

**LAW COMMISSION OF INDIA**

**ONE HUNDRED AND SEVENTY SIXTH**

**REPORT**

**ON**

**THE ARBITRATION AND CONCILIATION**

**(AMENDMENT) BILL, 2001**

**2001**

Justice B.P. Jeevan Reddy  
**Chairman, Law Commission of India**

LAW COMMISSION OF INDIA  
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12<sup>th</sup> September, 2001

D.O.No.6(3)(69)/2001-LC(LS)

Dear Shri Jaitley Ji,

I am forwarding herewith the 176<sup>th</sup> Report on the “Arbitration and Conciliation (Amendment) Bill, 2001”.

It was desired by you that the Commission may review the functioning of the Arbitration and Conciliation Act, 1996, in view of the various shortcomings observed in its provisions and certain representations received by you. The Commission considered the representations which pointed out that the UNCITRAL Model (on the basis of which the Arbitration and Conciliation Act, 1996 was enacted) was mainly intended to enable various countries to have a common model for ‘International Commercial Arbitration’ but the Act of 1996 had made provisions of such a Model law applicable also to cases of purely domestic arbitration between Indian nationals. This did give rise to some difficulties in the implementation of the Act. Meanwhile there were also conflicting judgments of the High Courts in regard to certain provision of the 1996 Act. Certain other aspects about the difficulties in the working of the said Act were also brought to the notice of the Commission. The Commission initially prepared a Consultation Paper (Annexure II of the Report) and held two seminars, one at Mumbai and another at Delhi in the months of February and March, 2001 and gave wide publicity to the paper by putting it on the website. Retired judges and leading lawyers were

invited for the seminars. Many luminaries also participated in the seminars and gave their written notes putting forth their suggestions. Proposals not contained in the Consultation Paper were also made and were exhaustively discussed. After making an in-depth study of the law relating to subject, looking into the position of the law in foreign jurisdictions, the Commission has made various recommendations for bringing amendments in the Arbitration and Conciliation Act, 1996. The summary of the recommendations are contained in Chapter III of the Report. A Bill entitled 'The Arbitration and Conciliation (Amendment) Bill, 2001' has also been prepared by the Commission bringing out various provisions through which the Arbitration and Conciliation

Act, 1996 is proposed to be amended. The said Bill is annexed as Annexure I to the Report.

With warm regards,

Yours sincerely,

(B.P. Jeevan Reddy)

Shri Arun Jaitely,  
Minister for Law, Justice & Co. Affairs,  
Shastri Bhavan, New Delhi

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## CHAPTER I

### **Broad framework of the Arbitration and Conciliation Act, 1996 and certain drawbacks experienced in its working**

At the request of Shri Arun Jaitley, Hon'ble Minister for Law, Justice & Company Affairs, Law Commission has taken up the review of the Indian Arbitration and Conciliation Act, 1996 and is proposing various amendments as suggested in this Report.

1.1 The Arbitration & Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. It came into force on 22.8.1996 and is deemed to have come into force on 25.1.96 (vide M/s Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., 2001 (3) SCALE 708).

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

The Act of 1996 covers both international and domestic arbitration, i.e., where at least one party is not an Indian national and also arbitrations where both parties are Indian nationals respectively. By virtue of sec. 85 of the 1996 Act, the old Arbitration Act, 1940 (relating to domestic arbitration) and also the Arbitration (Protocol and Convention) Act, 1937 and the

Foreign Award (Recognition and Enforcement) Act, 1961, (relating to international arbitration) were repealed, thus enabling the Act of 1996 to govern both domestic and international arbitrations.

1.2 Part I of the Act entitled 'Arbitration' is general and contains chapters I to X while Part II deals with 'Enforcement of Certain Foreign Awards and Chapter I of part II deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards. Part III of the Act of 1996 deals with Conciliation with which we are not concerned in this report. Part IV deals with supplementary provisions. The Act contains three Schedules. The First Schedule refers to Convention on the Recognition and Enforcement of Foreign Arbitration Awards (see sec.44); the Second Schedule refers to Protocol on Arbitration Clauses (see sec.53) and the Third Schedule to the Convention on the Execution of Foreign Arbitration Awards.

In this Report we are concerned only with Part I of the 1996 Act which deals with arbitration in India and not with Part II and Part III of the Act.

Although the Model Law does not take the form of a treaty, legislators of various countries who decided to review their arbitration laws since 1985 have all given 'due consideration' to the UNCITRAL Model Law.

Some countries adopted certain provisions of the Model Law, but considered that they could extend, simplify or liberalise the Model Law. Examples include the Netherlands in 1986 and Switzerland in 1987. Because of the specificity of their legal systems, Italy and England decided not to follow the Model Law closely. By March 31, 1999, a total of 29 countries (including Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Finland, Germany, Guatemala, Hungary, India, Iran, Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, the Russian Federation, Scotland, Sweden, Sri Lanka, Tunisia, Ukraine, Zimbabwe alongwith Hong Kong, 8 American States and all 12 Canadian provinces and territories) adopted legislation based to some extent on the UNCITRAL Model Law (see International Commercial Arbitration by Fouchard, Gaillard, Goldman, 1999, page 109, para 2.5; also website for updating:<http://www.un.or.at/uncitral>).

The importance of this gradual process of harmonization is that court decisions applying Model Law, from all the countries that have adopted or

adapted it, have been published since 1992. There is thus a growing body of case law concerning the interpretation of the Model Law (See CLOUT, available on Website <http://www.ur.or> at/uncitral and CLOUT XXII Y.B.Com. Arb. 297-300 (1997)(Fouchard, ibid, p.109, para 2.5).

The 1996 Act was the result of recommendations for reform, particularly in the matter of speeding up the arbitration process and reducing intervention by the court. In Guru Nanak Foundations Vs. Rattan Singh (AIR 1981 SC 2075 at 2076-77), the Supreme Court, while referring to the 1940 Act, observed that “the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep” in view of “unending prolixity, at every stage providing a legal trap to the unwary.” The Public Accounts Committee of the Lok Sabha had also commented adversely about arbitration in India (9<sup>th</sup> Rep. 1977-78 pp 201-202). The matter came to be dealt by the Law Commission in its 76<sup>th</sup> Report, which recommended certain amendments, including a proviso to be inserted in section 28 of the Act of 1940 forbidding, an extension beyond one year, in respect of the time for making the award except for special and adequate reasons to be recorded.

The Supreme Court in Food Corporation of India Vs. Joginderpal (AIR 1981 SC 2075 at 2076-77) observed that the law of arbitration must be ‘simple, less technical and more responsive to the actual reality of the situations’, ‘responsive to the canons of justice and fair play’.

### 1.3 Speedy disposal and least Court intervention are the basis of 1996 Act

A reading of the 1996 Act shows that speedy arbitration and least court intervention are its main objectives. In fact, sec.5 of the Act declares:

“Sec.5: Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (Part I), no judicial authority shall intervene except where so provided in this Part.”

This basic provision is found in the laws of all the countries which have adopted the UNCITRAL Model. The provisions as to waiving objections etc. contained in Sections 4, 12, 14(4), 16(5), 19(1) and 25 amply demonstrate that the objective is to see that the disputes are not unduly prolonged. In fact, the UNICTRAL Model, wherever it permitted intervention by court, by way of appeal, before the passing of the award, left

it to the arbitrator, to proceed or not to proceed further pending the appeal. This was intended to see that the appeal proceedings are not allowed to be unreasonably delayed.

It is, therefore, necessary to emphasize that the proposed amendments do not result in permitting parties to prolong the arbitration proceedings unnecessarily. While considering the need for amendments, the Commission has, therefore, not deviated from this main objective of the Act. The Commission has rejected quite a lot of proposals that have been made before it as it felt that the said proposals would certainly contribute to the delay in arbitration proceedings.

#### 1.4 **Representations regarding drawbacks in the Act:**

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

#### 1.5 **Representations regarding grounds for interference by the Courts after making of the award:**

Quite recently, representations have come before the Commission pointing out that the UNCITRAL Model was mainly intended to enable various countries to have a common model for ‘international commercial arbitration’ and the Indian Act, 1996 has made provisions similar to the model law and made applicable to, what we may call, cases of **purely domestic arbitration between Indian nationals** and that this has given rise to some difficulties in the implementation of the Act. Certain problems which surfaced after 1996 have also been placed before us.

1.6 In this report, the words “PURELY DOMESTIC ARBITRATION BETWEEN INDIAN NATIONALS’ are used to refer to arbitration where NONE of the parties is (i) an individual who is a national of, or habitually resident in, any country other than India, or (ii) a body Corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India, and its words

“INTERNATIONAL ARBITRATION” is used where at least one of the above mentioned parties/bodies is in a country other than India. This is done as a matter of convenience. This should not be confused with the proposed definition of the term ‘domestic arbitration’ in section 2(1)(ea).

The grounds for objecting an award under sec.34 and Sec. 37 are now made common to purely domestic awards as well as international arbitration awards. It has been suggested that the principle of least court interference of the award may be a fine principle for international arbitration awards but having regard to Indian conditions and the fact that several awards are passed in India as between Indian nationals sometimes by lay men who are not well acquainted with law, the interference with such awards should not be as restricted as they are in the matter of international arbitrations. This suggestion will be considered at the appropriate stage. The attention of the Commission has, in fact, been invited to a passage from Redfern and Hunter in Law and Practice of International Arbitration, (2<sup>nd</sup> Edition, pages 14 and 15) which reads as follows:

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

The above passage supports the view that in the matter of purely domestic arbitrations between Indian nationals, the State can desire that its courts should have greater or firmer control on the arbitrations.

At the other end, we find that under the English Statutes, there has always been and even now, more supervision by Courts in respect of international as well as domestic arbitrations, than under the Model Law. Sections 3 and 4 of the English Act, 1979 allowed for the exclusion of various forms of appeal to the High Court if so provided for in a ‘non-domestic’ arbitration agreement, which was defined to mean an arbitration agreement to which

none of the parties was either a national or resident in, or a company incorporated or managed in, England. It is important to note that the scope of interference as provided in sec.68 of the English Act, 1996 includes wide interference under sec. 68(2)(a) to (i) on grounds of “serious irregularity” and these grounds are in fact applicable to international and domestic arbitrations. Section 4 of the English Act, 1996 refers to the mandatory provisions in Schedule I which cannot be contracted out. The Schedule I includes among others, Sections 67 and 68 dealing with “serious irregularities”. In other words, both international and domestic arbitration suffer increased interference from courts in England after 1996 than in the UNCITRAL Model. The Department of Trade and Industry (UK) decided on 30.1.97 that the part relating to modifications for the purpose of domestic arbitration shall not come into force. It quoted the Corporate and Consumer Affairs Minister, John Taylor as follows:

“...I have also decided that all arbitrations, whether domestic or international, should be treated in the same way....”  
(see Russell on Arbitration, 1997 p.41 fn. 84)

The Belgian, Swiss and Italian arbitration statutes do contain separate and special provisions applicable to international arbitrations permitting lesser interference by courts (see Fouchard and others, International Commercial Arbitration, 1999, page 54 para 105). Therefore, it is a matter for consideration whether a few more additional grounds for challenging the award are to be added in the case of purely domestic arbitrations.

