Chapter-IV

Adjudicatory Method of Alternative Disputes Resolution: Arbitration

4.1 Introduction

The core problem of the litigation and growing backlog adding to the already overloaded courts, called for a far stronger and innovative approach for tackling the issues involved from a total different viewpoint and to be outside the system. In the last few decades, the commercial activity of the people got extended outside India which was earlier restricted within the country. Along with this the need for setting up of a system which would be sensitive to the quick resolution of any disputes that might arise in the course of commercial transactions between different nationalities became necessary.

On account of the growth in the international trade and commerce and also on account of long delays occurring in the disposal of suits and appeals in courts, there has been tremendous movement towards the resolution of disputes through alternative forum of arbitration. Arbitration is a dispute resolution procedure, which is an alternative to try a dispute in the court system with a jury and judge. This is a technique in which a third party reviews the case and imposes a decision, which is legally binding on both the parties. The alternative method of settlement of disputes through arbitration is a speedy and convenient process, which is being followed throughout the world.\footnote{Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj, AIR 2001 SC 626.}
4.2 Concept of Arbitration:

Arbitration is a legal process, which takes place outside the courts, but still results in a final and legally binding decision similar to a court judgment. Arbitration is particularly a means of dispute resolution in the commercial field. Arbitration is a flexible method of dispute resolution, which can give a quick, inexpensive, confidential, fair and final solution to a dispute. It involves the determination of the dispute by one or more independent third parties rather than by a court. The third parties, called arbitrators, are appointed by or on behalf of the parties in dispute. Arbitration is semi-judicial and more formal method of dispute resolution. The neutral third party hears the parties and makes the decision which is binding and is known as ‘award’.

The use of Arbitration is appropriate to civil matters only and in large part to the efficient disposal of disputes in the field of business, more so in the area of International Trade and commerce, since with the ever growing amount of global trade and investment, businesses are more attentive than ever before on the need to find a suitable means for resolving international commercial and investment disputes.

Arbitration is not a new method of dispute resolution in India. It has a long history and tradition of arbitration, deep rooted in the age-old institution of panchayat (group of elders in villages). Presently, arbitration law is governed by the ‘Arbitration and Conciliation Act, 1996’ (hereinafter the 1996 Act) which was enforced after repealing the ‘Arbitration Act, 1940’ (hereinafter the 1940 Act).

4.3 Legislative History of Arbitration:

The law of arbitration was not unknown to India even before the advent of the British rule, though it may not have been applicable in the form in which it applies
today. It existed in the form of ‘panchayat’ to which members were elected according to their status and standing in the society. Chief Justice Marten took note of this system as a striking feature of the ordinary Indian life and speaking for the Full Bench in Chanbasappa Gurushantappa v. Balingaya Gakurnaya\(^2\) observed, “It (arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a Panch is one of the natural ways of deciding many a dispute in India.” There were different panchayats such as panchayats of different castes and creeds. These panchayats are still found and play an important part and exercise considerable influence in many social and caste questions. There was no legislation governing arbitration in pre British period.

4.3.1 Regulations:

In the British period, the initial Bengal Regulations did not try to abolish the system of Panchayats. The Bengal Regulations of 1772, 1780 and 1781 were designed to encourage arbitration\(^3\). The Bengal Regulation Act, 1772 provided that in all cases of disputed accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final. There is a provision in Bengal Regulation of 1781 to the effect that no award of any arbitrator or arbitrators shall be set aside, except upon full proof, made by the oath of two credible witnesses that the arbitrators had been guilty of gross corruption or partially, in the cause in which they had made their award.

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The Regulations made by Lord Cornwallis in 1787 included a provision for arbitration with the consent of parties, but there were no provisions for the consequences of the award not being made in time, or for the situation, when arbitrators differed in their opinions.\(^4\)

Much more comprehensive was the set of provisions in Bengal Regulation 16 of 1793, which inter-alia provided for the reference by the court to arbitration, with the consent of the parties in suits for accounts, partnership, debts, breach of contract, where the valuation exceeded 200 sicca rupees and the like. Procedural provisions this time were very elaborate and after the extension of this Regulation by subsequent Regulation in 1803 to Benaras and to the ceded Provinces, the territorial application of the Bengal Regulation of 1793 covered a pretty large portion of so much of Northern and Eastern India as had, by the time, come under the British rule. Regulation 6 of 1813 extended the Regulation of 1793 to disputes relating to land.\(^5\) By Regulation 27 of 1814 Vakils were allowed to act as arbitrators, removing an age old bar on their acting as such.\(^6\)

In the meantime, Madras Regulation 4 of 1816 gave certain powers for calling in Panchayats for setting disputes. Madras Regulation 5 of 1816 was intended to encourage awards by village panchayats and provided machinery for working out the scheme. The scheme contemplated awards by village panchayats with compulsory

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\(^4\) Ibid.

\(^5\) Ibid, para 1.15.

service for a villager on a panchayat and was administered through the village Munsif, later by the District Munsif.\(^7\)

In Bombay, the Regulation 4 of 1827 and Regulation 7 of 1827 provided for arbitration. Bombay Regulation 7 of 1827, (repealed by Act 1 of 1861), in its preamble, expressly provided for arbitration through the intervention of the court.\(^8\) Section 1 of the Regulation gave express power to resort to arbitration notwithstanding a pending suit. Section 9, Clause 1 of the Regulation provided that awards (when filed under the Regulation) have the force of decrees. Section 9 Clause 2 of the Regulation provided that ‘arbitration awards or other adjustments not so filed shall not be entitled to any other consideration in a court other than as evidence or agreements to be adduced or proceeded on by ordinary course of law.’

### 4.3.2 Codes of Civil Procedure:

The Legislative Council for India came into existence in 1834. It passed Act 8 of 1859, which codified the procedure of Civil Courts (except those established by Royal Charter). It provided for arbitration in the course of a suit, which was dealt with in sections 312 to 325 of that Act. In 1862 when the Supreme Courts and the courts of Sudder Diwany Adalat in the presidency towns were abolished, the Act was extended to courts in the Presidency towns.\(^9\) These provisions were in force when the Indian Contract Act, 1872 came into force which permitted settlement of disputes by arbitration as provided in section 28 thereof. The Civil Procedure Code of 1859 was repealed by

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\(^7\) 76th Report of Law Commission of India, 1978, p. 6, para 1.15.


\(^9\) Supra Note 7, para 1.17.
Civil Procedure Code of 1877 (Act 10 of 1877) which made no change in the law relating to arbitration. The Code of Civil Procedure was again revised by Act 14 of 1882, which contained provisions for arbitration from section 506 to section 526. But no notable change relating to law of arbitration was introduced by this enactment too. These two enactments were confined to arbitration in the course of a suit. All these enactments provided for reference to arbitration of disputes after they had arisen. There was no provision for a reference to arbitration of future disputes.

4.3.3 Indian Arbitration Act, 1899:

In 1899, the Arbitration Act was passed based on the English Arbitration Act of 1889. Till then the state of the law of arbitration in India was unsatisfactory. This Act made provision for reference of disputes, present as well as future, to arbitration by agreement, without the intervention of the court. The Act applied in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town. The operation of the Act was limited to the Presidency Towns. The Local Government was given power by the provisions of Section 2 to extend the Act to other areas, but this power was never exercised.

4.3.4 Code of Civil Procedure, 1908:

In 1907 the Special Committee, which was presided over by Sir Erle Richards recorded its opinion that in due course the provisions regarding arbitration should find place in a new and comprehensive Arbitration Act. But since there were difficulties in doing so at that time, they decided to leave the arbitration provisions in the

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10 Section 2, The Indian Arbitration Act, 1899.
11 Supra Note 7, para 1.18.
Code of Civil Procedure, 1908, placing them, however, in a schedule in the hope that they would be transferred to a comprehensive Act.\(^\text{12}\)

The second schedule extended to all places to which the Act of 1899 did not extend. It contained provisions under which parties to a dispute might file their arbitration agreement before the court, which would then refer the matter to arbitration and also provisions for arbitration without the intervention of court. The main provisions on arbitration in this Code were section 89 and the Second Schedule.

4.3.5 The Arbitration Act, 1940:

In 1925 the Civil Justice Committee recommended several changes in the arbitration law. Some time passed before an action could be taken on the recommendations of the Civil Justice Committee. This was primarily due to the fact that the Government proposed to wait till the expected new English Act was placed on the Statute book after the consideration of the Mackinnon Committee on the law of arbitration. That Committee made its report in 1927, which was followed by the English Act of 1934. Thereafter in 1938, the Government of India appointed Shri Ratan Mohan Chatterjee, Attorney-at-Law, as a special officer for revision of the law of arbitration and the revised Act was passed in 1940.

This Act received the assent of the Governor General on 11th March, 1940 and came into force on 1st July, 1940. It repealed the arbitration Act, 1899 and sections 89 and 104(1), clauses (a) to (f) and the Second Schedule to the Civil Procedure Code, 1908. It was an Act to consolidate and amend the law relating to arbitration. It was therefore, intended to be a complete Code of the law.

\(^\text{12}\) Supra Note 7, p.7, para 1.20.
This Act extended to whole of India except J&K. This Act dealt with broadly three kinds of Arbitration viz., (1) Arbitration without intervention of Court; (2) Arbitration with intervention of Court where there is no suit pending and (3) Arbitration in suits. It applied to all Arbitration including statutory arbitration except as provided by the said Act or any other Act. The Arbitration Act, 1940, dealt with only domestic arbitration.


The Arbitration Act, 1940 acknowledged the pivotal role of the parties in resolving their disputes. But this Act did not fulfill the essential functions of ADR. Arbitration under this law was never effective and led to further litigation as a result of unchecked challenge of the awards rendered. The extent of Judicial Interference under the Act defeated the very purpose of speedy justice.
The Public Accounts Committee of the Lok Sabha had also commented adversely about arbitration in India. The matter came to be dealt by the Law Commission in its 76’th Report, which recommended certain amendments, including a proviso to be inserted in section 28 of the Act of 1940 forbidding, an extension beyond one year, in respect of the time for making the award except for special and adequate reasons to be recorded.

