CHAPTER IV
THE ARBITRATION AND
CONCILIATION ACT, 1996 - AN
ANALYTICAL OUTLOOK
The administration of justice happened to be one of the important and the primary function of the sovereign state in the ancient days. It has undergone several changes through various stages and ages. For example, during the ancient days the people have been allowed to send the petitions directly to the king and the king himself delivered the justice after hearing the case. When the numbers of the petitions have increased enormously then the king has delegated the function through the institutionalization of the justice delivery mechanism. The functioning of the astra pradhan in the north and the functioning of the “Enpareayam” in the south, the creation of the chancery court in U. K. can be cited as example.

The modern administration of justice system which we follow today, owes it’s origin from the British era. The commencement / application / enforcement of the Constitution of India have made a far reaching impact in the administration of the justice system in India. The application of the concept of the welfare state and fundamental rights and the directive principles of state policy embodied in the Constitution of India has made the justice delivery mechanism as a people friendly one and it is no more a mere sovereign function, but a constitutional mandate.

The advent of the globalization has proved that the quality is mantra for the success in each and every fields including in the judiciary. The Government of India has rightly realized the judicial reforms are inevitable for the success of the economic reforms. In this context the Government of India has decided to strengthen the existing ADR mechanism in general and the arbitration in particular.

In this context the topic assumes the more importance. The researcher would like to discuss the following issues: They are

1 Refer the Arts 37, 38 and 39 of the Constitution of India
2 Refer the Part 3 Ibid
3 Refer the Part 4 Ibid
1. The historical background and the legislative history.


3. The objectives of the Act.

4. The institutional mechanism relating to the arbitration.

5. The enforcement of the domestic award and the foreign award.


8. Finally the suggestions to improve the efficacy of the arbitration mechanism in India and the amendments to be incorporated in the Arbitration and Conciliation Act 1996 in this chapter.

4.1 THE HISTORICAL BACKGROUND AND THE LEGISLATIVE HISTORY OF THE ACT

Backdrop: Historical and Legislative

Arbitration as mechanism of justice is as old as civilization. Forms differed-as they must- from time to time and place to place. It was prevalent in the Roman Law and in the Greek civilization since sixth Century BC as it has been stated by Mr. Pound⁴.

"In Roman Law, there was no struggle to establish the jurisdiction of ordinary courts as against rival tribunals. Accordingly, contracts for submission of disputes to the decision of persons were recognized, and there were rules as to their effect and enforcement."

Disputes were settled by arbitration in Greece since sixth Century BC. The nature of disputes included boundary fixation, title to colonies and land, assessment of

⁴ Refer Pound Jurisprudence 1959, at page 360
damages occurred due to hostile invasion, monetary claims between the States and religious matters. However, in England in the early period attitude towards arbitration was generally hostile. There was a policy against agreements ousting jurisdiction of Court. Such agreements were considered as void against public policy. Business exigencies changed the scene in course of time, yielding place for commercial arbitration. First Arbitration Act was passed in England in 1889, which was preceded by the Common Law Procedure Act, 1854 in which several enactments were added.

In USA story about arbitration significantly begins in 1887 when the Chamber of Commerce of New York State established the first privately administered tribunal of businessmen, as noticed by an author,\textsuperscript{5} The state of New York adopted the first modern Arbitration Law in 1920 which was followed by the Federal Government in 1925 and more than a dozen States. Areas covered were, however, different. A uniform Arbitration Law was adopted by the National Conference of the Commissioners on Uniform State Laws in 1955 and amended thereafter.

Ancient India had long and many traditions of arbitration/conciliation up to medieval period. Affairs of the community were generally managed in cases of disputes between members by a single headman whose office was either hereditary or elective. In some parts, this authority vested not in a single individual but in a village council. Whatever, the strength of that council, it had a name "Panchyat" with the standard constitution of five persons. Traces of these institutions can be found in India even today though in the primitive communities.

An assembly for administration of justice was of various types and composition. It was either stationary being held in the village under a tree or movable being held in fields. It references to these features. The learned former C J of Orissa points out that the ancient Hindu jurist such as, "Yagnavalkya" and "Narad" have referred to various grades of arbitrators in ancient India, such as the "Puga" or Board of persons belonging to different sects and tribes, but residents of the same locality, the "Sreni", belonging to different sects and tribes or assemblies and meeting of tradesman and artisans belonging to different tribes, but having some kind of connection with one

\textsuperscript{5} Refer Wehringer Arbitration: Precepts and Principles 1960 at Page 5
another through the profession practiced by them and the "Kula" or meetings of kinsmen or assemblages of relations. There was hierarchy of appeals also. From the decision rendered by "Kula" appeal lay to "Sreni" and from the decision rendered by "Sreni" to "Puga" and from the decision of "Puga" to the King's judge and also to the King himself.

Scene changed with the arrival of the East India Company in Bengal and Banaras. As the Company established its roots in the soil of India, these institutions started vanishing and their place was taken by the foreign modes of dealings with such matters. The Bengal Regulations of 1772 provided that the parties to a dispute relating to accounts shall submit the dispute to the arbitration. It is interesting to notice the relevant clauses which read thus:

"In all cases of disputed accounts etc. it shall be recommended to the parties to submit the decision of their cause to the arbitration, the award of which shall become a decree of the court".

Similar provisions found place in the Bengal Regulation of 1781 which read as follows:

"The Judge do recommend and so far as he can without compulsion prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties. No award of any arbitrator or arbitrators be set aside, except upon full proof, made by oath of two creditable witnesses that the arbitrators had been guilty of gross corruption or partiality, in the cause of which they had made their award."

The Muffassal Courts had been established in India by the British in 1773. These Courts were supposed to administer the Hindu Laws to Hindus and the Muslim Laws to Muslims in family matters. In "Republic of India" by Mr. A. Gledhill 1st Edition at page 150 it is stated:

"Warren Hastings would seem to have exceeded the powers derived from the Diwani courts in issuing his Regulation of 1772 for the administration of Civil Justice, for it granted rights to Hindus and deprived Muslims of privileges. Its important
provision was that in suits regarding inhabitants, marriage, caste, religious usage and institution, Hindus and Muslims were to have the benefit of their personal laws, which were expounded to the courts by the Pundits and Maulvies."

