THE TAMIL NADU
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ALTERNATE DISPUTE RESOLUTION

STUDY MATERIAL

By

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PREFACE

This study material is meant for the students of IV year, 8th Semester B.A.LLB (Hons.) and B.Com.LLB (Hons.) and II year, 4th Semester LLB (Hons.) studying in School of Excellence in Law, The Tamil Nadu Dr.Ambedkar Law University (TNDALU). It covers the concept Alternative Dispute Resolution (ADR) adopted and effectively practiced in India with Frequently Asked Questions and few annexures. An attempt has been made to give basic information of various ADR mechanisms in usage. ADR being an alternative to the traditional court litigation, has to be seriously considered by law students in choosing their career with due regards to the nature of dispute (s) and the litigants perception. The readers shall understand this modern and hybrid advocacy with basic and simple ingredients.

The study material includes the essential components, namely, Introduction to ADR, Arbitration Law in India, Types & categories of Arbitration, Planning Arbitration, Conducting Arbitration, Award Writing, International Commercial Arbitration, Major Arbitration institutions and Emerging Trends. As a value addition, the course material consists of the following:

Arbitration Guide - FAQs

Annexure 1 – Glossaries

Annexure 2 – List of Arbitration institutions

It is imminent that this material would bring in awareness on law students on the effect and applicability of ADR processes with fundamental objective of facilitating the Judiciary with an enforceable alternative. Hope this material would reasonably satisfy the thirst of the students in observing the out of court dispute resolution techniques and effectively implementing in their future endeavours. I wish to acknowledge the support and encouragement of the teaching and non-teaching staffs of TNDALU. I thank each and every person who has helped me in bringing out this study material. All the efforts put into it will be deemed to be successful if it caters to the students who need it the most. The task of changing the mindset of law students to invoke alternatives to the traditional litigation process has just begun.

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CHAPTER I - INTRODUCTION TO ADR

A) Introduction: Overview

Arbitration has a long history in India. Arbitration in India is an age old concept, originating in ancient India and is still practiced as a a grass root system called Panchayat(s). It is still prevalent today in villages where the seniors of the village or community act as mediators and resolve disputes of villagers and/ or community. Therefore, it cannot be said that Arbitration as a concept or Alternate Dispute Resolution is a foreign import on the Indian legal system. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community - called the 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. Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act. 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). Increasingly, arbitration is recognized as the most effective method of solving commercial disputes, especially those of an international dimension. It can achieve equitable solutions more quickly than litigation, and at less cost; it allows parties to adopt whatever procedure they choose for the resolution of differences; it enables parties to decide where disputes shall be heard. Within and around Asia, India offers both the resources and a venue for Arbitrations and dispute resolution procedures and is dedicated in its mission to advancing and supporting arbitration as a means of resolving commercial disputes.

Indians have long been aware of the advantages of arbitration, acknowledging its value as a method of resolving disputes, and more recently has extended tradition by the statutory adoption of the UNCITRAL Model Law for

international commercial arbitration and the UNCITRAL Rules of Arbitration, with relevant modifications to fit into its institutional framework. In the field of resolving legal controversies, mediation stands tall as an informal method of dispute resolution, in which a neutral third party, called as the mediator, attempts to assist the parties in finding resolution to their problem through the mediation process. While technically, mediation has no legal standing, the parties can commit to certain agreed points to writing and sign this document, thus producing a legally binding contract in some jurisdiction specified therein. Mediation differs from most other conflict resolution processes because of its simplicity, and clarity of its rules. It is employed at all levels from petty civil disputes to global peace talks. It is thus difficult to characterize it independently of these scales or specific jurisdictions – where 'Mediation' may in fact be formally defined and may in fact require specific licenses.

Mediation is a flexible, non-binding dispute resolution process in which a neutral third party (the mediator) assists two or more disputants to reach a voluntary, negotiated settlement of their differences. The parties have ultimate control of the decision to settle and the terms of resolution. The mediator uses a variety of skills and techniques to help the parties reach a settlement, but has no power to make a decision. The parties remain the decision

makers, ensuring the retention of primary party autonomy. Mediation is an interest-based process because it is designed to help the parties clarify any underlying motivations or interests. Mediators help parties prove the strengths and weaknesses of their legal positions, enhance communications, explore the

consequences of not settling, and generate settlement options. Mediation results in creative solutions, including those where both sides can profit from the settlement terms and are generally confidential. Mediation is defined in Black's Law Dictionary as ``a private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement." In contrast to mediation, arbitration is a formal, quasi-judicial process where a neutral third party, `the arbitrator' renders a binding award on the basis of material placed before him. Arbitration proceedings closely mirror proceedings in a court of law. In a voluntary effort, the mediator facilitates communication between parties and encourages settlement. There is, unlike in arbitration, considerable latitude available to the mediator, as he can privately discuss the merits of a dispute with each part y individually -- unthinkable in the adversarial arbitration process.

In this context, there seems to be a considerable lack of clarity as to the scope of the words `mediation' and `conciliation'. There is, for example, no consistency in the use of these terms worldwide, and a number of ADR systems perceive them to be synonymous. The US and Australia use the term `mediation' while `conciliation' is commonly used in China, Japan, Thailand and Singapore. Black's Law Dictionary also fails to resolve this distinction, if any, by defining the word `conciliation' as ``the adjustment and settlement of a dispute in a friendly, un- antagonistic manner, used in courts with a view to avoiding trial and in labour disputes before arbitration."

It is interesting that the United Nations Commission on International Trade Laws (UNCITRAL) has rules for conciliation and not for mediation, while the World Intellectual Property Organization (WIPO) has rules for mediation but none for conciliation. Even the CPC (Amendment) Act incorporates, for the purposes of mediation and conciliation, the language used in the UNCITRAL Rules for Conciliation, thus perpetuating this verbal ambiguity. As the French arbitrator Professor Charles Jarrosson says, there is a subtle difference between mediation and conciliation -- one of degree rather than nature. Mediation is a more proactive form of conciliation, the latter being more passive in t he sense that the conciliator has an evaluative role as opposed to the facilitative role of the mediator. Unlike a mediator, who has to be active and see that justice is done, the conciliator is a withdrawn neutral.

With a sophisticated and well placed legal system, India is also a party to the New York Convention (on enforcement of arbitration awards) allowing arbitral awards to be enforced by the Courts in almost any country around the world. In India, varied ADR mechanisms exist for resolving disputes outside the courts. The choice of the ADR method largely depends on the nature of the dispute and relation of the parties. The general ADR methods of resolving disputes are arbitration, conciliation, mediation, negotiation, consumer forums etc. Thus, there are sufficient ADR mechanisms in India and the only requirement is their application in true letter and spirit. Arbitration is the most commonly used method in India for resolving and adjudicating various disputes. The Arbitration and Conciliation Act, 1996 governs the ?arbitration procedures? in India. Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I (Sections 2 to 43), no judicial authority shall intervene except where so provided in the said part. This clearly indicates the legislative intent to minimize supervisory role of courts to ensure that the intervention of the court is minimal. Section 4 is a deeming provision, which lays down that where a party proceeds with the arbitration without stating his objection to non-compliance of any provision of Part I from which the parties may derogate or any requirement under arbitration agreement, it shall be deemed that he has waived his right to so object. Section 7 provides that the arbitration agreement shall be in writing and such an agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (4) of Section 7 provides the conditions under which a document or exchange of letter or exchange of statement of claim and defence may amount to an arbitration agreement. Section 11 of the Act provides for appointment of arbitrators and sub-section (6) thereof empowers the Chief Justice of the High Court or any person or institution designated by him to make such an appointment

on the happening of certain conditions enumerated in clauses (a), (b) or (c). Section 16 of the Act is important and it provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement. Thus, the base provided by the Act, if supplemented by a sound e-governance infrastructure, is sufficient to accommodate the mandates of online dispute resolution mechanism (ODRM) in India.

B) Definition and Scope

Alternative Dispute Resolution, commonly known as ADR, refers to dispute resolution mechanisms outside the realm of judicial processes. The concept of Conflict Management through Alternative Dispute Resolution (ADR) has introduced a new mechanism of dispute resolution that is essentially of a non-adversarial kind. A dispute is essentially a lis inter partes and the justice dispensation system in India has found an alternative to such forms of adversarial litigation in the form of ADR Mechanism. The underlying importance is that immense stress is laid on amicable settlement of disputes, and retaining to the best extent possible, the friendly relations between the parties to the dispute in question. The entire ambit of ADR can be broadly studied under two major - arbitration and mediation. Arbitration is the procedure by which parties agree to submit their disputes to an independent neutral third party, known as an arbitrator, who considers arguments and evidence from both sides, then hands down a final and binding decision. In contrast to arbitration, mediation is a process whereby the parties involved utilize an out-side party to help them reach a mutually agreeable settlement. Rather than dictate a solution to the dispute between the two parties, the mediator—who maintains scrupulous neutrality throughout—suggests various proposals to help the two parties reach a mutually agreeable solution.

These methods of dispute resolution enable parties to deal with the underlying issues in dispute in a more cost-effective manner and with increased efficacy. Moreover, these mechanisms have the advantage of providing parties with the opportunity to reduce hostility, to resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case. The resolution of disputes takes place usually in the comfort and privacy of the parties, as opposed to open proceedings in a court of law, and is more viable, economic, and efficient. Immense party autonomy safeguards the rights of the parties to choose the law and rules governing the arbitration, the language, the venue, the number of arbitrators, in relation to the arbitration proceedings. All of these facets go into making ADR mechanisms essentially people- friendly.

The Alternative Dispute Resolution Mechanisms have proven to be one the most efficacious mechanisms to resolve disputes of an international commercial, familial, and domestic corporate nature. Transcending national boundaries it renders proportionate judgments over the merchants' disputes, as the Law Merchants of Medieval ages rendered justice in light of ?fair price, good commerce, and equity. =

On a generic note, ADR procedures can be broadly be segregated into two kinds, namely, adjudicatory and non-adjudicatory. The former genre includes procedures such as arbitration and binding expert determination, which in turn consequently leads to a binding outcome that decides the case. On the contrary, non-adjudicatory procedures include Negotiation, Mediation and Conciliation, which result in non-binding outcomes that amount to a resolution of disputes between parties themselves, without the involvement of the hand of adjudication. A brief outline of several kinds of ADR mechanisms are herein outlined:

- Negotiation: Negotiation refers to a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute. There is no binding outcome at the end of the dispute, and parties are free to accept or refute following the decision therein.

- Conciliation Mediation: Conciliation Mediation, or Conciliatory Mediation, refer to a non-binding procedure in which an impartial third party is appointed as the conciliator/mediator. He then assists the parties privy to the dispute, in reaching a mutually satisfactory and agreed settlement of the dispute. Given that this too, is a form of non-binding ADR, the parties are free to accept or refuse to follow the decision made therein.

- Med-Arb: Med-Arb, is a hybrid mechanism that refers to a procedure which combines conciliation or mediation and arbitration. Initially where the dispute is not settled through a process of conciliation or mediation within a period of time agreed in advance by the parties, arbitration is resorted to as an alternative. The outcome of the Mediation or Conciliation is not generally construed to bind the parties, but the outcome of the Arbitration is binding.

- MEDOLA : Medola refers to a procedure in which if the parties fail to reach an agreement through mediation, a neutral person selected by the parties themselves, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties such selection being binding on the parties.

- Mini-Trial : Mini trials are non-binding procedures in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses, and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser. This presents a chance to the parties to analyze the liable outcomes of their cases, and then permits them to choose a course of action that suits their needs best.

- Arbitration: Arbitration refers to a binding ADR mechanism, in which the dispute is submitted to an arbitral tribunal which makes a decision (an `award') on the dispute that is binding on the parties. Parties are free to choose the number of arbitrators, the arbitrators themselves, the rules and laws governing the arbitration, the procedures, the venue and the language.

- Fast track Arbitration: Fast track arbitration refers to a form of arbitration in which the procedure is expedited manifold, and is rendered in a particularly short time and at reduced cost.

- Neutral listener Agreement: In this mechanism, the parties to a dispute discuss their respective best settlement offers in confidence with a neutral third party who, after his own evaluation, suggests settlements to assist the parties to attempt a negotiated settlement.

- Rent a judge: The disputing parties mutually approach a referee, usually a retired judge, before whom they present their case in informal proceedings. The referee judge gives his decision which is enforceable in a court of law. The fee of the referee is paid by the parties.

- Final offer arbitration: In this mechanism, each party submits its monetary claim before a panel that renders its decision by awarding one and rejecting the other claim.

- Lok Adalats: Lok Adalat is a system of ADR developed in India. It literally means "People's court". The system of Lok Adalats is an improvement on that and is based on the principles of Mahatma Gandhi, and is a non-adversarial system, whereby court sessions are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. The sessions are usually presided by retired judges, social activists, or members of legal profession.

C) History of ADR

ADR in India, has been in existence since time immemorial. The Panchayat system created by the ancient Vedic Ages, are the earliest known modalities of ADR. The entire kingdom belonging to the erstwhile rulers were segregated into villages for administrative requirements, and the governance of each village was left at the hand of a five member body, consisting of the elderly in the village. This body officiated as the Panchayat, and performed judicial and administrative functions. The body was actively involved in dispute settlement, and arrived at peaceful conclusions between disputing parties. An equivalent in the old Indian system for arbitration is Panchayat. In India arbitration has a very ancient heritage. Indian civilization expressly encouraged the settlement of differences by Tribunals chosen by the parties themselves. In the Western world also arbitration has a very long history. The Greeks attached particular importance to arbitration. Submission of disputes to the decision of private persons was recognized also under the Roman law known by the name of compromysm (compromise), arbitration was a mode of settling controversies much favoured in the civil law of the continent. The attitude of English law towards arbitration has been fluctuating from stiff opposition to moderate welcome. The common law courts looked jealously at agreements to submit disputes to extra-judicial determination. With the advent of the British, instances of ADR were seen to exist in a peppered fashion, through the enactment of several pieces of legislation. The initial attempts of taking resort to ADR in British-India starts with the Bengal Regulation Act,1772 which provided that in all cases of disputed accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final. Following suit, The Regulation Act,1781 warranted that judges should recommend the parties to submit disputes to mutually agreed person and no award of arbitrator could be set aside unless there were two witnesses that arbitrator had committed gross error or was partial to a party. A recommendation for the first time was made to the Second Law Commission by Sir Charleswood to provide for a uniform law regarding arbitration. The Code of Civil Procedure was then enacted accordingly in 1859. Sections 312, 313-327 laid down the permission and procedure for arbitration without the court's intervention.

The Indian Contract Act, 1872 also recognizes arbitration, in that an arbitration agreement is deemed an exception to Section 28, which envisages that any agreement in restraint of legal proceedings is void. The Arbitration Act, 1899 was then enacted to apply only to presidency towns to facilitate settlement of disputes out of court. Following this, the Civil Procedure Code, 1908, was enacted, which depicted under s.89, that Arbitration may be resorted to. The Arbitration Act, 1940 repealed and replaced the previous act, and s.89 of the CPC.

Post Independence, in the Constitution of India, under Entry 13 of the Concurrent List, the word ?arbitration? was included. When India became a state signatory to the protocol on arbitration under the Geneva Convention and in order to give effect to the same, the Arbitration (Protocol and Convention) Act was passed. In the midst of this, in 1987, the Legal Services Authorities Act, 1987 came into play, providing for Lok Adalats in the country's judicial set up.

Later, India became a signatory to the New York Convention and accordingly Foreign awards (Recognition and Enforcement) Act, 1961 was passed. The 1940 Act seemed to have a plethora of lacunae, such as a strong supervisory role for courts, multiplicity of appellate layers, frugal institutional support and failure of the enforcement authorities in keeping track of the awards passed. After liberalization of the Indian economy in the 1990's, the Arbitration and Conciliation Act, 1996 was enacted. It superseded the earlier Act of 1940 and brought about radical changes in the law of arbitration and introduced concepts like Conciliation to ensure speedy settlement of commercial disputes. A key feature of the act is that by virtue of Section 5, the judiciary shall not intervene in an arbitration agreement between parties to dispute except as provided under the Act. The Act is a comprehensive one consisting of 86 sections and provides for

judicial intervention only under sections 9, 11, 14 and 34, dealing with exceptional situations. Part I deals essentially with domestic arbitration, part II with international commercial arbitration, Part III with conciliation, and Part IV involves supplementary provisions.

A distinct feature of the current legislation in force is that it has been codified along the lines of Model Arbitral Law (MAL) on International Commercial Arbitration adopted by United Nations Commission on International Trade Law (UNCITRAL) and therefore corresponds to international standards of norms. In Advocates Bar Association v. Union of India, the Supreme Court directed the setting up of a committee to formulate the manner in which various provisions of the Code of Civil Procedure including Section 89 is to be brought into operation. The court also directed the formation of rules and regulations that are to be adhered to while taking recourse to alternate dispute resolution systems. In the case of Babar Ali v. Union of India and Ors., the constitutionality of the act was challenged. The court held that the Act was not unconstitutional and did not in any way offend the basic structure of the Constitution of India. The act was further strengthened when in the case of Kalpana Kothari v. Sudha Yadav and Ors., The Supreme Court held that as long as the arbitration clause exists, a party cannot take recourse to the Civil Courts for appointment of receiver or for any other requirement, without evincing an intention to start the arbitration proceedings.

D) Overview of ADR Processes

ADR essentially includes all forms of dispute resolution that do not involve the courts in the process of settlement. It is, in every sense of the term, an alternative to conventional judicial processes. There is a very wide spectrum of dispute resolution processes, ranging from informal discussion to formal adjudication mechanisms, generally speaking. The underlying concept of ADR is best encapsulated as that the forum should fit the fuss, and not vice versa. With time, ADR has come to mean Appropriate Dispute Resolution. In light of the rapid growth of collaborative negotiation, mediation and other settlement processes, there is, in fact, nothing alternative at all about ADR today. Collaborative negotiations and mediation processes are being adopted with increasing frequency in legal, governmental, business and family matters. This concept of "informed consent to the process" permeates the ADR movement. Commonly, all ADR processes have the following desirable impacts:

- they motivate the parties and any representatives to fasten their attention to the case and prepare for resolution;
- the parties have "their day in court," a "hearing" in which they have the opportunity to present their perspectives on the situation and their sense of a "fair" resolution;
- often for the first time, the parties have the opportunity to experience a capable presentation of the other side's case; and
- the parties have a window of opportunity to identify common interests and points of agreement, and the opportunity to fashion mutually acceptable settlement options to disputed issues.

ADR processes differ in their formality and placement of decision-making power. If the process is mediation, the decision-making power will reside at all times with the parties. In adjudication and arbitration, the decision-making power lies with the third-party neutral. Broadly, there are two kinds of ADR:

- Interest Based: This refers to a mechanism where the interests of both parties are taken into consideration with the final intention of coming to an amicable conclusion that caters to the interests of both parties without impinging too much on that of one. It is essentially a balancing mechanism, to settle differences.

- Rights Based: Rights based ADR refers to an instance where the rights of the parties are at stake. The best is sought to be achieved, where the rights of both parties remain, at best, uncompromised. It is essentially outcome prediction.

There are three Primary ADR Processes:

- Negotiation: Negotiation is a voluntary, private mechanism. If it is based on an agreement, it is enforceable as a contract. No third party facilitator is required, and it is primarily an informal mechanism. There are no limits on the presentation of arguments. It ultimately seeks to arrive at a mutually acceptable agreement.

- Mediation: Mediation is a voluntary mechanism. If it is based on an agreement, it is enforceable as a contract. The process involves a party- selected neutral, unbounded presentation of evidence, and seeks mutually acceptable agreement, dealing with narrow issues for trial. It is a private process. Mediation may be particularly useful when parties have a relationship they want to preserve. So when family members, neighbors, or business partners have a dispute, mediation may be the ADR process to use. Mediation is also effective when emotions are getting in the way of resolution. An effective mediator can hear the parties out and help them communicate with each other in an effective and nondestructive manner. Mediation may not be effective if one of the parties is unwilling to cooperate or compromise. Mediation also may not be effective if one of the parties has a significant advantage in power over the other. Therefore, it may not be a good choice if the parties have a history of abuse or victimization.

- Arbitration: Arbitration is also a voluntary process. If the outcome is required to be binding, it is only subject to limited review. Party autonomy warrants that parties be permitted to select a third party decision maker. It is a less formal, procedurally oriented process. Parties are to present proofs and arguments. The outcome involves principled decisions at times, and the process is private. Arbitration is best for cases where the parties want another person to decide the outcome of their dispute for them but would like to avoid the formality, time, and expense of a trial. It may also be appropriate for complex matters where the parties want a decision-maker who has training or experience in the subject matter of the dispute. If parties want to retain control over how their dispute is resolved, arbitration, particularly binding arbitration, is not appropriate. In binding arbitration, the parties generally cannot appeal the arbitrator's award, even if it is not supported by the evidence or the law. Even in nonbinding arbitration, if a party requests a trial and does not receive a more favorable result at trial than in arbitration, there may be penalties.

Arising out of the three primary modalities, there are eight hybrid models of ADR:

- Mediation-Arbitration
- Private Judging
- Neutral Expert Fact Finding
- Early Neutral Evaluation
- Mini Trial
- Summary Jury Trial
- Ombudsman
- Negotiated Rule Making

The ADR Spectrum includes the following:

- Preventive ADR: Preventive ADR works on the principles of partnering and joint efforts. It arises out of written or orally created ADR clauses, and is essentially governed by a set of rules as a result of negotiations. Joint problem solving is the key feature.
- Negotiated ADR: This is essentially a principle based mechanism, and works primarily on positional problem solving. Parties have their own choices and remain in their position, while they discuss without third party interference and work to achieve a compromise.
- Facilitated ADR: This works in the form of Conciliation and Mediation, whereby resolution is facilitated with the intervention of a third party or a neutral, who works on both sides, in an attempt to create a win-win situation for the both.
- Fact-Finding ADR: Fact Finding ADR is essentially neutral, and merely works to cull out factual data. Experts maybe appointed towards this end, and the parties are free to choose even Magistrates for the task.
- Advisory ADR: Advisory ADR is purely neutral, and evaluates the requirements of the parties, and provides them the requisite advice. It involves private judging, a summary jury and a compendium of trials and mini-trials. The outcome is not binding.
- Imposed ADR: This refers to ADR mechanisms that are imposed by statute or rule book upon the parties, and this results in binding outcomes that oblige the parties to act in a certain manner.

Why ADR?

A) Advantages:

1. Party autonomy: Because of its private nature, ADR affords parties the ease and opportunity to exercise greater control over the way their dispute is resolved as opposed to court litigation. Parties are free to select the most appropriate decision-makers for their dispute. They may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.
2. Neutrality. ADR is generally neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.
3. A single procedure. Through ADR, parties can resolve in a single procedure a dispute, thereby avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.
4. Confidentiality. ADR proceedings are private. Parties can choose to keep the proceedings and outcomes confidential.
5. Finality of Awards. Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.
6. Enforceability of Awards. The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders. Domestic laws also provide for ease in enforcement of awards

7. Expenses are kept down. Attorneys and expert witnesses are expensive, meaning litigating a case can easily run up sky-rocketing bills. ADR offers the benefit of getting the issue resolved quicker than would occur at trial – and that means less money spent for both sides.

8. ADR is speedy. Trials are lengthy, without exception. In many jurisdictions it could take years before you even get to begin arguing your case before a judge, much less get a verdict. There are better things you could be doing with your time.

9. Increased Control over the Process and the Outcome: In ADR, parties typically play a greater role in shaping both the process and its outcome. In most ADR processes, parties have more opportunity to tell their side of the story than they do at trial. Some ADR processes, such as mediation, allow the parties to fashion creative resolutions that are not available in a trial. Other ADR processes, such as arbitration, allow the parties to choose an expert in a particular field to decide the dispute.

10. Preserves Relationships: ADR can be a less adversarial and hostile way to resolve a dispute. For example, an experienced mediator can help the parties effectively communicate their needs and point of view to the other side. This can be an important advantage where the parties have a relationship to preserve.

11. Increases Satisfaction: In a trial, there is typically a winner and a loser. The loser is not likely to be happy, and even the winner may not be completely satisfied with the outcome. ADR can help the parties find win-win solutions and achieve their real goals. This, along with all of ADR's other potential advantages, may increase the parties' overall satisfaction with both the dispute resolution process and the outcome.

12. Improved Attorney-Client Relationships: Attorneys may also benefit from ADR by being seen as problem-solvers rather than combatants. Quick, cost-effective, and satisfying resolutions are likely to produce happier clients and thus generate repeat business from clients and referrals of their friends and associates.

B) Disadvantages of ADR:

1. No guaranteed resolution. With the exception of arbitration, ADR processes do not always lead to a resolution. That means it is possible that you could invest the time and money in trying to resolve the dispute out-of-court and still end up having to go to court.

2. Arbitration decisions are final, according no right to appeal. With a few exceptions, the decision of a neutral arbitrator cannot be appealed against if the parties decide against the appeal in their arbitral agreement. Decisions of a court, on the other hand, usually can be appealed to a higher court.

3. Delaying Tactics. ADR processes can also be used as a delaying tactic or as an attempt by a disputing party to gain useful intelligence on its opponent before going down the litigation route in any event.

4. Limited Process. ADR is limited in the way it cannot, without consensus, involve multiple parties. The court system enables disputing parties to bring in third and fourth parties involved in the same dispute, to apportion the ultimate responsibility all on one occasion. This can often save much time and delay.

5. Vested Interests may play a role. Partiality, bias and vested interests may vitiate the procedure

C) ADR v. Litigation

- ADR is mostly a private proceeding, litigation is public.
- ADR works mostly for civil and commercial issues, Litigation works more in relation to civil and criminal issues
- ADR requires limited evidentiary processes, while Litigation requires rules of evidence to be followed.
- Parties select the neutral party in ADR, but judges for litigation are appointed by the courts.
- ADR is informal, litigation is formal.
- ADR is usually binding, appeal is not always permitted. In litigation appeals are easily possible.
- In ADR, the services of advocates may be enlisted at the discretion of the parties. But in litigation, advocates are mandatory.
- ADR is generally speedier than litigation.
- Costs owed in ADR involve fees for the neutrals, in courts, court fees ought to be paid.
- ADR is a cheaper process, litigation is expensive.
- ADR permits party autonomy, litigation does not.
- ADR allows judicial intervention only on certain occasions, litigation itself entails judicial involvement.
- While many legal practitioners engage in ADR processes, there is no legal or professional requirement for either the ADR practitioner or for party representatives at ADR processes to be legally qualified or to be members of legal professions such as the bar or the law society.

D) Role of Lawyers and Technical Experts in ADR

While ADR dabbles with the legal side in determining disputes between parties, as a rule, disputes involving qualitative issues are better addressed by technically trained neutrals than legal specialists. A technical skill set proves to be a valuable asset in evaluating qualitative disputes such as whether or not a project, design, system or component was performed appropriately and if it was the best choice. The benefit of knowledge and actual experience in the subject matter is useful in deciding if the outcome was reasonable or whether the performance of the parties was appropriate given the circumstances. A neutral trained in the appropriate matter has a better opportunity to gain the respect of the parties and thus either recommend or facilitate a solution which all parties can live with. Sometimes a technical solution presented on a project might be the perfect answer but to a different question than that posed by the project. A technically trained neutral may be better qualified to discern those subtleties. In disputes with substantial expert or technical testimony, technical experts are better equipped to deal with the technical nuances presented by experts. Lawyers, on the contrary, have a great role to play where ADR is concerned. Clients come to advocates with problems, in an attempt to seek solutions for their disputes. An advocate has to make sure that his client is assured justice, and this need not be granted to him only by way of the judiciary itself, but also by way of ADR. ADR works to the advantage of the lawyer and his client, as there is immense importance attached to the expeditious settlement of the dispute. A lawyer can combine both, legal and technical acumen within the ambit of his practice, in pertinence to ADR, and aid myriads of clients in the process.

