CHAPTER – IV

ARBITRATION AND CONCILIATION ACT, 1996 – AN OVERVIEW
In the present chapter, the researcher has elaborately discussed the Indian statute on arbitration and conciliation i.e., the Arbitration and Conciliation Act, 1996. The purpose of Arbitration and Conciliation Act, 1996 is to provide quick redressal to commercial dispute by private Arbitration. It is an agreed fact that quick decision of any commercial dispute is necessary for the smooth functioning of business and industry. It is also accepted internationally that normally commercial disputes should be solved through arbitration and not through the normal judicial system. The Law of Arbitration is mentioned in the arbitration and conciliation act, 1996. It came into force on the 25th January 1996. This Act includes the domestic, International commercial arbitration and the enforcement of foreign arbitral awards.

The International trade is the exchange of capital goods, and services beyond international borders or territories. While international trade has existed throughout history such as Uttarapatha, Silk Road, Amber Road, scramble for Africa, Atlantic

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1 Ancient Buddhist and Hindu texts use Uttarapatha as the name of the northern part of Jambudvipa, one of the “continents” in Hindu mythology. In modern times, the Sanskrit word uttarapatha is sometimes used to denote the geographical regions of North India, Western India, Central India, Eastern India, Northeast India, Pakistan, Bangladesh, and Nepal in just one term.
2 The Silk Road was an ancient network of trade routes that connected the East and West.
3 The Amber Road was an ancient trade route for the transfer of amber from coastal areas of the North Sea and the Baltic Sea to the Mediterranean Sea.
4 The Scramble for Africa was the occupation, division, and colonization of African territory by European powers during the period of New Imperialism, between 1881 and 1914. It is also called the Partition of Africa and by some the Conquest of Africa.
slave trade, salt roads⁵, its economic, social, and political importance has been on the increase in new centuries. International trade is the interchange of goods and services between the countries. This type of trade increases a world economy, in which prices, or supply and demand, affect and are affected by global events. Therefore, trading globally provides consumers and countries the opportunity to be exposed to goods and services which are not available in their own countries. In an international trade situation, almost every kind of product can be found on the international market may it be food, clothes, spare parts, oil, jewelry, wine, stocks, currencies, and water. In addition, services are also traded such as tourism, banking, consulting and transportation. A product is sold to the global market is an export, and a product is obtain from the global market is an import. Imports and exports are considered for in a country's current account in the balance of payments. Further, International trade not only results in increased efficiency but also allows countries to participate in a global economy, encouraging the opportunity of foreign direct investment (FDI), which is the amount that individuals invest into foreign companies and other assets. In theory, economies can grow more efficiently and easily become competitive economic participants. The international trade, from one angle, could be observe such as International trade has two comparing views regarding the level of control placed on trade i.e., free trade and protectionism. Free trade is the easily understand by the two theories, a laissez-faire approach, with no restrictions on trade. The main intention is that supply and demand factors, operating on a global scale, will ensure that production happens efficiently. Therefore, nothing requires to be done to protect or promote trade and growth, because market forces will do automatically.

International trade is the interchange of goods or services across international borders. This type of trade enable for a greater competition and more competitive pricing in the market. The competition results in more overpriced products for the consumer. The exchange of goods also affects the economy of the world as control by supply and demand, making goods and services obtainable which may not otherwise be available to consumers globally.

⁵ The Atlantic slave trade or transatlantic slave trade involved the transportation by slave traders of enslaved African people, mainly to the Americas. The slave trade regularly used the triangular trade route and its Middle Passage, and existed from the 16th to the 19th centuries.
In the Indian context, the Arbitration and Conciliation Act, 1996 (No. 26 of 1996) is to strengthen and to amend the law of arbitration in domestic and international its enforcement and to define the conciliation, also for matters connected therewith or incidental thereto. The preamble of the Act specifically spell out that this is an Act which is more important:

1. To cover international commercial arbitration and also domestic arbitration and conciliation.
2. To provide that the Arbitral Tribunal justify the award passed by it by giving reasons.
3. The act ensures that the arbitral tribunal would remain within the limits of its jurisdiction.
4. To make a just, fair and efficient arbitral procedure is able to meet the requirements of the specific arbitration.
5. To reduce and minimize the supervisory role of courts in the process of arbitral.
6. To provide that each final arbitral award is enforced in the manner as it was a court decree.
7. To permit the arbitral tribunal to use different modes of settlement of disputes like mediation and conciliation.

With the Globalisation trends all over the world, International trade and investment are increasingly accompanied by cross-border commercial disputes. These disputes needed an effective dispute resolution mechanism and international arbitration has proved to be one of the most successful legal regimes. By growing popularity of arbitration in the last two decades as a means to minimize the transaction costs is evident in that, “International Commercial Arbitration has become the normal means of resolving disputes in international commercial transactions\(^6\). India is a large and diverse country. In India the impetus for the International Commercial Arbitration arose in the early 1990’s; as India’s economic policies began to encourage free trade and investment and that concerns’ the delays in settling the

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disputes would deter foreign investors spurred the adoption of the Arbitration and Conciliation Act, 1996 to promote alternative dispute resolution procedures in India.

India adopted significant reforms to the laws governing arbitration in the 1990s. The principal reason was that the previous legislation relating to arbitration was felt highly problematic and thus resulted in delay and needless expense. It was believed that this deterred potential foreign investors, who were critical to ensuring the success of the economic reforms in India. According to Amanda Perry that there are well developed theoretical arguments that explain why the effectiveness of legal systems should be a determinant of foreign direct investment (FDI) and the empirical evidence suggest that investors take the state of a country’s legal system into account before making their decisions. She also points out that there is a widely accepted international consensus that the existence of the rule of law and functional, reliable legal institutions matters to foreign investors. Therefore, this being a widely accepted perception, which may act against India in attracting foreign investments, spurred the adoption of new laws governing arbitration in India.

In this background, India has updated its laws governing arbitration to promote itself as a viable forum for international commercial arbitration in competition with other venues, such as the LCIA and the Arbitration Institute of SCC. This is because the Alternative Dispute Resolution communities in India claim that local companies, especially public sector, are at a great disadvantage when they face foreign firms in arbitral proceedings. This is not only because arbitration is undertaken in a neutral third country, such as the UK or Sweden, is more expensive than local proceedings which Indian companies may be less able to afford, but also because there is a perception that foreign multinationals have a better understanding of how international arbitration works and can use it to their advantage.

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International disputes with respect to India are steadily increasing because of the influx of foreign investments, overseas commercial transactions, and open-ended economic policies. This has drawn a tremendous focus from the international community on India’s International arbitration regime. There is no mandatory legal regime governing International commercial Arbitration, it has a permissive regime of conventions which a nation follows if it is a signatory of the same. The two most important conventions in this regard are, The Geneva Convention, The New York Convention 1958 and the UNCITRAL MODEL Law 1985. India is a signatory for the same. In fact, with the 10 original Asian nations India was to have signed the Geneva Convention of 1927.12

Arbitration in India during the 20th Century was governed by the Indian Arbitration Act, 1859 with the limited application as a Second Schedule to the Code of Civil Procedure which was replaced by the Arbitration Act, 1940. India has acknowledged this fact and has specific legislation governing the arbitration regime called the Arbitration and Conciliation Act, 1996 taken from the UNCITRAL Model Law.13

4.1 History of Indian Arbitration law

Throughout the world, the industrial revolution to have led to a fast rise in the global trade and commerce. To avoid prolonged litigation the parties go to the arbitration due to success in dispute resolution mechanism not only in India but worldwide. It has promoted bonding relations of cross-border transactions and bilateral trade between the countries, due to this there is increase in a legal obstacles. Disputes have also become certain and there is a required for a methodology to speed up legal remedies. Briefly, on arbitration in the world, the evolution of arbitration in earliest days can be remembrance to the King Soloman period followed the theory of biblical. According to reference of historic the arbitration has been established even before the Christ’s time. The Arabic word for arbitration is termed as a Tahkeem and arbitrator is termed as a Hakam and similarly, in the Persian an arbitrator is a Salis and the party is Salisee existed in the history. At England in the year 1698 the first

12 The other five nations were Japan, Newzealand, Pakistan, Thailand and Hong Kong. None of the Americans subscribed to it. F.S Nariman, East Meets West: Traditions, Globalization and the Future of Arbitration, LCIA Arbitration International, Vol 20, Issue2, page 123.
13 Supra note 6.
arbitration law was taken into effect, Parliament enacted an arbitration law that had been drafted by John Locke. In drafting the statute, Locke was performed a duty for the Board of Trade, of which he was a member. Locke clearly was seeking a formula that would encourage private dispute settlement between merchants without legal entanglement. The present The Arbitration Act 1996 of England applies to both domestic and international arbitrations where in the seat of arbitration is made i.e. in England. Common law may also be applicable in interpreting the act or placing additional obligations on parties and arbitrators. General principles of English Arbitration law deals with the provisions founded on the following principles, and shall be construed accordingly— (a) to acquire the just and fair dispute resolution by tribunal without any unnecessary delay; (b) the parties should decide on resolving of disputes subject to protection for the public interest; and (c) the court should not intervene in the matters except in the I part of the Act.

Arbitration is an alternative to litigation and any dispute of civil nature can be adjudicated through it. However, the independence to refer matters to arbitration is relatively limited in India because the legislature has pre-existing institutions where issues are to be handled. The Preamble of the current Indian Arbitration Act, 1996 expressly states that this act includes the domestic, international arbitration and its enforcement and also defines conciliation.

