5.1 Introduction

Indian Law of arbitration originates from the contractual obligations made through arbitration agreements seriously; and, so far as possible, it tries to limit court intervention in cases where there are arbitration agreements. The minimize the judicial intervention of Courts, the policy of the Arbitration Act, 1996 has been to make the arbitral proceedings itself self-sufficient, result oriented, cheap and popular among the business community so that it may utilize the mode of arbitration in settling their disputes instead of knocking the doors of the Courts. Nevertheless, given that arbitral awards are binding and enforceable, arbitration has some judicial features that need to be taken into account. Admittedly it is a difficult task to strike a balance between judicial and contractual features of arbitration; and there has been an attempt by the Indian legislative to follow internationally established patterns in this regard. In this Chapter, four categories of Court interventions are discussed:

a) Referring to arbitration a dispute about which there is an arbitration agreement, when an action is made to bring the dispute before the court;

b) Court competence in the process of arbitration;

c) The possibility of setting aside an award by the Court; and

d) Finally, the role of the court in the enforcement of an award.

The interference of the judicial system is particularly crucial in considering the vacation and enforcement of an award, where the ultimate upshot of the arbitration process is at stake. As it is said, enforcement of the award is “the moment of truth” for arbitration.¹ Hence, it is important to assess the rules on setting aside and enforcing awards by the Indian Court, to see to what extent they converge with, or diverge from, internationally accepted standards and attract the confidence of

foreign or even Indian parties. In this Chapter, powers of the Indian court with regard to arbitration are discussed. First the inadmissibility before the court of a dispute about which there is an arbitration agreement, and then the court’s competences during the arbitration process are examined. In the next Section, the issue of setting aside an arbitral award, as it is provided for under Chapter VII of the Arbitration Act of 1996, is explored in some detail. The last Section, which is on the crucial issue of enforcement, begins by examining the background to enforcement of awards in India and general provisions of the existing Indian Law. Then, the procedure for enforcement of awards is discussed. It is followed by exploring grounds for refusing enforcement of arbitral awards in India. Chapter VII of the Arbitration Act of 1996 governs enforcement of awards made in India, whether international or domestic, as well as those made outside India but under Indian Law. Enforcement of foreign arbitral awards is discussed in the next Chapter. Finally, the important issue of public policy under Indian Law, which plays an important role in vacation and non-enforcement of arbitral awards, is considered in this Chapter.

5.2 Inadmissibility of a Case about which there is an Arbitration Agreement

If any disputant to an arbitration agreement brings before a judicial authority the subject-matter covered by the agreement, the other disputant may apply for stay of the suit and for order of reference to arbitration. Under Section 34 of the Arbitration Act, 1940, the competence Court could stay such proceedings if it found that there was no sufficient reason(s) why the subject-matter should not be referred in accordance with the parties’ agreement. But now under the Arbitration Act, 1996 in mandatory form of Section 27, the Court is under an obligatory to refer the disputants to arbitration.

2 Article 34, the Arbitration Act of 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.

3 Article 27(5), the Arbitration Act of 1996 reads as; -. “Power to refer parties to arbitration where there is an arbitration agreement. - (1) A judicial authority before which an action is brought in a
Given that Indian Law recognizes arbitration agreements if is contained in any condition of Section 7 the Act of 1996 as binding, if there is an arbitration agreement regarding a dispute, it will be inadmissible before the court. Article 8(1) of the Arbitration Act of 1996 provides that the court dismisses a suit that is filed regarding a dispute about which there is an arbitration agreement, provided that the defendant raises his objection to the admissibility of the case, before submitting any defence on the merit of the case. Moreover, filing a suit in respect of a dispute about which there is an arbitration agreement does not prevent the commencement or continuation of the arbitration proceedings or the passing of an award.\(^4\) Although this provision is about cases where the Indian Law of arbitration is applicable, given India’s accession to the New York Convention, 1958 (the NYC, 1958), Indian courts must do the same in cases where Indian Law of arbitration is not applicable, but the Convention is.

When an action is taken to bring a dispute about which there is an arbitration agreement before the court, it is crucial that one of the parties, and presumably the defendant, request the court to refer the dispute to arbitration. The Supreme Court (SC) in the case of *Sukanya Holding(P) Ltd. v. Jayesh H. Pandya & Other*,\(^5\) has made it clear that the word “Matter” used in Section 8 refer to the entire subject matter of the suit which relates to arbitration agreement. The SC also in *Bharat Sewa Sansthan v. U.P. Electronic Corporaton Ltd.*,\(^6\) has held that before a Court entertains application under Section 8 of the Arbitration Act, 1996, is has to determine on the basis of available evidence that there exists an arbitration agreement between the disputants. A similar view has been expressed by the Calcutta High Court in *India Pvt. Ltd. v. Ruhul Viniog Ltd. & another*,\(^7\) said that the language of Section 8 being pre-emptory. It is, therefore, obligatory for the court to

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\(^4\) Article 8 (1), the Arbitration Act of 1996.
\(^5\) AIR 2003 SC 2252, (Indian kanoon).
\(^6\) AIR 2007SC 2961, (Indian kanoon).
\(^7\) AIR 2003 SC 2881, (Indian kanoon).
refer the disputants to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising there from.

There is a same approach where the dispute was covered by the arbitration clause. The SC in *Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens Ltd.*,⁸ has observed that if in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbiter. In the instance case the existence of an arbitral clause in the agreement is accepted by both of the disputants as also by the Court. Therefore, in view of mandatory of language of Section 8 of the Arbitration Act, 1996, the Court by itself cannot refer a dispute about which there is an arbitration agreement to arbitration or a clause for arbitration. However, if the parties explicitly or implicitly did not object to a dispute being considered by the court, they cannot object to the Court and request arbitration, when the substantive part of the dispute is considered. All other States which on the pattern of Article 8 of the Model Law, 1985 (the ML, 1985) states follow the same rule about the inadmissibility of a case about which there is an arbitration agreement or arbitral clause.

The SC in *Sukanya Holding (P) Ltd. v. Jayesh H. Pandya & Other*,⁹ has found some major lacunae in Section 8 of the Arbitration Act, 1996 which is an emergent need of reformulating Indian law in this regard as follows:-

a) There is no provision in the Arbitration Act, 1996 for bifurcating the suit into two parts, one to be referred to arbitration for adjudication and the other to be decided by the Civil Court.

b) There is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement.

c) There is no provision in the Arbitration Act, 1996 that when the subject-matter of the suit includes subject-matter of arbitration agreement as well as other disputes, the matter is required to be referred to arbitration.

d) There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbiter.

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⁸ AIR 2007 (3) SCC 686, (Indian kanoon).
⁹ AIR 2003 SC 2252, (Indian kanoon).
Court’s Competences Regarding the Arbitration Process

Under the Arbitration Act of 1996, regarding those issues of domestic arbitration that are referred to the Indian Judiciary, the competent court is the court designated by Article 2(e) of the Arbitration Act of 1996 on the judicial system law. As to international arbitration, whether the proceedings are carried out in or outside India, the competent court is reference to the law of India. This provision is in line with the English Arbitration Law, which considers the court that has original jurisdiction as competent to decide upon such issues.

Article 9 of the Arbitration Act of 1996 provides that, upon the request of a party to an arbitration agreement, the court is competent to take interim or conservatory measures, whether before the commencement, or during the course, of the arbitration proceedings or at any time after the making of the tribunal award but before it is enforce. Such measures are of temporary or precautionary nature, and are intended to protect the outcome of the arbitration procedure. Sequestration or the attachment of the debtor’s assets by the court may be carried out on the basis of this provision. The question might arise as to whether the Indian competent court can order interim measures, when the seat of arbitration is outside India. The answer to this question may be positive, if the applicable law is the Arbitration Act of 1996. However, in other cases, the answer may not be so straightforward.

Under the Indian Law of arbitration, the Court may also be involved in taking evidence. If requested by the arbitration tribunal, the Chief Justice of the competent court for assistance in taking evidence may invite the witnesses who fail to appear before the tribunal or abstain from doing so, or issue judicial delegation orders. Under English Arbitration Act, too, the tribunal can apply to the court to compel attendance of witnesses and production of evidence.

