Recognition of arbitration as a mode of resolution of disputes is ingrained in the Justice Delivery System of India and forms a part of the psyche of the Indian people. This cultural heritage has enabled ready acceptance and evolution of arbitration as an Alternative Dispute Resolution (ADR) mechanism in recent years. The complete overhauling of this mechanism by a comprehensive new legislation in 1996 is the latest evidence of this historical fact.

It is this ethos which enabled the great success of Lok Adalats as an ADR mechanism to cope with the docket explosion in the law courts in recent years for resolving disputes which did not require decision of any significant question of law. By recent legislation the Lok Adalats have also received statutory status. This ADR mechanism has contributed significantly to reduction of backlog of cases in the subordinate courts.

Initially the field of arbitration in the Presidencies of Bengal, Madras and Bombay was governed by Regulations. Act 7 of 1870 and Act 10 of 1861 replaced these regulations. Certain provisions in the Code of Civil Procedure, 1859 also provided for arbitration in certain areas. Indian Contract Act, 1872, by Section 28, recognised arbitration agreements as an exception to the agreements in restraint of legal proceedings. The Specific Relief Act, 1963, by Section 21, made an arbitration agreement not specifically enforceable but the right to plead in defence the agreement as a bar to the suit was retained. Then came Indian Arbitration Act, 1899, which had English Arbitration Act, 1899 as a model. The Code of Civil Procedure, 1908 provided in the Second Schedule for arbitration outside the scope of the
Arbitration Act and related mostly to arbitration in suits. This amended the law relating to arbitration without the intervention of the court. The Act did not apply to the subject-matter of the suits which was governed by the Code of Civil Procedure. This Act was replaced by the Indian Arbitration Act, 1940 which was a complete code on the law of domestic arbitration. The Act of 1940 consolidated the law contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure. It was largely based on the English Arbitration Act, 1934. The Act dealt with (i) arbitration with intervention of a court; (ii) arbitration with intervention of a court where no suit was pending, and (iii) arbitration in suits. It applied to all arbitrations including statutory arbitrations except as otherwise provided either by the Act or any other Act.

The requirement of reasons in an award, unless so required by the arbitration agreement or any statutory provision was not essential for the validity of an award. The only grounds for setting aside an award were those in Section 30 of the Indian Arbitration Act, 1940, namely, (i) Misconduct of the arbitrator or proceedings (ii) Award being made after superseding of the arbitration or the proceedings having become invalid and (iii) the award being improperly procured or otherwise invalid. A non speaking award was, therefore, difficult to assail. It was held by the Privy Council in Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd.\(^4\) that an error of law on face of award was a ground to set aside the award based on jurisdiction that exists in common law independently of statute. This view was approved and followed by the Supreme Court of India in the later decisions. However, the tendency was to widen the scope by looking into some document in the record treating it as a document incorporated in the award to make out a ground of invalidity when the award was found to

\(^4\) [1923] AC 480: AIR 1923 PC 66
be unjust. However, the tendency of the arbitrators moved towards non speaking awards to eliminate the scope of judicial intervention.

The increased tendency towards non speaking awards in spite of the growing awareness of the requirements of reasons for transparency in the decision making process gave rise to the demand for reasons even in the arbitral awards. This led to the question being raised directly before the Supreme Court in *Raipur Development Authority v. Chokhamal Contractors* 43. However, the Supreme Court rejected the contention under the existing law and held:

Having given our careful and anxious consideration to the contentions urged by the parties we feel that law should be allowed to remain as it is until the competent legislature amends the law. In the result we hold that an award passed under the Arbitration Act is not liable to be remitted or set aside merely on the ground that no reasons have been given in its support except where the arbitration agreement or the deed of submission or an order made by the court such as the one under Section 20 or Section 21 or Section 34 of the Act or the statute governing the arbitration requires that the arbitrator or the umpire should give reasons for the award.

The Supreme Court, however, emphasised the need for the requirement of reasons by incorporating such a term particularly in the agreements to which the Government or the instrumentalities are parties.

The enforcement of foreign arbitral awards was covered by International Conventions, namely, The Geneva Protocol on Arbitration Clauses, 1923; the Geneva Convention on the Execution of Foreign Arbitral Awards 1927, to which India became a party on October 23, 1937. India enacted the Arbitration (Protocol and Convention) Act, 1937 for giving effect to the obligations under these instruments. India became a party to the

43 AIR 1990 SC 1426, at 1446

In the field of international commercial arbitration the stay of proceedings in respect of the matters to be referred to the arbitration was governed by Section 3 of the Foreign Awards Act, 1961 as amended by Act 47 of 1973. This question has arisen very often and the conditions for invoking Section 3 have been laid down by the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*\(^{44}\), as under:

(i) There must be an agreement to which Article II of the Convention set forth in the Schedule applies.

(ii) A party to that agreement must commence legal proceedings against another party thereto.

(iii) The legal proceedings must be ‘in respect of any matter agreed to be referred to arbitration’ in such agreement.

(iv) The application for stay must be made before filing the written statement or taking any other step in the legal proceedings.

(v) The Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the 'existence and validity' of the arbitration agreement;

(vi) The Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred;

\(^{44}\) AIR 1985 SC 1156
this relates to effect (scope) of the arbitration agreement touching the issue of arbitrability of the claims.

This position was reiterated in Svenska Handelsbanken v. Indian Charge Chrome Ltd.\textsuperscript{45}

2.1 MEANING OF ‘ARBITRATION’

In the terms of Section 2(1)(a) ‘arbitration means any arbitration whether or not administered by permanent arbitral institution’.

Law encourages parties, as far as possible, to settle their differences privately either by mutual concessions or by the mediation of a third person. Litigation is an evil, albeit necessary, and, being also very expensive, law wishes it to be kept to the minimum. When the parties agree to have their disputes decided with the mediation of a third person, but with all the formality of a judicial adjudication, that may be, speaking broadly, called an arbitration. An arbitration, therefore, means the submission by two or more parties of their dispute to the judgment of a third person, called the ‘arbitrator’, and who is to decide the controversy in a judicial manner. ‘An arbitration is the reference of a 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 of competent jurisdiction.’\textsuperscript{46}

‘Arbitration’ is thus defined by ROMILLY MR in the well-known case of Collins v Collins:\textsuperscript{47}

‘An arbitration is a reference to the decision of one or more persons, either with or without an umpire,\textsuperscript{48} of a particular matter in

\textsuperscript{45} 1994 (2) SCC 155
\textsuperscript{46} See, John B. Saunders, WORDS AND LEGAL PHRASES LEGALLY DEFINED, p 107 (Vol 1, 1969).
\textsuperscript{47} Dharma Pratishthanam v Madhok Construction (P) Ltd, (2005) 9 SCC 686: AIR 2005 SC 214, the essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choice of the parties.
\textsuperscript{48} The institution of umpire has been replaced by the 1996 Act with that of presiding
difference between the parties.’

On the facts of that case the parties to a sale wanted the dispute to be determined by a third party. Holding that this was not an ‘arbitration’, ROMILLY MR said:

‘An arbitration is reference to the decision of one or more persons, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although the difference between the parties, still that a difference may exist between the parties ... The distinction between an existing difference and a difference which may arise is a material one... Undoubtedly, as a general rule, the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest, and in that sense it may be said that an existing difference between them is to be implied in every case, but if no difference has actually arisen, it does not appear to me to be an 'arbitration'. Undoubtedly, if two persons enter into an agreement for the sale of any particular property, and try to settle the terms, but fail to agree, and after dispute and discussion respecting the price, they will refer this question of price to A B, he shall settle it’, and if they agree that the matter shall be referred to his arbitration, that appears to me to be an 'arbitration' in the proper sense of the term...

But if they agree to a price to be fixed by another, that appears to me to be an arbitration... Valuation undoubtedly prevents differences, in the proper sense of the term; it prevents differences, but does not settle any which have arisen. That is the distinction between 'appraisal' and 'arbitration'.

A clause dealing with claims relating to questions arising in respect of disputes over the price is often included in purchase agreements. 49

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49 Per ROMILLY MR in Collins v Collins, 28 LJ Ch 186; (1858) 26 Beav 306 at pp 312, 313
execution of the contract has been held to be not a clause for arbitration. Where a clause in a contract between the appellant State and the respondent contractor provided for decision by the Superintendent Engineer and reference to the Chief Engineer on questions relating to specifications, designs, etc and the respondent invoked jurisdiction of the two authorities under the clause and later being aggrieved by their decisions sought arbitration under Section 7 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983, it was held that the respondent was not precluded from seeking arbitration under that Act. The High Court rightly dismissed the appellant's revision petition.\(^{50}\)

The law of arbitration only aids implementation of an arbitration agreement. It remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference. It is not an adjudication by a statutory body.\(^ {51}\)

### 2.2 VALUER

The position of a valuer is different from that of an arbitrator in this respect that a valuer would be liable if a party suffers loss on account of his negligent judgment,\(^ {52}\) but an arbitrator enjoys the status and immunity of a judge. Where a building owner paid the building contractor on the basis of a certificate of his architect that the work was good, the architect was held liable to the owner for his loss when it turned out that the work was defective. Negligent assessment and valuation rendered him liable because the function he performed was not that of judicial nature but a performance of his specialised skill. The process by which the work was appraised and payment made was not the process of arbitration.\(^ {53}\) Similarly

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53 Sutcliffe v Thackrah, 1974 AC 727.
an auditor engaged to work out the value of a company's shares would be liable if he certifies a wrong value and the person selling those shares suffers loss.\textsuperscript{54}

2.3 EXPERTS, ETC.

In many cases experts like engineers, accountants and architects are appointed arbitrators. In such cases the expert has to act in a judicial manner and the fact that he has also to make some valuation or assessment in the process will not reduce his status as an arbitrator. He will enjoy immunity unless he acted fraudulently.\textsuperscript{55}

Every reference to an expert may not be a reference for arbitration. A clause in a contract did not mention that any dispute could be referred to arbitration by the managing director, nor it spelled out any duty on his part to record evidence or to hear both parties before deciding any question referred to him. The Supreme Court held that the managing director was merely in the category of an expert for deciding matters pertaining to the contract. The intention of the parties seemed to be to avoid disputes and then to have a decision on a formulated dispute in a quasi-judicial manner. Hence, the clause did not contemplate any arbitration.\textsuperscript{56} Sujata v. Manohar, J cited the following passage from Chawla, LAW OF ARBITRATION AND CONCILIATION:\textsuperscript{57}

`Arbitration agreement is to be distinguished from agreement for decision by an engineer or expert. Contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the engineer etc, is not an award. As pointed out by Bernstein such a person is under no


\textsuperscript{55} Burgess v Purchase & Sons (Farms) Ltd, (1983) 2 WLR 361.