4.2 Arbitration Act, 1940

The Arbitration Act, 1940 was enacted in British India which consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the second schedule of the Code of Civil Procedure 1908. The purpose of the Act was for speedy disposal of the disputes through the forum selected by the affected parties. However, due to the challenge of almost each and every award even up to the Apex Court rendered the Act almost otiose. It was in the last decade of 19th Century India opened up its market and the commercial activities went global. This brought about the need for speedier dispute redressal system and after upon much scrutiny the Arbitration and Conciliation Act, 1996 was enacted repealing the 1940 Act. The New Act has tried to bring about sea changes in the Arbitration law and to correct the deficiencies noticed in the earlier Act and also to fasten the process of settlement of international commercial disputes. Under the Regime of Britishers,
Arbitration Act was passed on 1940 March 11th taken effect on 1940 1st July as “The Arbitration Act, 1940”. This Act was passed to consolidate and amend the law relating to arbitration and applied to entire India including Pakistan and Baluchistan. This act referred number of disputes along with criticisms and drawn a variation between the setting aside an award application and the award resolution is a nullified in some of the cases as this suggests that it does not legally exist and considers that according to the sec 30 states as an application may be made for setting aside an award and according to sec 33 states as an application of that nullity award. As analyzed that the above act was failed in the arbitration recognizing in non-existence and invalidity the agreement.

The Arbitration Act, 1940 deals only domestic arbitration. In so far as international arbitration was concerned, there was no substantive law on the subject. However, enforcement of foreign awards in India was governed by two enactments, the Arbitration Act, 1937 and the Foreign Awards Act, 1961. Under this Act, the court intervention was required in the three stages, i.e. the dispute before the arbitral tribunal, in the duration of the proceedings, and after the award was passed. This Act also made provisions for arbitration without court intervention, arbitration in suits i.e., arbitration with court intervention in pending suits and arbitration with court intervention, in cases where no suit was pending before the court.

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15. Section 30 - Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely:- (a) that an arbitrator or umpire has mis-conducted himself or the proceedings, (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35; (c) that an award has been improperly procured or is other- wise invalid.

16. Section 33 - Arbitration agreement or award to be contested by application. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits: Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.


18. The Arbitration (Protocol and Convention) Act, 1937, is an Act to make certain further provisions respecting the law of arbitration in (the words the Provinces of were omitted by the A.O.1950.)India.

19. The Foreign Awards (Recognition and enforcement) Act, 1961, is an Act to enable effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on the tenth day of June, 1958, to which India is a party and for purposes connected therewith.

Before taking an cognizance of a dispute by an arbitral tribunal then the court start the arbitration proceedings. The agreement and disputes between parties are to be proved. At the proceedings, to make an award the extension of time court presence is required then, the award is enforced.

While the 1940 Act was perceived to be a good piece of legislation, but in its actual operation and implementation by all concerned- the parties, arbitrators, lawyers, and the courts, it proved to be ineffective and was widely felt to have become outdated\textsuperscript{21} and no longer responsive to the contemporary economic reforms and globalisation of Indian economy. In \textit{M/s Guru Nanak Foundation’s v. M/S Rattan Singh and Sons}\textsuperscript{22}, the Hon’ble Supreme Court observed while referring to the Act of 1940 noticed,

\begin{quote}
“The way in which the proceedings under the Act are conducted and without any exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports carry 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 selected by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with ‘legalese’ of unforeseeable complexity.”
\end{quote}

The Supreme Court of India has observed in \textit{Food Corporation of India v. Joginderpal Mohinderpal}\textsuperscript{23} the court opined that

\begin{quote}
“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 who will create confidence, not only to doing justice between the parties but by creating a sense that justice perform to have been done.”
\end{quote}

Then the commissioners and the legislatures decided to amend the law.

\textsuperscript{21} \textit{Arbitration and Conciliation Act, 1996}, Statement of Objects and Reasons.
\textsuperscript{22} \textit{M/S Guru Nanak Foundation’s v. M/S Rattan Singh and Sons AIR 1981 4 SCC 634}.
\textsuperscript{23} \textit{Food Corporation of India v. Joginderpal Mohinderpal AIR 1981 2SCC 349}
4.3 Arbitration and Conciliation Act, 1996 – An Overview

The Arbitration and Conciliation Act, 1996 has enacted to update the 1940 Act by government. In 1978, the UNCITRAL Secretariat, the Asian African Legal Consultative Committee (AALCC), and the ICCA and ICC arranged consultive meeting, wherever they must be unity and it must be within the interest of International Commercial Arbitration if UNCITRAL begin to take steps resulting for the uniform arbitral procedure standards. To achieve the uniformity for the Model Law on arbitration must be in proper way. The Model Law complete work was ratified by UNCITRAL on 21st June 1985. In India, this Model Law has been nearly adopted entirely in the 1996 Act.\(^24\)

In history, the last decade of 19th Century India opened up its market and the commercial activities went global. This brought about the need for speedier dispute redressal system and after upon much scrutiny the Arbitration and Conciliation Act, 1996 was enacted repealing the 1940 Act. The New Act has tried to bring about sea changes in the Arbitration law and to correct the deficiencies noticed in the earlier Act and also to fasten the process of settlement of international commercial disputes. The deficiencies in the 1940 Act and other difference from the 1996 Act are discussed as follows:

4.3.1 Appointment of Arbitrator

Under the old Act, an aggrieved party to get an Arbitrator appointed had to approach the jurisdictional Civil Court either under Section 8 or Section 20 of the 1940 Act. This was again time-consuming ordeal. Under the new 1996 Act, if the parties fail to reach an agreement as referred according to sub-section (2), or within the thirty days if the party fail to agree from the receipt of the request by any one of them, the Chief Justice can be moved for appointing an Arbitrator either under sub-clause (5) or sub-clause (6) of Section 11 of the 1996 Act\(^25\). The Chief Justice can delegate the power of appointment to any other person or institution\(^26\).


\(^25\) Section 11 of the Act provides provisions relating to appointment of arbitrators.

The Arbitration and Conciliation Act, 1996 enter into effect from 22nd August 1996. Arbitration and Conciliation Act, 1996 primary purpose was intended to cover widely the International and Commercial Arbitrations and Conciliations as well as the Domestic Arbitrations and Conciliations. It envisages the making of an arbitral method in capable of meet the needs of the globalized economy. It sought to strengthen and amend the law relating to domestic and international arbitration and the conciliation.

The Act is separated into the following parts, (a) Part I- Domestic Arbitration, (b) Part II- The Enforcement of Foreign Awards, (c) Part III- The Conciliation procedures, (d) Part IV- The Supplementary provisions, and (e) First Schedule- New York convention (The Convention on Recognition and Enforcement of Foreign Arbitral Award) (f) Second Schedule- Arbitration Clauses (The Protocol) (g) Third Schedule- Geneva Convention (The Convention on the Execution of Foreign Arbitral Awards).

The 1996 Act follows many of the provisions of the UNCITRAL Model Law is mostly based on the International Commercial Arbitration and the Conciliation Rules. International Commercial Arbitration is defined in the 1996 Act, as any arbitration conducted in India between an Indian and non-resident Indian or any foreigner. Under the Act, any written agreement proving the intent to have disputes arising from a commercial relationship resolved through arbitration is considered to be a valid arbitration agreement. The Act is divided into two parts. The first applies to arbitrations located in India. The second part applies to arbitration which took place outside of the country but where enforcement is sought within India under the terms of the New York Convention and Geneva Convention. In the first type of cases, the court’s ability to intervene in arbitral proceedings is limited except for before the appointment of the arbitrator(s) and then after the rendering of the arbitral award. The

28 The UNCITRAL Model Law of Arbitration was designed to meet the need for harmonising and improving the domestic laws of arbitration which had considerable disparity which created difficulties in resolving International commercial disputes.
arbitrator’s jurisdiction and competence are left to the arbitrator to decide; there is no way for the court to review this before an arbitral is been made. Arbitrators are to be appointed by the parties to the dispute and only if the parties fail to do so, then upon the application by one of the parties in the case of domestic arbitrations the appointments will be made by the High Court Chief Justice and in international arbitrations by the Supreme Court Chief Justice. Arbitrators are able to grant interim relief in India depending on the type of relief sought for and how far the arbitration has proceeded. The arbitrator’s award must be in writing and is enforceable like a decree of a civil court, where the grounds of challenge are limited.

The components of the 1996 Act, needs to be highlighted are that the 1996 Act, gives the parties to the dispute significant freedom to decide on the rules they wish to apply and who their arbitrators will be in comparison to the old regime governing arbitration in India. For example, the proceedings can take place either within India or outside the country in cases where the parties or the topics of the dispute have foreign origins. A second example is that depending on the contract the law applicable may be Indian or they may be a foreign country’s law of arbitration conduct and disputes on merits basis. The arbitral panel is also given the freedom not to adhere to the Indian Evidence Act of 1872 or the Code of Civil Procedure of 1908. This allows the arbitral process to be more flexible. The second component of the 1996 Act was that no judicial authority can intervene in the arbitral process but for a provision made in the Law itself. While misconduct and error apparent on the face of the award were legitimate reasons for seeking the setting aside of an award under the 1940 Act, which encouraged the disputants to litigate in courts and to draw out the process as long as possible, arbitral awards can only be set aside for very specific reasons under the new Act. These include that one of the parties was incapacitated; under the law arbitration agreement is not valid; not given proper notice of appointment by a party to an arbitrator, or unable to present its case by a party, the award given relates to a dispute was not contemplated by or not falling according within the arbitration agreement terms, the composition of the arbitral tribunal and the

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32 Supra note 30.
procedure was not followed accord to an agreement. The court has a power to set aside an award if dispute is not settled, or in conflict or contrary to public policy of India.