Lord Cornwallis made a change of system in 1787 to establish permanent rules for the administration of justice based on the ancient law and usages. The Regulation of 1787 provided for reference of suits to arbitration with the consent of parties. The Regulation, however, was silent about the contingency of difference of opinion or expiry of time for making the award. In this background, a more comprehensive regulation viz. the Bengal Regulation, 1793 came to be passed. Under these Regulations in suits concerning accounts, partnership deeds and non-performers of contracts valued over Rs. 200, the courts were to recommend the parties to refer the dispute to arbitration. The Regulation laid down the procedure for an order of reference and for the delivery of the award within a fixed time with provision for extension for appointment of umpire and for the award being made a rule of the court. The court had the power to nominate arbitrators in case of disagreement among the parties about the name of the arbitrators or the refusal of a named arbitrator to accept the arbitration. The Regulation also dealt with the procedure for arbitrators appointed under a written agreement for hearing of the parties, pleadings, reception of evidence before giving award which could be made into an executable decree. A party seeking to set aside an award was obliged to satisfy the court on the evidence of the two creditable witnesses that the arbitrator had been guilty of gross corruption and partiality.

It may be mentioned that, Judges of the Civil Courts were enjoined to afford every encouragement to persons of credit and character as arbitrators but they were not to use any coercive means for that purpose and were supposed not to allow any of their public officers or private servants or any of the authorized Vakil to be an arbitrator in a case.

By Regulation of 1813,\(^6\) was introduced for the first time the provision for arbitration in disputes relating to immovable property. Under these Regulations, whenever a dispute relating to land was referred to private arbitration and an award was

\(^6\) Refer Regulation No VI of 1813
duly made a summary application for execution of award could be made to the civil court and the award after due enquiry about its validity could be summarily executed. The application had to be made within six months from the date of the award and there was no power to extend the period. By the Regulation of 1814,7 the provision prohibiting Vakils from acting as arbitrators was removed.

Then followed the Madras Regulation of 1816,8 the object of which was quick settlement of petty suits by empowering heads of villages to summon Village Panchayats to be arbitrators in case the parties gave undertaking in writing to abide by their decisions. The decision of the Panchayat was final except where it was sent up by the District Judge for annulment to the Provincial Court of appeal on grounds of gross partiality of the arbitrator. Later on, the system was extended to District Panchayat convened by the District Munsif under Madras Regulation of 1816.9

Bengal Regulation of 1822 directed the Collectors to endeavor to induce parties to refer disputes in Revenue Courts to arbitration. The relevant part of the of this Regulation read thus.10

"First : It shall be competent to Collectors or other Officers exercising the powers of Collectors to refer to arbitration any disputes cognizable by them under the provisions of this Regulation as well as any questions or disputes of any kind respecting land or the tenures therein, or the rights dependent thereon, they may come before them, provided the parties' consent to that mode of adjustment and an award being made, to cause the same to be executed. In referring cases to arbitration under the above provision, and in their general proceedings relative to such suits, the Collector shall be guided by the rules contained in Regulation XVI of 1793 and other corresponding enactments and in Regulation IV of 1813, in so far as the same may be applicable and shall be competent to vest in the arbitrators the same powers and authority in regard to the summoning and examination of witnesses and the administration of oaths, and to enforce the orders passed by the arbitrators under such

7 Refer Regulation No XXVII of 1814
8 Refer the Madras Regulation No IV of 1816
9 Refer the Madras Regulation No VII of 1816
10 S.33 of the Bengal Regulation 1822
powers, in the same manner as the courts of judicature are empowered to do and all awards made on such references shall when confirmed by the Collector, have the same force and validity as a regular decree of the Adulate (Court), and shall not be liable to be reversed or altered unless the award shall be open to impeachment on the ground of corruption or gross partiality, or shall extend beyond the authority given by the submission of the parties; and such ground of impeachment shall be established in a regular suit in the Zillah (District), City, or other superior Court wherein the case may be cognizable.

**Second:** In referring any dispute to arbitration, the Collector shall be careful to specify in his proceedings and in the deed of arbitration to be executed by the parties, the precise matter submitted to the arbitrators; and if the award first made by the arbitrators shall not include all points submitted to them, or shall be otherwise incomplete, it shall be competent to the Collector again to refer the matter to them, with directions to perfect their award.

**Third:** The Pargannah Kunungoes and Tahsildars may be appointed arbitrators in any case referred to arbitration under the above Rules, anything in the existing Regulations notwithstanding."

The Bombay Regulations of 1827, provided for powers in the European Officers to secure the assistance of respectable Indians to act as assessors, during the trial of a suit. These Regulations laid down a complete set of rules for the appointment of arbitrators, for regulating their proceedings and providing for the making of awards, appeals and execution of awards.

The Bengal Regulation, The Madras Regulation and the Bombay Regulation remained in force until the Code of Civil Procedure of 1859 was enacted. The Act empowered the parties to a suit, desiring the matter to be referred to arbitration, could apply to the Court in writing for an order of reference. The Act laid down the procedure to be adopted in the making of the award and declared the legal efficacy of

11 Refer Regulation No IV and No VII of 1927
12 Refer S. 312 of the CPC 1859
13 Refer the SS. 313 to 325 of the CPC 1859
such award, while the and the act\textsuperscript{14} also dealt with arbitration without the intervention of a Court. This Act was made applicable to Presidency-towns of Calcutta, Madras and Bombay in 1862, when the Supreme Court and the Courts of Sudder Dewany Adulate in the said Presidency-towns were abolished. This Code of Civil Procedure Act VIII of 1859 was repealed by Act X of 1877, but with no change in the procedure relating to arbitration. The same provision was introduced by the Act XIV of 1882.