E) List of matters which cannot be referred to Arbitration

With a sophisticated and well placed legal system, India is also a party to the New York Convention (on enforcement of arbitration awards) allowing arbitral awards to be enforced by the Courts in almost any country around the world. In India, varied ADR mechanisms exist for resolving disputes outside the courts. The choice of the ADR method largely depends on the nature of the dispute and relation of the parties. The general ADR methods of resolving disputes are arbitration, conciliation, mediation, negotiation, consumer forums etc. Thus, there are sufficient ADR mechanisms in India and the only requirement is their application in true letter and spirit. Arbitration is the most commonly used method in India for resolving and adjudicating various disputes.4 The Arbitration and Conciliation Act, 1996 governs the ?arbitration procedures? in India. As per section 2(3) of the Act "This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."

List of matters which cannot be referred to Arbitration:

1) Matters related to industrial disputes
2) Matters related to criminal proceedings [excepting matters relating to compoundable offences]
3) Matters related to charities or charitable trusts
4) Matters related to dissolution or winding up of Companies
5) Insolvency matters e.g. adjudication of a person or an insolvent
6) Matters related to claim for recovery of octroi duty
7) Matrimonial causes (except matters relating to settlement of terms of separation or divorce)
8) Relating to proceedings for appointment of guardian of a minor or lunatic
9) Testamentary matters e.g. validity of a will
10) Relating to possession of leased premises governed by the provisions of the Bombay Rents, Hotels and Lodging House Rates Control Acts, 1947
11) Relating to suit under section 92 of the code of Civil Procedure, 1908
12) Relating to title to immovable property in a foreign country.

Any matter, which is contrary to public policy or unless, under any other law, such a dispute is not capable of determination by arbitration.

CHAPETER II - ARBITRATION LAWS

Arbitration Legislation:

Arbitration is essentially a dynamic field of sorts, warranting that the field is still expanding into a wider horizon of practice and theory. The quintessence of arbitration lies in the settlement of disputes by a tribunal chosen by the parties themselves, rather than by the Courts constituted by the State. The popularity of arbitration as a mode of settling disputes is due to the fact that arbitration is regarded as speedier, more informal and cheaper than conventional judicial procedure and provides a forum more convenient to the parties who can choose the time and place for conducting arbitration and the procedure. Where the dispute concerns a technical matter, the parties can select an arbitrator who possesses appropriate special qualifications or skills in the trade.

As a concept and as a process, arbitration is well embedded in commercial practices and in the socio-economic realm of the legal practice. When two persons have agreed to settle a dispute through arbitration, what they really mean is that the actual and final resolution of their dispute will rest with a third person called the arbitrator. The essence of arbitration, therefore, is that it is the arbitrator who decides the case and not the ordinary civil courts established by the state. The law of arbitration is based upon the principle of referring the disputes to a domestic tribunal substituted in the place of a regular Court. Thus arbitration can be defined as a reference to the decision of one or more persons called arbitrators of a particular matter in difference or dispute between the parties. Halsbury defines "arbitration" as the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a Court.

The exigencies and vagaries of business brought about an increasing demand for commercial arbitration in England. The realities of business in due course brought about a change in the judicial attitude. In India the history of statutes relating to arbitration began with the regulations under the East India Company made for the Presidency of Bengal, Madras and Bombay. These regulations were later expanded in the Civil Procedure Act of 1859. In 1940, an Arbitration Act was passed for the whole of British India. On 26.01.1950 the Act was extended to the whole of India except the Part B States. That Act was repealed by the Arbitration and Conciliation Ordinance 1996 (Act 8 of 1996) which came into force on 25.01.1996 and on its expiry Arbitration and Conciliation Ordinance (Act 11) of 1996 and thereafter during the Parliament session in 1996 came to be enacted as the Arbitration and Conciliation Act, 1996. The comprehensive nature of this Act arises due to the fact that it is modeled on the MAL of the United Nations Commission on International Commercial Arbitration, 1985 as, in the Geneva Assembly of the United Nations heavy emphasis has been laid on these rules constituting the recommended uniform model law on arbitral among all countries.

The term 'arbitration' is not defined under the Arbitration Act, but the term 'arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between the parties. Sec.7(5) of the Act expressly provides that reference to a document containing an arbitration clause would constitute an arbitration agreement. As defined under Section 2(1)(a) it covers any arbitration whether it is administered by any permanent arbitral institution or not. It also covers arbitration relied on voluntary agreement by the private parties or by operation of law.

a) 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 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.

b) New York Convention, 1958

The New York Arbitration Convention of 1958 is the cornerstone of international commercial arbitration. Although judicial interpretation of the Convention has proceeded since the publication of Albert Jan van den Berg's classic commentary, his extraordinarily thorough analysis remains the pre-eminent work on the application and enforcement aspects of the Convention. Under Section 44 of the Indian Arbitration and Conciliation Act, 1996, a foreign arbitration a foreign award by definition means an award passed in such territory as the Central Government by notification may declare to be a territory to which the New York Convention applies. Hence, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies. About 40 countries have been notified so far by the Indian government. The United States of America, United Kingdom, France, Germany, Japan and Singapore are among the countries notified by India. Australia and Hong Kong are among the countries which have not yet been notified. India is a party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. It became a party to the 1958 Convention on 10th June, 1958 and ratified it on 13th July, 1961. The following briefly describes the two basic actions contemplated by the New York Convention. The first action is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards made in the territory of another State. This field of application is defined in Article I. The general obligation for the Contracting States to recognize such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Article IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are limitatively listed in Article V(1). The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V(2). If the award is subject to an action for setting aside in the country in which, or under the law of which, it is made (?the country of origin?), the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement (Article VI). Finally, if a party seeking enforcement prefers to base its request for enforcement on the court's domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country.

Where it seeks enforcement, it is allowed to do so by virtue of the so-called more- favourable-right-provision of Article VII(1). The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II(3) provides that a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration. In both actions the arbitration agreement must satisfy the requirements of Article II(1) and (2) which include in particular that the agreement be in writing.

c) UNCITRAL Model Arbitral Law

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the

arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version. The UNCITRAL Model Arbitral Law is divided into eight chapters.

- Chapter I – General Provisions
- Chapter II - Arbitration Agreement
- Chapter III - Composition of Arbitral Tribunal
- Chapter IV- Jurisdiction of Arbitral Tribunal
- Chapter V - Conduct of Arbitral Proceedings
- Chapter VI - Making of Award and Termination of Proceedings
- Chapter VII - Recourse Against Award
- Chapter VIII - Recognition and Enforcement of Awards

Chapter I contains general provisions, pertaining to arbitration. Article 1 outlines the scope of application, while Article 2 talks of the Definitions and rules of interpretation. It talks of the meaning and interpretation of terms such as arbitration, arbitral tribunal, court, and also mentions the right of institutions in determining issues. Article 3 speaks of the offer and acceptance rule, by bringing out the manner of receipt of written communications. Article 5 talks of the extent of court intervention, while Article 6 elaborates upon the Court or other authority for certain functions of arbitration assistance and supervision.

Chapter II begins with Article 7, which talks of Definition and form of arbitration agreement. Article 8 enumerates details in relation to the Arbitration agreement and substantive claim before court. Article 9 deals with the interim measures by courts.

Chapter III commences with Article 10, dealing with the number of arbitrators. Parties are free to determine the number of arbitrators, failing which the number is three. Article 11 talks of the modes of appointing arbitrators. Parties are free to decide the procedures for appointment, and nationality-bias is excluded. Options in case of failure of parties to decide, are also enunciated. Article 12 provides for the grounds for challenge for the appointment of the arbitrator. Article 13 takes this substantive provision onto a procedural level, by speaking about the challenge procedure. Article 14 speaks of what ought to be done in case the arbitrator finds himself incapacitated to act. The withdrawal by the arbitrator, and termination of mandates by the parties are spoken of in detail. Appointment of substitute arbitrator is governed by Article 15.

Chapter IV, dealing with the Jurisdiction of the Arbitral Tribunal, commences with Article 16, which talks of Kompetenz Kompetenz, or the fact that the arbitral tribunal possesses Competence of arbitral tribunal to rule on its jurisdiction. Article 17 talks of the Power of arbitral tribunal to order interim measures.

Chapter V governs the conduct of the arbitral proceedings. Article 18 warrants the equal treatment of the parties to the arbitration. Article 19 deals with the determination of the rules of procedure by the parties. Article 20 talks of the Place of arbitration. Article 21 deals with the mechanism of commencement of

arbitral proceedings. Article 22 deals with the language of arbitration. Article 23 deals with the Statements of claim and defense. Article 24 enunciates the details pertaining to Hearings and Written proceedings. Article 25 deals with what needs to be done upon default of a party. Article 26 talks of Expert appointed by arbitral tribunal. Article 27 explains how Court assistance maybe sought in taking evidence.

Chapter VI deals with the making of award and termination of proceedings. Article 28 talks of rules applicable to substance of dispute. Article 29 deals with the issue of Decision-making by panel of arbitrators. Article 30 elaborates on the settlement. Article 31 talks of the Form and contents of award. Article 32 elaborates upon the Termination of proceedings. Article 33 deals with the Correction of interpretation of award and passage of an additional award. Chapter VII, dealing with seeking recourse against awards, contains only one article, namely, Article 34 which works on the same.

Chapter VIII elaborates upon the recognition and enforcement of awards. Article 35 elaborates upon the basic aspects of Recognition and enforcement. Article 36 mentions the grounds on which the recognition or enforcement may be refused.

UNCITRAL Arbitration Rules

Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award. The UNCITRAL Arbitration Rules are a comprehensive, internationally accepted, set of rules which parties can adopt for an arbitration arising under their contract. These rules, however, are designed essentially for a non- institutional form of arbitration. Neither UNCITRAL nor any other institution plays any role in the administration of the arbitration. Lack of institutional support often means delays and frustrations in arbitration according to these rules. Parties need to make special provision if they are to enjoy the benefit of institutional support in the conduct of an UNCITRAL rules arbitration.

The two main areas to be considered are:

(a) Appointment of the arbitrator(s)

(b) Institutional support for the progress of the arbitration

Parties are encouraged to appoint their own arbitrators, or to rely institutions to aid them in the process. The UNCITRAL Arbitration Rules do not provide for the management of the financial and other practical aspects of the arbitration. This is left entirely to the arbitral Tribunal and the parties. The Tribunal fixes its own fees, determines the amount of deposits towards its fees, collects the deposits from the parties, and pays itself at the end of the arbitration from the deposits. The parties and the Tribunal also try to manage other administrative chores in the proceedings. The rules are segregated into four sections:

- Section I : Introductory Rules
- Section II : Composition of the Arbitration Tribunal
- Section III : Arbitration Proceedings
- Section IV : The Award

Section I, dealing with Introductory Rules, contains four articles. Article 1 outlines the scope of application, and describes a model arbitration clause. Article 2 talks of Notice, Calculation of Periods of Time. Article 3 elaborates upon notice of arbitration. Article 4 enunciates upon the details of Representation and Assistance.

Section II deals with the composition of the arbitral tribunals. Article 5 elaborates upon Number of Arbitrators. Articles 6, 7 and 8 deal with the appointment of the arbitrators. Challenge of the appointment of Arbitrators is governed by Articles 9 to 12. Article 13 talks of the replacement of an arbitrator. Article 14 deals with Repetition of Hearings in the Event of the Replacement of an Arbitrator.

Section III, dealing with Arbitration Proceedings, contains sixteen articles. General Provisions are enunciated under Article 15. Article 16 governs the Place of Arbitration. Article 17 enunciates details on Language. Article 18 deals with the Statement of Claim, Article 19 deals with Statement of Defense. Article 20 deals with the amendment to these claims and defenses. Pleas as to the Jurisdiction of the Arbitral Tribunal are governed by Article 21. Further written statements are governed by Article 22. Periods of time fixed by arbitral tribunal are guided by Article 23. Evidence and Hearings are governed by Articles 24 and 25. Article 26 deals with interim measures of protection. Article 27 governs the appointment of experts. Article 28 talks of default on part of parties. Article 29 talks of closure of hearings. Article 30 speaks of waiver of rules.

Section IV elaborates upon the arbitral award. Article 31 deals with Decisions. The form and effect of the award is spoken of under Article 32. Article 33 mentions details of the applicable laws, and speaks of the applicability of the rule of amicable compositeur. Settlements and other grounds of termination are spoken of under Article 34. Interpretation and Correction of the award are governed by Articles 35 and 36 respectively. Additional awards maybe made in consonance with Article 37, while Costs are governed by Articles 38 to 40. The deposition of costs is governed by Article 41.

d) The Arbitration and Conciliation Act, 1996:

The 1996 Act, which repealed the 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism. The 1996 Act has two significant parts – Part I provides for any arbitration conducted in India and enforcement of awards there under. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award there under (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act.

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, 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.The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous. 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.13 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.15 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.16 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 of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee submitted its report in January 2005.

Arbitration and courts

Arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties or appointed under statutory authority, for determination of the same. In a broad sense, it is substitution of ordinary judicial machinery by a mutually chosen tribunal i.e., an Arbitrator.

The 1996 Act has limited the powers of Court rather restricted the exercise of judicial powers, in other words confined the extent of judicial intervention as provided under Section 5 of the Act - "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part." Finality of Arbitral Award under Section 35 is subject to this part according to which an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Thus, the Act itself provided finality of arbitral awards and its enforcement (Section 36) without intervention of the Court. The Arbitral Tribunals are empowered to settle any objections raised in respect of jurisdiction or scope of authority of the arbitrators. Arbitration offers definite advantages that litigation from its very nature can never provide. Courts have always adopted a conservative approach to problems. Courts are put into a straight jacket as they are obliged to follow fixed procedure and fixed rules of evidence. Arbitration, on the contrary, is more informal. The Evidence Act is not applicable to arbitration. The Civil Procedure Code has no application. The arbitrator need only proceed in a manner conforming to justice, equity and good conscience. He is not bound by any formulated rules. One of the major advantages of arbitration is that an expert arbitral tribunal can be selected considering the field of dispute; so much so, the entire procedure can be conducted without the intervention of expert lawyers, with major gains in speed and economy. Thus many disputes as to quality in commodity trades, many disputes arising out of construction contract, among others of a similar cadre, can be settled through arbitration in a speedy manner at lesser cost and more quickly than through courts.

Arbitrators and judges are similar in the business of dispensing justice - the judge in the public sector and the arbitrator in the private sector. The public legal system of any country represents a compromise between conflicting demands for quality, speed and cheapness of the decision - making process. Of these, quality of decision making is usually given the highest priority. Speed at which the decision is arrived at and the cheapness of the procedure have suffered considerably. Litigants had to queue up for the services of the Court and to accept the delay, the inconvenience and often the loss consequent on the delay.However, the success of any arbitration depends to a certain extent, upon the personality of the arbitrator. The arbitrator should always bear in mind the range of procedures open to him so as to be able to suggest to the parties the course which will save costs without reducing to an unacceptable extent the quality of the decision making process. Simply put, properly conducted arbitrations give acceptable results with speed and thoroughness at relatively lesser costs. In a few circumstances, since there is no right of appeal in Courts, the decision gains finality saving further time and costs.Commonly arising disputes include instances where the issue is how much is to be awarded or the assessment of damages for breach of contract. Here the proceedings generally tend to be bedeviled by wild overestimation by the claimant or underestimation by the respondents. Proceedings which should be an amicable attempt to resolve a genuine difference of opinion turn into an adversarial conflict. What is termed in legal parlance as the =forest technique' of pleading is used by claimants. The farrago of obscurities in the contract is highlighted - all instructions and drawings are

without exception alleged to have caused disturbance and additional loss or to have been issued late in an attempt to avoid the exposure to the critical examination involved in a more selective analysis of the claim.If rival claims are small and each side believes that the difference results from a genuine difference of opinion the parties may be normally content to appear in person or by an employee before the arbitrator. They may even square up the disputes behind the back of the arbitrator. The resulting procedure shows arbitration at its most useful. But if the difference is great and one or both the parties think that the other is knowingly exaggerating, the tendency is to appoint advocate partly because the amount in issue is such as to justify the additional expense involved or partly because of the fear that unless every possible point in defense is taken the exaggeration of the opponent may be accepted by the arbitrator also partly because the task of exposing by cross examination the exaggerations of the claimant and his witnesses is the expert task of a lawyer. The relevance of arbitration, its importance and its needs can never be over-emphasized. The rapid and phenomenal growth of commerce and industry and the complex and varied problems thrown out by them can find solution only through arbitration. Conventional courts are ill equipped to meet the needs.

Arbitrability and Non-arbitrability of Disputes

Arbitrability refers to whether a dispute is capable of being subject to arbitration, or not. While only some disputes seem to take to arbitration, by their nature, the subject matter of some disputes is simply not capable of arbitration. Broadly, two groups of legal procedures cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments that are binding on all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters were not arbitrable in the United States Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters are at least restricted. However, disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination. In India, the Patent regime provides powers for the High Court alone, to revoke a patent granted, in the judicial side. This power cannot be ousted by an arbitration process, no matter how crucial it is, as a decisive factor, in the settlement of the differences between the parties.

- Some legal orders exclude or restrict the possibility of arbitration for reasons of the protection of weaker members of the public, e.g. consumers. Examples: German law excludes disputes over the rental of living space from any form of arbitration, while arbitration agreements with consumers are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement. On a generic note, the above mentioned kinds of disputes are not arbitrable. However, each dispute is best assessed on a case by case basis, indicating whether the dispute in question is arbitrable or not.

Interim Measures by Court

The Act has been enacted on the line of UNCITRAL model law of International Commercial Arbitration. The Act provides autonomy to the parties in various matters and has reduced the intervention of court to the minimum. However, the courts can intervene to give effect to various matters as permitted by the Act. One such situation is to grant interim measures of protection as contemplated by Section 9.

Interim Measures by the Court: Section 9 of the 1996 Act:

It will be apposite to advert to section 9 of the Act which reads thus: A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings or for an interim measure of protection in respect of any of the following matters namely:

- The preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement.
- Securing the amount in dispute in the arbitration
- The detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
- Interim injunction or the appointment of a receiver.
- Such other interim measures of protection as may appear to the Court to be just and convenient. And the court shall have the same power for making orders as it has for the purpose of and in relation to, any proceedings before it.

Obviously, all such factors, which the court considers in passing interim order, would be applicable to orders passed under Section 9 of the Act also. Basically, the party seeking injunctive relief should establish a likelihood of success on the merits, irreparable harms that might be caused to him if the interim relief is denied and the balance of convenience in its favour. It may be relevant to point out that the Arbitration Act, 1996 of England makes interim relief more stringent in the sense that it permits such relief only when the parties have not otherwise agreed and only if and to the extent that the arbitral tribunal or any institution agreed to by the parties has no power or is unable for the time being to act effectively. Thus, the English Arbitration Act has minimized the intervention of the court and as such the provision is truly pro- arbitration. The Supreme Court, in Sundaram Finance Ltd. vs.NEPC India Ltd. held that Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service. The Supreme Court also made an observation about the relevance of Arbitration Act, 1940 in interpreting the Act of 1996. The Court held that the provision of this Act have, therefore to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words, the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. Provisions contained in section 9 regarding the availability of interim relief even before the arbitration proceedings commence may be misused by a party. It may so happen that after obtaining an interim order from the court it may not take initiative to have an arbitral tribunal constituted. This will amount to reaping the benefit of the interim order without any time limit. As per Sub-Sec (4), where a party makes an application under sub-section (1) for the grant of interim measures before the commencement of arbitration, the Court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of such direction. As per Sub-sec (5), the Court may direct that if the steps referred to in sub-section (1) are not taken within the period specified in sub-section (4), the interim measure granted under sub-section (2) shall stand vacated

on the expiry of the said period; Provided that the court may, on sufficient cause being shown for the delay in taking such steps, extend the said period. In Sub-sec. (6), where an interim measure granted stands vacated under sub-section (5), the Court may pass such further direction as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section. Thus, if the Amendment Bill is passed, it will be then mandatory on the part of the party who has obtained interim relief from a court to constitute the arbitral tribunal expeditiously. Failure to do so, a party may run the risk of automatic vacation of the interim measure. This is a step in the right direction.

The Court will generally take into account the following considerations while granting interim relief under section 9:

1. The party applying for interim relief must establish a prima-facie case.

2. The balance of convenience should be in its favour.

3. The party will suffer irreparable loss or injury if the interim measure is denied to it.

4. The exercise of discretion has to be in beneficial manner depending upon the circumstances of each case

CHAPTER III – TYPES AND CATEGORIES OF ARBITRATION

Types of Arbitration

There are different modalities of arbitration processes, depending upon varied factors, such as the agreement of the parties, the kind of reference made, the place or persons conducting the arbitration, and such other factors as shall be explained in due detail. While ultimately the goal is one and the same- i.e., that of settling the differences between the parties in question, there lies a perceptible difference in each kind from the other. The most generic types of arbitration are herein enunciated:

1. Ad-hoc Arbitration: Ad hoc arbitration is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The absence of administrative fees alone makes this a popular choice.18 Other advantages include astute party autonomy, in that the parties have the option of negotiating a complete set of rules, establishing procedures which fit precisely their particular needs. However, the

   a. disadvantage lies in the fact that this approach can require considerable time, attention

   b. and expense without providing assurance that the terms agreed will address all eventualities.

2. Institutional Arbitration: Institutional arbitration refers to the arbitration procedure undertaken by parties, in consonance with an arbitration institution. Plenty of popular institutions such as the London Court if International Arbitration, the ICC institute of Arbitration, the International Court of Arbitration, Singapore International Arbitration centre, Hong Kong Institute of Arbitration Centre, to name a few, administer arbitration procedures on a regular basis. Each institute has a set of rules that govern arbitral proceedings conducted by them, and while parties may be free to choose the substantive laws governing their arbitration and disputes allied therein, the procedural laws are essentially governed only by the rules of these institutions. The advantages of institutional arbitration to those who can afford it are apparent. Foremost are:

   i. availability of pre-established rules and procedures which assure that arbitration will get off the ground and proceed to conclusion with dispatch;

   ii. administrative assistance from institutions providing a secretariat or court of arbitration;

   iii. lists of qualified arbitrators, often broken out by fields of expertise;

   iv. appointment of arbitrators by the institution should the parties request it;

   v physical facilities and support services for arbitrations;

   vi. assistance in encouraging reluctant parties to proceed with arbitration and

   vii. an established format with a proven record.

   The primary disadvantages attending the institutional approach are:

   i. administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy;

   ii. the institution's bureaucracy may lead to added costs and delays and the disputants may be required to respond within unrealistic time frames.

3. Statutory Arbitration: Statutory Arbitration refers to any form of a mandatory arbitration which is imposed on the parties by operation of law. In such a case the parties have no option as such but to abide by the law of land. It is apparent that statutory arbitration differs from the above types of arbitration because

    a. The consent of parties is not necessary;

    b. It is compulsory Arbitration;

    c. It is binding on the Parties as the law of land; For Example: Section 31 of the North Eastern Hill University ACt, 1973, Section 24,31 and 32 of the Defence of India Act, 1971 and Section 43(c) of The Indian Trusts Act, 1882 are the statutory provision, which deal with statutory arbitration. There are more than 25 central Acts providing for statutory arbitration in India. For example, under the Co-operative Societies Act and under the Telegraph Act etc arbitration is provided for statutorily. The provisions of these statutes to the extent inconsistent with the provisions of the Arbitration Act will prevail over the provisions of the Arbitration Act.

4. Domestic Arbitration: Any Arbitration which occurs in India and all the parties bear the nationality or originate from India is termed as Domestic Arbitration. This arbitration mechanism involves no external elements with respect to enforcement or actual carriage of the arbitration process and is entirely within the scope of the territory of India.

5. International Arbitration: Any Arbitration in which any party belongs to any nationality or origin other than India and the dispute is to be settled in India, such arbitration is termed as International Arbitration. Such arbitration mechanisms involve some aspect that is international in character – perhaps in terms of jurisdiction or even in terms of the laws and rules, or the enforceability.

6. Mandatory/Statutory Arbitration: This form of arbitration refers to a method that is prescribed by a statute, or a legislative prerequisite. "Statutory Arbitrations" are arbitrations conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts. There are about 24 such Central Acts. Among them are the Cantonments Act, 1924, the Indian Electricity Act, 1910, the Land Acquisition Act, 1894, the Railways Act, 1890 and the Forward Contracts Regulation Act, 1956. Many State Acts also provide for arbitration in respect of disputes covered by those Acts, including Acts relating to co-operative societies. The provisions of the Arbitration Act, 1940 generally apply to those arbitrations unless they are inconsistent with the particular provisions of those Acts, in which case the provisions of those Acts will apply (Sections 46 and 47, Arbitration Act, 1940).

7. Voluntary Arbitration: Voluntary Arbitration is arbitration by the agreement of parties. It is a binding adversarial dispute resolution process in which the disputing parties choose one or more arbitrators to hear their dispute and to render a final decision or award after an expedited hearing. In the case of a dispute over a contract or other legal matter, arbitration may be in order. Arbitration involves the use of a neutral party to both review and help settle the dispute. The use of arbitration helps keep the matter from going to the courts, and may be either compulsory or voluntary. In compulsory arbitration, the parties involved are required to go through the third party to settle their dispute. If an arbitration clause is included in a contract, and if the contract itself is valid, the parties must abide by the clause. Arbitration may also be ordered by a court as a means to prevent a situation from going to trial, and the parties must comply or face possible sanctions. Another possibility is voluntary arbitration. In this instance, the sides involved agree on their own to use an outside party, like an arbitration attorney, to help settle their differences. No contract or law requires this action, yet deciding to use arbitration

can save money, time and maybe even good will. In business relationships, all of these are important. If the matter is personal, such as in a divorce proceeding, voluntary arbitration can be equally valuable. Whether you are mandated by a contract or court, or you choose voluntary arbitration, educating yourself beforehand will help you be prepared for the process.

8. Foreign Arbitration: When arbitration proceedings are conducted in a place outside India and the Award is required to be enforced in India, it is termed as Foreign Arbitration.

