time-barred is for the arbiter to decide. The disputants may make a plea that the claim is time barred. It will be for the arbiter to decide the matter.

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134 AIR 1951 Punj 440, (Indian kanoon).
The Indian Law of arbitration, which is concerned with the effectiveness of arbitration processes, does not set a time schedule for considering a dispute and making the award. The benefit is mainly to preclude any dilatory tactics used by a violating party or even by the arbiters. Neither the ML, 1985 and various international arbitration treaties and conventions or institutions to which India follow them, nor does Indian Law provide a schedule for different stages of arbitration, such as arbitration process, submitting statements of claim and defence, or notifying a party of such statements.

4.6.4 The Adversarial Procedure

Article 23 of the Act, 1996, which is equivalent to Article 23 of the ML, specifies the requirements of statements of claim and defence by the disputants. Article 23(1) of the Act, 1996, reads; “within the period of time agree upon by the disputants or determined by the arbitral tribunal, the claimant shall State the facts supporting his claim, the points at issue and relief or remedy sough, and the respondent shall State his defence in respect of these particulars, unless the disputants have otherwise agreed as to the required elements of those statements.” Such a statement initiates the arbitral proceedings. It is worthy of mention that a statement of claim requires much more details than that is required for a request to refer a dispute to arbitration. A statement of claim must be provided within the period of time agreed upon by the disputant parties or prescribed by the tribunal.

Under the Arbitration Act, 1996, the disputants can enclose to their statements the copies of some supporting documents or evidence, and can make reference to them in their statements. The arbitration tribunal has the right to require a party to submit the original documents or evidence relied upon in the statements. Article 24(3) of the Act, 1996 requires that each party must be provided with the copies of the submissions, documents, evidence, experts’ reports and any other record submitted to the arbitration tribunal by one of the disputants or others. Article 23(3) of the Indian Law permits a party to amend or supplement his claim or defence.

136 Article 23(1), the Arbitration Act, 1996.
137 Article 23, the Arbitration Act, 1996.
138 This is similar to Article 24(3) of the UNCITRAL Model Law on International Commercial Arbitration.
defence during the course of arbitration proceedings, unless the tribunal rules that such modification is inadmissible in order to prevent delay in making the arbitral award. This provision is equivalent to Article 23(2) of the ML (1985). However, it has been argued that the authority and power granted by Indian Law to the arbitral tribunal should be used with caution, in order not to prejudice the right of a party to fair hearing.

Regarding hearings, Article 24(1) of the Act, 1996 provides that the arbitration tribunal can arrange hearing sessions in which the disputants can explain the subject-matter of the dispute, and present their evidence and arguments. On the other hand, unless the disputants agree otherwise, the tribunal may issue its award only on the basis of written submissions and documents. Therefore, a request for a hearing can be refused, unless requested by both disputants. However, the tribunal’s rejection of holding hearings may be considered as a breach of due process, and consequently may be regarded as a ground for setting aside or non-enforcing the arbitral award. Hence, the tribunal should allow holding hearings, even if the request is made only by one of the disputants and refused by the other. This Section is on the pattern of Article 24 of the ML, 1985 that states, unless the disputants have agreed otherwise, upon the request of a party, the tribunal shall hold oral hearings. Nonetheless, it can be said that the Indian Law of arbitration completely requires holding an oral hearing, upon the request of only one of the disputants. This is because, for instance, Article 26(2) of the Act, 1996 provides that the tribunal may decide to convene a session to hear its expert’s report, if requested by one of the disputants.

The disputants must be given notice sufficiently in advance, as determined by the tribunal, of any hearing. The minutes of the proceedings in each session will be recorded, and shall be communicated to the disputants. The arbitration tribunal may also allow the hearing of witnesses. It is an important feature of the Indian Law of arbitration that it stresses that the witnesses and experts give evidence without the need to take an oath, while such a provision is not stipulated in the

139 Article 24 (2), the Arbitration Act, 1996.
140 Article 24, the Arbitration Act, 1996.
141 Article 24 (3), the Arbitration Act, 1996.
ML. It is the discretionary power of the arbitral tribunal to administer oath to the disputants or witnesses or not. The Punjab and Haryana High Court in *Balwant Singh v. Chief Secretary to Government of Punjab*[^142^] said that if the arbitral tribunal does not administer oath, it does not affect the admissibility of the statements of the witnesses.

Compared to Sections 43 & 44 of the English Arbitration Act, 1996, the Indian Law of Arbitration is less specific about the authorities and powers of an arbitration tribunal in relation to witnesses, evidence and the like.[^143^] For instance, under the English law, inquisitional powers is granted to the tribunal, in order to play an active role in ascertaining the facts and the law,[^144^] whereas such a power for cross-examination is not explicitly provided for, under the Indian Law. This can be regarded as a shortcoming of this legal system.

Under Article 18 of the Arbitration Act, 1996, “*the disputants shall be treated with equality and each party shall be given full opportunity to present his case.*” This provision secures certain important requirements of due process, that is, non-discrimination and equal treatment of the disputants, as well as full opportunity for claim and defence. It is the equivalent provision to Article 18 of the ML.

The complainant’s failure to submit his written statement of claim, without any acceptable reason, requires the tribunal to terminate the proceedings, unless the disputant parties have agreed otherwise.[^145^] On the other hand, if the respondent fails to submit his statement of defence, in the absence of an acceptable reason, the arbitration tribunal must continue the proceedings. Such a failure, however, is not tantamount to admitting the claims of the complainant by the respondent.[^146^] Article 25(c) of the Act, 1996 provides that if a party fails to take part in a hearing or to submit a required document, the tribunal may continue the proceedings, and issue its


[^146^]: Article 25 (b) of the Arbitration Act, 1996.
award on the basis of the available evidence. These provisions are stipulated, in order to preclude dilatory tactics by a party.