Under these Acts there was no provision for referring a future dispute to arbitration, the arbitrator had either to be specifically named or the discretion to name the arbitrator was to be left to the Court.

Experience showed the inadequacies in the Acts and this led to the passing of a full-fledged law pertaining to arbitration for the first time in India, viz. The Indian Arbitration Act, 1899. It provided for agreement to refer future dispute to arbitration and also for reference for arbitration without the intervention of the Court. This Act was more or less on the lines of English Laws on the subject. Though the Act extended to the whole of India, it applied directly only to the Presidency-towns and to Rangoon with power in the local Government to extend the same to other areas. It is significant to note that this power was never used.

Then followed the Code of Civil Procedure, 1908 which replaced the Code of Civil Procedure of 1882. The new Code contained elaborate provisions relating to the arbitration under sections 89 and 104 of the Second Schedule. The new Code put the sections dealing with the arbitration in the Second Schedule of the Act in view of contemplated codification of the subject in a separate enactment. The Government of India did not take any steps till the Report of Mackinnon Committee on the Law of Arbitration in 1927 in England had been examined and the English Arbitration Act of 1934 was brought into force. In 1938, the Government of India took up the matter and this gave birth to the Arbitration Act, 1940, which was basically on the lines of the English Arbitration Act, 1934.

\footnote{\textsuperscript{14} Refer the SS.326 and 327 of the CPC 1859}
During the long period of operation of the 1940 Act, it was noticed that there were widespread abuses of arbitral process under the said Act. So much disgusted was the Supreme Court that it observed in case of Guru Nanak Foundation v. Rattan Singh & Sons\textsuperscript{15} as follows:

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

Other caustic remarks of the Supreme Court on the working of the 1940 Act are contained in the case of Food Corporation of India Vs Joginderpal Mohinderpal\textsuperscript{16}.

\textbf{It is observed}

"We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done."

In one Special Leave Petition the Supreme Court had remarked that Arbitration is dreaded more than a suit by honest man.

\textsuperscript{15} AIR 1981 SC 2075 (2076, 2077)
\textsuperscript{16} AIR 1989 SC 1263 (1266)
In the 210 Report of the Public Accounts Committee of the fifth Lok Sabha at pages 133 to 139 and 9th Report of the Public Accounts Committee of the sixth Lok Sabha at pages 201-202 contained adverse comments against the working of the 1940 Act. The grievances pertain to the long delays in making awards, the number of extension of time for making the award, the enormous fees of the arbitrators and the counsel and other avoidable expenditure. The Government of India took a decision to have a second look at the Act and referred the matter to the Law Commission of India, for its examination and report in 1977. The 76th Report of the Law Commission under the Chairmanship of Hon'ble Mr. Justice H. R. Khanna submitted to the Government on 9th November, 1978 recommended the necessity to amend the 1940 Act to suit the felt necessities of the time including developing economy of the country. List of the recommendations were as under:

(1) In Section 2(a), an Explanation should be inserted to the effect that where the members of any association agree to abide by the rules of the association which contain provisions for arbitration, the members shall be deemed to agree with each other for arbitration.

(2) Another Explanation may be added to the same clause to the effect that where an arbitration agreement provides for the submission of future differences to arbitration, fresh consent of the parties to the arbitration should not be required when differences actually arise.

(3) Section 6, sub-section (1), should be revised by replacing the present phrase "either as respects the deceased or any other party" with the words "either as respects the deceased or as respects any other party".

(4) Section 6(2) should be revised as follows: -

"the authority of an arbitrator shall not be terminated by the death of any party to the agreement."

(5) A new section - section 8A - should be inserted to provide for the power of the court to supply the vacancy in case of arbitrator or umpire appointed by the court itself.
(6) Section 12(1) should be verbally amended, as recommended.

(7) In Section 13, a new clause should be inserted as follows:-

"Section 13(aa) proceed ex parte against any party who, without sufficient cause and after due notice, fails to attend personally or through agent."

(8) A new section 13-A should be inserted to deal with the powers of the arbitrators or umpire to award interest, as recommended.

(9) In Section 14, two new sub-sections -14(2A) and 14(2B) - should be inserted as recommended, to cover cases of death of the arbitrator after making the award but before filing it and similar situations.

(10) In section 16(1), a new clause (d) should be added as follows:

“(d) where for any reason the court considers that in the interests of justice it should, instead of setting aside the award, order such remission."

(11) Section 20 (2) should be revised as recommended, so that two situations in regard to filing an application are dealt with separately.

(12) Section 21 and the Heading of the Chapter should be revised as recommended, to include appeals within its scope.

(13) Section 24 should be revised as recommended, by the addition of the word "appeal".

(14) In section 28, a proviso should be inserted forbidding in respect of the time for making the award an extension beyond one year, except for special and adequate reasons to be recorded.

(15) In section 30, an Explanation should be inserted as recommended, to provide that the expression "or is otherwise invalid" includes the ground that there was no valid agreement or no valid reference to arbitration.

(16) New Section 30-A, should be inserted, to provided that no arbitrator or umpire can be compelled to give evidence as to the reasons for his award.
(17) Section 32 should be re-numbered as sub-section (1), and thereafter sub-sections (2) and (3) should be inserted as recommended, to provide that an award shall not be pleaded in defence except in certain specified cases.

(18) In section 33, after the words "any party", the words "including one alleged to be a party" should be added.

(19) From section 34, the words "or taking other steps in the proceedings" should be deleted.

(20) In section 34, an amendment should be made as to suits brought under Order 37 of the Code of Civil Procedure, by substituting the word "recommended".

(21) In section 37(1), reference to the Limitation Act, 1963 should be substituted.

(22) In section 37, sub-sections (3) and (5), reference to the Limitation Act, 1963, should be substituted in place of the old Act. Further, new subsections (6) and (7) should be inserted as recommended.