9. Sector-wise Arbitration: Arbitration is essentially a prominent feature in most sectors today, given the expedite nature with which disputes are settled. The ease of settlements and flexibility in procedure are essentially the key ingredients that draw most sectors towards arbitrating their differences. A few of the prominent areas where arbitration has played a significant role are herein enunciated upon:

i. Commodity Arbitration: The trade and commodity sector works on a transnational level, involving clientele from multiple nations. The role of arbitration in the trade and commodities market has been tremendous, as is evident from the fact that the genre of international commercial arbitration is a separate one by itself. The New York City Commodities Arbitrators is a famous institution devoted to arbitration in the commodities sector.

ii. Maritime Arbitration: Maritime law refers to the law that governs the realm of shipping and trade involving shipping. Plenty of disputes, spawning from territory issues, to custom-duty issues arise, warranting speedy settlement to enable a smooth flow of trade and ease in functioning of the economy. Arbitration, given its speed and flexibility, has come to play an immensely influential role in this field. Several institutions dedicated to Maritime Arbitration exist, such as the Maritime Association of the United States of America, the Society of maritime arbitrators, the London Maritime Arbitration Centre and the Singapore Maritime Arbitration Centre.

iii. Construction Arbitration: The construction industry is another popular industry that is involved in international business. Plenty of nations outsource construction requirements to foreign nationals, or foreign companies, and this interaction paves the way for differences and disputes. Once again, the ease and flexible nature of arbitration warrants a clear applicability of its services in dispute settlement. The Construction Industry Arbitration Council is a popular organization devoted to arbitration in the construction sector.

iv. Securities Arbitration: The securities sector, dealing with the share markets and all other modes of funding for a company, often sparks several differences between the parties. Pricing of shares, ownership issues, voting rights, veto powers and jurisdictional issues are common areas of differences between the parties to any securities agreement. Parties are free to place their demands as regards their own quantum of damages as they require, and the power of compromise that is achieved through arbitration draws this mode of dispute settlement into the world of the securities sector. Most common arbitration institutions deal with this field of dispute resolution.

v. IT Sector Arbitration: IT disputes differ from disputes in other industries mostly in their substance. IT projects tend to be complex and characterized by a network of responsibilities shared between parties that are dedicated to carry through a technology-related, long term relationship. Thus, IT disputes typically center on contractual or intellectual property (IP) law issues. The Indian Council of Arbitration (ICA), which is now considered to be an apex arbitral institution in the country, has started the process of identifying and training specialized arbitrators for disputes connected with the IT industry. In relation to this aspect, the ICA conducted an in-depth seminar on Alternate Dispute

Redressal methods for the IT sector in India's major cyber cities like Bangalore and Hyderabad for the purpose of creating an expert pool of arbitrators specialized in cyber laws.

vi. Intellectual Property Arbitration: Intellectual property rights are as strong as the means to enforce them. In that context, arbitration, as a private and confidential procedure, is increasingly being used to resolve disputes involving intellectual property rights, especially when involving parties from different jurisdictions. Intellectual property disputes have a number of particular characteristics that may be better addressed by arbitration than by court litigation.

vii. Investment Arbitration: Investment between members of two countries leads to the forging of contractual ties. As a consequence thereof, disputes arising there from need amicable and peaceful settlement, which arbitration permits.

viii. International Commercial Arbitration: The Indian Arbitration and Conciliation Act, 1996 applies to both domestic arbitration in India and to international arbitration. Section 2(1)(f) of the Act defines "International Commercial Arbitration" as arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India where at least one of the parties is:

1. An individual who is a national of, or habitually resident in any country other than India; or

2. A body corporate which is incorporated in any country other than India; or

3. A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

4. The Government of a foreign country.

International arbitration is a significant variant of the practice in many countries of arbitration, from which it is derived and shares many features. It is not just the fact that international arbitration arises in the context of international contracts that makes it different. In the international dispute resolution community, it is widely accepted to be a different animal entirely, involving different practices and rules, and being represented by a different community of arbitrators and legal practitioners. Although the procedural laws of many countries provide for "international" arbitrations to take place, an "internationalized" form of a provincial or domestic arbitration practice should not be confused with genuine international arbitration, which can be fairly said to exist outside and beyond the rules of any particular jurisdiction. In the international context, it is also worth making a firm distinction between Arbitration and Mediation, which are both sometimes characterized as forms of ADR (Alternative Dispute Resolution). In countries where mediation is new or struggling to be introduced as a concept, this association has given rise to the misleading impression that mediation is a form of non-binding arbitration, with the arbitrator "proposing" or suggesting outcomes based on an assessment of the parties' rights. In fact, arbitration and mediation are fundamentally different: the former is a determination of legal rights, the latter a form of facilitated negotiation which looks beyond rights and allows the parties to focus on their underlying interests. The one leads to a binding determination (arbitration), the other only in the event the parties agree to settle their dispute on mutually satisfactory terms (mediation).

ix. Domain Name Dispute Resolution: The Uniform Domain-Name Dispute- Resolution Policy (UDRP) is a process established by the Internet Corporation for Assigned Names and Numbers (ICANN) for the resolution of disputes regarding the registration of internet domain names. The UDRP currently applies to all .biz, .com, .info, .name, .net, and .org top-level domains, and some country code top-level domains. When a registrant chooses a domain name, the registrant must ?represent and warrant,?

among other things, that registering the name ?will not infringe upon or otherwise violate the rights of any third party,? and agree to participate in an arbitration-like proceeding should any third party assert such a claim. A complainant in a UDRP proceeding must establish three elements to succeed:

- The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- The registrant does not have any rights or legitimate interests in the domain name; and
- The registrant registered the domain name and is using it in "bad faith."

In a UDRP proceeding, a panel will consider several non-exclusive factors to assess bad faith, such as:

- Whether the registrant registered the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark;
- Whether the registrant registered the domain name to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, if the domain name owner has engaged in a pattern of such conduct; and
- Whether the registrant registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- Whetherby using the domain name, the registrant has intentionally attempted to attract, for commercial gain, internet users to the registrant's website, by creating a likelihood of confusion with the complainant's mark.

The goal of the UDRP is to create a streamlined process for resolving such disputes. It was envisioned that this process would be quicker and less expensive than a standard legal challenge. Also, if either party is dissatisfied by a UDRP decision, they may challenge the decision in court. If a trademark holder loses a UDRP proceeding, it may still bring a lawsuit against the domain name registrant. The UDRP process has already been used in a number of well-known cases, such as Madonna Ciccone, p/k/a Madonna v. Dan Parisi and "Madonna.com". In this case, the arbitration panel found against the defendant registrant based on all three of the above factors and ordered the domain name turned over to Madonna.

CHAPTER IV: PLANNING ARBITRATION

A) Court Litigation or Arbitration

Parties negotiating a dispute resolution provision will each endeavour to have the dispute resolved in the forum which favours their interests. This may be at the adjudication stage, where one party may feel that it can obtain favourable treatment in its own courts - with the other party fearful that it will not! At the enforcement stage, the nature and location of the dispute resolution procedure may have an important bearing on how easy it will be to enforce the judgment or award. The choice between arbitration or litigation in the courts is not one that can be made in a vacuum. The identities of the parties, the location of assets, the nature of the dispute (potential or actual) and the courts which might otherwise have jurisdiction are only a few of the many factors which may have to be considered.

Whilst it may occasionally be appropriate that some disputes arising out of a contract should be resolved by arbitration, with others being dealt with in the courts, that is usually not the case. Such provisions can lead to disputes as to the scope of the submission to arbitration, and are not catered for in this package. Arbitration may be appropriate in the following situations:

- Where the parties cannot agree on which courts are to have jurisdiction, and look for a neutral forum which arbitration may be able to provide. This may arise where one of the parties thinks that the courts which might otherwise have jurisdiction are inadequately developed, may not be truly independent of the other party, or may be logistically inconvenient. Another valid concern may simply be a sense of discomfort in the legal system and culture of the country concerned.
- Where court procedures would be lengthy and expensive. In arbitration, parties are able to agree their procedures, in particular as to:
  - the level of representation in the arbitration;
  - the extent to which oral argument may be permitted;
  - subject to the tribunal's availability, the time of the hearing;
  - the language of proceedings and documents to be used in the course of the proceedings.
- Where the decision will not be made in the same place that the debtor's assets are to be found. The New York Convention 1958 has established an effective and widely accepted scheme for the enforcement of foreign arbitral awards. There is no scheme (with the same geographical scope) for the enforcement of foreign judgments.
- Where expertise in the subject matter of the dispute is an important attribute of the person who is to decide the issues.
- Where a final binding decision is desired with a minimum, or no, right of appeal.
- Where confidentiality is required.
- Where state parties are involved, such parties frequently being reluctant to submit to the jurisdiction of a foreign court.

Arbitration may be neither appropriate nor possible in the following situations:

- In the case of non-arbitrable disputes. Some legal systems place restrictions on the type of disputes which may be arbitrated, eg: certain anti-trust and competition disputes; intellectual property disputes; disputes relating to nationalisation issues.
- Where one party lacks the capacity to enter into an arbitration agreement - eg the Saudi State may not be a party to an arbitration agreement, and neither can the US Federal Government (though state agencies may be). There are other states that can only be parties to an arbitration agreement where there has been a specific authorisation.
- Where coercive action may be required by way of final relief - eg where injunctions are required. The courts of a number of countries will, however, grant injunctions in aid of arbitration proceedings.
- Where efficient, quick and inexpensive justice is provided by the local courts.
- Where one party is likely to be deliberately obstructive.
- Where court procedure is likely to confer a particular advantage in the context of the actual or anticipated dispute (eg full discovery or a coercive order capable of immediate enforcement).
- Where proceedings might involve more than two parties in connection with disputes arising out of related contracts.
- Where the parties want to retain a right of appeal which would otherwise be prohibited under the law of the place of arbitration.

The decision to arbitrate or go to court is core to the strategy in many contract negotiations and most commercial disputes. If the dispute involves technical issues or a small amount, or if the parties want to preserve a commercial relationship, arbitration may be better. If the dispute involves a complex legal issue such as the interpretation of a contract clause or the intent of a law or regulation, or if the relationship between the parties is marked by hostility, litigation may make more sense. Because the decision of how to resolve disputes is often made when the relationship is formalized--well in advance of any disagreement--businesses should consider the following features of each method as early as possible:

- Arbitration is informal. In arbitration, the parties choose an arbitrator or select from among names provided by an outside organization such as the American Arbitration Association. In theory, arbitrators generally are fair-minded and have expertise in the subject of the dispute. Reality and theory may, however, diverge: The arbitrators on a list may not really have technical knowledge of the specific subject. And arbitrators, like juries, bring to the process their own biases and beliefs based on experience. For the most part, judges are assigned to cases randomly. They cannot be knowledgeable about technical issues of every case, and they rely on testimony and argument to make their decisions. Although they have considerable discretion, judges are bound by rules of procedure and evidence. Those rules are relaxed in arbitration proceedings. For example, "hearsay" evidence is frequently admitted, and contract interpretation cases may permit testimony that would be inadmissible in a trial. This informality may work against a party if the dispute hinges on documents and testimony that a judge would not admit as evidence, just as it may benefit a party that has reason to fear tough evidentiary standards.
- The right to appeal is limited in arbitration. In court, the loser may appeal. Ordinarily, the loser will have no such right in arbitration. Parties in arbitration should assume that an arbitration award will be final.

- Arbitration is generally faster and less expensive than litigation. An arbitrated dispute can usually be resolved in a matter of months. Arbitration proceedings can, however, drag out--they are hostage to the schedules of the arbitrators, attorneys and witnesses. This discontinuity can be disruptive and add costs if arbitrators have to take extra time to refresh their memories after long pauses between hearings. Limiting discovery, the process through which each side obtains case-related information from the opposition in preparation for the hearing, is what makes arbitration less expensive than litigation. Limited discovery can, however, make it difficult to prepare a case if the necessary information is in the exclusive possession or control of the opposing party, and it can result in unpleasant surprises at the hearing. Litigation can take years because of discovery and crowded court calendars. In litigation, however, once a hearing has started, it usually continues until it is completed, although frequently at a slower pace than in arbitration.

- While arbitration is usually less expensive than litigation, it is by no means inexpensive. In litigation, the government supplies the judge, the courtroom, the jury and court personnel. In arbitration, the parties pay the arbitrators, the court reporter and sometimes a facility charge. These fees can add up in lengthy proceedings. If an outside organization, administers the arbitration, it levies filing and case administration fees proportional to the amount in dispute. Large, complicated and protracted cases can therefore generate high costs in addition to the attorneys' fees that the parties would incur in either arbitration or litigation. Arbitrators can assign these arbitration costs to one party or the other, but they often simply split the costs equally between the parties.

- Arbitration is confidential. Arbitration proceedings are ordinarily confidential. Court rulings are a matter of public record, and trials are open to the public. There may be advantages to airing a dispute in public or to winning a public victory or public exoneration. If it is important to keep the terms or nature of the dispute confidential, arbitration is preferable.

- The judicial process may promote settlement. A party's litigation costs may exceed the value of the potential award. The possibility that both parties could come out of litigation with a net loss may induce them to negotiate. At various points during the judicial process, they are required to discuss a settlement, often with the judge's help. This is usually not the case in arbitration.

B) Arbitration Clause and Agreements- Drafting:

Arbitration Agreement

Definition: Section 2(1) (b) and Section 7 of Arbitration & Conciliation Act, 1996 deal with arbitration agreements. Section 7 says that it 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. It may be in the form of a clause in a contract or in the form of a separate agreement and should be in writing. Agreement shall be considered in writing if it is contained in a document signed by the parties or an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or 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.

Party Autonomy:

Arbitration is based upon either contract law of the law of treaties, the agreement between the parties to submit their dispute to arbitration is a legally binding contract. All arbitral decisions are considered to be final and binding. This does not, however, void the requirements of law. Any dispute not excluded from Arbitration by virtue of law (e.g. criminal proceedings of compoundable nature) may be submitted to arbitration. Arbitration exists under national and international law and Arbitration and it can be carried out between private individuals, between states or between states and private individuals.

Parties to an arbitration agreement are free to choose the laws binding them, the language and place of arbitration, the rules governing arbitration, the number of arbitrators and the arbitrators themselves, the manner of appointing the arbitrators, and sometimes, even the essentials of what they wish the award to deal with. Utmost autonomy ensures that parties are free to demarcate all their essential requirements at the very outset itself, so as to ensure that there are no differences in opinions when the procedure commences.

Ingredients of an Arbitration Agreement:

Under the statute, the provisions governing the arbitration agreement are ss. 2(1)(b) and 7 of the Arbitration Act, 1996, are derived from the content of Article 7 of the MAL. In keeping with this, thus, the quintessence of an arbitration agreement is summed up as follows:

- It must be in writing
- There must be an agreement between the parties
- The parties must necessarily be in ad idem
- The parties must be clearly intending to settle their disputes through arbitration.

The essential ingredients of an arbitration agreement were laid down in Jayant N.Seth Vs Gyaneshwar Apartment Cooperative Housing Society Ltd., as defined in Clause 2(1) (b) read with Section 7 as given below:

i. There should be a valid and binding agreement between the parties.

ii. Such an agreement may be contained as a clause in a contract or in the form of a separate agreement.

iii. Such an agreement is deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or 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. Reference in a contract to a document containing an arbitration clause also constitutes an arbitration agreement, provided the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

iv. Parties intend to refer present or future disputes to arbitration

v. The dispute to be referred to an arbitrator is in respect of a defined legal relationship, whether contractual or not.

Parties to the Agreement:

In the case of Pyrites, Phosphate and Chemicals Vs Excel Shipping Enterprises, the concept of parties to the agreement was explained. There was an agreement between the parties which was renewed. The original agreement contained an arbitration clause, however, there was no signature by or on behalf of the petitioner company; the signatures belonged to two employees of the petitioner, without there being a resolution in their behalf to sign on behalf of the petitioner company. They had signed as witnesses.The petitioner urged that since the 2 persons were employees of the petitioner, it could be taken that they signed for and on behalf of the petitioner. It was held that merely because they were employees of the petitioner would not give them the status to say that they signed for and on behalf of the petitioner. They had not signed on the basis of any resolution of the petitioner so as to permit the court to hold that they had signed on behalf of the petitioner. They had signed as witnesses and their status would remain to be that of a witness, rather than a party. The difference of signing as a witness and signing for and on behalf of the company is like the difference between chalk and cheese.

Drafting Agreements and Clauses:

- Ad Hoc Arbitration: Ad hoc arbitration is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. Provided the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The arbitration agreement, whether arrived at before or after the dispute arises, might simply state that "disputes between the parties will be arbitrated", and if the place of arbitration is designated, that will suffice. If the parties cannot agree on any arbitral detail, all unresolved problems and questions attending implementation of the arbitration, for example "how the arbitral tribunal will be appointed", "how the proceedings will be conducted" or "how the award will be enforced" will be determined by the law of the place designated for the arbitration, i.e., the "seat" of the arbitration. Such an abbreviated approach will work only if the jurisdiction selected has an established arbitration law. The ad hoc proceeding need not be entirely divorced from its institutional counterpart. Oftentimes the appointment of a qualified and/or impartial arbitrator (actual or perceived) constitutes a sticking point in ad hoc proceedings. In such case, the parties can agree to designate an institutional provider as the appointing authority. Further, the parties can at any time in the course of an ad hoc proceeding decide to engage an institutional provider to administer the arbitration.

Parties wishing to include an ad hoc arbitration clause in the underlying contract between them, or seeking to arrive at terms of arbitration after a dispute has arisen, have the option of negotiating a complete set of rules, establishing procedures which fit

precisely their particular needs. Experience has shown that this approach can require considerable time, attention and expense without providing assurance that the terms agreed will address all eventualities. Other options available to parties wishing to proceed ad hoc, who are not in need of rules drawn specially for them, or of formal administration and oversight, include:

i.adaption of the rules of an arbitral institution, amending provisions for selection of the arbitrator(s) and removing provisions for administration of the arbitration by the institution,

ii. incorporating statutory procedures such as the United States Federal Arbitration Act (or applicable state law) or the English Arbitration Act 1996, or the Indian Arbitration Act, 1996

iii. adopting rules crafted specifically for ad hoc arbitral proceedings such as the UNCITRAL Rules (U.N. Commission on International Trade Law) or CPR Rules (International Institute for Conflict Prevention and Resolution), which may be used in both domestic and international disputes, and

iv. adopting an ad hoc provision copied from another contract. Risks accompanying two of the available options are worthy of particular note.

Incorporating rules drawn by an institutional arbitration provider, amending provisions for appointment of the arbitrator(s) and excising provisions requiring administration by the provider carries with it the risk of creating ambiguities in the institutional rules as amended, despite efforts to redraw them to suit an ad hoc proceeding. It is also possible that in the adaptation process the parties may inadvertently create an institutional process. Copying an ad hoc arbitration clause from another contract may also result in later grief if the purloined clause was originally crafted for a particular, possibly unique, set of circumstances and/or was drafted taking into account different applicable arbitration law.

- Institutional Arbitration: An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply. Often, the contract between the parties will contain an arbitration clause which will designate an institution as the arbitration administrator. If the institutional administrative charges, which may be substantial, are not a factor, the institutional approach is generally preferred. In institutional arbitration, the first issue arising for agreement of the parties is choice of the institution, appropriate for the resolution of disputes, arising out of their contract. Whilst making such choice, there are various factors to be considered i.e. nature & commercial value of the dispute, rules of the institution as these rules differ, past record and reputation of the institution and also that the institutional rules are in tune with the latest developments in international commercial arbitration practice. There are many institutional arbitration administrators, some of which are associated with a trade association and many of which are independent. The London Court of International Arbitration, The Chartered Institute of Arbitrators (UK), The National Arbitration Forum (USA) and The International Court of Arbitration (Paris) are four of many.

C) Drafting the Agreement:

From time to time one may seek a model arbitration clause for use in a contract. There is no "perfect" model, because not everyone wants the same thing. A few important points of consideration that go behind the scenes where the establishment of an arbitration agreement is concerned, is enumerated herein:

1. Simplicity. Often parties to contracts do not want complicated arbitration clauses. A simple one-sentence arbitration agreement is fine, if that is what the parties really want. Parties may prefer to use an arbitration tribunal of their choice, in relation to the Institution of their choice, in which circumstance they are to incorporate the rules as given therein.

2. Expenses. A well-drafted arbitration clause should provide for the division of expenses incurred in arbitration. While most expenses will be divided equally, some may be borne by one party (for example, if a party decides to have a court reporter transcribe the proceedings). Questions of equal division become more complicated if there are several parties.

3. Arbitrator Selection and Qualifications. How many arbitrators will there be? What will be their minimum qualifications? How will they be selected? Will all arbitrators be neutrals, or will each party have one or more advocate? How many neutral arbitrators will there be? A well-drafted arbitration clause will answer these questions. Qualifications should be tailored for the type of dispute. If the agreement is to be contained in a purchase and sale agreement for a business, one may want an arbitrator to be an attorney or a CPA or a business broker with a minimum of certain years of experience in transactions involving the purchase and sale of businesses.

4. Discovery. How much discovery will be allowed? In what form (depositions, interrogatories, requests to produce documents, requests to admit, requests for inspection or physical examination? If discovery is to be allowed, for what period of time? After the arbitrators are selected, the parties counsel shall confer jointly with the arbitrator at the earliest convenient date to determine the discovery that shall take place. Each party shall have the right to take no more than depositions of potential witnesses, and each shall have the right to serve no more than sets of interrogatories, none of which shall include more than Interrogatories. Additional discovery shall be in the

discretion of the arbitrator. All discovery shall be completed within months after the selection of the arbitrator, unless this period of time is extended by the arbitrator for good cause.

5. Scheduling. Parties may wish to provide for scheduling when the arbitration will occur (with reference to the completion of the selection of the arbitrator), as well as any limit on the number of days that arbitration hearings will continue (this necessarily implies limits upon the amount of time each party will have to present direct testimony, and limits on the amount of time for cross-examination). Example: Unless extended by the arbitrator for good cause shown, arbitration hearings shall begin no later than 4 months after the selection of the arbitrator d a y s shall be allotted to the arbitration hearings, and the arbitrator shall determine how much of the hearing time shall be allocated to the direct and cross examination of witnesses. The arbitrator shall allocate time equally amongst the parties.

6. Privacy. Parties may want to include a confidentiality provision, keeping confidential any dispute, any testimony, any documents produced, and any outcome of the arbitrator.

7. Role of Arbitrators. Parties may want to consider whether the arbitrators may also serve as mediators, trying to settle the dispute through settlement negotiations, or whether the role of the arbitrator will be strictly limited to deciding the dispute.

8. Rules of Evidence. It is taken as a given in most arbitration that the Rules of Evidence do not govern, and that the arbitrator has discretion to consider whatever evidence he wants.

9. Briefs. If parties want to file pre-hearing or post-hearing briefs, they have to provide for them in the arbitration agreement. They may want to require that each party prepare an opening letter brief, no more than 3 pages long, setting forth the parties position at the outset of arbitration, and allowing each party to submit briefs, with stated page limitations, to the arbitrators within days after the close of the arbitration hearings. Parties may want to vary the briefs allowed, depending upon the amount in controversy, or may wish to allow the arbitrator to decide this matter.

10. Decision format. The manner in which the award is to be worded can be specified.

11. Appeal-Enforcement. Arbitration awards are generally thought to be final and binding. You should say this in your arbitration agreement. But parties may want to consider that courts sometimes get involved, unless the arbitration agreement prevents their involvement. For example, courts may become involved if it is claimed that the subject matter is outside the scope of the parties agreement to arbitrate (this is called substantive arbitrability). Generally, courts maintain that questions of substantive arbitrability are for the courts to resolve. But the parties to an arbitration agreement could agree otherwise. In contrast, procedural arbitrability involves whether the procedures for arbitration have been properly invoked, as, for example, whether time limits for invoking arbitration have been followed. Many courts have a rule that questions of procedural arbitrability are for the arbitrators to decide. A well-drafted arbitration agreement will set forth the precise agreement of the parties on both substantive and procedural arbitrability.

12. Limit: The Arbitrators Authority. Most statutes allow a court to set aside an award if the arbitrator exceeds his powers. A well-drafted arbitration clause defines the powers of the arbitrator. For example, "The arbitrator shall have the authority to award compensatory damages." An award of punitive damages by an arbitrator, or an attempt by an arbitrator to issue an injunction, would undoubtedly exceed his authority under such a clause.

13. Choice of Law. Some parties want to provide that the law of a particular jurisdiction will be followed. Unless the arbitration agreement clearly indicates that the arbitrator's judgment on the law of the jurisdiction shall be final and binding, such a clause invites a losing party to go to court to set aside the award on the grounds that the arbitrator has misapplied the law. A well-drafted arbitration agreement will clearly indicate whether the arbitrator's judgment on questions of law shall be final and binding, or subject to review in court. A well-drafted clause may also identify the jurisdictions whose law is to apply to the contract. Be aware that most states have statutes which govern arbitration, and there is a federal arbitration act that may apply. These enactments may provide for grounds for judicial review of arbitration. Most statutes permit parties to agree to greater judicial review, but probably do not allow parties to agree to deny courts the very limited jurisdiction defined by statute to set aside awards procured through corruption, fraud, partiality, or upon the conduct of a grossly prejudicial hearing.

14. Provisional Remedies. Unless parties provide for attachment, or garnishment, or preliminary injunctive relief, they may find that your arbitration clause gives you an exclusive remedy, and you may be denied provisional remedies. Decide at the outset whether parties will be allowed to seek provisional remedies from the courts, while arbitration is pending.

CHAPTER V : CONDUCTING ARBITRATION

A) Arbitral Process:

The first stage in arbitration is the formulation of the arbitration agreement whereby the parties agree to submit their present or future differences to arbitration. In case of any dispute, one of the parties to the contract must file a request for Arbitration and pay the required fee to an Arbitration Institution referred to in the agreement that provides Arbitration services. Often the Arbitration Institution will suggest an arbitrator or arbitrators to which the parties must agree. The arbitrator may be an attorney, judge, or business person. After the parties have defined their dispute, there will be a hearing, often at the arbitrator's office, where the parties present evidence and witnesses in a fairly informal manner without the formal rules of evidence used in court litigation. After the evidence has been presented, the arbitrator reaches a decision and usually later sends the parties a written reasoned opinion (an award). In India, an award passed by an arbitration tribunal has the force of a decree. Thus, it can be executed in the same manner in which a court decree can be executed.

The stages in an arbitral process are as follows:

- Step 1: Filing and Initiation: Arbitration cases commence when one party submits a demand for Arbitration, along with a copy of the arbitration provision and the appropriate filing fee to the concerned arbitrator or institution, as the case may be. From there, the respondent will be notified by the Arbitrator or the Institution, and a deadline will be set for an answer and/or counterclaim.
- Step 2: Arbitrator Selection: Following the respondent's answer, the parties are to identify and select arbitrators from their roster of neutrals. The parties' criteria are used to identify neutrals with qualifications that match the needs of the case. Once parties agree on the neutral, the arbitration proceedings may begin. If an even number of neutrals have been chosen by each party, the chosen neutrals work to choose a Presiding Arbitrator.
- Step 3: Preliminary Hearing: This meeting, conducted by the arbitrator, is the first opportunity for the parties and the arbitrator to discuss directly the substantive issues of the case. At this point, procedural matters such as the exchange of information, witness lists, etc., also will be discussed.
- Step 4: Information Exchange and Preparation: Parties make ready their presentations, and the arbitrator can address any impasses or challenges related to information sharing. The goal of this stage is to arrive at the point where evidence and arguments may be presented in the hearings.
- Step 5: Written Submissions and Oral Arguments: Written submissions maybe submitted by the parties to the arbitrator, as agreed between themselves. Ideally, written submissions are an enumeration of all lines of arguments to be put forth by the parties in their oral submissions.
- Step 6: Hearings: At this stage, parties have an opportunity to present testimony and evidence to the arbitrator in order to arrive at resolution. All lines of argument ought to be presented. It is to be remembered that any question as to the jurisdictional competence of the arbitral tribunal ought to be raised before submitting the first statement on the substance of the dispute.
- Step 7: Post-Hearing Submissions: This stage of the process provides parties with an opportunity to submit additional documentation, if allowed by the arbitrator. If this stage is necessary, it usually occurs shortly after hearings.

