CHAPTER IV
ARBITRATION

1. CONCEPT OF ARBITRATION

Halsbury’s Laws of England\(^1\) define Arbitration as reference of a dispute or difference between not less than two parties for determination after hearing both parties in a judicial manner by a person or persons other than court of competent jurisdiction.

Arbitration is a recognized private legal procedure used to resolve disputes between two or more parties\(^2\) where the parties entrust the dispute resolution process as well as the outcome of the dispute to a neutral third party i.e. the arbitrator (or the arbitral tribunal).\(^3\) The arbitrator/ arbitral tribunal considers the case of the parties on merits, follows as simplified procedure to adjudicate the dispute and the arbitral proceedings then culminate into a binding decision i.e. the arbitral award\(^4\).

Arbitration is a creature of agreement. An agreement to arbitrate is therefore really an agreement between the parties to substitute a tribunal other than the courts of the land to determine their rights and substitution of the decision or award of such tribunal for the judgment of the established courts of justice.\(^5\) The object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense and

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\(^3\) Arbitrator is a private judge and arbitration is private adjudication. See Latha K., “The Need for the Proper Utilization of ADR Facilities in India”, XLIII ICA Arbitration Quarterly 18 (October – December 2008).


\(^5\) See Merton C. Bernstein, Arbitration – What is it, Private Dispute Settlement – Cases and Materials on Arbitration (The Free Press, New York, 1968); Party autonomy is a commendable feature of arbitration. The parties are free to choose not only the arbitrator, but also the law, procedure, venue and almost everything related to the dispute resolution process. See Anurag K. Aggarwal, “Party Autonomy in Commercial Arbitration”, XLI (3) ICA Arbitration Quarterly 9 (October – December 2006).
the parties are free to agree how their disputes are resolved and intervention by the courts should be restricted.\textsuperscript{6}

The nature of most ADR processes is fundamentally non adjudicatory whereas arbitration is essentially an adjudicatory process\textsuperscript{7} and is similar to litigation in that sense. However since it is still an alternative to the conventional litigative process\textsuperscript{8} of dispute resolution conducted before law courts established under the writ of the state, arbitration finds its place in the galleries of what has been described as ADR.\textsuperscript{9} In India also the availability of arbitration as a dispute resolution process in section 89 CPC indubitably endorses its status as an ADR mechanism.

\textbf{2. HISTORICAL BACKGROUND OF ARBITRATION IN INDIA}

Arbitration as a mode for settlement of disputes between the parties has a tradition in India.\textsuperscript{10} The decisions rendered by Panchayats, which are recognized since times immemorial in India, represent a crude form of arbitration.\textsuperscript{11} With the advent of the British Rule commenced the era of codified legislation, rules and regulations and arbitration also made its way

\textsuperscript{6} Davit St. John Sutton, Judith Gill, Mathew Gearing (Eds.) \textit{Russel on Arbitration} 4 (Sweet and Maxwell, London, 23\textsuperscript{rd} Edn., 2007)


\textsuperscript{8} It is to be noted that matrimonial matters, disputes relating to winding up of companies, testamentary matters, matters relating to guardianship, insolvency matters, etc. which are triable by specified courts and criminal matters or questions of public law cannot be resolved by arbitration. See G.K. Kwatra, \textit{Arbitration & Conciliation Law of India} 9 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 7\textsuperscript{th} Edn., 2008).


\textsuperscript{x} See \textit{Food Corporation of India v. Jogindarlal Mohindarpal}, 1989 (2) SCC 347.

into the statute books.\textsuperscript{12} The first comprehensive law on the subject was enacted in India in the year 1899 viz. the Indian Arbitration Act, 1899.\textsuperscript{13} The Code of Civil Procedure, 1908 also contained various provisions relating to arbitration under section 89 and section 104.\textsuperscript{14} In 1940 the Government of India passed the Arbitration Act, 1940, the precursor to the contemporary legislation.\textsuperscript{15}

However with the passage of time, experience revealed that the Arbitration Act, 1940 was laden with inadequacies and defects. The Arbitration Act, 1940 even had to face stringent criticism time and again from none other than the Apex Court itself.\textsuperscript{16} The functioning of the Act of 1940 in fact dented the conception of arbitration in India and the government decided to refer the matter to the Law Commission of India, pursuant to which the Law Commission\textsuperscript{17} recommended far-reaching amendments in the Arbitration Act of 1940.

During this period the UNCITRAL after exhaustive research and due deliberations adopted the Model law on Arbitration.\textsuperscript{18} The necessity to amend the Arbitration Act of 1940 had become evident and imminent. The General Assembly of the United Nations\textsuperscript{19} had also recommended that all countries

\textsuperscript{12} The Bengal Regulations of 1772, the Bengal Regulations of 1793 and Regulation VI of 1813 dealt with arbitration in pre-independence India.


\textsuperscript{14} Section 89 CPC was repealed by the Arbitration Act, 1940. However, it got reincarnated with the passing of the Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 1\textsuperscript{st} July, 2002.

\textsuperscript{15} The Act was on the lines of its English counterpart i.e. the English Arbitration Act, 1934.


\textsuperscript{18} The UNCITRAL Model Law on International Commercial Arbitration, 1985 (The Model law has lately been amended in 2006).

give due regard to the UNCITRAL Model Law on Arbitration, to bring about uniformity and consistency in arbitration law all across the globe so as to develop arbitration as a wide spread and international mode of dispute resolution. Consequently, the government decided that enactment of a new comprehensive legislation in sync with the international standards was a better course of action rather than effecting radical amendments to the existing Arbitration Act, 1940. The result was the enactment of the Arbitration and Conciliation Act of 1996 on the lines of the UNCITRAL Model Law.\textsuperscript{20} While the UNICITRAL Model Law on Arbitration primarily applied only to international commercial arbitrations, the Arbitration and Conciliation Act of 1996 aimed to consolidate and amend Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.\textsuperscript{21}

### 3. TYPES OF ARBITRATION

#### 3.1 Domestic, Foreign and International Arbitration:

The term “Domestic Arbitration” denotes an arbitration which takes place in India\textsuperscript{22} and the resultant arbitral award is considered to be a domestic award.\textsuperscript{23} “Foreign Arbitration” is an arbitration which is conducted at a place outside India and the resultant award is designated as a “foreign award”.\textsuperscript{24} “International Arbitration”\textsuperscript{25} is an arbitration where at least one of the parties involved is a not a resident of India, or is domiciled outside India, or is a

\textsuperscript{20} See Preamble to the Arbitration and Conciliation Act, 1996.


\textsuperscript{22} The provisions of Part I of the Arbitration and Conciliation Act, 1996 apply to such arbitrations. See s. 2(2), Arbitration and Conciliation Act, 1996.

\textsuperscript{23} S. 2(7), Arbitration and Conciliation Act, 1996.

\textsuperscript{24} However only those foreign awards which are recognized by ss. 44 and 53, Arbitration and Conciliation Act, 1996, which in turn relate to the New York Convention for Recognition and Enforcement of Arbitral Awards, 1958 and Geneva Convention, 1937 respectively, can be enforced in India.

\textsuperscript{25} S. 2(1)(f), Arbitration and Conciliation Act, 1996 defines International Commercial Arbitration in a similar manner.
company incorporated outside India and such an arbitration may take place in India or outside India.

3.2 Institutional and ad hoc Arbitration

“Institutional Arbitration” is the arbitration conducted by an established permanent arbitral institution. There are various such institutions/or organizations which offer facilities for conduct of arbitration and have their own set of rules for conduct of arbitral proceedings which are managed and supervised by the institution from the stage of appointment of arbitrator till the passing of the award.

“Ad hoc Arbitration” is arbitration agreed to and arranged by the parties themselves without recourse to any permanent arbitral institution. In other words arbitration which is not ‘institutional’ is referred to as ad hoc arbitration.

4. THE ARBITRATION PROCESS

4.1 ARBITRATION AGREEMENT

The genesis of arbitration is the arbitration agreement. An arbitration agreement is plainly an agreement whereby the parties to the agreement consent to submit to arbitration all or certain disputes, which have arisen or which may arise between them in respect of a defined legal relationship.

The sine qua non for a valid arbitration agreement is that the parties must be

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27 Eg. International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), American Arbitration Association (AAA), Indian Council for Arbitration (ICA), FICCI Arbitration and Conciliation Tribunal (FACT), etc.


29 S. 7(1), Arbitration and Conciliation Act, 1996; In fact the efficacy and effective outcome of arbitration is decisively controlled by the formulations that are contained in the arbitration agreement and therefore the arbitration agreement needs adequate attention. See Jagdeep Dhankar, “Party Autonomy and Arbitration Agreement”, XLII (1) *ICA Arbitration Quarterly* 9 (April – June 2007).
ad idem and must intend to settle their disputes by arbitration and bound by the decision of the arbitral tribunal.\textsuperscript{30}

The arbitration agreement may be in the form of a separate agreement or may be incorporated in the form of an arbitration clause in the primary contract.\textsuperscript{31} However the arbitration agreement must be in accordance with the requirements enshrined under section 7 of the Arbitration and Conciliation Act, 1996.\textsuperscript{32}

\subsection*{4.2 APPOINTMENT OF ARBITRATOR(S)}

The parties are free to determine the number of arbitrators, however there cannot exist an arbitral tribunal with an even number\textsuperscript{33} of arbitrators.\textsuperscript{34} The parties are also free to agree on a procedure for appointment of arbitrator(s). The arbitrator(s) may be named in the agreement or the parties may nominate them themselves or through any other person or institution as and when the dispute arises. Where the parties fail to agree on the name of the arbitrator the appointment can be made, upon request of a party, by the Chief Justice of the High Court or his designate.\textsuperscript{35} In case of International Commercial Arbitration the arbitrator(s) can be appointed by the Chief Justice of India or his designate only.

