CHAPTER - I
INTRODUCTION

“Discourage litigation, persuade your neighbors to compromise whenever you can point out to them how the normal winner is often a looser in fees, expenses, cost and time. As a peace maker, the lawyer has a superior opportunity of being a good man. There will be business enough.”

Abraham Lincoln

STATEMENT OF PROBLEM

Human conflicts are inevitable. Disputes are equally inevitable. Disputes do arise among people in relation to their personal life, family life, economic life and political life. Disputes may disturb the peaceful conduct of human life. Since disputes are inevitable, there is an urgent need to find a quick and easy method of resolution. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time and more resource are spared for constructive pursuits.

Since, the ages, the civilization has recognized the light of every person to seek redressal through courts and tribunals. Traditional concept of “access to justice” as understood by common man is access to courts of law. For a common man a court is where justice is meted out to him/her. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like. To get justice through courts one has to go through the complex and costly procedures involved in litigation.

2 Law Commission of India, 222 Report on Need for Justice –dispensation through Alternative Dispute Resolution etc.,2009 (April,2009)
Therefore a moment started throughout the world for Alternative Dispute Resolution and Arbitration is one among them because with Economic Liberalization and the opening up of the market, there is a phenomenal growth of international trade: commerce, investment, transfer of technology, developmental and construction works, banking activities and the like. To cope with the changing scenario, India has updated its arbitration legislation in order to provide a level playing field for both domestic and foreign entrepreneurs. Indian arbitration law ensures fairness and justice to all the concerned parties. With the increase in business transactions both international and domestic contracting activities are rising. The potential for commercial arbitration accordingly has also shown a significant rising trend. India has undertaken major reforms in its arbitration law in recent years as part of the economic reforms initiated in 1991. Simultaneously many steps have been taken to bring judicial reforms in the country, the thrust being on the minimization of court’s intervention in the arbitration process by adoption of United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration. The focus of the government has been as much on the simplification of the law as on its rationalization in order to meet the requirements of a competitive economy. These reforms have resulted in increased Foreign Direct Exchange (FDI).

India has recently entered into bilateral investment protection agreements with the United Kingdom, Germany, Russian Federation, The Netherlands, Malaysia and Denmark. Each agreement makes provision for the settlement of dispute between an investor of one contracting party and an investor of the other contracting party through the following alternative dispute resolution procedure: Arbitration, Conciliation and negotiation.
Arbitration means any arbitration whether or not administered by permanent arbitral institution.\(^3\) But in simple terminology arbitration means a process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is submitted to and determined judicially and with binding effect by the application of the law by one or more person (the arbitral tribunal) instead of by a court of law.\(^4\)

Domestic Arbitration takes place in India when the arbitration proceedings, the subject matter of the contract and the merits of the dispute are all governed by Indian law, or when the cause of action for the dispute arises wholly in India, or where the parties are otherwise subject to Indian jurisdiction.

International Arbitration can take place either within India or outside India in cases where there are ingredients of foreign origin relating to the parties or the subject matter to the dispute. The law applicable to the conduct of the arbitration and the merits of the dispute may be Indian Law or Foreign, depending on the contract in this regard and the rules of conflict of laws.

A foreign arbitration is an arbitration conducted in a place outside India and the resulting award is sought to be enforced as a foreign award.

It is an arbitration agreed to and arranged by the parties themselves without recourse to any institution. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or with the concurrence with the parties. It can be a domestic, international or foreign arbitration. In this type of arbitration parties bear the responsibility of setting up, on their own, the arbitral tribunal that will settle their dispute and they must stipulate the rules that will govern the conduct of the arbitration.

\(^3\) Arbitration and conciliation Act, 1996, S.2(1)(a)
proceedings. In case of difficulties, the parties may some time call for the intervention of a competent state court to assist them in this respect. As parties are, more or less on their own in ad hoc arbitration, they will have to agree items such as fees and expenses directly with the arbitrators themselves.

It is an arbitration conducted under the rules laid down by an established arbitration organization. In institutional arbitration the parties call upon an arbitration center or an arbitral institution that they will have chosen to administer the proceedings in accordance with the institutions arbitration rules. The extent of administration of the arbitration process varies from one institution to another. Generally, the arbitral institution administers the arbitral process partially and limits of its assistance to the constitution of the arbitral tribunal (appointment of arbitrators), taking into account the desiderata of the parties as well as its own arbitration rules.