The Arbitration Act of 1996 authorizes the arbitration tribunal to use expert views in the arbitration proceedings. Article 26(1) of the Act, 1996 reads: “Unless otherwise agree by the disputants, the arbitration tribunal may-(a) appoint one or more experts to report to on specific issues determined by the arbitral tribunal”. It has been argued that the appointment of experts (i.e., legal expert, technical expert and financial expert) is usually made upon the request of one of the disputants. The tribunal may also do so, without requiring the consent of the disputants, if it finds it necessary. In such a case, however, the disputants may refuse to reimburse the expenses arising from employing the experts. The Indian Law need to goes beyond Article 26(1) (a) of the ML, 1985 by stressing that expert reports must be recorded in the form of minutes. It also requires that the copies of the tribunal’s decision specifying the scope of the functions assigned to the expert shall have to be sent to each of the disputants. This requirement is necessary because, under Article 26(1) (b) of the Act, 1996, the disputants are obliged to provide the expert/s with any relevant information, and to enable them to inspect and check any of the documents, goods and other properties relating to the dispute as may be required by the expert(s). Again here Indian Law need to goes beyond the ML, and provides that in any dispute between the disputants and the expert/s, regarding access to the above information, the tribunal shall make the decision. This is an important provision as it may settle many such differences that often arise between a party and the experts. The experts usually investigate technical or accounting issues, and if the applicable law is a foreign law, they may provide the tribunal with legal assistance.

Another advantage of Indian Law over the ML is that the former requires the tribunal to send a copy of expert reports immediately to the disputants in order to give them the opportunity to comment on it and pursue and check the documents.

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148 Article26 (1) (a) of the Arbitration Act, 1996.

149 Article26 (1) (b) of the Arbitration Act, 1996.
relied upon by the expert(s). Inspired by the ML, Article 26(2) & (3) of the Act, 1996 provides that unless the disputants have agreed otherwise, the tribunal, upon the request of one party or on its own initiative, can decide to convene a hearing where the disputants can discuss with the experts about their report that has already been submitted. The disputants can also present their own experts who can express their views regarding the tribunal experts’ reports. Beyond such expert discussion, the disputant parties can present their own experts during the arbitration proceedings which it is not clear in this Act.

In services of most famous institutional arbitration bodies in India, such as the Construction Industry Arbitration Council or the Indian Council of Arbitration, helps in avoidance of appointment of separate expert(s) because they empanel themselves as arbiters who are experts of fields and when an expert is appointed as an arbiter depending upon the nature of the dispute, his expertise may serve the purpose and a separate expert need not be appointed. In view of Russell, “The function of the arbiter does not need up with the appointment of an expert in technical matters, but he must form his own judgment upon the information or opinion received from the expert.” It means in spite of obtaining the opinion of expert the arbitral tribunal is not bound to rely on such opinions, but the tribunal is required to form its own judgment upon the opinion of expert.

It is clear that the arbitral tribunal have no power to issue processes for witnesses. Article 27 of the Arbitration Act, 1996 is a significant feature of the Indian Law of arbitration that it allows the intervention of the Court in taking evidence. This Section signifies very impressive approach in matter of arbitration where an arbitral tribunal may take a Court’s assistance to get evidences as such through that court, according to Court’s process. Such a decision is final, without allowing any appeal. Following a request by the arbitration tribunal, the Chief Justice of Court can also issue orders for judicial delegation.

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150 Article 26 (2) of the Arbitration Act, 1996.
151 This is similar to Article 26 (2) of the UNCITRAL Model Law on International Commercial Arbitration.
153 Sub -Sections (1) and (3) are on the pattern of Article 27 of the Model Law whereas sub- Sections (2), (4) and (5) are based on the Arbitration Act, 1940.
Under Sub-Section (1) of Article 27 of the Arbitration Act, 1996, the tribunal as well as any party with the approval of the tribunal can apply to the competence Court for assistance in taking evidence. Under Section 43 of the repealed Arbitration Act, 1940, only the arbiter or umpire could apply and not a party.

The relevant ML provision that has inspired the Indian provision only vaguely mentions court assistance in taking evidence.\(^{154}\) By contrast, the English Arbitration Act, 1996 contains a more articulate provision, in this regard. It provides that “A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.”\(^{155}\) The permission of the tribunal or the disputants ‘agreement is needed for recourse to such procedures. The above provision is applicable, when the witness is in the UK, and when the arbitral proceedings are conducted in England, Wales or Northern Ireland.

Since, unlike court procedures, arbitration is meant to be free from formalities, the disputants may personally undertake the representation of their case, without seeking professional assistance. Nevertheless, a party can give the power of attorney to somebody else at various stages of arbitration. Such power must be given through special authorization, when it is required by the law. However, the power of attorney before the arbitration tribunal can usually be granted less formally, through written communications or even orally, while representation before the court should be notarized. The Indian Law does not require the representative to be a lawyer. In oral hearings, the disputants may be accompanied by legal counsels, who may be foreign citizens and not necessarily lawyers admitted to the bar.

The termination of the proceedings under Article 32 of the Arbitration Act, 1996 may also be the result of a decision by the tribunal, if both disputant parties agree to terminate the proceedings.\(^{156}\) Similarly, the proceedings shall stop, if the plaintiff abandons his claims, unless the tribunal decides not to do so, because the

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\(^{154}\) Article 27 of the UNCITRAL Model Law on International Commercial Arbitration.

\(^{155}\) Article 43 of the English Arbitration Act of 1996.

\(^{156}\) There was no such provision in the old arbitration act 1940 on the point as to when the arbitral proceedings shall be deemed to have been terminated.
defendant has a legitimate reason to continue the case until the proceedings are completed. Also, the proceedings are ended, if the tribunal comes to the conclusion that it is impossible or unnecessary to continue the proceedings. If the contract is based on certain contingency or impossibility in performance of contract has crept in as per Sections 32 to 36 and 56 of Indian Contract Act, 1872, the proceedings may be terminated.

Although not explicitly stated in the law, the arbiters may render their award after summary proceedings, when the respondent does not have an arguable and meritorious defence. Making a summary award, before full disclosure of documents, helps avoiding undue delay and expenses, in the absence of defences. The tribunal should conduct summary proceedings in such a way that the defendant cannot challenge the award in an action for setting it aside.

4.6.5 Suspension and Interruption of the Arbitration Proceedings

Neither the ML, nor does India allows the suspension of arbitral proceedings in certain circumstances set out in law. The arbitral proceedings are interrupted in the following cases: the death of one of the disputants, his loss of capacity, the commencement of proceedings for forgery, or the commencement of criminal proceedings for forgery or for other criminal offences. Any procedural action taken during the interruption period is void, and this period is not considered as part of the time limit for arbitration proceedings.