The 1996 Act, departed from the 1940 Act by making a salutary provision mandating the arbitrator to give reasons for the award. 1996 Act, no longer requires the parties to file an application to the court to make the award a rule of the Court enforceable by the issuance of a decree under the Code of Civil Procedure, 1908, taking away the legal formality, thus saving the considerable time of the litigants in the execution of arbitral award. However, the usual procedure as prescribed by the Code of Civil Procedure has to be followed in respect of the claims and defenses submitted by the parties.

The significant feature of the 1996 Act is that the provision relating to interim measures which empower the arbitrator or arbitral tribunal to pass interim orders regards to the dispute at the request of a party. As the 1940 Act, had no such provision except that it could only make an interim award. 1996 Act, provides for enforcement of certain foreign awards made under the New York Convention and the Geneva Convention respectively. No such provision existed in the 1940 Act. These vital provisions of the 1996 Act included “autonomy” of parties to arbitration, minimizing the role of the judiciary during arbitration and limiting the grounds for appeal against arbitral awards.

4.4 Definitions and Key Concepts

The Arbitration and Conciliation Act, 1996 governs the arbitration in India. Arbitration is a legal technique for resolving disputes through which parties have agreed to do so in advance submits their differences, disputes to a third party for final and binding determination. Parties can also settle their disputes through a permanent arbitral institution like the Indian Council of Arbitration, Chamber of Commerce e.t.c. The following are the basic concepts which are critical to understanding the process of arbitration.

34 Section 26.
35 Chapter I of Part II of the 1996 Act.
36 Chapter II of Part II of the 1996 Act.
4.4.1 Arbitration

As to the Arbitration and Conciliation Act, 1996 Arbitration\(^{37}\) is or not administered by the permanent arbitral institution. This is a verbatim reproduction of the text of Model Law\(^{38}\). The single meaning is that this definition attaches to arbitration is that it is not necessary that arbitration should be by any permanent institution for arbitration. It is not the definition of the concept and gives no meaning. It is a definition of inclusion only, i.e. all arbitrations would be included whether by a permanent body of arbitration or otherwise\(^{39}\). This definition, therefore, was drafted with the object of covering institutional as well as ad hoc arbitrations. It indicates that the arbitration is a dispute settlement mechanism outside the court system\(^{40}\).

Lady Justice Romilly MR defined the “Arbitration” in the well-known case of Collins vs. Collins as “An Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties\(^{41}\)”. In Amar Chand\(^{42}\) case, Supreme Court of India defined the arbitration as “judging of a dispute between parties or groups of people by someone not involved in the dispute and whose decision both parties agree to accept”.

David defines arbitration as, “Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons i.e., the arbitrator or arbitrators who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement\(^{43}\).

Halsbury’s Laws of England defines arbitration as, “the process by which a dispute or difference between two or more parties as to their mutual legal rights and

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\(^{37}\) Section 2 (1) (a) of the Act.

\(^{38}\) Article 2 (a) of UNCITRAL Model Law.


\(^{43}\) David, Arbitration in International Trade, 5.
liabilities judicially determined and by application of law have binding effect by one or more persons (the arbitral tribunal) instead of by a court of law.”

In Jivaji Raja Vs Khimji Poonja & Company High Court of Bombay defines arbitration as “Arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties to a person chosen by the parties or appointed under statutory authority, for determination of the same.

Arbitration as a mechanism for the resolution of disputes takes place, usually in private, pursuant to an agreement between two or more parties, under which the parties are to be bound to agree the decision given by the arbitrator which is made in terms of law or, if so agreed, on other considerations, after a fair hearing and such decision being enforceable at law. Thus, the distinctive feature of arbitration is that it is a private dispute resolution mechanism, which nevertheless provides arbitrators with judicial power. Four concepts which are core requirements for the arbitration are an arbitration agreement, a dispute, and the reference for determination to a third party, and an award. It is in the agreement to arbitrate that the arbitral process should be judicial and the parties agree to abide by the decision of the third party. Thus, the arbitration may be viewed as an effective substitute for court litigation for settlement of dispute or difference between the parties. The purpose of arbitration is to provide a summary, speedy, and inexpensive method of settling disputes, devoid of legal and procedural trappings.

4.4.2 Arbitration Agreement

An arbitration agreement is an agreement requires the person who signed them to resolve any disputes by binding arbitration, rather than in court before a judge. The concept of an arbitration agreement is spelled out in two provisions of the Arbitration and Conciliation Act, 1996 and is more elaborative than 1940 Act. The definition of “arbitration agreement” under Section 7 is identical to Article II (1) of the New York Convention. New York Convention sets forth the requirement of valid agreement and

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45 Jivaji Raja vs Khimji Poonja & Company AIR 1934 Bom 476.
46 Supra 41.
47 Supra 33.
48 Section 2 (a) of 1940 Act, defines “arbitration agreement” to mean ‘written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not’.
is of a particular importance in the context of Article 7 of Model Law. The Model Law was seen as a means of clarifying and widening the range of means that constitutes an ‘arbitration agreement’ under the Convention.

According to Section 7(1) of the Act and UNCITRAL Model Law defines an arbitration agreement as, “An agreement by the parties to submit to arbitration all or certain disputes which have been arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.

Between the parties the arbitration agreement must disclose their definite intention to refer their present or future dispute in respect of a definite legal relationship for arbitration with bilateral rights and binding obligations to make such reference and no particular form of arbitration clause and the parties has a intention to refer the dispute to the arbitration accord to terms of agreement.

The arbitration agreement must necessarily be in writing which may be in the form of a signed document, letters exchange, telegrams or any other means of communications or claim exchange and defense statements which is provided to record of the agreement. Any contract references to a document contains an arbitration clause also form an arbitration agreement. However, it is necessary to apply the arbitration that there should be a mandatory requirement of the settlement of disputes by means of arbitration because the aim of the arbitration is to settle the disputes between the parties and to avoid further litigation. The essential of elements of an arbitration agreement as explained by the Supreme Court in *Bihar State Mineral Development Corporation v. Encon Builders (P) Ltd* case, are the existence of a present possibility or of a 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.

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49 Article 7 (1) of the Model Law has been split into sub sections (1) and (b) and Article 7 (2) has been split into sub sections (2), (3) and (5) of section 7 of Arbitration and Conciliation Act, 1996 without any variations in the language of the two provisions.
53 Section 7(3).
54 Section 7 (4) (b).
55 Section 7(5) of the Act.
of the tribunal and that the parties *ad idem* i.e. consensus between the parties. It was viewed in *BPCL v. Great Eastern Shipping Co. Ltd*, a case that the survival of the arbitration agreement and the terms thereof between the parties can be proved not only by their words but also by their conduct\(^{57}\).

However, the parties' intention must be according to the conveying meaning. In this it exhibit that there had been a meeting of minds between the parties and they had actually reached an agreement upon all material terms, then and then only it can be said that a binding contract was capable of being spelled out from the contract or the correspondence.

The provisions of the Act make it amply clear that arbitration proceedings cannot be initiated in the absence of a dispute between the parties. In *Agri-Gold Exims Ltd v. Sri Laxmi Knits & Woven & others*\(^{58}\), the Supreme Court of the view that the term “dispute” must give its general meaning and the Court was bound to refer parties to arbitration in terms of an arbitration agreement between the parties.

### 4.4.3 International Commercial Arbitration

Section 2 (1) (f) of the Arbitration and Conciliation Act, 1996 defines “international commercial arbitration” as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the Law in the force in India and where at least one of the parties whether an individual, body corporate, or a company is having business or residing abroad and in the case of Government, the Government is of a foreign company. This defines two elements i.e. physical and conceptual. While the physical being that one of the parties to the arbitration should be foreigner i.e. either a foreign national or body of individuals whose central management or control is in foreign hands or government of some foreign country and the conceptual being as arising out of legal relationship between the parties, contractual or otherwise and must be considered as “Commercial” under Indian laws.

On close scrutiny of the text, the article has three components, a) international b) commercial and c) arbitration. Therefore, an arbitration to be covered by the 1996

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\(^{57}\) BPCL vs. The Great Eastern Shipping Co Ltd, 2007 (12) SCALE 247.

Act must be of a commercial in nature and the dispute must be arising out of a legal relationship and international in character. It also gives an impression that the international character shall have to be determinant by the nationality of the parties rather than the subject matter of arbitration. In other words, if a dispute is a commercial and international in character but is between Indian nationals, is not considered as International commercial arbitration within the meaning of this definition.

In *Gas Authority of India v. Spie Capag*\(^59\) case the Delhi High Court while considering the circumstances in which the nature of a commercial arbitration agreement has an international in character was that a) if one of the parties has business located abroad; or b) the agreement has to be performed abroad; or c) the subject matter of the agreement is located abroad; or d) one of the parties to the agreement is a foreign national. According to the above, three factors i.e. a) the parties b) the subject matter and c) the place of arbitration, which determines the international character of the commercial arbitration.