The emergence of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958 was a step towards party autonomy in arbitration. The Convention assures the recognition of not only the arbitration agreement by a Member State but also the recognition and enforcement of foreign arbitral awards in the Member State.

Arbitration across the globe, over the years, witnessed a slow but sure movement of the players from the jurisdictional theory to the party autonomy concept. The former theory conceptualizes the process of adjudication by the national courts over the disputes essentially arising at the international levels. Where initially, the commercial disputes were engaged in and solved by the national courts, after the Second World War, there has been a drastic change in the manner of dispute-settlement. With the increase and growth of transnational commerce, trade and investment, simultaneously, there also arose the desire not to be assessed and decided upon by foreign judicial bodies. Thus, the concept of party autonomy gained importance. Parties were given more liberty not only

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to choose their own private fora for adjudication but also to decide the country of whose
domestic law will be applicable in such arbitration proceedings. ¹⁴

4.3.6 The Arbitration and Conciliation Act, 1996:

The Act of 1940 was not able to attain efficient results and intellectuals in
the field of arbitration felt that the 1940 Act suffered from a number of inadequacies in
law as well as in practice. A proposal was mooted on 27th July, 1977 by Secretary,
Department of Legal Affairs stating that as Public Accounts Committee had commented
adversely on working of the Arbitration Act due to its delay, enormous expenses and long
time spent. Government was desirous to have a second look to the provisions of
Arbitration Act, 1940 with a view to see whether the enormous delay occurring in
arbitration proceedings and disproportionate costs incurred therein could be avoided. The
matter was referred to the Law Commission of India for its examination in 1977. This

The Supreme Court in the case of Guru Nanak Foundations v. Rattan
Singh ¹⁵, while referring to the Act of 1940 observed, “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.”

¹⁴ Devashish Bharuka, Online Alternative Dispute Resolution,
¹⁵ AIR 1981 SC 2057.
In *Food Corporation of India v. Joginderpal*\(^{16}\), the Supreme Court observed that, “law of arbitration must be simple, less technical and more responsible to the actual reality of the situations, responsive to the canons of justice and fair play.” That being the command of law pronounced by the highest court of the land it made the Law Commission as well as Legislature and thinkers think over the issues rather seriously to consider amending the law.

United Nations Commission on International Trade Law (hereinafter UNCITRAL), in an attempt to encourage uniform national arbitration laws across the globe, found it wise, in 1985, to propose the UNICTRAL Model Law on International Arbitration.

The need for reform in the law relating to arbitration became necessary and urgent. The question was whether the 1940 Act should be amended or the new law be written on a clean slate. Besides the 76'th Report, the Government had before it representations from, among others, the Indian Council of Arbitration(ICA), the Indian Society of Arbitrators(ISA), the Confederation of Indian Industries(CII), the Federation of Indian Chambers of Commerce and Industry(FICCI), the Associated Chambers of Commerce and Industry(ACCI), proposing amendments to the 1940 Act.\(^{17}\)

The Act 1996 came into effect to remove few of its difficulties and judicial intervention was limited to some extent. 76th Report of the Law Commission of India, observations of the Supreme Court and Model UNCITRAL Law were primarily

\(^{16}\) AIR 1981 SC 2075.

responsible factors leading to enactment of Arbitration and Conciliation Act, 1996. The Statement of Objects and Reasons appended to the Arbitration and Conciliation Bill, 1995, reads as follows:

1. The law of arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognized that our economic reforms may not become fully effective if the law dealing with settlement of both the domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international
commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

The 1996 Act has adopted the UNCITRAL Model Law on International Commercial Arbitration 1985. This new Act has tried to bring about sea changes in the Arbitration law and to correct the deficiencies noticed in the earlier Act and also to hasten the process of settlement of international commercial disputes. Further, UNICTRAL Arbitration Rules were provided as guidance for arbitration. The International Chamber of Commerce provided its own Rules of Arbitration and Conciliation in 1998. Many other national and international arbitral institutions formed their own arbitration rules. These international documents contributed in making arbitration and conciliation a more positive and realistic approach to alternative dispute settlement across the globe.\textsuperscript{18}

\footnotesize{\textsuperscript{18}Supra Note 14.}
The changes brought about by the 1996 Act were so extensive that the entire case law built up over the preceding fifty-six years on arbitration was rendered outmoded. The Supreme Court in *Sunderam Finance v. NEPC Ltd.* held that, ‘the provisions of this Act (1996 Act) have to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconception.’

Ever since the Act of 1996 came into force, requests have been voiced for amendments in the provisions of the 1996 Act, in so far as they related to Arbitration. It was considered by the Law Commission in 1998, that it would not be appropriate to take up amendments of the Act of 1996 in haste and that it would be desirable to wait and see how the courts would grapple with the situations that might arise.


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19 (1999) 2 SCC 479 at 484.
The Committee on Personnel, Public Grievances, Law and Justice considered\textsuperscript{21} the Report of Justice Saraf Committee. It also received valuable comments and suggestions from eminent organizations and individuals in the country and abroad. The Committee also heard prominent arbitrators, both legal and non-legal, prominent lawyers and representatives of public sector corporations. The Committee was of the considered view that the Bill would:

i) lead not only to greater interference by Courts in the process of arbitration but also end up having arbitration being conducted under the supervision of the courts;

ii) have the Courts sitting in judgment over the arbitrators before arbitration, during arbitration and after arbitration.

There was a broad consensus in the Committee that the provisions of the Bill analyzed, if accepted, will make the arbitral tribunal an organ of the court rather than a party-structured dispute resolution mechanism. Also, many amending provisions are likely to create confusion and unnecessary litigation. Bringing back court control and supervision in arbitration and the choice of the arbitrator subject to High Court rules and supervision and control of the court, is neither in the interest of growth of arbitration in India nor in tune with the best international practices. It was felt that they are contrary to the best international practices in the field of arbitration. Hence the Committee was of the view that the adoption of that Bill may hamper further development of international trade

relations and diminish the confidence of the international community in the Indian system of arbitration.

### 4.4 Arbitration in India:

The Arbitration and Conciliation Act, 1996 is based on the UNCITRAL Model Law on International Arbitration (a set of 36 Articles) which was drafted to govern all international arbitrations by a working group of the UN and was finally adopted by the U.N. Commission on International Trade Law (UNCITRAL) on June 21, 1985. The Resolution of the UN General Assembly envisages that all countries should give due consideration to the Model Law, in view of the desirability of uniformity of the law on arbitral procedures and the specific needs of international commercial practice. It is also stated in the Preamble of the Act of 1996, “it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law …”

The Act of 1996 is more extensive than the Arbitration Act 1940. This covers both international and domestic arbitration, i.e., where at least one party is not an Indian national and also arbitrations where both parties are Indian nationals respectively. The new Act defines the term International Commercial Arbitration, it states the qualifications required for an Arbitrator, it abolishes the umpire system, reduces the interference of the Court in various regards and also provides for the enforcement of foreign awards made under the New York Convention and the Geneva Convention. By virtue of section 85 of the 1996 Act, the old Arbitration Act, 1940 (relating to domestic arbitration) and also the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Award (Recognition and Enforcement) Act, 1961, (relating to international arbitration)

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22 Supra Note 20.
were repealed, thus enabling the Act of 1996 to govern both domestic and international arbitrations.

The 1996 Act was the result of recommendations for reform, particularly in the matter of speeding up the arbitration process and reducing intervention by the court. The Act consolidates and amends the law relating to domestic and international commercial arbitration as well as enforcement of foreign awards. This Act has four parts. Part I of the Act entitled ‘Arbitration’ is general and contains chapters I to X. Any arbitration conducted in India or enforcement of award there under, whether domestic or international commercial arbitration, is governed by Part I. Part II is entitled ‘Enforcement of Certain Foreign Awards’. Chapter I of part II deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards. Part III deals with ‘Conciliation’ having sections 61 to 81. Part IV contains supplementary provisions.

4.4.1 Definition of Arbitration:

A method of alternative dispute resolution in which the disputing parties agree to abide by the decision of an arbitrator(s).23 The Black’s Law dictionary, defines arbitration as a method of dispute resolution involving one or more neutral third parties, who are agreed to by the disputing parties and whose decision is binding.24 Section 2(1) (a) provides, “arbitration” means any arbitration whether or not administered by permanent arbitral institution. “International commercial arbitration” is defined as an arbitration where at least one of the parties is a national or habitual resident in any country other than India or a body corporate which is incorporated in any country other

than India or a company or association of individual whose central management and control is exercised in any country other than India.\textsuperscript{25}

Halsbury defines arbitration\textsuperscript{26} as ‘the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law’ and ‘the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a Court.’

4.4.2 Types of Arbitration:

Arbitration can be categorized on the basis of appointment of arbitral tribunal, on the basis of parties’ agreement to arbitration, and on the basis of place of conducting arbitration.

4.4.2.1 Ad-hoc Arbitration and Institutional Arbitration:

For the purpose of constituting an arbitral panel, a person has two options available. One option is ad hoc arbitration whereby the parties themselves constitute an arbitral tribunal and make their own rules for arbitration. On the other hand, there is the option of institutional arbitration. At present there is a big trend in India to resort to ad-hoc arbitration mechanisms. This tendency is counterproductive since there is considerable scope for parties to be aggrieved by the functioning of ad-hoc tribunals. An empirical survey will reveal that a considerable extent of litigation in the lower courts’

\textsuperscript{25} The Arbitration and Conciliation Act, 1996, Section 2(1) (f).

deals with challenges to awards given by ad-hoc arbitration tribunals. Questions relating to the lack of impartiality of arbitrators and procedural defects in the conduct of arbitration proceedings are the subject-matter of frequent litigation and hence add to the caseload before an already overburdened judiciary.