The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11 of the Arbitration and Conciliation Act, 1996


\textsuperscript{32}Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., 2006 (2) Arb. L.R. 547 (SC).

\textsuperscript{33}In M.M.T.C. Ltd. v. Sterlite Industries (I) Pvt. Ltd., AIR 1997 SC 605 the Supreme Court held that where the arbitration agreement provides for appointment of two or an even number of arbitrators the same is not ipso facto void and the two appointed arbitrators can appoint the presiding arbitrator and proceed with the arbitral proceedings; In Narayan Prasad Lohiya v. Nikunj Kumar Lohiya, AIR 2002 SC 1139 it was further held that even where the two arbitrators appointed proceed with the arbitration and do not disagree and a common award is passed the same would be treated as valid and the requirement of appointment of third presiding arbitrator would step into picture only where they disagree.

\textsuperscript{34}S. 10, Arbitration and Conciliation Act, 1996.

\textsuperscript{35}S. 11, Arbitration and Conciliation Act, 1996.
is not an administrative power but a judicial power. Hence the same can be
delegated, by the Chief Justice of the High Court only to another judge of that
court and by the Chief Justice of India to another judge of the Supreme Court
only. The Chief Justice or the designated judge has the right to decide the
preliminary aspects on such an application being made including his own
jurisdiction to entertain the request, the existence of a valid arbitration
agreement, the existence or otherwise of a live claim, the existence of the
condition for the exercise of his power and the qualifications of the arbitrator
or arbitrators.  

4.3 INTERIM MEASURES IN ARBITRATION

Any party to the arbitration agreement, before or during arbitral
proceedings or at any time after making of the arbitral award but before it is
enforced, may apply to the court for interim relief in connection with the
dispute. However where such an application for grant of interim relief is
made before the commencement of arbitral proceedings there must be a
manifest intention on the part of the party to refer the dispute to arbitration
and it is incumbent upon the applicant thereafter to commence arbitral
proceedings within a reasonable time and on failure to do so the court may
recall the interim order, if granted.

The arbitral tribunal may also order for interim relief, although, this
power can be excluded by the parties by way of an agreement. However, the power of the court is much wider and in fact the interim order passed by

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36 M/s S.B.P. & Co. v. M/s Patel Engineering Ltd., 2005 (8) S.C.C. 618 overruling the previous
view that the power under s. 11, Arbitration and Conciliation Act, 1996 is a judicial power in
37 See s. 9, Arbitration and Conciliation Act, 1996.
40 S. 17, Arbitration and Conciliation Act, 1996.
the arbitral tribunal has been described as a toothless order as the same cannot be enforced by the arbitrator.\textsuperscript{41}

\section*{4.5 ARBITRAL PROCEEDINGS}

The arbitral proceedings before the arbitrator in respect of a particular dispute commence on the date on which a request for reference of the dispute to arbitration made by one party is received by the opposite party.\textsuperscript{42} The parties are free to agree on the procedure and venue of arbitration and the language in which the arbitration proceedings are to be conducted. In the absence of any such agreement the arbitral tribunal has the power to determine the same in the manner it considers appropriate. However the parties are to be treated with equality and each party has to be given full opportunity to present his case.\textsuperscript{43} The arbitrator otherwise is not bound by the provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.\textsuperscript{44}

\section*{4.6 ARBITRAL AWARD}

The final decision of the arbitrator is referred to as the arbitral award. The arbitral award has to be in writing and has to be signed by the members of the arbitral tribunal.

The arbitral award must state the reasons upon which it is based, unless the parties have agreed that no reasons\textsuperscript{45} are to be given.\textsuperscript{46} Parties to an arbitration particularly the losing party, are entitled to know the reasons for

\begin{footnotesize}
\begin{enumerate}
\item S. 18, Arbitration and Conciliation Act, 1996.
\item S. 19, Arbitration and Conciliation Act, 1996.
\item 'Reason' is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. See Poyser and Mills' Arbitration Re, (1963) 2 QB 467; The contractual stipulation of reasons under arbitration law means proper and adequate reasons. See Anirudh Wadhwa and Anirudh Krishnan (Eds.), R.S. Bachawat's Law of Arbitration and Conciliation (Lexis Nexis Butterworths Wadhwa, Nagpur, 5\textsuperscript{th} Edn., 2010).
\item S. 31(3), Arbitration and Conciliation Act, 1996.
\end{enumerate}
\end{footnotesize}
the tribunal's decision by which they are bound.47 The Supreme Court has also emphasized the mandatory nature of this provision requiring the arbitrator to give reasons unless the arbitration agreement provides otherwise.48 The requirement of a reasoned award is also excluded where the award is an arbitral award on agreed terms under section 30 of the Arbitration and Conciliation Act, 1996.49

A signed copy of the award is to be delivered to each party. The award must bear the requisite stamp duty50 and if the award creates any right title or interest vested or contingent in immovable property it is required to be registered also.51

4.7 SETTING ASIDE OF ARBITRAL AWARD

The arbitral award passed by an arbitrator can be assailed in terms of section 34 of the Arbitration and Conciliation Act, 1996 and can be set aside by the principal civil court of competent jurisdiction on an application by any party.52 However, the arbitral award can only be set aside on certain specified grounds 53 which are: incapacity of a party, invalidity of the arbitration agreement, lack of proper notice or opportunity to one party, the arbitral award being beyond the scope of the agreement, improper constitution of the arbitral

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48 Konkan Railway Corporation Ltd. v. Mehul Construction Company, (2000) 7 SCC 201; This exception however gives a tool in the hands of dominant parties to misuse arbitration law; In Raipur Development Authority v. Chokhamal Contractors, AIR 1990 SC 1426 the Supreme Court had criticized the practice of unreasoned awards.
50 In Delhi the award is required to be stamped with stamp duty as per article 12 of the schedule to the Indian Stamp Act, 1889 as applicable to Delhi, which is 2% where the value does not exceed Rs. 1000/- and thereafter one rupee for every one thousand rupees or part thereof of the value of the property to which the award relates where such value exceeds Rs.1000 (roughly 0.1%).
52 S. 2(e), Arbitration and Conciliation Act, 1996.
tribunal, the dispute being non arbitrable, the arbitral award being in conflict with the public policy of India.54

The application for setting aside of the arbitral award is to be made within 3 months of receipt of copy of the arbitral award. In case the party is able to show sufficient cause the court may also entertain such an application within the further period of 30 days.55 However no further delay can be condoned having recourse to section 5 of the Limitation Act, 1963.56

In a petition for setting aside of the award, however, the court does not exercise appellate jurisdiction. The court is not supposed to re-appreciate evidence or go into the reasoning given by the arbitrator and the award can be set aside on the specified grounds only. 57 This is a very important provision rendering finality to the arbitral award to a considerable extent and permitting only limited judicial review.

4.8 ENFORCEMENT OF ARBITRAL AWARD

The arbitral award can be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court when the time for making an application to set aside the arbitral award under section 34 of the Arbitration and Conciliation Act, 1996 has expired, or such application having been made, it has been refused.58 Such an arbitral award is deemed as a decree and can be executed by the civil court by filing an execution petition in accordance with Order XXI of the Code of Civil Procedure, 1908.59

54 In Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd, 2003 (5) S.C.C. 705 it was held that the award can be set aside as being in conflict with public policy if it is contrary to the fundamental policy of Indian law, the interest of India or justice or morality, or if it is patently illegal.
57 Arosan Enterprises Ltd. v. Union of India, AIR 1999 SC 3804.
5. ADVANTAGES AND MERITS OF ARBITRATION

5.1 PRIVACY AND CONFIDENTIALITY

The baseline for appreciating the advantages of arbitration is litigation since arbitration as an ADR mechanism and litigation both are adjudicatory in character. Judicial proceedings in courts are conducted in an open court in the gaze of the general public. Everything right from pleadings, evidence, proceedings to the final decision is open and accessible for all and sundry. In contradistinction to judicial proceedings arbitration is a private affair. Some parties prefer to have that their disputes determined out of public gaze and for them arbitration is a good option. Arbitration is closed door adjudication where the general public is excluded and therefore offers privacy and confidentiality for those whose circumstances or wishes require a private adjudication. Confidentiality is therefore an institutional security in arbitration.

5.2 CONVENIENCE OF PARTIES AND FLEXIBILITY OF PROCEDURE

Another principal feature of arbitration is convenience of parties. In the judicial process the parties have no control over the proceedings and they have no say as regards the procedure, venue and time of judicial proceedings. The procedure is largely predetermined, the venue is fixed and the time is controlled by the presiding judge. However arbitration caters to the convenience of the parties which is a very important advantage of arbitration. In arbitration the parties are free to choose the venue and time of arbitration, the procedure governing arbitration, the arbitrators etc. Further as arbitration is consensual and is based on the edifice of party autonomy, the parties can choose the most suitable procedure. The arbitral process is also very flexible unlike litigation before national courts which is governed by detailed,

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intricate and time consuming rules of procedure and evidence. 62 This is because the arbitrator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. 63 This flexibility of procedure and convenience of parties makes arbitration an excellent dispute resolution process.

5.3 LIBERTY TO CHOOSE ARBITRATOR

The arbitrator is a private judge chosen by the parties to adjudicate their dispute. Arbitration provides flexibility to the parties to choose any person of their choice to adjudicate their disputes. The right to choose or to have a say in the choice of one or more members of the arbitral tribunal is also regarded as an important advantage. 64 This permits the parties and gives them an option to have their dispute resolved by experts and professionals having specialized knowledge and experience in the applicable arena. This is most important in case of complex matters requiring technical or special expertise so as to understand and appreciate the issues in a better manner. It is also important as it enables the parties to appoint a person as an arbitrator who is readily available and inclined to accommodate and cooperate with the parties so as to expedite the dispute resolution process.