(23) In section 38, new sub-sections (4), (5), (6), (7) and (8) should be inserted, so as to prevent disputes about the amount of fees of the arbitrator and as to the time of payment.

(24) Section 42(a) should be amended to provide for the delivery of notice to duly empowered agent, in certain situations.

(25) In section 47, the proviso should be replaced as recommended, to deal with the effect of arbitrations entered into otherwise than under the Act.

(26) In the First Schedule, a new paragraph 2-A should be added to deal with the powers of arbitrators or umpire to act on evidence recorded by their predecessors, and also to provided that proceedings held before arbitrators shall be deemed to be proceedings before the umpire.

(27) In the First Schedule, paragraph 3, the period should be extended to six months and an Explanation be added defining the expression "entering on reference".
(28) In the First Schedule, paragraph 5, a similar amendment should be made defining the above expression and the period be increased to four months.

(29) In the First Schedule, paragraph 6 should be recast as recommended.

(30) In the First Schedule, paragraph 7 should be amended by adding an Explanation to deal with cases where rules of an association provide for appeal."

Several public institutions of trade, commerce and industry and eminent lawyers and scholars also proposed drastic changes. In the meanwhile, Thirteenth Law Commission also undertook a further examination of its recommendations. Unusually, a large number of cases were pending in the Courts and the legal system was proving to be too inadequate to deal with the problem. Even the system itself started having anxious moments which led to the formation of Arrears Committee, popularly known as the Malimath Committee, constituted by the Government of India on the recommendation of the Chief Justices' Conference. The Malimath Committee submitted the report in 1990. The Malimath Committee as well as the Law Commission recommended a number of alternative modes such as arbitration, conciliation, mediation etc.

On 4th December, 1993, there was a historic conference of Chief Ministers and Chief Justices under the Chairmanship of the Prime Minister of India to deal with the menace of ever increasing number of dockets. The Government of India had also before it some Model Laws including UNCITRAL Model Law on International Commercial Arbitration, I.C.C. Rules on Conciliation and Arbitration. Horizons of Indian trade and commerce were expanding. It was considered proper that instead of bringing piecemeal amendments to the 1940 Act, an entirely new law should be made and it should be based on UNCITRAL Model Law which had the provisions meant for universal application taking into consideration the international commercial angles.

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly resolution on 17th December, 1966, with promotion of the progressive harmonization and unification of the law of international trade as its objectives. The Commission consists of as many as 36 States from various
geographic regions and different economic and legal system of the world. India has been the member of the Commission since its inception. The Commission adopted after deliberations the Model Law on 21st June, 1985. Since the Model Law is not a treaty, it does not compel the State adopting it to enact a national law on that basis. But there were obvious advantages in following its terms. The General Assembly by its resolution dated 11th December, 1985 made recommendations as follows:

"All States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of law of arbitral procedure and the specific needs of international commercial practice."

Several countries have enacted law to give legal force to the Model Law within their jurisdiction. India followed them after extensive deliberations and consultations at all possible levels.

**The salient features of the Arbitration and Conciliation Act 1996**

The act contains 86 Sections, a Preamble and three Schedules in toto.

The Act has been divided into three Parts and the each and every part has been subdivided in to various Chapters. For example Part one of the act has been divided in to 10 Chapters, Part Two of the act has been divided in to 2 Chapters.

4.2 **THE OBJECTS SOUGHT TO BE ACHIEVED BY THE ACT**

The act embodies the following objects: They are,

1. To consolidate and amend the law relating to domestic arbitration and the international commercial arbitration and the enforcement of the foreign award.\(^{17}\)

2. To define the law relating the conciliation.\(^{18}\)

3. The enforcement of the UNCITRAL Modal Law on International Law of International Commercial Arbitration and the conciliation and the relevant Rules made by the UNCITRAL.\(^{19}\)

\(^{17}\) Refer the long title of the Act

\(^{18}\) Ibid

101
4. The creation of the uniform legal relating to arbitration and the conciliation in India.\textsuperscript{20}

5. The establishment of unified legal frame works for the purpose fair and efficient settlement of the disputes arising out of the international commercial relationship\textsuperscript{21} and the matter connected or, incidental there to.

4.3 SELF CONTAINED CODE

Only a few legislations can be called as self contained code. For example the Consumer Protection Act 1986 and the CAT Act. The Arbitration and the Conciliation Act 1996, is also one among them.

The following aspects of the act make the act as the self contained code.

- Firstly the act deals with the substantial as well as the procedural aspects of the arbitration in India.\textsuperscript{22}

- Secondly the act specifically excludes the application of the CPC 1908 and the Indian Evidence Act 1872.

- Thirdly the act empowers the arbitral tribunal to follow its own procedures in determining the issues brought before it.\textsuperscript{23}

- Fourthly the lays down the provisions relating to the commencement,\textsuperscript{24} conduct and termination of the arbitration proceedings.\textsuperscript{25}

- Fifthly the act regulates the jurisdiction,\textsuperscript{26} composition, evidence to be followed, producers’ relating to filing the claims the defiance and the appeal.

Thus the aforestated aspects of the act makes the act as the self contained code.

\begin{footnotesize}
\begin{itemize}
  \item Refer the Preamble of the act
  \item Ibid
  \item Ibid
  \item Refer the entire Part 1 of the Arbitration and the Conciliation Act, 1996
  \item Refer SS. 19 to 21 Ibid
  \item Refer S. 23 Ibid
  \item Refer SS.14,15, 32 and others Ibid
  \item Refer SS. 16and 17 Ibid
\end{itemize}
\end{footnotesize}
4.4 SALIENT FEATURES OF THE ARBITRATION AGREEMENT

1. The arbitration agreement is the foundation for the arbitration proceedings without which, nothing can be done in the process relating to the arbitration proceedings.27

2. The arbitration clause or, the arbitration agreement should clearly prescribe the subject matter of the dispute, or the disputes to be referred to the arbitration.28

3. It should specify the timing of the disputes that is, past, present and the future that why the act uses the words “disputes which have arisen or, arise, or likely to arise.”29

4. The agreement should clearly state the number30 of the arbitrators to be appointed and prescribe the qualifications subject to the conditions laid down in the act.31

5. The jurisdiction and the composition of the arbitral tribunal can be stipulated in the arbitration agreement by the parties.