International arbitration institutions provide ‘model clauses’ so that the parties, while incorporating them in their contracts, can aid smooth progress of arbitration. They also provide for a definite fee schedule. They (i) determine whether there is a prima facie agreement to arbitrate; (ii) decide on the number of arbitrators; (iii) appoint arbitrators; (iv) decide challenges against arbitrators; (v) ensure that arbitrators are conducting the arbitration in accordance with their Rules and replace them if necessary; (vi) determine the place of arbitration; (vii) fix and extend time-limits; (viii) determine the fees and expenses of the arbitrators; and (ix) scrutinize arbitral awards. In ad hoc cases, the arbitration will be administered by the arbitrators themselves. However, should problems arise in setting the arbitration in motion or in constituting the arbitral tribunal, the parties may have to require the assistance of a state court, or that of an independent appointing authority.

Opting for institutional arbitration gives the benefit of not only making use of the well-tested arbitration rules and procedures of the institution but also being confident of the presence of well-experienced and qualified arbitrators from the panel maintained by the institution. Arbitral institutions are well-equipped to identify and retain

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the services of arbitrators with interdisciplinary expertise. By resorting to institutional mechanisms, parties can ensure that their disputes will be resolved under internationally accepted and updated arbitration rules coupled with supervision by personnel with expertise in the area. Their prior experience with similar categories of dispute-resolution places them in a unique position wherein they can ensure the conduct of arbitration proceedings in a time-bound and transparent manner. Further, in an institution, the professional staff is available to guide disputants through the arbitration process.

4.4.2.2 Statutory or Voluntary Arbitration:

Sometimes the submission instead of being voluntary is imposed by statute. This is mandatory arbitration which is obligatory on the parties by operation of law. In such a case the parties have no alternative as such but to abide by the law of land. Statutory arbitration is different from other types of arbitration as the consent of parties is not necessary, it is compulsory arbitration and it is binding on the parties as the law of land. There are more than 25 central Acts providing for statutory arbitration in India. For example, under the Railways Act 1890, the Land Acquisition Act 1894, the Indian Electricity Act 1910, the Cantonments Act 1924, the Co-operative Societies Act 1912, the Indian Telegraph Act 1885 arbitration is provided for statutorily. Section 31 of the North Eastern Hill University Act, 1973, Section 24, 31 and 32 of the Defence of India Act, 1971 and Section 43(c) of the Indian Trusts Act, 1882 are the provisions, which deal with statutory arbitration. The provisions of these statutes to the extent inconsistent with the provisions of the Arbitration Act will prevail over the provisions of the Arbitration Act.
4.4.2.3 Domestic, International or Foreign Arbitration:

Arbitration which takes place in India and has all the parties within India is termed as domestic arbitration. An Arbitration in which any party belongs to any other place than India and the dispute is to be settled in India is termed as International Arbitration. When arbitration proceedings are conducted in a place outside India and the award is required to be enforced in India, it is termed as Foreign Arbitration.

4.4.3 Arbitrability of Disputes:

All civil disputes which fall within the jurisdiction of Civil Courts can be referred to Arbitration. The 1996 Act states that the relationship between the parties need not be contractual. Therefore, disputes in tort (relating to the contract) can also be referred to arbitration. Disputes relating to property, right to hold an office, compensation for non-fulfillment of a clause in a contract, disputes in a partnership etc. can be referred to arbitration. Even the disputes between an insolvent and his creditors can be referred to arbitration by the official receiver or the official assignee with the leave of the court. There are, however, certain exceptions. Disputes involving question of morality, public policy, status and religious rights are beyond the arbitration proceedings. Matters of public interest such as dissolution and winding up of incorporated companies, family relationships, workers rights, anti-trust matters, rent control laws etc. may not be arbitrable. Consequently, no Arbitration agreement can validly be executed which calls for adjudication of the following matters:

(a) Matrimonial matters and matters connected with conjugal rights.

(b) Determination of guardianship or Wards.

(c) Testamentary matters under Succession Act.
(d) Insolvency, Dissolution and Winding up Proceedings under Companies Act.

(e) Criminal proceedings.

(f) Matters under Indian Trust Act, Trusteeship of Charitable Institutions, Public charity, matters falling within the purview of Monopolies and Restrictive Trade Practices Act.

(g) Industrial Disputes and Revenue matters.

(h) Disputes arising from an illegal contract.

(i) Lunacy proceedings.

The above examples are not exhaustive. The general approach of the court to determine whether or not a dispute is arbitrable is to see whether the parties can make the settlement thereof a subject matter of private contract. This was pointed out by the Supreme Court in the case of Olympus Superstructures v. Meena Khetan, where the court relied on Halsbury’s Laws of England stating that the differences or disputes which may be referred must consist of “…….. a justiciable issue, triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction.”

The Supreme Court held in H. N. Radhakrishnan v. Maestro Engineers that a court could refuse to refer a dispute to arbitration if it involved allegations of fraud or misappropriation. According to the Court, proof of fraud involved elaborate production of evidence and “such a situation cannot be properly gone into by the Arbitrator”. The Court held that courts would be more competent to, and would “have the means to decide such a complicated matter involving various questions and issues

29 (2010) 1 SCC 72.
raised in the dispute” and that it was in furtherance of justice that the issue should not be tried by the arbitrator. It is fallacious to assume that arbitrators are not capable of deciding matters involving complicated questions of fact and of law. The decision in Maestro Engineers’ case goes against the prevailing policy on arbitration, as reflected in the Act. If the conditions in sec. 8 of the Act are satisfied, the judicial authority is bound to refer the dispute to arbitration.

4.4.4 Arbitral Agreement:

For resorting to arbitration it is very important that there exists an arbitration agreement to refer the existing or future disputes to arbitration. Either there should be an arbitration agreement or at least an arbitration clause in any commercial agreement made between the contracting parties. No particular form of arbitration agreement is required by law. The agreement however, must be in writing. The arbitration agreement shall be deemed to be in writing if it is contained in an exchange of letters or other means of communication which provide a record of the agreement. Further, the agreement need not be signed and an unsigned agreement affirmed by the parties conduct would be valid as an arbitration agreement. An arbitration agreement would also be considered to be in writing if there is an exchange of a statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.\(^{30}\) An agreement is not a state of mind but an act and as act is a matter of inference from contract. The parties are to be judged not by what is in mind but what they have said, written or done. An arbitration agreement as mentioned above, being an

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\(^{30}\) Supra Note 25, Section 7 (4) (c).
agreement must be legally valid in accordance with S.10 of Contract Act. The Constitution of India, under Article 299, provides for the procedure the State must follow in relation to contracts. It states that any contract with the Government of India or the Government of any State must be contained in a formal written instrument. If it is entered into with the Government of India, it must be expressed to be made by the President of India and executed on his behalf by a person duly authorised. If the contract is with a State Government, it must be expressed to be made by the Governor of the State and executed on his behalf by a person duly authorized. Further, several Public State Corporations are incorporated through legislation and the formalities for entering into contract contained in such statutes must be complied with.

Section 89 of the Code of Civil Procedure, 1908 empowers the Court to refer matters to arbitration if the Court thinks that a settlement is possible. Where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code. The Supreme Court in Jagdish Chander v. Ramesh Chander held, “It should not also be overlooked that even though section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there can not be a reference to arbitration even under section 89 CPC, unless there is a mutual consent of all parties, for such reference.” As and when the

31 Indian Contract Act, 1872, Section 10, ‘What agreement are contracts — All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and a lawful object, and are not hereby expressly declared to be void.’

provisions of section 89 come into force, the reference by the Court will be governed by the provisions of the 1996 Act, so far as may be, as provided in section 89 itself.

4.4.5 Appointment of the Arbitral Tribunal:

Arbitration is a domestic forum, selected by the parties either before entering upon the contract, or after the dispute has arisen. Parties are free to determine the number of arbitrators. Arbitration can be by a sole Arbitrator or by three or more persons. But if it is not by sole Arbitrator, it shall be by an uneven number of members, such as three, five, seven etc. Failing any determination the arbitral tribunal shall consists of a sole arbitrator.33 Arbitrators can be named in the agreement itself or nominated in accordance with the provisions of the contract after the disputes have arisen.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. A sole arbitrator or a panel of arbitrators so appointed, constitute the Arbitration Tribunal. Section 11 provides that the parties are free to agree on a procedure for appointment of arbitrator or arbitrators and if the parties have agreed upon the procedure for appointment of arbitrator then the said procedure should be followed initially. Failing any agreement on a procedure as to how the appointment of the arbitrator or arbitrators is to be made, the parties shall adopt the procedure as prescribed under section 11 clauses (3), (5) or (6). In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If there is a failure of the parties’ envisaged mechanism for constitution of the arbitral tribunal, the appointment shall be

33 Supra Note 25, Section 10.
made, in the case of a domestic arbitration by the Chief Justice of the relevant High Court and in the case of international arbitration by the Chief Justice of the Supreme Court of India. The parties may agree upon any qualifications required of the arbitrator and the person or authority in appointing an arbitrator, shall have due regard to any qualification required of the arbitrator and other conditions as are likely to secure the appointment of an independent and impartial arbitrator.

Section 12(1) makes it mandatory and obligatory on the part of a person arranged for being appointed as an arbitrator to disclose the interest which he may be having in relation to the arbitration matter. If an arbitrator has an interest in the subject matter of the dispute which he is going to decide, he is not a fit person to decide the dispute unless the parties are aware of that and they have referred the dispute to him with that knowledge. If he fails to do so and it is discovered subsequently, then the award made by him would be liable to be set aside.\textsuperscript{34}

The mandate of an arbitrator terminates if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay and he withdraws from his office or the parties agree to the termination of his mandate.\textsuperscript{35} If there remains controversy regarding his de jure or de facto inability to perform his function and his failure to act without undue delay for other reasons a party may apply the court to decide on the termination of the mandate.\textsuperscript{36} The mandate of the arbitrator also terminates where he withdraws from the office for any reason or the parties agree for the termination thereof.