An institution may notify a request for arbitration to the other party asking it to state its position on the case and on the constitution of the arbitral tribunal. The institution sometimes has the power to fix a sum of money estimated to be sufficient to cover the cost of arbitration, to claim its payment and at the end of the proceedings to determine the cost. It may also look after the process of notifying the parties of the award rendered by the arbitrators. The institution may on the other hand do much less this type of arbitration is generally referred as partly administered arbitration.

Institutional arbitration may also be fully administered arbitration. In such type of arbitration, the institution not only takes care of receiving the request for arbitration for notification to the other party but also actually constitutes the arbitral tribunal, fixes an advance on cost and fixes the place arbitration. Once the advance on cost has been paid, the arbitration institution sends the file to the arbitrators and supervises the conduct of
proceedings until the rendering of the award. It thereby keeps control over the proceeding and will resolve certain difficulties, such as deciding on the replacement of biased arbitrators. Its sometimes even ensures that the content of the award is acceptable, with regard to its form and may draw the arbitrators’ attention to certain points regarding the merits of the case. It looks after notification of the award to the parties after having fixed the cost of arbitration and it ensured that arbitrators paid. Finally, the arbitration institution ensures that the different steps of the proceeding have been accomplished within the time limit prescribed by its arbitration rules. A good example of an administered arbitration system is ICC Arbitration.

**Following are the main International Arbitration Institutions**

**1. International Court of Arbitration of the International Chamber of Commerce.**

It is world’s foremost organization in international arbitration. The ICC international court of arbitration was established in Paris. The ICC court is not really a court. The arbitrators appointed for each particular case decide on the matter submitted to ICC Arbitration. One important and unique feature of the court is that it scrutinizes and approves arbitral awards submitted in draft form by arbitrators. The quality control mechanism is a key element of the ICC arbitration system.

**2. International Center for Settlement of Investment Disputes (ICSID)**

It was established by the World Bank at Washington under the 1965 Convention on the settlement of investment disputes between states and nationals of other states. Its main purpose is to facilitate the settlement of investment disputes between governments and foreign investors.
3. China International and Economic and Trade Arbitration Commission (CIETAC)

It is one of the busiest international arbitration centers of the world, established in 1954 to settle dispute between foreign company and Chinese firms.

4. International Center for Dispute Resolution of the American Arbitration Association (AAA)

It was founded in 1926. In 1996 AAA established the international center for dispute resolution in New York city which now administered all AAA international cases.

5. Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute)

It was established in 1917 and is a separate entity within the Stockholm Chamber of Commerce. In the 1970’s it became recognized by the United States and Soviet Union as a neutral center for the resolution of East-West Trade disputes.

6. London Court of International Arbitration (LCIA)

It is based in London and is the longest established commercial arbitration institute. It took a major step towards internationalization in 1985 through the formation of London Court of international arbitration. Its principle functions are appointment of arbitral tribunals, the determination of challenges to arbitrators and the control of costs. It does not scrutinizes the arbitral awards.
7. Kuala Lumpur Regional Centre for Arbitration (KLRCA)

It was established in 1978 under the auspices of the Asian-African legal consultative committee with assistance of the government of Malaysia. It offers facilities for arbitration of business disputes within the region.

This type of arbitration is conducted under the auspices of arbitral institution which have framed special rules to meet the specific requirements for the conduct of arbitration in respect of dispute of particular types e.g. commodities, maritime, construction and specific areas of technology.

This type of arbitration is conducted in accordance with the provision of certain special Acts which specifically provide for arbitration in respect of disputes arising from matter covered by those Acts.

Presently, there is a wide divergence and disparity in laws relating to various aspects of business contracts in different countries. Such disparities create practical difficulties and legal problems in the smooth and swift flow of international business. With the view to promote uniformity at least on fundamental principles in the various business laws, UNCITRAL has either made Model laws/Conventions or has prepared guidelines on various subjects. The conventions are intended to provide useful means of reconciling the existing conflicts and diversities between Civil Law, Common Law and several other legal systems prevailing in different parts of the world. The Government of India has already taken up the task of harmonization and globalization of the legal framework relating to international trade and arbitration laws. The present arbitration law in India is radically based on UNCITRAL Model Law on international commercial arbitration as the Arbitration and Conciliation Act, 1996. In the past, statutory provisions on arbitration were contained in three different
enactments, namely, the Arbitration Act, 1940, (hereinafter referred as 1940 Act), the arbitration (Protocol and Convention) Act, 1937 and the foreign Awards (Recognition and Enforcement) Act 1961.