On the other hand, if an issue is raised that does not fall under the jurisdiction of the tribunal, or if a legal action is taken regarding the forgery of a document submitted to the tribunal or any other criminal offence, the arbitration proceedings can continue, on the condition that the tribunal comes to the conclusion that the outcome of the above legal action will not have any impact on the decision of the tribunal. However, if such an impact is predicted, the arbitration proceedings must be suspended, until a final decision about the alleged offence is made by the Court.

\[157\] Sub-Section 2 of Article 32 of the Arbitration Act, 1996. This Article is similar to Article 32 of the UNCITRAL Model Law on International Commercial Arbitration.
It is important to notice that, it is the arbitration tribunal that decides whether a matter outside its jurisdiction may affect its decision, and hence halt the proceedings or not. Therefore, not any matter outside the jurisdiction of the tribunal, but relating to the proceedings, can automatically interrupt the proceedings.

4.7 **Substantive Law of Arbitration**

The Act, 1996 provides that the disputants to an arbitration agreement can choose the law to be applied to their disputes by the arbiters. Under Article 7 of the Act, 1996, if the two disputants to the arbitration agree to make the legal relationship between those subject to the provisions of a model-format contract, an international treaties and convention or any other text, effect shall be given to the provisions of such text, including any provisions relating to arbitration which it contains.

Specifically regarding the substantive law of arbitration, Article 28(1) (i) of the Act, 1996 provides that the arbiters must apply to the subject-matter of the dispute the terms and conditions agreed upon by the disputant parties. Thus, “autonomy” provided under this sub-Section would promote ICA in India. In *Aurohill Global Commodities Ltd. v. Maharashtra Stc. Ltd.*, the arbiters not only applied the relevant provisions of Indian Law, but also when there was no such provision relating to the dispute, they referred to the jurisprudence of the Indian Court. Under the Indian Law, if the disputants have chosen the law of a country to be applied to resolve their disputes, it is the substantive rules of such law that apply to the dispute, and not its conflict of laws rules, unless the disputants agree otherwise. The SC in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, has observed Section 28 has been held to be imperative in nature. The legislative intent is that Indian nationals should not be permitted to derogate from Indian Law. That is a part of the public policy of the country.

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158 AIR 2007 SC 2706, (Indian kanoon)
159 Article 28 (1)(i), the Arbitration Act, 1996.
160 AIR 2008 SC 271, (Indian kanoon).
Therefore, under the Act, 1996, the disputants can make their disputes subject to foreign law. In this way, India follows England, in allowing the application of foreign laws on disputes referred to arbitration in the country, without being considered as a foreign arbitration. Authorizing the contracting disputants to stipulate for a foreign law to govern their agreement, on the condition that it is not contrary to public policy. It can be considered as a shortcoming of the Indian Law of arbitration that it does not stipulate a situation where the disputants’ choice of the applicable law is implicit.

In the absence of an agreement by the disputants on the applicable law to the substance of the dispute, the arbitration tribunal shall apply the law that it finds “very much relevant to the dispute.” When deciding on the substance of the dispute, the tribunal must take into consideration the terms of the agreement as well as the commercial customary laws which are relevant to the subject-matter of the dispute. The latter requirement can be interpreted as the need for the agreement to comply with the current trade customs and usages prevailing in the similar type of transactions. The Indian Law of contracts plays an important role in determining the proper law applicable to the contract, indicating the type of the contract, which can be the sale of goods or real property, the terms of employment, and ownership of intellectual property developed as part of a work for hire, and the like.

It is an important feature of the Indian Law of Arbitration that, following the ML, it allows the tribunal to decide *ex aequo et bono* or as *amiable compositeur* (its historical origins in French law, namely in Amicabilis Compositor of

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161 Article 28 (2) of the Arbitration Act, 1996. This is equivalent to Article 28 of the UNCITRAL Model Law on International Commercial Arbitration.

162 Article 28 (iii) of the Arbitration Act, 1996.

163 The words "*ex aequo et bono*" means decision founded on equitable principles of justice and good conscience without adhering to the strict rule of the court of law.

164 "Amiable compositeur" [Span.: "amigables componedores"] [Ital.: "compositori amichevoli"] [Ge.: "Schiedsrichter"] - Clauses in arbitration (infra) agreements allowing the arbitrators to act as "*amiables compositeurs*", permit the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law. The resulting arbitral awards are frequently based on equity (infra) or on the *lex mercatoria* (infra). The arbitrators are authorized, as "*amiables compositeurs*", to disregard legal technicalities and strict constructions which they would be required to apply in their decisions if the arbitration agreement contained no "*amiable compositeur*" clause. "*Amiable compositeur*" clauses in arbitration agreements are expressly permitted by art. 28(3) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (infra), as well as in both domestic and international
Common Law)\(^{165}\), and to facilitate conciliation between the disputants, if the disputants expressly authorize it to do so. Though, \textit{ex aequo et bono} have not been defined under sub Section (2) but, the disputants may tell the words to arbitral tribunal to do. The disputants are permitted to seek an amicable rout independently through arbitration, but cannot dictate against the public policy of India. In other words, if authorized, the tribunal may settle the dispute on the basis of equity, fairness and proportionality, without being restricted to the provisions laid down by the law.\(^{166}\) On such occasions, the tribunal can “\textit{take a lenient view of the legal rules, but cannot totally disregard them.}”\(^{167}\) This paves the way for choosing non-lawyer arbiters, who can bring their professional expertise and experience to arbitration, without strictly following the rules of law. This is important, because the law is developed by legislators who are not fully familiar with the subtle details of the business in question. Similar position is taken by English law.

An important misgiving about arbitration by \textit{amiable composition} is that, in some jurisdictions, it is sometimes confused with mediation or conciliation by a nominated third party. This is so particularly in the India, and even in those jurisdictions where the two settlement methods are defined and provided for separately. The wording of the Indian provision authorizing the arbiters to settle a dispute as \textit{amiable compositeur} reinforces the above mentioned confusion. It states that if the disputants expressly authorize the tribunal to reach conciliation between the disputants, the arbitration tribunal may resolve the dispute on the basis of equity and fairness, without being restricted to the applicable law. This makes arbitration procedures. See for example, the New Code of Civil Procedure (France), arts. 1474, 1495 and 1496, and the Québec Code of Civil Procedure, Art. 944.10. See also Art. 1054(2) of the Netherlands Arbitration Act; Art. 182 of the 1987 Swiss Law on Private International Law; Art. 28(1) of the 1993 Russian Law on International Commercial Arbitration; Art. 83(1), Part I, of the Italian Code of Civil Procedure; § 1051(1) of the German Code of Procedure; and the U.K. \textit{Arbitration Act, 1996}, c.23, sect. 46 (1) (b). In common law jurisdictions, conversely, “equity clauses” of any sort are often regarded as suspect. See Tetley, \textit{Int'l. C. of L.}, 1994; 160, 414; Tetley, \textit{"The General Maritime Law - The Lex Maritima"} (1994) 20 Syracuse J. Int. L. & Comm. 105-145; 137-138; reprinted in [1996] ETL 469-506 at pp. 499-500. See more detail in Tetley, William. "Glossary of Conflict of Laws | Tetley's Maritime & Admiralty Law" McGill university,(2011), <http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws/>. accessed date on (01/01/2014).