\textsuperscript{34} Murlidhar Roongta v. S. Jagannath Tibrewala, 2005(1) ArbLR 103 (Bom).
\textsuperscript{35} Supra Note 25, Section 14(1).
\textsuperscript{36} Id, Section 14(2).
If the default is in relation to an international commercial arbitration, the appointment shall be made by the Chief Justice of India. In other cases, the appointment shall be made by the Chief Justice of the High Court having jurisdiction in relation to the matter.\(^{37}\)

There has been great controversy as to the nature of the power of the court in exercise of its jurisdiction under Section 11 of the Act.

According to a three judge bench of the Supreme Court in **Konkan Railway Corporation v. Mehul Constructions**\(^{38}\), the role of the Chief Justice under sec.11 was merely to act as an appointing authority in case of failure of the appointment procedure agreed upon by the parties. This decision was confirmed by a Constitution Bench (five Judge Bench) of the Supreme Court in the case of **Konkan Railways v. Rani Construction**\(^{39}\), that the Chief Justice when making an appointment exercises only administrative (and not judicial or quasi judicial) functions. This, the court said, was in order that time is not unnecessarily consumed in resolving contentious issues and the arbitral tribunal is constituted at the earliest. However, a seven Judge Bench of the Supreme Court in the case of **S.B.P & Co. v. Patel Engineering Ltd.**\(^{40}\) overruled Konkan Railways case, holding that in fact the court would exercise judicial powers under Section 11 of the Act. Indeed the Supreme Court went a step further holding that the Chief Justice would have jurisdiction to determine whether there is in existence a valid arbitration agreement. The court held, “It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at

\(^{37}\) Supra Note 25, Section 11.

\(^{38}\) AIR 2000 SC 2821.

\(^{39}\) (2002) 2 SCC 388.

\(^{40}\) (2005) 8 SCC 618.
that stage......... He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.” The Court supported its conclusion with the following reasons:

1. When a statute confers power on the highest judicial authority, the authority as to necessarily act judicially unless the statute states otherwise.

2. When under sec.8 a court decides on the existence of the arbitration agreement, it is inappropriate that the highest judicial authority cannot decide under sec. 11 on the existence of the arbitration agreement.

3. Credibility is the reason for the statute to grant such a function to the Chief Justice. There would be no credibility in the decision of the Chief Justice if he refers the matter to arbitration when the dispute ought not to have been referred to arbitration for reasons such non-existence or invalidity of arbitration agreement. Such a decision might have serious monetary consequences on the respondent. This view is fortified by the fact that in case a mechanical reference is done by the Chief Justice and the tribunal refuses to accept the respondent’s genuine contention of non-existence or invalidity of the arbitration agreement, the respondent has to wait till the final award is passed and apply for setting the award aside. This approach is advantageous as the tribunal need not decide on issues pertaining to jurisdiction in view of the court’s confirmation of the existence of jurisdictional facts.
It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The decision makes a considerable inroad into Section 16 of the Act which provides that all contentious issues, relating to the jurisdiction of the tribunal, including with respect to the existence or validity of the arbitration agreement shall be decided by the arbitral tribunal. The power exercised by the Chief Justice is judicial and not administrative. The power can be delegated by the Chief Justice of the High Court to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court. The designated judge, in such cases, will be exercising the power conferred on the Chief Justice. The judge will be entitled to seek the opinion of an institution in the matter of nominating an arbitrator but the ultimate decision to appoint the arbitrator would only be that of the judge. The High Court Chief Justice cannot delegate his authority to a district judge. Once the matter reaches the arbitral tribunal, the High Court would not interfere with the orders passed by the arbitrator during the course of the arbitration proceedings. Since an order passed by the chief justice of a high court or a designated judge is a judicial order, an appeal would lie against that order only to the SC by special leave petition. There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court. This new interpretation is likely to cut short the length of arbitration proceedings as the number of appeals has been reduced. An administrative order could be challenged in several ways, in different High Courts and then to the Supreme Court. The likelihood for questioning the judicial decisions is limited.
4.4.6 Jurisdiction of the Arbitral Tribunal:

The jurisdiction of the arbitral tribunal to adjudicate on the disputes between the parties is dependant on the powers conferred by the arbitration agreement. The arbitration agreement is the source of power and authority of an arbitral tribunal and what is not contemplated to be settled in arbitration by the parties cannot be made subject-matter of arbitration. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. The question whether a particular issue is or is not one that should be referred to arbitration under the terms of the arbitration agreement must be raised as soon as the matter alleged to be beyond the authority of the arbitral tribunal is raised during the arbitral proceedings, but the delay can be condoned by the arbitral tribunal, if justifiable grounds causing delay are shown. Whatever be the decision of the arbitral tribunal, it is final and the aggrieved party can challenge only after arbitration proceedings are over and award has been made. The Act advocates that all kinds of questions pertaining to the tribunal’s jurisdiction should be taken before the arbitral tribunal. The Supreme Court, however, considerably watered it down and held that the jurisdictional questions were to be decided by the court under sec.11 and not by the arbitrator though at the time when the court appoints the arbitrators.

4.4.7 Challenge to the Appointment of Arbitral Tribunal:

There are only two grounds upon which a party can challenge the appointment of an arbitrator. First, if circumstances exist that give rise to justifiable grounds as to his independence or impartiality; second, if he does not posses the

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41 Supra Note 25, Section 16(1).
qualifications agreed to by the parties.\textsuperscript{43} The arbitrators are required to be independent and impartial and make full disclosure in writing of any circumstance likely to give rise to justifiable doubts on the same. The Indian courts have held that “the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision.”\textsuperscript{44}

Section 13 of the 1996 Act provides for challenge by a party to the arbitrator in any circumstances referred to in Section 12(3) of the Act. These circumstances are lack of independence, impartiality or lack of qualification. The parties are free to agree on a procedure for challenging an arbitrator. Failing any agreement, in the first instance, a challenge is to be made before the arbitral tribunal itself.\textsuperscript{45} Unless the arbitrator challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If the challenge is rejected, the tribunal shall continue with the arbitral proceedings and make an award.\textsuperscript{46} The arbitrator who is being challenged, remains in the arbitral tribunal and decides about his own competence as an arbitrator; which is completely against the principle of natural justice. A party whose challenge has been rejected by the arbitrator has to wait till the passing of the award before it can re-agitate these grounds before the court. With a view to prevent dilatory tactics, a distinct departure is made from the Model Law and recourse to courts at

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\textsuperscript{43} Supra Note 25, Section 12(3).
\textsuperscript{44} International Airports Authority of India v. K.D.Bali, (1988) 2 SCC 360.
\textsuperscript{45} Supra Note 25, Section 13(2).
\textsuperscript{46} Id, Section 13 (4).
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the stage of passing of an order by the arbitrator under sections 12 and 13 is not allowed under the 1996 Act.

4.4.8 Interim Measures:

The arbitral tribunal can order interim measures in respect of the subject-matter of the dispute, if it is so requested by one of the parties and jurisdiction of the arbitral tribunal is not excluded by agreement by the parties. The tribunal may order interim measures of protection as may be considered necessary in respect of the subject matter of the dispute. A party may approach a competent court before or during the arbitral proceedings or even after the award is pronounced but before it is enforced, for any interim relief. Article 9 of the Model Law has a more restrictive provision as it does not contemplate recourse to a court for an interim measure after the award is pronounced. The interim measure which a court might be requested by a party to take are detailed in section 9(ii) (a to e). An omnibus provision in the shape of sub-clause (e) has been added providing that an application may be made to the court for such other interim measures of protection as may appear to the court to be just and convenient. The interim directions can be issued under this section only for the purpose of arbitration proceeding and with a view to protect the interest of the parties which otherwise can not be protected or safeguarded by the arbitral tribunal.

The Supreme Court in the case of Sundaram Finance v. NEPC, held that if a court is approached before the arbitral proceedings are commenced, the applicant must issue a notice to the opposite party invoking the arbitration clause or alternatively

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47 Supra Note 25, Section 17.
48 Id, Section 9.
49 (1999) 2 SCC 479.
the court would have to be first satisfied that the applicant shall indeed take effective steps to commence the arbitral proceedings without delay. Further, the Court would have to be satisfied that there exists a valid arbitration agreement between the parties. This provision is independent of the arbitrator’s power to grant interim relief. Indian courts have very wide powers to grant interim relief. Usually a three-fold approach is followed (i) existence of prima facie case in favour of the applicant; (ii) irreparable hardship to the applicant if the interim relief is not granted; and (iii) balance of convenience.

It is only on adequate material being supplied by the petitioner that the court can form opinion that unless the jurisdiction is exercised under section 9(ii) of the 1996 Act, there is real danger of the respondent defeating, delaying or obstructing the execution of the award made against it. An appeal shall lie from the order granting or refusing to grant any interim measure under section 9 of the 1996 Act to the court authorized by law to hear appeals from original decrees of the court passing the order.

4.4.9 Conduct of Proceedings:

Under the provisions of the 1996 Act the parties have been given a choice in accordance with which they wish the arbitral tribunal to proceed with the adjudication of the controversy between the parties subject only to certain restrictions concerning public interest. The will of the parties prevail without intervention of the courts except as provided under sections 8 and 9. In domestic arbitration, the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time being in force in India. In international commercial transactions parties are able to decide on their choice of law by which they want to be governed.

The arbitral tribunal shall decide the dispute in accordance with the rule of law designated by the parties as applicable to the substance of the dispute. Failing any designation by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.\(^{51}\) Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have, as just and reasonable persons, intended as regards the applicable law had they applied their mind to the question. The judge has to apply the proper law for the parties in such circumstances by putting himself in the place of a reasonable man.\(^{52}\) Unless otherwise agreed by the parties, arbitral tribunal shall decide by a majority of all its members. But if authorized by the parties or all the members, questions of procedure may be decided by the presiding arbitrator.