5.4 ARBITRATION IS POTENTIALLY EXPEDITIOUS

Arbitration is potentially faster in comparison to litigation and can be expedited to suit the needs and requirements of the parties. The parties may also take recourse to a summary form arbitration referred to as Fast Track arbitration. Complex commercial/business disputes require expeditious resolution as high stakes are involved and expeditious resolution is in the interest of trade and commerce. If the dispute needs urgent resolution the parties can choose a tribunal which will act promptly rather than wait for their


turn in the queue. In arbitration the arbitrator can fix up a schedule for hearing of the case as per the convenience of the parties and without any institutional constraints so as to decide the dispute as expeditiously as possible. The arbitral tribunal follows a simplified procedure and is not bound by the provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Thus the arbitral procedure can be moulded so as to suit the requirements of the parties which results in expeditious adjudication of the dispute.

5.5 FINALITY OF AWARDS

The biggest and most important advantage of arbitration is the finality attached with an arbitral award. The arbitral award is treated to be final and binding between the parties. The award can be set aside by the court only on certain specified grounds as enunciated under section 34 of the Arbitration and Conciliation Act, 1996. The ambit and scope of section 34 of the Arbitration and Conciliation Act, 1996 is also limited and the court does not exercise appellate jurisdiction. Thus while in judicial proceedings we have provisions for successive appeals where at least the first appellate court appreciates the factual evidence also, in arbitration there is no provision for an appeal against the award. Where no application under section 34 of the Arbitration and Conciliation Act, 1996 is made or such application is made and refused the award is treated as a decree of the court and can be executed as such. The recourse against the award is limited in other jurisdictions also. This finality attached to the award coupled with limited judicial review results not only in expeditious final resolution but also expeditious enforcement of the decision.

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5.6 EXTENSIVE ENFORCEABILITY OF ARBITRAL AWARDS

Another important advantage associated with arbitration is the extensive enforceability of the arbitral award. An arbitration award passed in India can be enforced in other countries as well. Various countries including India are the signatories of the Geneva Protocol, 1923 and the New York Convention on Recognition and Enforcement of Foreign Awards, 1958 which facilitate enforcement of arbitral awards. Similarly foreign awards which have been passed in the other countries, which are signatories to the Geneva Protocol and the New York Convention and have made reciprocal arrangements, are enforceable in India. Thus arbitral awards can be enforced in most countries untrammelled by national boundaries.

6. ARBITRATION IN DELHI

Arbitration is extensively resorted to in Delhi as a mode of dispute resolution. In fact it is one of the most common methods of dispute resolution in commercial matters and there are numerous avenues for arbitration in Delhi.

6.1 DELHI HIGH COURT ARBITRATION CENTRE (DAC)

The Delhi High Court Arbitration Centre (DAC) is an independent and professional institution, providing institutionalized arbitration services, which has been recently established by the Delhi High Court and works directly under the supervision of the Delhi High Court. The DAC was created pursuant to the Charter of the Delhi High Court with a view to secure fair, speedy and inexpensive justice to the litigants by adopting recourse to arbitration and for giving effect to the provisions of section 89 CPC. The charter further directs

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69 In terms of the provisions of Part II of the Arbitration and Conciliation Act, 1996 dealing with enforcement of foreign awards.
70 DAC was inaugurated on 25.11.2009 by Justice K.G. Balakrishnan, Chief Justice of India and is housed in the premises of the Delhi High Court, Sher Shah Road, New Delhi.
the DAC to ensure that the arbitration proceedings are inexpensive and are concluded within a reasonable time frame.71

The DAC provides all modern infrastructure facilities and has five arbitration halls each equipped with a seating capacity of 20 persons, various consultation rooms for parties and their representatives and chambers for arbitrators. The ASSOCHAM in order to let its members enjoy the fruits of expeditious arbitration has also signed a MOU with the DAC.72

The DAC also has its own set of rules – the Delhi High Court Arbitration Centre (Arbitration Proceedings) Rules have been framed for conduct of the arbitral proceedings; the Delhi High Court Arbitration Centre (Arbitrators’ Fees) Rules govern the matters with respect to the fee payable for arbitration and the Delhi High Court Arbitration Centre (Internal Management) Rules, 2010 govern the management of the DAC.

The Chief Justice of the Delhi High Court is the patron-in-Chief of the Delhi High Court Arbitration Centre. An Arbitration Committee73 has also been constituted under the chairmanship of a Judge of the Delhi High Court to take decisions for the smooth and effective functioning of the DAC and for making appointments to the panel of arbitrators.

The matter can be referred to arbitration by DAC by virtue of a contract between the parties providing for the reference of all future disputes under that contract to DAC or even by a separate agreement providing for the reference of an existing dispute to DAC. Apart from that the matter can also be referred to DAC under section 89 CPC and even under section 11, 8 and 9 of the Arbitration and Conciliation Act, 1996.74

71 For Charter of the Delhi High Court establishing the DAC see Appendix 5.
72 See Delhi High Court, Biennial Report (2008-2010).
73 Arbitration Committee consists of five Judges of the Delhi High Court, the Additional Solicitor General attached to the Delhi High Court, President or Vice-President of the Delhi High Court Bar Association, four advocates and the Coordinator of the DAC (who is a member of the Delhi Higher Judicial service).
74 See Rule 1, Delhi High Court Arbitration Centre (Arbitration Proceedings) Rules; In Trinath Khera v. Aditya Birla Nuvo Ltd., Arb.P.No. 188/2010 decided on 18 July, 2011, the Delhi High
The DAC has a fixed schedule of fees and the fee prescribed is quite economical in comparison to the fee in ad hoc arbitration and even in comparison to other arbitral institutions.\(^{75}\) Arbitral proceedings are conducted in an expeditious manner and the rules also enjoin upon the arbitral tribunal to fix a time table for the conduct of arbitration in consultation with the parties.\(^{76}\) The parties may also agree for the summary procedure whereby the arbitral proceedings are fast tracked in terms of the Delhi High Court Arbitration Centre (Arbitration Proceedings) Rules. The DAC has achieved great popularity and recognition within a short period as it provides economical and expeditious institutionalized arbitration services and the fact that it functions under the aegis of the Delhi High Court lends it greater credibility.

6.2 INDIAN COUNCIL OF ARBITRATION (ICA)

The Indian Council of Arbitration (ICA) is also a premier arbitral institution in Delhi\(^{77}\) which was established in the year 1965. The ICA provides high class infrastructure facilities for conduct of institutional arbitration. The ICA has also entered into mutual cooperation agreements with various international permanent arbitral institutions including International Chamber of Commerce (ICC), American Arbitration Association, etc.

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\(^{75}\) This can be appreciated from the fact that in *Mahagun India Pvt. Ltd. v. Infiniti Retail Limited*, Arb. P.No. 364/2010 decided on 20.05.2011 by the Delhi High Court, the main submission of the petitioner was based on the apprehension of high cost being incurred on reference of the claim/dispute to the arbitral tribunal and for this reason the petitioner was granted the liberty to approach the arbitral tribunal with a request to charge fee as per the schedule maintained by the DAC; Again in *Stup Consultants Pvt. Ltd v. Indian Oil Corporation Ltd.*, Arb. P.No. 208/2009 decided on 15.12.2009, the Delhi High Court on an application under s. 11, Arbitration and Conciliation Act, 1996 appointed one of the empanelled arbitrators of the DAC as the arbitrator and directed that the fees of the arbitrator shall be in accordance with the schedule of fees as given under the rules of the DAC.

\(^{76}\) At the DAC normally pleadings are completed within a period of four months and thereafter the arbitral proceedings are conducted in a time bound manner as per the time table framed. Delhi High Court Arbitration Centre (Arbitration Proceedings) Rules also provide for imposition of costs on parties in case adjournments are sought. The result is that arbitration matters being finally disposed of on merits expeditiously within a time frame of 1-2 years or even less than that.

\(^{77}\) The ICA has its office at Room No. 12, Federation House, Tansen Marg, New Delhi.
The ICA has framed rules known as the Rules of Arbitration of the Indian Council of Arbitration dealing with appointment of arbitrators, commencement and conduct of arbitral proceedings, confidentiality etc. The rules also provide for fast track arbitration. The ICA has also framed ICA Maritime Arbitration Rules for resolution of maritime disputes. The ICA has also formulated an ICA Code of Conduct to be followed by the arbitration committee, arbitrators, parties and their counsel and has also issued a set of guidelines for arbitrators and parties for expeditious conduct of arbitration proceedings. The idea is to ensure expeditious and impartial arbitration proceedings. The ICA also publishes an official arbitration journal i.e. the ICA Arbitration Quarterly incorporating articles and latest developments in the field of arbitration and ADR.

The ICA has an arbitration committee constituted in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the President of ICA is the ex officio chairman of the arbitration committee. The arbitration committee of ICA appoints arbitrators in arbitration cases referred to ICA and also approves the empanelment of arbitrators. The ICA has a broad based panel of more than 2000 arbitrators comprising of retired judges, advocates, engineers, chartered accountants, experts, foreign nationals, etc. The ICA also charges fixed fee as per rule 31 of the Rules of Arbitration of ICA on the basis of the claim amount.

