Thus the UNCITRAL Model Law, 1985 has ushered in a new era in expeditious settlement of disputes through non-conventional choices.

Having a bird’s eye-view of the basic tenets of constituents like Dispute, its nature and kinds; and how dispute resolution is efficaciously prompted by alternate methods of arbitration, conciliation; and brief sketch of historical evolution of arbitration a comparative study, and the emergence of new and modern international jurisprudence on arbitration under the aegis of UNCITRAL Model Law, it is imperative to study in-depth the connotation of “Justice rendered through arbitration” in the next chapter.

Chapter – III
Justice Through Arbitration

JUSTICE THROUGH ARBITRATION

“Let Us Never Negotiate Out Of Fear But Let Us Never Fear To Negotiate.”


In a philosophical sense, arbitration reflects the human virtue to understand the situation to reconcile with the varied conditions that may not be under the human control and prediction and to adjust or compromise with the needs of the time in the interest of the peace and order in the society. Generally, disputes arise on some stated controversy or conflict of rights between individuals, and disputes may, though rarely, arise even without a controversy or bitterness or for some individual gain – be it material or
psychological – and such disputes represent the refractory or perverted human attitude. In the latter cases, there is no scope for arbitral mechanism since the parties tend to be legally deviant and stubbornly away from rule of law, and ultimately they will be trapped by criminal law. Thus the arbitration mechanism administers treatment to the former variety of cases i.e. where the parties are embroiled in material claims and solution is found to be beyond their individual egos, but the parties are truly obsessed by the intention of settlement with least friction and waste. After all, disputes may be settled either before the courts or outside the courts.

It appears from the development of the concept of arbitration, that the term ‘arbitration’ was related to resolve the disputes of commercial nature in the beginning predominantly involving financial or monetary interests of the people. Subsequently, with the expansion of the concept of Alternative Dispute Resolution consequent to the economic prosperity of the societies, particularly in the 20th. And 21st. centuries, the principles of justice through alternative modes are extended to resolve the conflicts in domestic front, marital issues and many segments of family law and succession law, and even in criminal law.

3.1 ARBITRATION SYSTEM AS NEO CLASSIC:

Justice is not the sole product of Courts System alone and this holistic endeavor can be partnered by every part of state administration and public participation. Equal justice for all is a cardinal principle on which entire system of administration of justice is based and its accomplishment is more obvious not only with single sovereign warrior but also with the association of compatriots like “Alternative Generals”. It is so deep rooted in the body and spirit of common law as well as civil law jurisprudence that the very meaning which we ascribe to the word ‘justice’ embraces it. We cannot conceive of justice which is not fair and equal, which is given to one and denied to another. This ideal has always stirred the hearts of men since the dawn of civilization and so far as Anglo-Saxon legal history is concerned, we find it manifested in the earliest laws which
continually directed that justice be done alike to rich and poor. It is imbedded in Indian ethos of justice – Dharma – equally. It was asserted in the Charter of Liberties of Henry II and it received its classic statement, its most glorious enunciation, in the fortieth paragraph of Magna Carta, where it is inscribed: “TO NO MAN WILL WE DENY, TO NO MAN WILL WE SELL, OR DELAY, JUSTICE OR RIGHT.”

But this great principle was not instantly translated into reality. It did not inaugurate an era of absolute freedom and equality of justice. Indeed, Gurney Champion, the author of ‘Justice and the Poor in England’ felt so strongly that the promise was not being honoured that he printed, as an appendix to his book, a Draft Bill to repeal this section of Magna Carta, “in so far only as poor persons are concerned.” Effective access to justice has thus come to be recognized as the most basic requirement, the most basic human right, in modern egalitarian legal system which purports to guarantee and not merely proclaim legal rights to all. Alternative Dispute Resolution methods are directed to achieve this end. To achieve neutrality and flexibility are the two basic reasons why arbitration and alternative dispute resolution processes, such as mediation, have been developed with the support and cooperation of State courts. But there are other considerations as well: time constraints, the need for specialized knowledge, confidentiality and – particularly relevant to arbitration – international enforceability, are all further good reasons for using arbitration and Alternative Dispute Resolution. But arbitration must also be popular with users. Whilst in the past, commercial men chose arbitration because it seemed a good way of resolving disputes, in the F.S.Nariman, a renowned advocate of the Supreme Court of India, observed that “there is much prosperity in arbitration – certainly, for arbitrators and arbitral institutions. Present, it is selected mainly through habit and only because all other methods seem even worse! The current pre-occupation with Alternative Disputes Resolution is a symptom of this, and demonstrates a growing sentiment that there is need, not for an alternative to national

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80 Justice K. Ramaswamy, Supreme Court of India, “Settlement of Disputes through Lok Adalat is one of the effective Alternative Dispute Resolution (ADR) on Statutory Basis, published in Alternative Dispute Resolution-What it is and how it works, edited by P.C. Rao & William Sheffield, Universal Law publishing Co. Pvt. Ltd. (1997) p.93.)
courts, for that does exist – in most places – in the shape of (court structured) arbitration; but a need for some alternative to ‘judicial arbitration’. In reality ‘arbitration’, ‘conciliation’, and ‘mediation’ are different forms of dispute-resolution outside courts: A.D.R. and arbitration are complementary; hence the preferred use of the words “appropriate” or “additional” in place of ‘alternative’.

Taking stock of the functioning of the Arbitration Act, 1940 and the porous performance, the Supreme Court in ‘M/S. Guru Nanak Foundation vs. M/S. Rattan Singh & Sons’ observed that – “Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with ‘legalese’ of unforeseeable complexity.

The Government of India realized that for effective implementation of its economic reforms it was necessary to recognize the demand of the business community in India and investors abroad for reforms in the law of arbitration in India. In Food Corporation of India Vs. Joginderpal Mohinderpal the Supreme Court also observed: “We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence not only by doing justice between the parties, but by creating sense that justice appears to have been done.” Referred to in the Article by Hon’ble Justice J.S.Verma

3.1.1. COMMERCIAL DISPUTE:

84 AIR 1989 SC 1263 at p.1267.
A commercial dispute can be resolved in one of two ways: either through JURISDICTIONAL processes or through NON-JURISDICTIONAL processes:

Jurisdictional processes simply refer to State court litigation and arbitration. Both the courts and arbitral tribunals have the power to render a decision which is not only binding upon the parties to a dispute, but which can also be enforced against the losing party.

Non-Jurisdictional processes involve having recourse to ‘alternative dispute resolution (ADR) schemes, such as conciliation or mediation. In contrast to State courts’ decisions and arbitral tribunals’ awards, the settlement, if any, that emerges from conciliation or mediation proceedings is not enforceable upon the parties. The parties will or will not comply with the contents of such a settlement, according to the extent of their goodwill. They may bind themselves contractually to a conciliator’s recommendation. Even so, should one of the parties not be willing to act in accordance with the conciliator’s recommendation, which it had previously agreed to comply with, the other party will need to bring the case before a court or an arbitral tribunal.

There is an interesting point to be debated i.e. “Are Lawyers always necessary for the dispensation of justice?” A Korean attorney-at-law presenting his country’s view said that – “Lawyers may be needed, but they are not necessarily wanted.” Similarly, a Japanese advocate conversant with the dispute resolution in Japan stated: - “It is the Japanese view that good people neither trouble nor are troubled by the law. To be brought before a court, even in a civil or private matter is a source of shame. The mere appearance of a lawyer in a business transaction is an unfriendly action. If there is litigation, the head of the legal department will lose face. “Further, the experience of Japan, Korea and Singapore shows that a lawyer-orchestrated resolution of disputes is not frequently resorted to, nor is it commended.

In the course of his Annual Benjamin Cardozo Lecture (1982) the then President of the prestigious Harvard University Mr. Derek Bok, lamented that law schools trained their students more for conflict than for the arts of reconciliation and accommodation and therefore served the profession poorly.

86 Courtesy: 9th LAWASIA Conference held in October, 1985, at New Delhi.
Already, lawyers devote more time to negotiating conflicts than they spend in the library or the courtroom, and studies showed that their efforts to negotiate were more productive for their clients. He then ventured a prediction: “Over the next generation society’s greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling co-operation and designing mechanisms which allow it to flourish, they will not be at the centre of the most creative social experiments of our time….A serious effort to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings towards a fair solution.

In short a just and effective legal system will not merely all for a revised curriculum; it will entail the education of entire new categories of people. It is time that our law schools began to take the lead in helping to devise such training. A former of Master of Rolls (who presided over the Court of Appeals in the United Kingdom) faced with a civil court list getting longer and longer by about eight percent each year, suggested that non-lawyer arbitrators should play a role in the resolution of civil disputes just as non-lawyers Justice of the Peace, who preside over 90% of the criminal cases. Commenting on this suggestion, the Financial Times of London wrote: “The first requirement for making arbitration work, therefore, is the removal of judicial review on points of law. Once this is done, parties in dispute will have no need of barristers to represent them, and arbitration will be faster and cheaper.”

Lawyers’ role as arbitrators is so derisively depicted at the 6th. International Arbitrational Congress held somewhere in 1981-82 in Mexico in the form of a businessman’s curse – when a commercial magnate in that country indulged in sharp practice with a colleague, the latter ended the acrimonious conversation with an invocation: “MAY YOUR LIFE BE FILLED WITH LAWYERS.” The aforesaid episodes and anecdotes illustrate that the presence of lawyers may not be warranted when the parties are senile for settlement of issues without inviting a technical judicial forum when the end result does not differ from what is gained through conventional court

87 Quoted by F.S. Nariman, ibid, p.52.
88 F.S.Nariman, ibid, p.55
system. It is for this reason, inter alia, that arbitration as the nucleus of alternative dispute resolution is construed as the “Neo Classic” justice dispensation. Arbitration is branching off in different dimensions consequent to Globalization and Liberalization of economics giving a boost up for the free flow of trade transcending the border barriers.