\textsuperscript{56} Food Corpn of India v Sreekanth Transport, (1999) 4 SCC 491: AIR 1999 SC 2184. \textsuperscript{18} At p 164.

\textsuperscript{57} AT p164
obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of 'evidence') put up before him by either party. An arbitrator, on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind will be brought to hear on the problems. There will be no discovery of documents, there will not normally be any oral 'evidence' or oral submissions.\(^{58}\)

Where a clause in an agreement provided that the decision of the Chief Engineer on specifications, drawings instructions, etc, would be final, it was held that the Chief Engineer was not thereby authorised to decide any difference or dispute arising out of the contract and the clause did not constitute an arbitration agreement.\(^{59}\)

\(^{58}\)Bharat Bhushan Bansal v U.P. Small Industries Corpn Ltd, (1999) 2 SCC 166: AIR 1999 SC 899; 1999 All LJ 679, another decision of the Supreme Court on the difference between an agreement for expert determination and an arbitration agreement

\(^{59}\)Ganga Pollution Control Unit, U.P. Jal Nigam v Civil Judge, AIR 2001 All 149, Gulbarga University v Mallikarjun, (2003) 4 RAJ 542 (Kar), dispute regarding contractor's payment, referred to the Superintending Engineer for his report in accordance with a clause in the agreement. His report rejected the counter-claim and stated that the amount claimed by the contractor was due to him. The court said that the clause in question was not an arbitration agreement. The SE had unilaterally and without any inquiry rejected the counter-claim. He only held a meeting with the parties in his chamber. His report was an expert opinion and not an arbitrator's award. State of Rajasthan v Nav Bharat Construction Co, (2005) 11 SCC 107: AIR 2005 SC 2795: (2005) 125 Comp Cas 1, a clause in contract providing for settlement of questions relating to specifications, design, quality and workmanship and other technical aspects by an officer of one of the parties was held to be not an arbitration clause. Registrar, University of Agricultural Science v G.G. Hosamath, (2004) 13 SCC 542, the contract provided that the decision of the Estate Officer would be final, conclusive and binding on all the parties upon all related matters, held, clause did not contemplate arbitration, hence, no arbitrator could be appointed.
2.4 VALUATION

‘Arbitration’ requires a dispute. An agreement to refer future disputes to arbitration is only an agreement, and not an arbitration. Even where a dispute has arisen and the parties agree to have it decided by a third person, that may not be an arbitration unless that person is to act judicially. This was pointed out in Carus-Wilson and Greene, Re60:

C-W sold some land to G on which there was some standing timber and G agreed to pay for it at a valuation. The parties further agreed that each should appoint a valuer who, if they failed to agree, appoint an umpire. The valuers failed to agree and the umpire made a valuation. The question was whether this was an arbitration.

Holding that it was not, Lord ESHER MR said:61

‘If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration, but of a mere valuation. There may be cases of an intermediate kind where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitration. Such cases must

60 (1886) 18 QBD 7 (CA).
61 Ibid at p 9
be determined each according to its particular circumstances.’ Thus, the usual features of an arbitration are the existence of a dispute between the parties and their agreement to refer it to the decision of a third person with the intention that he shall act judicially.

2.5 JUDICIAL INTERVENTION

**Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

This Section bars the jurisdiction of courts to interfere or to intervene in arbitration proceedings except to the extent provided in Part I. This Part provides for intervention of Courts in the following cases:

1. Section 8—Making reference in a pending suit.
2. Section 9—Passing interim orders.
3. Section 11—Appointment of arbitrators.
4. Section 14(2) —Terminating mandate of arbitrator.
5. Section 27—Court assistance in taking evidence.
6. Section 34—Setting aside an award.
7. Section 37—Entertaining appeals against certain orders.
8. Section 39(2)—Directing delivery of award.

Some of the cases where Courts exercised jurisdiction under the repealed Arbitration Act, 1940, and in which the jurisdiction is barred under the present Act were:

1. Section 11-Removal of an arbitrator or umpire.
2. Section 14—Filing of an award in Court.
(3) Section 15—Modification of award by Court.

(4) Section 16—Power of Court to remit an award for reconsideration.

(5) Section 17—Pronouncing judgment in terms of an award.

(6) Section 19—Superseding an agreement.

(7) Section 20—Filing of arbitration agreement in Court and seeking an order of reference.

(8) Section 28—Enlarging time for making an award.

The history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and un-extendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need ‘to minimise the supervisory role of courts in the arbitral process’. This objective has found expression in Section 5 of the Act which prescribes the extent of the judicial intervention in no uncertain terms.\(^6^2\)

Where a party sought a declaration that no dispute existed and, therefore, the invocation of the arbitration agreement should be restrained, the court said that intervention of the judicial authority was not available for this purpose. There was nothing in Sections 14, 34 or 37 to help him. The remedy under Section 34 of the Specific Relief Act, 1963 was also not available because the parties had agreed to the alternative procedure of settlement by arbitration.\(^6^3\)

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\(^6^3\) United India Insurance Co Ltd v Kumar Texturisers, AIR 1999 Born 118. The court followed State of Maharashtra v Nav Bharat Builders, 1994 Supp (3) SCC 83. The plea of lack of
When arbitration proceedings have commenced, they cannot be stayed by an order of a civil court in a civil suit. There is a total lack of jurisdiction on the part of civil courts with regard to arbitration matters.64

An application under Section 8 for stay of a suit because of the arbitration agreement has to be in writing and not merely an oral statement. Where no such application was filed, it was held that the suit would not be barred. Consequently, Section 5 would not come into play and, therefore, the intervention of judicial authority would not be barred. The court could entertain an application for recovery of possession of leased equipment and arrears of rent.65 Where the agreement provided for reference to arbitration of certain disputes and events only, it was held that the jurisdiction of the courts remained open and available in respect of other disputes and events.66

The Supreme Court stressed the need for providing underlying support for rescuing the arbitration process from the hands of a party who attempted to sabotage the process.67

2.6 JUDICIAL REVIEW BY WRIT COURT

When an arbitration agreement exists and it covers the dispute which has arisen between the parties, the Supreme Court said that a writ court should not ordinarily exercise its power of judicial review. The case

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64 SAIL v Ramkrishna Kalwantrai, AIR 1999 Cal 295; Pappu Rice Mills v Punjab State Coop Supply & Marketing Federation Ltd, AIR 2000 P&H 276; Secur Industries Ltd v Godrej & Boyce Mfg Co Ltd, (2004) 3 SCC 447: AIR 2004 SC 1766, the question was that of interest on delayed payments to an industry coming under the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993 proceedings were pending before the U.P. Facilitation Council set up under the Act. They were held to be proceedings under the Arbitration and Conciliation Act, 1996. Validity of such proceedings and whether a notice under S. 21 was to be considered as a precondition to the exercise of jurisdiction by the Council were held to be questions to be considered by the Council. The court had no jurisdiction to stay proceedings before the Council. Builder & Associates v RHCO, AIR 2004 Raj 81, mutually acceptable arbitrator appointed as required by the agreement, the further question of limitation for giving notice for appointment of arbitrator could be adjudicated by the arbitrator. SBP & Co v Patel Engg Ltd, (2005) 8 SCC 618: (2005) 128 Comp Cas 465, per incuriam, High Courts cannot interfere with orders passed by arbitrators and arbitral tribunals, during the course of arbitration proceedings. The parties can approach the court only in terms of S. 34 or S. 37. The court disapproved the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Arts. 226 and 227 of the Constitution.
65 Garden Finance Ltd v Prakash Industries Ltd, AIR 2002 Bom 8
involved disputed questions of law and fact about carrying costs in a contract for delivery of goods. The High Court should have left the parties to avail remedy under the substantive clause that existed in the contract. 68

2.7 TERMINATION OF PROCEEDING (Section 25)

An arbitrator happened to be appointed against the arbitration agreement about his qualifications. The claimant repeatedly protested against this fact and asked for time for filing the statement of claim. The arbitrator terminated the proceeding by reason of the claimant's default in filing his claim. No remedy is provided against such decision in the Act. Hence, the civil court could not intervene in the matter. The High Court allowed writ petition against the decision under Article 226 of the Constitution covering the arbitrator under the words ‘other persons’ in that Article. 69

Administrative Assistance (S. 6)—In order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

2.8 DELEGATION OF FUNCTIONS BY ARBITRATORS

No such provision was contained in the repealed Arbitration Act, 1940. Section 6 enables the parties and the Arbitral Tribunal to obtain administrative assistance in order to facilitate the conduct of arbitration proceedings. The arbitrators can take administrative assistance in respect of acts of ministerial and clerical nature, or acts for which one has necessarily to depend upon persons of skill and experience or acts for which functioning is usually delegated to others or for any other act with the consent of the parties.

68 Empire Jute Co. Ltd. v Jute Corpn of India Ltd. (2007) 14 SCC 680
69 Anuptect Equipments (P) Ltd. v Ganpati Coop Housing Society Ltd. AIR 1999 Bom 219.
2.9 ARBITRATION AGREEMENT

Arbitration agreement.—(1) In this Part, ‘arbitration agreement’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

2.10 AGREEMENT TO BE IN WRITING

One of the points of some formal importance emphasised by these provisions is that the reference should be by means of a written agreement. Section 7(3) most emphatically prescribes that ‘an arbitration agreement shall be in writing’. An oral agreement to submit a dispute to arbitration is not binding. If the agreement is in writing it will bind, even if some of its
details are filled in by oral understanding. It is not necessary that the agreement should be on a formal document, nor it is necessary that the agreement should be signed by both or either party. It is sufficient that the written agreement has been orally accepted by the parties or that one has signed and the other has accepted. It seems that the position in this respect under the new Act would remain the same. It recognises in Section 7(3) some three methods of arriving at a written agreement. One of them is an exchange of letters or raising a claim under an alleged arbitration agreement which is not denied by the other party. The Act provides in Section 7(4) that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams, or other means of telecommunications which provide a record of the agreement or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Whatever be the form or contents of the agreement, it is necessary for the Act to apply that there should be a mandatory requirement for settlement of disputes by means of arbitration. An agreement that the parties

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70 Banarsi Das v Cane Commr, AIR 1963 SC 1417: 1963 Supp (2) SCR 760.