Section 8 of the Act states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement, shall refer the parties to arbitration. The only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute and the application must be accompanied by the original arbitration agreement or a duly certified copy thereof. In the meantime, the arbitration proceedings may commence and continue and an award may be rendered. Section 5 supplements this and provides, through a non-obstante clause, that in matters governed by the Act, no judicial authority shall interfere except where so provided for. However, this provision i.e. Section 8 applies only to arbitrations where the seat is in India. This section has been enacted to

\(^{51}\) Supra Note 25, Section 28.

\(^{52}\) National Thermal Power Corporation v. Singer Co., AIR 1993 SC 998.
avoid conflict between the public tribunal and the private tribunal. It is intended to make arbitration agreements effective and prevent a party from going to court contrary to his own agreement.\(^{53}\)

The arbitrators, subject to the parties’ agreement, may conduct the proceedings “in the manner they consider appropriate”. This power includes the power to determine the admissibility, relevance, materiality and weight of any evidence.\(^{54}\) The parties are free to agree on the place of arbitration. If the seat is not agreed by the parties, the matter may be resolved by the arbitral tribunal.\(^{55}\) The seat of arbitration is a significant element in an arbitration agreement, for that would determine which part of the Act would apply to the proceedings. Domestic arbitrations are governed by Part I of the Act, while foreign arbitrations are governed by Part II of the Act. The place of arbitration would determine the procedural law applicable to the arbitration, the law of the arbitration agreement and the proper law of the substantive contract. It is for the arbitral tribunal to determine any issue as to its jurisdiction including objections in relation to the existence or validity of the arbitration agreement.

The arbitral tribunal shall treat the parties with equality and each party shall be given a full opportunity to present its case,\(^{56}\) which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure, 1908 nor the Indian Evidence Act, 1872 apply to arbitrations. However, the courts have held\(^{57}\) that certain provisions of the Evidence Act which are founded on justice and fair play shall


\(^{54}\) Supra Note 25, Section 19.

\(^{55}\) Id, Section 20.

\(^{56}\) Id, Section 18.

apply to arbitrations. Hence, “fundamental principles of natural justice and public policy”
would apply, though the technical rules of evidence contained under the Indian Evidence
Act would not apply. The party making the claim shall state the facts supporting his
claim, the points at issue and the relief or remedy sought within the period of time agreed
upon by the parties, failing which by the arbitral tribunal. On the receipt of statement of
claim, the respondents shall state his defence in respect of these particulars, unless the
parties have otherwise agreed as to the required elements of those statements.\(^5^8\) While
submitting their statement of claim and statement of defence the parties shall submit all
documents which are considered to be relevant or a reference to the documents or the
other evidence proposed to be submitted at a later stage. If the parties have not placed any
restriction on themselves, either party may amend or supplement his claim or defence.
The amendment or supplement of the claim or defence may be allowed by the arbitral
tribunal if the request had been made without any unreasonable delay. The arbitral
tribunal may appoint expert and may ask him to determine specific issues. The arbitral
tribunal on its own or upon request of a party shall ask the expert to participate in the oral
arbitral proceedings, where the parties may ask the questions to him.\(^5^9\) Unless the parties
agree otherwise, the tribunal shall decide whether to hold oral hearings for the
presentation of evidence or for arguments or whether to conduct the proceedings on the
basis of documents or other material alone. However, the arbitral tribunal shall hold oral
hearings if a party so requests unless the parties have agreed that no oral hearing shall be
held.\(^6^0\) The arbitrators have the power to proceed ex parte where the respondent, without

\(^{5^8}\) Supra Note 25, Section 23.

\(^{5^9}\) Id, Section 26.

\(^{6^0}\) Id, Section 24.
sufficient cause fails to communicate his statement of defence or appear for an oral hearing or produce evidence. However, such failure shall not be treated as an admission of the allegations and the tribunal shall determine the matter on evidence, if any, before it. If the claimant fails to communicate his statement of claim, the tribunal shall be entitled to terminate the proceedings.\textsuperscript{61}

Section 27 of the Act provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence including any disclosure or discovery. Hence, unless the parties voluntarily comply, disclosure or discovery can only be through a court and in accordance with the provisions of the Civil Procedure Code 1908. Courts would order discovery if satisfied that the same is necessary for fair disposal of the suit or for saving costs. Section 8 of the Indian Oaths Act, 1969 states that every person giving evidence before any person authorized to administer an oath “shall be bound to state the truth on such subject.” Thus, witnesses appearing before an arbitral tribunal can be duly sworn by the tribunal and be required to state the truth on oath and upon failure to do so, commit offences punishable under the Indian Penal Code.

4.4.10 Making Arbitral Award:

Under section 30, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. Besides Part III of the Arbitration and Conciliation Act, which lays down the general law governing conciliation proceedings, Section 30(1) of the Arbitration and Conciliation Act also seeks to promote the use of ADR procedures during arbitral proceedings and

\textsuperscript{61} Id, Section 25.
provides for Arb-Med. Section 30 of the Arbitration and Conciliation Act reads as, ‘It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.’ To enable an arbitrator to make award based on something other than adjudication, there will have to be a fresh consent of the parties.

If the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. This award shall have the same status as any other arbitral award on the substance of the dispute. There is no need to state the reasons in an arbitral award on agreed terms. Parties may agree under section 31(7) on matter of interest. In the absence of such an agreement, the arbitral tribunal has power to award interest on the amount at a rate which it may consider to be reasonable. The arbitral tribunal has power to award interest on the whole amount or any part thereof and also for any part or whole of the period between the cause of action and the date of award. Section 31(7) (b) curtails the power of the arbitral tribunal or the parties in matter of grant of future interest. The award shall carry future interest at the rate of 18 per cent per annum from the date of award to the date of payment unless the award otherwise directs. If the arbitrator has not awarded interest for the period of making and publishing of the award till the date of payment, the court can not re-write the award or modify the award of the arbitral tribunal. Costs are at the discretion of the tribunal. The general principle is that costs follow the event.62

62 Id, Section 31(8).
An arbitral award must be in writing and signed by the arbitrators or a majority of them and state the date and place of arbitration. It shall state reasons upon which it is based, unless the parties have agreed otherwise. Under section 31(5) it is mandatory on the part of the arbitrator to issue a signed copy to each of the parties to the arbitral proceedings. Sections 33 and 34 stipulate limitation period for taking recourse under these sections. Receipt of signed copy of the arbitral award is an important event in the arbitration proceedings. The period for challenging the award under section 34 or for requesting the arbitrator for correction and interpretation of award or additional award under section 33 shall start running from the date when a signed copy of the award is made available to the parties by the arbitrator. Section 32 makes provision for termination of the proceedings upon making of the final award by the arbitral tribunal. The arbitration proceedings can also be terminated by an order of the arbitral tribunal which order can only be passed when claimant withdraws the claim or when the parties to the reference agree on the termination of the proceedings or the arbitral tribunal finds that continuation of the arbitral proceedings has become unnecessary or impossible.

4.4.11 Enforcement of the Arbitral Awards:

Arbitration under 1996 Act is a speedy and effective remedy to resolve disputes between the parties by experts in technical, commercial or like fields, selected by parties’ own choice as far as possible, or otherwise, with the intervention of court.

4.4.11.1 Domestic Awards:

Under the old Act of 1940 once the award was published by the arbitrator, the arbitrator had to file the award before the court, either on request of the interested

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63 Id, Section 31.
party or on direction of the court under Section 14 of the 1940 Act to make it a decree of the court. The affected or defeated party could even seek to modify the award under Section 15, remit the award under Section 16 or even seek to set aside the award under Section 33 for the grounds set out in Section 30 under the 1940 Act.

Making of award was only the end of one round of litigation for commencement of another round. Under the new Act of 1996, the second circle of litigation to confirm the award into a decree has been taken away, though, subject to the power of the court to have the last declaration on the award, because the award is still subject to analysis under Section 34 for impeachment which however gives only a narrow scope for interference by the court as compared to the grounds under 1940 Act. Section 35 gives recognition to the arbitral award as final and binding, unless impeached on the grounds set out under section 34. The award is made enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.64 However the award cannot be enforced as a decree till the period of challenge under Sec.34 (3) is over or the objections filed have been dismissed. Thus, the commendable objective behind doing away of legal proceedings to make the arbitral award a rule of court under the 1940 Act by introducing Sec.36 in the 1996 Act has been undermined to a great extent. It was proposed by the Law Commission of India65 to make provision that mere filing objection petition under Sec.34 will not operate as stay of the award and the court may grant stay of the operation of the award subject to imposition of such conditions as it may deem fit to impose.

64 Id, Section 36.
65 Supra Note 20.
The award, if valid, is a final adjudication by a competent forum chosen by the parties themselves and until set aside is conclusive upon the merits of the controversy. It will therefore, operate as res judicata in subsequent proceedings between the parties either in court or before the arbitrators.\footnote{P.C. Ray and Co. (India) Pvt. Ltd. V. Union of India, AIR 1971 Cal 512 (DB).} The fact that certain issues have been finally determined by an arbitral tribunal prohibits those issues from being reheard in a national court. Subject to any challenge to the arbitral award, the same is enforceable as a decree and thus, the principles of res judicata would apply. Section 36 provides for enforcement of award under the Civil Procedure Code, 1908 in the same manner as if it were a decree of the court.

4.4.11.2 Foreign Awards:

Arbitration and Conciliation Act, 1996 provides a statutory support for the enforcement of foreign arbitral awards given in countries which are signatories to either the 1927 Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). For the enforcement of a foreign arbitral award in India’s courts, it should be a foreign award under the Geneva Convention or the New York Convention.