Global connectivity, integration, and interdependence have been augmented in all areas especially in the economic, social, technological, cultural, political, and ecological sphere. International trade, movement of capital, and integration of financial markets etc. play a vital role in globalization of the economy. Globalization is increasing interdependence, integration and interaction among people and corporations in disparate locations around the world. To say pithily, arbitration is coextensive with Liberalization, Privatization and Globalization. (L.P.G) 'Neoclassical Growth Theory' is an economic related proposition whose spirit is also absorbed in the arbitration theory.

An economic theory that outlines how a steady economic growth rate will be accomplished with the proper amounts of the three driving forces: Labour, capital and technology. The theory states that by varying the amounts of labour and capital in the production function, an equilibrium state can be accomplished. When a new technology becomes available, the labour and capital need to be adjusted to maintain growth equilibrium. This theory emphasizes that technology change has a major influence on economic growth, and that technological advances happen by chance. The theory argues that economic growth will not continue unless there continues to be advances in technology.

Finally, the need for alternative methods of dispute resolution can very well be cited with the quote of Charles Dickens –“In the High Court of Chancery, the solicitors are mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities and making pretence of equity with serious faces …. This is the Court of Chancery….. which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart; that there is not an honourable man among the practitioners who does not give – who does not often give – the warning,” Suffer any wrong that can be done you rather than come here” 89 These things are no better now whether in the United States or United Kingdom or in India

89 Charles Dickens, Bleak House (1853)
learned Hon’ble justice M. Jagannadha Rao observes that like the Americans and others, we too are a litigious society. It is revealed that a quarter million cases are filed in the U.S. Federal Courts each year and almost a 100 million in the fifty State Courts and District of Columbia. 

That is about one for every twenty people in the U.S; although many of these deals with relatively minor matters, about 12 million are filed in the major State and Federal Courts. “Litigation has become the nation’s secular religion”, commented a contemporary expert, J.K. Liberman. He said: “Ours is a law-drenched age. Because we are constantly inventing new and better ways of bumping into one another, we seek an orderly means of dulling the blows and repairing the damage. Of all the known methods of redressing grievances and settling disputes – pitched battles, rioting, dueling, mediating, flipping a coin, and suing – only the latter has steadily won the day in these United States”. R. William Ide III said “Ten States have had to close their Court-house doors – house doors – at least temporarily – to civil cases because of the huge caseloads. And we in the legal profession have to shoulder some of the responsibility for the mindset of turning to the Courts as a panacea for every dispute.” In 1907, an American writer Dos Passos has remarked the paradoxical effect of the multiplication of reported cases as follows: “When the law reports were few and the precedents shown like bright stars in the legal firmament, and the lawyers knew and followed them, as astronomers do the particular planets, the application of STATE DECISIS was easy and simple. But now, it flitters between the thousands of decisions as a phantom of the law – not as a vital principle.”

The result is that the law is likely to burdened with so great mass of decisions of different degrees of excellence and its principles, so far from being made more certain by the decisions of new cases, has become sufficiently uncertain to afford abundant material for the infinite disputations of professors of general jurisprudence as stated by Holdsworth. Thus it is from this utmost frustration, disgust and despair of the

91 J.K. Liberman, the Litigious Society, VIII, (1983).
92 79 ABA Journal (October 1993)
93 Dos Passos, The American Lawyer: As he was – As he is – As he can be, (1978)
94 Holdsworth, Some Lessons from our Legal History, 1928, p.226.)
people with the solidified pendency of litigation that a vigorous and rigorous and frantic search is made by the victims of probable delaying justice system and finally evolved an alternate mode to settle the grievances which in course of time is known as Alternative Dispute Resolution, of which Arbitration is considered to be the efficacious and expeditious method of resolving disputes.

3.2. ARBITRATION IN INDIA:

Let us advert to two quotes of celestial importance: Mahatma Gandhi, the Father of the Nation, believed, as an article of faith, in people’s participation and decentralized justice. He said: “My idea a of village Swaraj is that it is a complete republic, independent of its neighbours for its own vital wants, and yet inter-dependent for many others in which dependence is a necessity…. The Government of the village will be conducted by the Panchayat of five persons annually elected by the villagers, male and female, possessing minimum prescribed qualifications. These will have all the authority and jurisdiction required. So there will be no system of punishments in the accepted sense, this Panchayat will be the legislature, judiciary and executive combined to operate for its year of office. Any village can become such a republic to-day without much interference. “The Government of India has passed legislation Panchayat Raj, to translate the dream of the Father of the Nation into a reality.

But much more remains to be done at grass root level to reintroduce traditional informal dispensation of justice. Justice V.R. Krishna Iyer in his Report on Processual Justice to the People\textsuperscript{95} observed: -“Such a consummation – a proposition to which we are constitutionally dedicated – is possible only through an activist scheme of legal aid, conceived wisely and executed vigorously. Law and Justice can no longer remain distant neighbours, if the increasing deficiencies and distortions of the legal system and the challenge to the credibility of the judicature are to be adequately met. The lawlessness of the old original law, judged by the new Dharma, can be corrected either by radical reform or by surrender to direct action. The choice is obvious and the hour is late. Let us begin.”

\textsuperscript{95} India Ministry of Law, Justice & Company Affairs, Dept. of Legal Affairs, Report of the Expert Committee on Legal Aid-Processual Justice to the People (May-1973)
A lively question which looms large in the context of juridicare is the availability of free legal services to the constitutionally recognized weaker sections of the community. This is no doubt begun but found to be moving with snail pace with inconspicuous returns. Arbitration has a long history in India. In ancient times, people often voluntarily panchayat for a binding resolution. Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.

3.2.1. EVOLUTION OF REFORMS:

India is a sub-continent with an area of 3.3 million Sq.Kms now with a population of more than 1.22 billion, with abundant natural resources and human resources, scientifically advancing under federal governance has become the cynosure of the global economics. When the country was marching under five year plans with a large terrain of development reserved for public sector undertakings that controlled about a half of the national capital and a fourth of the national income, there was an economic crisis in 1991 which prompted the rulers to introduce reforms to marketise economy. Industries have been de-licensed, approval of foreign direct investment has been made automatic in a number of industries, portfolio investment up to 25% of the equity is freely permitted, import of capital goods, raw materials and components are no longer subject to the approval of the Government. Interest rates are market driven and the rupees is convertible on current account.

What is significant is that fiscal deficit has been made a policy target and the endeavor is to bring it down to four percent of Gross Domestic Product (GDP). The results have been astonishing G.D.P. jumped from 5% to 7.5%. Again economy suffered a temporary setback in 1998 but had its buoyancy. With economic liberalization and opening up of the market there is a phenomenal growth of international trade: commerce, investment, transfer of technology, developmental and construction works, banking

98 Ibid.
activities and the like. To cope with the changing scenario, India has updated its arbitration legislation in order to provide a level playing field for both domestic and foreign entrepreneurs. Indian arbitration law ensures fairness and justice to all the concerned parties. With the increase in business transactions both international and domestic contracting activities are rising. The potential for commercial arbitration accordingly has shown a significant rising trend. Until 1996, the law governing arbitration in India consisted mainly of three statutes:

(i) The Arbitration (Protocol and Convention) Act, 1937
(ii) The Indian Arbitration Act, 1940

The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards. The 1961 Act implemented the New York Convention of 1958. The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the outdated 1940 Act. The 1996 Act is a Comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act). Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. The 1996 Act covers both domestic arbitration and international commercial arbitration.

The Arbitration Act, 1940

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was

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100 Justice Ashok Bhan in his inaugural speech delivered at the conference on ‘Dispute Prevention and Dispute Resolution’ held at Ludhiana, India, October 8, 2012.
required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

While the 1940 Act was perceived to be a good piece of legislation 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. The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedures to be used by all signatories to the Convention. This Convention was first in the series of major steps taken by the United Nation since its inception, to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.

3.2.2. ARBITRATION AND CONCILIATION ACT, 1996:

The Arbitration and Conciliation Act, 1996, consisting of four parts and 86 sections with three schedules, is hailed to be heralding a new era in the justice dispensation system. Structurally, Part-I deals with Arbitration (with 10 chapters), Part-II deals with 'Enforcement of certain Foreign Awards' (Ch.1. refers to New York Convention Awards, Ch.II refers to Geneva Convention Awards); Part-III dealing with Conciliation and Part-IV deals with Supplementary Provisions. This new Act of 1996 replacing all the previous enactments on the subject, has assumed a commanding position to deal with all matters relating to Arbitration and to stand as a pivotal agency for expeditious and inexpensive justice delivery system.

The Preamble and ‘the statement of objects and reasons’ of the Act mentioned different reasons for the enactment of the Act: -

Firstly, the existing law relating to arbitration was contained in the Arbitration Act of 1940, the Arbitration (Protocol and Convention) Act of 1937 and the Foreign Awards (Recognition and Enforcement) Act of 1961 and it was widely felt that the Act of 1940 containing the general law of arbitration had become outdated.
Secondly, the economic reforms ushered in India might not become fully effective if the law dealing with the settlement of domestic and international commercial disputes remained out of tune with those reforms.

Thirdly, like arbitration, conciliation was also getting increasing worldwide recognition as an instrument of settlement of disputes and there was no general law on the subject in India.


Fifthly, the Indian Act of 1996 was being enacted ‘taking into account’ the UNCITRAL Model Law and the Rules “as a model for legislation”.

Thus though the Supreme Court of India has initially held that the 1996 Act must be interpreted not in the light of its own decisions on the 1940 Arbitration Act but in terms of the UNCITRAL Model Law, the Court has restated its position later holding that the 1996 Act deviated from the Model Law in certain respects and hence, the Act need not be interpreted only in terms of the Model Law. 101

The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law.

First, while the UNICITRAL Model Law was designed to apply only to international commercial arbitrations, 102 the 1996 Act applies both to international and domestic arbitrations.