We have already seen that the Chief Justice of the competent court has some powers in appointing an arbitrator, if a party or either parties or even a third party

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10 Article 27(5), the Arbitration Act of 1996 reads as; - “Persons failing to attend in accordance with such process, or making any other fault, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences is suits tried before the Court.”
has failed to appoint the arbitrator, as required.\textsuperscript{11} Under the Arbitration Act of 1996, the rejection of a challenge to the appointment of an arbitrator can also be appealed by making a request to the competent court, in case of international arbitration. A request for the removal or disqualification of arbitrators can be brought before the court in most Europe States, including France and German.\textsuperscript{12}

The court may also intervene, when the tribunal is faced with an issue falling outside its jurisdiction, such as the forgery of a document or any other criminal offence connected with the proceedings that require to be dealt with by the court. In a nutshell, it seems that in order to tackle some difficulties arising from disagreement between the parties, Indian Law has given some powers to the court. While the first category of court intervention, that is, the inadmissibility of a case about which there is an arbitration agreement, is of negative nature, the second one discussed in this Section is positive. In other words, in the first category, the court is asked not to interfere with the settling of a dispute about which there is an arbitration agreement, whereas in the second category, the Court is asked to interfere to deal with an issue that has hindered the arbitration process. Although it might be said that such interventions may undermine the confidence of some parties, particularly non-Indian ones, we should notice that such interventions are mostly of procedural nature, and are intended to remove problems that can affect the speed and fairness of the arbitration process.

5.4 Setting Aside an Arbitration Award

The Arbitration Act of 1996 does not provide for an appeal against an arbitral award. However, the party who is aggrieved with an arbitral award may take recourse to a court against the said award on any of the grounds stated in Section 34.

The SC in \textit{Oil Natural Gas Corporation Ltd. v. SAW Pipes Ltd.},\textsuperscript{13} had an occasion to elaborate and lay down proof grounds for setting aside of award which are available to both domestic as well as foreign awards. According to the SC these grounds are; -

\begin{itemize}
  \item Article 10 of the Arbitration Act of 1996.
  \item Ballantyne, William M. \textit{“Arbitration in the Gulf States: “Delocalisation”: A Short Comparative Study”}, Arab Law Quarterly (1986), 52.
  \item AIR 2003 SC 2629, (Indian kanoon).
\end{itemize}
1. ‘The Court can set aside the arbitral award under section 34(2) of the Arbitration Act if the party making the application furnishes proof that-
   i. A party was under some incapacity, or
   ii. The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
   iii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   iv. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration.

2. The Court may set aside the award;-
   i. (a) If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
      (b) Failing such agreement, the position of the arbitral tribunal was not in accordance with Part I of the Act;
   ii. If the arbitral procedure was not in accordance with-
      (a) The agreement of the parties; or
      (b) Failing such agreement, the position of the arbitral tribunal was not in accordance with Part I of the Act.

   However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be conflict with the provisions of Part I of the Act from which parties cannot derogate.

3. The arbitral award could be set aside if it is;-
   a) Against the public policy; or
   b) Against fundamental policy of Indian law; or
   c) Against the justice and morality; or
   d) Against the patently illegal; or
Setting aside an arbitration award is one of the most important Sections of the present Act. Section 34 of the Arbitration Act of 1996 is modelled on Article 34 of the ML (1985) and also this Section is analogous to Section 30 of the Arbitration Act, 1940. The SC of India in *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & others*,¹⁵ observed that Section 34 of the Arbitration Act of 1996 is based on Article 34 of the ML (1985) and it will be noticed that under the Arbitration Act of 1996 the scope of the provisions for setting aside the award is almost the same under Section 30 or Section 33 of the Arbitration Act, 1940. But in *Municipal Corpn of Greater Mumbai v. Prestress Products (India)*¹⁶ the Rajasthan High Court has emphasized there is a difference in scope for interference under earlier and present Acts. The Act, 1996 was brought into being with the express parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award. The court is duty bound to effectuate the letter and spirit of legislation.

Article 34(1) of the Arbitration Act of 1996 provides that the party against whom the award is made can request the setting aside of the award, within ninety days (three months) of being notified of the award. The proviso to Sub-Section (3) of Section 34 permits the disputant a further period of thirty days (one month) after expiry of three months if the court is satisfied that the disputant was prevented by a sufficient cause from making application within the aforesaid period of three months. However, no application for setting aside the arbitral award can be entertained by the court after the expiry of these additional thirty days period. In *Union of India v. Shring Construction Co. (P.) Ltd.*,¹⁷ the Apex Court clearly reiterated that Section 14 of the Limitation Act, 1963¹⁸ would apply while

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¹⁴ *Oil Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* AIR 2003 SC 2629.
¹⁵ AIR 1999 SC 2102, (Indian kanoon).
¹⁶ AIR 2003(4) RAJ 363(Bom), (Indian kanoon).
¹⁷ AIR 2010 SC 318, (Indian kanoon).
¹⁸ Section 14 of the Limitation Act, 1963 reads as “Exclusion of time of proceeding bonafide in court without jurisdiction. (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which,
considering the application for setting aside the arbitral award under Section 34(3) of the Arbitration Act, 1996. There is further proviso to Sub-section (3) of Section 34 that the period for filing application can be extended if the applicant could show that he was prevented by sufficient reason from making the application within the aforesaid period of ninety days (three months) by further 30 days but not thereafter. Like India’s previous law of Arbitration (the Arbitration Act, 1940), the Arbitration Act of 1996 allowed only thirty days (one month) to make a request for setting aside an award, beginning from the date the award was issued, or received by the parties, or a fraud, forgery or corruption and other violation was discovered or affirmed judicially, or a document not revealed by a party was discovered, or a witness was sentenced for false testimony. Similar to the second category of court intervention measures, a request to the Court for setting aside an award is also of positive or affirmative nature, that is, it requires the active interference of the court, rather than it abstinence.

Article 34 of the Arbitration Act of 1996 is inspired by Article 34(3) of the ML (1985), in compare with various legal systems, India is more precise, and states that the three months deadline for challenging an award also applies from the date the arbitral tribunal has disposed of a request for a correction or interpretation of the award or for an additional award dealing with claims presented in the arbitral

from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.- For the purposes of this section,- (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted; (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding; (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

19 In such cases a special issue for setting aside the agreement on the ground of fraud under Sections 17 and 19 of the Indian Contract Act, 1872 would have to be raised.

20 The Bombay High Court in Bombay Gas Co Ltd. v. Parmeshwar Mittal (AIR 1998 Bom 118) has held that mere allegations of fabrication of records not sufficient for refusing reference to arbitration.
In fact, no such details are mentioned in most national arbitration laws. Also, the Indian legislative provides that the court may suspend the setting aside proceedings for a period of time determined by it, if it finds it appropriate or if requested by a party, “in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.”

Unfortunately, most of arbitration laws do not contain such a provision that is intended to resolve problems arising from arbitration by referring them back to arbitration as wished by the parties in the first place. Providing the tribunal with an opportunity to remove grounds that may lead to the vacation of the award manifests respect for the contractual agreement of the parties, and expresses confidence of a legal system in arbitration.

In order to respect the contractual nature of arbitration, Indian Law has restricted the grounds on the basis of which an arbitral award can be vacated. It has been the intention of the Indian legislative to permit the setting aside of awards only in certain circumstances, in order to facilitate and protect arbitration. This has been a major step forward, since Indian courts can no longer review the facts and law of the dispute concerned. The grounds for vacating an award are, to a large extent, inspired by what is provided under the ML (1985). However, a shortcoming of Indian Law is that it does not make it clear who has the responsibility to establish these grounds, while, under the ML (1985), the onus of proof regarding some grounds is on the party requesting the vacation of the award, and regarding other grounds on the court.