\(^{166}\) Article 28 (2) of the Arbitration Act, 1996.

similar to a conciliation process. However, as we know, there are fundamental differences between arbitration and conciliation. The least is that the award of arbiters acting as *amiable compositeur* is binding, whereas conciliators can only recommend a solution.

Hence, it is said that the Western concept of arbitration by *amiable composition* has not yet fully assimilated into Indian legal systems; and that the concept of equity, in Indian legal thinking, is not linked to adjudication but to mutual concessions. The aforementioned difficulties can be addressed by modification of the law and the expansion of doctrinal works.

### 4.8 Arbitral Awards

Arbitral proceedings are ended when an award is made by the arbitration tribunal. The arbitration tribunal, if consisted of more than one person, must make its award on the basis of the majority vote, unless otherwise is agreed by the disputants.\(^{168}\) Hence, it is conceivable that the disputant parties agree that the award must be made unanimously, or by the chairman of the tribunal. A possibility, about which Indian Law is silent, is the cases where, despite the disputant parties’ agreement, a majority vote is not achieved, for example, when each arbiter gives a different vote. The law should provide appropriate arrangements for such a possibility. One way out of this difficulty can be providing the presiding arbiter with the right to make the final decision. Although, there is no umpire system under the Act of 1996 but the Apex Court in *Reserve Bank Of India v. S.S. Investment Ltd.*, \(^{169}\) considered the question when two arbiters have given different arbitral awards, thus disagreeing with each other and consequently, appointment of arbiter sought for making reference, which was challenged by one of the arbiters. The Court has held that disagreement between two arbiters and their action i.e., allowing the time limit to expire without making an arbitral award, clearly shows their disagreement to each other.

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\(^{168}\) Article 29 (1), Arbitration Act, 1996. This is equivalent to Article 29 of the UNCITRAL Model Law on International Commercial Arbitration, though in the latter it is also stipulated that the issues of procedure may be settled by a presiding arbitrator, if so authorized by the disputant parties or all members of the tribunal.

\(^{169}\) AIR1992 (2) SC 391, (Indian kanoon).
other, hence the appointment of umpire was justified and umpire’s entering upon the reference was not illegal.¹⁷⁰

The Act of 1996 requires that the arbitration award or a part of it cannot be published without the approval of the disputant parties. This is because arbitration is a confidential method of dispute settlement. However, when an arbitration case is brought before the court, whether for enforcement or setting aside, it may become public and available for comment and citation.

4.8.1 Binding Awards, without the Possibility of Appeal

The binding nature of the arbitral award is fundamental in the concept of arbitration. The awards passed in accordance with the provisions of the Act of 1996 shall not be subject to appeal in any manner prescribed by law. Other decisions of the tribunal are also not subject to appeal. For instance, under Article16(5) of the Act of 1996, there is no right of appeal to the tribunal against its decision regarding objections to its jurisdiction, or the non-existence, invalidity or the irrelevancy of the arbitration agreement to the dispute. This indicates not only that there cannot be any appeal against such awards by recourse to arbitration, but also that it is not possible to resort to the court to appeal against these awards. Although, as we will see later, it is possible to request a Court action for setting aside the award, such a legal action cannot be considered as an appeal. This is because errors of fact and law are not usually investigated, when a request for vacating an award is dealt with. Only procedural irregularities or substantive problems involving obvious and grave mistakes may lead to the nullity of an award. Although there cannot be an appeal against an award, it cannot be ruled out that a dispute be referred to arbitration again, for instance if the award is annulled.

Practically, Modern legal regimes tend to deny the possibility of appeal against an arbitral award. Nevertheless, under certain circumstances, appeal is possible in India, within a fixed period of time, and before the enforcement of the award by the Court. For instance, appeal is allowed, unless the disputants have an agreement to the contrary or if the award is a result of amiable composition, or compromise, there will be no possibility of appeal.

¹⁷⁰ Ibid.
4.8.2 Interim Measures

The availability and handling of Interim Measures in ICA has become one of the main subjects in developing a legal setup for arbitration\(^1\) and it can have a substantial effect on the final award in international arbitration, especially when subject matters relating to protection of evidence and assets arise before or during the course of the proceedings.\(^2\)

The ML, 1985 in Article 17(2) clearly defines “Interim Measures” as;

“An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.”\(^3\)

The Indian Law, unlike the ML (1985), expressly permits the tribunal to make interim and partial awards. Under Article 31(6) of The Act of 1996, the arbitration tribunal may issue provisional decisions, or decide on part of the claims, before making its final award. Partial awards dispose of some of the main matters, and usually are made on the basis of the urgency of some issues. For instance, when a contractor has completed his works, but the employer refuses to issue the certificate of completion until the final award is made. In such a case, the tribunal may order the issuance of the certificate. Interlocutory awards, on the other hand,


\(^{3}\) Articles 17(2), the UNCITRAL Model Law on International Commercial Arbitration.
deal with procedural issues such as the non-arbitrability of the dispute, the invalidity of the arbitration agreement, and lack of jurisdiction of the tribunal. As seen before, interlocutory awards can be made before, or jointly with, the final award. Interlocutory awards do not require enforcement, though partial awards may do so. The Article is silent about enforceability of such awards, which is probably left to the judicial authorities to decide upon. Those partial awards that finally resolve a matter should be enforceable.