However, the Supreme Court in the *TDM Infrastructure (P) Ltd. V. U.E. Development India (P) Ltd*\(^60\) case, while examining the case of a company incorporated in India but the central management and control being exercised in Malaysia, under subsection (iii) of Section 2 (1) (f) of the 1996 Act, opined that determination of nationality of the parties being crucial in the matter of appointment of arbitrator under the Act and in *COMED Chemicals Ltd. V. C.N Ramanand*\(^61\) case it was held that a Company incorporated in India only have nationality of India for this purpose, but any disputes with person of Indian origin and settled in other Country and being a foreign national therefore, it shall be an international commercial arbitration.

The Law Commission of India\(^62\) while reviewing the functioning of Arbitration and Conciliation Act, 1996 has received many representations and suggestions from the business community that the dropped the ‘commercial’ word

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\(^{59}\) Gas Authority of India v. Spie Capag AIR 1994 Del 75.  
\(^{60}\) TDM Infrastructure (P) Ltd. v. U.G. Development India (P) Ltd AIR 2008 SC 2928.  
\(^{61}\) COMED Chemicals Ltd. v. C.N Ramanand AIR 2009 SC 494.  
applies to international arbitration either it is commercial or not, where the arbitration seat is placed in India. The Commission finding substance basing on the case laws that it has examined, was of the view firstly, that on several times in different way the issue ensues either the arbitration is ‘commercial’ in nature or not as due to this leads unnecessary litigation. Secondly, there is no any reason to leave out text ‘commercial’ from Section 2 (1) (f) in Part I that when an arbitration is in international is not in an commercial nature. In order to remove any confusion in understanding domestic and international arbitration, the Commission proposes to add in sec 263 of the Act about the definition “domestic arbitration” and “international arbitration” and the existing definition was mentioned under section 2(1)(f) of “international commercial arbitration” is to be added in next paragraph

4.4.4 Arbitral Award

An arbitration award is an award which is granted by the arbitrator through their decision. It can be one party has to pay money to the other party. It can also be a non-financial award, such as stopping a certain business practice or attach an employment inducement. Arbitral award as per section 2 (1) (c) includes ‘an interim award’. It neither gives any meaning nor explains as to what an award is and what it contains and the concept of an interim award.

It is a trait that there is no internationally accepted definition of the term ‘award’. However, in practice, the term ‘award’ is reserved for decisions that it finally determines the substantive issues with which they deal. In other words, an award is an expression of an adjudication of a dispute between the parties and as long as the manifestation of the decision on the dispute raised is clear and unambiguous, it cannot

63 2.1.3 A The new definitions as proposed will be as follows: (ea) ‘domestic arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, where none of the parties is,- (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country, and shall be deemed to include, international arbitration and international commercial arbitration where the place of arbitration is in India. (eb) ‘international arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, and where at least one of the parties is, - (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.
be flawed merely because it does not subscribe to any particular format\textsuperscript{64}. Likewise, there is no ‘specific form’ of the award and ‘what substance is to be in the award’ is not prescribed in the Act except that the award shall state reasons. An award must give a decision and any form of words which expresses a decision is sufficient. According to Russell, “an award in order to be valid must be final, certain, consistent and possible and must decide submitted matters, and no more than matters submitted\textsuperscript{65}.

The following that makes the substance of an award according to Section 31 of the Act-

i) The award should be in writing; oral awards are not recognized in law;

ii) The award can be signed by the members of the arbitral tribunal;

iii) If arbitral tribunal consists of more than one member, majority members are to sign the award. However, reasons for the omitted signature is to be mentioned; an award should be signed by a majority of the members who are present throughout the proceedings and took part in all the deliberations;

iv) The members of the arbitral tribunal may sign at the foot of the award preferably at the same time and in the presence of other members;

v) The arbitral tribunal shall state the reasons based on which it has determined the award/arrived at award;

vi) The arbitral tribunal shall mention the date and place of the award where it is made; and

vii) After the award is made, a signed copy shall delivered to each party.

An arbitral award may either be a ‘final award’ or an ‘interim award’. It may also be a ‘domestic award\textsuperscript{66} or a ‘foreign award’. According to Supreme Court, 1996 Act contemplates four types of awards i.e. interim award, additional award, settlement award or agreed award and final award\textsuperscript{67}. The Court compared additional or partial award with the interim. As a protective measure, an arbitral tribunal may make an

\textsuperscript{64} O.P. Malhotra, \textit{The Law and Practice of Arbitration and Conciliation}, Lexis Nexis Butterworths, (2\textsuperscript{nd} Ed, 2006).

\textsuperscript{65} Russell on Arbitration (22 Ed, 2003).

\textsuperscript{66} Section 2 (7).

interim order at the request of the party regarding dispute\textsuperscript{68}. Such order will be effective only during the arbitral proceedings and a party may restrain from doing something which may be detrimental to the interest of the other party.

This may be in the form of an interim injunction. But unlike an interim measure (order) an interim award shall be a part of the final award and it is binding on the parties\textsuperscript{69} and such an interim award can only be passed after a proper hearing. In the form of an interim award the interim measures are accepted. In \textit{McDermott International Inc v. Burn Standard Co Ltd}\textsuperscript{70} in this case, the Supreme Court of the opinion that additional award is valid, being within the framework of the law. The general purpose of such order would be to prevent or minimize any disadvantage, which may be due to the duration of the arbitral proceedings until the final settlement and the implementation of its result. Where the matters are so entwined with each other that the decision on one is dependent upon, or would affect, the other matters no interim award can be made on such a matter. Nor can an interim award be made which cannot be merged into the final award. Supreme Court, in \textit{SBP & Co v. Patel Engg & Co}\textsuperscript{71} case, held that interim orders of the arbitral tribunal are not challengeable before the court. Only the final award can be questioned. The situation should be such an interim order/award only could save the parties from grave consequences. A decision of the arbitrator on the preliminary issue of jurisdiction is not an interim award as it does not decide the claim or any part of the claim or an issue of liability\textsuperscript{72}.

Section 30 codifies the law relating to ‘settlement award’. Such award has been described as a ‘compromise award’ ‘agreed award’ or ‘settlement award’. This provision is designed to encourage settlement, in the course of arbitral proceedings. If during the arbitral proceedings, the parties come to a settlement of the dispute, on being informed of the settlement, the arbitral tribunal, if it has no objection, shall precede the settlement in the form of an arbitral award accord to the terms\textsuperscript{73}. An

\textsuperscript{68} Section 17.  
\textsuperscript{69} Section 31 (6).  
\textsuperscript{72} Uttam Singh Dugal Vs. Hindusthan Steel Ltd; AIR 1982 MP 206; UOI Vs. East Coast Boat Builders & Engg Ltd ; AIR 1999 Del.  
\textsuperscript{73} Section 30 (2)
award shall have the same effect as any award in the dispute,\textsuperscript{74} it is final and binding between the parties\textsuperscript{75} and is enforceable as if it was a decree of the court\textsuperscript{76}.

A ‘final award’ as its name indicates, finally concludes all the issues in dispute between the parties. Such an award is final and binding as it determines all the issues referred to arbitration or determines all the issues which have remained outstanding following earlier awards dealing with only some of the issues\textsuperscript{77}. In this context, the word ‘final’ means that as between the parties to the reference the award is conclusive as to the issues with which it deals, unless and until it is set-aside by the court\textsuperscript{78}.

The award stands in the same footing as a decree of the Court, whether it has passed into a decree or not and therefore it is binding upon the parties\textsuperscript{79}. If the agreement prescribes a time limit within which an award is to be passed, the arbitrator is bound by it. An arbitrator is bound to pass the award within the time prescribed or within the extended period if any.

An award must be read as a whole. It should be construed liberally to give effect to the real intention of the arbitral tribunal\textsuperscript{80}. The supreme court in Santa Sila v. Dhirendra Nath Sen\textsuperscript{81} observed that-

\begin{quote}
"The Court should approach the award with a desire to support it if that is reasonably possible rather than to destroy it. Unless otherwise required, the award need not formally express the decision of the arbitrator on each matter of difference. The silence of the award on a particular matter is a clear indication that the claim was not upheld”.
\end{quote}

4.4.5 Foreign Award

The foreign arbitral award was defined in the 1937 Act and the 1996 Act were however not much different. Both emphasize on the dispute being commercial in

\begin{footnotes}
\footnote{Ibid.}
\footnote{Section 35}
\footnote{Section 36}
\footnote{Section 32 (1)}
\footnote{Section 34.}
\footnote{Satish Kumar v. Surendra Kumar AIR 1970 SC 833.}
\footnote{Gobardhan Das v. Lakshmi Ram, AIR 1954 SC 689.}
\footnote{Santa Sila v. Dhirendra Nath Sen AIR 1963 SC 1677.}
\end{footnotes}
nature further Section 4(2) of the Act says “Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceeding in [India], and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award”. Further, on fulfillment about the enforceability of the award, the Court shall order to be filed the award and proceed to pronounce the judgment according to the award.

The expression ‘Arbitral Award’ has not been defined in Part I, but the expression ‘foreign award’ has been defined in Section 44 of Part II of the Act. To qualify as foreign award under the Act, it must be an award on where the difference are out of legal relationship treated as commercial under Indian law, the award should be made according to an agreement in writing for arbitration which is to be administered by the New York Convention and not to be governed by the law of India; and such an award should have been made outside India in the territory of foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention.