Article 34 of the Arbitration Act of 1996 provides that a suit for the nullification of an arbitration award must be refused except on one of the following grounds:

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21 Article 34(3), the UNCITRAL Model Law on International Commercial Arbitration.
22 Article 34(4), the UNCITRAL ML on International Commercial Arbitration.
23 See Article 34, the UNCITRAL ML on International Commercial Arbitration.
5.4.1 Invalidity of Arbitration Agreement

If there is no agreement between the parties to refer the dispute to arbitration, or if such agreement is void, or if it has a time limit that before referring the dispute has been ended, the award may be set aside.\textsuperscript{24} Like the ML (1985), Indian Law does not specify the voidability, or relative nullity, of an agreement as a ground for setting aside the award. More importantly, the ML (1985) states that the validity of an agreement must be assessed against the law to which the parties have referred, or in the absence of such agreement, against the law of the seat of arbitration,\textsuperscript{25} but the Indian Law does not make it clear which law is relevant. It is, however, assumed that the parties have chosen the Arbitration Act of 1996 to govern their dispute. Nevertheless, if arbitration is taken place outside India, despite selecting Indian Law, sometimes the law at the seat of arbitration might prevail.

In general, under Indian Law, an arbitration agreement has to be in writing, in order to be valid.\textsuperscript{26} Issues such as the number of arbitrators being even and non-arbitrability of the subject-matter of the disputes covered by the agreement may also lead to the nullity of the award.\textsuperscript{27} It has been argued that voidable agreements cannot be nullified, if a valid waiver has already been made by the party making a claim regarding the voidability of the award. Also, if an award is made after the expiry of the arbitration agreement, but within the time period extended by the tribunal or by the parties, it cannot be set aside. The possibility of litigation against a tribunal decision by establishing the non-existence or invalidity of the arbitration agreement has also been stipulated in the Arbitration Act of 1996.

5.4.2 Incapacity to Enter into an Arbitration Agreement

As per Section 34(2)(i) of the Act, 1996 incapacity of a disputant is to be examined. Under this Section an award can be nullified, if either party has been insane or under some incapacity (if not represented through a guardian) to enter into

\textsuperscript{24} Article 34, the Arbitration Act of 1996.
\textsuperscript{25} Article 34(2)(i), the UNCITRAL ML on International Commercial Arbitration.
\textsuperscript{26} Article 7(5), the Arbitration Act of 1996.
\textsuperscript{27} Article 34(2)(4)(iii), the Arbitration Act of 1996.
an arbitration agreement, under the law that governs the issue of capacity. An arbitral award will not be binding on him. It is enforceable on the legal representative of incapacity person and the legal representative may apply for setting aside the arbitral award or oppose.

Similar view has been expressed about the death of a party by the Calcutta High Court in case Remniwas v. Banarsidas. The Court held that an arbitral award is not discharged by the death of a party, it is enforceable and binding on the legal representative, the executor and administrators of a deceased party and they may apply for setting aside the arbitral award or oppose it.

A difficulty is that, while the ML (1985) specifies that it is the law to which the parties have subjected their agreement or, failing that law, the law at the seat of arbitration that determines the issue of legal capacity, Indian Law does not specify the governing law. It is odd that Indian arbitration law regards it necessary to specify insanity, alongside incapacity, of a party as a ground for setting aside an arbitration award.

In order to protect the interest of such a party Section 9 of the Arbitration Act of 1996 enables him to apply to the court for appointment of a guardian for a minor or a person of unsound mind for purposes of arbitral proceedings. The ground of incapacity would cease to be available when the incompetent person is represented by a guardian.

5.4.3 Lack of Due Process

A basic requirement of a process is the right to a fair hearing and adversary proceedings, also referred to as audio et alteram partem. These fundamental rights are protected with same content in Sections 34(2) (iii) & 48(1) (b) of the

28 Article 34(2)(a)(iii), the Arbitration Act of 1996.
29 AIR 1968 Cal.314.
30 Article 34(2) (i), the UNCITRAL ML on International Commercial Arbitration.
31 Is a Latin phrase that means, literally, hear the other side. It is most often used to refer to the principle that no person should be condemned without a fair hearing in which the accused is given the opportunity to respond to the accusations against him.
32 This is similar to Article V (1)(b) of the New York Convention, 1958.
Arbitration Act, 1996\textsuperscript{33}, which are about due process. They cover, for instance, improper notice of the arbitral proceedings, inability to present a case, and a denial of the right to be heard. Those Sections ensure certain standards of fairness. Those Sections are probably the most important ground for refusal under the Arbitration Act, 1996, and is necessary for ensuring the future of arbitrations at both domestic and international level.

It is essential the disputants be given proper notice of the arbitral proceedings so that they may file their statements of claim or defence as required by Section 23\textsuperscript{34}. If one of the parties has been unable to present his defence or claims, because he was not properly notified of the appointment of the arbitrators or of the proceedings, the award can be vacated.\textsuperscript{35} Punjab and Haryana High Court in case \textit{Krishna Lal v. Union of India} \textsuperscript{36} has held that an arbitral award declared on basis of proceedings, inspections of goods and property, etc., without giving proper notice to the other party is liable to be set aside.

There is a minor, though important, difference between Indian Law and the ML (1985)\textsuperscript{37} to the effect that the ML (1985) provision is rather vague and general, and states that if a party was unable to present his case, the award may be set aside. In general, under Indian Law, lack of due process in the form of breach of fairness and equal treatment of the parties in the hearings, as well as problems such as preventing a party from presenting his evidence or from bringing his expert to give evidence can result in the setting aside of an award.

\textsuperscript{33} “The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.”

\textsuperscript{34} Article 23, the Arbitration Act of 1996 reads as:-“Statements of claim and defence:- (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit. (3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.”

\textsuperscript{35} Article 34(2) (a) (iii), the Arbitration Act of 1996.

\textsuperscript{36} AIR 1998 Punj & Hary 60. (Indian kanoon).

\textsuperscript{37} Article 34(2) (ii), the UNCITRAL Model Law on International Commercial Arbitration.
5.4.4 Illegality in Composition of the Tribunal or in Tribunal Procedure

As per Article 34(2) (a) (v) of the Arbitration Act of 1996, an arbitral award can be set aside because of illegality and faulty procedure and defective composition of arbitral tribunal. It may be divided in two particular headings:-

a) Lacuna in the formation of arbitral tribunal.

b) The procedure followed by the tribunal or misconduct of the arbiters.

Therefore, if the composition of the arbitration tribunal or the appointment of the arbitrators has been contrary to the parties’ agreement or to the law, the award may be vacated.\(^38\) This covers issues such as the number of the arbiters, and the procedure, through which the arbitrators are appointed, and even the independence and impartiality of the arbiters. For instance, it has been suggested that if an arbiter, upon his appointment, did not disclose circumstances that might causes serious doubt about his impartiality and independence, and the aggrieved party becomes aware of these circumstances after the award is issued, the award may be set aside. This is because it is required by the law that the tribunal be composed of impartial and independent arbitrators. The wording of the Indian provision indicates that, in determining the composition of the tribunal, there is no priority for the parties’ agreement over the Indian Law and vice versa, whereas the international trend is to give priority to the agreement. Particularly, if a rule of Indian Law is considered as mandatory, the parties cannot agree to its contrary. Hence, under Article 10(1) of the Arbitration Act of 1996, if the number of arbiters is even, the award will be nullified. In Narayan Prasad Lohia v. Nikunj Kumar Lohia\(^39\) the SC has held that the composition of tribunal or arbitral procedure are in accordance with agreement of the disputants, Section 34 of the Arbitration Act, 1996 does not allow challenge to an arbitral award merely on the ground that composition of the tribunal was in conflict of Section 10\(^40\) of the aforesaid Act. Although it is an established international practice to require the number of arbitrators to be odd, it does not seem

\(^38\) Article 34(2)(a)(v), the Arbitration Act of 1996.

\(^39\) AIR 2002 SC 1139, (Indian kanoon).

\(^40\) Article 10 of the Arbitration Act of 1996 reads as; Number of arbitrators;- (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.(2) Failing the determination referred to in sub-Section (1), the arbitral tribunal shall consist of a sole arbitrator.
justified that violation of this rule must lead to the vacation of the award, particularly in international arbitration.

5.4.5 Lack of Jurisdiction

The term jurisdiction signifies the power to decide the procedural irregularity or illegality and defects in pleadings whether legal or otherwise would not be covered by the expression jurisdiction.