In the case of \textit{Bhatia International v. Bulk Trading}\footnote{AIR 2002 SC 1432.}, the Supreme Court held that an arbitral award not made in a convention country will not be considered a foreign award and as such, a separate action will have to be filed on the basis of the award. The New York Convention provides a common yardstick on the touchstone of which these agreements and awards are recognized and enforced in the countries which
have accepted the same. Thus, generating confidence in the parties, who may be unfamiliar with the diverse laws prevailing in different countries with which they are trading, that the arbitral agreements and awards flowing there from will be respected and enforced by the courts of the states where the enforcement is sought.\textsuperscript{68}

Agreements for foreign arbitrations under New York Convention and under the Geneva Convention are governed by Section 45 and Section 54 of the Act respectively, which provide that a judicial authority, when seized of any matter where there is an arbitration agreement, shall refer the parties to arbitration, “unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

The party applying for the enforcement of a foreign award under the provisions of the Act must make an application to the court of competent jurisdiction with the following documents:

(i) the original award or a copy of the award duly authenticated;
(ii) the original agreement or a duly authenticated copy of the same and
(iii) such evidence as may be necessary to prove that the award is a foreign award.

When a party applies seeking for enforcement of an award notice has to be served to the other party intimating him that such an application has been filed in the court seeking for enforcement of the award. On service of notice the court shall proceed to hear the parties in order to determine and record its satisfaction.

In \textit{Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.}\textsuperscript{69}, the Supreme Court considered a question whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 28, which

\textsuperscript{68} \textit{Gas Authority of India Ltd. v. SPIE CAPAG, S.A., AIR 1994 Del. 75.}
\textsuperscript{69} (2003) 5 SCC 705.
affects the rights of the parties. Under subsection (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be whether such award could be set aside. Similarly, under subsection (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? The Supreme Court opined that reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn’t be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. The Supreme Court held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34.

A question was raised in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.70, in relation to foreign arbitrations as to whether a ruling by court on the

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70 (2005) 7 SCC 234.
validity or otherwise of an arbitration agreement is to be on a prima facie basis or is it to be a final decision. If it were to be a final decision, it would involve a full dress trial and consequently years of judicial proceedings which would frustrate the arbitration agreement. Keeping this and the object of the Act in mind, the Supreme Court by a 2:1 decision held that a challenge to the arbitration agreement under Section 45 on the ground that it is “null and void, inoperative or incapable of being performed” is to be determined on a prima facie basis. At the same time an issue would remain as to what is to be done in cases where the court does in fact come to a conclusion that the arbitral agreement is null and void, inoperative or incapable of being performed. A decision to this effect is appealable under Section 50 of the Act. Thus, a ruling on a prima facie view alone would not be satisfactory. One of the judges addressed this and held that if the court were to arrive at a prima facie conclusion that the agreement is in fact null and void, it would have to go ahead and hold a full trial and enter a final verdict in order that it can be appealed against if need be.

Where the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that court. An appeal shall also lie from the order refusing to enforce a foreign award under section 48 to the court authorized by law to hear appeals from such order.\footnote{Supra Note 25, Section 50.} No second appeal shall lie from an order passed in appeal but shall not affect or take away any right of appeal to the Supreme Court. However, no appeal lies if the foreign award is enforced.
4.4.12 Setting Aside Domestic Arbitral Awards:

Scope of interference with the award is very limited and is restricted to the grounds mentioned in section 34(2). Remedy under this section is available only in case of domestic arbitration and has no application whatsoever to international commercial arbitrations and awards. In the case of domestic awards court can set aside the award whereas in the case of foreign awards it is limited to refusal to enforce it, and no power has been conferred on the court to set aside the award as such. Section 13(5) and 16(6) of the 1996 Act are the additional grounds for challenge of an arbitral award along with the ones stipulated in Section 34 of the 1996 Act. Section 34(2) of the 1996 Act provides that an arbitral award may be set aside by the Court only if:

(a) The party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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

(b) the Court finds that:

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

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

Explanation.--Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81. Sections 75 and 81 referred to above are there under Part III of the Act which relates to Conciliation. Section 75 states that the conciliator and parties shall keep confidential all matters relating to the conciliation proceedings. Section 81 prohibits any reference in arbitral or judicial proceedings to views, suggestions, admissions or proposals, etc. made by parties during conciliation proceedings.

‘Public policy’ is defined as “principles in accordance with which action of men and commodities need to be regulated to achieve the good of the entire
community or public.”  

Public policy connotes matters which concern the public good and the public interest. The concept what is good for public good or in the public interest or what would be injurious or harmful to the public good or the public good has varied from time to time. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside an award.

In the case of Renusagar Power Plant Co. Ltd. V. General Electric Co. the Supreme Court observed that “the expression ‘public policy’ can be construed both in narrow or wide sense. It is obvious that since the Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction.” It held that an award would 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.

Judgment in the case of ONGC V. Saw Pipes Ltd. threatens to hamper arbitration’s progress toward speed and efficiency. In this case, the Supreme Court expanded the scope of ‘public policy’ from the earlier ratio laid down by a three bench judgment in the Renusagar case. The scope of public policy was widened to include challenge of award when such an award is patently illegal. The limited grounds of challenge provided under Section 34 are unanimously recognized. It is well accepted that

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74 AIR 1994 SC 860.

75 AIR 2003 SC 2629.
the courts have no power to get into the merits of the dispute. In this case, an award was challenged on the ground that the arbitral tribunal had incorrectly applied the law of the land in rejecting a claim for liquidated damages. The main attack on the judgment is that it sets the clock back to the same position that existed before the 1996 Act and it increases the scope of judicial intervention in challenging arbitral awards. Indian arbitration faces criticism in light of the ongoing intervention by the Indian courts in the proceedings.

It was criticized on the grounds that giving a wider meaning to the term ‘public policy’ was wrong, when the trend in international arbitrations is to reduce the scope and extent of ‘public policy’. The Parliament, when enacting the 1996 Act and following the UNICITRAL Model Law, did not introduce ‘patent illegality’ as a ground for setting aside an award. The Supreme Court cannot introduce the same through the concept of ‘public policy of India’.

After the Saw Pipes case, some judicial decisions have tried to control the effect of Saw Pipes. In the case of Indian Oil Corporation Ltd. v. Langkawi Shipping Ltd., the court held that to accept a literal construction on Saw Pipes would be to radically alter the statutorily and judicially circumscribed limits to the court’s jurisdiction to interfere with arbitration awards. In the case of McDermott International Inc. v. Burn Standard Co. Ltd., the Supreme Court rather read down Saw Pipes. It maintained that a literal construction of the judgment would expand judicial review

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77 2004 (3) Arb LR 568.
78 2006(11) SCC 181 at p. 208.
beyond all limitations contained not only under the 1996 Act, but even under the 1940 Act.

An application for setting aside an award must be made within 3 months of receipt of the award by the applicant subject to a further extension of 30 days on sufficient cause being shown. An application beyond this period is time barred and a further delay cannot be condoned.\textsuperscript{79} Section 37(1)(b) provides that an appeal shall lie from an order setting aside or refusing to set aside an arbitral award. Once the period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

4.4.13 Challenge to the Foreign Awards:

The Act of 1996 does not provide for challenge for foreign arbitral award expressly. Section 48 makes it clear that although it is not permissible to challenge a foreign award, it can be resisted in its enforcement on the same grounds as are available while challenging a domestic award. Under section 48 of the Act the court has been empowered to refuse enforcement of a foreign award if the party against whom the foreign award is sought to be enforced is able to prove and establish that any of the grounds mentioned therein is satisfied. A foreign award will not be enforced in India if it is proved that the parties to the agreement were, under the law applicable to them, under some incapacity, or the agreement was not valid under the law to which the parties have subjected it, or in the absence of any indication thereon, under the law of the place of arbitration; or there was no due compliance with the rules of fair hearing; or the award exceeded the scope of the submission to arbitration;

\textsuperscript{79} Supra Note 25, Section 34(3).
or the composition of the arbitral authority or its procedure was not in accordance with the agreement of the parties; or the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made.\textsuperscript{80} The award will not be enforced by a court in India if it is satisfied that the subject-matter of the award is not capable of settlement by arbitration under Indian law or the enforcement of the award is contrary to the public policy.\textsuperscript{81}

In \textit{Bhatia International v. Bulk Trading S.A}\textsuperscript{82} it was held that Part I of the 1996 Act will also apply to Part II unless expressly or impliedly excluded by the parties through agreement. The Supreme Court upheld a challenge in India to a foreign arbitration award on the grounds that the relief contained in the award violated certain Indian statutes and was therefore contrary to Indian public policy pursuant to Part I of the Indian Arbitration and Conciliation Act,1996. The court held, “The provisions of Part I of the Act (Arbitration and Conciliation Act, 1996) would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.”

\textsuperscript{80} Id, Section 48(1).
\textsuperscript{81} Id, Section 48(2).
\textsuperscript{82} Supra Note 67.
In Venture Global Engineering v. Satyam Computer Services Ltd., relying on the earlier judgment in Bhatia International, the Supreme Court held that it is open to the parties to exclude the application of the provisions of part I by express and implied agreement, failing which the whole of part I would apply.

4.5 Intervention by Courts:

Speedy arbitration and least court intervention are the main objectives of the 1996 Act. Section 5 of the Act declares, “Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (Part I), no judicial authority shall intervene except where so provided in this Part.” This basic provision is found in the laws of all the countries which have adopted the UNCITRAL Model. The main objectives set out in the Statement of Objects and Reasons of the 1996 Act are “to minimize the supervisory role of courts in the arbitral process” and “to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court”. Section 5 of the Act puts a complete bar on the intervention of the courts in matters where there exists an arbitration clause. Under the new Arbitration Act, the interference of the Court in all matters connected with the conduct of Arbitration, decision of the Arbitrator and the award has been very much minimized as compared to that under the 1940 Act.

Under Section 9, a party may, apply to a court for certain interim measures of protection including for preservation, interim custody or sale of goods, securing the amount in disputes, detention, preservation or inspection of any property, interim

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83 AIR 2008 SC 1061.
84 Supra Note 25, Para 4 (v) and (vii) of the Statement of Objects and Reasons.
injunction etc. The Supreme Court in *Bhatia International v. Bulk Trading*\(^85\) held that “an application for interim measure could be made to the courts of India, whether the arbitration takes place in India or abroad.”