71 Union of India v Rallia Ram, AIR 1963 SC 1685: (1964) 3 SCR 164; Chander Nath Ojha v Suresh Jhalani, (1999) 8 SCC 628, again emphasised by the Supreme Court that the only thing required is writing and not signature of the parties. A similar view was expressed in Jupitar Chit Fund (P) Ltd v Dwarka Dinesh Dayal, AIR 1981 All 251, it was held that the agreement may be in the form of a signed document by one party consisting of the terms and plain acceptance either signed or orally accepted by the other party or an unsigned document consisting of the terms of submission to arbitration agreed orally by both the parties. In Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd v Howrah Oil Mills Ltd, AIR 1958 Cal 620 the court emphasised that the conduct of the parties is also relevant in determining as to whether both the parties agreed to refer the dispute to the arbitrator. Groupe Chimique Tunisien SA v Southern Petrochemicals Industries Corp Ltd, (2006) 5 SCC 275, the main thing to be considered for examining the existence of the arbitration agreement is the contractual documents and not the contentions of the parties. The contentions are relevant when the case has to be considered under S. 7(4)(c). M V Baltic v State Trading Corp, (2001) 7 SCC 473, some consent must be shown. Signature is the minimum proof of consent.

may go in for a suit or may also go in for arbitration is not an arbitration agreement.\(^73\)

Where an arbitration clause provides for reference to arbitration of all disputes other than clearly excepted matters, there is no justification for holding that claims relating to a future period, during which work is to continue, are beyond the scope of reference or outside ambit of arbitration clause. This is so because the aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Where the award had clearly stated that reimbursement for crushed stone, required for continuing work, purchased after arbitration proceedings had begun and statement of claim had been presented before arbitrator, was to be made as and when such material was actually brought to the site, it was held that the High Court erred in setting aside that part of the award.\(^74\)

Where the contract (purchase order in this case) incorporated an arbitration agreement by reference, it was not necessary that the invoices submitted under the agreement should also contain the arbitration clause.\(^75\)

2.11 NO PRESCRIBED FORM OF AGREEMENT: ESSENTIAL ELEMENTS

In *Rukmanibai Gupta v Collector, Jabalpur*\(^76\), the Supreme Court laid down that an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression ‘arbitration’ or ‘arbitrator’ has

\(^73\)Wellington Associates Ltd v Kirit Mehta, (2000) 4 SCC 272: AIR 2000 SC 1379; Koneru Venkata Subbaiah v Koneru Venugopal, AIR 2003 NOC 148 (AP), existence of arbitration agreement mandatory for arbitrators to act upon and pass the award. The burden is on the party who relies on the agreement to prove its existence.


\(^76\)(1980) 4 SCC 556: AIR 1981 SC 479. The court said that what is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such disputes shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement.
been used. Nor it is necessary that it should be contained in the same contract document. An arbitration clause may be incorporated into an existing contract by specific reference to it. Section 7(5) clearly provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make the arbitration clause a part of the contract. Hence, the whole thing turns upon the intention of the parties. Where the party showed that the arbitration clause in the signed agreement crept in by mistake, it was held that the civil court was in error in acting upon a clause which the parties did not intend to be there and appointing an arbitrator on that basis.

A clause in a contract which stated that arbitration, if any, by ICC rules in London amounted to a valid agreement to arbitrate in case of any dispute arising.

The Supreme Court stated the essential elements of an arbitration agreement to be as follows, the existence of a present possibility or of a

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77 JK Jain v DDA, (1995) 6 SCC 571
78 For example, in U.P. Rajkia Nirman Nigam Ltd v Indure (P) Ltd, AIR 1994 Del (NOC) 60, [on appeal to Supreme Court, (1996) 2 SCC 667: AIR 1996 SC 2375] correspondence between the parties showed acceptance of the arbitration agreement, it was held to be sufficient.
79 M. Dayanand Reddy v A.P. Industrial Infra-Structure Corpn Ltd, (1993) 3 SCC 137: AIR 1993 SC 2268 citing Jugal Kishore Rameshwardas v Goolbai Hormusji, AIR 1955 SC 812: (1955) 2 SCR 857, no signatures, but it is necessary that the contract should be reduced to writing and the agreement between the parties on such written terms is established; Union of India v A.L. Ralli Ram, AIR 1963 SC 1685: (1964) 3 SCR 164, it is not necessary that all the terms of the agreement should be contained in one document, they may be ascertained from a correspondence consisting of a number of letters; Heyman v Darwin' Ltd, 1942 AC 356: (1942) 1 All ER 337, the courts have the power to dispense with the arbitration clause of an agreement, but not to dispense with other clauses. North Western Rubber Co and Huttenback, Re, [overruled on other grounds in Produce Brokers Co Ltd v Olympia Oil & Cake Co, (1916) 1 AC 314: 85 LJKB 160, an arbitration agreement does not clarify the rights of the parties, it relates wholly to the mode of determining the rights]. Govind Prasad Agarwal v Bhurelal Ji Agarwal, AIR 1994 (NOC) 36 (MP), here the award itself embodied the agreement to refer and the parties not only signed it after reading but also agreed to it and filed applications for making it a rule of the court, the agreement was held to be valid and effective and so was the award, (under the 1996 Act, it is no longer necessary to get the award made into a rule of the court).
81 Bihar State Mineral Development Corpn v Encon Builders (I) (P) Ltd, (2003) 7 SCC 418 cited by the Supreme Court in Malikarjun v Gulbarga University, (2004) 1 SCC 372; Union of India v Pesco Hydraulic (P) Ltd, AIR 2002 Del 367, arbitration clause in a contract document, it was accepted without any qualification, held, amounted to contract with arbitration clause.
future difference; the intention of the parties to settle such difference by a private tribunal; the agreement in writing to be bound by the decision of the tribunal and that the parties must be ad idem.

There is the necessity of the presence of a concluded consent of the parties to refer their disputes to arbitration. A mere use of the word ‘arbitration’ or ‘arbitrator’ does not make it an arbitration agreement if it requires or contemplates a further fresh consent of the parties for reference to arbitration. Such an agreement is only an agreement to enter into an arbitration agreement in the future. In this case, the clause in question stated that disputes ‘shall be referred to arbitration if the parties so determine.’ This was held to be not an arbitration agreement. The use of the word ‘determine’ showed that the parties would have to decide the matter at the crucial time with application of mind. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the dispute to arbitration was missing. The parties could not be referred to arbitration or an arbitrator under Section 11 appointed on the basis of such an agreement.82

2.12 REFERENCE OF TIME-BARRED CLAIM

An arbitration agreement may even contemplate reference of a time-barred claim. A policy of insurance required the assured to refer the matter to arbitration within twelve months of the company's disclaimer. The assured referred it after twelve months and yet the reference was held to be binding.83

A dispute or a difference does not cease to be subsisting because it is barred by time, though the Indian Limitation Act may require the courts to dismiss a suit based on the disputed claim. Nor is a right necessarily extinguished because it has not been enforced for the period referred to in

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83 Ruby General Insurance Co Ltd v Peare Lal Kumar, AIR 1951 Punj
the First Schedule of the Limitation Act, unless the right claimed refers to the possession of property and Section 28 of that Act is applicable or for some similar reason. Again a person may agree to pay a barred debt and a fortiori, to submit to arbitration. The significance of Section 25(3) of the Indian Contract Act, 1872 has also to be kept in view. A time-barred claim can, therefore, validly form the subject-matter of reference. A distinction, however, is to be made between an arbitration agreement entered into about a time-barred claim and a reference made on the basis of an arbitration clause after the expiry of the period of limitation. In the latter case no reference can be made as the right to claim ceases to subsist and the relief with respect to the dispute has become time-barred.

Ruby General Insurance Co Ltd v Peare Lal Kumar, is a typical case of its kind. Under an insurance policy all differences arising out of that policy were to be referred to arbitration within twelve months of the disclaimer of the claim by the company. The claim under a certain policy having been rejected by the company, the policy-holder referred the dispute to arbitration, but beyond twelve months after the disclaimer by the company. It was held that the question of disclaimer and the rights of the parties were themselves questions arising out of the policy and as such covered by the terms of the arbitration clause.

But where there is no specific reference of a time-barred claim, the arbitrator can reject a claim on the ground that it is time-barred.

84 Balmokand v Uttamchand, AIR 1927 Sind 177; (Official Receiver v Kersondas Maji, AIR 1927 Sind 184; Balmokand v Uttamchand, AIR 1929 Sind 55; Jammu Forest Co v State of J&K, AIR 1968 JK 86. Whether the claim is time barred is for the arbitrator to decide. The parties may make a plea that the claim is time barred. It will be for the arbitrator to decide the matter. Sarkar & Sarkar v State of W.B., AIR 1992 Cal 365.
86 AIR 1951 Punj 440
2.13 ADOPTION OF ARBITRATION CLAUSE FROM CONTRACT INTO SUBCONTRACT

Where an arbitration clause contained in the main contract is adopted in a subcontract also by a clause declaring that this sub being granted on the terms and conditions applicable to the main contract will not necessarily follow that the parties to the subcontract would be bound by the arbitration clause. For one thing, the parties are different, the purpose of the contract being different, different disputes are likely to arise than those contemplated by the main contract. Similarly, where a bill of lading was drawn out in terms of a charterparty, it was held that the arbitration clause contained in the charterparty became an integral part of the bill of lading.88 A learned comment decision says:

‘Recent cases, however, indicate that this particular provision, though still good law, is to be kept strictly within its own boundaries, and there is emerging now a new line of authority, acted on by common law courts, to the effect that an arbitration clause can be incorporated into a bill of lading, provided this is done explicitly in either document.’89

The provision on this point in the Arbitration and Conciliation Act 1996 is like this, ‘The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract writing and the reference is such as to make that arbitration clause the contract.’ [S. 7(5)] In Vessel M/V Baltic Confidence v State Trac

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87 Haskins v D & J Ogilvie (Builders), 1978 SLT (Sh. Ct.) 64; Goodwins, Jardine & Co, (1905) 13 SLT 329, noted 1979 JBL 156.
89 Enid A. Marshall, Incorporation of Arbitration Clauses into charterparty Bills of Lading 478.
of India\textsuperscript{90}, the Supreme Court examined the factors for considering whether a clause contained in a charterparty agreement became incorporated by reference into a bill of lading. The court was of the view that if the reading of the clause into some other document would not create an absurdity, inconsistency or insensibility, the clause would apply to the bill of lading and the intention of the parties would be given effect to.\textsuperscript{91}

The Karnataka High Court in its decision in \textit{Tata Elansi Ltd v Anand Joshi}\textsuperscript{92}, cited the decision in \textit{Hailton & Co v Mackie & Sons}\textsuperscript{93}, wherein Lord ESHER observed, ‘Where in a bill of lading there was such a condition as this that all other conditions as per charterparty must be read verbatim into the bill of lading as though they were there printed in extenso. Then if it was found that any of the conditions of the charterparty were inconsistent with the bill of lading and would be insensible, they must be disregarded.’