The SC in *Premier Fabricators v. Heavy Engineering Corporators*, had held that the arbitral tribunal before proceeding in the matter, itself ascertain whether the matter is capable of being decided by it or not. The question of jurisdiction can also be a ground for setting aside an award under Section 34. Article 34(2)(a)(v) of the Arbitration Act of 1996 provides that if the award is about a dispute that does not fall within the ambit of the arbitration agreement or goes beyond the scope of the agreement, it may be set aside. If it is possible to separate that part of the award that settles issues falling within the scope of the agreement and the other part dealing with issues not falling within that scope, only the latter part will be vacated. The possibility of litigation against a tribunal decision by objecting to its jurisdiction or the irrelevancy of the arbitration agreement to the dispute is also stated in Article 16(3) of the Arbitration Act of 1996. Then, if the tribunal acts beyond its jurisdiction, the aggrieved party may request the court to vacate the award on the basis of lacking validity. But a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award where a party has received notice and he does not raise a plea of lack of jurisdiction before the arbitral tribunal for instance, in *Gas Authority of India Ltd. v. Keti Construction (I) Ltd.*, where a party has received notice and he does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so, if he chooses to move a petition for

41 * Syndicate Bank v. Gangadhar*, AIR 1992 Karnataka 163, (Indian kanoon)
43 AIR 1997 SC 3603, (Indian kanoon).
44 This is inspired by Article 34(2) (iii), the UNCITRAL Model Law on International Commercial Arbitration.
45 AIR 2007 (5) SCC 38, (Indian kanoon).
setting aside the award under Section 34(2)(v) of the Act on the ground that the composition of arbitral tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.

Broadly speaking, it has been said that, unlike some other legal systems, such as the USA legal system, Indian Law adopts a restrictive interpretation of arbitration clauses, because arbitration is regarded as an exceptional means of settling disputes.

It can be added that the lack of jurisdiction ground not only covers those disputes the subject-matter of which falls outside the mandate of the tribunal, but also is applicable when third parties unduly are affected by the award.

5.4.6 Being Against Public policy

The public policy as an inconsistent, unpredictable and dynamic political tool is against the enforcement of awards in judicial activity’s framework. But unfortunately, there is no certain view and a universal consensus on the meaning of the phrase public policy in the legal communities. The unambiguous and uncertainty of public policy, clearly run the big risk of impinging upon Indian arbitration as an effective method of dispute resolution.

Under the Indian law, if an award is contrary to “The Public Policy” of India, the court may nullify it, under Article 34(2) (b) (iii), the Arbitration Act of 1996. In this context, arbitral awards can be voided on the basis of the above Article, only if its consequences contradict the basic principles of Indian Law. The Indian SC in Venture Global Engineering v. Satyam Computer Service Ltd. & other observed that explanation of Section 34 of the Arbitration Act, 1996 is like a stable man in the saddle on the unruly horse of public policy.46

46 AIR 2010(8) JT 583 (SC), (Indian kanoon).
To understand the phrase public-policy and its implication it is necessary to consider the case of *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, the SC laid down the law on the point. The court explained that the phrase ‘Public Policy of India’ is not required to be given a narrow meaning. The said phrase is susceptible of narrow or wide meaning depending upon the object and purpose of legislation. Hence the award passed in contravention of the existing provisions of law is liable to be set aside. The totality of the grounds for public policy has been presented by the SC in above case in the following Chart;

“The Court can set aside an award: The reasons stated in Section 34 (2) (b) (ii) on ground of conflict with the public policy of India, that is to say, if it is contrary to:

a) Fundamental policy of Indian Law; or
b) The interest of India; or
c) Justice or morality; or
d) If it is penalty illegal.”

The concept of public policy connotes some matter which concerns public interest and public good. What is for public interest or in public good or what would be injurious or harmful to the public interest or public good has varied from time to time. The SC in *Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, observed that there is no immunity to law which deals with the public policy. It keeps changing from place to place and time to time as per requirement. For instance, a transaction for importation of Liquor into Muslim States may be illegal on public policy grounds applicable in those Muslim States, but such a transaction would not be contrary to transnational public policy.

Similarly, the ML (1985) provides that an award in conflict with “the public policy” of the Forum State may be vacated. The term public order is as ambiguous as the term public policy is; and both need to be clarified. In the case of setting aside awards on the ground of being contrary to public policy, Indian Law is explicit that the court can do so on its own initiative.

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47 AIR 2003 SC 2629, (Indian kanoon).
48 *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, (Indian kanoon).
49 AIR 1986 SC 1571, (Indian kanoon).
50 Article 34(2)(b)(ii), the UNCITRAL ML on International Commercial Arbitration.
A provision stipulated in the ML (1985), and also, in the Indian Law, is that if the dispute is not capable of being resolved through arbitration, the award issued about it may be set aside.\textsuperscript{51} For instance, an arbitration agreement that refers a non-arbitrable dispute to arbitration may be regarded as invalid; and therefore the award rendered on its basis may be set aside. Also, making an award about a non-arbitrable dispute is against the applicable law, if it is the Arbitration Act of 1996; and thus may be vacated.

It worth mentioning that, in most legal systems, certain disputes are not arbitrable, because they are closely against to public policy. However, it is not adequately justifiable to vacate an award, if the dispute in question is merely related to public policy. It would be more justifiable to set aside an award, if it is against public policy. It was best if the Indian legislative has wisely avoided mentioning non-arbitrability of a dispute expressly as a ground for the vacation of the award, and instead has emphasized being against public policy as a ground for doing so.

\textbf{5.5 Enforcing an Arbitral Award}

Enforceability is what distinguishes arbitration from other Alternative Dispute Resolution methods, and puts it alongside litigation. The reason that many businesses, particularly in international trade, opt for arbitration to settle their existing or prospective disputes are that arbitral awards are enforceable at law. Enforcement is the point where a purely contractual agreement is transformed into a judicial decision. Therefore, arbitration has the advantages of Alternative Dispute Resolution mechanisms by providing the parties with an independent, flexible and private method tailored to their needs, as well as the advantage of litigation, that is, enforceability of the final decision. Various States have adopted different judicial mechanisms for enforcing arbitral awards. It is undoubtedly true that the tendency in international and municipal laws is to facilitate enforcement of arbitral awards.

With the introduction of present Indian Law of arbitration, that is, the Arbitration Act of 1996, arbitral awards issued in accordance with Indian Law of arbitration, whether in India or outside it, must be treated as a \textit{decree}, and is

\textsuperscript{51} Article 34(2)(b)(i), the UNCITRAL ML on International Commercial Arbitration.
enforceable. The Indian Law does not make a distinction between recognition and enforcement. This is a disadvantage of the present law, as a winning respondent may wish to request recognition of an award, in order to block new actions by the losing claimant, or a winning party may have to delay the enforcement of an award, and recognition of the award would guarantee such a future action. It seems to be a chronic problem with most arbitration legal regimes that they rarely stipulate the issue of recognition as distinct from enforcement.

Despite, after the enactment of the present Act, 1996, an award of tribunal can directly be enforced as decree but practically, the enforcement of domestic as well as international arbitral awards needs a legal action. Their enforcement needs a legal action converting the award into a Court judgment. In general, this requirement works to the disadvantage of arbitration, and can help an aggrieved party who might wish to delay the compliance with the award.

5.5.1 Procedure of Enforcement of Awards

Although, an arbitral procedure is the result of a private arrangement, the arbitral award constitutes a final and binding decision on the dispute between the disputants. If the failing party does not perform voluntarily, the arbitral award may be enforced by a court.

Section 36 of the Arbitration Act, 1996 is not modelled on the ML (1985). This provision makes a clear crystal departure from the old Arbitration Act of 1940. Under the old Act, after making of the award by the Arbitral Tribunal, the parties had to make an application to the court to make the award a rule of the court and it is only then, the award could be executed as a decree of the Court. The making of the application to the court for recognition of the award as a decree was termed as filing of the award. But this requirement has been done away with under the Arbitration Act of 1996. There is no need for filing the award and it can be enforced straight away without the necessity for the intervention of the Court. Obviously, this would mean saving of time of the parties in filing the award for execution by a Court. In

52 Article 37, the Arbitration Act of 1996.
other words, the arbitral award has now been given a similar status as any other decree of the Court and it may be enforced like a decree in accordance with of the Civil Procedure Code, 1908.