The Act of 1996 also stipulates another type of interim measures that are mainly intended to protect the subject-matter of the dispute. Under Article 17(1) of the present Arbitration Act, 1996, upon the request of a party, the arbitration tribunal may issue orders to any of them to take suitable temporary or precautionary measures necessitated by the nature of the dispute. The tribunal may also order the submission of an adequate security to cover the cost of the measures to be taken by its orders. Such a pragmatic measure secures compliance with the tribunal’s protective orders. Both types of arbitral orders are allowed on the condition that the disputants already have an agreement permitting the tribunal to issue such orders.¹⁷⁴ There is no difference between this Article and its equivalent under the ML, 1985.¹⁷⁵

Only certain urgent types of interim measures can be ordered by the tribunal, such as the sale of perishable goods, the destruction of food harmful to public health, and the suspension of the calling of guarantees. A tribunal is not competent to order measures like placing a building under sequestration, or imposing conservatory attachment on assets or disputed sums of money, due to the nature of such measures. The emphasis of Article 17(1) of the Act of 1996 that the interim award must be “necessary in respect of subject matter of the dispute” is susceptible to a restrictive interpretation according to which only provisional measures that are directly related to the subject-matter of the dispute can be permitted. Hence, for instance, freezing of assets that are not directly the subject-matter of the dispute may not be allowed. The SC in M.D. Army Welfare Housing Organization v. Sumangal Services (P) Ltd.¹⁷⁶ held that the power conferred on the arbiter under Section 17 is a limited one. It

¹⁷⁴ Article17(1), Arbitration Act,1996.
¹⁷⁵ Article 17, UNCITRAL Model Law.
¹⁷⁶ AIR 2004 SC 1344, (Indian kanoon).
cannot issue any direction which would go beyond the reference or the arbitration agreement. The interim order made by the arbitral tribunal under Section 17 must relate to the protection of subject matter of dispute and the order may addressed only to a party to the arbitration. It cannot be addressed to other disputants. But no power has been conferred on the arbitral tribunal under this Section to enforce its order nor does it provide for judicial enforcement thereof.

Neither the Indian Law, nor the ML, does explicitly provide for the termination or modification of interim measures, but there is no reason to assume that they do not allow such decisions. A more important issue is that they do not provide for the obligation of the party requesting the interim award to inform the tribunal of any material change to the circumstances requiring the measure. This may be considered as a shortcoming of both pieces of law.177

It is significant to note that the Act of 1996 has not provided for any mechanism for execution of order made by the arbitral tribunal under Section 17, neither in the Section itself nor in any other Section of the Act. Perhaps, this is a serious lacuna which has escaped attention of the framers of the present Act, 1996. However, certain States notably Canada and Scotland have specifically provided in their arbitration law that an order of the arbitral tribunal regarding interim measures shall take the form of an arbitral award which would be enforceable just like an award made by the arbitral tribunal.178

In the lack of any particular mechanism for enforceability of direction of arbitral tribunal regarding interim measures pertaining to protection of the subject matter of the dispute and providing adequate security in connection thereof, the provision contained in Section 17 appears to be a “toothless tiger” and totally depends upon the morality of the disputants. It is heartening to note that the proposed Arbitration (Amendment) Bill, 2003 seeks to remove this lacuna by


introducing two new Section 24 (A)\textsuperscript{179} and 24 (B)\textsuperscript{180} in the Act in order to provide on efficacious mechanism of imparting interim measures.\textsuperscript{181}

If the result of the interim measures is to be ensured the following suggestions by Dr S.S. Misra may be implemented by adding them through amendment of Section 17.

I. “The interim order may be treated at par the ‘award’ whose enforceability is ensured as a Court-decree.

II. In case of non-compliance of the interim measures ordered by the arbitral tribunal, it should have the power to order:
   a) Striking out the pleading,
   b) Imposition of costs including examplary costs,
   c) Ignoring of material documents,
   d) Ignoring of material documents,
   e) Drawing of adverse inferences from the evidences produced before the arbitral tribunal

\textsuperscript{179} “24A. (1) If a party fails, without showing sufficient cause, to comply with a directions made under Section 17, or time schedule determined under section 23 or orders passed under section 24, as the case may be, the arbitral tribunal may make a peremptory order to the same effect, prescribing such time for compliance as it considers appropriate.

(2) If a claimant fails to comply with a peremptory order made under sub-section (1) in relation to a direction specified in clause (c) of section 17, the arbitral tribunal may dismiss his claim and make an award accordingly.

(3) If a party fails to comply with any peremptory order made under sub-section (1), other than the peremptory order in relation to a direction specified in clause (c) of section 17, then the arbitral tribunal may— (a) make such order as it thinks fit as to payment of costs of the arbitral proceedings incurred in consequence of the non-compliance; (b) direct that the party in default shall not be entitled to rely upon any allegations in his pleadings or upon any material which was the subject-matter of the order; (c) draw such adverse inference from the act of non-compliance as the circumstances may justify; (d) Proceed to make an award on the basis of such materials as have been provided to it, without prejudice to any action that may be taken under section 25.”

\textsuperscript{180} “24 B.(1) Without prejudice to the power of the Court under section 9, the Court may, on an application made to it by a party, make an order requiring the party to whom the order of the arbitral tribunal was directed, to comply with the peremptory orders of the arbitral tribunal made under sub-section (1) of section 24A. (2) An application under sub-section (1) may be made by— (a) the arbitral tribunal, after giving notice to the parties; or (b) a party to the arbitral proceedings with the permission of the arbitral tribunal, after giving notice to the other parties. 3) No order shall be made by the Court under sub-section (1), unless it is satisfied that the party to whom the order of the arbitral tribunal was directed, has failed to comply with it within the time fixed in the order of the arbitral tribunal or, if no time was fixed, within a reasonable time. (4) Any order made by the Court under sub-section (1) shall be subject to such orders, if any, as may be made by the Court on appeal under clause (b) of sub-section (2) of section 37.”

\textsuperscript{181} N.V. Paranjape., 2011, op.cit., 158.
III. As a last resort the arbitral tribunal may be authorized to prepare the best for approaching the court by issuing a peremptory order on the line of interim measures, and the ball of enforcement as such to be placed in the Courtyard of the Court.”

4.8.3 Settlement during Proceedings

Since settlement of the dispute cheaply and speedily is the ideal of the ML, 1985 and the main object of the present Arbitration Act, 1996, Section 30 provides and encourages mutual settlement of dispute by disputants before the arbitral tribunal. The legislator with this section gives this position to tribunal that to the extent possible it should encourage the disputants to come to a voluntary settlement and for this purpose to use arbitration. This is a developmental and new specific provision of the Act of 1996, in arbitration law.

Article 30 of the Act of 1996 provides that if, during arbitral proceedings, the disputants reach a settlement ending their dispute, they may submit to the tribunal the terms of their settlement agreement. In such a case, the tribunal passes a decision that mentions the terms of the settlement, and terminates the proceedings. The decision containing settlement will have the same effect as an award has, regarding enforcement. But where only certain portion of dispute has been settled through the compromise between the disputant parties, the reference in respect of unsettled disputes would continue to be arbitrated unhindered.