Some countries have adopted the UNCITRAL Model as it is, while some other countries have adopted with some changes. Some other countries, while adopting the Model Law, have incorporated some provisions from the English Act of 1996. The latest Report of the Law Commission of South Africa takes note of these variations as follows in paragraph 2.4 of the Report:-

“Sanders P "Unity and Diversity in the Adoption of the Model Law" (1995) 11 *Arbitration International* 1 (hereinafter referred to as "Sanders") at pages 2-3 lists the following countries or states as having adopted the Model Law: Canada in 1986 (at both federal and provincial level - in the provinces, with the exception of Quebec, it applies to international arbitrations only); Cyprus in 1987; Bulgaria and Nigeria in 1988; Australia (at federal level for international

arbitrations only) and Hong Kong in 1989; Scotland in 1990; Peru in 1992; Bermuda, the Russian Federation, Mexico and Tunisia in 1993; and Egypt and Ukraine in 1994. Sanders also lists eight states of the United States of America as having adopted the Model Law, including California, Florida and Texas. However, whereas Connecticut totally adopted the Model Law (Sanders 3) it appears from a commentary on the Florida International Arbitration Act (see Loumiet C M "United States: Florida International Arbitration Act – Introductory Note" (1987) 26 *ILM* 949 at 960 n 13) that there are significant philosophical and textual differences between the Florida statute and the Model Law. Singapore adopted it for international arbitrations in 1994. Of the major industrial countries in Western Europe, as yet only Germany has adopted the Model Law. (See the New German Arbitration Law, being the Tenth Book of the German Code of Civil Procedure, which commenced on 1 January 1998. An English translation is published in (1998) 14 *Arbitration International* 1-18.) The new German Arbitration Law adopts the Model Law with minimum changes and applies to both international and domestic arbitrations (see s 1025 and Böckstiegel K-H "An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law" (1998) 14 *Arbitration International* 19 at 22-23). New Zealand has also adopted the Model Law for both domestic and international arbitrations (see the Arbitration Act 99 of 1996, which commenced on 1 July 1997). (The New Zealand legislation is discussed by Richardson M "Arbitration Law Reform: the New Zealand Experience" (1996) 12 *Arbitration International* 57-66 and "Arbitration Law Reform: the New Zealand Experience - an Update" (1997) 13 *Arbitration International* 229-31.) The Kenyan Arbitration Act 4 of 1995 and the Zimbabwean Arbitration Act 6 of 1996 referred to in the text came into force on 1 January 1996 and 13 September 1996 respectively."

That does not mean that the Commission is proposing to unduly increased court interference in cases of purely domestic arbitration. In fact, the Commission proposes to further restrict court interference, in certain respects than what is permitted by the Model Law or the 1996 Act, both for international and purely domestic arbitration. It proposes that all matters which come to the court against the award are to be listed for preliminary hearing and could be rejected straight away before notice. It is also proposed

to introduce a provision similar to sec.99 of Civil Procedure Code (CPC) that awards should not be interfered with lightly unless substantial prejudice is shown. It is also proposed to remove the obstacle created by sec.36 precluding enforcement of award merely because an application to set aside the award is filed and is pending. Mere filing of such an application should not amount to automatic stay of the award. Further, we propose to enable the court to impose conditions for compliance with the award, partly or wholly, pending disposal of objections.

Proposals are also being made to keep delays before the arbitral tribunal totally under control, by amending sections 23, 24 and 82 as also and inserting new sections 24A, 24B, 29A, 37A. Time limits are proposed to be imposed for passing awards subject to extension by Courts, however, providing that that, pending disposal of the application by the Court, the arbitration shall continue. Chapter XI is introduced for Fast Track Arbitration. Sections 34 and 35 of the Amending Act are proposed to be introduced to speed up arbitrations, applications and appeals under the Act of 1996 and also under the old Act of 1940. We shall advert to these provisions in para 1.8 hereinafter. Therefore, it is not as if, the proposed amendments will increase court intervention or thereby delay arbitration. On the other hand, the proposed amendments will speed up pending and future arbitrations.

### 1.7 Other aspects brought to the notice of the Commission

Several other aspects in the working of the 1996 Act have been pointed out. Some of these can be referred to at this stage itself briefly to substantiate why the Commission has now felt that it is appropriate to propose amendments to the Act. Of course, not all of these suggestions are being accepted by the Commission.

It has been stated that in several cases, Indian parties have been deprived of a right to seek prompt-interim relief under section 9 of the Act from the Court before the commencement of arbitration proceedings and after the award, in international arbitration awards, or after the passing of such awards where the seat of arbitration is outside India because sec.2(2) confines Part I of the Act to arbitrations in India. This, it is said, has resulted in serious prejudice to Indian parties who are not able to obtain any interim orders under sec. 9 before commencement of international arbitration or during or after conclusion of the proceedings, from Indian courts. In several

cases the awards might remain only on paper, at the end of the day. This anomaly has led to conflicting judgments in the High Courts. In fact all countries which have adopted the UNCITRAL Model, apply Arts. 8, 9, 35 and 36 of the Model Law to an international arbitration where the seat of arbitration is outside that country. This was not noticed when the 1996 Act was passed.

It has been pointed out that inasmuch as there is no need to file an award in the Court under the new Act, there is a scope for tinkering with the award. There is no public record of the contents of the award. Obviously, Stamp and Registration laws can easily be contravened under the new Act.

Divergent views have been expressed as to the stage at which jurisdictional issues could be decided and also as to whether orders of the Chief Justice of India or his nominee or that of the Chief Justice of the High Court or his nominee, as the case may be, appointing arbitrators-should be treated as administrative orders or as judicial orders. Treating the orders under Sec. 11 as administrative has led to several writ petitions being filed in the High Courts raising jurisdictional grounds and consequently stay of arbitration proceedings being obtained.

It has been pointed out that sec.8 of the Act has deviated from the Model Law by omitting the words 'unless it finds the agreement is null and void, inoperative and incapable of being enforced.' It has also been pointed out that where the arbitrator rejects objections relating pleas of bias or disqualification under sec. 13 or objections as to jurisdiction under sec.16 by way of interim decision, no immediate right of appeal is provided as in Art. 13 or Art. 16 of the Model Law and parties have to go ahead with the arbitration proceedings till the award is made. This may involve them in waste of money by way of fees to arbitrators and lawyers. This again is a deviation from the Model Law. Even after the award, the objection relating to rejection of a plea of bias or jurisdiction is not included in the list of grounds specified under sec. 34. It has again been pointed out that while an appeal is permitted, where the award deals with a dispute not contemplated by or not falling within the terms of the submission or matters beyond the scope of the submission for arbitration, no ground is provided in a case where the arbitrator omits or refuses, in spite of an application under sec.33(4) to decide an issue which definitely arises out of the pleadings of the parties. It has been pointed out that if arithmetical or typographical mistakes are not corrected after following the procedure under section 33(1),

there is no remedy. Similarly, it is stated that if no reasons are given in spite of the provisions of section 31(3), there is no remedy. Though, under section 28 the substantive law has to be followed, no provision is made in section 34 if there is an error of law apparent on the face of the award. Of course, some participants in seminars suggested that grounds of 'misconduct' of the arbitral proceedings must also be included in the grounds of challenge in section 34.

It has also been proposed that a provision similar to sec.21 of the Arbitration Act, 1940 is necessary so that whenever, during the pendency of a suit or proceeding or appeal in High Court or Supreme Court, parties could agree to go to arbitration. In such cases, specific provision must also be made to enable objections to the award to be filed in the same court which referred the matter to arbitration rather than driving them again to the District Court. For example, if after 20 years of litigation, the Supreme Court, by consent of parties, refers the matter to arbitration, the objections have now to be filed in the District Court according to the recent judgment of the Supreme Court in P. Anandagjapathi Raju vs. P.V.G. Raju (2000(4) SCC 539 = AIR 2000 SC 1886), while under the Act of 1940, they could be filed in the Supreme Court, since that was the court which referred the parties to arbitration.

It has been pointed out that section 43(3) is to be amended because of the amendments to section 28 of the Indian Contract, 1872, in 1997. By that amendment to the Indian Contract Act, the provision which extinguishes a right to a remedy even before the expiry of the time fixed in the Limitation Act, 1963, has become bad and hence there is no longer any need for approaching court to remove hardships.

It has been pointed out that there is a conflict of judgments as to whether the time limits fixed in section 11(4) and (5) of the 1996 Act are mandatory or not and whether in the event the opposite party does not appoint any arbitrator within the period, a party cannot move the court under section 11 for appointment. It is also stated that section 11(6) does not fix any time limit.

Under section 9, it is said that a party may obtain an interim order before taking steps for arbitration and after getting the order, he may not take steps to have an arbitrator appointed. It is pointed out that section 9 is badly drafted and requires restructuring.

It is urged that clauses in the contract which enable a party to appoint his own employer or adviser or consultant to be an arbitrator violate section 18 of the 1996 Act relating to equal treatment to the parties.

It was suggested that some more powers are to be given to the arbitrators to see that their interim orders or dates of hearing given by them are duly honoured. It is said that a “fast track procedure” may be proposed by way of a Schedule. Section 42, it is said, is vague and requires a detailed restructuring. Several important amendments to section 37 have been suggested to cover appeals against orders passed by the arbitral tribunal under sections 13 and 16 where certain jurisdictional pleas are rejected by the tribunal.

We are referring to these aspects only to point out the nature of defects that have been placed before the Commission for its consideration.

The above important aspects are, therefore, the starting point of the review of the 1996 Act by the Commission. The Commission prepared a Consultation Paper (Annexure-II) and held two Seminars, one in Mumbai and another in Delhi in the months of February and March, 2001 and gave wide publicity to the Paper by putting it on the website. Retired Judges and leading lawyers were invited for the Seminars. Several of them participated and also gave written notes putting forth their ideas. During these seminars there was consensus on various proposals and also divergence on some of the proposals. Proposals not contained in the Consultation Paper were also exhaustively discussed. Even in the month of May 2001, responses as well as fresh proposals have been received by the Commission.

In the light of the above, the Commission re-examined the proposals and has also considered the fresh proposals which were placed before it. It has considered the various responses, either accepting or rejecting the suggestions in this Report.

The Commission has accepted some of the proposals and has rejected a large number of other proposals. In fact, several proposals made in the Consultation Paper (Annexure-II) have not been accepted by the Commission in this report. The Commission has kept in mind the warning to keep away from any ‘mind-set’ of the 1940 Act but it has also taken care

to keep away from the other ‘mind-set’ that no amendments at all need be made.

### **1.8 Major reforms in speeding up pending and future arbitrations, applications and appeals under the 1996 Act and also under the 1940 Act.**

The Supreme Court has, time and again, lamented that there is enormous delay in the arbitral process in our country. We have already referred to the said remarks. It has, therefore, been decided by the Commission that some serious reforms must be brought in to speed up the entire arbitral process, both before the arbitral tribunal and before the Courts, whether such proceedings are pending under the 1996 Act or under the 1940 Act.

Section 5 of the Act of 1996 is proposed to be amended by adding an Explanation as to the meaning of the words ‘any other law for the time being in force’. Under the Explanation, the above words will include the Code of Civil Procedure (5 of 1908), any law providing for internal appeals within the High Court (like Letters Patent, or High Court Acts) and any law which provides for intervention by one judicial authority in respect of orders passed by another judicial authority (e.g. tribunals under the Consumer Protection Act). The effect of the Explanation is that intervention by resorting to remedies under all the above laws will be barred.