- Step 8: The Award: The arbitrator closes the record regarding the case and issues a decision, inclusive of an award. It is not mandatory that the arbitrator's decision contain reasons, but a reasoned decision works to the advantage of all the parties involved, given that the fundamental rules of natural justice ought to be followed. Parties ought to sign the award once passed.
- Step 9: Enforcement of the Award: The award, after passage, ought to be enforced.

Enforcement is as in the case of a decree by a civil court.

- Step 10: Appeal: If either party is not satisfied with the award passed, it may go in for an appeal to set the award aside, in consonance with s.34 of the 1996 Act.

Arbitral Tribunal

An arbitral tribunal or arbitration tribunal is a panel of one or more arbitrators which is convened and sits to resolve a dispute by way of arbitration. The tribunal may consist of a sole arbitrator, or there may be two or more arbitrators, which might include a chairman, presiding arbitrator or an umpire. The parties to a dispute are usually free to agree the number and composition of the arbitral tribunal. In India, an arbitration clause which provides for two (or any other even number) of arbitrators is understood to imply that the appointed arbitrators will select an additional arbitrator as a chairman of the tribunal, to avoid deadlock from arising. Different legal systems differ as to how many arbitrators should constitute the tribunal if there is no agreement. Tribunals are constituted for both, ad hoc and institutional arbitration proceedings. In the context of Institutional Arbitration, permanent tribunals are created, which have their own rules and procedures, and tend to be much more formal. They also tend to be more expensive, and, for procedural reasons, slower.

Appointment:

Party autonomy ensures that the parties are generally free to determine their own procedure for appointing the arbitrator or arbitrators, including the procedure for the selection of an umpire or chairman. If the parties decline to specify the mode for selecting the arbitrators, then the relevant legal system will usually provide a default selection process. Characteristically, appointments will usually be made on the following basis:

- If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator within a stipulated time frame of a request in writing by either party to do so.
- If the tribunal is to consist of an even number of arbitrators: Each party shall appoint an equal number of arbitrators and the arbitrators so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.
- If the parties arrive at a deadlock where appointing an arbitrator is concerned, they will be permitted to refer, under s.11, Arbitration and Conciliation Act, 1996, to the Chief Justice of the High Court of the State in whose jurisdiction they are (for domestic arbitration) or the Chief Justice of India (for international arbitration), to appoint an arbitrator.

Duties, Functions and Powers:

The duties of a tribunal will be determined by a combination of the provisions of the arbitration agreement and by the procedural laws which apply in the seat of the arbitration. The extent to which the laws of the seat of the arbitration permit "party autonomy" (the ability of the parties to set out their own procedures and regulations) determines the interplay between the two. However, in almost all countries the tribunal owes several non-derogable duties. These will normally be:

- to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent (complying with the rules of "natural justice")
- to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute

Procedure:

Matters of procedure are normally determined either by the law of the seat of the arbitration, or by the tribunal itself under its own inherent jurisdiction (depending on national law). Procedural matters normally include:

(i) mode of submitting (and challenging) evidence

(ii) time and place of the hearing

(iii) language and translations

(iv) disclosure of documents and other evidence

(v) use of pleadings and/or interrogatories

(vi) use of legal advisors

(vii) the appointment of experts and assessors

Jurisdictional Competence:

The rule of Kompetenz-Kompetenz, or that of Competence De La Competence, warrants the fact that the arbitral tribunal is vested with the authority to determine its own jurisdictional competence. This, as a rule, is incorporated under s.16 of the Arbitration Act, 1996. This rule addresses the issue of allocation of authority between arbitral tribunals and domestic courts to decide disputes over the existence and enforceability of arbitration agreements. Nothing prevents the arbitral tribunal from trying the issue fully and rendering a final decision thereupon. The Arbitral Tribunal may very well rule on its own jurisdictional competence, including ruling on any objection with regard to the existence or validity of the arbitration agreement. This power is inherent in an arbitral tribunal, and is given statutory recognition. Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule 'on any objections with respect to the existence or validity of the arbitration agreement' shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction. The civil court has no jurisdictional competence, whatsoever, to delve into the question of validity of the arbitral agreement.

Challenge, Removal and Substitution of Arbitrators:

- Challenge to appointment of Arbitrator- An arbitrator is expected to be independent and impartial. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment, as under s.12(1). The appointment of Arbitrator can be challenged only if

- Circumstances exist that give rise to justifiable doubts as to his independence or impartiality

- He does not possess the qualifications agreed to by the parties.

Appointment of arbitrator cannot be challenged on any other ground. The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award. However, in such case, application for setting aside arbitral award can be made to Court. If the court agrees to the challenge, the arbitral award can be set aside, as under s.13. Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to court. The arbitration can continue and challenge can be made in Court only after arbitral award is made.

- Removal and Substitution:

The procedure for the removal and substitution of an arbitrator is as given in S.13 of the Act which says that an application shall be filed by the party seeking change of the arbitrator quoting the grounds therein, within a period of 15 days of

(i) constitution of the tribunal, or

(ii) after becoming aware of the circumstances relating to his disqualification or lack of impartiality/ independence.

At this the courses open to the Tribunal are :

(i) either the arbitrator withdrawn himself from the proceedings or else the Tribunal will decide on the challenge.

(ii) if the tribunal rejects the challenge then the arbitration shall proceed and award shall be made,

(iii) if the party still holds on to his challenge then now he may challenge before the court only U/S 34 of the Act.

However, the Act permits that if the parties like they may provide any other procedure to decide on the challenge. Normally parties are not known to provide any alternate procedure.

CHAPTER VI : AWARD WRITING

Arbitral Award

An arbitration award (or arbitral award) is a determination on the merits by an arbitration tribunal in arbitration, and is analogous to a judgment in a court of law. It is referred to as an 'award' even where the entire claim of the claimant fails (and thus no money needs to be paid by either party), or the award is of a non-monetary nature. The legal requirements relating to the making of awards vary from country to country and, in some cases, according to the terms of the arbitration agreement. Although in most countries, awards can be oral, this is relatively uncommon and they are usually delivered in writing. The following are requirements under the Arbitration Act 1996 which the award must comply with, unless the parties agree to vary them under section 52 of the Act:

1. The award must be in writing and signed by all of the arbitrators assenting to the award (dissenting minority arbitrators need not sign unless the parties agree that they must);
2. The award must contain reasons;
3. The award must state the "seat" of the arbitration (the place where the arbitration took place); and
4. The award must state the date upon which it is made. This is important for the calculation of interest, and determination of time limits.

Many countries have similar requirements, but most permit the parties to vary the conditions, which reflect the fact that arbitration is a party-driven process. An arbitration comes into being as a result of an enforceable agreement. An agreement enforceable under law is called a contract. To be enforceable the agreement must be made by free consent of the parties. Parties are said to consent when they agree upon the same thing in the same sense. Consent can be said to be free when it is not induced by coercion, undue influence, fraud, misrepresentation or mistake as to matter of fact essential to the agreement. The onus of proving that free consent was not given is upon the party asserting it. An arbitration agreement is void if a party is a minor or is not of sound mind or is disqualified from contracting by any law to which he is subject. When both the parties to the agreement are under a mutual mistake as to a matter of fact essential to the agreement, the agreement is void. An arbitration agreement of which the object or consideration is unlawful is void. The consideration or object is unlawful if it is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the courts regard it as immoral or opposed to public policy.

The Arbitration Act provides that an arbitration agreement should be in writing. Hence, no oral arbitration is possible in India. It is not necessary to constitute the agreement in any single document. It can spread over so many documents. A contract may by express language incorporate the provisions of another contract containing an arbitration clause. If so, the arbitration clause will be deemed to have been incorporated in the contract.

If a contract is illegal and void an arbitration clause which is one of its terms is also rendered illegal. The taint of illegality attaches to every part of the contract. Thus an arbitration clause for stifling prosecution or involving criminal proceedings is of no effect. It was mentioned earlier that an arbitration agreement is an agreement to submit present and/or future disputes to arbitration. The existence of a dispute is one of the essential elements for invoking arbitration. A dispute implies assertion of a right by one party and the refutation thereof by another.

The refutation may be expressed or implied and may be by words or conduct. Failure to pay under a claim or right is a dispute. Failure to perform the contract in time may lead to an inference of refutation and denial of the right by the other party. Such conduct and such silence may be more eloquent than words and will show that the party is disputing liability. There can be no dispute unless there is a denial of a claim.

There is a dispute whenever there is a matter capable of being agitated in a civil court. It is not exactly necessary that the claim should be valid or sustainable in a court of law.

The decision of an arbitrator is called an award. Our law does not impose any legal requirement as to the form of a valid award. The only requirement is that it should be in writing, signed by the arbitrator. But, if the agreement contains requirements as to the form of the award then those requirements should be met. For example, if the agreement says that the arbitrator need not give a speaking award, the award need not contain reasons to support his conclusions. Otherwise in all cases an arbitrator is obliged to give a speaking award. As a matter of fact there are certain basic requirements for an award. The award should identify the parties by name. The date of the award should be shown at some place of the award. If there is more than one arbitrator all should sign the award. But if there is omission of any signature the reasons should be stated. There is no requirement of witnesses attesting the award. The award should be certain, i.e., one should be able to clearly understand the arbitrator's decision by reading the award. The Arbitration Act defines an award as including an interim award. This is a formal definition. In essence an award is the judgment of the arbitrator on the merits of the case. The Arbitration Act confers on the arbitrators the right to conduct the proceedings in the manner they consider appropriate. It has been held that parties by consent can also agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Arbitrators are not at liberty to make an award without giving reasons unless it is so stipulated in the agreement. The powers of the Court to interfere with the awards are now very limited. Section 34 of the Arbitration Act provides for an application to the Court for setting aside an award under the following circumstances:-

a) Incapacity of party
b) Invalidity of the agreement
c) Want of proper notice
d) Award deals with disputes not referred to arbitration
e) Arbitral tribunal was defective in composition
f) Subject matter not capable of arbitration
g) Award is in conflict with public policy.

An award can be enforced as such because it is now equated with a decree of the Court. A party who wishes to enforce the award can file it before the Court and it will be treated as a decree unless set aside in an application under section 34. An application for setting aside shall not be made after three months of the receipt of the award or after three months of an application under section 33 to the arbitration for any correction of the award. An arbitrator has got the power to file the award and the connected papers in Court =suo-motu' at any time. There is no period of limitation fixed for it. The arbitrator has to give a signed copy of the award to the parties. After receiving the award the concerned party has to apply to the Court to execute the award and obtain reliefs. The court will issue notice to the judgment debtor. After receipt of notice if the judgment debtor does not appear before Court, ex parte execution may be ordered granting the relief prayed for in the Petition. If the judgment debtor appears and files objection, the objection will be heard and disposed of and only thereafter necessary relief will be granted by the Court. Under Order XXI of the Code of Civil Procedure a judgment debtor can be proceeded against either in person or against his property. Personal execution is by arresting the judgment debtor. A judgment debtor can be imprisoned for a period of three months. The expenses for this have to be met by the decree holder. Execution against property is by attaching and selling through Court the saleable interest of the judgment debtor in the property. If a judgment debtor has no assets, he is safe in spite of a decree against him as he cannot even be imprisoned for the decree debt. The procedure for enforcing foreign awards is as per Part II of the present Act and incorporates the Geneva Convention of 1927 and the New York Convention of 1958.

Pursuant to this any person interested in enforcing a foreign award shall apply to a Court having jurisdiction over the subject matter of the award. The parties seeking to enforce a foreign award must produce:

a) The original award or a duly authenticated copy thereof.

b) Evidence proving that the award has become final and

c) Such evidence as is necessary to prove that the award is a foreign award.

Instances of arbitrators awarding huge amounts by way of non-speaking awards was prevalent in many departments, such as PWD, Irrigation and Electricity Boards and the Kerala Government was forced to take away the Arbitration clause forcing the contractors to seek remedy through court. If a suit is to be filed, Court fee has to be paid and the case has to be established through incontrovertible evidence.
If one court goes wrong there is an appellate court. Details and reasons are to be given by the Court for its findings. Because of these only genuine claims will be brought by the parties in a court of law. Avaricious contractors and dishonest arbitrators have given a bad name for the process of arbitration. Hence an honest man dreads arbitration even more than the dreaded law suits.

The general rule in matters of arbitration awards is that where parties have agreed upon an arbitration thereby displacing a Court of law, they must accept the award for good or worse. In such cases, the discretion of the Court will not be readily exercised and will be strictly confined to the specific grounds set out under section 34. The arbitrator is the final judge on fact. Adequacy of evidence is not to be examined. The arbitrator is not bound by technical rules of evidence. The Court cannot look into the reasonableness of the arbitrator's reasons. In deciding a controversy, the arbitrator works in an environment which is different from that of the judge. The ropes and pulleys that he uses in the arbitral process are different from the foot-rules and set- squares that the judge uses in the judicial process. Arbitral Institution has been authorized to determine any issue which the parties have the freedom to decide themselves. The power of judicial authority to intervene save except as provided in the said law has been taken away by prohibiting the same by express enactment. Arbitral Tribunal has been vested with the competence to rule on its own jurisdiction including ruling on any objection with respect to the existence and validity of the Arbitration Agreement. Arbitration Tribunal has been authorized to grant interim measures like injunction, attachment, receiver, security etc. Arbitral Award includes Interim Award and is executable as Court Decree. Arbitration proceedings have been accorded precedence over Legal Proceedings and stay of Arbitral Proceedings has gone beyond the scope of law. All persons guilty of contempt of tribunal are liable to disadvantages, penalties and punishments, as they would incur for like offences in suits before the court. An Award is ordinarily not liable to be set-aside on the ground either in fact or in law that it is erroneous.

Types of Arbitration Awards:

- Interim Award: An interim award is an award on a provisional basis subject to the final determination of the merits.
- Partial Award: A partial award is an award of only part of the claims or cross claims which are brought, or a determination of only certain issues between the parties. Importantly, this leaves it open to the parties to either resolve or to continue to arbitrate (or litigate) the remaining issues
- Agreed Award: An agreed award is usually in the form of a settlement between the parties of their dispute, i.e., the equivalent of a judgment by consent. But by embodying the settlement in the form of an award it can have a number of advantages.
- Reasoned Award: A reasoned award is not a sub-category of award, but is used to describe an award where the tribunal sets out its reasoning for its decision.
- Additional Award: An additional award is an award which the tribunal, by its own initiative or on the application of a party makes in respect of any claim which was presented to the tribunal but was not resolved under the principal award.
- Draft Award: A draft award is not an award as such, and is not binding on the parties until confirmed by the tribunal.

CHAPTER VII : INTERNATIONAL COMMERCIAL ARBITRATION

A) UNCITRAL Model Arbitral Law

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.

The UNCITRAL Model Arbitral Law is divided into eight chapters.

- Chapter I – General Provisions
- Chapter II - Arbitration Agreement
- Chapter III - Composition of Arbitral Tribunal
- Chapter IV- Jurisdiction of Arbitral Tribunal
- Chapter V - Conduct of Arbitral Proceedings
- Chapter VI - Making of Award and Termination of Proceedings
- Chapter VII - Recourse Against Award
- Chapter VIII - Recognition and Enforcement of Awards

B) UNCITRAL Arbitration Rules

Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award. The UNCITRAL Arbitration Rules are a comprehensive, internationally accepted, set of rules which parties can adopt for an arbitration arising under their contract. These rules, however, are designed essentially for a non- institutional form of arbitration. Neither UNCITRAL nor any other institution plays any role in the administration of the arbitration.

C) International Commercial Arbitration:

Definition – Arbitration and Conciliation Act, 1996

The Indian Arbitration and Conciliation Act, 1996 applies to both domestic arbitration in India and to international arbitration. Section 2(1)(f) of the Act defines "International Commercial Arbitration".

Domestic v. International

International arbitration is a significant variant of the practice in many countries of arbitration, from which it is derived and shares many features. It is not just the fact that international arbitration arises in the context of international contracts that makes it different. In the international dispute resolution community, it is widely accepted to be a different animal entirely, involving different practices and rules, and being represented by a different community of arbitrators and legal practitioners.

Although the procedural laws of many countries provide for "international" arbitrations to take place, an "internationalized" form of a provincial or domestic arbitration practice should not be confused with genuine international arbitration, which can be fairly said to exist outside and beyond the rules of any particular jurisdiction. In the international context, it is also worth making a firm distinction between Arbitration and Mediation, which are both sometimes characterized as forms of ADR (Alternative Dispute Resolution). In countries where mediation is new or struggling to be introduced as a concept, this association has given rise to the misleading impression that mediation is a form of non-binding arbitration, with the arbitrator "proposing" or suggesting outcomes based on an assessment of the parties' rights. In fact, arbitration and mediation are fundamentally different: the former is a determination of legal rights, the latter a form of facilitated negotiation which looks beyond rights and allows the parties to focus on their underlying interests. The one leads to a binding determination (arbitration), the other only in the event the parties agree to settle their dispute on mutually satisfactory terms (mediation).

Planning an International Commercial Arbitration

Arbitration and Conciliation Act, 1996, s. 28 provides that in international commercial arbitration:

(1) the dispute has to be decided in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(2) the designation by the parties of the law or legal system of a given country would have to be construed as directly referring to the substantive law of that country and not to its conflict of laws rules; and

(3) Where the parties fail to designate any such applicable law, the Arbitral Tribunal would have to apply the rules of law it considers to be appropriate keeping in mind all the circumstances surrounding the dispute.

The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of those parties and a third party. The parties have the freedom to choose the law, which applies to their international commercial arbitration agreement. They may choose the procedural law and also the substantive law. Parties are free to choose a venue, the language, the number of arbitrators, the manner of appointment of arbitrators and the like, for the procedure.

Conduct of International Commercial Arbitration:

(1) Initiation: The general practice of parties to an international commercial arbitration, is to avail of the facilities of an institution. The initiation of the process is done by approaching the concerned tribunal, with a request for arbitration. The party invoking the same is called the claimant. Upon receipt of the request, notice will be given to the other party, called as the Respondent.

(2) Pleadings: The parties to the arbitration are required to submit pleadings, both in writing, and in oral form. The written submissions are required if the parties have chosen to include the same.

(3) Composition of the Arbitral Tribunal: Parties are free to decide the composition of the arbitral tribunal. The number of arbitrators, the manner of appointment and termination, and replacement, if required, are to be determined by the parties themselves. Accordingly, the tribunal is constituted for the parties to carry out their basic procedures.

(4) Jurisdiction: Jurisdictional competence of an arbitral tribunal is left to the tribunal itself, to decide. This is in accordance with the rule of Kompetenz Kompetenz, which warrants that no authority but the tribunal, has absolute right in determining its jurisdictional competence to hear a given matter.

(5) Preliminary Meetings/Issues: Once the tribunal is constituted, the parties go in for a preliminary meeting with one another, and enumerate their prima facie claims. The parties are then guided into the issues, as they are framed by the arbitrators.

(6) Settlement: Once the parties present their sides of the case, the arbitrator works a settlement to arrive at a compromise. Sometimes parties may chalk out a settlement before hand. The outcome is always called an award.

(7) Witness (inclg. Expert witness): Calling witnesses to the proceedings, to lead evidence and to aid in administration of the award, are left to the parties to decide in the course of their agreements.

(8) Award – Appeal/Challenge/Annulment: Parties are permitted to appeal against the award, if finality has not already been accorded by the parties. Further, the award, after appeal, if set aside, cannot be enforced.

(9) Enforcement (1958 New York Convention): An award passed is capable of enforcement as a decree of a civil court is. Several grounds for the refusal of an award are provided for under the New York Convention.

An award is not enforceable if:

a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ;

e) or the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

f) the subject -matter of the difference is not capable of settlement by arbitration under the law of the place where enforcement is sought

g) or the enforcement of the award would be contrary to the public policy.

CHAPTER VIII : MAJOR ARBITRATION INSTITUTIONS

(ref.Annexure II)

A. International Chamber of Commerce (ICC): The dispute resolution procedures of the International Chamber of Commerce specifically target international business disputes. ICC arbitrations are confidential and offer the parties the choice of arbitrators, place of arbitration, rules of law, and language of the proceeding. The ICC has several dispute resolution mechanisms. ICC International Court of Arbitration has received 14,000 cases since its inception in 1923. Over the past decade, the Court's workload has considerably expanded. The Court's membership has also grown and now covers 86 countries. With representatives in North America, Latin and Central America, Africa and the Middle East and Asia, the ICC Court has significantly increased its training activities on all continents and in all major languages used in international trade. ICC Dispute Resolution Services exist in many forms:

- Amicable dispute resolution offers a framework for the settlement of disputes with the assistance of a neutral. Parties choose the settlement technique, such as negotiation or a mini-trial.
- Dispute boards are independent bodies designed to help resolve disagreements arising during the course of a contract.
- Expertise is a way of finding the right person to make an independent assessment on any subject relevant to business operations.
- DOCDEX provides expert decisions to resolve disputes related to documentary credits, collections and demand guarantees, incorporating ICC banking rules

B. International Court of Arbitration (ICA): The International Court of Arbitration was established in 1923 as the arbitration body of the ICC. Composed of members from 84 countries, it has administered over 13,000 arbitration cases involving parties and arbitrators from more than 170 countries and territories.The ICA oversees the arbitration process and regularly reviews the progress of pending cases. One of the Court's most important functions is to scrutinize and approve all arbitral awards.

C. Permanent Court of Arbitration (PCA): The Permanent Court of Arbitration (PCA), is an international organization based in The Hague in the Netherlands. It was established in 1899 as one of the acts of the first Hague Peace Conference, which makes it the oldest institution for international dispute resolution. The creation of the PCA is set out under Articles 20 to 29 of the 1899 Hague Convention for the specific settlement of international disputes, which was a result of the first Hague Peace Conference. At the second Hague Peace Conference, the earlier Convention was revised by the 1907 Convention for the Pacific Settlement of International Disputes. As of August 2009, 109 countries were party to one or both of these founding Conventions of the PCA. The PCA is not a court in the conventional understanding of that term,

but an administrative organization with the object of having permanent and readily available means to serve as the registry for purposes of international arbitration and other related procedures, including commissions of enquiry and conciliation. It is a permanent framework available to assist temporary arbitral tribunals or commissions. The PCA is housed in the Peace Palace in The Hague, which was built specially for the Court in 1913 with an endowment from Andrew Carnegie. From 1922 on, the building also housed the distinctly separate Permanent Court of International Justice, which was replaced by the International Court of Justice in 1946. Unlike the ICJ, the PCA is not just open to states but also to other parties. The PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.

In the early 1980s, the PCA helped in setting up the administrative services of the Iran-United States Claims Tribunal. The public at large is usually more familiar with the International Court of Justice than with the Permanent Court of Arbitration, partly because of the closed nature of cases handled by the PCA and to the low number of cases dealt with between 1946 and 1990. The PCA's caseload has, however, increased since then. The PCA administers cases arising out of international treaties (including bilateral and multilateral investment treaties), and other agreements to arbitrate. The cases conducted by the PCA span a wide range of legal issues, including disputes over territorial and maritime boundaries, sovereignty, human rights, International Investment investment (investor-state arbitrations), and matters concerning international and regional trade. Hearings are rarely open to the public and sometimes even the decision itself is kept confidential at the request of the parties. Many decisions and related documents are available on the PCA website.

D. International Council for Commercial Arbitration: International Council for Commercial Arbitration houses its editorial staff on PCA premises. The ICCA is devoted to promoting international arbitration and other forms of dispute resolution. It holds conferences and congresses for the presentation of papers and the discussion of topics related to international dispute resolution. It publishes, with the help of the PCA, the "International Handbook on Commercial Arbitration" and the ICCA Congress Series. It also participates in the preparation of the UNCITRAL Arbitration Rules, Model Arbitration Law and other documents. It is governed by a council of members from 32 countries.

E. Hong Kong International Arbitration Centre: The Hong Kong International Arbitration Centre (or HKIAC) was established in 1985 to assist disputing parties to solve their disputes by arbitration and by other means of dispute resolution. It was established by a group of the leading business and professional people in Hong Kong to be the focus for Asia of dispute resolution. It has been generously funded by the business community and by the Hong Kong Government but it is totally independent of both and it is financially self sufficient. Hong Kong International Arbitration Centre HKIAC is a non-profit making company limited by guarantee. It operates under a Council composed of business and professional people of many different nationalities and with a wide diversity of skills and experience. Administration of HKIAC arbitration activities is conducted by the Council through the Centre's Secretary-General who is its chief executive and registrar. In Hong Kong there are a variety of ways of resolving disputes and Hong Kong International Arbitration Centre is available to assist parties to choose the best available for their particular disputes.

F. London Court of International Arbitration: The London Court of International Arbitration (which now goes by the name of its acronym LCIA) is an institution based in London, United Kingdom providing the service of international arbitration. The administrative headquarters of the LCIA are merely based in London. LCIA is an international institution, and provides a forum for dispute resolution proceedings for all parties, irrespective of their location or system of law. Although arbitration and the provisional of formal arbitration tribunals are the institution's main focus, the LCIA is also active in mediation, a form of alternative dispute resolution (ADR). The LCIA remains one of the bigger permanent international arbitration institutions today. It promulgates its own rules and procedures, which are frequently adopted in ad hoc arbitrations even where the LCIA itself is not involved. The LCIA is formed as a not-for- profit company limited by guarantee. The LCIA Board of Directors (made up largely of prominent London-based arbitration practitioners) is concerned with the operation and development of the LCIA's business and with its compliance with applicable company law. The Board does not have an active role in the administration of dispute resolution procedures, though it does maintain a proper interest in the conduct of the LCIA's administrative function. The LCIA Court is the final authority for the proper application of the LCIA Rules. Its key

functions are appointing tribunals, determining challenges to arbitrators, and controlling costs. Although the LCIA Court meets regularly in plenary session, most of the functions to be performed by it under LCIA rules and procedures are performed, on its behalf, by the President, by a Vice President or by a Division of the Court. The Court is made up of up to thirty five members, selected to provide and maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world, and of whom no more than six may be of UK nationality. Among other parties, the 2006 Softwood Lumber Agreement between the United States and Canada establishes a dispute settlement mechanism based around the LCIA for the two parties' international trade issues regarding softwood lumber.

G. American Arbitration Association: The American Arbitration Association (AAA) is a private enterprise in the business of arbitration, and one of several arbitration organizations that administers arbitration proceedings. The AAA also administers mediation and other forms of alternative dispute resolution. It is headquartered in New York City. The International Centre for Dispute Resolution (ICDR), established in 1996, administers international arbitration proceedings initiated under the institution's rules. ICDR currently (as of 2007[update]) has offices in New York City, Dublin, and Mexico City, and is scheduled to open an office in Singapore. Many contracts include an arbitration clause naming the AAA as the organization that will administer arbitration between the parties. The AAA does not itself arbitrate disputes, but provides administrative support to arbitrations before a single arbitrator or a panel of three arbitrators. The arbitrators are chosen in accordance with the parties' agreement or, if the parties do not agree otherwise, in accordance with the AAA rules. Under its rules, the AAA may appoint an arbitrator in some circumstances, for example, where the parties cannot agree on an arbitrator or a party fails to exercise its right to appoint an arbitrator.