Like the ML, Indian Law makes the issuance of an award containing the settlement reached by the disputants subject to the approval of the tribunal. The arbitral tribunal is empowered to reject the request made by the disputants for settlement of their dispute, if the circumstances are opposed to the public policy in India, fraud and unfair terms of settlement and the like. The Article provides, an agreed solution can be made into an award only after the approval by the tribunal, its legal effect can be weightier in later stages; and also the legal responsibility of the tribunal will continue.

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183 Article 30, the UNCITRAL Model Law on International Commercial Arbitration.
The submission of a settlement in the form of an enforceable award precludes a party from embarking on a dilatory tactic by entering into a settlement that cannot be enforced. Whereas the Indian Law expressly provides that the award made on agreed terms must have the same formal requirements that a normal award has, Indian Law is also explicit in this regard. The Apex Court in *Harendra H. Mehta v. Muksh H. Mehta*,\(^{184}\) observed that during pendency of arbitral proceeding disputants entered into settlement, yet wanting arbiter to pass award in terms of settlement. It has been held that settlement arrived at between the disputants did not have effect of revoking arbitration agreement. It cannot be said that award passed was not an arbitral award though a consent award. However, a compromise reach between the disputants cannot be considered as an arbitral award by itself, except when the arbitral tribunal makes an award on the basis of that compromise.\(^{185}\)

### 4.8.4 Formal Features of an Award

An arbitral award must be written and signed by the arbiters, if not by all, then at least by the majority of the arbiters. For members who have not signed, reasons thereof should be recorded so that partiality or deprivation from participation may revealed.\(^{186}\) The Apex Court in *Dwarka Das v. India Engineering*,\(^{187}\) observed that an arbitral award must not merely be in writing but it should also be duly signed by the arbiter/s. If the reasons for omission of signature of other arbiters are mentioned in the award, an arbitral award signed by majority arbiters would also be valid. Hence, the possibility of the refusal by some arbiters to sign the award is envisaged. It is implicit in the above provision that the dissentient arbiters are permitted to mention their dissenting opinion, which would be annexed to the award. However, it cannot be concluded that such an opinion forms an integral part of the award. Such an opinion might be helpful when a court considers the recognition and enforcement of the arbitral award or, more importantly, its vacation. However, the question might arise as to what would happen if the dissentient arbiters refuse to state the reasons for not signing the award. In such a


\(^{185}\) Kapila Textiles v. Madhav, AIR 1963 Mys. 39, (Indian kanoon).

\(^{186}\) Article31 (1) & (2), the Arbitration Act, 1996.

\(^{187}\) AIR 1972 SC 1538, (Indian kanoon).
case, it seems that the award would be invalid, unless the other arbiters state the reason for the dissentient arbiters’ refusal, which in turn seems inappropriate.

The Arbitration Act, 1996 also requires that the award must contain the reasoning behind the decision, in support of determination of the liability/non-liability, unless the disputants have agreed otherwise, or the law applicable to the proceedings does not require so. The Apex Court in *Tamil Nadu Electricity Board v. M/S. Bridge Tunnel Constructions & Others* observed that the arbitral award should state the reason 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 of the Arbitration Act, 1996.

In other words, an award may not contain the reasons for making the decision. Mentioning the reasons for making the award is important when a court considers setting it aside. Hence, this provision of Indian Law has been criticized for not taking seriously such a need. It has been argued that party autonomy should not apply to the methods of making the award and the conditions of its validity. Particularly when the disputants do not authorize the arbiters to act as *amicable compositeurs*, but to make an award according to the law, it should be crystal clear on which grounds the arbiters have based their award. The above provision of Indian law may be intended to protect those awards made outside India and under Indian Law that, because of the prevailing law at the seat of arbitration, might not mention the reasons for making the award.

The Arbitration Act, 1996 is much more precise than the ML, 1985 regarding the formal features of the award if add a provision that the award must contain the names and addresses of the disputants and the arbiters, the latter’s nationality and capacity, a copy of the arbitration agreement, the summary of the claims, the statements and documents, the summary of the award, the date and place of making the award, and, if required, the grounds of the award. The tribunal must deliver a copy of the award duly signed to each party. The shortcoming of Indian Law even

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188 The old Arbitration Act, 1940 did not require arbiters to give reasons in support of arbitral award.
189 Article 31 (3), the Arbitration Act, 1996.
190 AIR 1997 SC 1376, (Indian kanoon).
the ML, 1985 is that is not the deadline set by the former to deliver a copy of the award to the disputants.\textsuperscript{191}

The Act of 1996 provides that an arbitral award is like a decree of a court, it is directly enforceable without the necessity of a further order of the court for its enforcement. Since the decrees, judgments and orders of courts are exempted from being registered under Section 17(2) (vi) of the Registration Act, 1908,\textsuperscript{192} an award made by tribunal should also be exempt from registration.

The Act, however, does not specifically mention whether an award is exempt from registration or not. The present Section also does not clarify whether an award has to be written on a stamp paper or it may simply be written on an ordinary plain paper and adhesively stamped.\textsuperscript{193} In 2003, the Andhra Pradesh High Court in \textit{Ch.Kodandapani & Others v. Kedidela Rajamouli} case\textsuperscript{194} has been held that unstamped and unregistered arbitration award is not admissible in evidence for pronouncing judgment in accordance with it. The aforesaid Court further held that arbitral award creating rights in immovable property by extending less for six years from the date of arbitral award being unregistered cannot be relied on.

It may be stated that the earlier Arbitration Act of 1940 required that after an award is made by arbitral tribunal an order of the court was necessary for enforcement as a decree of the Court. But now since this requirement is dispensed with the Act of 1996 because of the fact that an award has force of a decree and directly enforceable without the necessity of Court’s order, the earlier case law on this point has obviously become redundant. However, the SC in a number of cases has held that even under the earlier arbitration Act of 1940, an arbitral award which does not of its own force create or extinguish any right, title or interest in immovable property need not be registered.\textsuperscript{195}

\textsuperscript{191} Compare the above provision of the Indian law with Article 31(4), the UNCITRAL Model Law on International Commercial Arbitration.

\textsuperscript{192} Section 17(2) (vi) of the Registration Act 1908 “(vi) any decree or order of a court 13[except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding;]”

\textsuperscript{193} N.V.Paranjape. 2011, op.cit., 192.

\textsuperscript{194} AIR 2003 SC 1065, (Indian kanoon).

In *S.V.Chandra v. S.V.Sivaliga*,\(^\text{196}\) the SC observed that an award effecting mere division of partnership property on dissolution does not require registration as it creates no new rights. But where the award makes an allotment of the partnership shares, it clearly creates an absolute interest in the property; hence it has to be duly registered.