So far as the procedure before the arbitral tribunal is concerned, the proposal is to amend sections 23 and 24 of the 1996 Act by permitting the arbitral tribunal to fix time schedules for filing pleadings and for recording evidence (including affidavit evidence) and omitting from the said sections those clauses which permit parties to fix up the procedure or the time schedule. The proposals under sections 23 and 24 give full power to the arbitral tribunal to fix the procedure and time schedule for filing of pleadings and for recording evidence and said time schedule shall be binding on the parties or those who represent them. Further, under the proposed section 24A, the arbitral tribunal is empowered to take serious action if its orders are not complied with and under the proposed section 24B, the parties or the arbitral tribunal may approach the Court for implementation of the orders of the arbitral tribunal and the Court is given wide powers to take steps to have such orders implemented. The above said provisions in sections 23, 24, 24A and 24B are proposed to be applied not only to future proceedings under the

new Act of 1996 but also the pending proceedings under the Act as also the pending proceedings under the 1940 Act, before the arbitrators.

Next, for future arbitrations under the 1996 Act, the arbitrators will have one year and thereafter another period not exceeding one year as agreed by the parties, under the proposed section 29A, for passing the award. Thereafter, if the award is not passed, parties are to move the Court for extension and if the parties do not apply, the arbitrators can also apply for the same. Till the application is made, the arbitration proceedings are suspended, but once an application is made to the Court, the arbitration proceedings shall continue and are not to be stayed by the Court. On the other hand, the Court shall pass an order within one month fixing the time schedule or it may also pass orders as to costs taking into account various factors which have led to the delay and also the amount already spent towards fee etc. The Court will continue to pass such orders granting time and fixing the procedure, till the award is passed. The above procedure is also to be applied to arbitrations which are pending under the 1996 Act for more than three years as provided in sec. 33 of the amending Act. Applications under section 34(1) to set aside awards and appeals under sec. 37(1) are to be disposed of within six months and appeals under sec. 37(2) within three months from the date of commencement of the amending Act. A similar procedure is envisaged for future applications and appeals.

For the purpose of speeding up of pending arbitration proceedings under the 1940 Act, separate provisions are proposed to be made in sec. 34 of the Amending Act for granting one year for completion, failing which the procedure indicated in sec. 29A of the Court fixing the time schedule will apply, till the award is passed.

So far as pending applications under the old Act of 1940 to make the award a rule of Court or objections to set aside an award and appeals under sec. 39 of the old Act are concerned, under sec. 34 of the Amending Act, they have to be disposed of within one year from the date of the amending Act. Pending appeals/revisions against interim orders in proceedings arising out of the old Act are to be disposed of within six months from the date of the amending Act.

The Commission hopes that the above reforms contained in the proposed amendments to sections 23 and 24, addition of proposed sections 24A and 24B and sections 29 of the Principal Act, 33 and 34 of the

Amending Act are many sections will bring about a welcome change in the attitude of all persons connected with arbitrations – namely, the parties, the persons who represent them, the arbitrators and the Courts, and that hereafter not only arbitrations and Court proceedings under the Act of 1996 but also those under the 1940 Act, which are still pending, will all get a big push within one year from the commencement of the proposed amending Act and the blot upon the Indian arbitration system will stand removed.

Great care has been taken to see that there is no change in the law relating to international arbitration.

## CHAPTER-II

### **Discussion on the proposals for amendments and Commission's recommendations**

The Law Commission after receiving representations regarding certain drawbacks in the working of the Arbitration and Conciliation Act, 1996 published a Consultation Paper on the subject and circulated it among the lawyers, judges and academicians to obtain their views. It also conducted seminars at various places to discuss the working of the provisions of the Act. In the light of representations, responses to the Consultation Paper and deliberations in the seminars as also views of the experts in the field, the Commission has considered various provisions of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Principal Act). The Commission has accepted some of the proposals made in the Consultation Paper but has not finally carried forward a number of suggestions made in the Consultation Paper. The Commission proposes to deal in this Chapter various issues section-wise.

#### **2.1.1 Definitions - Section 2**

##### “Court”

Section 2(1)(e) reads as follows:

“Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;”

This provision defines 'Court' as the principal Civil Court of original jurisdiction in the district and includes the High Court wherever the High Court is exercising Original Jurisdiction.

The sections which use the word 'Court' are sec.9 (interim measures), sec.14(2) (impossibility on the part of the arbitrators to act), sec. 34(3) (filing of objection to the award), sec.36 (enforcement of award), sec.37 (appeals), sec.39 (2) and (4) (lien and deposit), sec.42 (jurisdiction) and sec. 43 (limitation).

The term 'Judicial authority' is used in sections 5 and 8. Here this term can also mean a District Court or a Court subordinate to the District Court or the High Court on the original side. It may also refer to a quasi judicial authority. Whatever the meaning intended, the word 'judicial authority' includes a 'Court'.

It has been proposed that in section 2(1)(e), the court of the Principal Judge of the City Civil Court in a city should also be included. This suggestion made in the Bombay seminar has been accepted to avoid any unnecessary controversy.

2.1.2 After such amendment, sec. 2(1)(e) will read as follows:

“(e) ‘court’ means the principal Civil Court of original jurisdiction in a district, the Court of principal judge of the City Civil court of original jurisdiction in a city and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court or to such Court of the principal judge City Civil Court, or any Court of Small Causes;”

Recently, it has been held in Western Shipbreaking Corpn. Vs. Clase Haren Ltd. (UK): (1997(3) Guj L.R. 1985) that the Additional District Judge cannot deal with an application under sec.8 of the 1996 Act but that the word 'District Judge' includes a 'Joint District Judge'. It is, therefore, proposed to make a provision enabling the principal court in a district or a court of the principal Judge of a City Civil Court in a city to transfer matters under this Act to other Courts of co-equal jurisdiction in the district or city, as the case may be, to reduce congestion in the principal courts. This will help matters to be transferred to Additional Courts having powers and jurisdiction under various sections, viz., section 8 and proposed sections 8A, 17A, 29A and section 34 etc.

2.1.2A The proposed addition to sec. 2 enabling transfer of matters from the Principal Courts to the Courts of co-ordinate jurisdiction, will read as follows:

“(10) The principal Civil Court of original jurisdiction in a district or the Court of the principal judge, City Civil Court exercising original jurisdiction in a city, as the case may be, may transfer any matter relating to any proceedings under the Act pending before it to any court of coordinate jurisdiction, in the district or the city, as the case may be, for decision from time to time.

### **2.1.3 Need for defining the scope of ‘domestic arbitration’, ‘international arbitration’ and ‘international commercial arbitration’**

The words ‘International Commercial Arbitration’ are used in the Explanation to section 1(2), and in sections 11(9), 11(12)(a) and section 28(1)(a) and (b) of the 1996 Act.

Section 2(1)(f) which defines the term “International Commercial Arbitration” requires that at least one of the parties is a national of, or habitual resident in, any country other than India or a body corporate incorporated in any country other than India, or a company or an association or a body of individuals whose central management and control is exercised in any country other than India or the government of a foreign country.

The Act has made a deviation from the Model Law. The model law lays emphasis on one of three factors namely the parties or place of arbitration or the subject matter. The 1996 Act lays stress on the parties’ residence and nationality. But, the Commission is of the view that there is no need to amend this part of the definition in section 2(1)(f).

The word ‘commercial’ occurs in sec.2(1)(f) of Part I and sec.44 of Part II of the Act (dealing with New York Convention). Sec.44 uses the expression ‘foreign awards’ to a limited class of awards falling within sec.44 and one of the conditions is that the award must have been made in one of the reciprocator States notified by the Central Government under the Foreign Awards Recognition and Enforcement Act, 1961. India is a signatory to this Convention subject to two reservations.

It is not in dispute that there are “international arbitration awards” which do not fall under Part II, may be because the dispute is not ‘commercial’ or the agreement is not in writing or the award is made in a non-reciprocating state. The Act in Part I covers awards where all parties are of Indian nationality and award is made in India and also to international commercial awards, i.e., where at least one party is not an Indian national, where the seat of arbitration is in India. Both these types of awards are called ‘domestic awards’ under sec.2(7). This is the broad nomenclature used in the Act.

It has been suggested that the word ‘commercial’ can be dropped so that the Act can apply to all international arbitrations, whether commercial or not, where the seat of arbitration is in India. There is force in this suggestion. Firstly, as disclosed from the case law dealing with New York Convention, on several occasions, an issue arises as to whether the arbitration is ‘commercial’ in nature. This leads to unnecessary litigation. Secondly, there is no reason to omit from sec.2(1)(f) in Part I an arbitration which is international in nature but which is not ‘commercial’. There was no dissent from this view during the discussion on the Consultation Paper. The Indian Chamber of Commerce of Bombay, in fact, made a specific suggestion through a report prepared by a group of retired Judges of the High Court and others, for omission of the word ‘commercial’.

In fact, even in regard to the New York Convention some countries have withdrawn the ‘commercial’ reservation. By letter dated 17.11.1989 to the Secretary General, UN, the French Government which ratified the New York Convention in 1959, withdrew the reservation so as to give the widest scope to the Convention. Out of 121 countries which adopted the New York Convention, only one-third have made the ‘commercial’ reservation by 1999.

There is one other reason as to why the word ‘commercial’ has to be dropped. The 1985 UNCITRAL Model Law itself watered down the distinction by including in its definition a wide range of matters as is clear from the footnote below the definition in Art.1(1). It says that the term ‘commercial’ must be given a wide meaning to cover matters arising from all relationships of a commercial nature and would also include any trade transaction for the supply or exchange of goods or services; distribution agreements; commercial representation of agency; factories; leasing; construction work; consulting engineering; licensing; investment; financing;

banking; insurance; exploitation agreement or concession; joint venture or other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail and road. The ‘footnote’ below Article 1(1) of the Model Law states that the above enumeration is not to be understood as being exhaustive.

Unfortunately in sec.2(1)(f) of the 1996 Act, this wider definition of the UNCITRAL Model had not been referred to, even by way of a foot note or by way of an Explanation.

It is, therefore, proposed to apply Part I of the Act to international arbitrations whether commercial or not, where the place of arbitration is in India. The result is that sec.2(7) shall now include international non-commercial awards also, where the seat of arbitration is in India.

In order to remove any confusion in understanding as to what is a domestic arbitration, it is proposed to define ‘domestic arbitration’ as an arbitration in India where none of the parties are nationals of a country other than India. The definition include shall “international arbitration” in India, whether commercial or not, where at least one of the parties is a national of a country other than India and where the place of arbitration is in India. The definitions of the terms “domestic arbitration” and “international arbitration” are proposed to be added in section 2 of the Act and the existing definition of the term “international commercial arbitration” mentioned under section 2(1)(f) is also proposed to be substituted in next paragraph. These definitions will help in understanding section 2(2) and 2(7) better.

Article 1(3) of the Model Law which defines international arbitration does not refer to a company which is incorporated in a country being under the central management and control from outside that country. Section 202 of Title 9 of the Federal Arbitration Act of the USA also states that the incorporation of a company in USA will be sufficient to deem the company as the citizen of USA.

It is, therefore, proposed to drop the word ‘company’ from sub-clause (iii) if clause (f) of section 2(1). The word ‘body corporate’ in sub-clause (ii) of section 2(1)(f) will obviously include a body corporate incorporated under a statute or under the Indian Companies Act, 1956. The same method is adopted in the new definition of ‘domestic arbitration in the proposed section 2(1)(ea).

2.1.3A The new definitions as proposed will be as follows:

(ea) ‘domestic arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, where none of the parties is,-

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country,

and shall be deemed to include, international arbitration and international commercial arbitration where the place of arbitration is in India.