The ICA Arbitration services are frequently utilized by the parties. The ICA has administered more than 2000 arbitration cases and every year numerous cases are referred to arbitration by ICA. Various business entities incorporate arbitration clauses in their contracts for reference of disputes to arbitration by ICA. Various ministries and PSUs have recommended the use of ICA arbitration clauses in their contracts. Thus ICA has been providing

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78 See Appendices 3 and 4.
79 Eg. In arbitration where the amount in dispute does not exceed Rs. 5 lacs, the ICA charges arbitrator's fees of Rs. 60,000/- per arbitrator, administrative fees of Rs. 45000/- and special facilitation fee of Rs. 5000/- per day and other misc. expenses.
quality arbitration services\textsuperscript{80} in Delhi which are being extensively used by the parties.\textsuperscript{81}

6.3 THE INTERNATIONAL CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION (ICADR)

The International Centre for Alternative Dispute Resolution (ICADR) with its headquarters at Delhi provides quality facilities for resolution of disputes by arbitration as well as by fast-track arbitration. ICADR functions under the aegis of the Ministry of Law and Justice, Government of India and the Chief Justice of India is the patron of ICADR.

The ICADR has also framed ICADR Arbitration Rules, 1996 (including provisions for Fast Track Arbitration) dealing with appointment of arbitrators, commencement and conduct of arbitral proceedings, confidentiality, etc. The ICADR has also entered into cooperation agreements with the WIPO Arbitration and Mediation Centre, the Chartered Institute of Arbitrators, London etc. for facilitating arbitrations. The ICADR has its own fixed schedule of arbitrator’s and administrative fees chargeable on the basis of the claim amount along with other miscellaneous charges.\textsuperscript{82}

The matter can be referred to arbitration by ICADR by virtue of a contract between the parties providing for the reference of all future disputes under that contract to institutional arbitration by ICADR or even by a separate agreement providing for the reference of an existing dispute to arbitration by ICADR.

\textsuperscript{80} The ICA mission is: The ideal forum for institutional arbitration which is Les Justes (a French word meaning 'The Just') used as an acronym for L- Low Cost, E- Efficient, S- Simple, J- Just, U- User friendly, S- Speedy, T- Trustworthy, E- Equitable, S- Serviceable. See ICA, \textit{Annual Report} (2010-2011).

\textsuperscript{81} The extensive resort to ICA arbitration can also very well be gathered from the fact that ICA received advance from the parties to arbitration to the tune of Rs. 4,42,27,441 during the financial year 2009-2010. See ICA, \textit{Annual Report} (2009-2010).

\textsuperscript{82} Eg. In domestic commercial arbitration where the amount in dispute does not exceed Rs. 5 lacs, the ICADR charges arbitrator’s fees of Rs. 30,000/- per arbitrator administrative fees of Rs. 15000/-, appointment fee of Rs. 10,000/- and facilitation fee of Rs. 2500/- per day. The fee may appear to be on the higher side but when compared with the fee in ad hoc arbitration it appears to be more economical. Moreover the important aspect is that the fee is fixed as per the schedule and is not left to the discretion of the arbitrator.
On some occasions, even where the matter is not referred to institutional arbitration by ICADR, the arbitrators on ICADR’s panel are engaged by various government departments and PSUs for conduct of ad hoc arbitration. As per the ICADR, Annual Report, 2009-2010 the ICADR’s New Delhi centre received 38 cases for arbitration. Furthermore the arbitration halls at ICADR’s centre at New Delhi are frequently utilized by the government departments, PSUs and even private parties for conduct of arbitration cases on payment of nominal fees. Since October 2005, 362 arbitration cases have been conducted by ministries and other parties and 319 hearings have been conducted by arbitrators appointed by ICADR in various cases till 2009-10 in ICADR’s new Headquarters building.  

6.4 FICCI ARBITRATION AND CONCILIATION TRIBUNAL (FACT)

The Federation of Indian Chambers of Commerce and Industry (FICCI) has established its own arbitral institution namely the FICCI Arbitration and Conciliation Tribunal (FACT) having its head quarters at New Delhi. The FACT was established in the year 1952 and at that time it was known as the FICCI Tribunal of Arbitration (FTA) and was afterwards renamed as FACT.

FACT provides facilities and services for conduct of institutional arbitration. In order to resort to arbitration by FACT the parties need not have a prior arbitration agreement to refer their dispute to FACT and cases may be registered on the spot after mutual consent of the parties in writing. FACT also provides for FACT fast track procedure for arbitration for speedier resolution of disputes.

An arbitration committee is constituted for selecting the members of the arbitral tribunal and for supervising the work of the Registrar of FACT. In individual cases the parties are given an option to choose an arbitrator from

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84 The Federation of Indian Chambers of Commerce and Industry (FICCI) is the largest and oldest apex business organization of Indian business.

85 The FACT has its headquarters at Federation House, Tansen Marg, New Delhi.
amongst the members of the tribunal failing which the arbitrator is appointed by the registrar.

FACT maintains a comprehensive panel of arbitrators including retired judges, advocates, chartered accountants, engineers, company secretaries, foreign nationals, maritime experts etc. It has also entered into international co-operation agreements with several arbitration organizations around the world for facilitating international arbitration.

The FACT has also framed the rules known as the Rules of Arbitration of the FICCI Arbitration and Conciliation Tribunal (FACT) dealing with appointment of arbitrators, commencement and conduct of arbitral proceedings, confidentiality etc. FACT charges fees in arbitration matters in accordance with its pre determined schedule of fees under the Rules of Arbitration of FACT and the fee charged by FACT is also quite reasonable.\footnote{Eg. In arbitration where the amount in dispute does not exceed Rs. 5 lacs, the FACT charges arbitrator’s fees of Rs. 30,000/- per arbitrator, administrative fees of Rs. 15000/- and special facilitation fee of Rs. 2500/- per day and other misc. expenses.}

\section{6.5 CONSTRUCTION INDUSTRY ARBITRATION COUNCIL (CIAC)}

Construction Industry Arbitration Council (CIAC)\footnote{CIAC is a registered society.}, having its head office at Delhi\footnote{The office of CIAC is situated at 801 (8th Floor), Hemkunt Chambers, 89, Nehru Place, New Delhi- 110019.}, is an arbitral institution established by the Construction Industry Development Council, India (CIDC)\footnote{The Planning Commission, Government of India, jointly with the Indian construction industry has set up Construction Industry Development Council (CIDC) to take up activities for the development of the Indian construction industry.}, in cooperation with Singapore International Arbitration Centre (SIAC).\footnote{The Singapore International Arbitration Centre (SIAC) is a Singapore based premier arbitral international institution having which has worldwide recognition in providing world class facilities and services for conduct of arbitration.} The CIAC has been established with the aim of providing an institutional mechanism for resolution of construction and infrastructure related disputes through arbitration in a in a fair, expeditious and cost effective manner.
The CIAC has framed rules known as the CIAC Arbitration Rules dealing with appointment of arbitrators, commencement and conduct of arbitral proceedings, confidentiality etc. The CIAC has also formulated a Code of Ethics for arbitrators, which is to be strictly followed by arbitrators with a view to ensure independence, impartiality and confidentiality in arbitration. The CIAC has its own fixed predetermined schedule of fee\(^{91}\) which is structured on the basis of the claim amount.

6.6 LCIA INDIA

LCIA India\(^{92}\) at New Delhi, launched in April 2009, is the first independent subsidiary of London Court of International Arbitration (LCIA)\(^{93}\) outside London. The fact that even an international arbitral institution of the stature of LCIA has started its subsidiary in Delhi shows the tremendous potential for arbitration in Delhi.

The LCIA India has framed rules known as the LCIA India Arbitration Rules dealing with appointment of arbitrators, commencement and conduct of arbitral proceedings, confidentiality etc. LCIA India has also published notes for arbitrators which essentially aim at guiding arbitrators in matters of independence, impartiality, confidentiality and proper conduct of arbitral proceedings in a cost effective and time bound manner. However the fee charged by LCIA India is slightly on the higher side.\(^{94}\) However, despite this fact LCIA India is gaining popularity in Delhi since it provides quality services and is a brand in itself.

\(^{91}\) Eg. In arbitration where the amount in dispute ranges from Rs. 1 lac to Rs. 5 lacs, the CIAC charges arbitrator’s fee of Rs. 24,000 + 5.25% excess over Rs.1,00,000 and administration fee of 7,000 + 1% excess over Rs.1,00,000.

\(^{92}\) LCIA India has its office at 301-A World Trade Tower, Barakhamba Lane, New Delhi.

\(^{93}\) London Court of International Arbitration (LCIA) is a London based premier international arbitral institution which has worldwide recognition in providing world class facilities and services for conduct of arbitration.

\(^{94}\) LCIA India charges arbitration fee at hourly rates not exceeding Rs. 20,000/- per hour. Apart from that registration fee of Rs. 30,000/- and secretarial fee of Rs. 2500/ Rs. 5000 per hour is also payable.
6.7 AD HOC ARBITRATION IN DELHI

Ad hoc Arbitration is also widely utilized in Delhi and numerous private arbitrators are available in Delhi. Various private companies have incorporated arbitration clauses in their contracts. Several Public Sector Undertakings also incorporate arbitration clauses in their contracts and are frequently resorting to arbitration as a mode of dispute resolution. They also conduct *ad hoc* arbitration utilizing the services of ICADR on chargeable basis without actually resorting to institutional arbitration. Some private individuals in Delhi also while entering into contracts are incorporating arbitration clauses in their agreements. The arbitrators are often named in the arbitration clauses in the contracts of private parties. The PSUs and private companies usually empower their MD/Chairman/CEO to nominate arbitrators in their contracts. Thus arbitration is quite a popular medium of dispute resolution in the commercial quarters.

6.8 ARBITRATION CASES IN COURTS AT DELHI

The Arbitration and Conciliation Act, 1996 provides for recourse to the court in arbitration matters primarily at four stages - at the stage of appointment of arbitrator, for obtaining interim orders, at the stage of setting aside the award and lastly at the stage of enforcement of an arbitral award.