CHAPTER IX : EMERGING TRENDS

A) S.89, CPC, 1908:

S.89 of the CPC, 1908, inserted after the 2002 amendment, is a radical change of sorts, from the pre-amendment CPC. According to this mechanism, the Courts have been given the power to refer the disputes to:

a) Arbitration;

b) Conciliation;

c) Judicial settlement including settlement through Lok Adalat;

d) Mediation.

The Court will endeavour in case of such disputes to formulate the terms of settlement between the parties and will also effect a compromise as per the prescribed procedure. Right after its statutory recognition in the form of Code of Civil Procedure, 1908, s.89 in 2002, the technique and use of mediation was challenged in the Supreme Court of India in Salem Advocate Bar Association, Tamil Nadu vs. Union of India,wherein the parties called upon the Court to decide on the validity of insertion of section 89 which mandated courts to encourage use of mediation. Dismissing the arguments against striking down the Code of Civil Procedure, 1908, s.89, the Supreme Court gave go ahead to legislative intention asking courts to encourage parties to use mediation and observed that:

'A fine distinction is to be maintained between conciliation and mediation, accepting the views expressed by British author Mr. Brown in his work on India that in 'conciliation' there is little more latitude and conciliator may suggest some terms of settlements too'.

As was seen above, the Court can also refer the case to mediation under s.89, Clauses 1(d) and 2(d). When the Court decides to refer the case to mediation ?the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. It is respectfully submitted that this provision is amenable to the interpretation that it is for the Court itself to ?effect a compromise? and follow the procedure prescribed for the purpose. If the Court for one reason or the other cannot itself effect a compromise, the only option it would have is to refer the parties to conciliation etc. In its historic judgment in Salem Bar Association v. Union of India, the Supreme Court has directed the constitution of a committee to frame draft rules for mediation under s. 89(2)(d) of the CPC. Consequently, the Committee presided over by Mr Justice M. Jagannadha Rao, Chairman of the Law Commission of India has prepared a comprehensive code for the regulation of ADR process initiated under s.89 of CPC. which consists of two parts---Part I: ADR Rules 2003 consisting of ?the procedure to be followed by the parties and the Court in the matter of choosing the particular method of ADR and Part II: Mediation Rules, 2003 consisting of ?draft rules of mediation under s.89(2)(d) of the Code of Civil Procedure.

It is interesting to note that Rule 2(b), proviso clearly states that the Court in the exercise of its powers under s.89(1)(a) to (d) read with Rule 1A of Order X ?shall not refer any dispute to arbitration etc without the written consent of all the parties to the suit" and Rule 4 calls this the exercise of the option by the parties. But, under Rule 5 (f) and (g), the Court is given the power to refer the parties under certain circumstances to ADR methods even if all the parties do not agree. This is in consonance with the letter and spirit of s. 89 of CPC. Rule 4 also requires the Court to do a sort of counseling in enabling the parties to choose the correct method of ADR depending on the nature of the case and the relationship between the parties that needs to be preserved. Rule 4(iv) may be reformulated to say ?where parties are interested in reaching a compromise which might lead to the final settlement?. Unlike the 1996 Act, Rule 4 gives a

workable definition of the terms arbitration, conciliation, mediation and judicial settlement. Under Rule 6(2), if the ADR methods fail and the case is referred back to the Court, the Court shall proceed with the case in accordance with law.

A welcome feature of these Rules is that they provide for a detailed scheme for the conduct of training courses in ADR methods for lawyers and judicial officers under the auspices of the High Courts and the District Courts, and the preparation of a detailed manual of procedure for ADR. The manual will describe various methods of ADR, the choice of a particular method, the suitability of a method for any particular type of dispute etc. The Manual shall particularly deal with the role of conciliators and mediators in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody cases. With a view to enhancing awareness of ADR procedures and for imparting training in them, the Rules provide for the conduct of seminars and workshops periodically (Rule 7). Thus these provisions prepared a blueprint for the building up of a body of trained professionals who are sensitized to efficiently handle cases in future, as that task requires specialized training and expertise of a high order.

Part II of the Rules contain a carefully prepared scheme for the appointment of mediators, empanelling of mediators, their qualifications and disqualifications and the proper selection of the mediator to suit a particular case etc. They also contain provisions regarding the actual conduct of mediation which, mutatis mutandi, apply some of the provisions of the 1996 Act relating to conciliation. A notable feature of these provisions is that Rule 19 imposes an obligation on the part of the parties to make an effort in good faith to arrive at a settlement, and this is intended to prevent the whole process from being reduced to a sham. This is also in conformity with the pronouncements of the International Court of Justice in cases like the North Sea Continental Shelf Cases (ICJ Reports, 1969). The Rules also deal with cases where the parties succeed in arriving at a solution through the ADR processes only regarding some of the issues and not all. In such cases the Court may incorporate the partial settlement in its judgment and decide the other issues according to law. Very importantly, the Rules also lay down a code of ethics to be followed by the mediator in the proper conduct of the proceedings so as to arrive at a fair and just settlement in an impartial and dignified manner so as to instill confidence in the parties in himself and the credibility of the process in general.

As mentioned at the outset, the recent amendments made in 1999 to the Civil Procedure Code have introduced provisions to enable the courts to refer pending cases to arbitration, conciliation and mediation to facilitate early and amicable resolution of disputes. The 1996 Arbitration and Conciliation Act doesn't contain any provision for reference by courts to arbitration or conciliation in the absence of the agreement between the parties to that effect. Under that Act arbitration and conciliation are purely consensual and not compulsory. But under the newly added s.89 of CPC, the Court can refer the case to arbitration etc ?where it appears to the court that there exist elements of settlement which may be acceptable to the parties.? The Court can formulate the terms of settlement and give them to the parties for their observation and after receiving the observations, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation etc. As can be seen from the language of the s. 89, the initiative and the role of the Court is considerable in the whole process. Here, the Court is not ascertaining the agreement of the parties but only their observations, because if there is agreement between the parties at the stage of formulation of possible terms of settlement, the Court can as well make it the basis of its judgment and there would be no need for further negotiations under the aegis of arbitration or conciliation. But once the Court refers the case to arbitration or conciliation, that reference creates a legal fiction that it is deemed to be a reference under the provisions of the 1996 Act and the provisions of that Act would take over from the provisions of the CPC under which the reference was made. Thus, if the parties choose to do so, the conciliation proceedings so commenced by Court's reference under s.89 of CPC can be terminated by the parties or the conciliator under s.76 of the 1996 Act.

B) Online Dispute Resolution

Introduction:

The growth of e-commerce and web site contracts has increased the potential for conflicts over contracts which have been entered into online. This challenging task can be achieved by the use of ODRM in India. The use of ODRM to resolve such e-commerce and web site contracts disputes is crucial for building consumer confidence and permitting access to justice in an online business environment. These ODRM are not part and parcel of the traditional dispute resolution machinery popularly known as ?judiciary? but is an alternative and efficacious institution known as ADRM. Thus, ADR techniques are extra-judicial in character. They can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. ADR offers the best solution in respect of commercial disputes. However, ADR is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It only offers alternatives to litigation. There are a large number of areas like constitutional law and criminal law where ADR cannot substitute courts. In such situations one has to take recourse of the existing traditional modes of dispute resolution. The swift growth of e-commerce and web site contracts has increased the potential for conflicts over contracts which have been entered into online. This has necessitated a solution that is compatible with online matters and is netizens centric. This challenging task can be achieved by the use of ODRM in India. The use of ODRM to resolve such e-commerce and web site contracts disputes are crucial for building consumer confidence and permitting access to justice in an online business environment. These ODRM are not part and parcel of the traditional dispute resolution machinery popularly known as ?judiciary? but is an alternative and efficacious institution known as ADRM.

Thus, ADR techniques are extra-judicial in character. They can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. These techniques have been shown to work across the full range of business disputes like banking, contract performance, construction contracts, intellectual property rights, insurance, joint ventures, partnership differences etc. ADR offers the best solution in respect of commercial disputes. However, ADR is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It only offers alternatives to litigation. There are a large number of areas like constitutional law and criminal law where ADR cannot substitute courts. In those situations one has to take recourse of the existing traditional modes of dispute resolution. The ADR mechanism can be effectively used to settle online disputes by modifying it as per the need. It is time effective and cost efficient. It can also overcome the geographical hurdles. However, there are certain issues revolving around ADR mechanism like need for personnel with knowledge of IT, ADR and law; technical concerns; legal sanctity of proceedings; industry support etc. But these hurdles are just a passing phase. The use of ADR mechanisms for resolving online disputes is increasing day by day. A number of web-sites provide for some type of online dispute resolution method like arbitration, negotiation, mediation etc. and also certain conflict management services. These services fall into the general categories of complaint handling, negotiation, mediation and arbitration. These services will be in great demand in the future since the 1996 Act has given paramount importance to ?party autonomy? by accepting the intention of parties as a platform for dispute resolution. Thus, what law will be applicable will depend on the intention of parties. If the parties have adopted the mechanism of ODRM then it will definitely apply with necessary minor modifications. The language used in various sections of the Arbitration Act give options to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. Thus, it is high time that we must build a base for not only offline ADRM but equally ODRM in India. It must be noted that every new project needs time to mature and become successful. Thus, the success of ADRM and ODRM depends upon a timely and early base building.

Overview:

The ADR mechanism can be effectively used to settle online disputes by modifying it as per the need. It is time effective and cost efficient. It can also overcome the geographical hurdles. However, there are certain issues revolving around ADR mechanism like need for personnel with knowledge of IT, ADR and law; technical concerns; legal sanctity of proceedings; industry support etc. But these hurdles are just a passing phase. The use of ADR mechanisms for resolving online disputes is increasing day by day. A number of web-sites provide for some type of online dispute resolution method like arbitration, negotiation, mediation etc. and also certain conflict management services. These services fall into the general categories of complaint handling, negotiation, mediation and arbitration. These services will be in great demand in the future since the 1996 Act has given paramount importance to ?party autonomy? by accepting the intention of parties as a platform for dispute resolution. Thus, what law will be applicable will depend on the intention of parties. If the parties have adopted the mechanism of ODRM then it will definitely apply with necessary minor modifications. The language used in various sections of the Arbitration Act give options to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It must be noted that party autonomy presupposes the existence of an arbitration agreement. There may be a situation where the parties had not entered into an arbitration agreement. To meet such situations Sec.89 of CPC can be invoked. The reason for inserting Sec.89 has been to try and see that all the cases which are filed in the court need not necessarily be decided by the court itself. Keeping in mind the law delays and the limited number of judges, which are available, it has now become imperative to resort to ADR Mechanism as contemplated by Sec.89. There is a requirement that the parties to the suit must indicate the form of ADR, which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act 1996 will apply and that will go outside the stream of the court.

Challenges:

Disputes over Internet subjects are no different from disputes in the physical world. They involve people, and they will use whatever mechanism for resolving the disputes that meets their needs. When a field is new and the road marks are few, there is often a greater need for public precedents that can show the way. Because ADR is private and contractual, it cannot generate a decision with the precedential power of a court, or bring together unwilling parties. Nor does it have the power to deprive anyone of his or her freedom, as the courts do. The role of the courts will never be supplanted by ADR, either the physical or the online variety.

Other factors may play a role in the lack of utilization of the dispute resolution programs online. Their existence may not be well known. By their very nature, it is difficult for them to get their success stories out for potential users to hear about them. What they do is confidential. They may not have been in existence long enough to earn the trust of consumers. Or, as is most likely, their voluntary nature is acting as a barrier to their utilization. The experience of voluntary mediation programs is that there is very little take-up. The mediation process is unfamiliar to most people, and consequently they are unlikely to volunteer for it. There are probably also effectiveness issues. A voluntary program will not easily attract the hardball player, or the person whose interest it is to delay resolution, or the person who thrives on the anonymity of the Internet.

Judicial Viewpoint:

The judicial response vis-à-vis information technology is positive and technology friendly. In M/S SIL Import, USA v M/S Exim Aides Silk Exporters the words "notice in writing", in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. The Supreme Court observed: "A notice envisaged u/s 138 can be sent by fax. Nowhere is it said that such notice must be sent by registered post or that it should be dispatched through a messenger. Chapter XVII of the Act, containing sections 138 to 142 was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988. Technologiacl advancements like Fax, Internet, E-mail, etc were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament. When the legislature contemplated that notice in writing should be given to the drawer of the cheque, the legislature must be presumed to have been aware of the modern devices and equipments already in vogue and also in store for future. If the court were to interpret the words "giving notice in writing" in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process will fail to cope up with the change of time. So if the notice envisaged in clause (b) of the proviso to section 138 was transmitted by Fax, it would be compliance with the legal requirement". Thus the requirement of a written notice will be satisfied if the same is given in the form of a fax, e-mail etc, using the information technology. It must be noted that a notice by e-mail can be send instantaneously and its delivery is assured and acknowledged by a report showing the due delivery of the same to the recipient. This method is more safe, accurate, economical and lesser time consuming as compared to its traditional counterpart, popularly known as "Registered A.D".

In Basavaraj R. Patil v State of Karnataka the question was whether an accused need to be physically present in court to answer the questions put to him by the court whilst recording his statement under section 313. The majority held that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in the facilities of legal aid in the country. It was held that it was not necessary that in all cases the accused must answer by personally remaining present in the court. Once again, the importance of information technology is apparent. If a person residing in a remote area of South India is required to appear in the court for giving evidence, then he should not be called from that place, instead the medium of "video conferencing" should be used. In that case the requirements of justice are practically harmonised with the ease and comfort of the witnesses, which can drastically improve the justice delivery system.

In State of Maharashtra v Dr.Praful.B.Desai the Supreme Court observed: "The evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Thus, it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is recorded in the "presence" of the accused and would thus fully meet the requirements of section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law". The advancement of science and technology is such that now it is possible to set up video conferencing equipments in the court itself. In that case evidence would be recorded by the magistrate or under his dictation in the open court. To this method there is however a drawback. As the witness is not in the court there may be difficulties if commits contempt of court or perjures himself. Therefore as a matter of prudence evidence by video conferencing in open court should be only if the witness is in a country which has an extradition treaty with India and under whose laws contempt of court and perjury are also punishable". This judgment of the Supreme Court is a landmark judgment as it has the potential to seek help of those witnesses who are crucial for rendering the complete justice but who cannot

come due to "territorial distances" or even due to fear, expenses, old age, etc. The Courts in India have the power to maintain anonymity of the witnesses to protect them from threats and harm and the use of information technology is the safest bet for the same. The testimony of a witness can be recorded electronically the access to which can be legitimately and lawfully denied by the Courts to meet the ends of justice. The above discussion shows that the judiciary in India is not only aware of the advantages of information technology but is actively and positively using it in the administration of justice, particularly the criminal justice. Thus, it can be safely concluded that the "E-justice system" has found its existence in India. It is not at all absurd to suggest that ODRM will also fine its place in the Indian legal system very soon.

C) Domain Name Dispute Resolution:

Domain name disputes arise largely from the practice of ?cyber-squatting,? that is, the pre-emptive bad faith registration of trademarks by third parties as domain names. Cyber- squatters exploit the first-come, first-served nature of the domain name registration system by registering names corresponding to trademarks with which they have no connection. As registration of a domain name is a relatively simple procedure, cyber-squatters can register numerous variations of such names as domain names. As the holders of these registrations, cyber-squatters often put the domain names up for auction, or offer them for sale directly to the company or person connected with the names, at prices far exceeding the cost of registration. Alternatively, they keep the registration and use the name of the person or business associated with that domain name to attract business to their own sites.

Despite the rapid growth of the Internet over the past decade as a place to do business, there was, until five years ago, no global uniform procedure for resolving disputes arising out of abusive domain name registrations. Prior to the establishment of the UDRP, trademark owners had to resort to litigation before the courts to reclaim domain names that had fallen victim to cyber-squatting. In view of the complex questions of jurisdiction, applicable law and enforcement that arise when resorting to national judicial systems to resolve disputes arising in the global context of the domain name system, and the resulting delays and costs, traditional court litigation was considered an unsatisfactory solution to the problem. Arguments were presented in support of a reform of the domain name system to include a mechanism for allowing intellectual property owners to rectify abuses of rights in domain name registration in a more efficient manner. In response to the growing concerns relating to intellectual property issues associated with domain names and the increasing number of abusive domain name registrations, the Internet Corporation for Assigned Names and Numbers (ICANN) adopted the Uniform Domain Name Dispute Resolution Policy (UDRP) on 24 October 1999, thereby creating an administrative alternative resolution procedure for domain name disputes.

UDRP:

The Uniform Domain-Name Dispute-Resolution Policy (UDRP) is a process established by the Internet Corporation for Assigned Names and Numbers (ICANN) for the resolution of disputes regarding the registration of internet domain names. The UDRP currently applies to all .biz, .com, .info, .name, .net, and .org top-level domains, and some country code top-level domains. When a registrant chooses a domain name, the registrant must ?represent and warrant, among other things, that registering the name ?will not infringe upon or otherwise violate the rights of any third party, and agree to participate in an arbitration-like proceeding should any third party assert such a claim.

INDRP- the .IN Dispute Resolution Policy

The ccTLD's category is specific and distinct from the gTLD's and correlate to the names of specific countries and territories. Various corporations today not only register their trade name and their core

brands as gTLD's, but also as ccTLD's in select countries where they see future business potential. Functionally, there is no dissimilarity between the gTLD and the ccTLD. A domain name registered in a ccTLD provides exactly the same connectivity as a domain name registered in a gTLD. There are at present more than 200 ccTLD's. Each of these domains bears a two letter country code derived from Standard 3166 of the International Standardization Organization. An example would be: Yahoo.com is a gTLD. However, Yahoo.co.in would be a ccTLD registered in India. Similarly, Yahoo.co.au would be a ccTLD registered in Australia.

The administration of a ccTLD is left to the specific country concerned and thus each ccTLD policy is distinct from the other. For example, the administration of domain names within the .in (Indian) category is overseen by NIXI (National Internet eXchange of India). Similarly, registrations in the UK are overseen by a body known as Nominet. Under NIXI, the INRegistry, functions as an autonomous body with primary responsibility for maintaining the .IN ccTLD and ensuring its operational stability, reliability, and security, implementing the various new policies set out by the Government of India and its Ministry of Communications and Information Technology, Department of Information Technology.

IN Registry has assumed responsibility for the registry from the previous registry authority, The National Centre for Software Technology (NCST) after the Government decided to revamp the administration of the .IN registry in late 2004.This change was announced via an executive order through a gazette notification issued by the Department of Information Technology (DIT), Government of India, according a legal status to the IN Registry. IN Registry does not carry out registrations itself. Instead, it accredits registrars through a process of selection on the basis certain eligibility criteria. Usually a domain names may be registered for a minimum of one (1) year, and a maximum of five (5) years. Domains automatically renew at the end of their term. .IN domain names may be between 3 and 63 characters in length. Only letters, digits, and hyphens are accepted in a domain name. It is proscribed to begin or end domain names with hyphens. For names in the unrestricted zones registrants are allowed to transfer their domains to the registrar of their choice. The registry holds the authority to deny or suspend a registration if it conflicts with the sovereign national interest or public order. Owners of registered Indian trademarks or service marks were also allowed a Sunrise Period to protect their marks online. The sunrise period gave preference to Indian citizens and companies over entities from abroad.

ANNEXURE I

Arbitration in INDIA - FAQs

Arbitration Guide – INDIA - FAQs

I. BACKGROUND

(i) How prevalent is the use of arbitration in India? What are seen as the principal advantages and disadvantages of arbitration?

Arbitrations are very common in commercial contracts in India (especially in cross border agreements). Indeed arbitration clauses are not only advisable, they are perhaps necessary. This is because the ordinary civil courts, which would entertain a suit for damages or breach of contract, are so badly clogged with a backlog that it can become pointless to pursue these remedies. Added to that are ad valorem court fees payable up front in civil suits. In most cases, such court fees do not have any cap. One can hope that with the passing of the "Commercial Courts, Commercial Division And Commercial Appellate Division of High Courts Act , 2015," judicial delays may be reduced, however it is too early to so predict. ?The principal disadvantages of an arbitration in India are: the lack of a pool of specialized arbitrators; the tendency to conduct arbitrations like court proceedings in terms of rules and procedures; the absence of strong domestic arbitration institutions; and local arbitrators and the bar not being in sync with the best practices of international commercial arbitration. The recent amendment to India's arbitration law, i.e. "The Arbitration And Conciliation (Amendment) Act, 2015" (2015 Amendment) aims to inculcate a more professional culture for arbitration in India, and also seeks to make arbitration proceedings more expeditious. However, the impact of the 2015 Amendment is yet to be tested.

(ii) Is most arbitration institutional or ad hoc? Domestic or International? Which institutions and/or rules are most commonly used?

Most arbitrations are ad hoc. UNCITRAL Rules are sometimes used in ad hoc international arbitration. Amongst the domestic arbitration institutions, the Indian Council of Arbitration (ICA) (headquartered in New Delhi) is frequently used. The Delhi International Arbitration Centre (which functions under the aegis of the Delhi High Court) is popular for Delhi seated arbitrations. The International Chamber of Commerce (ICC) is popular for off shore arbitrations. In recent times, the Singapore International Arbitration Centre (SIAC) has gained enormous popularity, chiefly for reasons of costs and convenience. The London Court of International Arbitration (LCIA) had set up a branch in New Delhi but has recently announced its closure.

(iii) What types of disputes are typically arbitrated?

Shipping, construction, joint venture agreements and cross border commercial contracts typically contain an arbitration clause. However, for disputes related to loans and borrowings, arbitrations are not ordinarily used, as the lender typically depends on the built-in securitization mechanism rather than a private dispute resolution forum.

(iv) How long do arbitral proceedings usually last in India?

This greatly depends upon the arbitrators, the parties and also the complexity of the matter. The 2015 Amendment aims to reduce the time consumed in arbitral proceedings, inter-alia by specifying an upper limit of 1 year from the date of constitution of the arbitral tribunal, for completion of proceedings and making of an award. Parties can consent to extend this period by a further 6 months only, after which an application is required to be made to the Court, which while deciding the same, is empowered to (i) should the delay be attributable to the tribunal, reduce the fees of an arbitrator / the tribunal (by a maximum of 5%), (ii) substitute an arbitrator and/or (iii) impose costs, including actual or exemplary costs on any

party. The Act further provides that such an application should be disposed off as expeditiously as possible, preferably within 60 days of service of notice on the non-applicant(s). While this amendment is likely to reduce delays, the precise impact is yet to be seen and would depend largely on the spirit with which courts deal with applications under this provision. A possible scenario is that such applications themselves get stuck in court procedures - rendering the remedy worse than the disease.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in India?

The Arbitration & Conciliation Act expressly states that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. Foreign advocates do appear in arbitrations and there is no legal bar. This position has been clarified by the High Court of Madras in A.K. Balaji v. The Government of India and Ors (reported in AIR 2012 Mad 124).

II. ARBITRATION LAWS

(i) What law governs arbitration proceedings with their seat in India? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

In 1996, India enacted a new Act titled the Arbitration & Conciliation Act ('the Act'). The Act has two significant parts. Part I deals with any arbitration seated in India irrespective of the nationality of the parties. Hence the applicability of Part I depends on the seat of the arbitration (India). Part I is based on the UNCITRAL Model Law and the UNCITRAL Rules of 1976. Part II is concerned with enforcement of foreign awards and is based on the New York Convention.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

As stated above, both domestic and international arbitrations (i.e., where at least one party is a foreign individual or entity), seated in India, are governed by the same set of provisions (contained in Part I of the Act). However, there are a few vital distinctions. ?First, in the case of an international arbitration, if the court's assistance is required to constitute the tribunal, an application in this regard would lie to the Supreme Court of India. In the case of a domestic arbitration it would lie to the High Court where the cause of action may arise or the defendant may reside, or where the arbitration is seated. ?Secondly, when a court is approached for appointment of a sole / presiding arbitrator in an international arbitration between parties belonging to different nationalities, it is required to appoint an arbitrator from a nationality other than the nationality of either party. (This however is not necessarily followed in practice). The third difference is that in an international arbitration, the court while appointing and fixing the arbitrator(s) fees (if approached to do so), need not be guided by the model fees prescribed under Schedule IV of the Act, or Rules framed under Section 11 (14) of the Act. ?Fourthly, in an international arbitration, the parties or the arbitral tribunal can apply non-Indian substantive law. In an arbitration between Indian parties, the tribunal is obliged to apply the substantive law of India. ?Fifthly, vide the 2015 Amendment, an additional ground for setting aside an award on 'patent illegality' has been inserted, in arbitrations between Indian parties only. Such a ground is not available in the case of an international arbitration. The sixth difference is that in an international arbitration, any application to a court, for interim relief, or for setting aside of an award, or for execution etc., shall lie to the High Court where the cause of action may arise or the defendant may reside, or where the arbitration is seated, even if such a High Court does not exercise 'original jurisdiction' (i.e. does not have the power to hear civil suits based on pecuniary valuation) or where the pecuniary valuation of the matter is below the pecuniary jurisdiction of the High Court. In the case of a domestic arbitration, an application may also lie to a subordinate court, in case the High Court in question does not exercise original jurisdiction, or where the pecuniary valuation of the matter is bellow the High Court's pecuniary jurisdiction.

(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

India is a signatory to the New York Convention and the Geneva Convention. It is not a signatory to any other convention relating to arbitration (including the Washington Convention).

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Please see Section II (ii) above.

In a domestic arbitration, the tribunal must decide the dispute in accordance with the substantive law of India. ?In an international arbitration, the arbitral tribunal is required to decided the dispute in accordance with the rules of law designated by the parties, and failing such a designation, the tribunal is required to apply the rules of law it considers to be appropriate "given all the circumstances surrounding the dispute," provided that it cannot decide "ex aequo et bono" or as "amiable compositeur", unless the parties have expressly authorized it to do so.

III. ARBITRATION AGREEMENTS

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

There is no legal requirement as to the form and content of an arbitration agreement. It may be even contained in an exchange of letters or any other means India of telecommunication which provides a record of the agreement, including communication through electronic means. The agreement need not be signed but it must be in writing.

An arbitration agreement need not necessarily use the word 'arbitration' or 'arbitral tribunal' or 'arbitrator'. The court will examine certain factors to determine whether the agreement (while not using these words) has the attributes or elements of an arbitration agreement. These include, whether: (a) the parties agreed to refer their disputes to a private tribunal; (b) the said tribunal is obliged to adjudicate upon the disputes in an impartial manner after giving due opportunity to both sides to put forth their case; (c) the parties agreed that the decision of the private tribunal will be binding on them.

At the same time, mere use of the word 'arbitration', 'arbitral tribunal' or 'arbitrator' will not make it an arbitration agreement. If the parties have made the reference dependant on a future act which may or may not happen it will not result in an agreement. Use of clauses such as 'parties can, if they so desire, refer their disputes to arbitration,' 'in the event of any dispute, the parties may also agree to refer the same to arbitration' or 'if any dispute arises between the parties, they should consider settlement by arbitration' do not result in an arbitration agreement. The rationale of the principle is that an agreement to enter into an agreement does not constitute a binding obligation.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Indian courts lean in favour of enforcement of arbitration agreements. The Act (by a non-obstante clause) prohibits judicial authorities from intervening in any arbitration except as provided for under the Act. The principle of non-intervention is expressly recognized as one of the 'main objectives' of the Act in its Statement of Objects and Reasons.