(eb) ‘international arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, and where at least one of the parties is,-

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country:

(f) ‘international commercial arbitration’ means international arbitration considered as commercial under the law in force in India;

2.1.4 **“Judicial authority”: Proposed section 2(1)(fa) -**

In view of the judgment of the Supreme Court in Fair Air Engineers Pvt. Ltd. Vs. M.K. Modi, AIR 1997 SC 533, holding that 'judicial authority'

in sec.34 of the 1940 Act includes a quasi-judicial tribunal like the consumer court, it has become necessary to define the term 'judicial authority' in section 2(1). In fact, in the above case, a reference was made to 1996 Ordinance which preceded 1996 Act. This aspect has been dealt with under section 8 (see para 2.4.1 to 2.4.4). As stated hereinafter in detail under section 8, , it was requested, at the Bombay seminar, that in section 8, the words "judicial authority" must include quasi-judicial statutory bodies also.

The definition of 'judicial authority' proposed to be added in section 2(1) is as follows:-

“(fa) judicial authority' includes any quasi-judicial statutory authority;”

#### 2.1.5 Application of Part I – Section 2(2):

Section 2(2) occurs in Part I of the 1996 Act and reads as follows:

“Section 2(2): This Part shall apply where the place of arbitration is in India.”

In view of the new proposed definition of the term "domestic arbitration" in proposed section 2(1)(ea) and section 2(2) is proposed to be amended by introducing two clauses, viz., (a) and (b).

Clause (a) will read as follows:-

"(a) This part shall apply to domestic arbitration".

The study relating to proposed clause (b) is carried out in subsequent paragraphs. This will mean that Part I of the Act will apply to the cases of purely domestic arbitrations between Indian nationals and also in international arbitrations where at least one party is not an Indian national, and in both such arbitrations, the place of arbitration is in India. These two types come under the definition of 'domestic arbitration'. The word 'domestic' signifies 'all the arbitrations in India'.

The existing sec. 2(2) is in conformity with the broad principle in international commercial arbitration that (subject to exceptions as decided by the Courts in various countries) the arbitration is governed by the law of the

country where it is held, namely, the “seat” or “forum” or “laws arbitri” of the arbitration. Such provisions are contained in the Geneva Protocol 1923 and the New York Convention, 1958.

2.1.6 Omission in Section 2 (2) of the Act in not applying sections 8, 9, 35, 36, to international arbitration outside India:

Some problems have arisen in cases of international arbitration where the seat of arbitration is outside India. It is part of the law of arbitration in several countries to allow a few provisions of their arbitration statutes to apply to international arbitrations held outside their countries. Such provisions are those which correspond to Articles 8, 9, 35 and 36 of the Model Law. In this behalf, there has been a serious omission in the 1996 Act in not following the provisions of the UNCITRAL Model Law. This has led to litigation.

(i) Omission to apply sec. 9 to international arbitrations outside India to be rectified-

We shall first take up the disadvantages so far as omission of section 9 is concerned. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts. These are cases where interim measures could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred.

Art. 1(2) of the Model Law reads as follows:

“Art. 1(2): The provision of the law, except Articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of the State.”

(Art. 9 of the Model Law corresponds to sec. 9 of the 1996 Act).

This aspect somehow escaped attention, when sec.2(2) was drafted in the 1996 Act. That section confined Part I (including sections 8, 9, 35 and 36) only to arbitrations where the place of arbitration is in India. As stated above, this provision has caused serious prejudice to an aggrieved party in as

much as these provisions do not apply to international arbitrations where the place of arbitration is outside India, or where the seat of arbitration is not defined in the arbitration agreement.

Almost all countries which have adopted the UNCITRAL Model apply provisions in their legislation corresponding to Art.8, 9, 35 and 36 to international arbitration held outside their countries.

The Delhi High Court, in certain judgments, took the view that sec.2(2) read with sec.2(5) would enable sec.9 to be applied even in cases of international arbitration held outside India (see Dominant Offset pvt. Ltd. vs. Adamovoske Strajirny: 1997(2) Arb.L.R.335 (Del), Suzuki Motors Corporation vs. UOI 1997(2) Arb. L.R. 477 (Del) and in Marriot International Inc. vs. Ansal Hotels 1999(82) DLT 13. Similar view was taken by the Delhi High Court by a Bench in Olex Forcas Ltd. vs. Skoda Export Co. Ltd. AIR 2000 Delhi 161, referring in sec.2(5). But a contrary view has been taken by another Division Bench of the Delhi High Court in Marriot International Inc. vs. Ansal Hotels 1999(82)DLT 13 and it held that interim measures could be granted in such cases. The Calcutta High Court has also held in East Coast Shipping Ltd. vs. M.J. Scrap (P) Ltd. 1977(1) Cal HN. 444 that interim measures could be granted in view of the clear language in sec.2(2). A Division Bench in Kaventers Agro Ltd. vs. Seagram of the same High Court (APO 449, 448/97, dated 27.1.98) has also taken the same view.

The Supreme Court Judgment in Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd.: 1999(9) SCC 334 did refer to sec.2(2) and sec.2(7) but this aspect did not directly fall for consideration.

There has been an absolute unanimity that this deficiency in sec.2(2) has to be immediately remedied by making sec.9 (and other provisions like sections 8, 35 and 36) applicable to international arbitrations where the place of arbitration is outside India or where the place of arbitration is not specified in the arbitration agreement.

In fact, the provision in sec.2(3) of the English Act, 1996 applies sec.9 even to other international arbitrations where no seat of arbitration is referred to in the arbitration agreement. It also extends the support of sec.43 and 44 of that Act to such arbitration. Section 43 of the English Act deals

with ‘securing the attendance of witnesses’ and is akin to sec. 27 of the Indian Act 1996.

Therefore, in sec. 2(2) it can be stated that the provisions of sec. 9 and sec. 27 shall also apply to international arbitrations where the place of arbitration is outside India or where the place of arbitration is not specified in the agreement.

(ii) Omission to apply sections 8, 35 and 36 to international arbitrations outside India to be rectified:

It has been noticed that Art. 1(2) of the Model Law makes not only Art. 9 but also Articles 8, 35 and 36 of the Model Law applicable to such international arbitrations where the seat of arbitration is outside the country.

In fact, almost all statutes of various countries which have adopted the UNCITRAL Model Law do permit the application of provisions of their statutes which correspond to Arts. 8, 35 and 36 of the Model Law. There is need to extend the provision of sections 8, 35 and 36 also to such arbitrations, apart from sec. 9 and sec. 27 as stated above. The reason is that in a suit or other legal proceeding filed before a judicial authority under sec.8 of the 1996 Act, where one of the parties is not an Indian national, the opposite party may plead an arbitration clause where the place of arbitration is outside India or the place of arbitration is not specified. In such cases, the Court must be enabled to refer the parties to arbitration under sec.8. Some objections based on reciprocity have been raised in this behalf but the Commission is of the view that the 1996 Act is one of the statutes which deals with alternative methods of resolution of disputes and the need to encourage such procedures should override considerations of reciprocity.

Sections 35 and 36 of the Act deal with recognition and enforcement of the arbitration awards. In the case of arbitration of an international nature where the place of arbitration is outside India or is not specified, then it is necessary to make sections 35 and 36 of the Act to be invoked rather than stipulate that parties are to obtain a judgment in a foreign Court on the basis of award and then file a suit in India for enforcement in cases not covered by sec. 44A of the Code of Civil Procedure, 1908 (CPC).

Section 27 deals with Court assistance and this is also be applied to international arbitrations outside India.

Thus, sections 8, 9, 27, 35 and 36 are to be applied to international arbitrations where the place of arbitration is outside India or where the place of arbitration is not specified.

2.1.7 An amendment to this effect is being proposed in clause (b) of section 2 (2) as follows:

“(b) Sections 8, 9, 27, 35 and 36 of this Part shall apply also to international arbitration (whether commercial or not) where the place of arbitration is outside India or is not specified in the arbitration agreement.”

### 2.2.1 **‘Extent of Judicial Intervention’: Section 5 of the Act**

Section 5 corresponds to Art. 5 of the Model Law but has a non-obstante clause added at the beginning of the section. It is to be noted that the important purpose of Art. 5, according to the UN Commission, was not to negate court intervention altogether or cut down the proper role of courts but to list out, in the national law, all the situations which permit court intervention and exclude any plea based on a remedy outside the Act or based on a residual power of the national courts. (See paras 62 and 63 of the UN Commission’s Report (1985) on the Adaptation of Model Law). These paragraphs are worth quoting and read as follows:

“In advancing the second objection, it was emphasized that article 5 expressed an excessively restrictive view as to the desirability and appropriateness of court intervention during an arbitration. It was to the advantage of businessmen who engaged in international commercial arbitration to have access to the courts while the arbitration was still in process in order to stop an abuse of the arbitral procedure. Furthermore, a limitation of the authority of the courts to intervene in arbitral proceedings might constitute an unwarranted interference in the prerogatives of the judicial power, and might even be contrary to the constitution in some States. Finally, even if the authority of the court to intervene in supervision of an arbitration might have to be limited, the court should have a broader power to act in aid of the arbitration. It was suggested, as a possible means of softening the extremely rigid character of Article 5, to give

the parties to an arbitration the authority to agree on a more extensive degree of court supervision and assistance in their arbitration than was furnished by the Model Law.

In response to the second objection, it was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse. The purpose of Article 5 was to achieve certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the (Model) Law on international commercial arbitration all instances of court intervention. Thus, if a need was felt for adding another such situation, it should be expressed in the Model Law. It was also recognized that, although the Commission might hope that States would adopt the Model Law as it was drafted, since it was a model law and not a convention, any State which might have constitutional problems could extend the scope of judicial intervention when it adopted the Model Law without violating any international obligation.”

Article 5 of the Model Law reads: “in matters governed by the law, no court shall intervene except where so provided in this law”. Corresponding section 5 of the 1996 Act contains a non-obstante clause which reads as follows:

“Section 5: Notwithstanding any thing 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”.

The important question is as to what is the meaning of the words ‘in matters governed by this part’ and ‘intervene’. Do they mean ‘intervention only after the arbitrators are appointed or only during the continuance of proceedings before the arbitral tribunal? In the view of the Commission, the above words have to be liberally construed keeping in mind the broad purpose of sec. 5. The purpose is to keep court intervention restricted to the situations expressly indicated in the Act and to exclude all other remedies. The exclusion is not confined to the stages after the arbitral tribunal is appointed nor to the period during the pendency of the arbitration

proceedings alone. The remedies excluded are those that may be otherwise available, right from the stage of interim measures under sec.9 before the commencement of arbitration and also at the stage of reference to arbitration under sec. 8 in pending actions or at the stage of appointment of arbitrators under section 11 applications.

In the view of the Commission, where, for example, orders under sec. 9 relating to interim measures are passed by a civil court as defined in sec. 2(1)(e), the remedies under sec. 115 C.P.C. or under Letters Patent or High Court Acts are excluded. This is the effect of section 5. Then again, if in a matter filed before a Judicial authority, an application under sec. 8 for reference is allowed or dismissed by the said authority all remedies to challenge the same under sec. 115 C.P.C. or under Letters Patent or the High Court Acts or by resort to the special remedies under the statute applicable to the Judicial authority are excluded.

Similarly, under sec. 11 of the Act, if arbitrators are appointed by the High Court or not appointed, then such orders will not be amenable to Letters Patent or the High Court Acts, if they are passed by any single Judge of the High Court.