Petitions for appointment of arbitrator under section 11, Arbitration and Conciliation Act, 1996 can only be filed before the Delhi High Court and such petitions are registered as Arbitration Petitions. In Delhi all the Judges of the Delhi High Court exercising ordinary civil jurisdiction have been nominated by the Chief Justices of the Delhi High Court as his designates under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the purpose of appointment of arbitrators.  

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95 The National Litigation Policy released by the Union Law Minister in 2010 also acknowledges this fact.
The Petitions for interim relief under section 9, Arbitration and Conciliation Act, 1996 and petitions for setting aside of the award under section 34, Arbitration and Conciliation Act, 1996 can be filed before the district courts\footnote{Such petitions are however maintainable only before the principal civil court of original jurisdiction as defined in s. 2(1)(e), Arbitration and Conciliation Act, 1996; See also Rahisuddin v. Gambit Leasing & Finance, MANU/DE/033/2010 and Surat Singh v. State of Himachal Pradesh, (2003) 3 Arb.L.R. 606 (DB); As far as the question of territorial jurisdiction is concerned we have to fall back to the provisions of the Code of Civil Procedure, 1908. See Jagson Airlines Ltd. v. Bannari Amman Exports (P) Ltd., (2003) 104 DLT 957; The situs of arbitral proceedings does not govern the jurisdiction of the court. See GE Countrywide Consumer Financial services Ltd. v. Surjit Singh Bhatia, 129 (2006) DLT 393; See also M/s. Gulati Construction Co., v. Betwa River Board, AIR 1984 Delhi 299. This is however subject to s. 42, Arbitration and Conciliation Act, 1996.} at Delhi as well as the Delhi High Court depending upon the valuation of the subject matter and the pecuniary jurisdiction. Such petitions are registered as Original Misc. Petitions (OMP)\footnote{OMP} before the Delhi High Court. The petitions for enforcement of awards under section 36, Arbitration and Conciliation Act, 1996 are filed in the form of regular execution petitions before all courts\footnote{See Kinetic Capital Finance Ltd. v. Anil Kumar Misra, 2000 (56) DRJ 774.} and are registered as Execution Petitions.

The extensive resort to arbitral proceedings in Delhi can well be imagined from the fact that with effect from 01.04.2007 to 31.03.2008, 536 Arbitration Petitions under section 11, Arbitration and Conciliation Act, 1996 and 686 Original Miscellaneous Petitions under section 9, 14, 15, 33 and 34 of the Arbitration and Conciliation Act, 1996 were filed before the High Court of Delhi.\footnote{Delhi High Court, \textit{Annual Report} (2007-2008).}

Similarly with effect from 01.04.2008 to 31.03.2009, 445 Arbitration Petitions under section 11, Arbitration and Conciliation Act, 1996 and 684 Original Miscellaneous Petitions under section 9, 14, 15, 33 and 34 of the Arbitration and Conciliation Act, 1996 were filed before the High Court of Delhi. Thereafter with effect from 01.04.2009 to 31.03.2010, 453 Arbitration Petitions under section 11, Arbitration and Conciliation Act, 1996 and 762 Original Miscellaneous Petitions under section 9, 14, 15, 33 and 34 of the
Arbitration and Conciliation Act, 1996 were filed before the High Court of Delhi.\textsuperscript{101}

Further as on 01.06.2011, 3668 applications/petitions under the Arbitration and Conciliation Act, 1996 were pending in the Courts of Additional District Judges in Delhi.\textsuperscript{102} That apart several petitions under sections 9 and 34 of the Arbitration and Conciliation Act, 1996 and execution petitions for enforcement of arbitral awards are filed daily before the district courts in Delhi. All this shows that arbitration is quite a popular mode of dispute resolution in Delhi and has tremendous potential in times to come.

7. ISSUES PERTAINING TO ARBITRATION

7.1 HIGH COST FACTOR

Arbitration was initially advocated as being an economical alternative to litigation. The proponents advocated that the disputants are absolved from payment of court fees and hence the notion of cost effectiveness came into existence.

However in arbitration the biggest economical burden is the fees of the arbitrator, which is not the case with litigation. The arbitral tribunal has been given the power to fix its own fees and at time arbitrators demand exorbitant fees.\textsuperscript{103} The fees may range from thousands of Rupees to over Rupees One lac per hearing depending upon the professional eminence and experience of the arbitrator and the quantum of the claim. Arbitrators are on the increase – so are the expectations of the Arbitrators.\textsuperscript{104} Further since the fee is chargeable on per hearing basis therefore it multiplies with adjournments and liberal repeated adjournments make arbitration a costly affair. Arbitration is

\textsuperscript{101} Delhi High Court, Biennial Report (2008-2010).
\textsuperscript{102} Pendency of cases available at http://delhicourts.nic.in/Statistics (last visited on 17.08.2011).
more cost-effective than litigation only if the number of sittings in arbitration proceedings is limited which only remains to be a dream. It is therefore unfortunate that arbitration in this country has proved to be a highly expensive means for resolution of disputes.

Not only this, the disputants have to take care of other administrative expenses also. Study fee is also charged by arbitrators in some cases. The institutions administering arbitrations also charge secretarial fee, administrative fee, arbitrator appointment fee and other misc. expenses also. Lawyers engaged by the parties also need to be paid. Therefore the large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

In case of institutional arbitration, however, there is some consistency. There are primarily two systems of remuneration – one based on time spent and the other based on the amount in dispute. The system of remuneration determined as a percentage of the amount in dispute was pioneered by the ICC. In Delhi LCIA India charges arbitration fees at hourly rates while other arbitral institutions such as ICA, ICADR, CIAC, DAC, etc. charge arbitration fee at pre determined rates on the basis of a structured

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107 There are reports that in one case the arbitrator demanded study fees of Rs. 10 lacs. [See R.K. Watel and R.C. Nebhnani, “Flaws in the Arbitration and Conciliation Act 1996”, XLVIII ICA Arbitration Quarterly 16 (Oct - Dec, 2010)].


109 The system of remuneration based on time spent is used by American Arbitration Association.

slab as per the claim amount. The Delhi High Court Arbitration Centre\textsuperscript{111} has however ushered an era of cost effective institutional arbitration and has introduced consistency in the fee charged.\textsuperscript{112} However the fee charged still cannot be said to be economical for an individual disputant though it may be feasible for business entities.

Further the award is subjected to the scrutiny of the court and again the parties have to go through successive rounds of proceedings before various courts and the cost keeps on multiplying. Thus the notion of arbitration being cost effective has become a fable in the real sense and arbitration is proving to be a costly affair which individuals and small entrepreneurs are finding difficult to afford. It is therefore necessary to find an urgent solution for this problem to save institution of arbitration from the arbitration cost.\textsuperscript{113}

7.2 ETHICAL CONCERNS

This is the most important issue in arbitration which is required to be addressed. Arbitration is fundamentally akin to the judicial process and therefore must necessarily be fair and impartial. The success of the institution of arbitration, like any judicial institution, depends upon the confidence the institution is able to generate in the minds of the public at large – such confidence chiefly depends on the infallible character, credibility, impartiality and uprightness of the arbitrator.\textsuperscript{114}

\textsuperscript{111} As per the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules in cases where the sum in dispute is less than Rs. 5 lacs the arbitrator's fee chargeable is Rs. 35,000/-; where the sum in dispute is between Rs. 5 lacs and Rs. 20 lacs the fees is Rs.35,000/- + 2.5% of the claim amount over and above Rs.5,00,000/-, etc. For the Delhi High Court Arbitration Centre (Arbitrators’ Fees) Rules see Appendix 6.

\textsuperscript{112} See Mahagun India Pvt. Ltd. v. Infiniti Retail Limited, ARB. P. 364/2010 decided on 20.05.2011 by the Delhi High Court.

\textsuperscript{113} Union of India v. M/s. Singh Builders Syndicate, 2009 (4) S.C.C. 523; Justice P.N. Bhagwati has also stressed the need to make arbitration cheap and speedy through the combined efforts of lawyers and arbitrators and moot legislation, if need be, in order to make it an effective tool, well within the reach of the common man. See P. N. Bhagwati, “People are Losing Faith in Arbitration”, Halsbury Law Monthly, May 2009, available at: http://www.halsburys.in/adr. (last visited on 02.06.2012).

\textsuperscript{114} D.K. Jain, “Arbitration as a Concept and as a Process”, XLI (4) ICA Arbitration Quarterly 1 (January – March 2007).
The ethical principles come into operation at the initial stage itself and enjoin upon the arbitrator to disclose his interest in a case at the earliest opportunity. The Arbitration and Conciliation, Act 1996 also casts a legal duty upon the arbitrator to disclose at the earliest ‘any circumstances likely to give rise to justifiable doubts as to his independence or impartiality’. But the absence of sufficient checks and balances and adequate legal remedies are the prime reasons for lack of proper implementation of this provision.

What happens if a biased arbitrator does not deliberately disclose his association with a party to the dispute? The opposite party may challenge the appointment of the arbitrator, however, the decision on this issue vests with the arbitrator himself. In case the arbitrator wrongfully rejects the plea the aggrieved party has no remedy at all at that stage. He is coerced into the arbitral proceedings and must suffer an award at the hands of such a biased arbitrator and thereafter assail the award in terms of section 34 of the Arbitration and Conciliation Act, 1996. But his precarious position can be imagined from the fact that at that stage bias or misconduct on the part of the arbitrator is not a specifically available ground for assailing the award under section 34 of the Arbitration and Conciliation Act, 1996. The problem of bias, therefore, not only remains unresolved at the arbitration stage, but it also stands compounded at the post-award stage by the absence of an appropriate remedy under the Arbitration and Conciliation Act, 1996.