A court would not enforce an arbitral agreement if it finds that it is prima facie invalid or (in the case of a foreign arbitration), prima facie null and void, inoperative, or incapable of being performed.

Courts have in the past also refused to refer a civil suit to arbitration on the ground that the dispute is not arbitrable, or that the subject matter of the arbitration agreement is not the same as the subject matter of the civil suit, or if the parties to the civil action are different from the parties to the arbitration agreement. However, the 2015 Amendment provides that reference to arbitration must be made "notwithstanding any judgment, decree or order of the Supreme Court or any Court," thereby putting all such preliminary objections before the arbitral tribunal and restraining the courts from getting into these issues and stalling arbitrations.

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/ or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

A bare agreement to negotiate is not enforceable and therefore does not constitute a legal impediment in commencement of arbitration proceedings. However, if the clause contemplates different levels of dispute resolution or constitutes a multi-tier clause it may be binding depending upon the language used. Thus, an agreement to first refer the dispute to a dispute review board or to an engineer (in a construction contract) would be binding and cannot be bypassed. Failure to comply with the dispute resolution mechanism would render the arbitral tribunal devoid of jurisdiction and the resultant award liable to be set aside.

(iv) What are the requirements for a valid multi-party arbitration agreement?

?Indian law (like the Model law) is silent on multi-party arbitrations. A recent case of seminal importance is Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. - (2013) 1 SCC 641. Here, the Supreme Court was faced with a situation where parties to a joint venture had entered into several related agreements – some with different entities from amongst their group. These agreements had diverse dispute resolution clauses – some with ICC arbitration in London; some with no arbitration clause and one agreement with an AAA arbitration clause with Pennsylvania (United States) as its seat. The Supreme Court strongly came out with a pro-arbitration leaning stating that the legislative intent is in favour of arbitration and the Arbitration Act 'would have to be construed liberally to achieve that object'. The Court held that non-signatory parties could be subjected to arbitration provided the transactions were within the group of companies and there was a clear intention of the parties to bind non- signatories as well. It held that subjecting non-signatories to arbitration would be in exceptional cases. This would be examined on the touchstone of direct relation of the non-signatory to the signatories; commonality of the subject matter and whether multiple agreements presented a composite transaction or not. The situation should be so composite that performance of the 'mother agreement' would not be feasible without the aid, execution and performance of the supplemental or ancillary agreements. ?In an earlier case, the Delhi High Court turneddown a challenge to a multi-party clause. In that case, (Focus Brands (India) Pvt. Ltd v. Campari International) there were three agreements but with only one common party. In two agreements, ?parties had agreed to arbitration in Milan under Italian law and in one to arbitration in Singapore under SIAC Rules as per India law. It was contended that the agreements and the cause of action was interlinked and the conflicting arbitration agreements would be unworkable. The court rejected the contention stating that mere inconvenience or difficulties in working out an arbitration agreement cannot be a ground to strike it down.

Another case to note is the Supreme Court decision in P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.; (2012) 1 SCC 594 where it has been held that a common arbitration may be brought against multiple parties, even if all the parties do not have an arbitration agreement with each other. To quote from the Judgment: "...if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C..." This would of course be applicable only where the subject matter of the dispute is common.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

A unilateral right of one party to elect whether to commence an arbitration or a civil suit (should a dispute arise) has been upheld by Indian courts. It may, however, be stated that there is not much case law on the subject and the issue has not been squarely dealt with so far.

(vi) May arbitration agreements bind non-signatories?If so, under what circumstances?

See Section III (iv) above. ?The 2015 Amendment seeks to give legislative force to the Supreme Court's decision in Chloro Controls [see Section III (iv) above], and also extend its applicability to domestic arbitrations, by inserting the words "or any person claiming through or under him" in Section 8 (1) of the Act. Section 45 of the Act (applicable to foreign seated arbitrations) already contained such language, which formed the basis for the decision in Chloro Controls. The Amendment to Section 8 (1) of the Act can be seen as a statutory approval of the decision in Chloro. ?While the language of Sections 8 (1) and 45 of the Act make clear that a non- signatory can seek arbitration (so long as it is claiming through or under a signatory), insofar as enforcing an arbitration agreement against a non-party is concerned, judgments such as Chloro Controls, and those rendered subsequently may be referred to. ?Applying its decision in Chloro Controls, the Supreme Court in Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd., (2014) 14 SCC 574, allowed a non-signatory affiliate to invoke arbitration.

Recently, the Supreme Court has applied Chloro Controls to bind a non-party to an arbitration by invoking the doctrine of lifting of the corporate veil (see Purple Medical Solutions Pvt. Ltd. vs. MIV Therapeutics Inc&Anr. Arbitration Case (Civil) No. 11 of 2014 and Arbitration Case (Civil) No. 12 of 2014, Decided on January 27, 2015).

The Delhi High Court, applying Chloro Controls, has held that members of a consortium, even though not directly parties to an arbitration agreement executed on behalf of the consortium, can be made parties to an arbitration. (see HLS Asia Ltd. vs. M/s. Geopetrol International Inc. &Ors. (2013) 196 DLT 52).

In another decision of the Delhi High Court (Havels India Ltd. v. Electrium Sales Ltd.) the Plaintiff had entered into a Supply Agreement with a co-subsidiary of the Defendant (which contained an arbitration clause). There was no arbitration agreement with the Defendant but the court held that the Supply Agreement was entered into by the co-subsidiary on behalf of itself as well as its 'Related Persons' (which expression was defined). Moreover, the goods in question were supplied to the Defendant. Under these circumstances, the court held that the Defendant could not be denied the benefit of the arbitration clause contained in the Supply Agreement (though it was not a party thereto).

There is thus a recognized body of case law allowing non-signatories to participate in an arbitration, and also enforcement of arbitration agreements against non-signatories.

IV. ARBITRABILITY AND JURISDICTION

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

The Act recognizes the principle of non-arbitrability. It is an express ground for setting aside an arbitral award ('the subject matter of the dispute is not capable of settlement by arbitration'). The Act, however, nowhere defines what is non- arbitrable. Generally, any civil or commercial dispute is in principle capable of being resolved by arbitration. A dispute becomes non-arbitrable where jurisdiction of a private tribunal is expressly or impliedly excluded. Examples of non-arbitrable disputes are: matrimonial disputes including child custody or guardianship; insolvency or winding up of companies; testamentary matters (grant of probate, letters of administration or succession certificates); eviction of tenants governed by tenancy statutes; suit for the sale of mortgaged property; criminal offences.

Non-arbitrability also depends generally on whether the award would affect third parties or the public at large, that is, whether it would be a judgment in rem. Another test is whether the dispute between the parties is capable of a private compromise between the parties.

Lack of arbitrability is considered to be a matter of jurisdiction i.e. to be determined in the first instance by the tribunal. At the pre-reference stage, a court may not decide whether a matter is arbitrable. This stands clarified by the 2015 Amendment to Section 8 (1) of the Act (see Section III(ii) above) and also the insertion of Section 11 (6A) which provides that a court while appointing an arbitrator under Section 11 of the Act "shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

In view of these amendments, a court may have occasion to decide the issue of arbitrablity only while deciding a challenge to an award.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

The Act states that if an action brought before a judicial authority is the subject matter of an arbitration agreement, the judicial authority shall refer the parties to arbitration, unless it finds that prima facie no valid arbitration agreement exists. The only condition is that the objecting party makes its objection no later than filing its first statement on the substance of the dispute (otherwise it is deemed to have waived its right to object). ?The amendment to Section 8 (1) of the Act (see Section III(ii) above) makes it clear that the only ground to reject reference to arbitration can be as stated above. Moreover, while an application seeking reference to arbitration is pending adjudication, an arbitration may be commenced or continued and an arbitral award made. (Section 8 (3) of the Act).

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the ?nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The principle of competence-competence is recognized and enshrined in the Act. Indeed (going beyond the Model Law) the Act envisages that should the arbitral tribunal reject any challenge to its jurisdiction it shall proceed with the arbitration and render the award. The aggrieved party would later have a right to challenge the award before a court on the ground of lack of jurisdiction.

There are, however, two situations in which the court would overshadow the arbitral tribunal in its competence-competence jurisdiction. First, if a judicial authority is seized of a matter and a party objects to the jurisdiction of the court on the ground that the parties have an arbitration agreement, the court can decide whether prima facie a valid arbitration agreement exists. Similarly, if the court is petitioned to appoint an arbitrator (sole or presiding), the court may examine whether there is an arbitration agreement in existence before it makes the appointment.

V. SELECTION OF ARBITRATORS

(i) How are arbitrators selected? Do courts play a role?

The law does not require the arbitrator to possess any special qualification, and subject to agreement and the requirement of independence/impartiality, parties are free to select any person as an arbitrator. The courts are involved only if parties are unable to agree upon a sole arbitrator or if the two appointed arbitrators fail to agree on a third arbitrator (within a period of 30 days). For further discussion see Section II(ii) above.

(ii) What are the requirements in your jursdiction as to disclosure of conflicts?Do courts play a role in challenges and what is the procedure?

The law states that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose (in writing) any circumstance likely to give rise to justifiable doubts as to his independence or impartiality. ?Schedule V to the Act lists the kinds of relations between an arbitrator and a party / advocate/ subject matter of the dispute, which give rise to justifiable doubts regarding an arbitrator's independence. ?Schedule VII to the Act lists the kinds of relations between an arbitrator and a party / advocate/ subject matter of the dispute, which would, notwithstanding any prior agreement between the parties, disentitle a person from acting as an arbitrator, unless post arising of disputes, parties expressly waive such a conflict. ?Schedule V and VII (inserted vide the 2015 Amendment) can be said to be along the lines of the IBA Guidelines on Conflicts of Interest.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or if he does not possess the qualifications agreed to by the parties. Any challenge shall be made within 15 days of a party becoming aware of the constitution of the tribunal or becoming aware of the circumstances leading to the challenge. The arbitral tribunal shall decide on the challenge. The court has no role at that stage and if a challenge is rejected, the arbitral tribunal shall continue with the proceedings and render its award. It would be open to the party challenging the arbitrator to take any wrongful rejection of challenge as a ground for setting aside the award.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties?

If so, what is their source and generally what are they? ?The Act does not require any qualifications from an arbitrator. It expressly states that a person of any nationality may be an arbitrator (unless the parties have agreed otherwise). The law does not prescribe any code of conduct or ethical duties from arbitrators and none have been formulated in case law (though some arbitral institutes have prescribed these). As per principles applicable to all judicial and quasi-judicial tribunals, the legal standard in deciding a challenge to an arbitrator is that justice should not only be done but seen to be done. If the arbitrator has compromised a free trial in any manner or denied due process by any act or omission, it may be a ground for disqualification. Actual bias is never required. The test is whether there is a real likelihood of bias. The law in this regard is part of the administrative law of India.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

See Section V(ii) above. ?

VI. INTERIM MEASURES

(i) Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue?Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

The arbitral tribunal is empowered to order a wide variety of interim measures of protection in respect of the subject matter of the dispute. The said power has received a major impetus by the 2015 Amendment, which provides that the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it. Furthermore, vide the 2015 Amendment, any interim order passed by the tribunal shall be deemed to be an order of the court for all purposes, and shall be enforceable as such.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances?

May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal? ?Under the Act, courts have very wide powers to grant interim measures before, during or even after the award is pronounced (but before it is enforced). However, post the 2015 Amendment, a Court shall entertain an application for grant of interim measures post formation of the arbitral tribunal, only if it is satisfied that the facts and circumstances of the case make it inefficacious for the party to approach the arbitral tribunal for the said relief. ?If a court is approached before the arbitration proceedings have commenced, the applicant should have at least invoked the arbitration clause or satisfy the court that it will take the necessary steps to do so without delay. The 2015 Amendment lays down a time limit of 90 days from the passing of an interim order (extendible by the court) for invocation of arbitration. ?A court ordered relief will remain in force following constitution of the arbitral tribunal, but would not prevent the tribunal from reaching final conclusions which may be at variance of the court order. ?Vide the 2015 Amendment, courts have also been empowered to grant interim measures of protection in relation to offshore arbitrations.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration?Do such measures require the tribunal's consent if the latter is in place?

The arbitral tribunal or any party with the approval of the tribunal may apply to the competent court for assistance in taking evidence. Going beyond the Model Law, the Act states that any person failing to attend in accordance with the court direction, or refraining from giving evidence, or guilty of contempt of the arbitral tribunal, shall be subject to like penalties and punishments as are applicable in law. Judicial assistance also extends in a similar manner to any document to be produced or property to be inspected.

VII. DISCLOSURE/DISCOVERY

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

In a civil case, discovery is through a court order and the court would allow it only if it is considered relevant or for saving costs. Courts do not order discovery as a matter of routine (or by way of a fishing expedition) as it may carry adverse consequences for the opposite party. If a document is referred to or relied upon in a pleading, then generally discovery is to be allowed. ?If a party deliberately or willfully disobeys an order regarding discovery, its claim or defence is liable to be stricken. However, if the default is not willful or contumacious the court will only draw an adverse inference against the defaulting party. ?This approach to discovery is followed in arbitrations as well. If an arbitral tribunal needs court's assistance for discovery the procedure will be as outlined in Section VI(iii) above.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

See Section VII(i) above.

(iii) Are there special rules for handling electronically stored information?

Elaborate rules have been prescribed under the Evidence Act for electronically stored information. However the said Act does not apply to arbitrations and it is rare for Indian arbitrators to require compliance with the same.

VIII. CONFIDENTIALITY ?

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Arbitration proceedings are not confidential per se. The law does not impose any such obligation. Indeed, given the transparency laws of the country (including the Right to Information Act, 2005) the state and its agencies cannot agree to keep arbitration proceedings confidential. Similarly large corporations may also find it difficult to have any such agreement.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no specific provisions in this regard. However the arbitrator has general power to order interim measures of protection. (See Section VI(i) above). Alternatively the court can be approached for this purpose. (See Section VI(ii) above).

(iii) Are there any provisions in your arbitration law as to rules of privilege?

Under Indian law, arbitrators do not have the same protection as judges or magistrates and as such do not have any privilege against examination as to their conduct or as to anything which may come to their knowledge in the discharge of their functions. However, no arbitrator can be summoned in a court proceeding as a matter of routine. This would be done by a court (if at all) sparingly and after due deliberation. Further, an arbitrator cannot be summoned as a witness merely to show how he has arrived at his conclusions. ?Conciliation proceedings initiated under the provisions of the Act are privileged and the conciliator or parties cannot testify as to views expressed, or proposals or admissions made, during any arbitral or judicial proceeding. ?There are no special provisions in the arbitration law as to attorney client privilege but the general law is wide enough to cover arbitrations and indeed any attorney work product.

IX. EVIDENCE AND HEARINGS

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Indian arbitrators rarely refer to or rely upon the IBA Rules. In practice examination of witnesses is conducted along the lines of a regular court hearing.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Arbitrators are masters of their own procedure and, subject to the parties' agreement, may conduct the proceedings in a manner they consider appropriate. The only restraint is that they shall treat the parties with equality and each party shall be given a fair opportunity to present its case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure nor the Indian Evidence Act apply to arbitrations, but in practice only the technical rules of procedure contained therein are ignored. The arbitrators ?generally guide themselves by the underlying legal principles contained in these statutes. The arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

The usual method is to have witness statements in advance followed by cross examination. The claimant's witnesses are examined first. An arbitrator may question witnesses as often and at any stage as he or she deems appropriate. The cross examination is usually not a verbatim reproduction of what the witness

states. The transcript is quite often paraphrased or re-phrased by the arbitrator and recorded as such. Counsel for the witness or a party can of course request that a particular question or answer be reproduced exactly. The tribunal can interject the cross examination with their own comments and observations as to witness demeanour, hesitation, lack of forthrightness, etc. ?Live transcript facilities are not available in India and therefore are usually not followed.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

Under Indian law, any person is competent to testify unless the judicial authority feels that he is prevented from understanding the questions or giving rational answers. Subject to this, even a mentally challenged individual is qualified to testify. The principle applies to arbitrations as well. ?The Indian Oaths Act encompasses persons who may be authorised by parties consent to receive evidence; thus, it extends to arbitration proceedings as well. The practice in arbitration is to affirm the affidavits in evidence before an Oath Commissioner. The witness is put under oath before his oral testimony or cross-examination and signs the transcript.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?

Though there is no bar for a legal representative of a party to testify (either for or against a party whose case he is conducting), courts and arbitrators are circumspect in allowing it and find it 'undesirable'. When necessary, the legal representative would be expected to retire from the case.

Relationship (per se) is not a disqualification for being a witness. There is no legal presumption as to evidence from a witness who may be related to a party (though the court will carefully scrutinize his credibility).

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Expert testimony is presented in the same manner as any other evidence (ie, based on a sworn witness statement followed by cross examination). There are no formal requirements regarding independence and/or impartiality of expert witnesses; rather the law assumes that an expert witness will lean in favour of the party producing him as a witness and expects the court to test his credibility through collaborative evidence or otherwise.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Normally a tribunal would not appoint its own expert unless a party so requests or there are other compelling reasons to do so. A tribunal-appointed expert would have certain special powers as compared to a party-appointed expert. He may require relevant information (including goods, documents or other property) for inspection from any party. An expert may also be requested by a party to make available for examination all documents, goods or other property in his possession which he was provided in order to prepare his report. ?There is no legal presumption as to credibility of a tribunal-appointed expert as opposed to a party-appointed expert. ?Some courts do maintain a list of experts but there is no requirement that the expert be selected from that list only.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Witness conferencing is not used in India.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

The Act enables the arbitrator with the consent of parties to arrange for administrative assistance by a suitable institution or person. However, there are no rules or regulations in this regard.

X. AWARDS

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

An award is required to be made in writing and signed by all members of the tribunal or signed by the majority with reasons for any omitted signatures. It shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. ?The award shall bear its date and state the place of the arbitration. A signed copy is required to be delivered to each party. There are no limitations on the type of permissible relief save as may apply to any court. (See Section X(ii) below).

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators cannot award punitive or exemplary damages for breach of contract (indeed under Indian law, even courts cannot do so). Arbitrators can award interest, on the whole or part of the sum awarded, and for any period between the date of cause of action and the date of the award, and thereafter till payment is received. ?Where the contract specifies a particular rate of interest (or prohibits grant of interest), the arbitrator is bound to abide by the same while awarding pre-award interest. ?Insofar as post-award interest is concerned, the arbitrator can award interest in the manner deemed reasonable. The general rule is that pre-award interest gets subsumed in the amount awarded, and the post award interest is on such amount (i.e. principal amount + pre-award interest). The arbitrator has the power to award compound interest, even if the contract does not provide for the same. [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189, and Supreme Court Order dated 12.03.2015 in Civil Appeal No. 3148 of 2012]

(iii) Are interim or partial awards enforceable?

Yes. Under the Act, the definition of arbitral award includes 'interim award'.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply **to the form and content of dissenting opinions?**

An arbitrator can issue a dissenting opinion but there are no rules as to the form or content thereof. (An arbitral tribunal is empowered to make typographical or clerical corrections or other errors of a similar nature in the award either on its own initiative or on an application by a party. A time limit of 30 days is prescribed in this regard.

If the parties agree, any party may request the arbitral tribunal to given an interpretation to a specific point or part of the award. Unless otherwise agreed by the parties, a party with notice to the other party may request the arbitral tribunal to make an additional award as to claims presented in the proceedings but omitted from the award. The time limit for such an application is also 30 days.

When a court is seized of an application to set aside an award, it may adjourn the proceedings for a specified period to give the arbitral tribunal an opportunity to take such action as may eliminate the ground for setting aside the arbitral award.

XI. COSTS

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

?The normal rule is that the unsuccessful party bears the costs. However, where the case of the parties is evenly balanced, parties are often left to bear their own costs. In case the unsuccessful party is not being burdened with the costs, the tribunal is required to record its reasons in writing.

(ii) What are the elements of costs that are typically awarded?

The Act stipulates that costs include reasonable sums relating to the fees and expenses of the arbitrators and witnesses; legal fees and expenses; fees of the arbitral institution; and any other expense in connection with the court and arbitration proceedings and the arbitral award.

While awarding costs, the Act requires the court / tribunal to have regard to the conduct of parties, whether a party made a frivolous counter-claim leading to delay, whether any reasonable offer to settle the dispute is made by a party and refused by the other party and whether a party has succeeded partly in the case.

A court / tribunal may make any order on costs, including that a party shall pay a proportion of another party's costs; a stated amount in respect of another party's costs; costs from or until a certain date only; costs incurred before proceedings have begun; costs relating to particular steps taken in the proceedings; costs relating only to a distinct part of the proceedings; and interest on costs from or until a certain date.

The elaborate scheme on costs stated hereinabove is provided for by virtue of the 2015 Amendment. Until now, Indian arbitrations (especially ad hoc arbitrations) rarely see full costs being awarded. With the implementation of the 2015 Amendment, it is hoped that realistic costs become the rule rather than the exception.

(iii) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

A consent order can be made at the request of the parties if not objected to by the arbitral tribunal. It can be recorded in the form of an award on agreed terms. An award on agreed terms shall comply with other requirements of a formal award (except for the requirement of giving reasons). It shall have the same status and legal effect as any other award on the substance of the dispute. ?The arbitral tribunal shall issue an order of termination of the arbitral proceedings where: the claimant withdraws his claim or he fails to communicate his statement of claim as per the directions of the tribunal; the parties agree to terminate the proceedings; or the tribunal finds that continuation of the proceedings has become unnecessary or impossible.

(iv) What powers, if any, do arbitrators have to correct or interpret an award? ?Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes. Insofar as ad-hoc and purely domestic arbitrations (i.e. involving Indian parties only) are concerned, the tribunal's fees, if fixed by the court (when approached for appointment of an arbitrator), may be guided by the model fees prescribed under Schedule IV to the Act, and/ or Rules framed under Section 11 (14) of the Act.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes. The tribunal would exercise its discretion inter alia based on the merits of the parties' claim or defence and conduct. See Section XI(ii) above.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

An appeal against costs alone would be on very limited grounds, for instance: where a pro forma party (against whom no relief was sought) was made to bear costs or where the court below committed a fundamental error (making the successful party bear the costs of the losing party on an erroneous factual assumption). In the absence of decided cases, it is not clear the extent to which these principles will apply to an arbitral award. Given the present state of law, a review of the tribunal's decision on costs would not lie (but see Section XII(i) below).

XII. CHALLENGES TO AWARDS

How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

There is a difference between domestic awards (including those arising from an international arbitration taking place in India), and foreign awards.

A domestic award is straightaway enforceable as a decree of the court, without the need to go through a separate proceeding to convert it into a decree.

An application to 'set aside' a domestic award may be filed, within three months of receipt of the same (extendable by 30 days thereafter, but no more).

An application to seek the execution of a domestic award may be preferred, when the time prescribed for making of an application to set aside the award has lapsed. Earlier, mere preference of an application for setting aside of an award resulted in an automatic bar to enforcement (till disposal of such an application). The 2015 Amendment has changed the position. Now, execution of an award as a decree can nonetheless proceed pending adjudication of the setting aside application, unless the court has specifically 'stayed' execution of the award. While staying the execution of an award, the court is required to pass a reasoned order, taking into account the provisions applicable for staying of a money decree, which ordinarily requires the judgment debtor to deposit the decretal amount (or a part of the same) in court, which may, pending proceedings, be allowed to be withdrawn by the decree holder, subject to furnishing a suitable security.

The grounds for challenge of domestic awards are the same as per the Model Law (Article 34 thereof). The minor differences are that under the Act an award can also be challenged on the grounds of lack of impartiality or independence of the arbitrator or any ruling by the arbitrator as to the existence or validity of the arbitration agreement. Under Indian laws there is no recourse to courts on these grounds during the arbitral process and thereafter a challenge is permitted once the award is rendered. A controversial decision of the Supreme Court (Oil & Natural Gas Corporation v. SAW Pipes (2003) 5 SCC 705) (Saw Pipes) has introduced the concept of a challenge to a domestic award on the merits if the court finds it to be 'patently illegal' or against the terms of the parties' contract, by expanding the 'public policy' ground as contained in Section 34 of the Act.

The 2015 Amendment restricts the applicability of Saw Pipes, by providing that:-

- The ground to set aside an award on 'patent illegality' is not available against an award rendered in an international arbitration (i.e. where at least one party is a foreign national / entity),
- An award can be set aside for being patently illegal, only if the same is apparent on the face of the award,
- An award cannot be set aside merely on the ground of an erroneous application of the law, or by re-appreciation of evidence,
- The public policy ground has been narrowly defined, making clear that it is confined to cases where there is fraud or corruption in the making of the award or where the award is in "contravention with the fundamental policy of Indian law", or "is in conflict with the most basic notions of morality or justice." The definition clarifies that the public policy contravention ground shall not entail a review on the merits of the dispute.

Lastly, the 2015 Amendment provides a time limit of 1 year from date of service of notice on the non-applicant, for deciding an application to set aside an award. It is yet to be seen if Indian courts are able to follow this time limit. ?Now to deal with foreign awards. The first point of distinction is that a foreign award is not a decree capable of being enforced automatically. An application is required to be moved, for enforcement and execution of a foreign award. Such an application shall lie to the appropriate High Court having jurisdiction over the subject matter, or the respondent. ?A foreign award cannot be set aside; it can only be enforced or declined to be enforced. The grounds on which enforcement of a foreign award can be declined are similar to those provided under the New York Convention.

The 2015 Amendment, as a matter of abundant caution, clarifies that a merits based review is not available while considering an application for enforcement of a foreign award. There was some confusion in the past, with another controversial decision in Venture Global Engineering Vs. Satyam Computer Services Ltd. and Anr. (2008) 4 SCC 190, (Venture Global) which held that the provisions for setting aside of a domestic award (including on the patent illegality ground laid down in Saw Pipes) shall apply to foreign awards as well, unless it could be shown that the parties intended to exclude the applicability of Part-I of the Arbitration Act (which contains the provisions applicable to domestic arbitrations). The decision in Venture Global was over-ruled (prospectively) by a 5 Judge decision in Bharat Aluminum Co. v. Kaser Aluminum Technical Services - (2012) 9 SCC 552.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

As a matter of public policy this right cannot be waived as it would be considered to be a restraint on legal proceedings.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

There is no provision to "appeal" against an arbitral award. ?As stated in Section XII (i) above, only an application seeking to "set aside" a domestic award can be preferred. From a decision rendered in such application, one statutory right to appeal is available. Further, there is a constitutional right to file an appeal to the Supreme Court of India (second appeal). This however is at the discretion of the Supreme Court and is entertained only if there is a gross error of law or an issue of public importance. The appeal provisions mentioned above would not expand the grounds on which an award can be set aside. The appellate court can only consider whether the court of first instance correctly applied the available provisions while

considering the application for setting aside the award. ?No statutory appeal lies against an order enforcing a foreign award; it lies only against an order refusing to enforce a foreign award. However, a discretionary appeal would lie to the Supreme Court of India (as stated above) from an order enforcing the award.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

The power to remand exists only in relation to domestic awards (including those arising from an international arbitration taking place in India) as discussed in Section X(vi) above.