It is proposed to add an Explanation in section 5 at the end to make this position clear as stated hereunder:

“Explanation:- For the removal of doubts, it is hereby declared that the expression ‘any other law for the time being in force’ shall always be deemed to include,-

- (a) the Code of Civil Procedure, 1908 (5 of 1908);
- (b) any law providing for internal appeals within the High Court;
- (c) any enactment which provides for intervention by a judicial authority in respect of orders passed by any other judicial authority.”

Thus the result of the “non-obstante” clause will be to override ‘any other laws’ and interference under any law is prohibited. The policy of the Act being least court intervention, the Commission is of the view that the non-obstante clause need not be deleted. In fact even with its deletion, the result will not be different in view of the words ‘except where so provided in this Part’. Instead an Explanation as stated above, is to be added below section 5, to strengthen the section and remove any doubts.

## Section 89 CPC

2.2.2 In the context of Section 5, it has also been pointed out that in view of the introduction of sec. 89(1)(a) and sec. 89(2)(a) in the Code of Civil Procedure, 1908, the courts in India would be empowered to refer matters to arbitration, and sec.5 should except sec.89 of the Code of Civil Procedure. (the amendment to the Code has been passed by the Parliament but has not yet come into force as the date of its enforcement has not yet been notified). The Commission is of the view that there is no need to except section 89 of the Code from section 5 of the 1996 Act inasmuch as section 89 merely requires the application of the 1996 Act. There is no conflict between section 5 of the 1996 Act and section 89 of the Code. We may explain further.

Section 89 empowers the Court to refer matters to arbitration if the Court thinks that a settlement is possible. This power under Section 89 does not depend on the agreement of parties. On the other hand, the 1996 Act deals with reference to arbitration under an arbitration agreement. As and when the provisions of sec. 89 come into force, the reference by the Court will be governed by the provisions of the present Act, 1996, so far as may be, as provided in sec. 89 itself. Hence no amendment is necessary in section 5 of the Act in this behalf. Further, if a reference is made by the court under section 89 CPC, such a reference, in the view of the Commission, does not fall under section 2(4) inasmuch as the arbitration is not by an arbitrator appointed under the statute, *i.e.*, the Code of Civil Procedure, 1908, as is the case under the Cooperative Societies Acts. Similarly, section 42 is also not attracted because, there is no agreement between parties nor any application before court. There is, therefore, no need to except Section 89 CPC from Section 5 of the Act to make provisions in Section 42 of the 1996 Act.

Once a reference is made under section 89, the provisions of the 1996 Act will apply.

2.2.3 Of course, it is obvious that the words ‘notwithstanding anything contained in any other law for the time being in force’, used in sec. 5 will not come in the way of the exercise of powers under Art.227 of the Constitution of India by the High Court or under Art.136 by the Supreme Court of India in as much as these are constitutional provisions. (See para

62 of the U.N. Commission Report which notices such a possibility). We are referring to this aspect because when we come to sec.8 of the Act which uses the words 'judicial authority', orders passed by such judicial authorities, - if they are orders of quasi-judicial tribunals, they may be amenable to the above provisions in Art.227 and Art.136.

2.2.4 In the result, the 'non-obstante' clause in section 5 is retained and an Explanation as stated earlier is proposed to be added.

**2.2.5 Administrative Assistance: Amendments proposed in Section 6:**

Section 6 of the Act as it stands now, reads as follows:

"Administrative assistance: In order to facilitate the conduct of the arbitral proceedings, the parties or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person".

The above section was drafted on the model of Art. 8 of the UNCITRAL Report on Adoption of Conciliation Rules (prepared by the United Nations Commission on International Trade Law), which was, more or less, in the same language. In fact, in that Report it was suggested that if the conciliators arrange for administrative assistance, they must not merely consult the parties but must also obtain their consent.

In practice, however, at any rate in India, it is becoming increasingly common for arbitration proceedings being conducted at expensive venues. On several occasions, even when the proceedings last for a very short duration, the parties have to pay for a whole day. If the venue is a five-star hotel, the expense will be heavier. Parties feel embarrassed if they have to reject request for an expensive venue.

On the other hand, there are places available, which are fairly decent and not as costly as five star hotels. Several public institutions do make their conference rooms available for arbitration and all facilities are available at inexpensive rates. The Commission has been informed that in certain arbitrations which have been continuing for years, the costs of meeting the expenses of the venue are running into lakhs of rupees. One party who is rich enough may agree but another, not so rich, may not, but may have to share the huge costs ultimately, depending upon the order of the arbitral tribunal as to cost in the award.

After taking into account these problems and with a view to reduce arbitration expenses for the parties, the Commission proposes that section 6 be amended as follows:

“Section 6 Administrative assistance:- In order to facilitate the conduct of the arbitral proceedings, the parties may arrange for administrative assistance by a suitable institution or person”.

We are making this amendment applicable to pending arbitrations also. We hope this amendment will help in reduction of costs of arbitration.

### **2.3.1 Arbitration agreement: Section 7**

Sec.7 defines ‘arbitration agreement’ and is almost a verbatim reproduction of Art.7 of the Model Law except that a single paragraph in the Model Law is split up into different clauses. It has been suggested that the definition of ‘arbitration agreement’ in sec.5 of the English Act of 1996 is wider than sec. 7 of the Indian Act of 1996 and can be adopted under sub-section (4) of Section 7 of our Act because the term includes, under sub-section (4) of section 5 that “an agreement which is endorsed in writing if an agreement made otherwise than in writing is recorded by one of parties or by a third party, with the authority of the parties to the agreement.”

The Commission is of the view that it is not necessary to amend sec.7 of the Act by bringing into it the provision of sec.5(4) of the English Act, 1996 in as much it is likely to result in unnecessary litigation if the clause is to be based only on a record of one of the parties or of a third party.

It has been suggested that sec.5(2)(a) of the English Act says in brackets “whether or not it is signed by the parties” and those words should be introduced in section 7 of 1996 Act. Now sec.7(3) says that an arbitration agreement shall be in writing. Sec.7(4)(a) suggests that an arbitration agreement is in writing if it is contained in a document signed by the parties. In as much as sec.7(4)(a) does not use the word ‘only’, it does not appear that it is a mandatory requirement that the agreement must be signed. In fact, the Supreme Court has held under the 1940 Act in Jugal Kishore Rameshwardes vs. Mrs. Gorbji AIR 1955 SC, Banardas vs. Carve Commission AIR 1963 SC 1417 (1425) and Satish Chandra vs. State of UP

AIR 1983 SC 347: 1983(2)SCC 141 that a submission must no doubt be made in writing but need not be signed. All that is necessary is that there should be a formal written agreement and the parties should agree to submit present and future disputes to arbitration. This legal position was declared under sec.2(a) of the 1940 Act which used the words ‘written agreement’ and did not refer to any requirement of signature of the parties. In view of the law declared by the Supreme Court, and the specific language of section 7(4) it is considered not necessary to use the words “whether signed or not” as used in sec.5 of the English Act.

2.3.2 It has been suggested that “share brokers” use certain documents which contain an arbitration clause and these documents are received by other parties without demur, that is to say, accepting the clause by conduct. In the Bombay seminar, it was suggested that this contingency is to be provided for in section 7(4)(b). This suggestion is accepted. Hence certain other words are required to be added in sec. 7(4)(b).

It is, therefore, proposed to substitute following words for the words ‘an exchange of letters’ in section 7 (4) (b)

“any written communication by one party to another and accepted expressly or by implication by the other party, an exchange of letters.”

#### 2.4.1 Amendments to Section 8

‘Judicial authority’ in section 8 & proposed sec. 2(1)(fa) and new sub-section (3) to section 42:

Several suggestions have been made with regard to section 8. We will deal with these suggestions one after another. Whether the term ‘Judicial authority’ in sec. 8 includes quasi judicial statutory authorities.

Section 8 deals with a situation where an action is filed before a “judicial authority” and the opposite party relies on an arbitration clause, and in such a situation the Court ‘shall’ refer the matter to arbitration. The Supreme Court has held that by using the word ‘shall’ (in contrast to the word ‘may’ used in sec. 34 of the old Act of 1940), there is no discretion vested in the Judicial authority and the reference to arbitration is mandatory (See P. Anandagajapathi Raju vs. P.V.G. Raju (2000)(4) SCC 539: AIR 2000 SC 1886). It is not proposed to deviate from this principle. It is true

that the English Act still retains the discretionary part in sec. 86 of that Act so far as domestic arbitration is concerned but even in England, the said provision in section 86 has not been brought into force and it is, in fact, said that it is not likely to be brought in force.

A two judge Bench of the Supreme Court has held in M/s. Fair Air Engineers Private Ltd. vs. M.K. Modi (AIR 1997 SC 533) while dealing with the identical words 'judicial authority' used in the corresponding provision, sec.34 of the old Act of 1940, that the said words will cover Consumer Courts. It was held that the consumer fora are quasi judicial bodies falling within the meaning of the words 'judicial authority' and could refer disputes to arbitration, if the parties before the fora are parties to arbitration agreements. Though the case arose under the 1940 Act, specific reference was made in the judgment to the Ordinance of 1996 which preceded the present Act and to section 8 of the Ordinance, interpreting it as applicable to quasi-judicial authorities also.

2.4.2 In this context, we have also to refer to a latter three judge judgment of the Supreme Court in Skypack Couriers Ltd. vs. N.K. Modi (200(5) SCC 294), wherein the Court set aside an award made by a third party to whom the National Consumer Commission referred the dispute for final adjudication without any further scope for filing objections. In the order of the National Commission making the reference, it was stated that they were not invoking the provisions of the Arbitration Act but were referring the matter to a third party for consensual adjudication. The Supreme Court set aside the award and held that the Commission could not have adopted the above procedure of reference to a third party, for final decision without a right to file objections thereto. At the same time, the Supreme Court stated that it was not deciding whether the consumer courts could refer matters to arbitration under the Arbitration laws. We are referring to this case only to highlight that the earlier decision in M/s. Fair Air Engineers Ltd. vs. M.K. Modi was neither referred to nor overruled in the Skypack Courier case.

2.4.3 In the Consultation Paper (Annexure II), it was proposed that the words 'judicial authority' be dropped and the words 'Courts' substituted instead. This proposal was made keeping in view that the remedies that may be resorted to for questioning orders passed by different 'judicial authorities' may not be uniform. But in view of the subsequent discussion in various seminars, it was pointed out that it would be better if quasi judicial authorities before whom some actions are pending, are in a position to refer

matters to arbitrators, wherever reliance is placed upon an arbitration clause. The Commission is of the view that the words ‘judicial authority’ can be retained to enable easy reference to arbitration under section 8 itself by the judicial authority concerned, (as held in Fair Air Engineers case) before whom the matter may be pending rather than drive the party who is relying on the arbitration clause to a separate application under sec.11.

2.4.4 It is true that remedies against an order passed by different judicial bodies under sec.8 may normally be different. But because of sec. 5, remedy under sec.115 Code of Civil Procedure is barred and the remedy may be only under Art.227 of the Constitution of India. If it is an order passed by any quasi-judicial statutory authority, then because of sec. 5, the remedy under the special Act applicable to the tribunal is barred and remedy may be only under Art.227. Therefore, there is no scope for different remedies becoming available under different special statutes applicable to different quasi-judicial authorities. Thus the remedies are perhaps restricted to Art. 227. Therefore the word ‘judicial authority’ will remain and will, therefore, cover quasi-judicial tribunals also as per the law declared by the Supreme Court in Fair Air Engineers case. We have already referred to the proposal to add a definition of 'judicial authority' in section 2(1) as follows:

Section 2(1)(fa): ‘judicial authority’ includes any quasi-judicial statutory authority.