The 1940 Act covered only the domestic arbitration while the two Acts dealt with enforcement of foreign awards. These three statutes have been repealed and replaced by a consolidated, comprehensive legislation in the Arbitration and Conciliation Act, 1996. This legislation, by and large adopts the UNCITRAL Model Law in its entirety.

This Act particularly accentuates the concepts of party autonomy, judicial minimalism and fair trial by an impartial tribunal. Arbitration in the form of ad hoc arbitration, institutional arbitration, specialized arbitration and statutory arbitration are practiced in India there has been a gradual trend in favor of institutional arbitration in recent times with realization of it several advantages over ad hoc arbitration. Under the Law there is no clear definition of terms such as ‘domestic arbitration’ or ‘foreign arbitration’, either in the statutes or decided cases. However the term ‘international commercial arbitration’ has been defined in the 1996 Act.

The Arbitration and Conciliation Act, 1996 is the result of borrowing the provisions from UNCITRAL Model Law and an improvement over the Arbitration Act 1940, which only deals with Domestic Arbitration while the Act of 1996 is mainly for the purpose of dispute resolution in International Trade. Although the Arbitration and Conciliation Act, 1996 is based on UNCITRAL Model Law still it departs from Model Law – Subsection. (1) of section. 10 of the 1996 Act deals with the number of the arbitrators in an arbitral tribunal and provides that the number shall not be of even number. The Model Law does not contain any such limitation. Where the parties fail to determine the number of arbitrators, the Model law provides that the number of arbitrators shall be three. Subsection (2) of section 10 of 1996
Act provides that in such an eventuality, the arbitral tribunal shall consist of a sole arbitrator. In the matter of appointment of arbitrators, where the parties fail to reach an agreement, the model law permits the party to approach a court or other authority specified in the National Law for appointment of the third arbitrator or sole arbitrator as the case may be. However, section 11 of the 1996 Act empowers the Chief Justice of the High court concerned or any person or any person or institution designated by him to appoint the arbitrator. Further in the case of International commercial arbitration, it is the Chief Justice of India, or any person or institution designated by him, who is empowered to appoint the arbitrator. Sub-section (10) of the section 11 empowers Chief Justice of India or the Chief Justice of High Court, as the case may be, to make such scheme as he may deem appropriate for dealing with such appointments.

The Model Law lays down the procedure for challenging an arbitrator. It empowers the arbitral tribunal to decide on the challenge and, if a challenge is not successful, the challenging party may request a court or other authority to decide on the challenge. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. The corresponding provision contained in section 13 of the 1996 Act does not permit the challenging party to approach the court at that stage. However after the award is made the party could challenge the award on the ground that the arbitrator has wrongly rejected the challenge.

Similarly under the Model Law, if the arbitral tribunal turns down the plea that it has no jurisdiction, provision exists for the party concerned to approach a court to decide the matter. The corresponding provision contained in section 13 of the 1996 Act does not make provision for approaching the court at that stage.
The following additional provisions, which are not to be found in the Model Law, have been made in the 1996 Act.

Subsection (7) of the section 31 contains detailed provisions on award of interest by the arbitral tribunal.

Section 31 also deals with the cost of arbitration.

Section 36 provides that under the following two situations, namely,
1. where an award is to challenged within the prescribed period, or
2. where an award has been challenged but challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the court.

Section 37 makes provision for appeals in respect of certain matters.

Section 38 enables the arbitral tribunal to fix the amount of deposit or supplementary deposit as the case may be as an advance for cost of arbitration.

Section 39 to 43 make provision for lien on arbitral award and deposits as to costs, arbitration agreement not to be discharged by death of party thereto, the rights of a party to an arbitration agreement in relation to the proceedings in solvency of a party thereto, identification of the court which shall have exclusive jurisdiction over the arbitral proceedings and application of the Limitation Act to arbitrations under 1996 Act.

**OBJECT OF STUDY**

Object of present study is whether arbitration law in India is satisfactory in its working after getting influenced from the various
protocols conventions, treaties, regulations, rules and Acts etc. in the form present enactment, the Arbitration and Conciliation Act, 1996 Act.