The bill of lading issued under a charterparty specifically provided that each party may appoint an arbitrator out of a panel of arbitrators maintained by the Indian Council of Arbitration and that the disputes between the parties would be settled according to the provisions of the arbitration agreement. The court said that this had the effect of creating a binding arbitration agreement between the parties.\textsuperscript{94}

A person was engaged to construct a paper mill. He engaged another person to carry out the mechanical and electrical works. The latter subcontracted the work to yet another person. This last subcontract was formed by an exchange of correspondence which included the contractor's

\textsuperscript{90} (2001) 7SCC 473 AIR 2001 SC3381.
\textsuperscript{91} The court conducted a survey of authorities which included Dawal Aciers D'usinor Et De Sacilor v Armare SRL, [1996] 1 Lloyd's Rep 1 (CP), from which the court cited passages at pp 3386-387; Pride Shipping Corp v Chung Hwa Pulp Corp, [1991] 1 Lloyd's Rep 126; Miramar Maritime Corp v Holborn Oil Trading Ltd, 1984 AC 676: [1984] 2 All ER 326 (HL).
\textsuperscript{92} (2003) 4 RAJ 602 (Kant).
\textsuperscript{93} (1989) 5 TLR 677
order upon the subcontractor stating that the works were to be carried out on
the same terms and conditions as were applicable under the main contract.
This was held to be as not amounting to sufficient incorporation, because the
contractor's order did not refer explicitly to the arbitration clause.95 A draft
charterparty agreement was executed between the parties. But it could not
become enforceable because the terms of the letter of credit and performance
guarantee could not be agreed to between the parties. There being no
concluded and binding contract between them, the clause of the charterparty
relating to arbitration had no existence in the eyes of the law.96

An export contract provided that the contract was made under
terms and conditions of GAFTA Contract 15 and also that it was being
presumed that both buyers and sellers were familiar with the text of the
GAFTA Contract. It was held that an effective arbitration agreement came
into existence. The award delivered under the agreement was accordingly
enforceable. The party could not question the existence of the agreement.97

Where the letters of intent were delivered after modifications in
accordance with the other party's General Conditions of Purchase, and these
conditions contained an arbitration clause, it was held that the letters of
intent did not make an arbitration agreement.98 The court said that the tender
document by itself was neither a contract nor agreement. Further, the
acceptance of modifications to the terms of General Conditions merely set
out the terms on which the purchasing party was willing to place its purchase
orders with the sellers. Since no purchase order was placed, neither the
General Conditions nor the arbitration clause contained in them became

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effective or enforceable.99

2.14 TRIPARTITE AGREEMENT

One of the components of a tripartite arrangement was a head-contract which contained arbitration clause. The question was that of the applicability of the clause between the head-contractor and his subcontractor. The head-contract specified certain specific obligations between the head-contractor and sub-contractors. It was also signed by the head-contractor and sub-contractors. It was held that the arbitration clause had become applicable to disputes in respect of the specified obligations between the head-contractor and subcontractors.100

2.15 POSITION OF NON-PARTIES

An arbitration is a private procedure. It is an implied term that strangers to the agreement are excluded from hearing and conduct of proceedings. Accordingly, an arbitrator cannot, unless all parties consent, order that the arbitration of a dispute between a shipowner and a charterer arising out of a charterparty and the arbitration of a separate but closely-related dispute between the charterer and a sub-charterer arising out of a sub-charter be heard together even though the two disputes are closely related and a consolidated hearing would be convenient.101

2.16 REFERENCE WITHOUT AGREEMENT OR UNDER VOID AGREEMENT

The jurisdiction of an arbitrator to hear and decide a dispute is derived from an arbitration agreement. Where there is no such agreement, there is initial want of jurisdiction which cannot be cured even by

The court may stay arbitration proceedings where the party not agreed to refer the particular dispute to arbitration or where the contract carries the arbitration clause is itself void. The proceedings stayed till the matter as to the validity of the reference is decided.

The situation of this kind came before the Court of Appeal in England:

There was a contract to purchase palm-oil by a Karachi firm from a Singapore seller. The contract included a London arbitration clause. The Karachi firm contended that the agent who purport to contract on their behalf had no actual or apparent authority to do so. The seller commenced arbitration proceedings in London. The Karachi firm applied for a stay.

The court allowed stay till the matter of the validity of the contract was decided.

The mere acquiescence in the jurisdiction of the arbitration party would not stop that party from disputing the existence of the arbitration agreement. This was the decision of the Supreme Court in Rajkiya Nirman Nigam Ltd v Indure (P) Ltd. Two parties joined to submit a tender. The proposal by one party to the other was very amended by the other before acceptance in terms of responsibility. The proposer, without considering the amended version, filed his own and subsequently withdrew it. The other party invoked the arbitration clause and appointed an arbitrator. The proposer also, without preferring his rights, appointed an arbitrator and subsequently filed an application.

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103 See, RUSSELL ON ARBITRATION, pp 79-80 (18th Edn).
104 Kitts v Moore, [1895] 1 QB 253
a declaration that there was no agreement or an arbitration agreement application was held to be maintainable. The material changes in the draft agreement amounted to counter-proposal, which was never accepted by the proposer and hence there was no consensus ad idem. In the absence of a binding agreement the party was not estopped from challenging the existence of the agreement by merely nominating an arbitrator.107

In a family matter before the Supreme Court, a memorandum of understanding was signed between the two branches of the family, bringing about division of property among them. Experts were appointed for valuation and preparation of scheme for division between groups, the corporate undertakings of the family. The agreement provided that any dispute, clarification, etc., in the memorandum of understanding or in the implementation would be referred to the Chairman of the Industrial Corporation of India. It was held that this did not constitute an agreement. It only amounted to a reference of issues to an expert decision.108

Section 16 of the Arbitration and Conciliation Act, 1996, in Sub-section (1) that the arbitral tribunal may rule on its own jurisdiction including ruling on any objections with respect to the existence of the arbitration agreement. Apart from this, a decision on the validity of the contract does not by itself vitiate the arbitration agreement. Yet, forms of invalidity may be so fundamental that they might invalidate the arbitration agreement. The court may not sustain the proceedings if the agreement is so vitiated. In Harbour Assurance v. Union of India, 108 the appellate court noted that the agreement to arbitrate was inter se the parties and did not preclude the possibility of the parties entertaining a different course of action. Therefore, the court held that the agreement to arbitrate was enforceable.


Kama Ltd\textsuperscript{109}, it was observed: ‘...arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be. The most common example of cases in which the ground of invalidity of the substantive obligation of the contract also necessarily entails the invalidity of the arbitration clause are cases of initial invalidity, such as the absence of consensus ad idem, nonest factum, mistake as to person and so forth.’

2.17 INTERNATIONAL ARBITRATION

2.17.1 Introduction

In India, international commercial arbitration as a mode of resolution of disputes came to be adopted from the medieval times when trade and commerce between traders in India and outside started growing. In the earlier part of this century, certain laws were enacted to govern resolution of international commercial disputes and the recognition and enforcement of foreign awards. The ‘Historical Background and Development of the Arbitration Law’ is in Appendix-I.

The law of arbitration in India relating to domestic arbitration was governed by the Indian Arbitration Act, 1940 and relating to international arbitration, was governed by the Arbitration (Protocol and Convention ) Act, 1937 and the Foreign Awards (Recognition and Enforcement ) Act, 1961 till the commencement of the Arbitration and Conciliation Ordinance, 1996. The current law of arbitration covers the entire field of domestic and international arbitration. It has been brought into force from January 25, 1996. It has not yet been formally replaced by an Act.'

Experience shows that in spite of provision of forum for resolution of disputes in another country and the applicability of a foreign law as the

substantive law frequent litigation in Indian Courts gave rise to doubts about the efficacy of the arbitration clause incorporated in the agreement. This tendency was visualised as a disincentive to foreign investors and was likely to affect full implementation of the nation's economic policies. Care has been taken to enact measures in the 1996 law to eliminate these grey areas and to provide effective measures to circumvent laws delays limiting judicial intervention while retaining fairness in the process of adjudication.

2.17.2 Need for International Arbitration

The growth of international trade is bound to give rise to international disputes which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preference to international arbitration vis-a-vis litigation in national courts is natural because of arbitration being preferred to litigation in courts and the foreign element being preferred in the international arbitration to the domestic element in the national courts. This is also because there is no international court to deal with international commercial disputes.

In situation of this kind, recourse to international arbitration in a convenient and neutral forum is generally seen as more acceptable than recourse to the courts as a way of solving any dispute which cannot be settled by negotiation.

The rationale and purpose of international arbitration should be to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce.

Basic features which are uniform in the legal framework for resolution of international commercial disputes ‘can be broken down into three stages: (i) jurisdiction, (ii) choice of law and (iii) the recognition and enforcement of judgments and awards.’ (Para 1.1.3.).
The trend towards growing judicial intervention which tends to interfere with arbitral autonomy as also finality is a significant factor to be kept in view. The need is to reconcile and harmonise arbitral autonomy and finality with judicial review of the arbitral process. National laws differ on this issue. UNCITRAL Model Law attempts to promote harmony and uniformity in this sphere. The aim is to ensure arbitral autonomy coupled with neutrality or impartiality in the arbitral process by the composition of the arbitral tribunal by competent and impartial members which ensures equality between the parties and full opportunity to them to present their case. Total exclusion of judicial intervention does not match with the current trend but the scope of Judicial supervision needs to be reduced to the minimum. The source of authority of the international arbitral tribunal is the agreement of the parties and not the mandate of the State. The choice of the law applicable is also determined by the provision in the arbitration agreement. With the increased arbitral autonomy the requirement of reasons for the award is greater. Apart from transparency in the arbitral process, it also acts as an inherent check on the arbitrators and discloses to the party the basis of the award and the logical process by which the conclusion was reached by the arbitrators. The presence of reasons also regulates the scope of judicial supervision.

Informality of the arbitral process permits relaxation from strict rules of evidence and it reduces costs and delay which are often unavoidable in litigation. However, observance of basic principles of natural justice cannot be dispensed with.