There is no uniformity in judicial decisions in respect of applicability of Part I of the Act in respect of cases where the seat of arbitration is not in India. As per *Bhatia International*\(^86\) and *Satyam Computers*\(^87\), in cases of international commercial arbitrations held out of India provisions of Part I would apply, unless the parties by agreement exclude all or any of its provisions. The result is that all the provisions of Part I including provisions relating to appointment of arbitrator under Section 11 and challenge of arbitration award under Section 34 would also be applicable to International Commercial Arbitration where seat of arbitration is not in India. However, in view of the observations made by the Supreme Court in *Shreejee Traco(I) Pvt. Ltd. v. Paper Line International Inc.*\(^88\), no provisions of Part I would apply to cases where the place of arbitration is not in India.

If provision of Section 9 is not made applicable to international commercial arbitration where seat of arbitration is not in India, a party may be out of remedy if the assets and property are in India. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts. These are cases where interim measures could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the

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\(^{85}\) Supra Note 67.

\(^{86}\) Ibid.


\(^{88}\) (2003) 9 SCC 79.
award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred.89

In order to remove the difficulties stated above, it was proposed by the Arbitration and Conciliation (Amendment) Act, 2003 to amend Section 2(2) of the Arbitration and Conciliation Act, 1996 as follows: “(2) This part shall apply only where the place of arbitration is in India. Provided that provisions of Sections 9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable and recognized under Part II of this Act.”

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. Intervention of courts becomes necessary in cases of bias of arbitrators, misconduct of proceedings, etc. Courts also intervene in setting aside or enforcing an award. If a party wants to challenge the appointment of an arbitrator under section 13 on the grounds of lack of independence or impartiality or lack of qualification, the challenge has to be made before the arbitral tribunal itself. If the challenge is rejected, the tribunal shall continue with the proceedings and make an award. After that the party may make an application for setting aside the arbitral award under section 34 of the Act. The arbitration tribunal has under section 16 of the Act jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the

request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 itself also provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

Though the parties are free in their arbitration agreement, however, court intervention is indispensable to have certain measure of control over the arbitral process and make sure its effectiveness. Arbitrators do not have power, by themselves, to enforce awards. One can apply to the court for setting aside or refusing to enforce an award. Court intervention is a necessary evil and it can not be done away with completely. But a balance is necessary in the court intervention and independence of the arbitration. Otherwise the very purpose of opting for arbitration will be defeated. Under the earlier law of arbitration i.e. Indian Arbitration Act, 1940 there were so many instances where the courts could intervene and the matters kept pending in the courts for years and sometimes decades forcing the Supreme Court to comment, “…the way law of arbitration is being administered has made lawyers laugh and legal philosophers weep. Proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary.”

Along with a lot of other issues, the 1996 Act has tried to deal this problem also. One of the important objectives of the new law is to minimize the supervisory role of courts in arbitral process.

4.6 Suitability of Arbitration:

Arbitration is suitable where a neutral with highly specialized knowledge of the subject matter of the dispute is required, e.g. in construction disputes or where the parties do not want to publicize the dispute and at the same time, want some binding and

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specialized resolution of dispute. There is need to resolve business disputes speedily. Litigation is not preferred in business disputes because of various reasons—delay is one of them. The Indian judicial system is facing the problem of overburden. Businesses suffer because disputes are not resolved in a reasonable time. The business in India is flourishing and is expected to grow up at a fast speed in the future also. “After the liberalisation of Indian economy in 1991, business has grown exponentially. As business grew so did the disputes. Most of the business communities have their own very old, time-tested methods of dispute resolution which have nothing to do with the formal legal system.”

4.7 Arbitration Practice in India:

Arbitration is particularly a means of dispute resolution in the commercial sphere. One of the reasons for doing so is that in international trade it is often easier to enforce a foreign arbitral award than to enforce a judgment of the Court. The closing decades of the twentieth century saw arbitration gain worldwide acceptance as the normal means of resolving commercial disputes. The arbitration is conducted in accordance with the terms of the parties’ arbitration agreement, which is generally found in the provisions of a commercial contract entered into by the parties. The disputing parties agree to take their dispute to arbitration. This agreement is generally made before the dispute arises and is included as a clause in their commercial contract. By signing a contract with an arbitration clause, the parties agree that they will not take their dispute to

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the court but they will get their dispute resolved by a private individual or a panel of several private individuals. If any party takes their dispute to the court, the court will normally refuse to hear their case by staying it to force the unwilling party to honour their agreement to arbitrate.

Arbitration is becoming popular, particularly in construction, industrial and labour disputes. Arbitration has been considered the most suitable method of resolving disputes between parties to domestic or international contracts. This idea has been encouraged by the fact that there are international conventions i.e. the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 which have well recognized international rules that provide a structure within which disputes can be resolved.

There are some important institutions making significant contribution in promoting ADR services in India. These institutions are Indian Council for Arbitration (ICA) and international Centre for Alternative Disputes Resolution (ICADR), the Federation of Indian Chambers of Commerce and Industry (FICCI), Indian Chamber of Commerce (ICC), the Bengal Chambers of Commerce and Industry (BCCI). International institutions include the International Court of Arbitration (ICA), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration.
The Indian Council for Arbitration established on April 15, 1965 provides arbitration facilities for all types of domestic and international commercial disputes and conciliation of international trade complaints received from Indian and foreign parties, for non-performance of contracts or non-compliance with arbitration awards. Disputes between the Government of India, State Governments and Public Sector Undertakings with foreign governments, trading organizations are referred to arbitration under the rules formulated by the ICA. It maintains comprehensive international panel of arbitrators with eminent and experienced persons from different lines of trade and professions for facilitating choice of arbitrators.

In recent times, the Government of India has also indicated its’ willingness to encourage the use of Institutional arbitration mechanisms. The Union Ministry for Law and Justice has been in talks with representatives from the Permanent Court of Arbitration (PCA) with the objective of the establishment of a regional centre by the latter. There are of course numerous arbitral institutions which can expand their involvement with Indian parties and even think of establishing arbitration centres in India. Some of these institutions are affiliated to trade associations while some are independent entities. One can easily recount the names of a few of these institutions such as the ICC International Court of Arbitration (Paris), the London Court of International Arbitration (LCIA), The Chartered Institute of Arbitrators (UK), the American Arbitration Association (AAA) and the National Arbitration Forum (USA) among others.\(^\text{93}\)

\(^{93}\) Supra Note 27.
Recently construction and IT industries have grown significantly in India. Arbitration is common in the construction industry. Governments and private parties enter into arbitration agreements as part of their commercial activity. The construction industry felt the need to introduce new measures to resolve disputes in a fair, speedy and cost-efficient manner. Due to such requirements, the Construction Industry Development Council, India (CIDC), in cooperation with the Singapore International Arbitration Centre (SIAC), set up an arbitration centre in India called the Construction Industry Arbitration Council (CIAC). This type of institution-administered arbitration has clear advantages over ad hoc arbitrations for construction companies, public sector undertakings and government departments that have construction contracts.  

In the same way IT disputes tend to be complex. IT disputes typically involve contractual or intellectual property (IP) law issues. The Indian Council of Arbitration (ICA), which is now considered to be an apex arbitral institution in the country, has started the process of identifying and training specialized arbitrators for disputes connected with the IT industry. In relation to this aspect, the ICA conducted an in-depth seminar on Alternate Dispute Redressal methods for the IT sector in India’s major cyber cities like Bangalore and Hyderabad for the purpose of creating an expert pool of arbitrators specialized in cyber laws.

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94 Krishna Sarma, Momota Oinam, Angshuman Kaushik, Development and Practice of Arbitration in India –Has it Evolved as an Effective Legal Institution, Center on Democracy, Development and the Rule of Law, Freeman Spogli Institute for International Studies, http://iis-db.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf

95 Ibid.
4.8 Advantages of Arbitration:

There are many other dispute resolution alternatives to the court. But among all alternatives available arbitration is the most frequently used internationally. The reasons for this are final and binding decisions by arbitration. Other methods can also be used by the parties to reach an amicable settlement, for example through mediation or conciliation. But the success of these depends, ultimately, on the responsiveness and assistance of the parties. A final and enforceable decision can normally be obtained only by resorting to the courts or by arbitration. Because arbitral awards are not subject to appeal, they are much more likely to be final than the judgments of courts of first instance. Arbitration is final because domestic legal systems generally do not permit any appeal from arbitrators’ awards and allow only very limited review of such awards on procedural grounds. Although arbitral awards may also be challenged, the grounds of challenge available against arbitral awards are restricted.

The award given by the arbitrator is equivalent to a decree of a court of law and the same can be executed directly, without making it a decree of the court. In the language of Lord Mustill, “The great advantage of arbitration is that it combines strength with flexibility. Strength because it yields enforceable decisions, and is backed by a judicial framework which, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose procedures which fit the nature of the dispute and the business context in which it occurs.”

The common experience is that alternative dispute resolution processes preserve or enhance personal and business relationships that might otherwise be damaged.

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by the adversarial process. Arbitration proceedings are very flexible in regard to country, language and nationality of the arbitrators. Hence it is possible to construct a neutral procedure without any fear of bias. Under the traditional court system the parties to a dispute do not choose their own judges. But in arbitration parties designate arbitrators of their choice, provided they are independent. In this method the services of the people who have specialization and competence can be availed of.