The working of the Arbitration And Conciliation Act,1996 is the result of UNCITRAL Model Law which provides provisions to fulfill the need of the present world scenario is perfect in its self or it need to be amended so it can cater the demands of International Trade disputes Resolutions smoothly

HYPOTHESIS

The hypothesis of this present research work is that

1. Whether the Arbitration and Conciliation Act 1996 is success?

2. What are the impact of UNCITRAL Model Law on the Arbitration and Conciliation Act 1996?

3. How the judiciary has influenced the Arbitration and Conciliation Act 1996?

4. What is the overall Impact of globalization on Arbitration and Conciliation Act 1996?

RESEARCH METHODOLOGY

Method is the way of doing something. Methodology is the science of study of particular subject. The concept of the research methodology is much wider. The method a research followed in pursuing a research is research methodology.

The systematic investigation of problem and of matters concerned with law such as code, act etc. is legal research judges, lawyers, Law Commission and researchers constantly do research in law. They do make
systematic research into the social, political and other fact conditions which give rise to the individual rules.

The legal research deals with the social and behavioral phenomena. It studies behavioral of human beings as members of society, and their feeling responses, attitudes under different circumstances.

Legal research is carried on both for discovering new legal facts and verification of the old ones.

Legal research tries to establish causal connection between various human activities.

The object of legal research may be classified into two parts—firstly academic objects and secondly utilitarian objects.

The object of legal research may be evaluative, when the objective of the legal research is to find out how a legal rule came into being and what it is—the research is evaluative in character.

When the objective of a legal research is to ascertain the nature, scope and source of law in order to explain what law is, it is explicative research. If a legal research is conducted to analyses the nature of alcoholization and the legal control of it through diverse law is explicative in nature.

The legal research may be identificatory also. If the object of a research is to ascertain for whose benefit a legal rule is made, the nature of the research is said to be identificatory. If a study is intended to find out the beneficiary of land reform laws, it is identificatory in nature.

An impact analysis of legislation may be the objective of a legal research.
A research carried out to find out the degree of social acceptance to the anticipated or proposed legislation is called projective or predictive research.

Legal research can be classified in various ways. It can be divided on the basis of the nature of data, tools of data collection, interpretation of already available data, purpose and other such criteria.

There are two major theoretical perspective- positivism, phenomenology, purpose research is divided as: (i) empirical and (ii) non empirical.

Another classification based on the nature of tools and techniques is quantitative and qualitative research. Another classification divides research into (i) description research, and explanatory research.

The most popular classification divides various forms of research into: (i) theoretical, (ii) applied, (iii) action, (iv) inter-disciplinary, and (v) evaluation research.

A doctrinal research means a research that has been carried out on a legal proposition or propositions by may of analyzing the existing statutory provisions and cases by applying the reasoning power. Doctrinal research involves analysis of case law, arranging, ordering and systematizing legal reasoning or rational deduction. Ascertaining a legal rule for the purpose of solving problem is one of the purposes of the traditional legal research. This has been achieved by the original sources of low. The Act of parliament and the Acts passed by the legislature fall under this category of legislation. The case laws decided by the Supreme Court and High court which are binding on lower courts fall under the category of precedents.
The doctrinal legal research attempts to verify the hypothesis by a first hand study of authoritative sources. A doctrinal researcher should know how to use a Low library, for the major portion of his research methodology concerns with the identification of authoritative sources and use the techniques to find them out.

Doctrinal research looks at the following issues:-

1. The aim of preferred values;

2. The problems posed by the gap between the policy goal and the present state of achievement;

3. Availability of alternative choice for the implementation goal;

4. The predictions and consequences that were made.

For the research work the doctrinal methodology has been adopted by researchers.

REVIEW OF LITERATURE

The researcher has gone through several books, articles, regulation, legislature, Acts and generals etc by using law library of faculty of law, Maulana Azad Library, Aligarh Muslim University, Aligarh.

The researcher has gone through, “Law of Arbitration in India” by Durga Charan Banerjee from which the researcher has studied regarding the growth of arbitration law in India.

The researcher has gone through “The Law of International Commercial Arbitration” by A.K Bansal form which the concept of international commercial arbitration is consulted.
Further the researcher has gone through “Arbitration Act” by Rameshwar Dayal from which the various aspects of Arbitration are consulted.

The researcher has further gone through “The Arbitration and Conciliation Act, 1996 and Alternate Dispute Resolution System” by Dr. Tripathi from which arbitration as alternative dispute resolution system is consulted.

The researcher has further consulted “Evidence and Procedure in Arbitration” by H. Gill William to consult what evidence and procedure is adopted in arbitration.

P. Gilies and G. Moens book “International Trade Law and Business Law, Policy and Ethics” has been consulted for use of arbitration law to resolve the dispute concerning international trade law and business requirement of arbitration law to deal with disputes.