6. The rules relating to the conduct of the arbitration proceedings provision relating to the speaking order should be included in the arbitration agreement by the parties.

7. The parties to the arbitration agreement can also choose the place of the arbitration that is, the seat of the arbitral tribunal and the venue of the arbitration proceedings to be conducted by the arbitral tribunal.32

8. The parties to the arbitration agreement should clearly specify or, indicate the substantive law to be applied by the arbitration tribunal in the agreement subject to certain conditions as, prescribed in the act.33

27 Refer S. 7 of the Arbitration and Conciliation Act,1996
28 Ibid
29 Ibid
30 Refer S. 10 Ibid
31 Refer S. 11 (8) and S. 12 (2) Ibid
32 Refer S. 20 Ibid
9. The arbitration agreement should also contain the provisions relating the mandate of the arbitration and the termination of the mandate.\textsuperscript{34}

10. The parties can also extend the mandate of the arbitration through the agreement.\textsuperscript{35}

4.5 THE POWERS AND THE FUNCTIONS OF THE ARBITRAL TRIBUNAL

1. The act empowers the arbitral tribunal to rule on its own the competency and the jurisdiction of the tribunal.\textsuperscript{36}

2. The Arbitral Tribunal can provide the interim direction to the parties to the arbitration proceedings; for example to preserve the evidence and to furnish security and the inspection of the documents.\textsuperscript{37}

3. The Tribunal can appoint the experts and consultants for the purpose of determining the issues between the parties.\textsuperscript{38}

The act empowers the arbitral tribunal to decide the place of the tribunal,\textsuperscript{39} procedure relating to the conduct of the proceedings.\textsuperscript{40} It can also decide the substantive law to be applied in the to resolve the dispute subject to the condition as, embodied in the act.\textsuperscript{41}

The act permits the tribunal to approach the court of the law for enforcement of the interim orders and can also arrange the institutional facilities for the purpose of the conduct of the proceedings.\textsuperscript{43}

\textsuperscript{33} Refer S. 28 (1) (III) Ibid
\textsuperscript{34} Refer SS.14 and 15 Ibid
\textsuperscript{35} Ibid and refer the NBCC Case decided by the Hon’ble Supreme Court of India
\textsuperscript{36} Refer S 16 of the Arbitration and Conciliation Act, 1996
\textsuperscript{37} Refer S 17 Ibid
\textsuperscript{38} Refer S. 26 Ibid
\textsuperscript{39} Refer S. 20 Ibid
\textsuperscript{40} Refer S. 19 Ibid
\textsuperscript{41} Refer S. 28 Ibid
\textsuperscript{42} Refer S. 27 Ibid
\textsuperscript{43} Refer S. S.6 Ibid
The tribunal can award the cost including the interest during the three stages of the suit.\textsuperscript{44} The tribunal can provide the award, the interim award, the additional award, and the final award.\textsuperscript{45}

The empowers the tribunal to make the corrections in the award on suomotto basis. The act empowers the arbitral tribunal to decide whether to hold oral hearing or not or to conduct the proceedings on the basis of the documents and other materials available to it. Subject to certain conditions laid down in the act the tribunal can conduct the proceedings on the ex-parte basis.

4.6 THE IMPORTANT RIGHTS OF THE PARTIES RECOGNIZED UNDER THE ACT

Party autonomy is the back bone of the Arbitration and the Conciliation Act 1996. This concept has been given due recognition in the act through various provisions of the act. For example, the act provides the complete freedom in framing the arbitration agreement or, the arbitration clause in the contract in the matters relating the appointment of the arbitrators and prescribing the qualifications, extending the mandate of the arbitration and others. The concept of party autonomy is highly reflected in the act in all most in all the stages of the arbitration proceedings under this act. That is why, the act uses the words such as, “unless otherwise agreed by the parties”, “as agreed by the parties” and “failing of the agreement by the parties” and others.

The following valuable rights have been recognized and guaranteed by the Arbitration and the Conciliation Act 1996

1. The right to frame the rules relating to the procedural aspects the arbitration proceedings to be conducted by the arbitral tribunal by the parties themselves.\textsuperscript{46}

\textsuperscript{44} Refer S. 30 Ibid  
\textsuperscript{45} Ibid  
\textsuperscript{46} Refer S. 2 (9) Ibid
2. The right to determine the number of the arbitrators to be appointed as, the arbitrators for purpose of the conducting the proceedings.\textsuperscript{47} This right can be exercised by the parties subject to the condition laid down in the act.\textsuperscript{48}

3. The parties are entitle to prescribe the qualification for the arbitrators to be appointed by them.\textsuperscript{49} In addition to this the act also empowers the parties to remove the arbitrators through challenge procedure as prescribed by the act. The act makes it very clear that, the parties free to extend the mandate of the arbitration unless, it is extended with the clear cut consent of the parties through the subsequent agreement mandate cannot be extended automatically but, the mandate the arbitration gets terminated legally.\textsuperscript{50}

The Supreme Court of India has rightly absorbed in the case of that, the right has been exclusively vested up on the parties by the 1996 act. It also ruled that the High Court cannot extend the mandate of the arbitration without the consent of the parties under the present act.

4.7 THE RIGHT TO EQUALITY

The act mandates the arbitral tribunal to provide the equal treatment to all the parties in the matter of hearing and adducing the evidence and all other matter connected to the proceedings before the tribunal.\textsuperscript{51}

The act guarantees the parties to have an independent tribunal and the impartial hearings by the tribunal. In addition to this the act empowers the parties removes the arbitrators who, act with bias or, who does not act independently or, impartially through challenge procedure as, laid down in the act.