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116 S. 12, Arbitration and Conciliation Act, 1996; To cite another example the arbitrators appointed at the Delhi High Court Arbitration Centre have to submit Arbitrator’s Declaration of Acceptance and Statement of Independence in the format prescribed in Schedule – IV to the Delhi High Court Arbitration Centre (Arbitration Proceedings) Rules.

117 Under S. 11, Arbitration Act, 1940 the courts could be approached without waiting for the award.

118 In USA s. 10, Federal Arbitration Act, 1925 provides for vacating the arbitral award on grounds of corruption, fraud, undue means, partiality, misconduct of arbitrators and the arbitrator exceeding his powers.

119 Sunil Gupta, “No power to remove a biased arbitrator under the new Arbitration Act of India”, 3 SCC (Journal) 1 (2000).
The biggest lacuna is that in case the arbitrator does not comply with the mandate of section 12 of the Arbitration and Conciliation Act, 1996 or furnishes a wrong disclosure he neither suffers any disability nor he is exposed to any penalty as there is none to oversee, supervise and govern the conduct of arbitrators. This malady is most glaring in case of ad hoc arbitrations.

The genesis of the problem is biased contracts conferring unilateral power of appointment of arbitrator on one party which results in appointment of a biased arbitrator. Experience has shown that in standard form contracts where one party is in a dominant position and the other party is not in a position to negotiate the terms and conditions of the contract, arbitration is incorporated in such agreements with a view to ensure biased and one sided awards in favour of the dominant party so as to compulsorily pin down the opposite party in case of any dispute. This malady is prevalent in other jurisdictions also.

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120 The Law Commission of India in its 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001) recommended substitution of s. 12 (1) so as to enumerate specific instances requiring disclosure by the arbitrator.

121 Case studies reveal that in case of loan/credit card agreements of private banks/financial institutions. The borrower has no option but to accept the standard form contract of the bank which contains a heavily biased arbitration clause. The arbitrator is appointed at the sole discretion of the bank and he colludes with the bank and passes awards ex parte. The borrower comes to know about the award only when it is executed; The opponents of arbitration agreements point to the lack of bargaining power or the lack of information available to individuals in consumer, employment and franchise contracts. See Peter B. Rutledge, “Arbitration Reform: What we Know and what we Need to Know”, 10 Cardozo J. Conflict Resol. 579 (2009).

122 A large number of contracts nowadays contain a predetermined set of terms and conditions often printed in the form of a leaflet/booklet at the instance of one of the parties, giving no room for the other party to negotiate the individual terms and conditions, but only an option to reject the contract in toto or accept in toto in its existing form. Such contracts are known as standard form contracts.


124 See Jean R. Sternlight, “Creeping Mandatory Arbitration: Is it Just”, 57 Stan. L. Rev.1631 (2005); See also “Developments in the Law, Access to Courts”, 122 Harv. Negot. L. Rev. 1151 (2009); The "haves", or better resourced litigants, and repeat players in the system of Arbitration have structural advantages over “one-shotters” and less resourced litigants. See
The process of appointment of arbitrator is therefore the most important factor in the conduct of unbiased arbitral proceedings. The success of arbitration depends on the quality of arbitrator who acts impartially and independently to dispense quick justice.

The corporates and medium and big business entities seem to be fairly satisfied with the arbitration process as they resort to institutional arbitration or efficiently and professionally conducted ad hoc arbitration. The repeat players and the dominant entities have no issues as they themselves exploit the loopholes in the process. However for the masses, the common people, for those who are not connected with the commercial world, ad hoc arbitration is the only form of arbitration and they still look it with suspicion and distrust and perceive it as an instrument of exploitation.

Accountability of the arbitrator is another area requiring consideration. As on date an arbitrator is not accountable to anyone. He is not bound by any code of conduct nor is there any sanction provided for misconduct of an arbitrator. Misconduct of an arbitrator is not even a ground for setting aside of the award. It is an unfortunate and open secret that some of the arbitrators do act arbitrarily and collusively with the beneficiary of the award to share the booty. It has been reported in some cases that where serving government


Appointment of arbitrator requires adequate attention. It is not a routine exercise but a careful and all attentive first left step in the right Direction. See Rajiv Sinha, “First Left Step in the Right Direction”, XLIII (2) ICA Arbitration Quarterly 13 (July to Sept. 2008).


The Law Commission of India in its 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001) has advocated that misconduct of the arbitrator be introduced as a ground for challenge to the award.

officers are appointed as arbitrators they demand bribes from the parties and this is a major source of corruption.\textsuperscript{129}

The binding nature of arbitral awards requires a clear ethics code to create some behavioral benchmark and uphold the integrity of arbitration practice.\textsuperscript{130} Therefore unless the arbitrator is made to adhere to a code of conduct or made to function under the regulation of the court or some other independent institution the purity of the arbitral process cannot be maintained. The arbitrator should be made to adhere to such processes and norms so that not only justice is done amongst the parties but also appears to have been done.\textsuperscript{131}

Today, all over the world, instead of being reserved to personal reflection, arbitrator ethics have become an important topic of public debate, and various trends have led to a proliferation of specialized codes of ethics, rules intended to guide and govern arbitrators’ conduct and national court cases evaluating their conduct.\textsuperscript{132} The arbitral institutions like ICA and CIAC operating in Delhi have come up with self formulated code of ethics for arbitrators for ensuring impartial and fair arbitral proceedings. However there are no uniform principles of universal application in this arena. Moreover \textit{ad hoc} arbitration is totally unregulated and is prone to numerous maladies which

\begin{footnotes}
\item[131] Food Corporation of India v. Jogindarlal Mohindarpal, 1989 (2) SCC 347. For example section 9 of the Nepal Act on Arbitration contains an unusual provision of the mandatory requirement of the arbitrator taking a written oath of impartiality and honesty as per the form provided in the Schedule before proceeding with the arbitration. See V.A. Mohta and Anoop V. Mohta, \textit{Arbitration, Conciliation and Mediation} 37 (Manupatra, Noida, 2\textsuperscript{nd} Edn., 2008).
\end{footnotes}
have blemished the image of arbitration as an impartial and independent process dispute resolution. Therefore these ethical issues pertaining to arbitration in the Indian context therefore require urgent consideration in order to resurrect the confidence of the people in the impartiality and fairness of this dispute resolution process. Time has come when the standards of arbitration and purity in conduct of arbitration proceedings must be raised.133

7.3 THE PROBLEM OF DELAY IN ARBITRATION

One of the main reasons why arbitration gained momentum was that it was envisaged as a process of speedy dispute resolution. There is also no doubt about the fact that arbitration has sufficient potential for operating as an expeditious mode of dispute resolution. However despite this potential the manner in which arbitration has in fact operated in this country, has falsified the belief of expeditious arbitral proceedings. Legal luminaries are skeptical about the effectiveness of arbitration mechanism in India for providing quick and inexpensive solutions.134

The Arbitration Act, 1940 contained a stipulated time limit for passing of the award. It is another thing that the said time limit was seldom adhered to and repeated extensions were sought which itself was a time consuming exercise.135 Moreover under the Arbitration Act, 1940 the magnitude and frequency of judicial intervention was so extensive that it resulted in the entire arbitral process being converted into a court centered process, contrary to the modern concept of minimal judicial intervention. Even the Supreme Court was constrained to comment on the sordid state of affairs in arbitration pinpointing the problem of undue delay in arbitral proceedings.136

136 The Supreme Court in Guru Nanak Foundation v. M/s. Rattan Singh, A.I.R. 1981 SC 2075 remarked: “....Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for
The enactment of the Arbitration and Conciliation Act, 1996 was expected to bring in more efficiency in the process and provide succor from this problem of delay in arbitration by developing a speedy and efficacious dispute resolution mechanism. However even the Arbitration and Conciliation Act, 1996 has also not been able to successfully respond to the problem of delay in arbitration.

The Arbitration and Conciliation Act, 1996 also does not stipulate any time limit at all for conclusion of arbitral proceedings and passing of the award and the result is an unduly protracted arbitral process which does not serve the purpose. There is an urgent need to amend the law in this respect and prescribe a time limit for conclusion of arbitral proceedings\textsuperscript{137} with a provision for sanctions upon arbitrators for not passing the award within the stipulated time frame.\textsuperscript{138}

Moreover the maladies which affect the arbitral process are introducing the delay factor in arbitral process. There is no independent institution or set of uniform and binding rules to supervise and regulate the arbitrators. Repeated adjournments are liberally granted adding to the delay and the arbitration proceedings keep on dragging for years. The reasons are twofold – first the fee charged on per hearing basis acts as a temptation for repeated adjournments and secondly the limited coercive powers of the tribunal also make arbitration vulnerable to delay.\textsuperscript{139} The arbitrators also cannot impose costs for adjournment on the defaulting party. Another important reason is the resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. 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.....


\textsuperscript{138} Department Related Parliamentary Standing Committee (Rajya Sabha), Ninth Report On Personnel, Public Grievances, Law and Justice on the Arbitration and Conciliation (Amendment) Bill, 2003, presented to the Rajya Sabha on 4\textsuperscript{th} August 2005.