XIII. RECOGNITION AND ENFORCEMENT OF AWARDS

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

A domestic award does not require any enforcement application proceeding. Once the time prescribed for making an application to set aside the award has lapsed, the award can straight away be enforced. See Section XII(i) above. ?A foreign award on the other hand needs to go through an enforcement process. The grounds for opposing enforcement are the same as in the New York Convention. See Section XII(i) above. ?A foreign award can be enforced (at the discretion of the enforcing party) in any court within the territorial limits where the defendant resides or has his business or where the defendant's assets can be traced. ?Any opposition to the enforcement of a foreign award will have the legal effect of staying the same, till such an application is decided. However, the court can pass appropriate orders to secure the interests of the party seeking enforcement.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Indian law does not recognise double exequatur in relation to enforcement. The procedure for enforcement would be the same as described in Section XIII above.

(iii) Are conservatory measures available pending enforcement of the award?

Yes.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Indian courts do not suffer from any anti-foreigner bias and it is very common for foreign awards to be enforced. Statistics from the past 20 years show that the foreign award was not enforced in only about eight per cent of cases. ?Indian courts would not enforce a foreign award set aside by the court at the place of arbitration as that it is a complete defence against enforcement under the New York Convention.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

An application for enforcement of foreign award must be brought within three years of the award. ?India is a large and diverse jurisdiction. The average duration of court proceedings can vary widely depending upon the complexity of the case and the court involved. Though it is difficult to hazard a guess on the time, broadly it can take between two to three years to enforce a foreign award. Please see Section XII(i) above.

XIV. SOVEREIGN IMMUNITY

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

The doctrine of sovereign immunity has had a bumpy ride in India chiefly due to a 1965 decision of the Supreme Court which gave it recognition (KasturilalRalia Ram Jain v. State of Uttar Pradesh AIR 1965 SC 1039). The case dealt with an act of negligence committed by police officers relating to property seized in exercise of their statutory powers. The Supreme Court held that if a tortious act is committed by a public servant in discharge of statutory functions based on a delegation of the sovereign powers of the state, then the state is not vicariously liable. It relied on the maxim 'the King can do no wrong', thereby embracing an absolute view of sovereign immunity. However, the doctrine has not been applied since and courts have continuously held the state liable in a variety of circumstances. The doctrine is for all purposes dead where the state is involved in commercial or private undertakings.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

There are no special rules that apply to enforcement of an award against a state or state entity.

XV. INVESTMENT TREATY ARBITRATION

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

India is not a party to the Washington Convention or indeed any other Convention or treaty pertaining to arbitration (other than the New York Convention and the Geneva Convention).

(ii) Has your country entered into Bilateral Investment Treaties with other countries?

As of March 2016, India has entered into BITs with 84 countries, out of which 72 stand ratified. Additionally it has four comprehensive economic co-operation agreements with investment protection provisions.

XVI. RESOURCES

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

The most popular electronic media for reference and research are: (www.scconline.com), (www.westlawindia.com) and (www.manupatra.com). Supreme Court judgments and its day-to-day orders can be accessed free of cost from (www.supremecourtofindia.nic.in) but there is no search engine. The link to various High Court websites is also available. (Delhi High Court at (www.delhihighcourt.nic.in) and the Bombay High Court at (www.bombayhighcourt.nic.in). A leading textbook is: Justice R.S. Bachawat's Law of Arbitration & Conciliation; 5th Edition, 2010; published by LexisNexis ButterworthsWadhwa Nagpur.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction?

If so, what are they and when do they take place? ?India is becoming an attractive destination for international conferences on arbitration and almost every major arbitral institution has conducted seminars or conferences in the recent past. However, there are no regular events announced and it is generally on an ad hoc basis.

Key Judicial Decisions Post the 2015 Amendment

Procedural Law follows the Law of the Seat

The Bombay High Court in Harkirat Singh v. Rabobank International Holding BV (2015) 5 Bom CR 9 held that if the arbitration agreement is silent on the applicable procedural law, it should follow the seat of arbitration and not the substantial law governing the arbitration agreement. Although this follows Yograj v. Ssang Yong (2012) 12 SCC 359 but departs from Sakuma Exports Ltd v Louis Dreyfus Commodities (2015) 5 SCC 656, which held that the proper law of the contract should govern the arbitration agreement.

Appointment of Arbitrator

In two decisions arising out of Section 11(6) of the Act: Panihati Rubber Limited v. Principal Chief Engineer (of the Hon'ble High Court of Guwahati) and Assignia-VIL-JV v. Rail Vikas Nigam Limited (Hon'ble High Court of Delhi) have now interpreted the above provisions to strike down the prevailing practice of the appointment of employees as arbitrators by state instrumentalities. The courts were guided by the principle of the amended Section 12 (both arbitrations were initiated after the Amendment Act) and the courts proceeded to appoint impartial arbitrators even giving a go-by to the wordings of the arbitration agreements.

Arbitrator's Fees

In Union of India v UP State Bridge Corp Ltd (2015) 2 SCC 52, a judgment pronounced before the amendment, it was held that the Indian Arbitration and Conciliation Act does not exhaustively list circumstances that give rise to justifiable doubts over an arbitrator's impartiality or independence. In government contracts, arbitration clauses can provide for the appointment of departmental authorities as arbitrators. Principles of natural justice must, however, be given due regard and no authority can adjudicate on any decision or subject that has been within the domain of that authority or its direct superior.

Public Policy of India

In Associate Builders v Delhi Development Authority 2014(4) ARBLR 307 (Associate Builders), the Supreme Court defined a breach of fundamental policy of Indian law as having disregard for orders of superior courts and violatino of the principles of natural justice. The amendment echoes the rationale of Associate Builders.

However, in Oil and Natural Gas Corporation Ltd v Western Geco International Ltd (2014) 9 SCC 263 (Western Geco), the Supreme Court, through an elaborate consideration of the scope of the term "fundamental policy of India" reverted to and enhanced the ruling in Oil Natural Gas Corporation Lrd v Saw Pipes Ltd (2003) 5 SCC 705 (Saw Pipes) by granting courts greater latitude to interfere with arbitral awards. The Supreme Court, under the head "fundamental policy of India" identified three no-exhaustive, distinct and fundamental juristic principles that must be understood as a part and parcel of the fundamental policy of Indian law:

Adopting a judicial approach while adjudicating on a dispute.

Adhering to principles of natural justice.

Shunning perversity and irrationality by abiding by Wednesbury principles of reasonableness.

Arbitrability of Fraud

In 2014, Swiss Timing Limited v Commonwealth Games 2010, Organising Committee (2014) 6 SCC 677 (Swiss Timing) held that fraud can be adjudicated by arbitral tribunals, overruling N Radhakrishnan v Maestro Engineering (2010) 1 SCC72 (N Radhakrishnan). In 2015, the clarity afforded by Swiss Timing has been blurred.

The Delhi High Court in RRB Energy Limited v Vestas Wind Systems 2015 SCC OnLine Del 8734 and the Madras High Court in Abubackkar Siddiq v Ganesan (2 June 2015 in C.R.P. (PD)(MD) Nos.1242 of 2010 and 1243 of 2010 M.P.(MD) No.1 of 2010) , have applied N Radhakrishnan. Whereas VGN Developers Pvt Ltd v Vanjulavalli (18 June 2015 in Original Petition No.49 of 2014) applied Swiss Timing and referred claims involving fraud to arbitration.

Other cases have differentiated serious allegations of fraud from a mere allegation of fraud (see Vandana Gupta v Kuwait Airways Ltd 2015 SCC OnLine Del 11038).

Enforcement of a Foreign Arbitration Award when BIFR proceedings are on foot in India

In Armada (Singapore) Pvt. Ltd v Ashapura Minechem Ltd 2015 SCC OnLine Bom 4783, the Bombay High Court declared that the foreign arbitration award was enforceable as a decree despite ongoing proceedings before the board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act 1985. However, the court added that in view of pending proceedings, the foreign award could not be executed without permission from the Board.

Two Indian Companies Can Arbitrate at a Foreign Seat

The Bombay High Court in M/s Addhar Mercantile Pvt Ltd v Shree Jagdamba Agrico Exports Pvt Ltd relied on the 2008 Supreme Court judgement in TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd and held that it was not permissible for two Indian parties to select a foreign seat, ultimately derogating from Indian substantive law and if selected, it would be against the public policy as per S. 28 of the Act. The Court also held that in the light of the circumstances, the parties must conduct the arbitration in India. Hence, it was construed that the Court held that foreign seated arbitrations were not encouraged for two Indian parties.

However, the Madhya Pradesh High Court in Sasan Power Limited v North American Coal Corporation India Pvt Ltd (11 September 2015, Madhya Pradesh High Court, Rajendra Menon and Sushil Kumar Gupta JJ) upheld Atlas Exports Industries v Kotah & Company (1999) 7 SCC 61 and held that the two Indian companies can have an arbitration agreement which provides for the seat to be in a foreign country. In such cases, Part I of the 1996 Act will not apply, and if Part II applies then a court must refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (section 45). The Madhya Pradesh High Court also upheld Enercon (India) Private Limited and others v Enercon GMBH and Another 2014 (5) SCC 1, which included the principle that the arbitration clause is independent of the underlying contract. Therefore, arbitration could not be avoided even in the absence of a substantive contract.

Finally, the Supreme Court in 2015 implicitly permitted two Indian parties to choose a foreign seat for arbitrating their disputes. In Reliance Industries, the Supreme Court acknowledged the selection of a foreign seat of arbitration for the two Indian parties at dispute. Albeit, the Supreme Court did not conclusively comment on the ability of the two Indian parties to select a foreign seat for arbitrating their disputes, it did not downrightly object to the parties' will of selecting a foreign seat for the arbitration of their disputes.

Arbitrator Can Award Compound Interest

- In Hyder Consulting (UK) Ltd. V. State of Orissa (2015) 2 SCC 189, the Court held that in so far as post-award interest is concerned, the arbitrator can award interest in the manner deemed reasonable. The general rule is that pre-award interest gets subsumed in the amount awarded, and the post award interest is on such amount (i.e. principal amount + pre-award interest). The arbitrator has the power to award compound interest, even if the contract does not provide for the same.

ANNEXURE I

GLOSSARIES

Latin Legal Terms and Maxims - Common

1. Amiable Compositeur – Term for An Arbitral Tribunal Expressly Authorized By The Parties To Base Its Decision On Equitable Principles Such As Fairness, And Not Solely On The Basis Of The Law.
2. Amicus Curie – Friend of the Court
3. Arbiter compromissarius - Arbiter of compromise (Legal Term - A referee who was chosen by the two parties in dispute)
4. Arbiter ex nudo pacto - Arbiter without covenant (Legal term - A referee who was chosen by the two parties of the dispute, but they are not obliged to obey his decision)
5. Arbiter in causis bonae fidei - Arbiter in good faith
6. Arbiter in stricti iuris - Arbiter in strict judgment (Legal term - A referee who was assigned to strictly follow the law)
7. Arbiter iuratus - Sworded arbiter (Legal term - Referee which both parties in dispute swore to obey)
8. Arbiter nihil extra compromissum facere potest - The arbitrator can do nothing beyond the agreement to arbitrate
9. Arbiter sententia iudicum constitutus - Arbiter appointed to settle the sentence (Legal term - Referee assigned by a judge to settle the accounts)
10. Arbitrio boni iudicidus – By the opinion of a good judge.
11. Arbitrium est iudicium – The decision of the arbitrator is a judgment.
12. Argumentum a maiori ad minus - Argument from major to minor (Legal term - Applied to civil law where if one party has rights to the larger item, it also has it to he smaller one)
13. Ex Aequo Et Bono – Decision-Making Based On Equitable Principles Such As Fairness And Not Purely On Strict Legal Principles.
14. Exequatur – Latin Term Meaning "To Execute/Abide". Order Issued By Certain State Courts, Such As French National Courts, That A Party Must Obey An Arbitral Award.
15. Kompetenz-Kompetenz – Legal Doctrine According To Which An Arbitral Tribunal Can Decide Whether It Has Jurisdiction Over A Dispute, Which Is Enshrined In Many National Arbitration Statutes.
16. Lex Arbitri – Latin Term Referring To The Arbitration Law Applicable To The Conduct Of The Arbitration.
17. Lex Fori – Latin Term Referring To The Law Applicable In The Seat Of The Arbitration.
18. Lex Mercatoria – Latin Term Referring To Legal Principles And Customs Established By Commercial Practice
19. Quantum Meruit – Latin Expression Meaning "The Amount It Deserves." It Is A Method Of Assessing Damages According To What Appears Reasonable In The Circumstances.

Latin Legal Terms and Maxims – Continuation

acte de mission	-	Terms of Reference
ad valorem	-	Depending on the amount in dispute
affidavit	-	sworn statement
amiable compositeur	-	arbitrator engaged in amiable composition
amicus brief	-	written submission by a non-party
amicus curiae	-	friend of the court
an debeatur	-	the question of principle
clausula rebus sic stantibus	-	hardship clause
culpa in contrahendo	-	negotiating parties a reciprocal obligation of good faith
damnum emergens	-	the loss suffered
de facto	-	in fact
de jure	-	according to rightful entitlement or claim (or) by right
dictum/obiter dictum	-	a judge's expression of opinion uttered in court or in a written judgement
ex aequo et bono	-	considerations of fairness and justice in making decision
exceptio fori	-	another forum has jurisdiction over the dispute
ex officio	-	by force of once office
ex parte	-	proceedings in absence of other party
extra petita	-	ultra petita
favor arbitri	-	the policy in favour of arbitration
favor validitatis	-	the policy in favour of vailidity
forum	-	state court or arbitral tribunal
forum non conveniens	-	doctrine of competent court waiving its jurisdiction to another court for the benefit of the parties
fraus legis	-	complying with the wording, but not the spirit of the law
functus officio	-	no longer in office
gravamen	-	the essence or most serious part of a complaint/accusation
in camera	-	the public being excluded
in limine litis	-	at the threshold of the proceedings
infra petita	-	a decision not covering all prayers for relief
Inter partes	-	between the parties
Ipso facto	-	in and by itself
Ipso jure	-	by operation of law
iura novit curia	-	arbitral tribunal must apply the law
iure/jure gestionis	-	act of a state in a business perspective
iure/jure imperii	-	act of a state as a imperial authority
ius cogens	-	mandatory law

ius/jus commune	-	common law in certain jurisdictions
ius/jus dispositivum	-	law adapted by consent
lex anterior	-	the earlier law
lex arbitri	-	applicable arbitration law
lex contractus	-	the law applicable to the contract
lex fori	-	the law at the seat of the arbitration
lex generalis	-	general source of law
lex loci actus	-	the law at the place of an action
lex mercatoria	-	substantive rules of non-state law/law of merchants
lex posterior	-	the later law
lex specialis	-	specific source of law
lis pendens	-	dispute pending before a forum
lucrum cessans	-	lost profits and compensation towards it
modus operandi	-	way of working
motu proprio	-	inquisitorial system
pacta sunt servanda	-	principle that contracts must be kept
pari passu	-	at the same pace
pendente lite	-	while the arbitration is pending
per diem	-	for each day
petita	-	prayers for relief
prima facie	-	at first glance
quaere	-	who should decide
quantum debetur	-	how much money is due
quantum meruit	-	the amount it deserves
res ipsa loquitur	-	self evident
seriatim	-	in series
sine mora	-	without delay
stare decisis	-	upholding previous decision
status quo	-	situation as before
sub judice	-	under a judge
sub poena	-	under penalty
suo jure	-	one's own right
suo moto	-	by own motion
supra	-	above
ultra vires	-	beyond the powers
versus	-	against

LEGAL TERMS USED IN ARBITRATION

1. **Claimant**: A Claimant is the party who files the claim or starts the arbitration. Either the consumer or the business may be the Claimant.

2. **Respondent**: A Respondent is the party against whom the claim is filed. If a Respondent states a claim in arbitration, it is called a counterclaim. Either the consumer or the business may be the Respondent.

3. **ADR Process**: An ADR (Alternative Dispute Resolution) Process is a method of resolving a dispute out of court. Mediation and Arbitration are the most widely used ADR processes.

4. **Arbitration**: In arbitration, the parties submit disputes to an impartial person (the arbitrator) for a decision. Each party can present evidence to the arbitrator. Arbitrators do not have to follow the Rules of Evidence used in court. Arbitrators decide cases with written decisions or "awards."

5. **Award**: An award is usually binding on the parties. A court may enforce an arbitration award, but the court's review of arbitration awards is limited.

6. **Desk Arbitration**: In a Desk Arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No hearing is held.

7. **Telephone Hearing**: In a Telephone Hearing, the parties have the opportunity to tell the arbitrator about their case during a conference call. Often this is done after the parties have sent in documents for the arbitrator to review. A Telephone Hearing can be cheaper and easier than an In Person Hearing.

8. **In Person Hearing**: During an In Person Hearing, the parties and the arbitrator meet in a conference room or office and the parties present their evidence in a process that is similar to going to court. However, an In Person Hearing is not as formal as going to court.

9. **Mediation**: In Mediation, an impartial person (the mediator) helps the parties try to settle their dispute by reaching an agreement together. A mediator's role is to help the parties come to an agreement. A mediator does not arbitrate or decide the outcome.

10. **Neutral**: A Neutral is a word that is used to describe someone who is a mediator, arbitrator, or other independent, impartial person selected to serve as the independent third party in an ADR process.

11. **ADR Agreement**: An ADR Agreement is an agreement between a business and a consumer to submit disputes to mediation, arbitration, or other ADR processes.

12. **ADR Program**: An ADR Program is any program or service set up or used by a business to resolve disputes out of court.

13. **Independent ADR Institution**: An Independent ADR Institution is an organization that provides independent and impartial administration of ADR programs for consumers and businesses.

14. **Action to set aside:** Action aimed at setting aside an award. Modern arbitration laws permit only limited review of an award by local courts in setting aside actions, and they do not permit any review of its merits. Under French law, the conditions for setting aside an award in international matters are the same as those for refusing its enforcement. Awards set aside in their country of origin (cf Seat of arbitration) cannot be enforced in that country and also may lose the benefit of enforcement under the New York Convention. However, some countries (such as France) allow an award set aside in its country of origin to be enforced in their territory if the conditions for doing so are fulfilled.

15. **Ad hoc arbitration:** Arbitration that is not administered by an arbitral institution. The parties do not benefit from any assistance in case of difficulty other than from the courts of the **seat of arbitration**, who may provide support if they have jurisdiction. Parties to an ad hoc arbitration may agree to the use of established arbitration rules, such as UNCITRAL Arbitration Rules, and may provide for an appointing authority to assist them in the constitution of the arbitral tribunal or the appointment of a sole arbitrator.

16. **Amiable composition:** Power given by the parties to the arbitrators to seek an equitable solution to their dispute, by setting aside, if necessary the rule of law which would otherwise be applicable or the strict application of the contract. It is said that in this case, the arbitrator decides "ex æquo et bono", as "amiable compositeur", or in "equity", these three expressions being often considered interchangeable. The only limit to the power of the arbitrator lies in international public policy, a breach of which would constitute a ground for refusing to enforce the award or for setting it aside.

17. **Appointing authority:** Individual or institution selected by the parties to a dispute or determined by applicable arbitration rules to select the arbitrator or arbitrators who will hear a matter. The appointing authority may select the arbitrator or arbitrators in the first instance or only after the failure of one or more parties to nominate an arbitrator within an established timeframe.

18. **Arbitral case law or Arbitral precedent:** The body of existing arbitral awards that may be referred to by parties in later disputes seeking a set of legal principles to support the arbitrators' decision. Prior awards are referred to in relation to both arbitral procedure and substantive law. The vast majority of commercial arbitration awards are unpublished, but excerpts from many awards are published. Public international law arbitral awards (including the majority of awards in investment treaty arbitrations) have, on the other hand, very often been published and are frequently cited by parties in later cases. Unlike certain judgments in common law systems, arbitral case precedent is non-binding and is referred to only in support of arguments.

19. **Arbitral institution:** Organisation that manages arbitral procedures, generally taking place under the arbitration rules it issues. Among the leading international arbitral institutions are the ICC, AAA (and its international arm, the ICDR), CIETAC, HKIAC, DFIAC, LCIA, SIAC, SCC, and Swiss Chambers. Some institutions have adopted the UNCITRAL Arbitration Rules, whereas most have developed their own rules. The institution's role is more or less extensive depending on its arbitration rules, but in no event does it have a jurisdictional function. The jurisdictional function of deciding on the merits of a dispute resides with the arbitral tribunal. In addition to the issuance of arbitration rules, the arbitral institution's role consists mainly in assisting the parties in resolving certain procedural difficulties, such as the constitution of the arbitral tribunal, and in supervising the proper conduct of the arbitration proceedings.

20. **Arbitral tribunal:** In contrast to a sole arbitrator, a collegial body generally consisting of three arbitrators. Usually each party nominates one arbitrator and the two arbitrators so nominated appoint the third, who acts as the chairman of the arbitral tribunal. In some instances, and in particular in multiparty arbitrations, it may be necessary or desirable to have all three arbitrators appointed directly by an arbitral institution or other appointing authority. It is possible to envisage an arbitral tribunal comprising more than three arbitrators, or two arbitrators only, subject to the mandatory provisions of some arbitration laws that prohibit an even number of arbitrators.

21. **Arbitration:** Way of resolving disputes whereby the parties withdraw their dispute from the jurisdiction of State courts to submit it to private individuals – the arbitrators – freely nominated by them and charged with the task of resolving the dispute by means of an enforceable decision.

22. **Arbitration agreement:** Agreement in which parties agree that a dispute that has arisen (submission agreement) or that may arise between them in the future (arbitration clause) shall be resolved by arbitration.

23. **Arbitration Institute of the Stockholm Chamber of Commerce (SCC):** Independent body of the Chamber of Commerce of Stockholm devoted to dispute resolution, its mission is to lend assistance, in accordance with the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce, or other rules that it may adopt in the resolution of domestic or international disputes.

24. **Arbitration law:** Legal system applicable to arbitration in a particular country. It deals in particular with the validity and effects of the arbitration agreement, the functions of the arbitrator, the constitution of the arbitral tribunal, the mandatory procedural rules and actions to set aside the awards and their enforcement. It should not be confused either with the substantive law or the procedural law. It is sometimes referred to as the lex arbitri.

25. **Arbitration rules:** Set of provisions that determine the main rules regarding the establishment and conduct of the arbitration, facilitate the constitution of the arbitral tribunal or the appointment of the sole arbitrator and govern the powers and obligations of the arbitrators. They are usually issued by the arbitral institutions and used in arbitration proceedings conducted under their aegis. UNCITRAL offers arbitral rules devoted to ad hoc arbitrations.

26. **Arbitrator:** Private individual, in principle a natural person, to whom the parties submit a dispute which has already arisen or which may arise with a mandate to decide the dispute and who accepts this mandate. Unless the arbitration agreement provides otherwise, no restriction under French law limits the choice of the arbitrators by the parties except that they must be independent from the parties. Some national laws require that arbitrators be lawyers when they are deciding matters based on the law. Where more than one arbitrator (usually three arbitrators) together decide a dispute, they act together as an arbitral tribunal.

27. **Award:** Written decision of the arbitral tribunal or sole arbitrator that finally settles the dispute, in whole or in part, whether on the merits, on jurisdiction or on any other procedural issue that may lead to the end of all or a portion of the proceedings. The award is binding on the parties and terminates the arbitrators' jurisdiction over the dispute or portion of the dispute that they have resolved. It is generally acknowledged that the award is res judicata with regard to that dispute. An award is said to be partial when it settles only part of the dispute (jurisdiction, applicable law, one contested issue ...) and final when it disposes of all the issues. In principle, the award is not subject to appeal but may be subject to an action to set aside.

28. **Award by consent:** Award whereby the arbitrators record a settlement entered into by the parties. It has the authority and effect of an arbitral award.

29. **Competence – competence:** Generally accepted principle according to which the arbitrators have jurisdiction to decide on their own jurisdiction when a party to the arbitral proceedings challenges it, without having to suspend the proceedings until a State court determines whether the dispute it to be arbitrated. In its "negative" sense, acknowledged by some national laws only, especially in France, competence-competence further means that the jurisdiction of the arbitrators to decide on their own jurisdiction is exclusive of the jurisdiction of the State court, which, when faced with an arbitral agreement, does not have any jurisdiction either to decide the dispute or to decide on the validity of the agreement unless it is prima facie null and void and cannot be applied. This does not mean that the State court is prevented from ever assessing the validity or the subject matter of the **arbitration agreement**; but this assessment is postponed until the review of the award in connection with either its enforcement or an action to set it aside.

30. **Enforcement:** Arbitral awards may, and in principle should, be subject to immediate enforcement by the losing parties, from the time of their notification to the parties; otherwise they may be subject to legal enforcement once they are declared enforceable (via exequatur proceedings or other locally applicable procedures) by a judicial decision rendered in the country where enforcement is sought.

31. **Exequatur:** Procedure whereby the State courts make an arbitral award enforceable in the territory of that State. States Parties to the New York Convention undertake not to refuse the enforcement of awards issued in other States Parties (referred to as foreign awards) unless it is established that they do not comply with certain conditions, which should not be stricter than those provided by the Convention. Under French law, which is more liberal than the Convention, the exequatur of foreign awards can be refused only on the following five grounds: the arbitrator has decided in the absence of an arbitration agreement or on the basis of a void or expired agreement; there was an irregularity in the constitution of the arbitral tribunal or in the appointment of the sole arbitrator; the arbitrator's decision does not conform to the terms of his reference; the principle of due process has not been complied with; or the recognition or enforcement of the award would be contrary to international public policy. In addition, awards issued in France in international matters may be set aside for these same grounds.

32. **Independence and impartiality:** Essential characteristics of the arbitrator at the time of the acceptance of his/her function and throughout tenure. The absence of these attributes may lead either to a challenge of the arbitrators, the setting aside of the award or a refusal to enforce the award. A lack of independence is demonstrated, according to the French jurisprudence, through "the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favour of a party to the arbitration". The arbitrator may be suspected of partiality primarily on the grounds of lack of independence, especially towards one party, but also because the arbitrator's previous knowledge of the case may have led him to take a prior position that could be prejudicial to one of the parties; it may be also evidenced by the arbitrator's behaviour during the proceedings if it shows clear bias in favour of one party. Some arbitration rules require the arbitrators to provide the parties with a statement of independence whereby they must disclose any facts or circumstances which might be of such nature as to call into question the arbitrator's independence in the eyes of the parties in order to allow a possible challenge before the proceedings begin.

33. **Institutional Arbitration:** The notion of international arbitration varies from country to country, and local arbitration law in each country usually treats international arbitration differently from domestic arbitration. Under French law, Article 1504 of the Code of Civil Procedure states that: "an arbitration is international when it involves the interests of international trade". This means that apart from any other external criteria, such as nationality, the parties' domicile or headquarters, the seat of the arbitral institution, the place of arbitration or the law applicable to the merits, the arbitration is international under French law if it deals with an economic transaction involving a transfer of goods or services or a cross-border payment.