Second, the 1996 Act goes beyond the UNICITRAL Model Law in the area of minimizing judicial intervention. 103 The changes brought about by the 1996 Act were so

102 See Article 1 of the UNCITRAL Model Law.
drastic that the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous.104 Unfortunately, there was no widespread debate and understanding of the changes before such an important legislative change was enacted.105 The Government of India enacted the 1996 Act by an ordinance, and then extended its life by another ordinance, before Parliament eventually passed it without reference to a Parliamentary Committee—a standard practice for important enactments.106 In the absence of case laws and general understanding of the Act in the context of international commercial arbitration, several provisions of the 1996 Act were brought before the courts, which interpreted the provisions in the usual manner.

The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments.107 Based on the recommendations of the Commission, the Government of India introduced the Arbitration and Conciliation (Amendment) Bill, 2003, in Parliament for amending the 1996 Act.108 It has not been taken up for consideration. In the meantime, Government of India, the Ministry of Law and Justice, constituted a Committee popularly known as the ‘Justice Saraf Committee on Arbitration’ , to study in depth the implications of the recommendations.

The Supreme Court held at p 484 thus: ‘The provisions of this Act (the 1996 Act) have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction.’ of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003.109 The Committee submitted its report in January 2005.

Arbitrations conducted in India are mostly ad hoc. The concept of institutional arbitration, though gradually creeping in the arbitration system in India, has yet to make an impact. The advantages of institutional arbitration over ad hoc arbitration in India need

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103 S K Dholakia, ‘Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003’, ICA’s Arbitration Quarterly, ICA, New Delhi, 2005 vol. XXXIX/No.4 at page 3. S K Dholakia is a Member of ICC International Court of Arbitration and Senior Advocate, Supreme Court of India
104 (1999) 2 SCC 479 (Sundaram Finance vs. NEPC Ltd.).
105 Supra note 10.
106 Supra note 10.
107 Supra note 10.
108 The full report of the 176th Report of the Law Commission of India can be downloaded from www.lawcommissionofindia.nic.in visited on 5/5/10
109 The Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in Parliament on December 22, 2003. It is available on the website www.lawmin.nic.in visited on 3/3/10
no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost effectiveness of the arbitration process. There are a number of advantages of institutional arbitration over ad hoc arbitration in India, some of which are discussed below:

- In ad hoc arbitration, the procedures have to be agreed upon by the parties and the arbitrator. This requires co-operation between the parties and involves a lot of time. When a dispute is in existence, it is difficult to expect cooperation among the parties. In institutional arbitration, on the other hand, the procedural rules are already established by the institution. Formulating rules is therefore no cause for concern. The fees are also fixed and regulated under rules of the institution.

- In ad hoc arbitration, infrastructure facilities for conducting arbitration pose a problem and parties are often compelled to resort to hiring facilities of expensive hotels, which increase the cost of arbitration. Other problems include getting trained staff and library facilities for ready reference. In contrast, in institutional arbitration, the institution will have ready facilities to conduct arbitration, trained secretarial/administrative staff, as well as library facilities. There will be professionalism in conducting arbitration.

- In institutional arbitration, the arbitral institutions maintain a panel of arbitrators along with their profile. The parties can choose the arbitrators from the panel. Such arbitral institutions also provide for specialized arbitrators. These advantages are not available to the parties in ad hoc arbitration.

- In institutional arbitration, many arbitral institutions such as the International Chamber of Commerce (ICC) have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, the experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal, because the scrutiny removes possible legal/technical flaws and defects in the award. This facility is not available in ad hoc arbitration, where the likelihood of court interference is higher.

- In institutional arbitration, the arbitrators are governed by the rules of the institution, and they may be removed from the panel for not conducting the arbitration properly. In ad hoc arbitration, the arbitrators are not subject to such institutional removal sanctions.
• In the event the arbitrator becomes incapable of continuing as arbitrator in an institutional arbitration, substitutes can be easily located and the procedure for arbitration remains the same. This advantage is not available in an ad hoc arbitration, where one party (whose nominee arbitrator is incapacitated) has to re-appoint the new arbitrator. This requires co-operation of the parties and can be time consuming.

• In institutional arbitration, as the secretarial and administrative staffs are subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the secretarial staff. In spite of the numerous advantages of institutional arbitration over ad hoc arbitration, there is currently an overwhelming tendency in India to resort to ad hoc arbitration mechanisms. This tendency is counter-productive, since there is considerable scope for parties to be aggrieved by the functioning of ad hoc tribunals. An empirical survey will reveal that a considerable extent of litigation in the lower courts deals with challenges to awards given by ad hoc arbitration tribunals. Some of the arbitral institutions in India are the Chambers of Commerce (organized by either region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternative Dispute Resolution (ICADR).

**FAST TRACK ARBITRATIONS:**

Establishment of fast track arbitrations is a recent trend aimed at achieving timely results, thereby lowering the costs and difficulties associated with traditional arbitration. Fast track arbitration is a time-bound arbitration, with stricter rules of procedure, which do not allow any laxity or scope for extensions of time and the resultant delays, and the reduced span of time makes it more cost-effective.

Fast track arbitration is required in a number of disputes such as infringement of patents/trademarks, destruction of evidence, marketing of products in violation of patent/trademark laws, construction disputes in time-bound projects, licensing contracts, and franchises where urgent decisions are required.

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The 1996 Act has built-in provisions for fast track arbitration. Section 11(2) of the 1996 Act provides that the parties are free to agree on a procedure for appointing an arbitrator. Theoretically, under Section 11(6) of the 1996 Act, a party does not have to approach a court for appointment of an arbitrator by the parties in case of failure by the parties to appoint the arbitrators. Appointment of an arbitrator, if the agreement provides for a mechanism to deal with the failure of the other party to appoint the arbitrator.

Thus, the parties are given complete autonomy in choosing the fastest possible method of appointing an arbitrator, and constituting a valid arbitral tribunal. Section-13(1) confers the freedom on parties to choose the fastest way to challenge an arbitral award. Section-13(4) expedites arbitral proceedings by providing that if a challenge to an arbitral proceeding is not successful, the arbitral tribunal shall continue proceedings and pass an award. Section-23(3) of the 1996 Act enables parties to fix time limits for filing of claims, replies and counter claims. Section-24(1) also permits the parties to do away with the requirement of an oral hearing, if they so desire. More importantly, Section-25 authorizes an arbitral tribunal to proceed ex parte in the event of default of a party. Section-29 even empowers the Presiding arbitrator to decide questions of procedure.113

As a premier Indian organization for institutionalized arbitration, the Indian Council of Arbitration (ICA) has pioneered the concept of fast track arbitration in India. Under the rules of the ICA, before commencement of the arbitration proceedings, parties may request the arbitral tribunal to settle disputes within a fixed timeframe of three to six months or any other time agreed upon by the parties. The Arbitration and Conciliation (Amendment) Act, 2003, proposes to introduce a single-member fast track arbitral tribunal, wherein filing of pleadings and evidence will be on fast track basis, so as to pronounce an award within six months, and will also specify the procedures to be followed by such fast track arbitral tribunals.

The term ‘arbitration’ for quite some time has become contextual and need-based. In the regime of economics literature, arbitration appears to have emphasized on arbitration-litigation relationships. For example, commercial arbitrators often rely on customary commercial law rather than national law, suggesting that arbitration can be a

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112 Section 11(6) of the Arbitration and Conciliation Act, 1996
113 Indu Malhotra, ‘Fast Track Arbitration’, ICA’s Arbitration Quarterly, ICA, 2006, vol. XLI/No.1 at p. 8-Indu Malhotra is an advocate of the Supreme Court of India.
jurisdictional alternative to litigation rather than simply a procedural one. In support of this, the literature demonstrates that arbitration is a potential source of precedent, and is viable without judicial backing. Other studies, mostly dealing with labour disputes, focus on negotiation incentives given alternative forms of compulsory interest arbitration. The law and economics literature on contracts and contract enforcement has focused almost exclusively on judicial adjudication despite the fact that the vast majority of contracts are never adjudicated.

Outside the realm of law and economics there is a large literature on alternative dispute resolution (ADR) including arbitration, for instance, indicating that even when disputes cannot be resolved through negotiation or mediation, they are directed away from national courts into arbitration, at least for some large categories of contracts? Lew’s detailed examination of the evidence on International commercial contracts concludes that around 80% of these contracts had arbitration clauses at the time of his study, for example, and that over time, ‘more and more [international traders] ... turn to arbitration’. More recent studies confirm this trend. Berger (1994) and others report that about 90% of all international trade contracts contain arbitration clauses. Similarly, within the United States, arbitration under the auspices of various commercial organizations, or by 7500 independent arbitrators, perhaps from the American Arbitration Association (AAA), resolve at least three times as many commercial disputes as the common law courts do. Arbitration of disputes between employers (both government and private) and unionized employees has also been routine (and even compulsory for government employees, as well as for some private sector employees, when negotiation proves inadequate) for several decades in the United States. Furthermore, while non-union employees’ disputes were almost never arbitrated before 1970, growing numbers are now resolved by arbitrators. There is a much larger literature on arbitration outside of economics; of course, Arbitration is also used for disputes between businesses and customers. For instance, the New York Stock Exchange formally provided for arbitration in its 1817 constitution, and it ‘has been working successfully ever since, primarily to

114 Rubin, 1995, p. 113
115 Lew, 1978, p. 589
116 Casella (1992, p. 1)
117 Aurebach-1983, p.113
118 Ware, 1996, p. 1.
rectify disputes between Exchange members and their customers.\footnote{119} The Council of Better Business Bureaus (BBB) operates arbitration programs for consumers in many parts of the United States; several automobile manufacturers have contracts with the BBB to arbitrate car owners’ complaints. Arbitrators annually resolve thousands of insurance claims, the National Association of Home Builders offers. Arbitration of buyers’ complaints against association members, medical malpractice arbitration, begun in 1929, is on the rise, and so on.\footnote{120} Non-contract civil disputes are also shifting to arbitration in the United States, in part to avoid litigation costs such as delays due to congested government courts.\footnote{121}

Indeed, a new private-for-profit court industry, developing since 1979, offers a wide variety of ADR procedures to resolve all kinds of disputes (there were more than 50 such firms in the United States 1992, most with offices in several states. These firms are attracting growing numbers of customers as well as profits and investors, including many who do not contractually stipulate ADR prior to the dispute arising.