There is no time limit for registering the arbitral award, and it is up to the winning party to do so in his own time. Such registration, however, is crucial if the enforcement of the award by court becomes necessary due to the refusal of the losing party to comply voluntarily with the award.

### 4.8.5 Interpretation, Correction and Additional Awards

The provision relating to correction of errors in the award also existed in the earlier Arbitration Act of 1940, but there was no provision on interpretation of award. Sub-section (2) and (4) of Section 31 of the Act, 1996 clearly postulates that the arbiters have the jurisdiction to interpret their award and, if necessary for that purpose, they may even amend their core arbitral award. Therefore, it is an innovative provision in the present Act of 1996 which is based on the analogy of interpretation of international commercial arbitral awards\(^\text{197}\) for removal of doubts and ambiguities in the arbitral award to saving the disputants from court intervention and in result saving of time and money which is spent in court proceedings.

Under the Act, 1996, however, each of the disputants can request the arbitration tribunal to interpret its award, if he considers it ambiguous. Article 33 of the present Act, 1996 provides that such a request must be made within thirty (30) days of the receipt of the award. Before making his request, this party must inform the other party of his intention to make the request. The interpretation is considered as the complementary and integral part of the award. The arbitration tribunal is obliged to provide its interpretation within thirty days (one month) of receiving the request. This period can be extended for another thirty days (one month), if necessary.

\(^{196}\) (1993) 1 Arb LR 386 (SC), (Indian kanoon).

Similarly, under Article 33(1) (a) of the Act, 1996, if there is any computation or any electrical, typographical, mathematical or any other errors in the award, upon the request of a party or on its own initiative, the tribunal must correct the error. Such corrections must be made within thirty (30) days after the award is made or a request is made by a party. If necessary, the period can be extended for another thirty days. The correction may be carried out without deliberations, pleading or hearing.

Article 33 of the Act, 1996 provides that, upon the expiry of the arbitration period and within thirty days of the receipt of the award, a party may request the tribunal to make an additional award regarding the claims raised in the proceedings that are not dealt with in the award. The other party must be notified before making such a request.\textsuperscript{198} The arbitral tribunal must make the additional award in sixty days (two months), or in ninety days (three months), if an extension is necessary.\textsuperscript{199} Although not provided for in the Indian Law, it can be said that after the expiry of the period for the tribunal to interpret the award, to make correction to it, or to issue an additional award, the court that originally had jurisdiction over the dispute may provide the interpretation, correction or additional awards.

What distinguishes Indian Law from the ML, in this regard, is that while the latter allows the disputants to agree upon a time limit for making a request for interpretation, correction or additional awards,\textsuperscript{200} the former fixes the thirty days (one month) limit for a request for interpretation or an additional award, and does not set a limit for a party to request correction, though such correction, if made on the tribunal’s own initiative, must be made within thirty days of the issuance of the award.

\subsection*{4.9 Arbitration Costs}

Sub -Section 8 of Article 31 of the Arbitration Act, 1996 which is replaces Clause 8 of the First Schedule of repealed Act of 1940,\textsuperscript{201} empowers the arbiter to

\begin{itemize}
\item[\textsuperscript{198}] Article 33(4) of the Arbitration Act, 1996.
\item[\textsuperscript{199}] Article 33(6) of the Arbitration Act, 1996.
\item[\textsuperscript{200}] See Articles 33(1) & 33(2) of the UNCITRAL Model Law on International Commercial Arbitration.
\item[\textsuperscript{201}] The cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and
\end{itemize}
determine and arbitral award costs of arbitration including the fees and expenses of arbiters and witnesses, legal administering arbitration and other fees incurred in connection with the arbitral proceedings and the arbitral award. In Mohd.Akbar v. Attar Singh\textsuperscript{202} case the Privy Council emphasized that arbitral award of costs is at the discretion of the arbitral tribunal.

The Government of India, in the Rules of the Indian Council of Arbitration contains elaborate provisions relating to fees and expenses incurred for arbitration proceedings and award. Rules 28\textsuperscript{203} and 29 \textsuperscript{204} of the Indian Council of Arbitration provide that clearly incidental costs and charges of reference and arbitral award and the like shall be at discretion of arbitral tribunal. The scale of fees chargeable for administrative work and arbiter’s fees is given in Rule 30\textsuperscript{205}.

\textsuperscript{202} AIR 1945 PC 170, (Indian kanoon).

\textsuperscript{203} The Registrar may require the Parties before passing the case on to the arbitrators under Rule 38, to deposit in advance in one or more installments such sums of money as he deems necessary to defray expenses of the arbitration including the administrative charges and arbitrator’s fee. As a general rule, the deposits shall be called for in equal shares from the Claimant(s) and the Respondent(s). The arbitral tribunal may, during the course of the arbitration proceedings or in the arbitration award, require further sums to be deposited by the Parties or any one of them to meet the expenses of the arbitration. When one of the Parties neglects or refuses to make the deposit, the Registrar or the arbitral tribunal, as the case may be, may require such deposit whether in relation to a claim or a counter-claim, to be made by the other Party to the dispute (Claimant or Respondent as the case may be). Should the whole or part of the deposit be not made by the Parties or any one of them, the Registrar shall inform the Parties or the Party concerned that the claim or counterclaim, as the case may be, will not be the subject matter of the reference. The arbitral tribunal shall proceed only in respect of those claims or counter-claims for which the deposit has been duly paid to the Council and otherwise may order the suspension or termination of the arbitral proceedings. All deposits towards costs and expenses shall be made with the Council and no payment shall be released to the arbitrators directly by the parties. The deposit made shall be taken into account by the arbitral tribunal in apportioning the cost while making the award. Any deposit made in excess shall be refunded to such of parties as the arbitral tribunal may direct. The Council shall have a lien for the arbitral award on any unpaid cost of the arbitration.

\textsuperscript{204} The arbitral tribunal shall be entitled to allow fees and expenses of witnesses, expenses connected with the selection and carriage of sample and examination of goods, Licensed Measure’s Department charges, conveyance, hire, cost of legal or technical advice or proceedings in respect of any matter arising out of the arbitration incurred by the arbitral tribunal, and any other incidental expenses and charges in connection with or arising out of the reference or award as the arbitral tribunal shall, in its absolute discretion, think fit.