The High court of Calcutta in Serajuddin v. Michael Golodetz states the essential elements of foreign arbitration results to a foreign arbitral award are

1. Arbitration must be conduct in foreign lands
2. By the foreign arbiters
3. By applying foreign laws
4. The party must be a foreign nationality.

The Foreign Awards (Recognition and Enforcement) Act, 1961 contained a specific provision to exclude its operation to what may be regarded as ‘domestic award’ in the sense of the award is being made according to an arbitration agreement.

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governed by the Indian law, although the dispute was with a foreigner and the arbitration was held and the award was made in a foreign State\textsuperscript{85}.

The Supreme Court while examining the language of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961 in National Thermal Power Corporation v. The Singer Co\textsuperscript{86} case clarified that-

“An award if ‘foreign’ not merely because it is made in the territory of a foreign state, but because it is made in such a territory on an arbitration agreement not governed by India. An award on arbitration agreement administered by the law of India, though rendered outside India, is affected by the saving clause in section 9(b) of the Act of 1961 and is, therefore, not a ‘foreign award’.

In Bhatia International v. Bulk Trading SA\textsuperscript{87} case, the Supreme Court has ruled that general provisions of Part I continue to apply to international commercial arbitrations outside India. Thus, the award from such arbitration would be a domestic award in terms of s.2 (7). The proper law of the contract, not the venue of arbitration, determines the nature of such an award under Indian law. In Bharti Televentures Ltd v DSS Enterprises P. Ltd\textsuperscript{88} case the Delhi High Court ruled that an award from an international commercial arbitration made outside India is a foreign award irrespective of the proper law. Adopting a literal interpretation, the court reasoned that territorial nexus is the only relevant criterion under s.44. Also, domestic awards and foreign awards are subject to distinct legal regimes and the ratio of Bhatia International is limited to the applicability of Section 9 in cases where the arbitral proceedings are made outside India but the properties are situated in India.

Supreme Court in Centrotrade Minerals\textsuperscript{89} case overruling the above proposition clearly ruled that an award from an international commercial arbitration held outside India is a foreign award as territoriality is the only criterion under

\textsuperscript{88} Bharti Televentures Ltd v. DSS Enterprises P. Ltd (2005) 2 Arb.L.R. 561.
Section 44. The 1996 Act, puts domestic awards and foreign awards in two different and distinct compartments, the subject of course to certain overlapping provisions as has been noticed in some decisions of this Court. It may not, therefore, be possible to hold that the 1996 Act contemplates that an arbitration award can be an admixture of the domestic award and foreign award.

Under Part II of the Act a foreign award is enforceable in a country if it is a signatory to the New York or Geneva Convention and that territory must be notified by the Central Government of India. Once an award is made to be enforceable it is deemed to be a court decree and executed as such. In the Act, there is no method for setting aside a foreign award. A foreign award can only be enforced or refused it can be enforced but it cannot be set aside. This fundamental variation in a foreign and a domestic award has been customized by the Supreme Court in the recent case of Venture Global Engineering v. Satyam Computer Services Ltd\(^{90}\) case and further confirmed in Videocon Industries Limited v Union of India\(^{91}\) case.

4.5 Understanding Commerciality in Arbitration

The phrase ‘considered commercial under the law in force in India’ appears in three places\(^{92}\) in the Arbitration and Conciliation Act, 1996. This phrase is thus relevant in connection with the arbitral proceedings to enforcement of the award under Part I and also with the enforcement of ‘foreign awards’ made under Part II and as such the arbitration of a dispute or enforcement of an award must arise out of a legal relationship and such a relationship must be treated as a commercial under Indian law.

The Gujarat High Court observed the term “commercial” and suggest that it pertains to commerce, and therefore, ultimately nothing else than money\(^{93}\). The Supreme Court of India in Fateh Chand v. State of Maharashtra\(^{94}\) case held that “any service or activity which in modern complexities of business would be considered to be a lubricant of the wheels of commerce is commercial”. A division bench of the

92 First in the definition under Part I Section 2 (1) (f), second, in the definition of ‘foreign award’ of Part II Chapter 1, Section 44 and the third is at Section 53 of Part II Chapter 2 under the definition of foreign award.
93 Orient Middle East Lines Ltd.v. Brace Transa Corporation AIR 1986 Guj 62
94 Fateh Chand v. State of Maharashtra AIR 1977 SC 1825
Bombay High Court was critical on the view that there must be some legal provision in the agreement which specifies or indicate or provides recognition of the legal relationship as commercial and an agreement must be commercial as not normally understood but by virtue of provisions of law in force in India. The division bench while expressing its opinion in *European Grain and Shipping Ltd., v. Bombay Extractions (P) Ltd.*, case of the view that “where it was held that mere use of the word ‘under’ preceding the words ‘the law in force in India” would not definitely mean that one has to find a statutory provision or a provision of law which specifically deals with the particular legal relationship which is being commercial in nature and it was not necessary that there should be a statutory provision enumerating such legal relationship for determining whether the relationship is commercial or not.

In regard to defining the term “commercial” the Law Commission of the view that is in sec.2(1)(f) of the 1996 Act, the wider definition is not referred in UNCITRAL Model, or in a footnote or an Explanation to sec.2(1)(f) of the 1996 Act. Therefore, in order to remove any confusion about commercial or what is not, the Commission was proposed to change the definition to the term “International Commercial Arbitration” is in the line of Article I (3) of New York Convention 1958.

4.6 Appointment of Arbitrators and challenges to the appointment

According to the Arbitration and Conciliation (Amendment) Act, 2015 allows appointing an arbitrator by parties mutually. According to sec 10 of the Act mentioned that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, if the parties fail to do so, the arbitral tribunal shall consist of a single arbitrator.

Section 11 of the Act mention about the method of arbitrators appointment, Section 12 of the Act enumerates the on which grounds can be challenged about the appointment of an arbitrator by a party or parties whereas the advanced Section i.e.

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95 European Grain and Shipping Ltd v. Bombay Extractions (P) Ltd AIR 1983 Bom 36
96 International commercial arbitration means international arbitration considered as commercial under the law in force in India.
Section 13 mentions the procedure to be adopted for challenging the appointment of an arbitrator. Both the sections are, therefore, cognate sections.

According to section 11, “a person of any nationality may be an arbitrator, unless otherwise agreed by the parties”. The abovementioned section also deals with wherein the parties fail to appoint an arbitrator mutually. In such situation, the appointment shall be made, upon request of a party, by the Supreme Court or any person or institution appointed by such Court, in the case of an International Commercial arbitration or by High Court or any person or institution appointed by such Court, in case of a domestic arbitration.\(^{98}\)

As per section 12\(^{99}\), the arbitrator appointment may be challenged only in two situations. First, if the circumstances exist the justifiable grounds is independence or impartiality; second, if he does not qualified accord the parties. Sub-section (1) casts a duty on a person who is for an arbitrator has to disclose in writing whether he is independence, impartiality or not. These obligations apply not only to a sole arbitrator or the Chairman of the arbitral tribunal but also party-appointed arbitrators. This provision contemplates two stages for an arbitrator to make the disclosure. The first stage is the pre-appointment stage, when the prospective arbitrator is approached for being appointed as an arbitrator and the second stage is after his appointment as arbitrator and during the course of arbitral proceedings; any circumstances likely to give rise to justifiable doubts regards to his independence or impartiality it comes into existence then the arbitrator should without any unnecessary delay disclose the circumstances in writing to the parties\(^{100}\).

*Russell* states -

“There is universal agreement amongst jurists of all the countries that it is of the first importance that judicial tribunals

\(^{98}\) Ibid  
\(^{99}\) Sec 12: Grounds For Challenge - When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in subsection (1) unless they have already been informed of them by him. An arbitrator may be challenged only in two situations. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason, of which he becomes aware after the appointment has been made.  
\(^{100}\) Section 12 (2).
should honest, impartial and disinterested. This rule applies in full force to arbitral tribunals, subject only to this exception, that parties who are free to choose their own tribunal may, provided they act with full knowledge, choose dishonest, partial or interested arbitrators (though this exception is in its turn subject to a statutory exception which gives parties who have so chosen a locus poenitentiae in certain circumstances). But apart from this exception, arbitrators who are in all other respects suitably qualified or disqualified by dishonesty, partiality or interest”¹⁰¹.

The question is as to whether those doubts are justifiable is measured objectively. In *International Airports Authority of India v. K.D. Bali & Anr* case, the Supreme Court held that “the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision¹⁰²”.

The parties may agree upon certain qualifications, required of an arbitrator¹⁰³, which may be relevant and necessary for the subject matter of the dispute. Such qualifications may be expressly specified in the arbitration clause or the submission agreement. The qualification may also be included in the agreement by incorporation of rules of some arbitral institutions. In the language of *Redfern and Hunter*, ‘the task of presiding over the conduct of an “international commercial arbitration” is no less skilled than of that driving a car or flying an aircraft¹⁰⁴’. It cannot be entrusted to a person who lacks the necessary education, training, skill and practical experience to deal with the subject matter of the arbitration. The Supreme Court of the view that while appointing an arbitrator the Court’s cannot ignore the qualifications prescribed under the agreement¹⁰⁵, where a Gazetted Officers of Railway to be appointed as the arbitrator and hence appointment of arbitrator who is not an officer so prescribed and

¹⁰¹ Russell on Arbitration, (20th Ed).
¹⁰³ Section 12 (3) (b).
as such appointment of an arbitrator who is a retired High Court Judge is illegal\textsuperscript{106}. The purpose of the conditions was to ensure the right sort of people familiar with the practice at the time of their appointment sat as arbitrators, not to oblige arbitrators to remain in full-time employment so as to be allowed to continue to sit on a tribunal\textsuperscript{107}.