---

\textsuperscript{47} Refer S. 10 (1) Ibid
\textsuperscript{48} S.10 (1) of the Arbitration and Conciliation Act,1996 empowers the parties to appoint the Arbitrators provided the number of the arbitrators should not be an even one
\textsuperscript{49} Refer S. 11 (8) Ibid
\textsuperscript{50} Refer SS. 14 and 15
\textsuperscript{51} Refer S 18 Ibid
4.8 THE RIGHT TO WAIVER

In the Constitutional parlance the doctrine of waiver is not at all applicable in India. On the other hand, the act is an exception to that, the act specifically incorporates the doctrine of waiver in the following language. The relevant part of the act reads as follows:

“Waiver of right to object

A party who knows that-

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

(b) any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.\footnote{S. 4 Ibid}

The aforestated part of the act makes very clear that, the act permits the concept of waiver only to a limited extend that is a party cannot waive the fundamental right or, any other constitutional right legal right but, he can waive the rights embodied in the part 1, of the act and any of the right embodied in the arbitration agreement.

The researcher would like to strongly recommend that the aforestated concept of waiver should be limited only to commercial arbitration. The same shall not be extended or, applied to the non-commercial arbitration.

The researcher would like to suggest that the Arbitration and the Conciliation Act should be suitably amended for the purpose of incorporating the limitation/condition relating to the concept of the waiver. The act specifically empowers the parties to waive the following rights. They are firstly the right to waive the oral hearing and the right to waive the reasoning the award of the arbitral tribunal.

\footnote{S. 4 Ibid}
The researcher would like to point out that the provisions relating to waiver of oral hearing and speaking order should be restricted only to the commercial arbitration. The same shall not be extended to the noncommercial domestic arbitration.

4.9 THE POWERS AND FUNCTIONS OF THE JUDICIAL AUTHORITY UNDER THIS ACT

The act generally prohibits the intervention of the court or, the judicial authority in the arbitration proceedings. The relevant part of the act reads as follows. “Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.” At the same time, the act also specifically mandates the court to carry out certain powers and the functions that is why, the act uses the words such as, “except where so provided in this part”. The words “this part” clearly indicates that the prohibition as well as the permit on to intervene in the arbitration proceedings exclusively refers the domestic arbitration under this act.

Power of the court to refer the matter for the arbitration

The act empowers the court to refer the matter for the arbitration in the following conditions. They are:

- Firstly there should be an arbitration agreement between the parties.
- Secondly at least one of the parties should have approached the court in accordance with the provisions of the act.
- Thirdly the applicant should have complied all the conditions prescribed under this act. For example, the act mandates the applicant to furnish the original copy of the arbitration agreement to the court. The relevant part of the act reads as follows.

---

53 S.5 Ibid
54 Ibid
55 Ibid
56 Part one of the act has been exclusively devoted to the domestic arbitration
57 Refer SS 7 and 8(1) Ibid
58 Refer S 8 Ibid
59 Refer S 8(2) Ibid
Refer parties to arbitration where there is an arbitration agreement

A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

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

Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.60

Power of the court to grant the interim measures

The act specifically permits the court to provide the following interim measures.

- Firstly to appoint the guardian to minor;
- Secondly to secure the amount involved in the arbitration
- Thirdly to preserve the goods and the evidence;
- Fourthly, the appointment of the receiver and the granting of the interim injunction.

Measures by Court

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

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

60 S. 8. Ibid
(2) for an interim measure of protection in respect of any of the following matters, namely:-

(a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; 61

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

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

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

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

The statute confers the wider power up on the court to provide the interim measures for the propose of doing the complete justice between the parties as, a case brought before it.

This view can be clearly explained with the help of the language used in the relevant part of the reads as follows. “such other interim measure of protection as may appear to the court to be just and convenient, and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.” 62

---

The words “such other interim measures of protection” used in the statute is very wider one which can cover many interim measures, which are specifically mentioned in the act.

**Power of the court to provide assistance in taking the evidence to the arbitral tribunal**

The act empowers the parties and the arbitral tribunal to approach the competent court for the purpose of taking the evidence relating the arbitral proceedings before the arbitral tribunal. The act also empowers the competent court to provide the necessary assistance to the arbitral tribunal in the process relating to the matter of the taking the evidence. In addition to this, the act vests the powers what it calls, “same powers of the court” to execute the request of the arbitral tribunal as in a case originally brought before the court. The relevant part of the act reads as follows:

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

(2) The application shall specify:-

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

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

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

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

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

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

---

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

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

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

The act lays down the procedure relating to the contempt of the arbitral tribunal for the purpose of enforcing the process relating to the taking of the evidence. What the arbitral tribunal has to do is that the arbitral tribunal has to make a representation to the competent court against the persons, who is in default or who refusing to provide the evidence to the tribunal in accordance with the process issued by the arbitral tribunal to be punished for the offence of committing the contempt of the arbitral tribunal and the act mandates the court to provide the necessary orders for the purpose of punishing the persons, who has committed the contempt of the arbitral tribunal based on the representation made by the arbitral tribunal.

This power of the court is very important one without which it will be impracticable for the arbitral tribunal to conduct the proceedings in an effective manner.

**Power of the court to set-aside the arbitral award**

The Act confers the necessary powers to set-aside the award made by the arbitral tribunal subject certain limitations and conditions as prescribed by the act.

---

64 S. 27 Ibid
65 Refer S. 27 (5) Ibid
(a) The aggrieved party can make application in the prescribed form in accordance with the prescribed procedure in the prescribed time to the competent court.

(b) The applicant should prove any of the ground or, grounds for the purpose of setting aside the award as prescribed in the act. For example, the applicant should prove that there are some incapacity existed during the arbitral proceedings, or, the arbitral tribunal exceeded the terms submissions to the arbitration by the parties and the others.