While arbitration has not attracted much attention in the core of the law and economics literature, there are some exceptions (for example, Landes and Posner, 1979; Bernstein, 1992; Shavell, 1995). Furthermore, expanding ‘law and economics’ to include some contributions from ‘new institutional economics’ and labour economics, reveals considerable analysis of various including several journals exclusively concerned with arbitration or ADR, but this review focuses on research by economists or by legal scholars who have adopted a law and economics approach (and at times, contributions from the larger literature referred to in this research), thus leaving out some issues that may be attracting attention in the larger literature and/or of potential but yet unexplored interest from a law-and-economics perspective. The economics literature on arbitration divides, roughly, between labour Arbitration and commercial arbitration. However, within this literature, a different (but correlated) division is also apparent.

In particular, some studies, mostly concerned with commercial arbitration, emphasize relationships between arbitration and litigation, while other economics research, primarily in the labour literature, focuses on arbitration’s influence on negotiation

\footnote{119} Lazarus, et al., 1965, p. 27
\footnote{120} Dannenberg and Dannenberg, 1981
\footnote{121} Bloom and Cavanaugh, 1987,
incentives (explorations of the arbitration process are found in both literatures). The following presentation is organized in reflection of this division. It appears that the reason for the differences in focus arises, at least in part, because commercial arbitration is generally an ex ante voluntary decision by both parties to contractually specify arbitration over litigation in the event of a dispute, while the most widely studied examples of labour arbitration by economists (interest arbitration dealing with public sector employees) are compulsory under statute law. This is probably due to the fact that data on some compulsory arbitration systems can be obtained relatively easily, while data on general grievance arbitration is not nearly as accessible. As a consequence, however, within the economics literature, voluntary commercial arbitration is often depicted as a cooperative Endeavour to minimize the costs of dispute resolution, while labour arbitration tends to be characterized as a much more adversarial process. In reality, like commercial arbitration, most private-sector labour arbitration arises through collective bargaining contracts rather than through compulsory statutes, the primary exception being parts of the transportation industry governed by the Railway Labour Act so, as indicated below; the impression taken from the labour economics literature on arbitration may be quite misleading.

First, some of the reasons for why law and economics scholars should be interested in arbitration, one important reason, at least for commercial law, is that arbitrators often resolve disputes under customary commercial law and/or trade association rules rather than under the statute and/or precedent law of a particular nation. That the choice of arbitration is a jurisdictional issue rather than simply a procedural one might not be accepted if, as is frequently claimed, arbitration is not viable without judicial enforcement of arbitration agreements and rulings, and/or arbitration is simply a compromising process and not a source of legal interpretation and precedent.

3.2.3. ANATOMY OF THE ACT OF 1996:

In India, laws/rules that govern the arbitration process are laid down in Arbitration and Conciliation Act, 1996. But the Act itself does not give any right to any party unless parties have entered into an arbitration agreement/contract for adjudication.

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of dispute(s)/difference(s) by way of arbitration. Section 2(1) (b) of the Act says that an arbitration agreement means an agreement referred to in section 7.

Section 7(1) further states that an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The Act does not prescribe any specific form for arbitration agreement. It says that “an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement” like any other agreement - Section 7(2). But an arbitration agreement shall be in writing - Section 7(3). Here the term “writing” has special meaning that has been clarified in sub-section 4 of section 7 i.e. (4) An arbitration agreement is in writing if it is contained in (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other. “Other means of telecommunication” indicates that a record of the agreement by exchanging e-mails may also be taken into account, since, as per the Law Encyclopaedia (applicable to United States law) telecommunication means the transmission of words, sounds, images, or data in the form of electronic or electromagnetic signals or impulses. Section 7 (5) further clarifies that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 2(1) (a) of the Act says that arbitration means any arbitration whether or not administered by permanent arbitral institution. Thus it is clear from the definition that the act recognizes every type of arbitration whether it is institutional or non-institutional. Institutional arbitration means an arbitration process conducted by an institute; whether it is permanent or not; for adjudication of dispute(s) / difference(s) between the parties following rules of proceeding already framed by the parties themselves, failing which its own rules after obtaining the consent of the parties to such rules at a preliminary meeting in arbitration proceeding. Non-institutional arbitration means an arbitration process conducted by a arbitral tribunal other than institute for adjudication of dispute(s) / difference(s) between the parties following rules of proceeding already framed by the
parties themselves, failing which its own rules after obtaining the consent of the parties in this regard at a preliminary meeting in arbitration proceeding.

Section 2(1) (h) party means a party to an arbitration agreement. This definition is not an expressed one. It is an implied definition as it has not been clarified who can be a party to an arbitration agreement. Here the term “party” covers a living person competent to enter into an agreement/contract and juristic person as well since juristic person may also be a party to an agreement/contract after fulfilling the certain legal formalities. Thus here party means a person competent to enter into a contract as per Indian Contract Act.

Section 2 (1) (e) of the Act defines arbitral tribunal. It says “Arbitral tribunal means a sole arbitrator or a panel of arbitrators.” Where arbitral tribunal is a panel of arbitrators; “the parties are free to determine the number of arbitrators, provided that such number shall not be an even number”-Section 10(1) of the act. Failing the determination of number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator- Section 10 (2) of the Act.

To be an arbitrator, no formal qualification has been prescribed in the Act. Even nationality is also no bar. Parties have been given full authority to determine the qualification of the arbitrator. Section 11 (1) of the Act says that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. It is the parties who have to determine the qualification of the arbitrator keeping in mind the nature of the dispute(s)/difference(s) that has arisen or may arise between them. Parties may agree upon the qualification at very initial stage when they enter into an arbitration contract/clause or after dispute(s)/difference(s) arose if earlier has not been agreed. It will be beneficial for the parties themselves to determine the qualification otherwise decision of the arbitrator i.e. arbitral award may be set aside where the adjudication of such dispute(s) / difference(s) requires a person having a technical knowledge.
APPOINTMENT AND POWERS OF ARBITRATOR:

Appointment of Arbitrator:

Priority has been given to the procedure framed by the parties for appointing the arbitrator(s). Section 11(2) of the Act says that the parties are free to agree on a procedure for appointing the arbitrator(s). Where a party (ies) fails to act as required under that procedure, appointment of arbitrator(s) can be secured by taking recourse to “other means” if arbitration agreement/clause provides such “other means” for securing the appointment of arbitrator(s) (Section 11(6)(a)).

The term “other means” has not been defined anywhere in the Act. In case arbitration agreement does not provide such “other means” for securing the appointment, aggrieved party (ies) may request the Chief Justice or any person or institution designated by him to take the necessary measure for securing the appointment under Section 11(6)(a). Where, under an appointment procedure agreed upon by the parties, the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment (Section 11(6)(b) & (c)).

Section 11(5) provides both the procedure and limitation period if the parties have not agreed on a procedure for appointing the arbitrator(s) in arbitration with a sole arbitrator. It says that if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice of any person or institution designated by him. Section 11(3) provides only procedure with three arbitrators if the parties have not agreed on a procedure for appointing the arbitrator(s). It says that each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator. Further Section 11(4) provides a limitation period for such appointment. It clarifies that if a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date
of their appointment, the appointment shall be made upon request of a party, by the chief justice or any person or institution designated by him.

Section 11(7) provides that a decision of the Chief Justice or the person or institution designated by him is final on the matter entrusted by sub section (4) or sub section (5) or sub section (6) of Section 11 whereas sub section (10) of it clarifies that the Chief Justice may make such scheme as he may deem appropriate for dealing with such matters.

The Chief Justice or the person or institution designated by him, in appointing arbitrator, shall have due regard to (a) qualifications required of the arbitrator by the agreement of the parties and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator Section11(8).

What will happen if more than one request has been made under sub section (4) or subsection (5) or sub section (6) to the Chief Justices of different High Courts or their designates ? Section 11(11) answer it. It says that the Chief Justice or his designate to whom the request has been first made under the relevant sub section shall alone be competent to decide on the request.

Section 11(12) (b) clarify the term “Chief Justice”. It says Where the matters referred to in sub sections (4 ), (5 ), (7 ), (8 ), and (10 ) arise in any other arbitration, the reference to Chief Justice in those sub sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub section (1 ) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief justice of that High Court.

Primary Duties of Arbitrator:

Sec.2 (d)” "arbitral tribunal" means a sole arbitrator or a panel of arbitrators.” When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing [to the authority concerned only] any circumstances likely to give rise to justifiable doubts as to his independence or impartiality: Section 12(1).

Mode of Communication:
Arbitrator should inform the parties to arbitration agreement about his appointment as an arbitrator. Procedure for written communication is given in section 3 of the Act. It gives freedom to parties to agree upon any procedure for written communication during the arbitration proceedings what they feel proper and speedy for adjudication of their dispute(s)/difference even through e-mails but mode of communication must provide a record of such communication. Failing any agreed communication procedure any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address: (Section 3(1)(a).

If none of the places of business, habitual residence or mailing address can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it Section 3(1) (b). No substitute mode of service such as publication etc required. The communication is deemed to have been received on the day it is so delivered (Section 3(2). Section 3(3) indicates that arbitrator is not a judicial authority so arbitration proceeding is not a judicial proceeding. It says “This section does not apply to written communications in respect of proceedings of any judicial authority” but it applies in arbitration proceedings. It confirms that arbitrator is not a judicial authority

Duties of Arbitrator:

The Arbitration and Conciliation Act 1996 imposes tremendous responsibilities upon Arbitral Tribunal to act in such a way that don’t give rise to his independence or partiality. When parties appear before the arbitrator in response to the notice, the 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 sub section (1) of section 12 unless they have already been informed of them by him - Section 12(2).