Appropriate provisions for enforcement of award are essential to impart efficacy to international arbitration.

These are some of the significant and basic features of international arbitration and the UNCITRAL Model Law aims at achieving
these objectives by incorporating principles of universal application in the field of international commercial arbitration for resolution of such disputes.

2.17.3 Need for the New Arbitration Law

Several factors indicated the need for a comprehensive new legislation to remove the deficiencies and to make arbitration an effective ADR mechanism. In *M/s. Guru Nanak Foundation v. M/s. Rattan Singh & Sons* the Supreme Court observed, thus:-

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

The Government of India realised that for effective implementation of its economic reforms it was necessary to recognise the demand of the business community in India and investors abroad for reforms in the law of arbitration in India. In *Food Corporation of India v. Joginderpal Mohinderpar*, the Supreme Court also observed:

We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator
adhere to such process and norms which will create confidence in doing justice between the parties, but by creating sense that justice to have been done.

The Government of India recognizing the need for reform, law relating to arbitration decided to act on the basis of the UN Model Law on International Commercial Arbitration and the ICC Conciliation and Arbitration by enacting a new law based on the Model which was designed for universal application. The law enacted in 1996 based on UNCITRAL Model Law provides for the resolution of domestic disputes also. A significant feature of the new Indian law is that role of courts therein is even more limited than that envisaged in the Model Law. It is significant that the Model Law on which it is envisaged in the context of international commercial arbitration by Indian law treats the Model as equally appropriate for domestic arbitration. This scheme eliminates a dichotomy in the new Indian law between applicable to domestic arbitration and that applicable to international commercial arbitration.

2.18 NEW LAW

The Arbitration and Conciliation Ordinance, 1996


The main objectives of the Bill as stated in the Statutes, Objects and Reasons are as under:

(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
(ii) to make provision for an arbitral procedure which is fair, efficient, and capable of meeting the needs of the specific arbitration

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(viii) to provide that for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

The provisions enacted in the new law aim to achieve these objectives. The Ordinance is divided into four parts. Part I contains general provisions on arbitration. Part II deals with enforcement of certain foreign awards. Part III deals with conciliation. Part IV contains supplementary provisions. Details are in Appendix-II.
2.19 SALIENT FEATURES OF THE ORDINANCE

Some of the significant provisions made in the Ordinance follows:

(1) Clear provisions to indicate commencement of proceedings [Section 21].

(2) The requirement of giving reasons in the arbitral proceedings provide for transparency in the decision making process. Parties have agreed that no reasons are to be given [Section 31 (3)].

(3) The departure from the 1940 Act which prescribed a time limit for making an arbitral award and for the enforcement of the award. The Ordinance does not prescribe a specific time limit for making an arbitral award but undue delay on the part of an arbitrator can be challenged on the ground for termination of the mandate of the arbitrator [Section 14 (1) (a)].

(4) The supervisory role of the Court is reduced to a great extent under the Ordinance and intervention by the Court is allowed only after the award is made [Sections 5 and 16]. Grounds for challenging the award are precise and well defined [Section 34 (2)].

(5) The Ordinance enables the arbitrator to decide the issue of his continuance as the arbitrator as also on the existence of jurisdiction and the existence and validity of the arbitration agreement. This prevents delay and litigation in these issues.
(6) The Ordinance enables the arbitral tribunal to order interim measures in respect of the subject-matter of the dispute (Section 17). This lends efficacy to the arbitral process.

(7) Section 28 of the Ordinance deals with the applicable law. Under Section 28 (1)(b), the arbitrator decides the dispute in an international commercial arbitration, in accordance with the rules of law designated by the parties as applicable to the substance of the dispute. In the absence of such designation, the arbitrator is to apply the rules of law which he considers to be appropriate, ‘given all the circumstances surrounding the dispute’. Section 28(3) requires the arbitrator to take into account the usages of the trade applicable to the transaction.

(8) Section 36 provides that where an award is not challenged within the prescribed period, or the challenge has been rejected, the award shall be enforced as if it were a decree of the Court.

(9) The Ordinance makes it clear that all awards given within India are domestic awards and all awards given in foreign countries are foreign awards [Section 2(7)]. This sets at rest the controversy as to what constitutes a foreign award within the meaning of Indian law and eliminates the potential of litigation on that ground.

2.20 MACHINERY

An efficient machinery to implement the provisions made in the new law is equally important to achieve the objectives. With a view to achieve this purpose and to make the new lawfully effective an independent non-profit making body has been set up in India in 1995 known as the
'International Centre for Alternative Dispute Resolution' (ICADR) Arbitration Rules, 1996 are comprehensive to arbitration proceedings in the ICADR. Rule 38 provides for arbitration by agreement according to modified procedure.

The establishment of this International Centre is a significant development in the ADR movement in India and is intended to provide the needed for implementing the new law of arbitration enacted in 1996.

2.21 MAIN OBJECTIVES

The main objectives of the Act are:

(i) to comprehensively cover international and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is efficient and capable of meeting the needs of arbitration;

(iii) to provide that the Arbitral Tribunal gives reasons for an arbitral award;

(iv) to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in legal process;

(vi) to permit an Arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral process to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards, to which India is a party applies, will be treated as a foreign award.

2.22 UNCITRAL AND ARBITRATION


And Whereas the General Assembly of United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of law of arbitral procedures and the specific needs of international commercial arbitration practice;

And Whereas the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial
AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;

Be it enacted by Parliament in the Forty-seventh Year of the Republic as follows:

2.23 OBJECTS AND REASONS

The statement of objects and reasons appended to the bill proceeded as follows: The law on arbitration in India was at the time of the adoption of the new Act 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.\(^\text{110}\) It was widely felt that the 1940 Act, which contained the general law of arbitration, had become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration had proposed amendments to this Act to make it more responsive to contemporary requirements. It was also recognised that our economic reforms might not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remained out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There was, however, no general law on the subject in India.


that all countries should give due consideration to the said Mode of view of the desirability of uniformity of the law of arbitral procedure the specific needs of international commercial arbitration practice. UNCITRAL also adopted in 1980 a set of Conciliation Rules. The Assembly of the United Nations recommended the use of these cases where the disputes arose in the context of international co-relations and the parties seek amicable settlement of their disputes through recourse to conciliation. An important feature of the UNCITRAL Law and Rules is that they have harmonised concepts on arbitration, conciliation of different legal systems of the world and thus provisions which are designed for universal application.

Though the said UNCITRAL Model Law and Rules were 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 law 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 UNCITRAL Model Law and Rules.

2.24 THE NEW LAW OF ARBITRATION AND CONCILIATION IN INDIA

The Arbitration and Conciliation Ordinance, 1996 (8 of 1996), promulgated by the President on 16 January 1996, marks the beginning of an important chapter in the history of legal and judicial reforms in India. It is to be seen not as just another law but as a piece of legislation with the potential to bring about a qualitative change in the way the role of arbitration is perceived and the way in which administration of justice is carried on.

111 The Ordinance has come into force as an Act of Parliament w.e.f. 22nd August, 1996.
Arbitration as an institution for settlement of disputes has been known and practised in all civilised societies from time immemorial. ‘Of all mankind's adventures in search of peace and justice, arbitration is among the earliest. Long before law was established or courts were organised, or judges had formulated principles of law, man had resorted to arbitration for resolving disputes’.\(^{112}\) The practice of parties to a dispute referring their disputes to a person of their choice and accepting them as binding was known to ancient and medieval India.\(^{113}\) With the advent of the British rule and the introduction of their legal system into India starting from the Bengal Regulation of 1772, the traditional system of dispute resolution methods in India gradually declined. Traces of the ancient system can, however, still be found in the institutions of Panchas and Panchayats practised in many village communities and tribal areas in India. The institution of the hierarchical court system, the introduction of elaborate codes of procedure, the pre-eminence given to statute law vis-a-vis customary law, the emergence of the professional lawyer and the doctrine of precedents introduced during the British rule, all contributed to the gradual disappearance of the system of arbitration and other similar institutions, which prevailed in India till then. The introduction of the new law assigning a more meaningful role to arbitration and conciliation in the settlement of disputes is, in this sense, more a rediscovery than an innovation. What is new is the fashioning of these time-tested tools to serve the complex needs of contemporary society.

Two important current developments which provided added urgency for a fresh look at the range of the issues involved are:

(a) the mounting arrears of cases in courts\(^{114}\); and


\(^{113}\) P.V.Kane, History of Dharma Shastras, Vol. III, 1946.

\(^{114}\) It is estimated that about 25 million cases are pending in about 8000 courts throughout India.
(b) the process of economic liberalisation set in motion from 1991.

Arbitration has traditionally been considered as an efficacious alternative to litigation. However, the Arbitration Act, 1940 containing the substantive law of arbitration in India had become increasingly outmoded and discredited. The Supreme Court itself had lamented over the state of affairs in 1981 by observing:

However, the way in which the proceedings under the Act are conducted and without exception challenged in the 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.115

Arbitration proceedings under the 1940 Act has degenerated into a legal quagmire which left the parties, irrespective of whether they win or lose, impoverished in terms of time and money. In most of the cases, arbitration proceedings merely meant the first stage of several rounds of further litigation with no holds barred, leaving the parties at the mercy of a system which encouraged wastage of productive resources both in human and material terms. Invariably, the process ended with the winner feeling that the gain was not commensurate with the effort and the loser vowing never to repeat the mistake.

A viable and effective alternative to litigation for resolving disputes and a qualitative change in the style of conducting arbitration has become an imperative need for sustaining the credibility of the legal system and the role of law itself. The new law of arbitration and conciliation would, hopefully, open up new vistas in the area of dispute resolution in the country

and usher in an era of new and efficient processes of justice delivery system by promoting Alternative Dispute Resolution (ADR) systems in the country. ADR systems are gaining increasing recognition and acceptance in other parts of the world such as the United States of America, the United Kingdom, Canada and Australia. It has already emerged as a significant movement in some of these, countries and is likely to become a significant international movement in the years to come.

The first pre-requisite for a well developed system of arbitration and other forms of ADR systems is a modern and well conceived legal framework. The Arbitration and Conciliation Ordinance, 1996 provides such a framework. It has repealed the Arbitration Act, 1940 and has introduced a new law which has eliminated the core weakness in the earlier Act, i.e., the numerous provisions which provided for court intervention at almost every stage of conduct of arbitral proceedings. Modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, the new law provides for only two occasions when court intervention can be sought at the pre-arbitral award stage. The new law has provided a unified regime for both international commercial arbitration and domestic arbitration of all types. Part I of the Ordinance containing substantive provisions will govern all arbitrations held in India, i.e., where the place of arbitration is in India.