\textsuperscript{139} Davit St. John Sutton, Judith Gill, Mathew Gearing (Eds.) Russel on Arbitration 13 (Sweet and Maxwell, London, 23\textsuperscript{rd} Edn., 2007).
casual and unprofessional approach of the players involved. The arbitrator and the parties’ lawyers treat arbitration as extra time or overtime work to be done after attending court matters.\(^{140}\)

In fact even before the arbitration process actually commences there is a possibility of a protracted legal battle. The order for appointment of arbitrator passed by the High Court under section 11 of the Arbitration and Conciliation Act, 1996 is a judicial order\(^ {141}\) and therefore an appeal from the same lies to the Supreme Court under Article 136 of the Constitution of India. Even otherwise in practical terms it takes, on an average, one year time in courts to get an arbitrator appointed under Section 11 of the Act by the Chief Justice, however there are several cases in where the proceedings extend to over 2-3 years.\(^ {142}\)

Further even after passing of the award a party is not available to enjoy the fruits of the arbitral award as in most contested matters the arbitral award is assailed before the courts\(^ {143}\) and again there are neither sufficient number of dedicated courts for exclusively dealing with arbitral matters nor there is a time frame for the disposal of such matters. Lastly there are numerous hurdles in the process of execution of an award. In fact filing of an application for setting aside of the award renders the award inexecutable during the pendency of the petition.\(^ {144}\) This provision for automatic stay of the execution of the award once the other party assails it results in considerable delay even

\(^{140}\) D.M. Popat, “ADR and India: An Overview”, The Chartered Accountant (December 2004); Lawyers want their arbitration cases fixed after court hours or when the courts are not functioning. See A.K. Sikri, “Trends and developments of Arbitration Law in India”, XLII (3 & 4) ICA Arbitration Quarterly 18 (October- December 2007 & January – March 2008).


\(^{143}\) The arbitral award may be assailed in terms of s. 34, Arbitration and Conciliation Act, 1996. The decision of the court under s. 34, Arbitration and Conciliation Act, 1996 is appealable under s. 37, Arbitration and Conciliation Act, 1996 and thereafter even SLP can be filed before the Supreme Court.

\(^{144}\) S. 36, Arbitration and Conciliation Act, 1996; See also M.V. Shanker Bhatt, “Arbitration – Bane or Boon as ADR”, XLVI ICA Arbitration Quarterly 2 (April-June 2010).
in cases where the award is flawless and this situation demands adequate legislative correction.

The Arbitration Process

- Arbitration Agreement
- Arbitral Proceedings before Arbitrator - Award
- Petition for interim measures before
- Petition for Setting Aside of Award
- Appeal under Section 37 of the Act
- SLP before the Supreme Court
- Execution of Award by the

Thus arbitration instead of proving to be an expeditious method of dispute resolution has developed into an extremely complex, protracted never-ending disaster for the consumers of justice. This is despite the fact that arbitration has the potential to serve as an expeditious dispute resolution
process, but the way it is being implemented has resulted in inevitable delays. There is therefore a need to reform and streamline the process, cure the maladies and resolve the problem of delay in arbitration.

7.4 INSTITUTIONAL ARBITRATION VIS-À-VIS AD HOC ARBITRATION

There is a conception which prevails that ad hoc arbitration is more suited to Indian needs being more cost effective, expeditious and flexible rather than institutional arbitration. But the truth of the matter is that whatever problems are being faced by this branch of ADR i.e. arbitration are primarily a result of ad hoc arbitration only which as it operates in India is totally unregulated.145 An empirical survey reveals that a considerable extent of litigation in the lower courts deals with challenges to awards given by ad hoc arbitration tribunals.146

First of all there is no regulated and homogeneous fee structure in ad hoc arbitration nor is there any prescribed rate of miscellaneous expenses. The fee is ordinarily payable on per hearing basis and rate of fees, number of hearings and miscellaneous expenses vary extensively. Further, if exorbitant fee is demanded by the arbitrator and one party is agreeable to pay the same, the other party who considers the fee on the higher side is put in an awkward position. He will not be in a position to express his reservation or objection to high fee, owing to an apprehension that refusal by him to agree for the fee may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee.147

Furthermore in ad hoc arbitration, right from appointment of arbitrator to procedure to venue has to be mutually agreed upon by the parties. The effectiveness of ad hoc arbitration therefore depends upon the willingness and

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146 Justice K G Balakrishnan, address at the International Conference on “Institutional Arbitration in Infrastructure and Construction”, New Delhi, October 16, 2008”.
cooperation of the parties.\textsuperscript{148} But when a dispute is in existence, it is difficult to expect such cooperation and coordination amongst the parties and the casualty in essence is the arbitral process. Moreover the unregulated process in \textit{ad hoc} arbitration marred by myriad maladies from impartial and one sided appointment of arbitrators to bias and misconduct on the part of the arbitrator, makes delay inevitably a part of the process.

The answer to the lack of expedition and exorbitant costs lies in institutional rather than \textit{ad hoc} arbitrations—instiutions with time bound schedules, fixed fees, impartiality and noted judges and experts chosen because of their independence and experience being empanelled.\textsuperscript{149} The numerous flourishing permanent arbitral institutions all over the globe serve as an example for being emulated in India and because of its well entrenched and experienced advantages the concept of institutional arbitration is gradually developing in India. Most permanent arbitral institutions in India, such as ICA, CIAC or DAC have their own pre determined schedules for arbitrators’ fees and administrative fees, based on the claim amount. Moreover with the concept of institutional arbitration gaining momentum, cost effective institutional arbitration is also emerging on the scene.

In institutional arbitration, the arbitral institution maintains a panel of arbitrators along with their profiles and the institution may appoint the arbitrator or the parties can choose the arbitrator from the panel. The process of appointment of arbitrator is therefore much more impartial in case of institutional arbitration which ensures fair and unbiased resolution of disputes.\textsuperscript{150} Going a step forward the arbitral institutions have well defined rules and established procedures for conduct of arbitration. The infrastructure


\textsuperscript{149} Ruma Pal, “Arbitrations and Arbitrators”, 1(1) Dispute Resolutions (Nani Palkhivala Arbitration Centre Quarterly) 3 (September 2010). See also K.L. Varghese, “ADR & Role of Institutional Arbitration”, 1(7) The Indian Arbitrator 6 (August 2009). The Charter of the Delhi High Court establishing the DAC also underlines the importance of institutional arbitration. See Appendix 5.

\textsuperscript{150} Law Commission of India, 222\textsuperscript{nd} Report, Need for Justice-dispensation through ADR etc., 2009
facilities are in place and the secretarial and administrative assistance are readily available. The arbitral process is conducted in a well organized, time bound and professional manner thereby eliminating delays and bringing in efficiency.

The impartial appointment of arbitrator coupled with well defined rules for conduct of the arbitral proceedings also reduces the scope of misdemeanor on the part of the arbitrator. Moreover the arbitrator is answerable and accountable to the arbitral institution and many such institutions have formulated their own code of conduct for being stringently followed by the arbitrators. Resort to institutional arbitration would therefore put an end to the alleged unethical practices followed in arbitration matters\(^\text{151}\) and would bring in certainty, accountability and efficiency.\(^\text{152}\)

To sum up the inherent factors in an institutional arbitration which make the arbitral process efficient, expeditious and cost effective are the availability of pre established rules and procedure which provide for any conceivable situation that might arise, administrative assistance from institutions providing a secretariat, periodic revision of rules by the institution drawing on experience in conducting arbitrations regularly and latest developments, selection of arbitrators possessing requisite experience and knowledge to resolve the dispute facilitating quick and effective resolution of disputes, assistance from institutional staff to resolve deadlocks minimizing court intervention, and review procedures adopted by some institutions to ensure fairness and justice.\(^\text{153}\)

Therefore if arbitration is to leave an imprint on Indian jurisprudence as an impartial, expeditious, effective and economical ADR mechanism institutional arbitration should gradually replace \textit{ad hoc} arbitration to a large

\textsuperscript{151} Department related Parliamentary Standing Committee (Rajya Sabha), \textit{Ninth Report On Personnel, Public Grievances, Law and Justice on the Arbitration and Conciliation (Amendment) Bill,} 2003, presented to the Rajya Sabha on 4\textsuperscript{th} August 2005.


extent and the limited number of *ad hoc* arbitrations should be subjected to some form of regulation and necessary statutory amendments and judicial pronouncements are much needed in this direction.

### 7.5 JUDICIAL INTERVENTIONS IN THE ARBITRAL PROCESS

The role of courts in arbitration matters has also been a subject of much discussion. One view is that the process of arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it\(^ {154} \) and it is only a court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.\(^ {155} \) When viewed in this perspective it cannot be disputed that arbitration being a process of adjudicatory dispute resolution must be regulated in some form or the other and judicial intervention is one form of regulation which legal systems all over the world have experienced.\(^ {156} \) However the resistance to judicial regulation appears to be not on account of the fact that the judicial system might not be an efficient regulator but on account of the delay and expense which have come to be associated endemically with the judicial system.

The other view is that the interference of the courts should be minimal in view of the fact that the parties have themselves opted for ADR and they being legally entitled to do so their will must be respected and the impulse to decide the issue again must be resisted by the courts.\(^ {157} \)

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\(^ {154} \) *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.*, AIR 2007 SC 2563.


\(^ {157} \) See Lord Mustill, Foreward to O.P. Malhotra’s *The Law and Practice of Arbitration and Conciliation* (Lexis Nexis Butterworths, Delhi, 1\(^ {st} \) Edn, 2003); See also Thomas E. Carboneau, “Arguments in favour of Triumph of Arbitration” 10 *Cardozo J. Conflict Resol.* 395 (2009).
One of the main reasons for discontent under the Arbitration Act, 1940 was excessive judicial intervention. Therefore the Arbitration and Conciliation Act, 1996 was enacted to *inter alia* achieve the twin goals of cheap and quick resolution of disputes by giving more powers to the arbitrators and reducing the supervisory role of the court in the arbitral process.\(^\text{158}\) In this background judicial intervention in arbitration matters is expressly prohibited in the Arbitration and Conciliation Act, 1996 unless provided in the Act itself.\(^\text{159}\)

There are primarily\(^\text{160}\) four stages of judicial intervention in the arbitral process. One is at the stage of appointment of arbitrator, the second at the stage where interim orders are sought for preserving the subject matter of arbitration proceedings or for securing the amount in dispute, the third at the stage of assailing an arbitral award and the fourth at the stage of enforcement of an arbitral award. It is the intervention at the first and the third stage which has been a matter of concern.