Arbitration is quicker and less costly than litigation in the courts. However the benefits of less costs and quicker resolution of disputes may not be realized in arbitration in cases involving complex issues, as such cases may take long periods to dispose of, thus increasing costs. But there is limited scope for challenge to these awards. Arbitration has an advantage over litigation where the enforcement of foreign awards is concerned. In the international cases arbitral awards enjoy more international appreciation than the judgments of national courts. A litigant might face difficulties in enforcing judgement in the country where the defendant has assets. Arbitration is more effective in such cases as there are many International Conventions on Arbitration, which are signed by many countries. Arbitral awards are enforced in all the signatory countries. Arbitration offers confidentiality in the matter. The proceedings in arbitration are private, not open to public. So this ensures privacy in proceedings.

4.9 Limitations of Arbitration:

Arbitration has some limitations also, (i) traditional adversarial system is used in arbitration proceedings; (ii) proceedings are delayed as both parties take lot of time presenting their submissions; (iii) the cost of arbitration is much more than the other ADR processes, so, it does not draw the poor litigants; (iv) participatory role of the
parties is neglected as the submissions are made by the party counsels. Arbitration is generally considered cheaper mechanism for the settlement of disputes. This is one of the reasons that the parties resort to it. But arbitration in India, mainly ad hoc arbitration, is becoming fairly expensive in comparison with the traditional litigation due to the high fee of the arbitrators and liberal adjournments. Arbitration is more cost-effective only if the number of arbitration proceedings is limited. Arbitration may not be the best dispute resolution method where dispute can be resolved by negotiation or mediation, which are far much faster and cheaper methods of dispute resolution.

The prevalent procedure before the arbitrators today is that at the first hearing, the claimant is directed to file his claim statement and documents in support thereof. At the second hearing, the opposite parties are directed to file their reply and documents. Then, the claimant files his rejoinder at the third hearing. Normally at each of these stages, there are at least two or three adjournments. Sometimes, applications for interim directions are also filed. Thus, today, the first occasion for considering any question of jurisdiction does not normally arise till at least 6 adjournments have gone by. If the respondent is the State or a public sector undertaking, the number of adjournments is certainly more. Parties pay fees to the arbitrators for each hearing running into thousands of rupees.97

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The 176th Law Commission of India was required to review the functioning of the Arbitration and Conciliation Act, 1996, in view of the various shortcomings observed in its provisions and certain representations received. The Commission considered the representations which pointed out that the UNCITRAL Model was mainly intended to enable various countries to have a common model for ‘international commercial arbitration’ and the Indian Act, 1996 has made provisions similar to the model law and made applicable to, cases of purely domestic arbitration between Indian nationals and that this has given rise to some difficulties in the implementation of the Act.

The grounds for objecting an award under sec.34 and Sec. 37 are now made common to purely domestic awards as well as international arbitration awards. It had been suggested that the principle of least court interference of the award may be a fine principle for international arbitration awards but having regard to Indian conditions and the fact that several awards are passed in India as between Indian nationals sometimes by lay men who are not well acquainted with law, the interference with such awards should not be as restricted as they are in the matter of international arbitrations.

The attention of the Commission had, in fact, been invited to a passage from Redfern and Hunter in Law and Practice of International Arbitration, (2nd Edition, pages 14 and 15) which reads as follows:

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98 Ibid.
“Amongst states which have a developed arbitration law, it is generally recognized that more freedom may be allowed in an international arbitration than is commonly allowed in a domestic arbitration. The reason is evident. Domestic arbitration usually takes place between the citizens or residents of the same state, as an alternative to proceedings before the courts of law of that state…..it is natural that a State should wish (and even need) to exercise firmer control over such arbitrations, involving its own residents or citizens than it would wish (or need) to exercise in relation to international arbitrations which may only take place within the state’s territory because of geographical convenience.”

The above passage supports the view that in the matter of purely domestic arbitrations between Indian nationals, the State can desire that its courts should have greater or firmer control on the arbitrations. That did not mean that the Commission was proposing to unduly increase court interference in cases of purely domestic arbitration. In fact, the Commission had proposed to further restrict court interference, in certain respects than what is permitted by the Model Law or the 1996 Act, both for international and purely domestic arbitration. It had proposed that all matters which come to the court against the award are to be listed for preliminary hearing and could be rejected straight away before notice. It was also proposed to introduce a provision similar to sec.99 of Civil Procedure Code that awards should not be interfered with lightly unless substantial prejudice is shown. It was also proposed to remove the obstacle created by sec.36 precluding enforcement of award merely because an application to set aside the award is filed and is pending. Mere filing of such an application should not amount to automatic stay of the award. Further, the commission had proposed to enable the court to impose
conditions for compliance with the award, partly or wholly, pending disposal of objections.

It was proposed to include in the definition of the word “Court” under section 2(1)(e), the ‘Court of the Principal Judge, City Civil Court in a city exercising original jurisdiction’. A clause was proposed to be introduced to allow the Principal Courts referred to in Section 2(1)(e) to transfer matters before them to Courts of coordinate jurisdiction. This clause was proposed to get over some judgment of the High Courts which have stated that the Principal Court in Section 2(1) (e) cannot transfer matters to other Courts. This proposal would have reduced congestion in the Principal Courts.

The provisions of Section 8, 9, 27, 35 and 36 were proposed to be made available whenever arbitration is outside India. Section 8(4) was proposed to be added enabling the judicial authority to decide, subject to the proposed sub-section (5), the preliminary issues as to whether (a) there is no dispute in existence (b) the arbitration agreement is null and void or inoperative (c) the arbitration agreement is incapable of being performed (d) the arbitration agreement is not an existence. Section 8(5) was proposed to be added to say that the judicial authority may not decide the above issues referred to in the proposed sub-section (4), if (a) the relevant facts or documents are in dispute or (b) oral evidence is necessary to be adduced or (c) enquiry into the preliminary questions is likely to delay reference to arbitration or (d) the request for a decision is unduly delayed or (e) the decision on the questions is not likely to produce substantial savings in costs of arbitration or (f) there is no good reason as to why these questions should be decided at that stage.
Depending upon the above factors, the judicial authority shall either decide the issues or make reference to arbitration. The above conditions were imposed to see that frivolous jurisdictional issues are not raised at the preliminary stage so as to delay the reference. At the same time, if the said issues can be decided easily and without oral evidence being adduced, they can be decided and will certainly save costs of arbitration.

Several amendments were proposed in Section 11. At the same time care was taken to see that reference to arbitration is not delayed. In sub-sections 11(4) to (12), the proposal was to replace the words “Chief Justice of India” and the word “Chief Justice” by the words, “Supreme Court” and “High Court”, so that the appointment of the arbitral tribunal is made on the judicial side. Section 24B was proposed to be introduced to enable the parties or the arbitral tribunal, (if need be), to approach the Court for the purpose of implementation of the interim orders passed by the arbitral tribunal under Sections 17, 23 and 24.

Proposals were also made to keep delays before the arbitral tribunal totally under control, by amending sections 23, 24 and 82 as also by inserting new sections 24A, 29A, 37A. Time limits were proposed to be imposed for passing awards subject to extension by courts; however, providing that, that pending disposal of the application by the Court, the arbitration shall continue.

Meanwhile there were also conflicting judgments of the High Courts in regard to certain provisions of the 1996 Act. Certain other aspects about the difficulties in the working of the said Act were also brought to the notice of the Commission. The Commission initially prepared a Consultation Paper (Annexure II of the Report) and held
two seminars, one at Mumbai and another at Delhi in the months of February and March, 2001 and gave wide publicity to the paper by putting it on the website. Retired judges and leading lawyers were invited for the seminars. Many luminaries also participated in the seminars and gave their written notes putting forth their suggestions. Proposals not contained in the Consultation Paper were also made and were exhaustively discussed. After making an in-depth study of the law relating to subject, looking into the position of the law in foreign jurisdictions, the Commission had made various recommendations for bringing amendments in the Arbitration and Conciliation Act, 1996.

Another Committee, popularly known as “Justice Saraf Committee on Arbitration”, was constituted to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee was headed by Justice Dr. B.P. Saraf, Retired Chief Justice of the High Court of Jammu & Kashmir. The final Report of the Committee was presented in January 2005.99 The Report made a detailed evaluation of the recommendations of the Law Commission apart from suggesting suitable lines on which the 1996 Act could be amended for improving the system of arbitration in India. In April 2006 the Government made a decision to ‘withdraw’ the Bill from Rajya Sabha, where it was introduced.100

4.11 To Sum Up:

The Government is committed to bring about an arbitration friendly culture as it considers it necessary to facilitate economic reforms. Arbitration is used frequently as a method of choice for business dispute resolution. All over the world, commercial arbitration has been approved as the most proficient form of dispute settlement available to participants in international trade. Arbitration clause is now getting much greater consideration in the contracts than it did in the past. It is true about businesses in India as well. The popularity of arbitration as a mode of settling disputes is due to the fact that the arbitration is considered as speedier, more informal and cheaper than conventional judicial procedure and provides a forum more convenient to the parties who can choose the time and place for conducting arbitration.

One of the objectives of the 1996 Act was to achieve the goals of cheap and quick resolution of disputes, but the reality is that these goals are yet far to be achieved. This can be ascertained from the study and analysis of the various aspects in conducting arbitration. It has been noticed that arbitration is becoming a costly affair, which is a different approach from the intent of the 1996 Act. This is particularly factual in ad hoc arbitration, where the fees of the arbitrators are not regulated, but decided by the arbitral tribunal with the consent of the parties.

Some of the arbitral tribunals, consisting of high profile arbitrators such as retired Supreme Court and High Court judges, charge high arbitration fees. This is a factor that prevents arbitration from being an effective mechanism for resolution of commercial disputes. For this reason, arbitration is not progressing in the manner it should in order to keep pace with the increase in commercial disputes due to the inflow of
international as well as commercial transactions. The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system. But an analysis of behaviour of the courts in the arbitration system reveals that it has failed to achieve its desired objectives.

The present arbitration system in India is still plagued with many loopholes and shortcomings and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of commercial disputes. Although the huge entry of international commercial transactions encouraged by the growth of the Indian economy has resulted in a significant increase of commercial disputes, arbitration practice has lagged behind. Arbitration in India is still developing.