GROUNDs FOR CHALLENGE FOR APPOINTMENT OF ARBITRATOR:
If a party becomes aware about circumstances that give rise to justifiable doubts as to arbitrator’s independence or impartiality, or missing of the qualifications agreed to by the parties as mentioned in section 12(3), the party has only recourse to it is, to challenge the appointment of arbitrator(s) before arbitrator itself. 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: Section 12(4)

**Procedure for challenging an arbitrator:**

The parties are free to agree on a procedure for challenging an arbitrator: Section 13(1) Failing any agreement on a procedure for challenging the arbitrator, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal: Section 13(2) Unless the arbitrator challenged under sub section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge: Section 13(3) If a challenge under any procedure agreed upon by the parties or under the procedure under sub section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award: Section 13(4)

**Power and Duties of Arbitrator:**

The Arbitration and Conciliation Act, 1996 imposes mandatory obligations on Arbitral Tribunal to follow and give due respect to the contents of the arbitration agreement. Whatever has been written in the arbitration agreement regarding procedure to be followed, documents to be used as evidence, mode of communications to be used, place of arbitration, language etc in arbitration proceedings, arbitral tribunal is bound to follow the contents of the arbitration agreement. The parties (in arbitration proceedings) shall be treated with equality and each party shall be given a full opportunity to present his case - Sec 18.

The whole purpose of enacting the Arbitration and Conciliation Act, 1996 is to remove technical difficulties; faced by the parties in the court proceedings, from arbitration proceedings. That is why sec 19(1) says that the arbitral tribunal shall not be
bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings Sec19 (2) but failing any agreement in this effect, the arbitral tribunal may conduct the proceedings in the manner it considers appropriate. - Sec19 (3). This power of the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence (Sec 19(4)). The tribunal should give reasons regarding the determination of admissibility, relevancy, materiality and weight of any evidence.

POWERS OF ARBITRAL TRIBUNAL:

Section 16 of the Act gives full competency to arbitral tribunal to rule on its own jurisdiction. But this competency is subject to courts’ supervision.

“Section 16-Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, ----

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall he raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

Though the arbitral tribunal has been empowered to order interim measures but this power is subject to arbitration agreement. Section 17 says:
Interim measures ordered by arbitral tribunal.-

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) the arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)”

Thus from above discussion, one can easily understood that there is no codified rules that govern arbitration proceedings except mentioned in arbitration agreement/ clause if any. It is, therefore, one should be very careful before entering into any arbitration agreement/ clause in any walk of life. Justice M. Jagannadha Rao in his most illuminating article on Sec-34 of the Arbitration and Conciliation Act, 1996 explains why the judicial review of an arbitral award should extend to the examination of errors of law, in the context of the controversial ONGC judgment, through the paradigm of the approaches adopted in the UK and US.

The Indian Arbitration Act, 1940 was applicable purely to the domestic arbitration between Indian parties. There were two other enactments which applied to international arbitration outside or within India. The 1940 Act was found to be cumbersome, particularly because it enabled challenges to an award on the ground that the arbitration proceedings were misconducted. This provision led to a lot of unnecessary litigation. There was also need to make changes to consolidate the international arbitration, subject

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124 Arbitration in India: Section 34, ONGC vs. SAW Pipes, manifest illegality and similar approaches in UK and US. - Justice M. Jagannadha Rao is a former Judge of the Supreme Court of India, former Chief Justice of the Kerala High Court and the Delhi High Court, and Chairman of the 16th and 17th Law Commissions) - http://www.halsburys.in/arbitration-in-india.html visited on 12/2/10
of course to the New York Convention, 1958. That is why the 1996 Act came into existence.

The framers of the new Act of 1996 brought domestic and international arbitration and conciliation under one umbrella, in three separate parts. The first part is applicable to all arbitration in India, whether it is between Indian nationals/companies or where one party is a foreign national (i.e. domestic and international arbitration in India). The second part is related to arbitration outside India, which is mostly governed by the New York Convention, 1958 (i.e. foreign arbitration). The third part related to conciliation. There is not much difficulty with Parts II and III, but Part I which is related to arbitration in India is a virtual adaptation of the UNCITRAL Model Law, which was a model prepared for international arbitration. Even while adopting the Model, several beneficial provisions contained therein were omitted.

There were certain very beneficial provisions in the 1940 Act, which were also not adopted. The result was that from its inception, the implementation of the Act created serious problems and filling up all these lacunae by way of judicial interpretation became a very difficult task. Unfortunately, there was no public debate nor a consultation paper before the Bill was prepared. A distinguished author of one of the recent commentaries on the new Act of 1996 has stated as follows recently in his book: “This Act, with a few significant interpolations, adopts the Model Law in its entirety. However, the Model Law is far from comprehensive and leaves many important areas of arbitration law and practice unexplored because its promoters had limited their aim only to provide a model law for the States desiring uniformity and harmonisation of arbitration regulation. It may not be irrelevant to point out that by adopting the Model Law in its entirety; the Parliament lost the benefit of debate and public consultation with all parties’ support in the House. Thus, the opportunity to fill in the gaps in the model and to adapt it to the national requirement and environment was lost.

This Act, therefore, inherits all the weaknesses and shortcomings of its model…So far, the working of the Act has revealed a host of problems of application and interpretation of its various problems…” “From the host of odd problems faced by the Courts, and experienced by the lawyers in their day to day practice, it has become evident that the Act is a leaking umbrella. It does require radical amendments for
harmonising arbitration legislation, which has been stimulated by the Model Law. The surgery to remove deformity of the Act is a rather complex operation.”

In the same book, Lord Mustill, who wrote a foreword, stated as follows: “The account given by Mr. Malhotra of the origins of the 1996 Act and of the choice by the Indian legislature to enact the UNCITRAL Model law directly, apparently with very little local debate, is most illuminating and describes a process which has many counterparts elsewhere.”

“…Yet Mr. Malhotra must surely be right to point out that it (the Act) is both incomplete and expressed in generalities “…there are important questions on which the Act is silent, and the advisor or decision-maker has no text from which to start. Nor will the statute yield any guidance on the important aspects of general procedural law in which the Act is embedded.”

In Bhatia International vs. Bulk Trading, the Supreme Court described the Act as an ‘ill-drafted enactment’. It is clear from the above that the Act does require a good number of amendments.

In fact, Sri O.P. Malhotra in his preface referred to three judgments mentioned them of the Supreme Court under the new Act, a ‘triplet’, though well-intentioned, amounted clearly to “judicial legislation”. In the chapter entitled “The continual search for improvements” adverting to the unwanted conservative approach to arbitration reform, the author says “The area of mystery which contributes to the creation of this special atmosphere (conservative approach), which psychologically prevents many people from trying to improve arbitration, is reflected in Dezalay and Garth’s reference to arbitration as a “somewhat mysterious world”. The authors add: “Arbitration requires the understanding and improving. Only in this way is its effectiveness as a service to citizens assured and there will be no need to look for alternative methods to settle disputes.”

Today, arbitrations are delayed before arbitrators and costs have increased tremendously. Excessive costs are linked up with excessive duration of proceedings.

125 See the Commentary by Sri O.P. Malhotra, 2002.
126 SA. 2002 (4) SCC 105
Except the corporate sector and the multinationals and perhaps the State, no one else can bear the expense. Arbitration has become a ‘luxury clinic’. Mauro Rubino-Sammartano says: “...the image of arbitration as a luxury clinic has been created and that this seriously damages arbitration.” As to costs, the same author states: “Another serious down-side is the cost of arbitral proceedings.

The fees of three arbitrators, the administrative cost of the arbitral institution, counsel fees to be paid by each party and possible expenses (for example for travel, translations, employees and witnesses) to be borne by the parties...in a global cost for the losing party (or for the willing party who does not succeed in obtaining costs from its opponent), being higher than the cost of court proceedings in a national court or in a court of another legal system.”

If there are three arbitrators instead of one, the costs multiply threefold and parties are unable to control adjournments by the counsel. But that it is not as if all arbitrations in India are prolonged or all arbitrations outside India are fast. There are arbitration matters which have been disposed of in India in record time of six months. There are others at the same times which are pending for years. Even outside India, there are sometimes awful delays. In *Pilkington vs. PPG* 129, the arbitration took seven years and sixteen million pounds were paid as arbitrators’ fee. The arbitration in *Intel vs. AMD* 130 took over four years and 300 hearing days. In international arbitration, there are severe problems of choice of law and jurisdiction because of which cases get prolonged.

If the arbitration law does not contain a statutory procedure for speeding up the arbitral process—at least after one year—or for control of the excessive charge of fee by the arbitrators, the State must step in and make some law for speeding up arbitration. The amendments which the 176th Report of the Law Commission had proposed addressed these questions. The arbitration has to be completed in one year, if not, the court will monitor it by fixing dates and during the interregnum, when the court is moved and it passes orders, there shall be no stay of the arbitral proceedings.

The prospect of a civil court setting the time schedule for retired judges of the superior courts (whose award would any way go under the Act before the civil courts, if

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129 29 CIT 109 (2005)
challenged) should be a deterrent and if once this amendment comes into force, arbitration in India will be quite fast, if not faster than elsewhere, and the mechanism we have proposed for speeding up arbitration is unique and there are no parallel provisions elsewhere in any other country. If we do not address the questions of speed and costs, parties will soon opt for other alternatives—alternative not only to court adjudication but also to arbitration. Mauro Rubino-Sammaartano is right when he says: “…arbitration has not been the perfect alternative to court proceedings which many people expected and this has given rise to the Alternative Disputes Resolution formulas, as a further alternative, not only to courts but also to arbitral proceedings.” This concept is echoed in Justice Drummond’s Lecture\textsuperscript{131} and the following observations of that judge are significant: “… if the arbitration industry is unable to satisfy the demands of consumers of its services for an efficient, economical and expeditious disputes resolution service, then it will continue to wither. I say ‘continue’ because the process is already under way.” In the US today, mediation has won its day against arbitration and between 90-94 percent cases are settled by mediation process well before trial. This scenario will set in our country too.