To begin with the scope and ambit of the proceedings under section 11 of the Arbitration and Conciliation Act, 1996 dealing with appointment of Arbitrator has been increased lately by the judiciary. The Supreme Court has held that the power exercised by the Chief Justice under section 11 of the Arbitration and Conciliation Act, 1996 is a judicial power.\(^\text{161}\) As a result the same can be delegated by the Chief Justice of a High Court to a Judge of the High Court only and by the Chief Justice of India to a Judge of the Supreme Court only. This has first of all augmented the cost factor as a party has to compulsorily approach the High Court or the Supreme Court for the purpose of appointment of an arbitrator.


\(^{159}\) S. 5, Arbitration and Conciliation Act, 1996.

\(^{160}\) Others being power to hear an appeal u/s 37 of the Arbitration and Conciliation Act, 1996 against an order accepting the plea referred to in ss. 16(2) & 16(3) of the Act, power to take evidence under s. 27 of the Act, power to direct determination of any question in connection with insolvency proceedings by arbitration under certain circumstances under s. 41(2) of the Act, power to extend time for reference to arbitration of time barred disputes under s. 43 (3) of the Act.

Secondly the scope of the proceedings has also been widened in as much as the Chief Justice is supposed to decide whether the party making the application has approached the appropriate High Court and whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement. Further the Chief Justice also has an option to decide whether the claim is a dead claim or a live claim and whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.\textsuperscript{162} For this purpose the Chief Justice can either proceed on the basis of affidavits and the documents or take such evidence or get such evidence recorded as may be necessary.\textsuperscript{163} Thirdly the order passed by the Chief Justice of a High Court or his designate would be open to challenge by way of an appeal to the Supreme Court under Article 136 of the Constitution of India thereby bringing in one more round of a court battle.

This has made the proceedings for appointment of arbitrator, which were once branded as administrative, more complex, multifaceted and exhaustive, thereby resulting in multiplication of delay and costs.

Judicial intervention at the third stage i.e. at the stage of assailing the arbitral award has evoked even greater concern. An arbitral award can be challenged in the courts on certain limited statutorily specified grounds.\textsuperscript{164} The courts, however through judicial interpretation, have expanded the scope of judicial review in arbitration matters. Therefore, although the role of Courts has been expressly minimized the courts have widened their role\textsuperscript{165} by giving an extremely wide interpretation to the expression “the arbitral award being in conflict with the public policy of India” in section 34, Arbitration and Conciliation Act, 1996.

\textsuperscript{164} S. 34, Arbitration and Conciliation Act, 1996.
Conciliation Act, 1996 thereby expanding the scope of judicial review of arbitral awards.\(^{166}\)

Under the Arbitration Act, 1940 the Supreme Court\(^{167}\) had held that an award can be said to be contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. In 2003 the Supreme Court further expanded the ambit of the expression public policy for the purpose of section 34, Arbitration and Conciliation Act, 1996 holding that an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest and accordingly the same would also be contrary to public policy and can be set aside in terms of section 34 of the Arbitration and Conciliation Act, 1996.\(^{168}\)

Thus the boundaries of permissible challenge delineated by section 34 of the Arbitration and Conciliation Act, 1996 have been virtually done away with by a process of judicial interpretation.\(^{169}\) Markanda has also criticized the ONGC judgment saying that the Supreme Court has vastly enlarged the scope of challenge to awards much more than what was available under the Act of 1940 and it is thus contrary to the very spirit of the Act of 1996.\(^{170}\) It has been commented that as a result of SAW Pipes\(^{171}\) and Patel Engineering\(^{172}\), arbitration appears to have been reduced to a mere prelude to protracted

\(^{166}\) The English Courts have held that public policy is always an unsafe and treacherous ground for legal decision [See Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd., (1902) AC 484]; In Richardson v. Mellish, (1824) 2 Bing 229 Burrough, J., held that public policy is a very unruly horse, and when once you get astride it you never know where it will carry you.\[\]


\(^{168}\) Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629.


\(^{172}\) Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629
litigation in Indian courts, thereby increasing the “risk premium” associated with Indian transactions.  

Be that as it may, there can be no dispute about the proposition that the process of arbitration needs to be regulated. The \textit{ad hoc} arbitrators are not subject to any kind of regulation at all and the shift from \textit{ad hoc} to institutional arbitration and implementation of other remedial measures may take quite some time. The setting up of an Arbitral Council of India on the lines of Press Council of India and Bar Council of India may be a plausible solution for regulating arbitration.

Till such time the courts can fill the vacuum and exercise supervisory jurisdiction over the arbitration process within the parameters under the \textit{Arbitration and Conciliation Act, 1996}. There is also a need to draw a distinction between international arbitrations and domestic arbitrations and \textit{ad hoc} and institutional arbitration in this respect. The \textit{ad hoc} domestic arbitration definitely require judicial intervention and regulation at this stage. The minimization of the supervisory role of the courts though indubitably one of the primary objects of the Act, however, the restraint cannot logically be conceded a primacy to override the provisions permitting judicial intervention in the interest of ensuring a fair, efficient and capable arbitral procedure. It is on this rationale that the aforesaid judicial decisions appear to have been

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173 Alok Ray and Dipen Sabharwal, “What Next for Indian Arbitration?” \textit{The Economic Times}, Mumbai, 29\textsuperscript{th} August 2006; Arbitration has now become closer to litigation because it has to be in accordance with the statutory provisions and therefore it has become virtually an adjudicatory process with all formalities of the functioning of a court. See Mathew Thomas, “Conciliation as a necessary Precursor to Arbitration”, 1(3) \textit{The Indian Arbiter} 7 (April 2009).

174 In arbitration proper regulation, enforcement, and even a basic set of substantive standards by which arbitration providers must abide are lacking. See Miles B. Farmer, “Mandatory and Fair? A Better System of Mandatory Arbitration”, 121 \textit{Yale L.J.} 2346 (2012).


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8. EPILOGUE

Arbitration or private judging has emerged as a pervasive ADR mechanism across the globe and Delhi is no exception. Arbitration, albeit is an adjudicatory process, yet it finds itself seated in the galleries of ADR since it serves as an effective substitute for litigation. Arbitration has distinct advantages such as procedural flexibility and party autonomy which make it a preferred dispute resolution mechanism for commercial disputes, however the biggest advantage of arbitration is the finality associated with the arbitral awards.

Arbitration was developed and projected as an efficacious alternative to litigation so as to enable the parties to have their disputes adjudicated by private judges of their choice in an expeditious and cost effective manner. However, arbitration, as it has been operating in Delhi in the past, has, failed to live up to its expectations and it is regrettable that undue delays, soaring expenses, unethical practices and recurrent judicial interruptions are critically impeding the growth of arbitration as an effective ADR mechanism. This is indeed the fate of several arbitration proceedings today.178

Immediate remedial measures are warranted to save the credibility of the institution of arbitration and there is an urgent need to make arbitration more effective, expeditious, economical and convenient so that it can prosper as an ADR mechanism in Delhi. This would require concerted efforts of the

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legislature, judiciary, arbitral institutions, arbitrators, lawyers and last but not the least the disputant parties. The basic purpose of arbitration is to bring about cost effective and speedy resolution of disputes. Therefore neither the parties nor the lawyers concerned, nor the arbitrators appointed by the parties should enter the fray unless and until they are in a position to accept and respect this fundamental premise.\textsuperscript{179} Delay and high cost are two areas where the arbitrators by self regulation can bring about a marked improvement.\textsuperscript{180} If arbitration is to prosper a change in the mindset of all stakeholders and observance of strict discipline are the foremost requirements.

Institutional arbitration is one of the plausible solutions to the problem and an important step can be that institutional arbitration gradually replaces \textit{ad hoc} arbitrations to a considerable extent and the remaining \textit{ad hoc} arbitrations be properly and effectively regulated so as to maintain the standards of the dispute resolution process. There are various permanent arbitral institutions flourishing in Delhi, such as ICA, ICADR, LCIA, CIC, DAC, etc. which provide state of the art infrastructure for resolution of disputes through arbitration in a professional, impartial and expeditious manner. The establishment of the Delhi High Court Arbitration Centre at Delhi under the aegis of the Delhi High Court has marked the beginning of a new era of cost effective and expeditious institutional arbitration.

There is also an urgent need to a re-look at the law either judicially or legislatively if necessary so as to allow the statute to operate to achieve its main objective of resolving disputes as expeditiously as possible with the minimum intervention of a court of law so that the trade and commerce are not affected on account of litigations before a court.\textsuperscript{181} The law of arbitration must be made simple, less technical and more responsible to the actual


\textsuperscript{181} Ruma Pal, “Arbitrations and Arbitrators”, 1(1) Dispute Resolutions (Nani Palkhivala Arbitration Centre Quarterly) 3 (September 2010).
realities of the situation but must be responsible to the canon of justice and fair play.¹⁸²

Be that as it may, given the current scenario in the courts characterized by an extremely poor judge to population ratio and ever surmounting judicial arrears, litigating may not be the best option for the disputant parties in search of timely justice, especially in commercial matters where timely resolution is the most important criteria. Therefore despite all its individual and procedure generated aberrations arbitration continues to be widely utilized as an ADR mechanism in the commercial quarters in Delhi. In fact arbitration has great potential in Delhi and its use as an ADR mechanism needs to be further encouraged¹⁸³ and time is not far when majority of the commercial disputes would be resolved by arbitration in Delhi.

¹⁸² Food Corporation of India v. Jogindarlal Mohindarpal, 1989 (2) SCC 347.
¹⁸³ The National Litigation Policy released by the Union Law Minister in 2010 also provides that resort to arbitration should be encouraged.