\textsuperscript{205} The costs of the reference and the award including charges, fees and other expenses shall be in the discretion of the arbitral tribunal, which may direct to and by whom, and in what proportion, such charges, fees and other expenses and any part thereof shall be borne and paid, and may tax and settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between solicitor and client. In the event, any administrative fees and expenses are due to the Council, the arbitral tribunal may award them in favour of the Council.

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Where the disputants fail to agree as to the arbiter’s costs, it would be misconduct on the part of an arbiter to conclude an agreement as to his fees with one party only. The court may at the request of a party remit the arbitral award back to the arbiter for reconsideration if his decision as to cost is arbitrary. In case Blue Horizon Shipping Co. v. E.D. & F. Man Ltd., the ship had suffered damage at two berthing. The umpire found that only on one of these occasions the master was at fault and the ship-owner was entitled to recover for that but not for other. As to costs he decided that each party has to bear his own costs because there was only partial success. The case was sending back for reconsideration because the appointment of costs was not in accordance with the established principles.

There is no regulated fee structure for arbiters in an Ad hoc arbitration. In Union of India v. Singh Builders Syndicate case, the SC has held that it is necessary to find an urgent solution for the problem to save arbitration from the arbitration cost in an Ad hoc arbitration. In practice, the arbiter’s fees are decided by the arbiter, with the consent of the disputant parties. The fee varies from approximately INR 1,000.00 to INR 50,000.00 per hearing for an arbiter, depending upon the professional standing of the arbitrator and the size of the claim. The number of hearings required and the cost of the arbitral venue also vary widely.

In contrast, Institutional arbitration has provided a solution, as the Arbitrators’ fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. Most famous institutional arbitration bodies in India, such as the Construction Industry Arbitration Council or the Indian Council of Arbitration, have their own schedules of arbiters’ fees and administrative fees, based on the amounts claimed. They also charge a nominal, non-refundable registration fee on the basis of the claim amount including determined interest in each case, as under:

206 1979(1)Lloyd’s Rep 475.
<table>
<thead>
<tr>
<th>Name of institution</th>
<th>Amount in dispute</th>
<th>Arbiter’s fee</th>
<th>Administrative fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Indian Council of Arbitration</td>
<td>up to INR 10,000,000.00</td>
<td>from INR 30,000.00 to INR 315,000.00</td>
<td>from INR 15,000.00 to INR 160,000.00</td>
</tr>
<tr>
<td>The Construction Industry Arbitration Council</td>
<td>up to INR 100,000,000.00</td>
<td>from INR 5,000.00 to INR 260,000.00</td>
<td>from INR 2,750.00 to INR 62,000.00</td>
</tr>
</tbody>
</table>

Table 4.1: Arbiters’ fees and administrative fees in two famous institutional arbitration bodies in India

4.10 Formal Features of Arbitration

We have already examined formal features necessary to be observed in various stages of arbitration. In this Section, these formal requirements and those that are not yet considered are discussed together.

Concerning written communication between the disputants and others involved in the arbitration procedure, Article 3 of the Act, 1996 provides that any letter or notice must be delivered to the addressee personally or to his place of business or domicile or to his postal address, unless otherwise has been agreed by the disputants. In case that none of these addresses are found, such a written communication is deemed to have been received, if sent by registered mail to the addressee’s last place of business, domicile or postal address.\(^\text{209}\)

The arbitration agreement must be in writing, although it can be exchanged through any means of communication.\(^\text{210}\) An arbiter’s acceptance of his position must also be in writing.\(^\text{211}\) An application to challenge the appointment of an arbiter, too,

\(^\text{209}\) This is similar to Article 3(1)(a) of the UNCITRAL Model Law on International Commercial Arbitration.

\(^\text{210}\) Article 7, the Arbitration Act, 1996.

\(^\text{211}\) Article 12, the Arbitration Act, 1996.
must be in writing.\textsuperscript{212} Further, statements of claim and defence submitted by the disputants to the tribunal must be in writing.\textsuperscript{213}

The arbitral award must be written and signed by the arbiters, if not by all, then at least by the majority of the arbiters, stating the reason for not containing the signatures of the other arbiters. It must contain the reasoning for making the decision, unless the disputants have agreed otherwise, or not required by the applicable procedural law. The award must contain the names and addresses of the disputants and the arbiters, the arbiters’ capacity and nationality, the text of arbitration clause, the summary of the claims, the statements and documents, the summary of the award, and the date and place of making the award.\textsuperscript{214}

A pattern can be recognized concerning the formal requirements at various stages of arbitration, under Indian Law, and that is the emphasis on writing as the way of recording events and evidence and communicating between all those involved. Although most arbitration legal regimes in various States require writing as a method of making the arbitral agreement and the award, Indian Law is more persistent, and requires such a method in some other stages of arbitration. This can be attributed to the influence of English Law on the Indian Law of Arbitration.

4.11 Conclusion

In India, there has been a conscious attempt to revise those provisions and customary rules that hinder arbitration, or to find some ways of reconciling those rules with the requirements of modern arbitration. The Indian Law of arbitration has more and more become aligned with the internationally accepted standards of arbitration, as it is heavily influenced by the ML, 1985. It has also become more and more regulated and codified. More importantly, it has become more reliable and facilitative of arbitration. International arbitration institutions have also been established in India such as the London Court of International Arbitration, though mainly domestic, rather than international disputes, are referred to them.

\textsuperscript{212} Article 13, the Arbitration Act, 1996.
\textsuperscript{213} Article 23, the Arbitration Act, 1996.
\textsuperscript{214} Article 31, the Arbitration Act, 1996.
International arbitration, particularly in commercial disputes, is recognized, under the present Indian Law of arbitration. Broad definition of ICA, in India, facilitates arbitration in various areas of international business, investment, development and technology transfer. However, differences between domestic and international arbitration, with a view to providing a more favourable environment for international arbitration, are not seriously taken into account.

There has been a tendency towards strengthening the contractual features of arbitration and to make it more independent of Indian judicial system, in order to attract the confidence of foreign disputants to arbitration. At the same time, there has been an attempt to protect such contractual agreements through the legal system, for instance, by allowing court intervention on certain occasions, which will be elaborated in the next Chapter. Nevertheless, it can be said that the court, and specifically the Chief Justice of the competent court, is given too much power, particularly when a disagreement between the disputants impedes the arbitration procedure. This might be interpreted as the residual of the approach towards judicialisation of arbitration in India, and may weaken the confidence of a foreign party in Indian arbitration. Under Indian Law, formal requirements of arbitral agreements and awards are much more detailed than they are under many other legal systems and particularly the ML; and this might not be regarded as favourable to international arbitration.