The recent amendment to the Code of Civil Procedure, 1908 has introduced Section 89, which requires parties to choose one of these:

(a) Arbitration,
(b) Conciliation
(c) Mediation
(d) Lok Adalat or
(e) Judicial settlement.

Ordinary litigants, who cannot spend money at par with corporate litigants or multinational corporations, are bound to opt for conciliation, and mediation, rather than arbitration.

Having referred to the fact that the Arbitration and Conciliation Act of 1996 was brought in without debate and to the fact that the Act has not addressed itself to speedy arbitration where an award is passed, in at least a year, it is pertinent to refer to one of the

\textsuperscript{131} 1996, John Keays Lecture, see the Arbitration, August 1996, p.76)
judgments of the Supreme Court in ONGC case on the question of whether judicial
review of an award should extend to the examination of errors of law.

The ONGC judgment of the Supreme Court has held that under Section 34 of the
Act, an award can be set aside on the ground that it is erroneous in law. Several counsel
for the Government and public sector have wholeheartedly welcomed the judgment.
Several others, particularly lawyers appearing for private parties/corporation, have
criticised the judgment stating that it is wrong and totally unwarranted in the context of
an Act which has adopted the UNCITRAL Model. The fact remains that the Supreme
Court has referred to the fact that in England, under Section 69 of the English Act of
1996, there is an appeal provided on a point of law, subject of course to obtaining leave
(or with consent of all parties).

Leave shall be given only if the court is satisfied that on the findings of the fact
arrived at, a question of general public importance has arisen or the decision of the
arbitrators is ‘obviously wrong’ or is at least open to serious doubt in all the
circumstances of the case, and the court feels that it is ‘just and proper’ to decide the
question of law. The Supreme Court also strongly relied upon Section 28 of the Indian
Act which requires the arbitrator to follow the law.

In fact, after an elaborate consideration of this aspect, the Law Commission has
recommended the introduction of Section 34A, incorporating a ground of a ‘substantial
question of law’ in our Act, subject to like conditions as under the English Act, so far as
purely domestic awards between Indian parties are concerned. The Commission has
pointed out that award for millions of rupees are being passed which are contrary to law,
particularly where the State or a public sector undertaking is the respondent.

The award which came up before the Supreme Court in the ONGC case was one
such. According to Gary Born’s\textsuperscript{132} the defence of ‘manifest disregard’ of parties’
contract, or misjudging oral testimony or misunderstanding the applicable law is
permissible in US in several States where the case is not governed by the New York
Convention.

\textsuperscript{132} Commentary on Arbitration (see p.809 to 814, 2nd Ed. 2002)

Recall similar approach of the Egyptian Courts in Chromalloy135 Limited judicial review of arbitrator’s substantive decision: As discussed below, arbitral awards made in the United States are generally subject to actions to vacate, if the arbitrator’s decision is in “manifest disregard of law”136. Compare Section 69 of the English Arbitration Act, 1996. Note that it contemplates a degree of judicial review of international (but not foreign) arbitral awards. Contrast the standards and appeal of Section 69 to the ‘manifest disregard test’ (in US). ‘Manifest disregard’ in the US under the FAA (Federal Arbitrator Act): As discussed above, US courts have fashioned ‘manifest disregard of law’ doctrine under the domestic FAA, which permits domestic arbitral awards to be vacated if they depart sufficiently from the clear dictates of applicable law.

The ‘manifest disregard of law’ formula derives from the dicta in *Wilko Vs. Swan*137, where the Supreme Court remarked that the interpretation of the law by the arbitration, in contrast to manifest disregard, are not subject in federal courts to judicial review for error in interpretation. Though the discussion on the main point decided in the case was overruled in *RD Quijas vs. Shearson/American Express*,138 The exception as to ‘manifest regard’ has survived. In the same paragraph 7, the author says: “Nonetheless it appears very likely that the manifest disregard conception is so deeply entrenched in domestic law that it cannot be abandoned”139 refer to a large number of US Appeal Court

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133 811 F.2d 1265 (9th Cir 1987) 
134 405. F.2d 1123 (3rd Cir 1969 At p.810, the author points out (Para 5 (b) (c) 
135 Supra pp.768-77 
136 Infra pp.810-13 
137 396 Us 436-37 wilko vs swan 
139 First Options of Chicago Inc Vs. Kaplan: 514 US439 (1995)).
decisions where principle of ‘manifest disregard of law’ was applied in domestic awards.

“That is clearly true in Federal Courts and is almost clear in State Courts.”

It is accepted in US that manifest disregard of law is nevertheless a necessary
ground for the effective functioning of the arbitral process. Some courts apply the
principle of ‘irrationality’ of the domestic award or even lack of factual basis. Ainsworth
vs. Kurnick.\footnote{960 F.2d. 939 (11 Gr.1992)} ignoring the unambiguous contract language, Shearson Lehman
Brothers Inc. vs. Hedrich\footnote{639 N.Y. 2d.939 (11 Gr.1992)} and other decisions suggest demonstrably wrong decisions
need not be recognised. In this connection, in his book,\footnote{Arbitration Law by Mauro Rubino-Sammaartano International, 2nd Ed. 2001, page 870-871} the scrutiny of domestic
awards by the courts for ‘manifest disregard of law’ as accepted in Wilko vs. Swan\footnote{346 Us 417 (1953)} as
an exception is referred to and it is stated that:“Manifest disregard of the law is a ground
for vacation of an award introduced in the American system by a dictum in Wilko.” The
above decisions of US courts in domestic law are absolutely on the same lines as the Law
Commission’s proposals for Section 34A for scrutiny on the ground that domestic award
between Indian parties on the face of it suffers from an error which can be treated as a
‘substantial error of law’.

Those who have been vehemently criticising the ONGC judgment of the Supreme
Court or the Law Commission’s recommendations for the proposed Section 34A, so far
as domestic arbitrations between Indian parties is concerned, have not noticed that both
the UK and US courts permit such a limited review on error, apparent or manifest on the
face of the award, so far as purely domestic awards are concurred\footnote{Arbitration in India: Section 34, ONGC vs. SAW Pipes, manifest illegality and similar approaches in
12/2/10}. 

SIMILARITY IN THE TREND OF ARBITRATION PRACTICE UNDER THE
1996 ACT WITH THAT OF THE 1940 ACT:

The 1940 and the 1996 Acts differ in some important ways in terms of the
Arbitration system they establish and the processes that they require. First, the role of
judges is more limited in the 1996 Act. Under the 1940 Act, courts played a substantial
role in the arbitration process. Perhaps more importantly, the 1940 Act required that an
arbitral award be filed in a court before it could become binding upon the parties.\footnote{under Section 31 of the Arbitration Act, 1940} an award has to be filed before any court having jurisdiction, to make an award the rule of the court. Furthermore, the grounds for challenging an award before the courts were broad and quite liberal. In the 1996 Act, however, there is limited scope for interference by courts. The award is no longer required to be filed before the court to make it a rule of law, and the grounds on which an award can be challenged are very limited.

Second, the authority of the arbitral tribunal varies. The old Arbitration Act of 1940 did not give any express authority to the arbitral tribunal. However, the situation has changed with the 1996 Act. Under the 1996 Act, the arbitral tribunal has the power to decide its own jurisdiction, which was initially determined by the courts under the 1940 Act. In addition, the Arbitral tribunal does not have any power to grant any interim relief in arbitration proceedings under the 1940 Act, and such power is traditionally enjoyed by the courts. However, under the 1996 Act, an arbitral tribunal has powers to give interim relief. Despite these differences, there are still some notable arbitration practices of the 1940 Act, which continue even under the new 1996 Act. These include the following:

- The tendency for parties to ask for and for arbitral tribunals to grant frequent adjournments, although technically constrained by the 1996 Act, continues unabated. While elaborating on this problem, one cannot help but notice the manner in which appeals and revisions are filed at interlocutory stages against every decision or order taken or made by the arbitral tribunal, which is not even contemplated under the Act.

Moreover, the intervention of the courts, though statutorily restricted, has not subsided, and the courts have been very liberal in entertaining petitions, revisions, and appeals at an interlocutory stage, because of which the fruits of an existing Alternative Dispute Resolution (ADR) mechanism is neither timely nor effective.

- Section 34 of the 1996 Act makes a mere challenge to an award operate as an automatic stay even without an order of the court, thereby encouraging many parties to file petitions under that provision to delay the execution proceedings. However, under the 1940 Act, there was no such automatic stay. There is an amendment proposed by the Law Ministry
in the Arbitration and Conciliation (Amendment) Bill, 2003, which has not been taken up for consideration by the Parliament- sec.34-A is enacted.

• The 1996 Act narrows down the scope of grounds available for challenging awards as compared to the earlier 1940 Act. However, with gradual judicial interpretation, the scope of appeal against an award under the 1996 Act has become broader particularly after the decision of the ONGC case, which has widened the ambit of ‘public policy.’ Violation of public policy of India is one of the grounds for challenge of an award under the 1996 Act.

The ONGC case, undoubtedly, invited substantial criticism from the legal circles and fraternity. While some large corporations and bodies welcomed the decision, most of the members of the legal profession disagreed and stated that the 1996 Act will in effect become ‘old wine in new bottle’, because under the 1940 Act, it was easy to set aside awards only on the basis of public policy.

**Enforcement of Awards**

One of the factors for determining arbitration as an effective legal institution is the efficiency and efficacy of its award enforcement regime. Under Section 36 of the 1996 Act, an arbitral award is enforceable as a decree of the court, and could be executed like a decree in a suit under the provisions of the Code of Civil Procedure, 1908.

Enforcement - Where the time for making an application to set aside the award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court. An award resulting from an international commercial arbitration is enforced according to the international treaties and conventions, which stipulate the recognition and enforcement of arbitral awards. Enforcement of foreign awards in India is governed by the 1958 New York Convention and the 1927 Geneva Convention, which are incorporated in Chapter II, Part I and Part II, respectively.