“History and English Law” by Holdsworth is consulted to look the historical background of law.

G.K Kwatra's “The new arbitration and conciliation law in India” has been consulted to look the various aspects of arbitration law and implementation of arbitration law in India.

“International Commercial Arbitration” by H. Martin and A. Redfern has been consulted for implementation of international commercial arbitration in India.

“Law of Arbitration ADR and Contract D.P Mittal has been consulted to see the use of arbitration in India.
“Concise Law dictionary” has been used to see the meaning of various legal terms.

“International Economics and Trade Law” by Schimithoff and simond has been consulted to see the impact of globalization to enact the new law for dispute resolution.

“Law of Arbitration” by S.D Singh is consulted for law of arbitration and various dimensions.

“Arbitration Act” by J.P Singhal is consulted for looking into various aspects of arbitration law.

“Law of Arbitration and Conciliation Act” by K.K Veenugopal, B.K Singh Bachawat, Mohinder Singh has been consulted to see the various dimensions of arbitration law.

“Commentary on Arbitration and Conciliation Act by P. Chandershekhar Rao has been consulted regarding the working of arbitration law in India.

The researcher has gone through various Articles like:

1. Article,” Does the world need Additional Uniform Legislation on Arbitration in Arbitration International Vol 15 No. 3.
2. Ashwani Kumar Bansal, Article 'India as a Centre for International Arbitration; Chartered Secretary, October 2002 pp. A 453, 1413- A 454,1414.
5. Fali S Nariman, Articles 'The spirit of Arbitration' presented on Feb.
17,200 in Hong Kong, president International Council for Commercial Arbitration (ICCA).


15. Sarma Krishna, Articles' Transnational commercial Arbitration in India 2000 Comp. LJ.

16. Sor Narajah M., Article International Commercial Arbitration the protection of state contracts.


To consult the impact of globalization arbitration law in India the researcher has gone through several regulations to look the historical background of arbitration law and its growth with time. The regulations which are consulted are as follows:

**REGULATIONS**

1. Bengal Regulation, 1772
2. Bengal Regulation, 1781
3. Regulation of 1787
4. Bengal Regulation 1793
5. Regulation XV of 1795 and XXI of 1803
6. Regulation VI of 1813 and XXVII of 1814
7. Regulation of 1816 and V of 1816
8. MADRAS Regulation VII of 1816
9. Bengal Regulation VII of 1822
10. Bombay Regulation IV of 1827
11. Bengal Regulation VI of 1832
12. Bengal Regulation IX of 1833

The researcher has also gone through various enactment for comparative study and impact of them on arbitration Law in India as well as variation from arbitration law in India.
CHAPTERISATION

The framework of this research work is to study the working of Arbitration and Conciliation Act 1996, the judicial pronouncement of the Supreme Court and various High Courts for which various judicial books have been consulted. The scheme of research has been divided into following chapters.

- Introduction- What is Arbitration, Types of arbitration and application of arbitration according to Arbitration and Conciliation Act, 1996
- Genesis of arbitration law in India – this chapter deals with historical background of arbitration law in India and its growth with time to face the pace of changing world scenario and how and why the present law that is the arbitration and conciliation Act 1996 came into existence.
- Commercial Arbitration and UNCITRAL Model Law-this chapter deals with commercial arbitration, need of it and about the various aspects of UNICITRAL Modal Law and how the Indian Law is influenced by it.
- Mechanism of commercial arbitration - this chapter deals with the mechanism of commercial arbitration it also deals with various requisition for resolving the disputes through arbitration and about arbitration, arbitration tribunal, arbitration agreement, arbitral award its enforcement its recourse against the arbitral award.
- Arbitration and Resolution of IPR Disputes – this chapter with deals with IPR Disputes as in this global world various intellectual property right disputes are arising and how they can be resolved.
- Enforcement and recourses against arbitral awards – in this chapter deals with enforcement of arbitral award and how it is enforced and when the enforcement can not be done and if one is not satisfied with
the arbitral award then what are the recourses available to him to set aside such an award.

- Impact of Globalization on arbitration law in India – this chapter deals with the impact of globalization on the arbitration law in India and what is the need to get influenced from the various law of the world.

- Judicial response and arbitration practices – in this the Supreme court and the High court give their Pronouncement and these Pronouncements are Precedent’s through out India and there precedent are trend makers in law in it self so it is discussed in this chapter that how the judicial responses change the law and play a role in the growth of law.