In addition to this the act empowers the court to set aside the award on certain grounds as prescribed in the act, provided, if the court finds the existence of the grounds to set aside the award. For example, the act states the following grounds that is, the subject matter of the case cannot be settled through arbitration and the arbitral award is against the public policy of India. The relevant part of the act reads as follows.

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

(2) An arbitral award may be set aside by the court only if,

(a) The party making the application furnish 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 matters beyond the scope of the submission to arbitration:

PROVIDED that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) The court finds that-

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

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

Explanation:

Without prejudice to the generality of sub-clause (ii) 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 or was in violation of section 75 or section 81.

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

PROVIDED that, if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
(4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.66

**Power of the Court to entertain the appeals**

The act generally did not encourage more appeals but, allows the appeals to be heard by the courts only in certain grounds as, prescribed in the act. For example, it allows the parties fill the appeal against the matters falling under Sections 16, 17 and 34 and other provisions of the act. The Act generally curtails the second appeal, subject to the condition that the said limitation shall not applicable to the Supreme Court of India. The relevant part of the act reads as follows:

**4.10 APPEALABLE ORDERS**

(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;

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

(2) An appeal shall also lie to a court from order of the arbitral tribunal,-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) or section 16; or

(b) Granting or refusing to grant an interim measure under section 17.

---

66 S 34. Ibid

115
(3) No second appeal shall lie from an order passed in appeal under this section, but noting in this section shall affect or take away any right to appeal to the Supreme Court.”

In addition to this the act confers a number of powers up on the court, which includes, the appoint and remove the arbitrators, subject to certain condition laid down in the act and the power decide the quantum of the fees to be paid by the parties to the arbitrators in certain situations.

4.11 THE STAGES IN THE ARBITRAL PROCEEDINGS

The arbitral proceedings consist of the following stages:

They are making an arbitration agreement, the appointment of the qualified arbitrator, or, arbitrators the arrangement of institutional facilities and the infrastructures, fixing of the waive of the arbitration, commencement of the proceedings termination of the proceedings or, the termination of the mandate, making of the award, and the enforcement of the award.

The Appointment of the Arbitrators

It lays down the clear cut procedures in the matter relating to the appointment of the arbitrator, or the arbitrators. It provides wide freedom in determining procedure and the qualifications to the arbitrators. It also lays down the procedure to be followed by the Chief justice of the High Court and the Chief Justice of the Supreme Court of India in the matters relating to the appointment of the arbitrators in the domestic and the international commercial arbitration respectively. The act also mandates the CJI and the CJ of the High Courts to frame the appropriate schemes for the afore stated purpose.

Appointment of Arbitrators

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

67 S. 37 Ibid
(2) Subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

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

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

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

(b) The two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request to a party, by the Chief Justice or any person or institution designated by him.

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

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

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

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

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take a necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) Any qualifications required of the arbitrator by the agreement of the parties;

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

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

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

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

(12) (a) Where the matters referred to in sub-section (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-section (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal civil court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the
court referred to in that clause, to the Chief Justice of that High Courts for challenge.\(1\)

**Jurisdiction of the Arbitral Tribunal**

Once the sole arbitrator or, the odd number of the arbitrators have been appointed as per the procedures prescribed in the arbitration agreement is over then, the next step follows that is, the ascertaining/ determining the jurisdiction of the arbitral tribunal is to be done.

The act empowers the arbitral tribunal itself to give the ruling relating the jurisdiction of the tribunal over the subject matter of arbitration.

**Competence of arbitral tribunal to rule on its jurisdiction**

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

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

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

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

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

\(1\) S. 11 Ibid
(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

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

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.69

The act empowers the parties to attack the jurisdiction of the tribunal on the following grounds:

The party can challenge the jurisdiction of the tribunal on the basis the contract embodying the arbitration clause itself is null and void therefore the tribunal does not have the jurisdiction.70

The parties can generally challenge that the arbitral tribunal does not have the jurisdiction and finally the parties can also challenge that the tribunal exceeds the scope of the authority conferred by the parties. The act not only prescribes the grounds for the attack of the jurisdiction but, also prescribes the time limit with in which, the objections relating the jurisdiction should be raised.71

The act empowers the tribunal to condone the delay in the raising the objections relating the issue of the jurisdiction and to give a ruling on it in case, if, the tribunal rejects the aforestated objections the tribunal is entitled conduct the proceedings and make the award.72 The act allows the aggrieved party to make an application to the court to set-aside the award on the aforestated ground, or, grounds.73

69 S 16 Ibid
70 Refer S 16 (1) (a) Ibid
71 Refer S 16 (1) and (2) Ibid
72 Refer S 16 (4) and (5) Ibid
73 Refer S 16 (6) Ibid
Commencement of the proceedings

The act uses the term proceedings in wider manner. The arbitral proceedings do not start with the hearing of the case by the arbitral tribunal but, it starts on the receiving date of the request of the arbitration by the respondent.

Statements of the claim and the defence

In the civil case the person who fills the suit is known as plaintiff and the person against whom it is filled is called as defendant like that, the statement filled by the plaintiff is known as plaint the written statement by the defendant. Whereas, in the arbitral proceedings the same statement of the claim and the defence.

“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 these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statement 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. 74

74 S. 23 Ibid
Hearing of the case by the tribunal

The act mandates the arbitral tribunal to provide the equal and sufficient opportunity to present the full case. The word “presentation of the full case” includes the oral as well as the written presentation.\textsuperscript{75}

The act empowers the parties to choose the language to be used by the arbitral tribunal in the proceedings and the matters connected with it.\textsuperscript{76}

The parties can choose whether to have the oral presentation and the written presentation or to dispense the oral presentation in case the tribunal appoints any expert, then the parties can request the tribunal for the oral presentation to be made by the expert so that, the parties can put the questions to the expert.\textsuperscript{77}

Hearing and Written proceedings

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

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

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

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and

\textsuperscript{75} Refer S 18 Ibid
\textsuperscript{76} Refer S 22
\textsuperscript{77} Refer SS 24 and 26 Ibid
any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.\(^78\)

**Consequences of the default of the parties:**

The act empowers the arbitral tribunal to conduct the proceedings on the ex-parte basis provided, if the parties failed to cooperate with tribunal. In addition to this, the tribunal can also terminate the proceedings if the claimant fails to appear without any sufficient causes provided the respondent does not raise any objections to that.