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146 2003 5 SCC 705.
147 Section 34(2) (b) (ii) of the Arbitration and Conciliation Act, 1996.
148 Section 36 of the Arbitration and Conciliation Act, 1996
in the 1996 Act, Deals with enforcement of foreign awards pursuant to New York Convention, while Chapter II, Part II of the said Act deals with foreign awards pursuant to the Geneva Convention.

The decree holder must file the award, the agreement on which it is based and evidence to establish that the award comes under the category of foreign award under the 1996 Act. Contain provisions relating to the documents to be produced before a Court executing a foreign award. The rate of enforcement of arbitral awards is high. Under the 1996 Act, the Supreme Court of India declined to enforce or recognize awards in only two out of twenty four cases relating to enforcement of arbitral awards (Section 36 of the 1996 Act) that came before it. Both cases involved Indian parties and Indian law. It is stated that the two cases are: Rajinder Krishnan Khanna vs. Union of India; and Oil and Natural Gas Corporation vs. Saw Pipes.

3.3. ENFORCEMENT STATISTICS:

Based on reported cases, the enforcement statistics for domestic awards, including the grounds of challenge, are given in Tables 1(a) and (b) for the High Court and Supreme Court, respectively.

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150 Chapter I, Part II of the Arbitration and Conciliation Act, 1996.
151 Sections 37 and 56 of the Arbitration and Conciliation Act, 1996
153 (1998) 7 SCC 129
154 2003) 5 SCC 705 The data given here is from the Supreme Court Cases Journal. Dholakia is a member of ICC International Court of Arbitration & is a Senior Advocate, Supreme Court of India.
155 Supra, note 44 at p. 73.
### Table 1(a)

**Enforcement Statistics for Domestic Awards (High Court)**

<table>
<thead>
<tr>
<th>Sl. No</th>
<th>Grounds for challenge of awards</th>
<th>Total no. of awards challenged before court</th>
<th>Appeals Allowed</th>
<th>Appeals rejected</th>
<th>Awards modified by court</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Jurisdiction</td>
<td>246 (43.53%)</td>
<td>43 (17.47%)</td>
<td>197 (80.08%)</td>
<td>6 (2.43%)</td>
</tr>
<tr>
<td>2.</td>
<td>Public policy</td>
<td>151 (26.72%)</td>
<td>25 (16.55%)</td>
<td>112 (74.17%)</td>
<td>14 (9.27%)</td>
</tr>
<tr>
<td>3.</td>
<td>Limitation</td>
<td>77 (13.62%)</td>
<td>9 (11.68%)</td>
<td>66 (85.71%)</td>
<td>2 (2.59%)</td>
</tr>
<tr>
<td>4.</td>
<td>Violation of natural justice</td>
<td>37 (6.54%)</td>
<td>8 (21.62%)</td>
<td>24 (64.86%)</td>
<td>5 (13.51%)</td>
</tr>
<tr>
<td>5.</td>
<td>Bias</td>
<td>22 (3.89%)</td>
<td>1 (4.54%)</td>
<td>21 (95.45%)</td>
<td>-</td>
</tr>
<tr>
<td>6.</td>
<td>Non appreciation of facts/evidence</td>
<td>14 (2.47%)</td>
<td>1 (7.14%)</td>
<td>13 (92.85%)</td>
<td>-</td>
</tr>
<tr>
<td>7.</td>
<td>Not a reasoned award or no grounds</td>
<td>9 (1.62%)</td>
<td>-</td>
<td>9 (1.62%)</td>
<td>-</td>
</tr>
<tr>
<td>8.</td>
<td>Not signed/stamped</td>
<td>3 (0.54%)</td>
<td>-</td>
<td>3 (0.54%)</td>
<td>-</td>
</tr>
<tr>
<td>9.</td>
<td>Not a party</td>
<td>1 (0.18%)</td>
<td>1 (4.54%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>10.</td>
<td>Non application of mind</td>
<td>1 (0.18%)</td>
<td>1 (4.54%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>11.</td>
<td>Wrongful rejection of defence (filing beyond time)</td>
<td>1 (0.18%)</td>
<td>-</td>
<td>-</td>
<td>1 (0.18%)</td>
</tr>
<tr>
<td>12.</td>
<td>No arbitration agreement</td>
<td>1 (0.18%)</td>
<td>1 (4.54%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>13.</td>
<td>Typographical error</td>
<td>1 (0.18%)</td>
<td>-</td>
<td>1 (0.18%)</td>
<td>-</td>
</tr>
<tr>
<td>14.</td>
<td>Withdrawn (challenge not pursued)</td>
<td>1 (0.18%)</td>
<td>-</td>
<td>1 (0.18%)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>565</strong> (1996 to Sept 2007)</td>
<td><strong>94</strong> (16.63%)</td>
<td><strong>443</strong> (78.41%)</td>
<td><strong>28</strong> (4.96%)</td>
</tr>
</tbody>
</table>

### Table 1(b)
Enforcement Statistics for Domestic Awards (Supreme Court)

<table>
<thead>
<tr>
<th>Sl. No</th>
<th>Grounds</th>
<th>Total no. of awards challenged</th>
<th>Appeals Allowed</th>
<th>Appeals Rejected</th>
<th>Awards Modified by court</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Jurisdiction</td>
<td>11               68.75%</td>
<td>2              12.5%</td>
<td>7               43.75%</td>
<td>2</td>
</tr>
<tr>
<td>2.</td>
<td>Public policy</td>
<td>2                12.5%</td>
<td>1              50%</td>
<td>1               50%</td>
<td>-</td>
</tr>
<tr>
<td>3.</td>
<td>Limitation</td>
<td>1                6.25%</td>
<td>1              100%</td>
<td>-               -</td>
<td>-</td>
</tr>
<tr>
<td>4.</td>
<td>Non appreciation of facts/evidence</td>
<td>2    12.5%</td>
<td>1               50%</td>
<td>1               50%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>16</strong> (1996 to Sept 2007)</td>
<td><strong>5</strong> (31.25%)</td>
<td><strong>8</strong> (50%)</td>
<td><strong>3</strong> (18.75%)</td>
</tr>
</tbody>
</table>

Source: Asian International Arbitration Journal, 2008, vol.4, number 1, page 74

Enforcement Statistics of Foreign Awards:

An examination of the enforcement statistics of foreign awards will show that courts in India greatly leaned in favour of enforcement, and except for a lone case, foreign awards have been upheld and enforced. Based on the reported cases, the enforcement statistics for foreign awards in India are shown in Table 2 and Table 3.156

Table 2

Enforcement Statistics for Foreign Awards in India - High Court and Supreme Court (1996 to September 2007)

---

<table>
<thead>
<tr>
<th>Sl No.</th>
<th>Grounds</th>
<th>Total No of Challenges</th>
<th>Allowed</th>
<th>Rejected</th>
<th>Rejected Modified</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jurisdiction</td>
<td>29.41%</td>
<td>-</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Public policy</td>
<td>17.64%</td>
<td>-</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>Technical grounds (petition to be made under s48, not s34)</td>
<td>17.64%</td>
<td>-</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Requirement of separate execution proceedings</td>
<td>2</td>
<td>-</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>No grounds or reasons in award</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Petition filed for winding up on the basis of foreign awards</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>No arbitration agreement</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>1996 Act does not apply</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>


Table 3
Institution-wise Breakdown of Challenges
3.3.1. ARBITRATION PRACTICE ACROSS REGIONS – RELATIONSHIP BETWEEN ARBITRATION AND COMMERCIAL GROWTH:

To understand the relationship of arbitration with commercial growth, it is relevant to examine the spread of arbitration across regions in India. Based on the extent of the spread, the correlation between arbitration and commercial growth can be studied and analyzed. For the purpose of understanding the sectorial representation of arbitration cases across the Indian states, 349 arbitration cases decided by the Supreme Court, High Courts, and Tribunals in India were reported between 2004 and 2007. Out of the 349 cases studied, 238 cases pertained to the 1940 Act, while 121 cases pertained to the 1996 Act. The data showing distribution of these cases amongst the various High Courts in India under the 1996 Act and the 1940 Act is provided in Table No. 4.

Table 4

Distribution of cases amongst various High Courts under the 1940 Act and The 1996 Act (2004 to 2007)

<table>
<thead>
<tr>
<th></th>
<th>Ad hoc</th>
<th>10</th>
<th>-</th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>ICC</td>
<td>2</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>3.</td>
<td>LCIA</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>4.</td>
<td>IGPA (International General Produce Association)</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>5.</td>
<td>ICA</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>6.</td>
<td>Korean Commercial Arbitration Board</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Total</td>
<td>17</td>
<td>1</td>
<td>15</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>High Court</th>
<th>Arbitration and Conciliation Act, 1996</th>
<th>Arbitration Act, 1940</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allahabad</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>19</td>
<td>6</td>
</tr>
<tr>
<td>Bombay</td>
<td>20</td>
<td>9</td>
</tr>
<tr>
<td>Calcutta</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Delhi</td>
<td>80</td>
<td>38</td>
</tr>
<tr>
<td>Guwahati</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Gujarat</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Himachal</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Jammu &amp; Kashmir</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>Karnataka</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Kerala</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Madras</td>
<td>17</td>
<td>1</td>
</tr>
<tr>
<td>Orissa</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Patna</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Punjab &amp; Haryana</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Uttaranchal</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total No. of cases</td>
<td>238</td>
<td>121</td>
</tr>
</tbody>
</table>

Source: Data collected from arbitration journal for the years 2004-2007\textsuperscript{157}

The representative chart shows that across all High Courts, the Delhi High Court has the most cases followed by the Bombay High Court and the Andhra Pradesh High Court. The figure is only representative of data collected from reported cases. Unlike the 1940 Act, which required the arbitral tribunal to file the award before the court, the 1996 Act does not have such a requirement and arbitration cases come within the public record only when parties approach the courts for procedural assistance or to challenge an

\textsuperscript{157} Data collected from arbitration journals.2004-2007 source [www.ficci.com](http://www.ficci.com) visited on 22-4-2011
Ad hoc Arbitrations, in particular, are not recorded if the parties do not challenge the award before a court.