The enforcement of award under Section 36 is confined to domestic arbitrations i.e. awards which are enforceable in India. For enforcement of foreign awards, the provisions of Section 48 of part II of the present Act shall be applicable. The criteria whether an award is domestic or foreign, has been held by Calcutta High Court in *Hindustan Copper Ltd. v. M/s. Centro Trade Minerals and Metals*, where Indian Courts would be domestic otherwise it would be treated as foreign award. Where the parties have agreed that the law governing the arbitration shall be Indian Law, the award will be within the limits of domestic award and will be regulated by Section 48 of the Act, 1996.

For procedure of enforcement of awards, the Madras High Court in *Shivi Kant Engineers and Contractors v. Aurofood Ltd.*, has held that the appropriate

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54 AIR 2005 Cal 133, (Indian kanoon).
55 Article 48, the Arbitration Act of 1996; "Conditions for enforcement of foreign awards.- (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.(2) Enforcement of an arbitral award may also be refused if the court finds that-(a) the subject -matter of the difference is not capable of settlement by arbitration under the law of India; or(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.-Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. (3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

56 AIR 2000(100) Comp Cas 623 Madras, (Indian kanoon).
time for enforcement of an award comes when the time for setting aside an award under Section 34 has expired or proceedings in this respect have failed. As such it may be said that proceedings under Section 36 are subject to proceedings of Section 34 of the Act. This becomes evident when a party desires part performance of the award during the pendency of the application to set aside the award. The Calcutta High Court in *Damodar Valley Corporation v. Calcutta Electric Supply Co. Ltd.*,\(^{57}\) has held that execution of part of award is not permissible during pendency of an application to set aside the award under Section 34 of the Act. The SC in *National Aluminium Co. Ltd. v. Pressteel and Fabrications (P) Ltd.*,\(^{58}\) has also held that once an application under Section 34 for setting aside is filed, the award simply becomes non-executable under Section 36 of the Act. The filling an application under Section 34, the award becomes dormant and no executable decree or execution proceedings can be initiated for enforcing any part of such a dormant award.

Practically, in a request for enforcement, the court procedure will be the same as that of ordinary cases. The parties present their arguments, submissions, witnesses and evidence, and there may be several hearings. And also, under Indian Law, the procedure of executing enforcement orders for an award is the same as that of judgments, and is relatively straightforward. A request for executing enforcement orders must be made to the court of the area where it is to be enforced, and it will be carried out under the supervision of an enforcement judge, assisted by sufficient number of bailiffs.

### 5.5.2 The Tribunal's Power to Grant Enforcement of Orders

Alongside the Court, the arbitration tribunal has some power to enforce certain decisions of its own, if the parties have already agreed so. These are orders for temporary or precautionary measures or security guarantees. If a party fails to execute such orders, upon the request of the other party, the tribunal may grant permission to such other party to take necessary steps for the execution of the order. Such a possibility, however, does not prejudice the right of this party to request the chief justice to execute the order. This is because the original authority to issue and

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\(^{57}\) AIR 2005 Cal 67, (Indian kanoon).

\(^{58}\) AIR 2004 (I) SCC 540, (Indian kanoon).
enforce interim measures is the court. However, the problem is that, unlike the court, the tribunal does not have the punitive power of the State that is the instrument of enforcement. So, if a party does not voluntarily comply with an interim award, there is not much that the tribunal can do. Therefore, the question might arise as to what is the point of a provision empowering the tribunal to issue and enforce interim orders. It has been argued that there might be certain interim or conservatory measures that the tribunal might order, without the need for the voluntary cooperation of a party and without punitive powers. These are, for instance, the “proof of the capacity of a party by an expert appointed by the Tribunal or if the Tribunal orders that the goods, subject to the dispute, be stored in a vault or with a trustee or in a bank account subject to the arbitral tribunal signature (or its chairman), or ordering not to withdraw a letter of guarantee before an award was made”. If the winning party or the tribunal has already some control over the other party’s goods and assets or promissory notes signed by it, such enforcement powers by tribunal may be effectively used. Such a power is not stipulated in the ML (1985).

5.5.3 Grounds for Refusing Enforcement of an Arbitral Award

Grounds for refusing enforcement of an arbitral award in India are not modelled on the ML (1985) as a separate provision. The ML (1985) on International Commercial Arbitration regarding grounds for refusal of enforcing awards. On the one hand, the ML (1985) puts it at the discretion of the court to do so, by providing that it “may” refuse enforcement, if there are grounds to do. Moreover, a ground for refusing enforcement of awards that is not stipulated in the ML (1985) is where there is a conflict between the award and a court decision already made in a State about the subject-matter of the dispute. Conflict between an award and a court decision already made may appear in several forms. Such a conflict may be very obvious, for instance, when an award has already been vacated by the court, or when there is a court decision about the same subject-matter. In these cases, refusing enforcement of the award is completely justified. However, when the conflict is not so straightforward, or is partial, the complications of the case render making a decision very difficult; and denying enforcement of the award may not be so easily justified.

59 Article 36(1)(a)(v), the UNCITRAL ML on International Commercial Arbitration.
On the other hand, the ML (1985) provides for a wider range of reasons for denying enforcement of an award.\(^60\) For instance, it states that if a party to an arbitration agreement has been under some incapacity, or if the agreement is invalid under the applicable law, the award may not be enforced. Under the ML (1985), if the aggrieved party was not given proper notice of the appointment of an arbitrator or of the tribunal proceedings or the party was not able to present his case, the award may not be enforced.

Also, the ML (1985) provides that if the dispute about which the award was made does not fall within the jurisdiction of the tribunal, or if the award contains decisions on matters beyond the scope of submission to arbitration, the award may be denied enforcement. Under the ML (1985), if the composition of the tribunal was not according to the parties’ agreement or, failing such agreement, it was not according to the law at the seat of arbitration, the award may not be enforced.

Moreover, an award that is not yet binding or has been set aside or suspended by the court may not be enforced, under the ML (1985), while there is no such provision in Indian Law. The ML (1985) permits non-enforcement of an award, if the relevant dispute is not arbitrable under the law of enforcing country, but again Indian Law does not contain such a provision. Lastly, the ML (1985) allows courts not to enforce an award if it is contrary to the public policy of the enforcing State. As it will be seen, the term of public policy denotes a more limited concept. Grounds stated by the ML (1985) for non-enforcement of awards are similar to what is provided for under the NYC (1958).

The ML (1985) has also been criticized for creating some confusion. For instance, it has been asked whether a court can enforce an award if it is proved that there is a ground for setting it aside, but it has not been set aside either because the period for applying to the court for vacating it has been expired or for whatever reason such application was not made or the court did not vacate the award. In theory, the enforcing court should not pay any attention to the grounds that may lead to the nullification of the award, but it seems untenable to assume that even if it is established that there is such a ground, the enforcing court can ignore it.

\(^60\) See Article 36, the UNCITRAL ML on International Commercial Arbitration.
5.6 Public Policy under Indian Law

In various parts of this Thesis, we have noticed that the concept of public policy plays an important part in arbitration, particularly when the court intervenes, whether in reviewing or enforcing an award. Hence, it is necessary to explore the issue of public policy, under Indian Law, more closely. We have already seen that the legal concept of public policy indicates the existence of a general interest or a supreme value fundamental for a society. Generally, public policy is a complex and ambiguous legal issue. Various countries may adhere to different concepts of general interest and consequently public policy. The latter is closely related to mandatory rules of law, and, more specifically, to certain mandatory rules expressing fundamental values or interests in a country. In business law, public policy can be about issues such as trademarks, industrial property rights, bankruptcy, contract between a foreign company and a local distributor, certain construction contracts or public works, for instance, urbanization or general utilities programmes. It may also contain economic mandatory prescriptions, such as exchange regulations and rules for protecting certain groups of people like the consumers, tenants, the employees, commercial agents or distributors. In arbitration, the arbitration procedure, such as the appointment of arbitrators, or the substance of an arbitration award, may be considered as public policy issues.