116 In a recent study the Indian Council of Arbitration lists out 15 provisions under the 1940 Act which empower courts to intervene in arbitration proceedings.

117 Sections 9 and 14(2) of The Arbitration and Conciliation Ordinance, 1996.

118 Sec. 2(2).
It is for the parties to agree on the place of arbitration\textsuperscript{119} Failing such choice by the parties, the arbitral tribunal will decide on the question, having regard to all the circumstances of the case.\textsuperscript{120}

The new law allows resort to arbitration by parties for resolution of their disputes in any matter which is arbitrable.\textsuperscript{121} However, where, by virtue of any other law, a certain dispute or certain kinds of disputes cannot be submitted to arbitration, they cannot be referred to arbitration under the new law.\textsuperscript{122} In all other cases, the new law will apply to every arbitration and proceedings relating thereto.\textsuperscript{123}

The new law gives maximum freedom to the parties in all matters. In the matter of the composition of the arbitral tribunal and appointment of arbitrators, the parties may either agree on the number and procedure for appointment all by themselves or agree to abide by an existing procedure for appointment. The provision [Section 11(2)] empowering the parties to agree on a procedure for appointing arbitrators provides the basis for institutional arbitration inasmuch as the parties may, before or after a dispute has arisen, agree to abide by the rules of procedure of an arbitral institution for the purpose. Since the procedure for appointment of arbitrators is one of the most important aspects dealt with in arbitration rules of all arbitration institutions, this is an important enabling provision from the point of view of arbitral institutions. A noteworthy feature of the new law of arbitration is the provision relating to the appointment of arbitrators by the Chief Justice when

\textsuperscript{119} Sec. 20(1).
\textsuperscript{120} Sec. 20(2).
\textsuperscript{121} Traditionally arbitration can be resorted to in all civil matters. Some of the areas in which arbitration and other ADR methods have been successfully resorted to are commercial disputes such as those relating to joint ventures, partnership differences, intellectual property, real estate, securities and product liability. Building and construction disputes are another group of disputes where arbitration is widely used. In family disputes, conciliation is the preferred alternative. In labour disputes, both conciliation and arbitration are resorted to.
\textsuperscript{122} Sec. 2(3).
\textsuperscript{123} Sec. 2(5).
the parties are not in a position to agree on a procedure for appointment of arbitrators. Section 8 of the 1940 Act had provided that any party to an arbitration agreement could approach the court to appoint an arbitrator or an umpire under certain circumstances. In the situation presently obtaining in India and the total unpredictability of time factor in getting even such urgent matters disposed of by courts, arbitration proceedings had become virtually a gamble of sorts. It is in this context that the provisions of Section II have been conceived. Though the various sub-Sections in that Section empower the Chief Justice of a High Court or Chief Justice of India, as the case may be, to appoint the arbitrator, the Chief Justice is also empowered to designate any person or institution to take the necessary steps for the appointment of arbitrators. For this purpose, Section II (10) empowers the Chief Justice to make schemes for dealing with matters entrusted to him by sub-Section (4), (5) or (6) of that Section. A scheme made by a Chief Justice may designate a person by name or ex officio or an institution which is specialising in the field of arbitration. This is another instance of the new law giving recognition to the role of arbitral institutions.

Following the UNCITRAL Model Law, the Ordinance gives power to the parties to challenge an appointed arbitrator on specific grounds. This is an important departure from the provisions of the 1940 Act which required the parties to approach the court for removal of an appointed arbitrator.

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124 See Sec. 11(4), (5) and (6).
125 See in this connection the definition of "arbitration" in sec. 2(1)(a) which says that "arbitration" means any arbitration whether or not administered by a permanent arbitral institution.
126 Sec.12(3).
127 Sec.11 of the Arbitration Act,1940.
The new law also confers competence on the arbitral tribunal on its own jurisdiction and to consider objections with respect to the or validity of the arbitration agreement.\textsuperscript{128}

The Ordinance also clearly provides that an arbitral tribunal not be bound by the Code of Civil Procedure, 1908 or the Indian Act, 1872. However, the parties are free to agree on the procedure followed by the arbitral tribunal in conducting its proceedings. The given to the parties to agree on the procedure to be followed by the tribunal envisages agreement of the parties to follow the procedure rules of arbitration of established arbitral bodies. This is yet another of the new law promoting institutional arbitration.

Chapter V of the Arbitration and Conciliation Ordinance [Sections 18 to 26] contain detailed provisions relating to conduct proceedings such as the date of commencement of the proceeding, appointment of experts, etc. The Arbitration Act, 1940 lacks provision in this regard. Such provisions are usually contained in the arbitration prescribed by various arbitral bodies. Similarly, Clause contains detailed provisions relating to making of an award and the of proceedings. An important provision of Chapter VI is Section 3C empowers an arbitral tribunal to encourage settlement of a dispute mediation, conciliation, negotiation, etc., even after arbitration proceeding have been initiated. The conciliation procedure envisaged under 30(l) is, however, different from conciliation referred to in Part Ordinance. Whereas conciliation initiated under Part III will be proceeding in accordance with the detailed and structured scheme under that Part, a conciliation resorted to in the course of a proceeding under Section 30(1) will be more informal and flex

\textsuperscript{128} Sec. 16.
settlement arrived at by the parties during the course of the arbitral proceeding will be recorded by the arbitral tribunal in the form of an arbitral award on agreed terms. Such a settlement will have the same status and effect as any other arbitral award on the substance of the dispute.\textsuperscript{129}

The new law requires the arbitral award to contain reasons unless the parties have agreed that no reasons are to be given.\textsuperscript{130} This is a significant departure from the provisions of the Arbitration Act, 1940, which contained no mandatory provision requiring the arbitrator to record reasons. Doubts have been expressed as to the wisdom of making it mandatory under the law to give reasons for the award. It has been contended that giving of reasons in the award will make it vulnerable to judicial scrutiny and thereby affect the finality of the award. It may, however, be pointed out that by virtue of the provisions in Sections 5 and 34 of the Ordinance, the scope of judicial scrutiny of the award is quite restricted. It is a settled principle that no court can sit in appeal over an award given by an arbitrator. The provisions of Section 34(2) clearly define the grounds on which an application for setting aside an award can be entertained by a court. These grounds are confined to lack of capacity of a party, invalidity of the arbitration agreement under law, violation of principles of natural justice and the arbitrator exceeding his terms of reference. The scope of judicial scrutiny, therefore, even when the award is a speaking order, is limited. The only residuary ground which empowers the courts to go into the merits of the award is that the arbitral award is in conflict with the ‘public policy of India’\textsuperscript{131} read with Explanation thereof. Though, admittedly, ‘public policy’ is a concept incapable of precise definition, it will be reasonable to assume that the courts will not interfere with an arbitral award merely on the ground of a wrong interpretation of the law by the arbitrator or an inadequate appreciation of facts or evidence by him.

\textsuperscript{129} Sec.30(4)
\textsuperscript{130} Sec.31(3).
\textsuperscript{131} Section 34(2) (b) (ii)
Section 36 of the Ordinance confers on the award the status of a decree. This provision, again, is a departure from the provisions of the Indian Arbitration Act, 1899 where Section 15 also provides that the award shall be enforced as if it were a decree of the court. The law has turned a full circle.

Though the Ordinance repeals the two earlier enactments, viz., the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961, Part II of the Ordinance re-enacts the portions of the repealed enactments. The three Schedules to the Ordinance also reproduce the provisions of the New York Convention Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the First Schedule), the Geneva Protocol on Arbitration Clauses of 1923 (the Second Schedule) and the Geneva Convention on the Execution of Foreign Awards, 1927 (the Third Schedule). In other words, India continues to be a party to the three important international instruments on the recognition and enforcement of foreign arbitral awards. There is also no change in the matter of legislative provisions implementing international instruments. In other words, there is no change in position relating to enforcement of foreign arbitral awards. However, the new law has removed one irritant namely, Section 9 of the Foreign Awards (Recognition and Enforcement) Act, 1961 [and provision in the Arbitration (Protocol and Convention) Act, 1937] provided that the Act will not apply to an award arising from an agreement governed by the law of India. The interpretation given by the Supreme Court that, even an award made outside India will still be enforceable as if it were a decree of the court.

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132 See secs. 14 to 17 of the Arbitration Act, 1940 dealing with filing of the award in court and judgment in terms of award.
on an arbitration agreement governed by the law of India if the substantive law of the contract is Indian law \(^{133}\) and the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 will not be applicable to it, has now been negatived by legislation. Misgivings voiced on this count by foreign parties have now been unequivocally set at rest.

Though the new law repeals the Arbitration Act, 1940 and the two enactments relating to enforcement of foreign arbitral awards from the date of commencement of the Ordinance \(^{134}\), the provisions of the repealed enactments will continue to apply in relation to arbitral proceedings which commenced before the Ordinance came into force (unless the parties have agreed otherwise). In other words, all arbitral proceedings pending on 24-1-1996, will continue to be governed by the repealed enactments by virtue of the saving provided by Section 85(2)(a). For this purpose, all proceedings before a court arising out of any arbitral proceedings will also be an ‘arbitral proceeding’ within the meaning of that expression and the old enactments will continue to govern those proceedings. However, where no arbitral proceeding had ‘commenced’ on or after 25-1-1996. Section 85 also saves the validity of all rules and notifications issued prior to 25-1-1996 under the repealed enactments to the extent they are not repugnant to the new law. Such rules or notifications would be deemed to have been made or issued under the new law. \(^{135}\) In view of this provision, all rules, notifications, etc., made under the earlier enactments will still be

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\(^{133}\) Supra note 10

\(^{134}\) The Ordinance promulgated on 16-1-1996 has been brought into force with effect from 25-1-1996 vide notification No.GSR63(E) Gazette of India Extraordinary, dated January 24, 1996. It was re-promulgated as the Arbitration and Conciliation Second Ordinance, 1996 (11 of 1996) on 25-3-1996 to provide continuity for the Ordinance promulgated on 16.1.1996.