If any party intends to challenge the appointment of arbitral tribunal within the 15 days a challenge is to be made by the petitioner become aware of the arbitral tribunal constitution or the conditional grounds for challenge which are furnished or else it will not be acceptable the challenge\textsuperscript{108} or treated as deemed to have been waived\textsuperscript{109}. Further, according to the agreement between the parties the arbitral tribunal shall decide on the challenge. The tribunal shall continue with the arbitral proceedings and render the award if the challenge is not eminent and the challenge is made by an aggrieved party at that stage. This is another considerable departure from the Model Law, if the arbitral tribunal rejects the challenge then recourse to a court of law\textsuperscript{110}.

4.7 Jurisdiction of Arbitrators

The Arbitrator’s right to rule on their own jurisdiction is an almost fully uncontroversial part of the well-established doctrine and practice in international arbitration. The provision of Art.16 MAL\textsuperscript{111} in its basic idea now really reflects the globally harmonized approach to the issue universally called Kompetenz Kompetenz. Practically all countries recognize the right of the tribunal to decide on their jurisdiction, subject to the subsequent court control.\textsuperscript{112} It integrates the separability and kompetenz-kompetenz doctrines, which strengthen the arbitral process as a self-rule. The arbitral tribunal has the capability to settle disputes on their own appointment as well as jurisdiction or on any other objections regarding the existence or validity of the arbitration agreement, subject to court control. This power often referred to as kompetenz-kompetenz, is an essential and widely accepted feature of modern

\textsuperscript{106} Union of India v. V.S. Engineering, AIR 2007 SC 285.
\textsuperscript{107} Russell on Arbitration, (22\textsuperscript{nd} Ed, 2003).
\textsuperscript{110} Article 13 of Model law.
\textsuperscript{111} UNCITRAL Model Law on International Commercial Arbitration
international commercial arbitrations. For that principle, an arbitration clause shall be managed as an agreement in an independent nature as the other contract terms, and an arbitral tribunal decision is that it is null contract and not to be ipso jure i.e., by the law itself to invalidity of the arbitration clause. The ultimate court control on the issue of an arbitrator’s jurisdiction is also of manifest importance, as this is the only way fraudulent acquisition of a tribunal’s power can be undermined.

Under the Arbitration Act of 1940 has no provisions of the Arbitral Tribunal permitted to make a final decision of jurisdiction and it was the power of the court to decide on the jurisdiction. But under Section 16 of the Arbitration and Conciliation Act, 1996 stated that the Arbitral Tribunal has been allowed the power to make a ruling on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation provides that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. Section 16 of the Arbitration and Conciliation Act also contains the principle of competence-competence. It has two aspects that are as mentioned as follows: firstly, without support of the courts the tribunal may decide on its jurisdiction and secondly, before the tribunal has made a resolution on this issue the courts are prevented from determining this issue.

The jurisdiction of the arbitrator may be challenged as a preliminary objection. However, such plea that before the submission of the statement of defense it shall be raised the arbitral tribunal does not have jurisdiction. A challenge to exceeding the scope of authority of the arbitrator, though not a preliminary objection, such a plea has to be raised as quickly as on the stated matter. The arbitral tribunal shall decide on such pleas. If it rejects plea regarding the qualification or independence or impartiality, the arbitral tribunal shall continue with the arbitral proceedings for making the award. In the event of a plea regarding jurisdiction or arbitral tribunal going beyond its scope, the arbitral tribunal may admit the pleas for justifiable reasons even though they are delayed.

114 Section 16(1) (b).
If the arbitrator accepts the pleas against his appointment he has to withdraw from his office. On the other hand, if the pleas are rejected, the arbitral tribunal shall continue with the proceedings. In all the above situations, the aggrieved party may have a remedy of filing an application to a court for setting aside such an arbitral award.

There are no two opinions that the arbitrator is appointed by the parties with mutual consent. A question arises, if it is so, how can jurisdiction of the arbitrator be challenged by one of the parties. Hence, it is necessary to know ‘what mutual consent really means’. Where arbitration agreements are a standardized format like Government, institutionalized formats such as ICA, ICC or LCIA both parties will sign the agreements abiding themselves with the conditions. According to these conditions, either of the party or both can empower to appoint an arbitrator. In case of an arbitral tribunal consisting of three members, one member will be by each of the party’s nominee and the presiding arbitrator by the appointed arbitrators as the case may be. Mere appointment of an arbitrator does not mean that claims are acceptable, or they can be arbitrated, or they truly arise out of the agreement. Parties have a right to object the arbitral tribunal jurisdiction and its powers. Hence, an arbitrator has the power about own jurisdiction and to receive any objections regarding to the arbitration agreement. Supreme Court observes in Secure Industries case that the effect that the arbitral tribunal’s authority under the section is not with its jurisdiction but moves to the deep of its jurisdiction117.

The term ‘jurisdiction’ signifies ‘the power to decide’. In *Hindustan Petroleum Corp v Pink City Midway Petroleum*118 case where the Supreme Court while answering the question on what would be the role of the civil court when an argument is raised that an arbitration clause does not apply to the facts of the case, concluded that Section 16 of the Act enumerated that the Arbitral Tribunal has a power on its own jurisdiction with objections in regards to the validity of the arbitration agreement, the court below cannot proceed to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as required under Sections 16 of the Act. In

SBP & Co v. Patel Engineering Ltd & another\textsuperscript{119} case, the Supreme Court reiterated that Section 16(1) enables the arbitral tribunal has a power about its own jurisdiction with objection in regards to validity of the arbitration agreement.

4.8 Recourse against the Arbitral Award

The arbitral award given by the arbitrators is final and binding between the parties and the parties cannot appeal against it. But the parties may take recourse to a law court for setting aside the arbitration award on certain grounds under sec 34 of Arbitration and Conciliation Act, 1996. The effect of an award no doubts that the parties cannot appeal against it as to its merits and the court cannot interfere with it on merit or substitute its own view in place of the arbitrator. The Supreme Court has observed that “an arbitrator is a judge appointed by the parties and as such an award passed by the arbitrator is not to be lightly interfered with”. But that does not mean that there is no check on the arbitrator’s conduct. In order, therefore, to assure proper conduct of proceedings, the law allows certain remedies against an award. The three remedies are available against award are modification, remission and setting aside. These remedies are available for rectification of errors and can be obtained through a court of law having jurisdiction over the matter\textsuperscript{120}.

In India the mentioned grounds for setting aside an award rendered, either in a domestic or international arbitration are provided under Section 34 of the Arbitration and Conciliation Act, 1996. Following the present law, the Indian Act provides for a limited recourse to challenge against an arbitral award. The limited grounds of challenge are universally recognized. To paraphrase, an award can be set aside only if:

(i.) a party was under some incapacity; or
(ii.) the arbitration agreement was not valid under the governing law; or
(iii.) a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or

\textsuperscript{119} SBP & Co v. Patel Engineering Ltd & another AIR 2006 SC 450; 2005 (9) SCALE 1.
(iv.) the award deals with a dispute not contemplated by or not falling within
the terms of submissions to arbitration or it contains decisions beyond the
scope of the submissions; or
(v.) the composition of the arbitral tribunal or the arbitral procedure was not
subject with the agreement of the parties; or
(vi.) the subject matter of the dispute is not capable of agreement by arbitration;
or
(vii.) the arbitral award is in differ with the public policy of India.¹²¹

Section 34 goes on to add an "Explanation" in relation to the ground of public
policy to clarify that an award if the it affected by fraud or corruption or in violation
of the confidentiality requirements attached to the conciliation proceedings provisions
contained in the Act.¹²²

An award can be challenged within period of three months from the receipt
date of an award. However, on the evidence of sufficient cause the courts may
condone a delay up to maximum of 30 days. According to any challenge to an award,
the decision given is final and binding on the parties and as enforceable as a decree of
the Court.

In examining, reasoning and concluding in respect of setting aside an award
the observation of English Court is worth noting in the context. It amplified the way it
has to be as under-

“The principles to be applied by the Court to an arbitrator’s
award are that first, the Court should read an arbitral award
as a whole in a fair and reasonable way. It should not engage
in minute textual analysis. Second, where the arbitrator’s
experience assisted him in determining a question of law, such
as the interpretation of contractual documents or
correspondence passing between members of his own trade or
industry, the court would accord some deference to the
arbitrator’s decision on that question. The court would only

¹²¹ www.theindianlawyer.in/blog/2016/08/23/setting-aside-arbitral-award/
¹²² Section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996.
reverse that decision if it were satisfied that the arbitrator, despite the benefit of his relevant experience, had come to the wrong answer. Questions of law arising out of an award are to be identified in line with existing authority by examining the way in which an arbitrator had stated in law in his reasons and by examining whether the correct application of law to the facts would have led to a different decision”\textsuperscript{123}.