#### 2.4.5 **Whether certain preliminary issues at the stage of section 8 could be decided**

We then turn to another and more important aspect In Art. 8(1) of the Model Law, it is provided that the court before which an action is brought shall, if an arbitration agreement is pleaded, refer the parties to arbitration “unless it finds that the agreement is null and void, inoperative or incapable of being performed”. These words have been omitted in sec.8 of the 1996 Act. The result of the omission is that, in view of sec.5, the judicial authority cannot decide if the arbitration agreement is ‘null and void, inoperative or incapable of being performed’. In the Consultation Paper (Annexure-II), it was proposed that sec.8 is to be amended to bring it in conformity with Art.8(1) of the Model Law, so as to enable the judicial authority to decide these jurisdictional issues at the initial stage. It has been suggested at the Bombay seminar that the ‘judicial authority’ may be empowered, if need be, to decide these issues, in case they can be decided on

admitted facts or documents and without receiving oral evidence and if there is no likelihood of delay.

As far as deviation of the 1996 Act from the Model Law is concerned (as set out above), the only reason one can find is that any decision rejecting the plea that the agreement is ‘null and void, inoperative or incapable of being performed’ may be challenged and that this may lead to delay in the commencement of arbitration proceedings. But even otherwise, any order under Section 8 is amenable to Art. 227 of the Constitution of India. So this cannot be a good reason to exclude these words.

Now these words have been there in the corresponding provision under the New York Convention, 1958 and are retained in sec.45 of the 1996 Act. In other words these words are retained in Part II in sec. 45, however, they have been omitted in sec.8 of Part I.

This aspect was exhaustively considered by the UN Commission in its 1985 Report (Report of the United Nations Commission on International Trade Law on the work of its 18 Session, 21 August, 1985). In its para 91, the U.N. Commission referred to the fundamental principle that if the jurisdictional issues were first raised before court, “priority should be accorded to the court proceedings by recognizing power in the courts to stay the arbitral proceedings or, at least, by precluding the arbitral tribunal from rendering an award”. The UN Commission felt that the above words were to be retained in Art.8 and that the arbitral tribunal is to be permitted, to continue the proceedings (including the making of an award), while the issue of jurisdiction is before the Court.

The UN Commission in the said Report regarding deliberation of the Commission leading to the adoption of UNCITRAL Model in para 92 states:

“It was pointed out that expenses could be saved by awaiting the decision of the Court in those cases where the Court later ruled against the jurisdiction of the arbitral tribunal. However, it was for that reason not recommendable to provide for a postponement of the court’s ruling on the jurisdiction of the arbitral tribunal. Furthermore, where the arbitral tribunal had serious doubts as to its jurisdiction, it should either decide it under Art.16(2) as a preliminary issue or await the court’s decision.”

Thus the UN Commission considered this aspect in depth and retained the words “null and void, inoperative or incapable of being performed” in the Model Law.

The above words ‘null and void etc.’ which have been copied from the New York Convention, 1958 in to Art.8 of the Model Law are also found in the statutes of various countries which have adopted the Model Law (See for example, section 1032 of the German Act, 1998, Art. 9 of the Korean Act 1999, Art 8 of the Canadian Act 1986, Art. 8 of the Zimbabwe Act, 1996 and also sec.15 of the British Columbia Act 1996 which is supposed to have been kept in view when the 1996 Act was drafted, see Dr. P.C. Rao’s Commentary on the Act at p.9).

Section 9(4) of the English Act, 1996 also includes these words in the corresponding section and calls for a decision at that stage itself as done in the Model Law and other statutes which followed the Model Law.

Redfern and Hunter in **Law and Practice of International Commercial Arbitration** (1999) (see para 3.34) has cited an example to show why these words have to be retained. They explain as follows:

“Suppose, for example, that one of the parties claims that it was not a party to the main contract (“that’s not my signature”), and therefore not a party to the arbitration clause within that contract. If it is right, there can be no valid arbitration and no valid award. No amount of insistence upon the autonomy of the arbitration clause (i.e., Art.16) can make it valid if the respondent was not a party to it.”

Russell in **Russell on Arbitration** (21<sup>st</sup> Edn. 1997) (para 7.005) says: “if the arbitration agreement itself is challenged the Court will have to decide its validity before granting stay of the legal proceedings...The Court will however lean towards giving effect to the arbitration agreement if at all possible”.

Fouchard and others in **International Commercial Arbitration** (1999) have made an important distinction between similar cases which come under sec.8 and those which come under sec.16 of our Act, i.e., cases which start from the court and cases which are already before the arbitral tribunal to start with. The authors said that these issues can be left to be

decided by the arbitral tribunal in cases where reference is made by parties without court assistance but not if the matter starts from the court. They said (see para 680):

“If the dispute is already before the arbitral tribunal, i.e., under sec.16, the Courts have no jurisdiction, because of the risk of deliberate delay. On the other hand, the attitude of a plaintiff who brings its dispute directly before the Courts is less likely to be in bad faith. Since the dispute has not yet gone before the arbitral tribunal, the idea of avoiding duplication of effort resurfaces: the court will retain jurisdiction to rule on the merits of the dispute only if it considers the arbitration agreement to be patently void.”

The above reasons are, in the opinion of the Commission, very weighty and cannot be ignored. Russell says that these words also include by implication a situation where there is no arbitration agreement or where it is invalid or is one to which the applicant (opposite party) is not a party. (Russell on Arbitration Act, (1999) (See 7.013, 7.004, 7.007 and 7.006). It may also be a case where the plaintiff or petitioner before the judicial authority is not a party to the arbitration clause. According to the decisions of our Supreme Court, under sec.20 of the old Act this jurisdiction covers also cases where there is no dispute in existence. In all these situations, should the judicial authority fold its hands? In fact, even if the Court is not to decide at that stage and the arbitral tribunal alone is to first decide these issues, such a decision of the tribunal will anyway be subject to the decision of the Court ultimately. Can't time and money be saved by permitting these issues to be decided at this stage? Or can we make a flexible provision in order to prevent delay at this stage?

Under sec.34 of the Act of 1940, the Supreme Court held that before the Court allows an application for reference to arbitration, the Court could decide about the existence, validity of the arbitration clause or its binding nature on the plaintiff or whether the applicant was a party bound by the clause or if there was a dispute. (See UOI vs. Birla Cotton Spg & Wg. Mills, AIR 1997 SC 6; Anderson Wright Ltd. vs. Molan & Co., AIR 1955 SC 53; ITC Ltd. vs. George Joseph Fernandes AIR 1989 SC 839; Security & Finance (P) Ltd. vs. Gurcharan Singh, 1969 SC WR 877). But perhaps now, in view of sec. 5, unless the Court is empowered to decide these issues, it will have no jurisdiction under section 8 of the 1996 Act.

#### 2.4.6 Situations in which the preliminary issues are to be decided under sec.8:

It has been suggested at the Bombay seminar by retired Judges of the High Court that the position under sec. 8 and sec. 11 of the Act in this behalf should be similar. They proposed that a discretion may be conferred under sec. 8 and sec. 11 upon the Court to decide the jurisdictional issues if facts are all admitted and documents are not in dispute and if oral evidence is not to be adduced and there is no likelihood of undue delay. They had proposed a similar discretion to be vested in the judicial authority under sec. 8 to decide these jurisdictional issues on the same lines. In fact, the Model Law and the New York Convention give no choice to the judicial authority and it has to decide these jurisdictional issues at the initial stage.

The proposal that is being made by us will, therefore, be an improvement over what is contained in Art. 8 of the Model Law or the New York Convention 1958 inasmuch as we are not compelling the judicial authority to decide these issues at the initial stage but we are proposing to vest a discretion upon the judicial authority to decide these issues, only if the documents and facts are admitted and no oral evidence is required and if the inquiry is not likely to be delayed and if the judicial authority thinks that costs could be saved. This liberal procedure is also proposed to be introduced in sec. 11. Today arbitration costs are very heavy. Even if a simple issue is to be decided, the arbitral tribunal will have to list the case at least six times before even pleadings are completed. In cases where there are three arbitrators each adjournment can cost at least a lakh of rupees. To eliminate this expense, we propose to adopt the procedure as provided under Section 32 (2) of the English Act, 1996 that the court could decide these issues at the stage of Section 8 only, if facts and documents are not in dispute and if it is found that no oral evidence is necessary. We, therefore, propose not to include in sec. 8, the compulsive element for a decision on these jurisdictional issues, as in Art. 8 of the Model Law and we are providing a flexible provision which we also propose to provide in sec. 11. Our approach here is, therefore, better than under Art. 8 of the Model Law or under the New York Convention, 1958 and will have the advantage of cutting down arbitration costs substantially. These issues will be decided only if the relevant documents are not in dispute and oral evidence is not necessary and there has been no delay in raising the issues and the Court feels that arbitration costs can be saved.

Our recommendations in this behalf are made at the end of the discussion under section 8.

It is, therefore, proposed to bring sec.8 in conformity with the Model Law by adding the words ‘unless it finds that the agreement is null and void, inoperative or incapable of being performed’, or there is no agreement in existence or no dispute in existence at the end of sec.8(1), subject to the discretionary power to decide these issues or not as mentioned above and these proposals are contained in the proposed sub-sections (4) and (5) of section 8 as extracted below.

#### 2.4.7 Provision to be made for stay of action in case reference is made under sec.8:

A question was also posed in the seminars as to what should happen to the action that has been filed before the ‘judicial authority’ in the event of a reference to arbitration is made under section 8. The Commission is of the view that a separate sub-section should be added that in the event of a reference being made under section 8, the action before the judicial authority should remain stayed and the stay should be subject to the result of the order of the judicial authority on jurisdictional issues. For example, if the agreement is declared void or not in existence or not enforceable, the action filed before the judicial authority has to go on for disposal on merits.

#### 2.4.8 Section 8(3)

##### Whether parallel arbitrations under section 8 and section 11 are permitted by section 8 (3):

Sub-section (3) of section 8 states that notwithstanding that an application has been made under section (1) of that section and that the issues pending before the judicial authority, an arbitration may be commenced or continued or an arbitral award made.

There have been certain cases where even after the judicial authority has referred the matter to arbitration or has referred to refer the dispute to arbitrators, the arbitrators appointed by one of the parties earlier, are continuing to deal with the disputes.

It is proposed to rectify this problem by adding a provision below sub-section (3) of section 8 to the effect that the decision of the judicial authority shall be binding on the parties and that the arbitrators otherwise appointed have to cease to perform their functions. Primacy has to be given to the judicial authority's order, i.e., passed after hearing the parties, including the party who has already appointed an arbitral tribunal.

Of course, in case the judicial authority holds that there is no arbitration agreement or dispute that the agreement is null and void etc., the arbitration which has already commenced, has to terminate.

The above aspects are provided by way of a proviso to sec. 8(3).

(Proposed section 8 (6) is also extracted here but it is dealt with separately in para 2.7.1)

#### 2.4.9 The following amendments are proposed in sec. 8

In section 8 of the principal Act,-

(a) for sub-section (1), the following sub-sections shall be substituted, namely,-

“(1) Subject to the provisions of sub-sections (4) and (5), a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, unless it has to decide any questions referred to in sub-section (4) as preliminary issues under that sub-section, refer the parties to arbitration.

(1A) The judicial authority before which an action is brought shall stay the action before it for the purpose of deciding the questions set out in sub-section (4) and the stay so granted shall be subject to the outcome of the orders that may be passed under the said sub-section and sub-section (5).”