\(^{135}\) This is on the lines of sec. 24 of the General Clauses Act, 1897 which provides that where any Central Act or Regulation is repealed and re-enacted with or without modification, unless otherwise expressly provided, any appointment, notification, order, scheme, rule, form or by-law made or issued under the repealed enactment will continue in force and will be deemed to have been made or issued under the provisions so re-enacted, so far as the notification, rule, etc., previously made is not inconsistent with the provisions re-enacted.
valid so long as they are not inconsistent with the provisions of the Ordinance. However, it would appear that the rules made by the High Courts under Section 44 of the Arbitration Act, 1940, may require a fresh look since some of the provisions and the forms in the earlier rules such as those relating to statement of special case to the court, award, etc. may no longer be required under the new law.

Under the Ordinance, the High Courts have been given power to make rules with relation to proceedings before the court.\textsuperscript{136} The Government has also been given power to make rules for carrying out the provisions of the Ordinance.\textsuperscript{137} The power of the Government to make rules, though more widely worded, is restricted to matters other than those for which the High Court makes rules. The power given to the Central Government under Section 84 is a residuary power to enable the Central Government to fill gaps in the law, if any, by subordinate legislation. The Government has also been given power to make provisions, by way of regulations, to remove difficulties in implementing the provisions of the Ordinance. It cannot also be issued after the end of the period of two years from the commencement of the Ordinance. Such an order is also required to be laid before each House of Parliament. This ensures Parliamentary scrutiny of the exercise of the power by the Central Government.

The Ordinance has also, for the first time in India, provided a detailed statutory framework for the conduct of independent arbitral proceedings.

\textsuperscript{136} Section 82
\textsuperscript{137} Section 84
proceedings outside Court. The conciliation part in the Ordinance is modelled on the Conciliation Rules adopted by the UNCITRAL. UNCITRAL Conciliation Rules were conceived primarily in the context of dispute resolution in international commercial relations. In the new law, the conciliation part (Part-III) is envisaged as an independent procedure. Part-III will apply to conciliation of disputes arising out of legal relationship whether contractual or not and where the parties agree to refer their dispute to conciliation. The applicability of Part-III of the Ordinance is barred only where, by virtue of any law, a certain dispute is not be submitted to conciliation.

Incorporation of Part III in the Ordinance is a significant step to promote ADR systems and methods in India. The ADR methods perceived in many countries consider even arbitration (which is an adversarial proceeding) as a less preferred procedure of ADR. Arbitration is traditionally considered to be a less formal and more amicable system of dispute resolution vis-a-vis litigation in courts, because the proceedings before the arbitrator are also adversarial in nature and is considered to be less conducive to the promotion of goodwill between the parties than the conciliation method or mediation method where with the assistance of the conciliator or mediator, arrive at a settlement which is the result of consensus rather than imposition.

Part III (Sections 61 to 81) of the Ordinance contains provisions governing conciliation proceedings. It is for the parties to agree to refer a dispute to conciliation. A conciliation proceeding can be initiated by any party inviting the other party to conciliate under the provisions of Part III.

138 Though O. XXXII-A of the Code of Civil Procedure, 1908, sec. 23 of the Hindu Marriage Act, 1955, sec. 3 of the Industrial Disputes Act, 1947 provide for conciliation, the scope of conciliation envisaged under these provisions are not as exhaustive as Part-III of the present Ordinance.
the Ordinance. Once the opposite party accepts in writing the invitation to conciliate, the conciliation proceedings start.\footnote{Section 62} It is for the parties to agree as to the number of conciliators. Unless the parties agree that there should be two or three conciliators, there will be only one conciliator. Parties can also enlist the support of a suitable institution or person for the appointment of conciliator or conciliators.\footnote{Section 64(2)} Where the parties have not enlisted the assistance of a suitable institution or person, the parties themselves can agree on the name of a sole conciliator. Where the conciliation is with two conciliators, each party may appoint one conciliator. Where the conciliation is by three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who will act as the presiding conciliator. Since conciliation with the assistance of an institution is a new concept in India, existing arbitration bodies who do not provide for conciliation under their rules will have to add new provisions relating to conciliation in their rules incorporating the new law. Where the existing rules provide for conciliation they may have to be suitably revised to bring them in line with Part III of the Ordinance. Section 66 of the Ordinance specifically provides that the conciliator is not bound either by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The role of the conciliator is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement to their dispute.\footnote{Section 67(1)} It is important to note that, unlike the arbitrator, the conciliator is not a judge, but only a facilitator. His authority is limited to the extent the parties have entrusted it to him. The conciliator is to be guided by the principles of objectivity, fairness and justice. He should also give consideration to the usages of the trade concerned, the circumstances surrounding the dispute including any previous business practices between the parties. The manner of
conducting the conciliation proceeding is left to the conciliator. After taking into account the wishes of the parties, he will allow a party to present oral statement if the party so wishes. At any stage of the conciliation proceeding the conciliator may make proposals for a settlement of the dispute. The proposal need not be in writing and need not be accompanied by reasons. Though Section 67 provides a basis for the conduct of conciliation and mentions some basic principles relating to the conciliator's role, it does not go beyond providing a profile of the conciliator. In actual practice, the conciliator has to be a person who is not only impartial and independent, fair and objective, knowledgeable and tactful, but also to be a man who can influence the parties by his personality and persuasive skills. In this sense his job is more challenging than that of an arbitrator. The skills required of a successful conciliator are quite distinct from that of a judge or an arbitrator. If the system of conciliation is to succeed there will be need for professional training of persons who, apart from their educational qualifications and professional experience, will also require to acquire the special attributes and skills of a conciliator. Institutions engaged in the promotion of arbitration, conciliation and other ADR forms will need to give thought to providing training to potential conciliators before putting them in their panels of conciliators. Success of the conciliation method envisaged in Part III of the Ordinance will depend to a considerable extent to the availability of trained conciliators throughout the country.

Section 68 provides that for facilitating the conduct of conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person. This is another provision providing impetus to ADR institutions. Since the concept of institutionalised conciliation is comparatively new in India, existing institutions active in the field of arbitration will have to think in terms
of expanding the scope of their services to conciliation proceedings and provide infrastructure and trained personnel. Since the ambit of conciliation proceeding under the new law is quite wide and takes in disputes arising out of any legal relationship, whether contractual or not, there is wide scope for establishing new institutions providing facilities for conciliation in non-commercial fields like family and matrimonial disputes, landlord and tenant disputes, etc.

A noteworthy principle incorporated into law by the Ordinance is that a settlement agreement reached by the parties and signed by them with the help of the conciliator will be final and binding on the parties and the persons claiming under them.\textsuperscript{142} Such a settlement agreement will have the same status and effect as if it is an arbitral award on agreed terms. Section 30(3) of the Ordinance provides that a settlement arrived at between the parties in the course of arbitration through mediation, conciliation or other procedures shall be made in the same manner as any other arbitral award under Section 31 except that a settlement on agreed terms need not be a reasoned award. Since an arbitral award can be enforced as a decree under Section 36 of the Ordinance, a settlement agreement reached after the conclusion of a conciliation proceeding will also be enforceable like a decree of court.\textsuperscript{143}

The parties may terminate a conciliation proceeding by giving a written declaration addressed to the conciliator to the effect that the conciliation proceedings are terminated from the date of the declaration.\textsuperscript{144} Since conciliation is a consensual proceeding, it is entirely dependent on the continued goodwill of the parties and could be terminated by the parties at any time before the signing of the settlement agreement. However, the parties are under obligation not to initiate any arbitral or judicial proceeding during

\textsuperscript{142} Section 73(3)
\textsuperscript{143} Section 74
\textsuperscript{144} Section 76(C)
the continuance of the conciliation proceeding\textsuperscript{145}, the only exception being that resort to such proceedings are necessary for preserving the parties' rights.

A very important aspect relating to conciliation proceedings and which is crucial to the success of conciliation as an effective alternative dispute resolution procedure is the principle of confidentiality. The conciliators and the parties are under obligation to keep all matters relating to conciliation proceedings confidential. Section 75 provides that notwithstanding anything contained in any other law, the principle of confidentiality shall be maintained by the parties as well as the conciliator except where its disclosure is necessary for parties for the implementation and enforcement of the settlement agreement.

As a corollary to this principle, Section 80 also provides that the conciliator shall not, unless otherwise agreed by the parties, act as arbitrator, representative or counsel of a party in any arbitral or judicial proceeding. The conciliator is also not to be presented as witness in any arbitral or judicial proceeding by the parties later. There is also a bar on parties relying or introducing as evidence in any subsequent arbitral or judicial proceedings, the views expressed or suggestions made by either party in the course of the conciliation proceedings.\textsuperscript{146} In other words, any information pertaining to the conciliation proceedings, whether it has resulted in a settlement agreement or not, is required to be kept confidential by all the parties and the conciliators. The confidentiality principle will apply to all persons who had access to matters relating to the conciliation proceeding. Though there is no specific mention of persons other than the parties and the conciliator in Section 75, this aspect will assume importance

\textsuperscript{145} Section 77

\textsuperscript{146} Section 81
when the conciliation proceedings are under institutional arrangements and records are kept and maintained by ADR institutions. ADR institutions providing conciliation facilities would do well to ensure strict adherence to the principle of confidentiality by persons who have access to such information.

The Arbitration and Conciliation Ordinance is a new and bold initiative. It is based on the assumption that many disputes can be resolved without resort to litigation in courts.’ It also assumes that there are fora other than courts where disputes can be resolved.

2.25 ARBITRATION AMONG BUSINESS PARTNERS

If mediation doesn't work—and sometimes it won't for a variety of reasons, the next best dispute resolving format is arbitration. For years, attorneys and businessmen have been writing arbitration clauses into their business contracts. Often with little thought. Even so, and generally speaking, it is a good idea.

Like the courtroom, arbitration requires at least one and often three, neutral arbitrators. Here again, for the advantages of efficiency, minimization of expense and speed to be realized, an experienced arbitrator, usually a retired judge, is important. I strongly recommend using retired judges because their judicial career has required them to learn how to move litigation and how to handle lawyers—especially those specializing in recalcitrance. Judges can move your case along so that a final decision can be reached within a few weeks.

One big advantage of arbitration as an alternative to the courtroom, is that the parties retain control of their dispute resolving process. This saves lots of money and lots of time and produces a result more to their liking. However, legal counsel, recognizing they have a dispute not resolvable by mediation, must have a reasonably good working relationship
with each other to reap all of the advantages of arbitration (or mediation). If
counsel on both sides have their client's best interest at heart and their own
egos in check, they can work together to create an ideal dispute resolving
forum; one tailor made by them to resolve their client's dispute. They can
agree on a timetable, who the arbitrator(s) will be, rules of evidence, flow of
witnesses, procedural and substantive law and many other ingredients. They
can even control the situs (venue) of the hearing, agreeing on India perhaps,
or the United States, Bermuda or anywhere in the world they choose. The
point is they retain control—not a judge or system. Once litigation and the
courts are opted for, control is lost and instead vested in the third party
judge. It is unfathomable why this control would ever be given up-when
there is an alternative.