In \textit{Sanshin Chemical Industry v. Oriental Carbons & Chemical Ltd.},\textsuperscript{124} a dispute arose between the parties regarding the decision of the Joint Arbitration Committee relating to the venue of arbitration. The Apex Court stated a decision on the question of venue will not be either an award or an interim award so as to be appealable under sec 34 of the act.

In \textit{Brijendra Nath V. Mayank}\textsuperscript{125} the Court stated that where the parties have acted upon the arbitral award during the pendency of the application challenging its validity, it would amount to estoppels against attacking the award.

An award in \textit{Bharat Cocking Coal Ltd v. L.K. Ahuja & Co}\textsuperscript{126} in the nature of hybrid i.e. partly speaking and partly non-speaking, the Supreme Court held that the award suffered from an apparent defect and, therefore, liable to set aside. Where a part of the award suffered from an apparent error or legal misconduct such part if the award found to be severable from the valid part of the award, therefore, the entire award was not liable to be set aside. A part of the award allowed a claim which was time-barred, was separable from the rest of the valid award\textsuperscript{127}.

Supreme Court in \textit{Renu Sagar Power Co. Ltd. v. General Electric Co}\textsuperscript{128} case was of the view that an award could be set aside against to the public policy of India or against the interests of India or to justice or morality not yet on the grounds that it is based on an error of law or fact. However, in \textit{Oil and Natural Gas Corporation vs. Saw Pipes}, the Court included an added another ground is “patent illegality”, thereby

\textsuperscript{123} Kershaw Mechanical Services Ltd v. Kendrick Construction Ltd, (2006) 4 All ER 79 (QBD).
\textsuperscript{124} Sanshin Chemical Industry v. Oriental Carbons & Chemical Ltd AIR 2001 SC 1219
\textsuperscript{125} Brijendra Nath v. Mayank AIR 1994 SC 2562
considerably widening the scope of judicial review on the merits of the decision. In *Saw Pipes* case the court obtained that the scheme of Section 34 which dealt with setting aside the domestic arbitral award and Section 48 which dealt with enforcement of foreign award were different.

### 4.9 Enforcement of Arbitral Award

The enforcement of the award is an important and last step that follows the arbitration proceedings. The award is enforced as a decree of the court. In the Act of 1996, there were two interesting features dealing with enforcement of awards conferring finality to the award of arbitral u/s 35, and u/s 36 is awards enforcement in the manner as a court decree. whereas section 35 states the recognition to the arbitral award as final and binding, unless impeached on the grounds set out under Section 34 on the other hand section 36 lays down two conditions which necessarily have to be satisfied before enforcement of award that are as follows: (i) the time taken for making of an set aside the award application has to be expire and (ii) such type of an application have made was to be refused. The above makes clear that the ultimate power of the court to look into the question whether the award is hit by mischief on account of grounds set out under Section 34 on which an award can be set aside. Now the consequence of the time expiring under Section 34 is that the award becomes immediately enforceable without any further act of court in the manner as a court decree as accord to the Code of Civil Procedure, 1908 (5 of 1908).

Under the Act of 1940, once the award is published by the arbitrator it is only the end of one round of litigation for commencement of another round, which at times becomes more onerous and time consuming because under Section 14 of the 1940 Act, the arbitrator has to file the award before the court, either on request of the interested party either on direction of the court, the affected or defeated party can, seek to modify the award under Section 15, remit the award under Section 16 or even pursue to set aside the award under Section 33 for the grounds set out in Section 30. In contrast, under the Act of 1996, the second round of litigation to confirm the award into a decree has been taken away, of course, subject to the power of the court to have

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129 Section 34 mandates time for making application to set aside the arbitral award as three months from the date of receipt of the copy of the arbitral award plus 30 days which Court could give extension in its discretion, if concerned party proves sufficient cause, but not thereafter; and If such an application is made it has to be refused.
the last word on the award, because the award is still accord to scrutiny under Section 34 for impeachment which however gives only a narrow scope for involvement by the court compared to the grounds under 1940 Act.

Section 36 makes arbitral award capable of being executed in court in its own right and it is no longer required to be filed in a court to make it a decree i.e. rule of the court. Thus, it is a special feature of the arbitral award under the 1996 Act that the party need not wait for a formal decree for enforcement of the award. The Kerala High Court in Ramaswamy vs. Principal Subordinate Judge\textsuperscript{130} case has held that the Execution Court is duty bound to accept the execution petition with a certified copy of the award. In Damodar Vally Corporation v. Calcutta Electric Supply Co. Ltd\textsuperscript{131} case, the Calcutta High Court of the view that execution of part of the award is not permissible during the pendency of the application for setting aside of an award as Section 34 of the Act. Similarly in National Aluminium Co. Ltd v. Pressteel & Fabrications (P) Ltd\textsuperscript{132} case, the Supreme Court held that once an application under Section 34 for setting aside is filed, the award simply becomes in-executable under Section 36 of the Act, the award cannot become executable decree because of pendency of application under Section 34 and no execution proceedings can be initiated to enforce any part of such an award.

The 1996 Act does not mention about stamping or registration of an award. In M. Anasuya Devi v. Manik Reddy\textsuperscript{133} case, the Supreme Court while examining the effect of non-stamping and non-registration of an award held that section 34 of the 1996 Act permits an award to be set aside ‘only’ on the grounds listed therein and non-stamping or non-registration of an award is not one of them. Accordingly, an award cannot be set aside on the ground of non-stamped/improperly stamped or unregistered. The Madras High Court in N. Poongodi Vs. Tata Finance Ltd\textsuperscript{134} case clarified that once an arbitral award has become final and binding upon the person or persons claiming under and bound by the award, the said award is impressed with the character of a decree and can be enforced as a court decree.

\textsuperscript{130} Ramaswamy v. Principal Subordinate Judge (1997) (2) KLT 393
\textsuperscript{131} Damodar Vally Corporation v. Calcutta Electric Supply Co. Ltd AIR 2005 Cal. 67
\textsuperscript{132} National Aluminium Co. Ltd v. Pressteel & Fabrications (P) Ltd (2004) 1 SCC 540
\textsuperscript{133} M. Anasuya Devi v. Manik Reddy (2003) 8 SCC 565
\textsuperscript{134} N. Poongodi vs. Tata Finance Ltd (2005) (3) Arb. LR 423 Madras
4.10 Public Policy Considerations

Public policy means that a government maintains the needs of citizens by its constitution. If this definition is vague, it is due to a public policy is generally not a tangible thing but rather to interpret of laws, or regulations established by political method.135

The concept of ‘Public policy’ proposes which relates some matter of public good and public interest. The following are varied from time to time i.e., what is good or what is injurious to the public good or interest.136 There is no definition to the term “Public Policy of India” in the Arbitration and Conciliation Act, 1996, except the reference under Section 34 (2) (b) (ii) of Part I, Section 48(2) (b) of Part II– Enforcement of Certain Foreign Award (New York Convention Awards) and Section 57 (I) (e) of Part II– (Geneva Convention Awards), which inter alia states that the awards made, be not contrary to the “Public Policy of India”. Similarly, in Part III relating Conciliation Section 75 Confidentiality and Section 81 Admissibility of Evidence in other proceedings also restrain the sole Arbitrator /Arbitral Tribunal to make award any which is against the “Public Policy of India.”

Rule 34 of the UNCITRAL Model Rules provides grounds for setting aside an arbitral award and one of the grounds is that where, the award is in conflict or contrary to the public policy of the state was verbatim reproduced in Section 34 of the Arbitration and Conciliation Act, 1996. The UNCITRAL Model Law Commission mentioned in its report that the term “public policy” comprises “fundamental principles of justice”. This provision was inserted in the Model Rules after a great deal of debate and the words ”public policy” of the State were preferred in view of its universal acceptance.

According to Arbitration and Conciliation Act, 1996 a domestic arbitration award may set aside award if it is against public policy of India as section 34 of the Act. The Indian courts have explained "public policy of India" widely in ONGC v Saw Pipes137(Saw Pipes) the Supreme Court said it included circumstances where a

tribunal has made an error in applying Indian law. This interpretation has guide to the courts reviewing the merits of awards as if the arbitrators were a lower tier of the court system.

The expression “Public policy” or “exposed to Public policy” is not defined either in Act of 1996 or in the Contract Act, 1872. The reason is that these expressions are incapable of precise definition as the concept to connote larger public interest or public good. The Supreme Court of the view in Renusagar Power Plant Co. v. General Electric Co\(^\text{138}\) case that “from the very nature of things, the expressions public policy 'as opposed to public policy' or 'contrary to public policy' is incapable of precise definition”, and it contains lack of a viable definition to the concept “international public policy” the court found difficult to construe the expression “public policy” in Article V (2)(b) of the New York Convention to mean international public policy. It could be, construed both in a narrow or wide sense. Any declaration or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction. The court while applied the principles of private international law recognising the intent of the 1996 Act, held that an award would be contrary to public policy if such enforcement is contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality\(^\text{139}\), thus gave a narrow view leaving little scope of judicial intervention in arbitration proceedings and the final determination of awards.