Notwithstanding this literal point, the term public policy is not clearly defined, as there is no provision defining or enumerating matters considered as public policy issues. Nor is sufficient case law to clarify it. There are, nevertheless, some cases to refer to. The SC in case of Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd. 61 defined public policy as a number of basic regulations without agreeing upon which the society cannot survive. These regulations that cannot be challenged by the individual cover a gamut of legal and economic issues. Nevertheless, public policy is thought as being subject to change from time to time and from one place to another. In the following, some issues regarded as being matters of public policy by the Indian courts are considered. In general, public policy issues can be classified in four categories: those about the economic order of

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61 AIR 2003 SC 2629, (Indian kanoon).
the country, those regarding the judicial order, those about individual liberties, and religious moral principles.

Regarding the first category, for instance, the conditions of owning property in India are determined by public policy. So if selling properties in some areas is prohibited by the government, any contract for selling such properties would be void, because of being against public policy. Another instance of public policy, the law regulates the operation of foreign companies in India. Public policy also determines the upper limit of interest rates. The Reserve Bank of India’s central board of directors is to set interest rates. Hence, an agreement between the parties for the payment of 7.25% interest,\(^\text{62}\) in case of any delay in paying a certain amount, was against public policy. Working days and hours, holidays and wages are also regulated by public policy. Rights secured for a third party by the law is also considered as part of public policy. Hence, an insurance policy that purported to exclude cover for third party claims, despite such cover being compulsory by the law, was also ruled to be void on the ground of being contrary to public policy.

In the second category, a violation of Indian Constitution would be considered as against public policy. It would also be against public policy to agree to settle disputes arisen in India or between Indian parties through foreign courts, though referral to foreign arbitration is allowed. In other words, jurisdictional rules of the Indian court are also part of public policy to the effect that the court has jurisdiction over Indian citizens, whether in India or abroad, and over foreigners, if they are domiciled or resident in the country, or if the dispute that has arisen relates to assets or an obligation performed or to be performed in India. Thus, for instance, it is authorized to bring an action before the Indian court against a bankruptcy declared in India, or against foreign nationals not resident in India under commercial agency agreements or bills of lading, if there is an element of performance in India, such as the delivery of goods in an Indian port. Such an action is allowed, although the relevant agreement contains a foreign jurisdiction clause.


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As to the third category, rights guaranteed by the mandatory rules of law form a part of Indian public policy. Certain rights cannot even be waived by the individual or a party to a contract or dispute. For instance, even if the party invoking nullity of an award by the court waived his right to do so before the issuance of the award, an action for nullity before the court is admissible. Also, a joint venture agreement is void, if it binds the parties for ever.

Religious moral principles form the fourth category of public policy issues in India. Hence, a breach of the specific religious is considered as a violation of public policy in India, particularly those such as India that recognize the most of religious as a source of law. However, the question arises as to whether all religious rules are considered as a part of public policy. It has been said that fundamental rules of the each religious are regarded as public policy. A rule is considered as fundamental, if it is absolute in the method in which it is proven and in the meaning that it purports. Therefore, a rule stated in the recognized religious book, about whose meaning there is no disagreement among the leader is considered as a fundamental rule that cannot be violated. Prohibition of usury is an example of such a rule in Islam. The difficulty is that, however, there are rules with Quranic origin about whose meaning there is no consensus, while being considered as fundamental. Moreover, many other fundamental rules have their source in the *Hadith*, but there is disagreement about the authenticity of their source.

With regard to the impact of Indian public policy on arbitration and particularly international arbitration, two approaches may be followed. First, a broad interpretation of public policy may be adopted that limits arbitration, and particularly international arbitration. This approach has a tendency towards considering all matters falling within the exclusive jurisdiction of the Indian court as issues of public policy. Advocate of this approach, however, usually make a

63 In the nomenclature of the majority of the Hadith specialists, a Hadith means: It is the reported speech of the Messenger of Allah, whether this is: (a) explicit (sarih) or (b) implicit (hukmi). It is also the action of the Messenger of Allah, also split into the two categories, and also what someone did or said in front of the Messenger of Allah, but the Messenger of Allah did not condemn that action or what was said, but, in fact remained silent and established it through his action. This is also split into two categories, as mentioned above. For more detail: see, Na'eemi, Mufti Ahmad Yar Khan. *The Definition of Hadith and its Types*, (updated 25th August 2013) <http://www.alahazrat.net/islam/the-definition-of-hadith-and-its-types.php>, accessed date on (25/10/2013).
distinction between domestic and international arbitration, with the latter being more affected by public policy. For instance, whereas a broader category of disputes is regarded as arbitrable in India and under Indian Law, fewer matters may be referred to foreign arbitration. Moreover, according to this approach, a violation of any mandatory rule of Indian Law can result in the non-enforcement of a foreign award.

Second, a restrictive approach that distinguishes between domestic arbitration, on the one hand, and international and, particularly, foreign arbitration, on the other. According to this approach, the existence of a certain mandatory public law rule does not automatically entail an impact on various aspects of arbitration, particularly international and foreign arbitration. In other words, even when a general interest is involved, it does not follow that recourse to arbitration is limited by default. If this is the case, for instance, an award issued outside India by a tribunal consisting of an even number of arbitrators may be enforced, despite being contrary to Article 10(1) of the Arbitration Act of 1996. Also, an award in which the reasoning behind the decision is not mentioned may also be enforced, in spite of being against Article 31(2) of the Arbitration Act of 1996.

If the second approach is to be followed, it is necessary to distinguish between domestic and international public policy, both in procedural and substantive issues. International public policy is not only narrower than domestic public policy, but also distinct from it. The former reflects values fundamental for a national community, while the latter consists of universally held fundamental values and internationally approved decisions, such as the UN Security Council resolutions.

Indian public policy should be applicable to domestic awards, whereas international public policy should be applicable to foreign awards. Depending on the case, international awards made under Indian Law should be subject to either set. A violation of international public policy of India may justify the vacation or non-enforcement of an award, although under the applicable law to the arbitration no violation may have occurred. Finally, it should be mentioned that since, under the Arbitration Act of 1996, the parties are permitted to choose procedural and substantive law applicable to their disputes, the Decree, as a whole, cannot be considered as of public policy nature, though some parts of it may be so.
5.7 Appeals

To curb more than necessary interference of the courts in subject-matter of arbitral solution, the Arbitration Act of 1996 has provided the avenues of appeals in some selected issues very cautiously so that disputants may be saved from the labyrinth of court technicalities and proceedings as well as to get cheap and timely solutions of their disputes.

As is well known the right of appeal is given by law and hence unless it is provided in the law, no appeal can be preferred against any subordinate order. For instance, In Apex Court in *Neelkantha v. Superintending Engineer*,\(^6\) held that there is no appeal from the decision of the arbitrator and the Court has no power to correct any error or mistake in the arbitrator’s verdict nor can it review the award. To cope the need of satiation of disgusted party, the Arbitration Act of 1996 provides certain remedies under Section 34 within the specified circumstance to satisfy that disgusted party. But they are quite different from an appeal. The SC in *Sardar Singh v. Krishna Devi*,\(^7\) has held emphasizing the finality of arbitral proceedings through the Arbitral Tribunal that the disposing of claims of disputant parties through an award by the arbitral tribunal is recognized as final as per provisions of the Arbitration Act, 1996.

Section 37 of the Arbitration Act of 1996 is not modelled on the ML (1985), but it is analogous to Section 39 of the Arbitration Act, 1940. However this Section specifies some scope of appeal from the orders of the Courts as well as the Arbitral Tribunal. It is evident from the phraseology used in Section 37 that it provides appeal against the orders of Arbitral Tribunal not against the awards formulated by it. Moreover appealable orders have been specified in Sections 9, 16(2), 16(3), 17 and 34 the Arbitration Act of 1996 and no appeal is preferable against any order which is not specified. No period of time is, however, specified for filing an appeal. Presumably, the provisions of Article 116 of the Schedule of Limitation Act, 1963

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\(^6\) AIR 1981 (1) Arb. LR 34 (SC), (Indian kanoon).