Opting for arbitration, when mediation fails (mediation is
successful in over 85% of the cases), offers disputants a final (because the
arbitrator's decision is usually non-appealable), and binding forum for
resolving their dispute. It is efficient, inexpensive (when compared to
litigation), speedy and the disputants retain control over much of the process
without turning that control over to a judge who can be exceedingly
arbitrary, depending on how his wife treated him before he left the house in
the morning.

It is also important to note that arbitration awards can be quickly
converted into a court judgment for enforceability purposes. In other words,
when the arbitrator(s) makes a decision (the award), the prevailing party can
take that award to most any country (in the case of a foreign company)
where the defendant has assets and petition the local court, asking that the
arbitration award be converted into a court judgment. Once this is
accomplished (and the process is usually quite abbreviated) the judgment
may be enforced like any other court judgment. (For example, in the US, an
arbitration award rendered in, for example, India or Singapore, or Europe, can be enforced against a US company in any United States District Court pursuant to the Federal Arbitration Act.)

Finally, in the event you decide to try mediating or arbitrating your next dispute, I suggest you look for a reputable neutral firm whose business is that of resolving disputes. A firm, such as The International Arbitration Centre will obtain the other side's consent to participate (if that's a problem) in mediation or arbitration and will provide you with an extensive list of highly qualified retired judges you can choose from to serve as your neutral(s). (In the case of a dispute among multinationals, I suggest one arbitrator from the home country of each participant plus one from another country, not the home of any of the participants—for a total of three). They will also help you select a venue and take care of all other details such as scheduling.

2.26 FAST-TRACK ARBITRATION

Speed and cost are vital elements in commercial dispute resolution and fast-track arbitration, a new form of arbitration, has evolved to ensure rapid and efficient settlement of disputes. Parties can, without the typical war of attrition, resolve disputes rapidly and cost effectively by fast-track arbitration. In commercial disputes, the parties could no longer pursue an arbitration as long as it takes. Fast-track arbitration provides structure which requires all parties to evaluate their case, set priorities, and adopt the best Alternative Dispute Resolution (ADR) strategy which could be accomplished in a short period of time.

2.27 WHY FAST-TRACK ARBITRATION

It is common belief that justice delayed is justice denied. Arbitration is generally intended to provide speedy, economic and fair
results. But international arbitration has now become too time-consuming. It is generally said that an ICC arbitration may take two to three years to be completed. Many a time, it is felt that the arbitral process has been judicialised and it is as slow as courts. Arbitration is governed by rules and practices which are becoming more and more sophisticated and complex. The detailed rules and prescribed procedures may be fairer and more just but these do not serve the purpose of commercial arbitration because of delay in the resolution of disputes. As observed by the Supreme Court of India in *M/s. Guru Nanak Foundation v. M/s. Rattan Singh & Sons*:\(^{147}\):

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

Necessity to provide for fast decisions in commercial matters caused development of special type of arbitration – Fast-track arbitration which is becoming popular day-by-day. Traditional arbitration is an improvement over traditional litigation in the courts and fast-track arbitration

\(^{147}\) AIR 1981 SC 2075
is an improvement over traditional arbitration. The outcome of a case does not change much if the case is completed in 6 months instead of 24 months but it can cause substantial time and cost saving for the parties. Establishment of hard, fast and speedy case management deadlines has a tremendous impact on the management of resolution of disputes by arbitration.

2.28 COMPARISON TO OTHER ADR TECHNIQUES

ADR techniques such as conciliation, mediation, negotiation and mini-trials have the benefit of less time and less cost but there is no assurance that it will result in a legally binding settlement of disputes. These techniques bring the parties together but the settlement is not compulsory. Any party may walk out of such proceedings at any time or may not agree even to a very fair settlement. It happens many times that for the respondent it is a case of either total liability or no liability and to avoid liability he may refuse the settlement. But fast-track arbitration is an effective ADR technique which ensures speed, economy and binding settlement of disputes. The award given in fast-track arbitration is equally binding as an award given in traditional arbitration.

2.29 MAIN FEATURES OF FAST-TRACK ARBITRATION

Faster — It ensures resolution of disputes in an agreed period. The time management techniques prevent continuation of arbitration proceedings for years and ensures completion of the same within the prescribed period. The causes of excessive delay in arbitration are well known. Fast-track arbitration gives parties a chance to secure a settlement of disputes in a given time frame by eliminating abuses and delays of traditional arbitration. It causes meaningful reduction in length of arbitration. The parties need not waste time on unimportant matters and they can focus their attention on key issues in the dispute.
**Economical** — The costs of fast-track arbitration are comparatively low due to reduction in the length of arbitration, elimination of abuses and delays of arbitration and general avoidance of oral hearings. The cost management techniques prevent multiplication of actual costs to the parties. It seeks to make the arbitration cost efficient.

**Final and binding settlement**— Fast-track arbitration agreement is binding on parties and it can be enforced as any other arbitration agreement between parties. Similarly, arbitral award is final and binding on parties.

### 2.30 PROCEDURE

Arbitration moves faster not because of skipping of any vital step in the process of arbitration but mainly because of the cutting of delays and long procedures. Arbitral tribunal is constituted as per provisions of agreement between parties; claimant submits statement of facts and claims, and respondent submits his defence and counter claim. Both parties file documentary evidence with the pleadings and also submit written submission/argument/summary. The arbitral tribunal applies its mind and may ask for further documentation, submission or information if any required by it and, thereafter, makes an award. The only difference is that periods of time for particular steps to be taken in the course of the proceedings are enforced and oral hearings are generally avoided.

### 2.31 APPLICATION

Fast-track arbitration is best suitable in majority of cases which can be decided on basis of documents and in which oral hearings and witness are not very necessary. Even oral hearing can be held in fast-track arbitrations but only in exceptional cases. Fast-track arbitration is not suitable in cases involving large scale discovery of documents, very lengthy
presentations, numerous submissions, numerous witnesses, or expert analysis.

Fast-track arbitration requires highest priority leaving other matters aside. Hence, disputes for which there is no real need to have an urgent decision may not be submitted to fast-track arbitration. Similarly, disputes which require urgent settlement but, due to evidentiary requirements are not suitable to being decided by fast-track arbitration, may not be submitted to fast-track arbitration.

2.32 COMPATIBILITY OF FAST-TRACK ARBITRATION AND MODEL LAW

Success of fast-track arbitration depends on the law applicable to arbitration and its tolerance of the freedom of parties to contract. The UNCITRAL Model Law on International Commercial Arbitration (Model Law) provides for faster arbitration and it has in-built provisions for accelerated arbitration. Model Law and fast-track arbitration are compatible.

Article 11(2) of Model Law provides that parties are free to agree on a procedure for appointing the arbitrator. Hence, there is complete freedom to the parties to agree to any faster procedure to appoint an arbitrator. Article 13(1) gives freedom to parties to agree on a faster procedure for challenging an arbitrator. Article 13(4) provides that, if a challenge is not successful, the arbitral tribunal shall continue the proceedings and make an arbitral award. Article 23(1) gives freedom to the parties to agree on time-limits for filing of claims, replies and counter-claims and hence fast-track rules can operate without risk of infringement of any provision of Model Law due to short periods allowed to the parties to submit claims, replies and counter-claims under fast-track arbitration rules. Article 24(1) gives freedom to parties to agree that no oral hearing shall be held. Article 25 allows arbitral tribunal to continue proceedings in case of default.
by a party. Article 29 provides that questions of procedure may be decided by the presiding arbitrator. These provisions of the Model Law are very useful in accelerating arbitration and permit parties to agree on fast-track rules. Fast-track arbitration rules can operate safely within the limits laid down by Model Law. The Arbitration and Conciliation Act, 1996 is largely based on Model Law, hence fast-track rules are also compatible with the Act.

2.33 SEGMENTATION OF DISPUTES

Segmentation of issues for settlement by fast-track arbitration and by general arbitration is also possible to meet the special requirements in big contracts, such as civil engineering contracts in which certain urgent disputes can be settled immediately by fast-track arbitration, even during execution of the contract so that the project is completed in the stipulated period and remaining disputes can be decided by traditional arbitration.

2.34 INSTITUTIONAL ARBITRATION

Institutional arbitration is usually a fast-track arbitration. Institutions help in enabling faster communications among the parties, appointment of the arbitrators, handling the administration of the case and the costs in effective manner. The institutions exercise a supervisory and supportive role over arbitration conducted in accordance to their rules. They effectively deal with delays and defaults of any party and ensure speed in settlement of disputes.

2.35 CONCLUSION

Mediation first and then arbitration, are far better ways than the courtroom to resolve disputes among business partners. The major difference between mediation and arbitration is that in mediation, an experienced retired judge acts as mediator/facilitator in helping the parties reach a negotiated settlement of their dispute. The mediator makes no decisions and
does not impose his view of what a fair settlement should be. In arbitration, a neutral, usually retired judge, makes a decision in the stead of the parties. In this regard arbitration is like court. Of the two processes, I prefer mediation because it is quicker, less expensive, less stressful, more private and the parties retain much more control over the outcome than either arbitration or the courtroom because they, the parties, ultimately make the decision.

So, the next time you and a business partner are in a dispute, don't litigate—mediate or arbitrate. Mediation especially and arbitration to a lesser extent, but still greater than litigation, will save your company huge sums of money, lots of time, vital energy and will allow you to salvage a business relationship which may be in your company's best interest to preserve—and, last but not least, provide you a forum of privacy.

Fast-track arbitration provides final and binding settlement of those disputes which are required to be resolved urgently. It is the need of the hour when a large number of cases are pending in courts. It can be applied in most of the cases without risking the fairness and finality of any settlement so arrived at.

Enactment of the 1996 Ordinance satisfies the need of a comprehensive and effective law responsive to both domestic and international requirements. It also seeks to eliminate the laws delays by limiting the supervisory role of Courts and minimising its scope by reducing the grounds on which an award can be challenged while ensuring fairness of process and transparency in the arbitral proceedings by enacting suitable measures. Care has been taken to ensure appointment of competent and honest persons as arbitrator.

The new law has brought in a sea change in the law of arbitration and appears to be an improvement on the UNCITRAL Model Law. Its object
inter alia is to provide ‘a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.’