The limited grounds of challenge provided under Section 34 are universally recognized. It is accepted that the courts have no power to get into the merits of the dispute. However, this basic proposition has suffered a setback in ONGC v. Saw Pipes Ltd\(^\text{140}\) case wherein the Supreme Court in its bid to protect legalism carved out a new and additional route to question arbitration awards. Instead of limiting the concept of public policy as enunciated in the Renusagar case, it was widened to include 'patent illegality'. While Renusagar narrowed the term 'public policy of India', on the other hand, Saw Pipes vastly enlarged the scope and expanded the same to such an extent that any award is likely to affect the administration of justice, such award could be set aside if it is contrary to:


1. the fundamental policy of India or
2. the interest of India or
3. justice or morality or; in addition
4. if it is patently illegal

Such illegality must see deep into the matter and if it is of trivial nature it cannot be against the public policy, therefore, award could be set aside if it is so unfair and unreasonable and such opposed to public policy is void.\textsuperscript{141} Thus, the arbitral awards could now be reviewed on their merits. This is a huge step backward in laws relating to alternative dispute resolution in the era of globalization and contrary to the very spirit of the Act of 1996\textsuperscript{142} and altered the entire roadmap of arbitration law and put the clock back to where India started under the old 1940 Act.

The Arbitration and Conciliation (Amendment) Act, 2015 has made vital changes to section 34. The changes were recommended by the 246th Report of the Law Commission of India on Amendments to the Arbitration and Conciliation Act, 1996 of August 2014 and the Supplementary to the 246th Report of the Law Commission of India on Amendments in Arbitration and Conciliation Act, 1996 of February 2015. These changes were focused at restricting Courts from interfering with arbitral awards on the ground of "public policy." Accordingly, the amendment added, "Explanation 2" to section 34(2) as well as Section 2A. Explanation 2 of section 34(2) states –

\begin{quote}
“For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute.”\textsuperscript{143}
\end{quote}

Since the amendment, Courts have refrained from giving a wide interpretation of "public policy" or interfering with the merits of the case. On November 2017

\begin{footnotes}
\textsuperscript{141} Supra note 137
\textsuperscript{142} Clause 4(v) of the statement of objects and reasons, of the Arbitration and Conciliation Act, 1996 which reads “to minimize the supervisory role of courts in the arbitral process”.
\textsuperscript{143} Supra note 137
\end{footnotes}
Supreme Court Judgment of *Venture Global Engineering LLC and Ors v Tech Mahindra Ltd. and Ors*, the Court observed –

"The Award of an arbitral Tribunal can be set aside only on the grounds specified in Section 34 of the AAC Act and on no other ground. The Court cannot act as an Appellate Court to examine the legality of Award, nor it can examine the merits of the claim by entering a factual arena like an Appellate Court."

A close perspective was also taken in the judgment of *Sutlej Construction v. The Union Territory of Chandigarh*. These judgments manifests that the recent trend of interpretation of "public policy" has been one where the Courts have refused to examine the arbitral awards on merits, thereby upholding the legislative mandate of "minimal intervention of the Courts in the arbitral process" as reflected by the changes brought by the Arbitration and Conciliation (Amendment) Act, 2015.

### 4.11 Problems and Prospectus in implementing Arbitral Awards

For either judicial proceedings or arbitral proceedings, their crucial points are the same viz. justice and efficiency. As to efficiency, arbitral proceedings are superior to and more preferable than judicial proceeding because the disputed parties can receive a final resolution after only one instance in the arbitral proceedings. However, if the final award cannot be timely recognized and enforced by the competent court, the superiority of arbitration in respect of efficiency will certainly be weakened or even thoroughly frustrated. Therefore, one of the reasons that arbitration is so popular in international trade as a means of dispute resolution is that it is easier to enforce the arbitral awards in a foreign country than court judgment. Under the New York Convention 1958, an award by a contracting state can be enforced in other contracting state with certain defenses.

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144 Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd and Ors (2017) 13 SCALE 91 (SC)
145 Sutlej Construction v. The Union Territory of Chandigarh (2017) 14 SCALE 240 (SC); Judgment dated December 5th, 2017
An arbitration award is being a determination on the merits by a tribunal in arbitration, and analogous to a court judgment. It is a 'award' even the all claimant's claims or the award is of a non-monetary nature. Arbitration is admired as a dispute resolution in the commercial. The main advantage of the arbitration is that the decision is normally final unlike in the litigation. However, courts do have some role in assuring that the arbitral award meets at least minimal standards of procedural fairness and, perhaps, substantive reliability before, they affix their imprimatur. This narrow but important role for judicial review raises significant tactical issues for parties to arbitration in the relatively small number of cases that are taken to Court. Therefore, the choice of the forum in which review is sought, either to enforce an award or to overturn it, may determine whether the award stands or fails.

The object of the 1996 Act was that judicial authority shall not intervene except where so provided. However, with the passage of time, some difficulties in implementing the awards have been emerged/ emerging. The Supreme Court and High Courts have interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which leads to conflicting views. Further, in some cases, courts have explained the provisions of the Act in such a way which defeats the main object of such legislation.

One of the main obstacles which were created under Section 36 was that merely precluding the award enforcement because of set aside the award application is filed and it is pending before. In fact, the mere filing of such an application should not have a usual stay of the award. Further, in the absence of time limit in disposing of the application filed for setting aside the award under section 34 and 35 it causing an enormous delay in the arbitral process especially in enforcing and implementing the awards. Another important obstacle is that enlarging the application of Part- 1 of the Act to international arbitrations conducted outside India which led to conflicting judgments. The major one being enlarging the scope of “Public policy” by giving wider meaning to it which included the phrase “patently illegality". It is important to note at this point that the Supreme Court while distinguishing earlier

proposition in *Renu Sagar*\textsuperscript{149} case on the concept of “public policy of India” construed that it necessarily related to enforcement of foreign award after it became final. In that, Supreme Court acceded “it is for the Parliament to provide for limited or wider jurisdiction of the court in case where award is challenged”, however, expressed its view that a wider meaning is required to be given to the phrase “public policy of India” so as to “prevent frustration of legislation and justice” and supported its view considering “allowing restricted jurisdiction to the court to the finality of award and dispute was settling by speed which is more frustrated by permitting patently illegal award to operate. The award of patent illegality is required or else it would endorse injustice”.

The Law Commission of India\textsuperscript{150} considering the debate and criticism in various fora, suggested amending the explanation II to Section 34 of the Act and at the same time it was also elaborately discussed in the Consultation Paper\textsuperscript{151} on Arbitration. The Act is barely twenty years old and the Indian experience is by the fact that the court's interference is not minimal and is hyper active. Under the head of the Public Policy provided under Section 34 of the Act, any arbitral award can easily be set aside. A party, after going through the entire arbitral process, and having secured an award in his favour, could find himself back in the court from which the arbitral process was intended to save them. A challenge, if entertained, could ultimately reach the Supreme Court and the total delay would be greater than if the parties had, in the first place, chosen not to arbitrate but in a court of law.

Arbitration is completely alien to the law and courts that's why the arbitration word exist, apart from others, a concept such as *amiable compositeur* and *ex aequo et bono*. These concepts permit and indeed authorize an arbitrator to decide disputes between parties on some basis other than the law. In fact, the spirit must be allowed and encouraged to pervade in arbitral awards so long as justice is done notwithstanding some deviations from established principles of law or violations of the statute. The unwarranted judicial intervention led to a situation where the remedy, in many cases, had become far worse than the disease.

\textsuperscript{149} Supra note 136.


\textsuperscript{151} Ministry of Law and Justice, Government of India 2005
One has to understand the purpose and object of arbitration and also why courts must keep their hands off arbitration. Arbitration belongs to the realm of private law that allows the parties to determine by way of a private bargain how their chosen tribunal will resolve their dispute and what their respective obligation will be in relation to the conduct of reference. The state is not concerned with it. The state is only expected to lend its support to the process of arbitration and use its coercive power to support the system wherever such support is needed. That has to be the role of the courts which is expected to play. But after going through the various pronouncements of the Supreme Court it seems that it wants to take the realm of the arbitration in its own hand.

**Summing up**

In a globalized economy, arbitration looks like the best method for effective dispute resolution to settle commercial disputes. In India, it occupies the prime position in dispute resolution. India updated its law governing the arbitrations hitherto followed under 1940 because it is not suitable to attract foreign investors in the fast faced globalization of economic dynamics by enacting Arbitration and Conciliation Act, 1996 on the lines UNCITRAL Model Law. This new act restricts limited judicial intervention and thus is aimed at party autonomy; flexibility of procedures and enforcement. But in reality, the court’s interference is not minimal but the courts are hyperactive. In respect of the appointment of arbitrator(s) under section 11 of the 1996 Act, become an issue that the appointment of the arbitrator by the court whether judicial or administrative in nature. By the *Konkan Railway* case the natures of appointment are administrative, but with the *Patel Engineering* case, it becomes judicial in nature, thus, invited another ground to challenge the arbitral process. In respect of challenging the award, the defense that “public policy” is the grounds to set aside the final award under section 34 of the 1996 Act, which is the verbatim reproduction of Model Law; It is pertinent to note that the *ONGC and Satyam* cases are clear examples of the Supreme Court of India in ignoring this principle by widening the scope of public policy including patent illegality in contrast to the narrow view expressed in *Renu Sagar* Case. The Indian judicial system compared to arbitration was and is proactive which is least desirable for promoting international trade and commerce. According to *Jan Paulson* that the courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the legitimate
expectation of the international community; the judgments can be relied upon to encourage further litigation by the aggrieved party to arbitration, and in doing so diminish the benefits of arbitration as a mode of dispute resolution.

In the next chapter, the researcher has presented a detailed study on the enforcement of both domestic and international awards in respect of international commercial arbitration.