A. Relationship between Development of Arbitration and Commercial Growth:

Sec. 60 under the Act of 1996, there is no provision for filing an award before a court of law to make the award ‘rule of the court’. The award becomes automatically enforceable unless challenged in a court of law. In India, the development of arbitration is correlated with the growth of commerce and industry. Figure 1 is also indicative of the fact that the number of arbitration cases is higher in the States/Union Territories which are more commercially developed, such as Delhi, Maharashtra, Tamil Nadu, West Bengal, and Andhra Pradesh. Arbitrations tend to occur more or less frequently in the highly developed states as they have several advantages over the less developed states - more business operations, large companies, better dispensation of justice.

Further, most of the skilled arbitrators tend to work in commercially developed regions due to a larger number of commercial disputes involving higher stakes. On the contrary, few of the arbitrators prefer to work nationally. For instance, some arbitrators on the panel of arbitrators in institutional arbitral institutions like the Indian Council of Arbitrators (ICA) and the Indian Council of Alternative Dispute Resolution (ICADR) have no jurisdictional limitations and arbitrate on any proceeding in any part of India. The prevalence of more skilled arbitrators in commercially developed regions is indicative of the growth of arbitration with the increase in commercial disputes.

B. Difference in Arbitration Practice across Regions:

There are also differences in the way arbitration is practiced across states. These differences arise due to a number of factors, such as availability of skilled arbitrators and lawyers alike, and infrastructure that creates an environment conducive to the arbitration process.

C. Difference in the Arbitrators’ Fees across Regions:

In case of incentives for the arbitrators in various states, the incentives depend upon whether it is ad hoc arbitration or institutional arbitration. The incentives for the arbitrator in ad hoc arbitration vary from state to state, with the trend of arbitrators in major cities of developed states charging relatively more than their counterparts in less developed
states. In case of institutional arbitration, the incentives for the arbitrators remain more or less the same in all the states, as the fees of the arbitrators are regulated under the rules of the arbitral institutions. For example, Table 5 shows the fee structure of arbitrators under the rules of the Indian Council of Arbitrators.

**Table 5: Arbitrator and Administration Fees (Indian Council of Arbitration)**

<table>
<thead>
<tr>
<th>Amount in Dispute</th>
<th>Arbitrator's Fee (in INR)</th>
<th>Administrative Fee (in INR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to INR 0.5 million</td>
<td>30,000</td>
<td>15,000</td>
</tr>
<tr>
<td>From INR 0.5 million one to INR 2.5 million</td>
<td>30,000 plus 1,500 per one hundred thousand or part thereof subject to a ceiling of 60,000</td>
<td>15,000 plus 750 per 750 per one hundred thousand or part thereof subject to a ceiling of 30,000</td>
</tr>
<tr>
<td>From INR 2.5 million one to INR 10 million</td>
<td>60,000 plus 1,200 per one hundred thousand or part thereof subject to a ceiling of 150,000</td>
<td>30,000 plus 600 per one hundred thousand or part thereof subject to a ceiling of 75,000</td>
</tr>
<tr>
<td>From INR 10 million one to INR 50 million</td>
<td>150,000 plus 22,500 per ten million or part thereof subject to a ceiling of 240,000</td>
<td>75,000 plus 11,250 per one hundred thousand or part thereof subject to a ceiling of 120,000</td>
</tr>
<tr>
<td>From INR 50 million one to INR 100 million</td>
<td>240,000 plus 15,000 per ten million or part thereof subject to a ceiling of 315,000</td>
<td>120,000 plus 8000 per ten million or part thereof subject to a ceiling of 160,000</td>
</tr>
<tr>
<td>Over INR 100 million</td>
<td>315,000 plus 12,000 per ten million or part thereof</td>
<td>315,000 plus 12,000 per ten million or part thereof</td>
</tr>
</tbody>
</table>

*Source: Data collected from arbitration journal for the years 2004-2007*

**3.4. INTERNATIONAL ARBITRATION:**

India has always excelled in charity of wisdom and knowledge. It revealed in sharing the knowledge across the globe and respectfully received the gains of knowledge from outside the world. Our ancient traditional culture is acknowledged to be the pristine source of solutions for problems of various fields – social, political, economic, religious and spiritual. It is hailed as the effective system of administration of justice – both within

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158 Supra note. 79
and without the traditional boundaries. The modern justice system Alternative Dispute Resolution is traceable to that genealogy. Alternative dispute resolution (ADR) is increasingly seen as an effective alternative to traditional court based dispute resolution. ADR is speedier, economical and more effective than traditional litigation model. India has also been encouraging use of arbitration, conciliation, mediation and other ADR techniques to settle disputes out of court.

ADR may be used for both national as well as international dispute resolution. One area that actively looks upon ADR as a preferential mode of dispute resolution is international commercial arbitration. International commercial arbitration in India has also invoked interest of foreign investors and international business community. Disputes arising out of international commerce are resolved more conveniently by international arbitration that national court litigation for the sheer overriding advantages of arbitration. International arbitration is an arbitration which may take place either within India or outside India, where there are ingredients of foreign origin in relation to the parties or the subject matter of the dispute. Arbitration becomes ‘international’ when at least one of the parties involved is resident or domiciled, outside India or the subject matter of the dispute is abroad.

The law applicable may be the Indian law or a foreign law, depending on the terms of the contract in this regard and the rules of conflict of laws. “International arbitration” becomes ‘international commercial arbitration’ if it relates to disputes arising out of a “legal relationship”, whether contractual or not, considered as commercial under the law in force in India. In India, international commercial arbitration as a mode of resolution of disputes came to be adopted from the medieval times when trade and commerce between traders in India and outside started growing. Arbitration law in India underwent substantial change in 1996 with the enactment of the Arbitration and Conciliation Act. This Act which covers both domestic arbitration and international commercial arbitration, consolidates Indian Arbitration law and minimizes the role of the courts in the arbitration process. The Act is modelled on the UNCITRAL MODEL LAW. According to Sec-2(f) of the Arbitration and Conciliation Act, 1996, International Commercial Arbitration means an arbitration relating to dispute arising out of legal
relationships, whether contractual or not, considered as commercial under the law in force in India 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) A company or association or a body of individuals whose central management and control is exercised in any country other than India; or

It is interesting to note that the term ‘commercial’ has not been defined in the Act of 1996. Black’s Law Dictionary defines ‘commercial’ as – “Relates to or is connected with trade and traffic or commerce in general or is occupied with business and commerce.” In Stroud’s Judicial Dictionary, the term ‘commercial’ is defined as “traffic, trade or merchandise in buying and selling of goods.” This term is explained in a footnote annexed to Art-1 of UNCITRAL Model Law on International Commercial Arbitration, 1985, and can be used for guidance since Model Law has been referred to in the Preamble of the Act. The explanation says – “The term ‘commercial’ should be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are limited to the following transactions: ANY TRADE TRANSACTION FOR THE SUPPLY OR EXCHANGE OF GOODS OR SERVICE DISTRIBUTION AGREEMENT: commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods of passengers by air, sea rail or road.”

International commercial arbitration may take place in India or it may take place outside India. Part-I of the Act applies only to ‘international commercial arbitration’ held in India. In other words, Part-I does not apply to international commercial arbitrations held outside India. The award which would result from such arbitration taking place in India would be domestic award. If international commercial arbitration takes place outside India, the award resulting from such arbitration would be foreign award, irrespective of whether the arbitration agreement in that case was or was not
governed by the law of India. It may be noted that Part-II is concerned only with the enforcement of New York Convention and Geneva Convention Awards. It does not relate to ‘International arbitration’ or ‘international commercial arbitration’.

The Indian Council of Arbitration (I.C.A) is India’s primary arbitration institution. Established in 1965, the ICA not only acts as an administration centre for a wide range of domestic and international arbitrations, it also trains lawyers and arbitrators and serves as a research centre. It has its own rules of arbitration and panel of arbitrators. Although India has been a party to the New York Convention since 1958, it has only been since the enactment of the new laws in 1996 that parties have been able to enforce awards under the Convention with relative ease. International commercial arbitration is no more a simple one as it used to be. The emerging trends in International commercial arbitration indicate that it has become complicated and more demanding. This is especially true when Information and Communication Technology (ICT) is used for dispute resolution159

The advent of online dispute resolution (ODR) is a classic example of the same. Further, ODR is no more just technical or legal. Rather it has become techno legal in nature. Both online dispute resolution in India and international commercial arbitration in India have been trying their level best to cope up with the contemporary international standards. However, even the international standards are themselves not uniform and there is an urgent need to have harmonized standards for ODR. The scope of international commercial arbitration in India is increasing day by day. It can be availed of for disputes arising out of contracts on sales of goods, distributorship, agency and intermediary contracts, construction, engineering and infrastructure contracts, intellectual property contracts, domain name dispute resolutions, joint venture agreements, maritime contracts, employment contracts, etc. India needs to fine tune its practices regarding international commercial arbitration, especially those pertaining to ODR. The future disputes resolution would rely heavily upon ICT and adapting the current dispute resolution model to the same is need of the hour160.

Some of the important conventions and events relating to International Commercial Arbitration and Conciliation are given hereunder –

- 2010 - UNCITRAL Arbitration Rules (as revised in 2010)
- 2006 - Recommendation regarding the interpretation of article II (2), and article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
- 2002 - UNCITRAL Model Law on International Commercial Conciliation
- 1996 - UNCITRAL Notes on Organizing Arbitral Proceedings
- 1982 - Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules.
- 1980 - UNCITRAL Conciliation Rules
- 1976 - UNCITRAL Arbitration Rules

Thus, this chapter covers the emergence, evolution and proliferation of arbitration as a neo-classic nodal agency in the justice delivery system covering the development of arbitration in India with the statutory base of the Arbitration Act of 1940 and the Arbitration and Conciliation Act, 1996, Indian approach in domestic arbitration and the role of arbitrators and the growing need of international arbitration.