(b) in sub-section (3), the following proviso shall be inserted at the end, namely:-

“Provided that the arbitration proceeding so commenced shall stand terminated if the judicial authority, after hearing all the parties, passes an order under sub-section (4) to the effect, namely:-

(a) that a reference to arbitration cannot be made because of its decision on any question referred to in clauses (a) to (e) of that sub-section; or

(b) that though a reference to arbitration has to be made, the proceedings have to be conducted by a different arbitral tribunal.”

(c) after sub-section (3), the following sub-sections shall be inserted, namely:-

“(4) Where an application is made to the judicial authority by a party raising any question -

(a) that there is no dispute in existence;

(b) that the arbitration agreement or any clause thereof is

null and void or inoperative;

(c) that the arbitration agreement is incapable of being performed;

(d) that the arbitration agreement is not in existence ;

the judicial authority may, subject to the provisions of sub-section (5), decide the same.

(5) Where the judicial authority finds that the questions mentioned in sub-section (4) cannot be decided because,-

- (a) the relevant facts or documents are in dispute; or
- (b) oral evidence is necessary to be adduced; or
- (c) the inquiry into these questions is likely to delay reference to arbitration; or
- (d) the request for deciding the question was unduly delayed; or
- (e) the decision on the question is not likely to produce substantial savings in costs of arbitration; or
- (f) there is no good reason why these questions should be decided at that stage,

it shall refuse to decide the said questions and shall refer the said questions also to the arbitral tribunal for decision.

(6) If the Judicial authority holds that though the arbitration agreement is in existence but it is null and void or inoperative or incapable of being performed and refuses to stay the legal proceedings, any provision in the arbitration agreement that the award is a condition precedent for the initiation of legal proceedings in respect of any matter, will be of no effect in relation to the proceedings.”

#### 2.4.10 Proposed section 8(6): Scott vs. Avery clause

A Scott vs. Avery clause is one which requires an award to be first obtained as a condition for starting any legal proceedings. Such a clause is intended to see that parties do not bypass arbitration clauses and go to a Court of law so as to compel the opposite party to raise a plea based on the existence of an arbitration clause. Both in England and in India, such clauses have been upheld.

However, there was a provision in sec. 19 of the 1940 Act for supersession of the arbitration agreement by the Court in certain situations.

The old Act therefore had to deal with a situation where the arbitration clause was superseded by the Court, for, in that event, a party would not be in a position to obtain an award and then the condition of first obtaining an award would be a condition impossible of being complied with. Hence sec. 36 of the old Act provided that in case the arbitration agreement is superseded, the Court should also supersede the Scott vs. Avery clause. A further provision was made in the old Act in sec. 37(2) that so far as the period of limitation is concerned, once the arbitration clause and the Scott vs. Avery clauses are not applicable, the period has to be reckoned from the date of the cause of action as done normally. Thus sec. 37(2) was consequential to sec. 36 which was in itself consequential to an order of supersession of the arbitration clause under sec. 19 of the old Act.

The 1996 Act makes a deviation and there is no provision corresponding to sec. 19 of the old Act for superseding an arbitration clause. Hence, the legislature rightly dropped a provision corresponding to sec. 36 and sec. 37(2). This is understandable.

But then, we have to refer to another similar situation that can arise as per the proposals made by us for amending sec. 8 of the principal Act of 1996 enabling the 'judicial authority' to decide (i) whether an arbitration agreement is null and void, (ii) inoperative or (iii) not capable of enforcement (iv) whether there is a dispute in existence or (v) whether there is an arbitration clause in existence. Of these contingencies, if under (i), (ii) and (iii), it is held by the judicial authority that the agreement which is in existence is null and void or inoperative or incapable of enforcement, then, the arbitration agreement cannot be of any help and it is not possible to obtain an award initially, as required by the Scott vs. Avery clause. In that event, a provision has to be made that the 'judicial authority' under sec. 8 will refuse to stay the legal proceeding and will decide it on merits. In other words, in as much as it is not possible in contingencies (i), (ii) and (iii) to pass an award though the arbitration clause is in existence, it is necessary to have a provision that the Scott vs. Avery clause requiring an award to be obtained as a condition precedent is not applicable. Therefore, a provision nullifying the Scott vs. Avery clause in situations covered by contingencies (i), (ii) and (iii) above referred to, has to be made as under the English Act, 1996.

The English Act, 1996 contains a provision similar to the proposed sec. 8 and enables the Court to decide whether an arbitration agreement is

null and void or inoperative or incapable of enforcement. If these pleas are accepted, the Court will refuse stay of the legal proceeding and decide the said proceeding on merits. The English Act, 1996, therefore, made a special provision in sec. 9(5) that in case the arbitration agreement goes out of operation on any of these grounds, the Scott vs. Avery clause does not apply. Sec. 9(5) of the English Act, 1996 states as follows:

“Section 9(5): If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to the proceedings.”

Therefore, in view of the proposal to amend sec. 8 conferring power on the judicial authority to decide issues (i), (ii) and (iii), referred to above, a provision similar to sec. 9(5) of the English Act, 1996 becomes necessary, stating that if the judicial authority decides that the agreement is null and void, inoperative or unenforceable, then it will proceed to decide the legal proceeding on merits and refuse stay and that there is no need to obtain an award as a condition precedent. Accordingly, it is proposed to have such a provision by inserting sub-section (6) in sec. 8 as already mentioned in preceding para 2.4.9.

**2.4.11 Necessity for a separate provision in sec. 42 as to the forum where subsequent applications including those under section 34 to set aside the award are to be filed in cases arising under section 8 – proposed section 42 (3):**

Here we are filling up an omission in sec. 42 of the 1996 Act in as much as it was not noticed that the action could be filed in Courts subordinate to the Principal District Court. The question is as to what is to be done in the event of the application being allowed and an award being passed by the arbitral tribunal and as to where the objections or subsequent applications are to be filed. This aspect will again be dealt with in discussion under Section 42.

Under the old Act of 1940, in view of the very general definition of ‘Court’ in section 2 (e), objections to the award could be filed under sec.39 of that Act in the same court in which the legal proceeding was stayed and which made the reference to arbitration. Here Section 2 (1) (e) defines court differently. What is to happen if the action under sec. 8 is filed before a

Judicial authority which is a Court subordinate to the principal District Court.

Firstly, one would think prima facie that under the 1996 Act, objections to the award could be filed before the same ‘judicial authority’ i.e., the subordinate Court which made the reference. But Section 42 refers only to a ‘court’ as defined in Section 2 (1) (e). Secondly, In view of the enlarged meaning proposed to be given to the words ‘judicial authority’, as including quasi-Judicial statutory authorities, it is not possible to direct objections to the award to be filed before “judicial authorities” which are not courts in the strict sense and which are only quasi judicial statutory authorities. At the same time it is necessary to see that applications for setting aside awards are filed uniformly in one court (This will be so except under the proposed section 8A to same extent). We proposed to resolve these two issues arising under sec. 42 in the context of sec. 8.

Section 42 requires that if an application has been filed in a court, then all subsequent applications under the Act are to be filed in the same Court. In the case of section 8 which relates to reference by a ‘judicial authority’ having original jurisdiction, if the judicial authority is the Principal District Court or the Court of the Principal Judge, City Civil Court or the High Court in its original jurisdiction, sec. 42 can apply in all its terms. The action under sec. 8 can also be one before a court inferior status to the above principal court. In such a situation, we propose that the subsequent applications should be filed in the Principal Court of the District or City, as the case may be, as aforesaid and not in the inferior Court. Similarly, if the initial action is before a quasi-judicial authority like the District Consumer Forum or the State Commission or the National Commission – all of which have also original jurisdiction – and where the said authorities refer matters to arbitration, all subsequent applications should be filed not before those tribunals which might have made the references to arbitration but the applications have to be filed in the Court as defined in Section 2 (1) (e). To this effect, we are rectifying an omission in sec. 42 and we are clarifying the position by adding a sub-section in Section 42, viz., Section 42 (3).

In view of what we have stated already under sec.5, there is no question of such orders on the jurisdictional issues passed on the application referred to in sec.8 being challenged under sec.115, Code of Civil Procedure Code, 1908 or Letters Patent or High Court Acts or under any remedy

provided by the special law applicable to the judicial authority. All these remedies are clearly excluded. Of course, in cases where the 'judicial authority' is subordinate to the High Court, an application may perhaps be filed under Art. 227 of the Constitution of India. The Report of the UN Commission (see paras 62, 63 extracted earlier) accepts the availability of a constitutional remedy. After all Art.227 is also discretionary.

So far as future applications under sec. 34(1) or other applications in matters where reference to arbitration is made under sec. 8, see the discussion under sec. 42, in para 2.30.1 and the relevant sub section (3) of section 42 in para 2.30.3 and 2.30.6.

#### 2.5.1 Proposed section 8A: Separate provision for reference where, pending proceedings in courts of law, the parties agree to have the disputes referred to arbitration and corresponding amendments in Section 42(4)

Under section 21 of the Act of 1940 there was a specific provision enabling a court to refer disputes to arbitration, pending suits or proceedings, if parties so agreed. In fact in several cases the trial courts or after long years of litigation, the High Court and the Supreme Court have been referring matters to arbitration because of subsequent agreement of parties with a view to shorten litigation. The absence of such a provision in the Act of 1996 has given rise to serious difficulties. As it is, sections 8, 11 and 16 apply only in cases where there is already an 'arbitration agreement' between parties well before the parties have gone to Court. We are now considering a case where after parties go to court, they agree to resolve disputes by arbitration.

The UNCITRAL model, no doubt, does not expressly provide for a contingency where at any stage during the pendency of legal proceedings before a court of law, parties agree to go for arbitration. Sometimes, it happens that after fighting litigation from the trial court upwards, the parties decide at the stage of an appeal in the High Court or the Supreme Court to go for arbitration. The British Columbia Act, 1996 (which is said to have been followed while drafting the 1996 Act, (see Dr. P.C. Rao, The Arbitration and Conciliation Act, A commentary 1997 edn., page 9), does contain in section 36 a provision similar to section 21 of the 1940 Act which reads as follows:-

"Section 36: Reference by Court Order

(1) The Court may order at any time that the whole matter, a question of fact arising in a proceeding, other than a criminal proceeding, be tried before an arbitrator agreed by parties if -

- (a) all the parties intended, and not under disability, consent;
- (b) the proceeding requires a prolonged examination of documents or a scientific or local investigation before a jury or conducted by the Court through its other ordinary officers, or
- (c) the question in dispute consists wholly or partly matters of account".

Though there is no corresponding provision in the 1996 Act to cover such a case, the Supreme Court implied such a power in sec.11. A separate provision is now proposed to be made to deal with agreements for arbitration entered into after the filing of suits before courts. Of course, this is different from what is proposed in sec.89 of the Code of Civil Procedure as stated earlier. (That section has not yet come into force). That section would permit the Court, if it appears to the Court that there exist elements of settlement, to refer parties to arbitration, conciliation or to Lok Adalat or to mediator. Section 89 does not depend upon consent of parties.