\(^7\) AIR 1995 SC 491, (Indian kanoon).
will apply in matters of appeals made under above Section. \(^{66}\) List of certain orders in the Arbitration Act, 1996 which are not appealable \(viz.\)^{67}:

a) An order of a court for reference or refusal thereof. [Under Section. 8]
b) An order of Chief Justice for appointment of arbiter(s). [Under Section. 11]
c) An order by the Arbitral Tribunal regarding the impartiality or fairness of arbitrators if any doubt is alleged by a party. [Under Sections. 12 & 13]
d) An order determining the jurisdiction or non-jurisdiction of an Arbitral Tribunal. [Under Section. 14(2)]
e) An order by the Arbitral Tribunal rejecting the objection regarding the jurisdiction of it. [Under Section. 16(5)]
f) An order by the Arbitral Tribunal passed regarding non-compliance by any party. [Under Section. 25]
g) An order of a Court to facilitate presence of witnesses before the Arbitral Tribunal is so requested. [Under Section. 27]
h) An order by the Arbitral Tribunal where claim of a party is withdrawn.[Under Section. 32(2)(a)]
i) An order by the Arbitral Tribunal passed under this section where the Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. [Under Section. 32(2)(c)]
j) An order of a Court rejecting the request of remission of the award to the arbitral tribunal. [Under Section. 34(4)]
k) An order by a Court regarding payment of expenses. [Under Section. 39 (2)& (4)]
l) An order of judicial authority in case of insolvency directing the submission of the matter to the Arbitral Tribunal. [Under Section. 41]
m) An order of a Court regarding future disputes where time is extended. [Under Section. 42 (3)]

All this signifies the object of the present Act, 1996 regarding minimal interference of the courts in matters of arbitration scheme of Section 37 provides

\(^{66}\) Under Section 116 of the Act reference to Limitation Act, 1963 has been made according to which in civil cases against an order or decree within 90 days an appeal can be preferred to the high court and to other courts within 30 days from the receipt of such an order. This provision shall be, it seems, applicable in the context of Section 37 of the Act, as well.

\(^{67}\) Bachawat, R. S. \(\textit{Law of Arbitration and Conciliation}\", 2nd, Nagpur; Wadhwa &Co., (2005), 899.
three parts one and two for nominating orders which happen to be appealable while part third prohibits second appeal except in rare matters competent for second appeal in supreme courts has been kept open. It is well known that matters competent for second appeal in the SC are rare hence in certain matters only second appeal can be preferred in the SC. Moreover under Article 136 of the Indian Constitution, 1950, the special appeal to the SC has been provided, yet the SC in matters of arbitration tries to escape its authority of entertaining appellate jurisdiction. Section 37 of the Act, 1996 provides for appeals against orders;

5.7.1 **Order passed by the Court:**

It is important to note that Section 37 sub-clause (1) of the Arbitration Act of 1996 provides for appeals against order and not against the arbitral award. The orders against which an appeal lies are specifically laid down in this Sub-Section and no other orders are appealable. The following orders of the Court under the Arbitration Act, 1996 are appealable:

a) **Under Section 9 of the Act, 1996**

The Courts have been authorized to take certain interim measure to make effective the proceedings of arbitration and in this connection it can pass orders for appointment of a guardian or to protect the disputed subject matter of the arbitration, its security, sale deposit of money or appointment of a receiver or for interim injunction, an order can be passed by the court. These orders can be passed before the commencement of arbitral proceedings or during the proceedings or after formulation of the award (but before its implementation). Section 37 (1) (a) makes appealable these orders made under Section 9 in the shape of interim measures.

In the case of *M/s Archon & Other v. M/s Sewda Construction Co. & Others*, the dispute related to construction of a multi-storied building named ‘Surya Enclave’ at the cost INR. 2.65 Crores. It was alleged that respondents used sub-standard building material as well as sub-standard unskilled workers in the construction work. The respondents were asked to rectify the defects and ascertain quality construction work failing which petitioners would terminate the contract and

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68 AIR 2005 Gau.58, (Indian kanoon).
take up the construction work themselves. Since respondents failed to comply with the conditions, the site of ‘Surya-Enclave’ was eventually taken over by petitioners on 29/05/2004. Meanwhile the respondents moved the District Court, Kamrup, and Guwahati for interim measure of protection under Section 9 of the Act, 1996 against the termination order. The court granted *ex-parte* interim relief to the respondent and ordered status quo restraining petitioners from interfering with the construction work.

*b) Under Section 34 of the Act, 1996*

Likewise as recourse against arbitral award a party under Section 34 may approach a Court to get the award set aside. The Court may set aside the award or may refuse by rejecting the application for setting aside the award. Under Section 37, an appeal may be preferred against the orders passed by the court under Section 34, either way i.e., where the court passed on an order to set aside the award or where it has rejected the application for setting aside an award. It is to be noted that he courts exercise its jurisdiction as per provisions contained in Section 2(1) (e) of the Act, 1996 in arbitral matters and provisions of appeal in Section 37 are against the orders passed by a court in exercise of that jurisdiction and as such the orders passed by a court under Section 34 get extinguished under the appellate orders of a court under Section 37 of the Act, 1996.

As such appellate Court should be chosen as High Court and the SC, as the case may be. The Calcutta High Court in *Vishwa Bharati v. Sarkar & Sarkar*, has held that under Section 34 the proceedings against an award would lie at a High Court of proper jurisdiction and not any other Court.

**5.7.2 Order passed by the Arbitral Tribunal:-**

The orders of tribunal have been made appealable. This is a new stage of development in the Arbitration Act, 1996. It is undoubtedly true that the tribunal has freedom to act in judicial way.

The following orders of the Arbitral Tribunal under the Arbitration Act, 1996 are appealable:

69 AIR 2008 NOC 1934(Cal) , (Indian kanoon).
To minimize judicial interference by courts in issues of arbitral proceedings, the tribunals have been empowered to determine its own jurisdiction under Section 16 of the Arbitration Act, 1996. Under this Section an aggrieved party is given a right to challenge award on that ground in accordance with Section 34. If the plea of jurisdiction is not raised at this stage then it cannot be raised under Section 34. However, under both the Sections 31 & 16, a party cannot file such a petition unless the procedure contemplated thereby is followed. It is settled law that if the Arbitral Tribunal accepts the plea about lack of its jurisdiction or that certain dispute is beyond the scope of its authority an appeal lies from such order to court under Section 37(2) (a) of the Arbitration Act, 1996.

The Bombay High Court in *Atul R. Shah v. Vrijal Lalloo Bhai & Co.*, has held that a court without jurisdiction merely on account of non-objection by the parties cannot assume jurisdiction in itself. The same is also applicable to Arbitral Tribunal.

In *National Thermal Power Corporation Ltd. v. Siemens Atkeingesells Chaft.*, wherein opposite party has not taken any plea of jurisdiction before Arbitral Tribunal, but has raised certain counterclaims. However, claimant has opposed such counterclaims, *inter alia*, on the ground that they were not arbitrable. The Arbitral Tribunal by a partial award rejected the counterclaims of the opposite party as having already been settled in earlier meeting between the parties. It was held that such a partial award did not involve a question of jurisdiction. Hence, the case of opposite party, even if it was aggrieved by such a partial award, it did not fall within the purview of Section 16(2) or 16(3) of the Act. So appeal filed by it

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70 Section 16(2) of the Arbitration Act, 1996 reads as:- A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

71 Section 16(3) of the Arbitration Act, 1996 reads as; - A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

72 Section 16(6) of the Arbitration Act, 1996.

73 AIR 1999(2) Arb.LR 54 (Bom), (Indian kanoon).

74 AIR 2007 SC 1491, (Indian kanoon).
against the partial award directly under Section 37(2) (a)\textsuperscript{75} of the Act, is not maintainable.

An appeal against the decision of the arbiters under Section 16 of the Arbitration Act, 1996 that they had no jurisdiction to go into the dispute must be filed before the “Principal Civil Court of Original Jurisdiction in the District” as defined in Section 2(1) (e).\textsuperscript{76} This Section does not include the High Court where it is not exercising any original civil jurisdiction. Since, in Pandey & Co Builders (P) Ltd. v. State of Bihar,\textsuperscript{77} the Patna High Court does not exercise any original civil jurisdiction, no such appeal would lie before it.