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

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

(b) the respondent fail to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.\(^79\)

**Making of the award by the arbitral tribunal**

This is the last stage in the arbitral proceedings. The decision taken by the majority of the members of the tribunal will be expressed in the form of the award.\(^80\)

\(^78\) S. 24. Ibid  
\(^79\) S 25 Ibid  
\(^80\) Refer SS 29 and 30 Ibid
The tribunal can render the interim award\(^{81}\) provided, if the tribunal deems it necessary, otherwise, the tribunal may render directly the final award.\(^{82}\)

The act permits the arbitral tribunal to encourage the parties to arrive at a settlement and if the parties have agreed for a settlement then, the same can be incorporated in the award by the arbitral tribunal.\(^{83}\)

The act mandates the tribunal to specifically state that, it is an award made by the tribunal on the basis of the agreed terms of the parties.\(^{84}\)

**Contents of the award**

The arbitral award should contain the following:

They are the place of the award,\(^{85}\) the date of the award,\(^{86}\) information relating to the cost to be borne by the parties, the rate of the interest if any,\(^{87}\) and it should be signed by the majority of the members of the tribunal. The same shall be delivered by the tribunal to the parties at free of cost.\(^{88}\)

**Finality of the award**

The act prescribes two conditions for the award to attained the status of the finality that is, one, the time for making the application to setaside the award is over or, the application has been made and the same has been rejected by the court then, the award become a final one.\(^{89}\)

---

\(^{81}\) Refer S 31 (6) Ibid
\(^{82}\) Refer SS 35, 30 and 32 Ibid
\(^{83}\) Refer S 30 Ibid
\(^{84}\) Refer S 31 Ibid
\(^{85}\) Refer S 31 (2) Ibid
\(^{86}\) Refer S 31 (1) Ibid
\(^{87}\) Refer S 31 (7) (a) and (b) Ibid
\(^{88}\) Refer S 31 (3) Ibid
\(^{89}\) Refer SS 34, 35 and 36 Ibid
Enforcement of the award: \(^{90,91}\)

Once the award reaches the finality then, the parties can enforce the award in the same manner of the decree of the court.\(^{92}\)

4.12 ENFORCEMENT OF CERTAIN FOREIGN AWARDS

The act does not the term domestic award but, uses the award in several places. For example, form and the contents of the award, finality of award, award on the agreed terms, power of the court to set-aside the award, and the enforcement of award. The mere plane reading of the part 1. Will make it very clear that entire part 1 has been devoted to the domestic arbitration. It goes without saying that the award passed in the domestic arbitration should be necessarily the domestic award.

On the other hand, the act uses the term foreign award specifically and it has devoted the entire part 2. For the aforestated purpose, The part 2, contains II Chapters Chapter I of part1, deals with the New York Convention Awards\(^{93}\) and the Chapter II of part 2, deals with the Geniva Convention Awards.\(^{94}\)

Definition of the term foreign award

Foreign award means an arbitral award made by an arbitral tribunal located in the foreign territory pursuant to legally binding arbitration agreement and capable enforcement in by the courts in India.

The Act defines the term foreign award in the following words:

In this chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960,-

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in First Schedule applies, and

---

\(^{90}\) Refer S 31 (8) (a) and (b) Ibid
\(^{91}\) Refer S 31 (1) Ibid
\(^{92}\) Refer S 36 Ibid
\(^{93}\) Refer SS 44 to 51 Ibid
\(^{94}\) Refer SS 52 to 59 Ibid
(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.  

**Power of the court to refer the parties to the arbitration**

The act has conferred the powers up on the courts in India to refer the parties to the arbitration in the context international commercial arbitration subject to certain conditions as prescribed in the act. The relevant part of the act reads as follows:

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The power of the court to refer the parties to the arbitration is quit different from part 1, of the act. For example, in the case of the former, the court can do so, only, when the court satisfies that the agreement is not null and void or, inoperative and incapable of performed in India. Whereas, in the case of latter the court need not look in the aforesatated issues but, the applicant must furnish the original copy of the arbitration agreement. On the other hand, the furnishing of the original copy of the foreign award and the arbitration agreement has been stipulated as one of important condition to be complied by the party, who wants enforce the foreign award in India. The relevant part of the act reads as follows:

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court,-

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

---

95 S. 44 Ibid
97 Refer S 8 Ibid
(b) the original agreement for arbitration or a duly certified copy thereof and

(c) Such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.\textsuperscript{98} The mere plain reading of the afore stated provision of the act will make it very clear that the person who wants to enforce the foreign award must furnish more evidence comparing with the a person who wants to enforce the domestic award.\textsuperscript{99} At the same time, the act imposes several conditions up on the persons against whom the foreign award is invoked to be enforced in India.

The relevant part of the act reads as follows:

(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,-

\begin{enumerate}
\item[(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
\item[(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
\item[(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:
\end{enumerate}

\textsuperscript{98} S. 47 Ibid
\textsuperscript{99} Refer SS 34 to 36 Ibid
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) of this section, 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.”

100 S. 48 Ibid
It should be noted that the Act puts the ones of the same up on the person, who wants set aside the domestic award. Thus it becomes very clear from the forgoing discussion that the Arbitration regime in India as undergone lot of changes.

The time has come for the appropriate and drastic legal reforms to make India as an Arbitration Hub in the eyes of International Community for the success of economic growth. It is high time to re-introduce the Arbitration Amendment Bill, 2001 with appropriate changes in the light of the ruling of the Hon’ble Supreme Court of India in the BALCO case, so as to make India as an attractive destination for International Commercial Arbitration.

---

101 Refer S 34 Ibid