34. **International Arbitration:** The notion of **international arbitration** varies from country to country, and local arbitration law in each country usually treats international arbitration differently from domestic arbitration. Under French law, Article 1504 of the Code of Civil Procedure states that: "an arbitration is international when it involves the interests of international trade". This means that apart from any other external criteria, such as nationality, the parties' domicile or headquarters, the seat of the arbitral institution, the place of arbitration or the law applicable to the merits, the arbitration is international under French law if it deals with an economic transaction involving a transfer of goods or services or a cross-border payment.

35. **International public policy:** Set of rules or principles applicable either to the merits of a dispute or to the arbitral proceeding, which should be followed in the law of a particular State. The failure to comply with one of these rules could justify setting aside the award or refusing its enforcement.

36. **Language of the arbitration:** Language used in the parties' written and oral submissions, in the procedural orders and in the award(s) issued by the arbitrators. It is chosen based on joint agreement of the parties, usually in the arbitration clause, or is otherwise decided by the arbitral tribunal. The flexibility of the arbitral procedure allows the parties and the arbitrators to provide for the most appropriate solutions, the only limits to the imagination of the parties being the costs of translation and interpretation. Thus, it is possible to foresee an arbitration in several languages, for example, with each party expressing itself orally in its own language while the procedural orders and the award are drafted in only one language. It is also possible for the written submissions and the award to be drafted in two different languages.

37. **Lex Mercatoria:** International trade usages and general principles of law developed by arbitral awards, resulting from the convergence of national laws, or stated by public or private international organisations. Parties submitting their disputes to arbitration may direct the arbitrators to apply a national law or may submit their dispute for resolution under the lex mercatoria alone.

38. **Multiparty Arbitration:** Arbitration involving more than two parties. Multiparty arbitration can create procedural complications that need to be considered during the drafting of an arbitration clause or during the conduct of an arbitral proceeding. Multiparty arbitration does not pose significant problems when the parties consist of two, clearly-defined groups having common interests and a common procedural position (claimant or defendant), with each side being able to nominate an arbitrator. When this is not the case, difficulties can arise with respect to the constitution of the arbitral tribunal. According to a decision of the French Cour de cassation, each party has, in principle, the right to nominate an arbitrator. Many institutional arbitration rules take this into account by requiring the arbitral institution to appoint all members of the tribunal if the parties have been unable to agree to an alternative procedure.

39. **New York Convention:** The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" issued in 1958 by an international conference under the aegis of the United Nations mainly aims at facilitating the enforcement of arbitral awards. The States Parties undertake to recognize and to enforce foreign arbitral awards issued in another State Party, unless the defendant in the enforcement action can establish the existence of one of the limited grounds established under the Convention for refusing to enforce the award. The Convention grounds exclude any review by the enforcement court of the merits of the dispute. On 27 September 2010, Fiji became the 145th State Party to the Convention, which facilitates the international movement of awards, and is one of the most important instruments of international arbitration.

40. **"Pathological clause":** Term used to describe an arbitration clause, or more generally an arbitration agreement, whose defective drafting does not allow the constitution of an arbitral tribunal or the appointment of a sole arbitrator without the intervention, not anticipated by the parties, of the "supporting" judge – or even renders it impossible to establish arbitral jurisdiction. In this last situation, the arbitration agreement is null and void or cannot be applied and the State Courts regain jurisdiction to settle the dispute.

41. **Procedural law:** The set of rules applicable to the conduct of the arbitral proceedings, it is determined by the parties, directly or indirectly by reference to arbitration rules, or by the arbitral tribunal without reference to a national law. It should not be confused with either the substantive law or the arbitration law.

42. **Provisional and conservatory measures:** Measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement. Decisions on provisional or conservatory measures do not involve any prejudgment of the decision on the merits. Depending on the exact circumstances, the local arbitration law of the seat and the applicable arbitration rules, these measures in principle may be decided both by a judge and the arbitral tribunal.

43. **Request for arbitration:** The initial claim or writ filed by the claimant that starts the arbitral proceedings. Its form and content vary according to the applicable law, the provisions of the arbitration rules agreed by the parties, and the provisions of the arbitration clause.

44. **Seat of arbitration:** Initially the physical place where the arbitration proceedings take place, the seat of arbitration today refers to the legal situs of the arbitration proceedings — linking the arbitration procedure and the award to a particular, national legal system. The arbitration award is thus deemed rendered at the seat of the arbitration. The seat of arbitration is determined by the parties, usually in the arbitration agreement or, in the absence of party agreement, by the arbitral institution or the arbitration tribunal. The choice of the seat of arbitration involves important legal consequences. Among other things, the choice of the seat will determine whether national courts will support or interfere with the arbitral process, will determine whether the benefits of enforcement under the New York Convention will be available, and will determine the competent courts to hear any action to set aside the arbitral award.

45. **Sole arbitrator:** A single individual, as opposed to an arbitral tribunal, to whom a dispute is submitted for resolution by arbitration. The arbitrator is nominated either by joint agreement of the parties, by the institution that the parties have identified in the arbitration agreement, by an "appointing authority," or by the "supporting" judge.

46. **Substantive law:** Rules and principles of law applicable or applied to the resolution of a dispute on its merits. Their origin may be State law (national law), public international law or privately determined law (such as via a contractual agreement to apply lex mercatoria). When the substantive applicable law has not been chosen by the parties, the arbitrators apply the substantive law they deem appropriate taking into account the reasonable expectations of the parties. A distinction has to be made between the substantive law and the procedural law.

47. **Supporting judge:** Used to describe the judge who intervenes to lend support to an arbitration by resolving procedural difficulties, especially during the constitution of the arbitral tribunal (in connection with the appointment or challenge of an arbitrator), in evidentiary matters or to grant provisional and conservatory measures.

48. **Terms of Reference:** The terms of reference are a characteristic of ICC arbitration and certain other institutional arbitration. Under the ICC arbitration rules, it is prepared by the arbitral tribunal and includes at a minimum: the parties' and arbitrators' names and addresses, a summary of the parties' respective claims, the main rules applicable to the proceedings, the place of arbitration, and, if appropriate, a list of issues to be resolved. It is signed by the parties, unless one of them refuses to sign, in which case it is submitted for approved by the ICC International Court of Arbitration. The main purpose of terms of reference is to define the dispute clearly, such that the parties are not to present new claims beyond the limits of the terms of reference without the authorisation of the arbitrators.

49. **UNCITRAL:** The United Nations Commission on International Trade Law, which is the principal legal organ of the United Nations in the field of international commercial law, empowered by the General Assembly to promote the progress of international commercial law's harmonisation and unification. In this context, UNCITRAL has created several instruments in the field of arbitration, including arbitration rules applicable to ad hoc arbitrations and also used by certain arbitral institutions, and a model law on international commercial arbitration which has been totally or partially adopted by numerous States in their domestic laws.

ANNEXURE II

LIST OF ARBITRATION INSTITUTIONS - Worldwide

S.No.	INSTITUTIONS	WEBSITE
I - INTERNAIONAL		
1	Court of Arbitration for Sport (CAS)	www.tas-cas.org
2	ICC International Court of Arbitration	www.iccarbitration.org
3	International Centre for Dispute Resolution (ICDR)	www.icdr.org
4	International Centre for Settlement of Investment Disputes (ICSID)	www.worldbank.org/icsid
5	London Court of International Arbitration (LCIA)	www.lcia.org
6	London Maritime Arbitrators Association (LMAA)	http://www.lmaa.london
7	Permanent Court of Arbitration (PCA)	www.pca-cpa.org
8	World Intellectual Property Organisation Arbitration and Mediation Centre (WIPO)	www.wipo.int/amc
II - REGIONAL		
1	Asia Pacific Regional Arbitration Group (APRAG)	www.aprag.org
2	Cairo Regional Centre for International Commercial Arbitration (CRCICA)	www.crcica.org.eg
3	European Center for Arbitration and Mediation	http://cour-europe-arbitrage.org
4	GCC Commercial Arbitration Centre	www.gcc-sg.org
5	Lagos Regional Centre for International Commercial Arbitration (LRCICA)	lrcica@metrong.com
6	OHADA Cour Commune de Justice et d'Arbitrage (CCJA)	www.ohada.org/ccja.html
7	Regional Centre for Arbitration , Kuala Lumpur	www.klrca.org
8	Regional Facility – Permanent Court of Arbitration	www.corte.arbitrage.org
9	SAARC Arbitration Council	http://sarco.org.pk
10	Tehran Regional Arbitration Centre (TRAC)	www.trac.ir
11	European Centre for Financial Dispute Resolution	www.euroarb.org

S.No.	INSTITUTIONS	WEBSITE
III – Countries – Continent wise		
AFRICA		
1	Algeria - Chambre algerienne de commerce et d' industrie (CACI)	www.caci.com.dz
2	Burkina Faso – Centre for Arbitration, Mediation and Conciliation of Ouagadougou	www.camco.bf
3	Cameroon – Centre d'Arbitrage du Groupement Interpatronal du Cameroun (GICAM)	www.legicam.com
4	Congo (DRC) – Centre National d'Arbitrage Conciliation et Mediation (CENACOM)	www.cenacom.cd
5	Congo (DRC) – Ventre d'Arbitrage du Congo (CAC)	www.cac-rdc.org
6	Egypt – Sharm El Sheikh International Arbitration Centre (SHIAC)	www.shiac.com
7	Egypt- Alexandria Centre for International Arbitration (ACIArb)	www.aba.org.eg
8	Ethiopia – Addis Ababa Chamber of Commerce Arbitration Institute	www.addischamber.com
9	Ghana – Ghana Arbitration Centre	www.ghanaarbitration.org
10	Ivory Coast – Cour d'Arbitrage de Cote d'Ivoire de la Chambre de Commerce et d'Industrie de Cote d'Ivoire (CACI)	www.chamcoci.org
11	Madagascar – Centre d'arbitrage et de mediation de Madagascar (CAMM)	http://www.camm.mg
12	Mali- Centre de conciliation et d' Arbitrage du Mali (CECAM-CCIM)	http://www.cecam-mali.com
13	Mauritius- Mauritius Permanent Court of Arbitration	www.mcci.org
14	Mauritius – LCIA-MIAC Arbitration Centre	www.lcia-miac.org
15	Morocco – Centre d'Arbitrage	www.ccis-agadir.com/pages/c_arbitrage.php
16	Mozambique – Centro de Arbitragem (CACM)	www.cacm.org.mz
17	Rwanda – Kigali International Arbitration Centre (KIAC)	www.kiac.org.rw
18	Senegal – Centre d'Arbitrage de Mediation de Conciliation	www.cciad.sn
19	South Africa – Africa Alternative Dispute Resolution (Africa ADR)	www.africaadr.com

S.No.	INSTITUTIONS	WEBSITE
III – Countries – Continent wise		
AFRICA		
20	South Africa - Arbitration Foundation of Southern Africa (AFSA)	www.arbitration.co.za
21	South Africa - The Association of Arbitrators (Southern Africa)	www.arbitrators.co.za
22	Tunisia- Centre de Conciliation et d'arbitrage de Tunis (CCAT)	www.ccat.org.in
23	Uganda- Centre for Arbitration and Dispute Resolution (CADER)	cader@spacenetuganda.com
AMERICAS		
1	Argentina- Argentina Chamber of Commerce (CEMARC)	www.cac.com.ar/institucional/Comision_de_Arbitraje_1944
2	Argentina–Arbitration Chamber of the Crops Exchange (CABC)	www.cabcbue.com.ar
3	Argentina – Arbitration Tribunal of the City of Buenos Aires Bar Association	www.cpacf.org.ar
4	Bolivia – CAMARA NACIONAL DE COMERCIO	www.boliviacommercio.org.bo
5	Bolivia–Centro de Conciliacion y Arbitraje Comercial (CCAC)	www.cainco.org.bo
6	Bolivia – Centro de Conciliacion y Arbitraje Comercial de la Camara Nacional de Comercio de Bolivia (CAC)	www.arbitraje.bo
7	Bolivia – Centro de conciliacion y Arbitraje de la Camara de Comercio de Cochabamba (CCA of CADECO)	www.cadeco.org/cca
8	Brazil - ARBITAC	http://arbitac.acpr.com.br
9	Brazil – Arbitration Center of AMCHAM	www.amcham.com.br/centro-de-arbitragem-e-mediacao
10	Brazil – CAMARB	http://camarb.com.br
11	Brazil –CBMA/CMBA	www.cbma.com.br
12	Brazil - CBMAE	www.cbmae.org.br
13	Brazil–Camara de Comercio Argentino Brasileira de Sao Paulo	www.camarbra.com.br
14	Brazil – Center for Arbitration and Mediation	www.ccbc.org.br
15	Brazil - CMA	www.assespro-sp.org.br

S.No.	INSTITUTIONS	WEBSITE
16	Brazil – CONIMA	www.conima.org.br
17	Canada – ADR Chambers Canada	http://adrchambers.com/ca
18	Canada- British Columbia International Commercial Arbitration Centre	http://bcicac.com
19	Canada – Canadian Commercial Arbitration Centre	www.ccac-adr.org/en
20	Chile – Centro de Arbitraje y Mediacion (CAM Santiago)	www.camsantiago.com
21	Colombia – Centro de Arbitraje y Conciliacion de la Camara de comercio de Bogota (CACCB)	www.centroarbitrajeconciliacion.com
22	Colombia – Centro de Conciliacion, Arbitramento y Amigable Composicion de la Camara de Comercio de Cali	www.ccc.org.co/conciliacion-arbitraje/16584/centro-de-conciliacion-arbitraje-y-amigable-composicion.html
23	Colombia – Inter American Arbitration Commission	www.ciac-iacac.org
24	Costa Rica – CCA of Camara de comercio de Costa Rica	http://camara-comercio.com/sobre-el-cca
25	Costa Rica – International Center for Conciliation and Arbitration (CICA)	www.cica.co.cr
26	Cuba – Cuba Court of International Commercial Arbitration	www.cepec.cu/en/arbitration
27	Cuba- Cuban Court of International Trade Arbitration	www.camaracuba.cu/index.php/en/cuban-court-of-international-trade-arbitration/cuban-court-of-international-trade-arbitration#arbitros-de-la-ccaci
28	Ecuador – Centro de Arbitraje y Conciliacion de la Camara de Comercio de Guayaquil	www.centrodearbitraje.org
29	El Salvador – Centro de Mediacion y Arbitraje (CCIES)	www.mediacionyarbitraje.com.sv
30	Guatemala – CENAC Guatemala	www.cenac.com.gt
31	Honduras – CCIT	www.ccit.hn/cca
32	Mexico -	
33	Mexico –Centro de Arbitraje de Mexico (CAM)	www.camex.com.mx
34	Mexico – CANACO	www.arbitrajecanaco.com.mx
35	Panama – camara de Comercio	

S.No.	INSTITUTIONS	WEBSITE
36	Panama – Centro de Conciliacion y Arbitraje de Panama	www.cecap.com.pa
37	Paraguay – CAM Paraguay	www.camparaguay.com
38	Peru – centro de Arbitraje	www.camaralima.org.pe/principal/categoria/centro-de-arbitraje/518/c-518
39	Trinidad & Tobago – Dispute Resolution Centre	www.disputeresolutioncentre.org.tt
40	Uruguay – Centro de Conciliacion & Arbitraje	www.arbitraje.com.uy
41	USA - American Arbitration Association (AAA)	www.adr.org
42	USA - Chicago International Dispute Resolution Association	www.cidra.org
43	USA - International Institute for conflict Prevention and Resolution (CPR)	www.cpradr.org
44	USA - JAMS	www.jamsadr.com
45	USA - Society of Maritime Arbitrators Inc	www.smany.org
46	Venezuala – Centro de Arbitraje	http://arbitrajeccc.org
ASIA		
1	Armenia - Arbitration Court at the Chamber of Commerce and Industry of the Republic of Armenia	www.arbitrage.am/eng
2	Azerbaijan Arbitration and Mediation Center	www.arbitr.az
3	Bahrain – Bahrain Chamber for Dispute Resolution (BCDR-AAA)	www.bcdr-aaa.org/en
4	Bangaldesh–Bangladesh International Arbitration Centre (BIAC)	www.biac.org.bd
5	Brunei – Arbitration Association of Brunei Darussalam	onglegal@brunet.bn
6	Cambodia – Cambodia Arbitration Council	www.arbitrationcouncil.org
7	Cambodia – National Commercial Arbitration Center (NCAC)	www.ncac.org.kh
8	China – Beijing Arbitration Commission (BAC)	www.bjac.org.cn
9	China – China International Economic and Trade Arbitration Commission (CIETAC)	www.cietac.org
10	China – China Maritime Arbitration Commission (CMAC)	www.cmac.org.cn
11	China – Shanghai International Arbitration Center (SHIAC)	www.shiac.org
12	China – Shenzhen Court of International Arbitration (SCIA)	www.sccietac.org
13	China–Hong kong International Atbitration Centre (HKIAC)	www.hkiac.org

S.No.	INSTITUTIONS	WEBSITE
14	Cyprus–Cyprus Arbitration and Mediation Centre (C.A.M.C)	www.cyprusarbitration.com.cy
15	Cyprus – Cyprus Eurasia Dispute Resolution and Arbitration Center (CEDRAC)	www.cedrac.org
16	Georgia – Georgian International Arbitration Centre (GIAC)	www.giac.ge
17	India – chartered Institute of Arbitrators India (CIArb India)	www.ciarb.org/branches/middle-east-and-indian-subcontinent/india
18	India – Council for National and International Commercial Arbitration (CNICA)	www.cnica.org
19	India – Delhi High Court Arbitration Centre (DAC)	www.dacdelhi.org
20	India –Indian Council of Arbitration (ICA)	www.icaindia.co.in
21	India – Indian Institution of Technical Arbitrators (IITArb)	www.iitarb.org
22	India - International Centre for Alternative Dispute Resolution (ICADR), New Delhi	www.icadr.org
23	India – Nani Palkhivala Arbitration Centre (NPAC)	www.nparbitration.in
24	Indonesia – BANI Arbitration Center	www.baniarbitration.org
25	Indonesia – Indonesian Arbitrators Institute (IArbI)	www.iarbi.org
26	Iran – Arbitration Center of Iran Chamber	http://arbitration.ir/En/Home
27	Iraq – Iraqi Center for International Arbitration (ICIA)	www.icacn.org/en
28	Israel – The Israeli Institute of Commercial Arbitration	http://eng.borerut.com
29	Japan – Japan Commercial Arbitration Association (JCAA)	www.jcaa.or.jp/e
30	Japan – Tokyo Maritime Arbitration Commission of JSE (TOMAC)	www.jseinc.org/en/tomac/index.html
31	Kazakhstan - Kazakhstani International Arbitrage	www.arbitrage.kz/eng
32	Kuwait – Kuwait Commercial Arbitration Center	www.kuwaitchamber.org.kw
33	Kyrgyzstan – International Court of Arbitration	www.arbitr.kg
34	Lebanon – Lebanese Arbitration Centre	https://www.ccib.org.lb/en/?p=post&id=26
35	Mongolia – Mongolian International and National Arbitration Center (MINAC)	www.mongolchamber.mn/en/index.php/departments-divisions/126-2011-12-21-114136
36	Nepal – Nepal Council of Arbitration (NEPCA)(SIAC)	www.nepca.org.np

S.No.	INSTITUTIONS	WEBSITE
37	Pakistan – National Centre for Dispute Resolution (NCDR)	www.ncdr.pk
38	Palestine–Palestine International Arbitration Chamber (PIAC)	www.piac.ps
39	Palestine – Jerusalem Arbitration Center	www.jac-adr.org
40	Philippines – Philippine Dispute Resolution Center (PDRC)	www.pdrci.org
41	Qatar – Qatar International Center for Conciliation and Arbitration (QICCA)	http://qatarchamber.com/1505
42	Russia – International Commercial Arbitration Court (ICAC)	https://mkas.tpprf.ru/en
43	Russia – Maritime Arbitration Commission (MAC)	http://mac.tpprf.ru/en
44	Russia - Russian Arbitration Association	www.arbitrations.ru/en
45	Singapore–Singapore International Arbitration Centre (SIAC)	www.siac.org.sg
46	South Korea–Korean Commercial Arbitration Board (KCAB)	www.kcab.or.kr
47	Sri Lanka – Sri Lanka National Arbitration Centre (SLNAC)	www.slnarbcentre.com
48	Sri Lanka – ICLP Arbitration Centre	www.iclparbitrationcentre.com
49	Taiwan–The Chinese Arbitration Association, Taipei (CAA)	http://en.arbitration.org.tw
50	Thailand – Thailand Arbitration Center (THAC)	http://thac.or.th/en
51	Turkey – Istanbul Arbitration Centre (ISTAC)	http://istac.org.tr/en
52	UAE - Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC)	www.abudhabichamber.ae/English/AboutUs/Sectors/CCAC/Pages/Default.aspx
53	UAE – Dubai International Arbitration Centre (DIAC)	www.diac.ae
54	Vietnam – Pacific International Arbitration Centre (PIAC)	http://en.piac.vn
55	Vietnam – Vietnam International Arbitration Centre (VIAC)	http://eng.viac.vn
EUROPE		
1	Albania –Albanian Commercial Mediation and Arbitration Center	www.medart-al.org
2	Austria – Vienna International Arbitral Centre (VIAC)	www.viac.eu
3	Belarus – International Arbitration Court	www.cci.by/en/content/international-arbitration-court-general-information
4	Belgium-Belgian Centre for Mediation and Arbitration (CEPANI)	www.cepani.be
5	Bulgaria –Arbitration Court	www.bcci.bg/bcci-arbitration-court-en.html

S.No.	INSTITUTIONS	WEBSITE
6	Croatia – Permanent Arbitration Court at the Chamber of Economy	www.hgk.hr/category/sudovi-pri-hgk/stalno-arbitrazno-sudiste-pri-hgk
7	Cyprus–Cyprus Arbitration and Mediation Centre (C.A.M.C)	www.cyprusarbitration.com.cy
8	Cyprus–Cyprus Chamber of Commerce and Industry (CCCI)	www.ccci.org.cy
9	Czech Republic – Arbitration Court	www.arbcourt.cz
10	Denmark – Danish Institute of Arbitration (DIA)	www.danisharbitration.dk (http://voldgiftsinstituttet.dk/en)
11	Estonia – Arbitration Court/ Estonian Chamber of Commerce and Industry	www.koda.ee
12	Estonia – International Commercial Court of Mediation, Conciliation and Arbitration (ICCMCA)	www.iccmca.com
13	Finland – The Arbitration Institute of the Finland Chamber of Commerce (FAI)	www.arbitration.fi
14	France – Arbitration and Mediation Centre of Paris (CMAP)	www.camp.fr
15	France – Association Francaise de l'Arbitrage (AFA)	www.afa-arbitrage.com
16	France – Carbitrage de Reassurance et d'Asssurance (CEFAREA)	www.cefarea.com
17	France – Centre de Mediation et d'Arbitrage Pres la Chambre de Commerce Franco-Arabe	www.ccfranco-arabe.org
18	France – International Arbitration Chamber of Paris	www.arbitrage.org
19	Germany – Chinese European Arbitration Centre (CEAC)	www.ceac-arbitration.com
20	Germany – Frankfurt International Arbitration	www.fiac-arbitration.de
21	Germany – German Institution of Arbitration	www.dis.arb.de
22	Greece – Department of Arbitration, Athens Chamber of Commerce and Industry	www.acci.gr
23	Hungary – Court of Arbitration at Hungarian Chamber of Commerce and Industry	www.mkik.hu/en/magyar-kereskedelmi-es-iparkamara/court-of-arbitration-2071
24	Iceland – Nordic Arbitration Centre, Iceland Chamber of Commerce	http://chamber.is/services/NAC
25	Ireland – Dublin International Arbitration Centre	www.dublinarbitration.com
26	Italy – Chamber of Arbitration of Milan	www.camera.arbitrale.it
27	Italy – Italian Arbitration Association (AIA)	http://arbitratoaia.com

S.No.	INSTITUTIONS	WEBSITE
28	Italy – Venice Chamber of Arbitration	www.camera-arbitrale-venezia.com
29	Kosovo – Kosovo Permanent Tribunal of Arbitration	www.kosovo-arbitration.com
30	Latvia – Baltic International Arbitration Court	www.arbitration.lv
31	Latvia – Court of Arbitration of the Latvian Chamber of Commerce and Industry (LCCI Court of Arbitration)	www.chamber.lv/en/court-of-arbitration
32	Latvia – Riga International Arbitration Court	www.rsst.lv
33	Lithuania – Vilnius Court of Commercial Arbitration	www.arbitrazas.lt
34	Macedonia – Permanent Court of Arbitration attached tot he Economic Chamber of Macedonia	www.mchamber.org.mk
35	Malta – Malta Arbitration Centre	www.mac.org.mt
36	Moldova - International Commercial Arbitration Court of the Chamber of Commerce and Industry of Moldova	www.arbitraj.chamber.md
37	Monaco – Maritime Arbitration Chamber	http://arbitragemaritimemonaco.com
38	Montenegro – Foreign Trade Arbitration of the Chamber of Economy of Montenegro	www.privrednakomora.me/en/foreign-trade-arbitration
39	Netherlands – Netherlands Arbitration Institute (NAI)	www.nai-nl.org/en
40	Norway – Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce	http://en.chamber.no/tjenester/tvistelosning
41	Poland – Court of Arbitration at Polish Chamber of Commerce	www.sakig.pl
42	Portugal –Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC)	www.centrodearbitragem.pt
43	Romania–Court of International Commercial Arbitration, Chamber of Commerce and Industry	http://arbitration.ccir.ro
44	Scotland – Scottish Arbitration Centre	www.scottisharbitrationcentre.org
45	Serbia – Belgrade Arbitration Center	www.arbitrationassociation.org
46	Serbia – Foreign Trade Court of Arbitration at the Chamber of Commerce and Industry of Serbia	www.pks.rs
47	Slovakia – Arbitration Court of Slovak Chamber of Commerce and Industry	www.sopk.sk
48	Slovenia – Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC)	www.sloarbitration.eu

S.No.	INSTITUTIONS	WEBSITE
49	Spain – Barcelona Arbitration Court	www.tab.es/index.php?lang=en
50	Spain – Madrid Court of Arbitration	www.arbitramadrid.com/web/corte/home
51	Spain – Spanish Court of Arbitration	http://corteespanolaarbitraje.es/?lang=en
52	Sweden – Arbitration Institute of the Stockholm Chamber of Commerce	www.sccinstitute.com
53	Switzerland – Swiss Chambers' Arbitration Institutions	www.swissarbitration.org
54	Ukraine – International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry	www.ucci.org.ua
55	UK - Chartered Institute of Arbitrators	www.ciarb.org
56	UK – Centre for Effective Dispute Resolution	www.cedr.com
57	UK- Grain and Feed Trade Association	www.gafta.com
AUSTRALASIA/OCEANIA		
1	Australia - Australian Centre for International Commercial Arbitration (ACICA)	www.acica.org.au
2	Australia - The Institute of Arbitrators and Mediators Australia (IAMA) & LEADR	www.iama.org.au
3	Australia -Chartered Institute of Arbitrators Australia (CIArb Australia)	www.ciarb.net.au
4	New Zealand - Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ)	www.aminz.org.nz
5	New Zealand - New Zealand International Arbitration Centre (NZIAC)	www.nziac.com
6	New Zealand - New Zealand Dispute Resolution Centre (NZDRC)	www.nzdrc.co.nz