\textit{b) Orders passed under Section 17 of the Act, 1996}

Under Section 17\textsuperscript{78} of the Arbitration Act, 1996, the Arbitral Tribunal has been authorized to pass such orders which manage interim measure such as to protect the property of subject-matter of the dispute and appointment of some person to take charge of it or sell it or to function as receiver, etc., an appeal can be preferred against orders which accept the request of such interim measures or which reject such a request, under Section 37 of the Act, 1996.

\textbf{5.7.3 Second appeal against the order of the appeal}

Section 37 sub-clause (3) which is replaced Section 39 of the repealed Act of 1940, prohibits second appeal against the order of the appeal, obviously to minimize courts interference in arbitral matters. The Section only bars a second appeal and not revision. But the right of the parties go to SC against the orders passed under Section

\textsuperscript{75}Section 37(2) (a) of the Arbitration Act, 1996 reads as : (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-(a) granting or refusing to grant any measure under Section 9 .”

\textsuperscript{76}Section 2(1)(e) the Arbitration Act, 1996 :- “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.”

\textsuperscript{77}AIR 2007(1)SC 467, (Indian kanoon).

\textsuperscript{78}Section 17 of the Arbitration Act, 1996 :- Interim measures ordered by arbitral tribunal.- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).
37 has been kept intact. In this context the SC in *Mulkaj Chhabra & Others v. New Kenilworth Hotel Ltd. & Another*, 79 has held that the impugned order passed under the Arbitration Act, 1996 is admittedly appealable before a Division Bench of High Court under Section 37 of the aforesaid Act. Hence, no interference is warranted under Article 136 of the Constitution of India, 1950. Thus, second appeals can be made to the SC under the Constitution of India (1950) and is also provided in the SC Rules. It was held by the Allahabad High Court in *Kanpur Nagar Mahapalika v. Narain Das*, 80 that the jurisdiction conferred on the SC by the Constitution of India (1950) cannot be taken away or abridged by any statute.

Since the primary objectives of the Arbitration Act, 1996 were to achieve twin goal in arbitration as a cost effective and quick mechanism with the minimum Court intervention for the settlement of commercial disputes, no review is permitted against the orders made by the Court but some of the High Courts in those earlier decisions under the Act 1940, particularly those of Punjab High Court in *Ramchandra v. T.N.Corporation* 81 and Bihar High Court in *State of Bihar v. Khetan Brothers*, 82 have allowed review of such order. But revision is neither prohibited nor mentioned in the Section, hence to give justice SC has affirmed to rely on this remedy. In *Shyam Sunder Agarwal & Co. v. Union of India*, 83 the Apex Court has held that Part I does not contemplate any revision of appellate order under Section 37 of the Arbitration Act, 1996, but where under the purview of some special enactment, if any civil Court has passed any final order, then the revisional jurisdiction of the High Court shall not be treated as barred. The Arbitration Act, 1996 does not contain any express bar against the exercise of the revisional power by the High Court provided exercise of such revisional power does not mitigate against giving effect to the provisions of the Arbitration Act, 1996.

79 AIR 2000 SC 1917, (Indian kanoon).
80 AIR 1964 All 25, (Indian kanoon).
81 AIR 1989 Punj 199, (Indian kanoon).
82 AIR 1984 Pat 74, (Indian kanoon).
83 AIR 1996(2)SCC 132, (Indian kanoon).
In *I.T.I Ltd. v. Siemen’s Public Communications Network Ltd.*,\(^{84}\) the SC has held that such a revision under Section 115 of Code of Civil Procedure, 1908 will not be deemed as interference in the arbitral process as contemplated by Section 5 of the Arbitration Act, 1996 and as such revision of order may be in the High Court. This decision of the SC has been affirmed in *Nirma Ltd. v. Lungi Lent Jes Energietecnik Gmbh.*\(^{85}\) which has emphasized in terms of similarity of reasoning a revision under section 115 of Code of Civil Procedure, 1908 would also lie from a non-appealable original order, if passed by a court under the provisions of the Arbitration Act, 1996. Recently in *Ashok Kumar Singh & Others v. Shanty Devi & Others*,\(^{86}\) the Patna High Court has held that when remedy of appeal is provided under the Act, revision petition under Code of Civil Procedure, 1908 would not be maintainable.

### 5.8 Conclusion

In line with the international arbitration practice, the Indian Law of arbitration provides for four categories of court intervention in arbitration. While in the first category, the court is required not to interfere with the settling of a dispute about which there is an arbitration agreement, in the other categories, court intervention is requested. In the second category, court interference is mainly intended to assist the tribunal in making a decision or securing some of the rights of the parties, during the arbitration process and before a final decision is rendered. In considering the vacation of the award, the integrity of the arbitration and its outcome, as well as safeguarding the legal rights of the parties, particularly those of the aggrieved party, are guaranteed by the court. Enforcement, on the other hand, is the intervention of judicial bodies for securing the rights of the winning party and compliance with the outcome of arbitration.

Regarding court powers during the arbitration process, such as taking interim or conservatory measures, involving in taking evidence or fining an uncooperative witness, appointing an arbitrator, extending the time limit for arbitration and the like, it can be said that such measures are of precautionary or procedural nature.

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\(^{84}\) AIR 2000 SC 2308, (Indian kanoon).
\(^{85}\) AIR 2002 SC 30, (Indian kanoon).
\(^{86}\) AIR 2010 Pat 1, (Indian kanoon).
They are primarily devised to remove anything that may hinder the arbitration process. While Indian rules on setting aside an award, to a considerable extent, catch up with international standards, such as those set up by the ML (1985), such rules can be subject to some criticisms. Court investigation on the way that the applicable law has been applied in arbitration can be interpreted as allowing examination of the merit of the case, which is now outdated in the present practice of arbitration. The Indian Law is also unduly silent about the law that governs the legal capacity of the parties to an arbitration agreement. More importantly, it is not specific on whom the burden of proof is to establish grounds for setting aside an award. Indian Law could have provided the tribunal with an opportunity to remove the grounds that may lead to the vacation of the award, as a token of respect for the contractual agreement of the parties.

As to enforcement, in the past, stringent examination of arbitration awards by the courts at the stage of enforcement was a feature of arbitration in most countries, including India. This led to a virtual re-examination or re-hearing of relevant cases. However, in the recent years, the situation has dramatically changed. From the discussions of this Chapter, it can be concluded that regarding enforcement of arbitral awards, there has been a significant development in Indian Law. A pro-enforcement bias can be identified in the present Indian Law of arbitration. Whereas the earlier Law of Arbitration, 1940 very briefly addressed the issue of enforcement, the intention in enacting the present law was to catch up with internationally established practices of enforcement of arbitral awards. It can also be said that, in general, Indian Law is not more than the ML (1985) and the NYC (1958) facilitative of enforcement of awards whether domestic or international, made under Indian Law. Requesting enforcement of awards is made relatively straightforward by the Arbitration Act of 1996. More importantly, the grounds for refusing enforcement of an award are not modeled on the ML as a separate provision but, generally, it can limited to three possibilities: when the award is in conflict with a previously made decision by Indian courts, when it endangers the public policy in India, or when some requirements of due process have not been observed. It should, however, be noted that such an awards is made according to Indian Law, so the aggrieved party has already had the opportunity to challenge it; and the grounds for vacating an award, under Indian Law, are relatively extensive. A feature of the Arbitration Act
of 1996 is that while a request for enforcing an award can only be made after the expiry of the ninety day period for challenging it, it also permits the suspension of enforcing the award, if the award is being challenged in the court.

A lacuna in Indian Law is that it does not contain a clear and comprehensive definition of public policy. Given the importance of the concept of public policy in various areas of arbitration law, ambiguity in the definition of the concept may easily be abused and create distrust among those, particularly foreign parties, who may wish to resort to arbitration in their disputes with Indian parties. Thus, an important step to be taken by the Indian legislative is to provide a crystal definition of the concept. More importantly, it is necessary to make a clear distinction between domestic and international public policy, and respectively apply them to domestic and foreign awards. International awards rendered under Indian Law may be subject to either type of public policy, depending on the case.