There are two cases of the Supreme Court on this point. The Supreme Court had occasion to deal with a civil proceeding which came up from the High Court in appeal from a suit in P. Anandagjapathi Raju vs. P.V.G. Raju (2000(4) SCC 539 = AIR 2000 SC 1886). In Tamil Nadu Electricity Board vs. Sumathy 2000 (4) (SCC 543 = AIR 2000 SC 1603) the High Court had appointed an arbitrator in a writ petition where damages were claimed against the Tami Nadu Electricity Board on account of death by electrocution. Reference to arbitration was made by the court after the 1996 Act and award was passed which became a decree. It was sought to be attacked in appeal to the Supreme Court. The Board contended that the High Court could not have appointed an arbitrator by relying upon Articles 21 and 226 of the Constitution. This contention was rejected following the judgment in P. Anandgajapthy Raju's case. The Supreme Court held that Section 8 of the Act applied not only to arbitration agreements entered into before the commencement of the suit or other proceeding but also those entered into pending suit or other proceedings.

To the above extent the problem was solved. But the Supreme Court still held that under section 2(1)(e) of the 1996 Act, the award decree could be questioned only before the Court in which a suit for the relief could have been filed. The result was that litigation would start again, in the 'Court' as defined in Sec. 2(1)(e) and then move up to the High Court and Supreme Court.

It has been pointed out during the discussion on the Consultation Paper (Annexure-II) that sec. 42 of the 1996 Act requires that further proceedings need be taken in the same court and that the Supreme Court in the case of Sri P.Anandagujapathi Raju (supra) did not notice this provision when it directed the award to be filed in the principal District Court as defined in sec.2(1)(e).

Without going into the controversy, it is decided to have a separate section enabling reference to arbitration in pending legal proceedings, i.e., suits or appeals or writ petitions by any court if parties so agree and file an application for reference to arbitration. Application to set aside the award has to be filed before the same court which made the reference except in the case of courts co-equal, or inferior in rank to the principal civil court in the district or the court of the Principal Judge City Civil Court, in the city. In such cases the subsequent applications including applications to set aside the award, will be made to the aforesaid Principal courts. These aspects will be covered by proposed section 8A and proposed amendments to section 42 (see proposed section 42 (4) and Explanations proposed thereto).

In fact, in the 76<sup>th</sup> Report of the Law Commission, this aspect was dealt with in the context of making amendments to section 21 of the 1940 Act (see paras 7.1 to 7.3). The Commission suggested that the word "suit" in section 71 should be enlarged as "suit or appeal". But now, in the light of the decision of the Supreme Court in Tamil Nadu Electricity Board's case, it is felt that there should be a new provision like section 21 of the old Act, covering not only suits or appeals but also other legal proceedings in Courts, in which parties agree to go for arbitration. We are not prepared to extend this benefit to proceedings before quasi-judicial authorities as in section 8. There, the use of the words "judicial authority" in the principal act 1996 together with the law decided by the Supreme Court in Fair Air Engineers case (AIR 1997 SC 533), permitted quasi-judicial tribunals also to come within section 8. But, when we are proposing a new provision thereby, we propose to restrict the new provision only for legal proceedings in a court at

any stage of the proceedings. The proposed section will be section 8A. It is also proposed to add an ‘Explanation’ below section 8A to clarify the meaning of the word “legal proceedings” which will include not only suits, appeals or other civil proceedings at any stage but also proceedings in writ jurisdiction involving civil rights.

2.5.2 Hence a new **section 8A** is proposed to be added as follows:

**“8A Parties in pending legal proceedings may agree to seek arbitration**

Where at any stage of a legal proceeding in the Supreme Court or the High Court or in the principal Civil Court of original jurisdiction in a district or in the court of the principal judge of the City Civil Court of original jurisdiction in a city or any Court of coordinate jurisdiction or inferior in grade to such Principal courts, as the case may be, all the parties enter into an arbitration agreement to resolve their disputes, then the Court in which the said legal proceeding is pending shall, on an application made by any party to the arbitration agreement, refer the disputes in relation to the subject matter of the legal proceeding to arbitration.

Explanation: For the purposes of this section, “legal proceeding” means any proceeding involving civil rights of parties pending in the courts mentioned in this section, whether at the stage of institution or at the stage of appeal or revision and includes proceedings involving civil rights instituted in the High Courts under article 226 and 227 of the Constitution of India or on further appeal, if any, to the Supreme Court.”

2.5.3 In view of the proposed section 8A, a special provision is proposed to be made in Section 42 (4) and two exceptions, as discussed later. (see para 2.30.4 and 2.30.6).

2.6.1 **Grant of interim measures etc by court: Section 9 restructured into sub-sections (1) to (3) and sub-section (4), (5) and (6) added.**

Section 9 is not proposed to be altered but is only proposed to be restructured and clauses (4), (5) and (6) are being proposed to be added to prevent abuse of Section 9.

The existing section 9 of the Act 1996 reads as follows:-

**“9 Interim measures etc. by court -**

(1) 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 -

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) 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;

(d) interim injunction or the appointment of a receiver.

(e) for such other interim measure 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.”

Section 9 of the 1996 Act deals with the power of the Court to grant interim measures before commencement of, or pending, or after conclusion of, the arbitration proceedings. This section has been adverted to in detail while dealing with sec. 2(2) and making it applicable to international arbitrations where the place of arbitration is outside India or where the place of arbitration is not specified in the arbitration agreement. Now we shall deal with certain other aspects relating to section 9.

So far as the 'Court' which can grant interim measures is concerned, it will be the 'Court' which falls under proposed sec. 2(1)(e), i.e., Principal civil court of original jurisdiction in a district or Court of Principal Judge Civil Court in a city or the High Court exercising original jurisdiction.

There have been suggestions that the scope and width of sec. 9 of the Act have to be brought at par with the provisions of sec. 44 of the English Act. But it is felt that in view of the omnibus provision in section 9(e) "such other interim measures of protection as may appear to be just and convenient:", there is no need to amend sec. 9 in this behalf but its restructuring is required.

A reading of section 9 as it stands shows that the wider power of the court is placed at the end and the limited powers are set out at the beginning of the section. This is rather misleading and is to be rectified. Section 9 shows that the "interim measures" contemplated by the section are enumerated in clauses (i) and (ii). Clause (ii) has sub-clauses (a) to (e). Clause (ii) refers to "protection" and appears to govern sub-clauses (a) to (e) thereof but gives an impression that interim measures in sub-clauses (a) to (e) are restricted to "protection", i.e., protection of the subject matter of dispute in arbitration. However, it appears that the Act has intended that at the stage before commencement of arbitration or during arbitration or after the award and before the enforcement of the award under order 21 CPC, it may be necessary for the parties to obtain orders in respect of other property of the opposite party, such as attachment or by way of temporary or interim mandatory injunction. In fact, the Supreme Court of India in Sundaram Finance Ltd. v. NEPC India Ltd. (1999 (2) SCC 479 = AIR 1999 SC 565) has accepted that section 9 can be invoked before any application for reference is filed under section 11 (unlike under the 1940 Act) and made reference to Russel on Arbitration (21<sup>st</sup> Edn.) (1999) to the effect that under sec. 9, the Court can even grant a Mareva injunction or interim mandatory injunction. We may point out further that the various items of interim

measures enumerated appear to have been drawn from sec. 41 and Schedule II of the 1940 Act. Section 41 enabled exercise of wide powers by the Court before commencement of arbitration.

In the view of the Commission, and as pointed out by the Supreme Court, the present Act does not show any intention to exclude the wide powers which were there under the 1940 Act. The clue in this behalf is given by the last part of sec. 9 which says-

“and the court shall have the same powers for making orders as it has for the purposes of, and in relation to, any proceedings before it.”

These words are drawn from sec. 41 of the old Act. The words ‘same powers’ in this part of sec. 9, in the view of the Commission, are neither referable nor controlled by the enumerated measures in sub-clauses (a) to (e) of sec. 9 and, in fact, they clarify that the Court under sec. 9 shall have all the powers of the Court which it exercises in respect of “any proceeding before it”, i.e., all the power of a Civil Court.

It is thus clear that the place in which the above clause is found is likely to create an impression that the words ‘same powers’ are referable to the enumerated categories (a) to (e) in clause (ii) of sec. 9. The flaw in the framework of sec. 9 appears to be that the limited enumerated powers are referred to at the outset and the broad and wider powers are relegated to the end of the section. The Commission is of the view that this has to be rectified by bringing the last para of sec. 9 to the forefront as sub section (2) and the enumerated powers are to be placed lower down in the section under sub section (3).

2.6.2 Existing sec. 9 is proposed to be recast as follows:

**Interim measures etc. by court**

“9. (1) 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 interim measures.

(2) The Court shall have the same powers for making orders under sub-section (1) as it has for the purpose of, and in relation to, any proceedings before it.

(3) In particular and without prejudice to sub-section (2), a party may apply to the court for any of the following, namely:-

(a) appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings;

(b) interim measure of protection in respect of any of the following matters, namely:-

(i) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(ii) securing the amount in dispute in the arbitration;

(iii) 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;

(iv) interim injunction or the appointment of a receiver.

(c) other interim measure of protection as may appear to the court to be just and convenient.

2.6.3 One other aspect under sec. 9 is of some procedural importance. In case interim orders are issued before the commencement of proceedings, can they be allowed to continue for ever even if the party who has obtained an order in his favour does not within reasonable time takes steps to have an arbitrator appointed under sec. 11?

To obviate any such situation, it is decided to introduce a provision in sec. 9 requiring the Court to prescribe a specific period to file the application under sec. 9 to take steps as envisaged under sec. 11 for appointment of an arbitrator, and with a further condition that the Court must also prescribe that if such steps are not taken within the prescribed time, the interim directions granted shall stand vacated unless the prescribed time is extended. It is proposed to confer a power on the Court to order restitution, if need be.

Therefore, sub-sections (4), (5) and (6) are proposed to be inserted after the proposed sub-sections (1), (2) and (3) of section 9 as follows:

“(4) Where a party makes an application under subsection(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 the said order.

(5)The court may direct that if such steps are not taken within the period of thirty days specified under sub-section (4), the interim measure granted under sub-sections (2) and (3), 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.

(6) Where an order granting an interim measure stands vacated under sub-section (5), the court may pass such further orders as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section.”

A suggestion was made that at the stage of section 11, the court, i.e., section 2 (1) (e), court should itself be able to appoint arbitrators. It is pointed out that there is no need to drive the parties to the High Court or the Supreme Court under section 11. They have to incur **extra expense** and even travel upto the seat of the High Court for purpose of appointment under section 11, in case there is no agreement in the appointment.

The Commission does feel that this is a very legitimate point but feel that it is not possible now to alter the scheme of the 1996 Act that in the case of disagreement, parties have to approach the Chief Justice of the High Court or the Chief Justice of India, as the case may be, for appointment under section 11. Therefore, we are not able to make any provision in section 11 for reference by the court as defined in section 2 (1) (e).

A suggestion has been made that even at the stage of sec. 9 proceedings, the Court must be enabled to first decide jurisdictional issues if raised. It has been held in Alpic Finance Ltd. vs. Allied Resins & Chemicals Ltd. 2000 C.L.C. 293 (Cal) that the existence of an arbitration agreement is necessary for application of sec. 9 though not the existence of a dispute. In the opinion of the Commission, it is not necessary for the Court to decide jurisdictional issues as preliminary issues before granting interim measures under sec. 9. After all, the grant of interim measures is discretionary, and while exercising the discretion, the Court is supposed to take into account various factors including the existence of a prima facie case on jurisdictional issues. Hence no provision need be made in this behalf.

**2.7.1 Proposed Section 10A, Section 11 (5A) and Section 13: Disqualification of an employee of one party or of a person having business connection to be an arbitrator:**

During the debate under sec.13, this was one aspect upon which strong and divergent views were expressed by several participants. It was pointed out that in the case of contracts with Government and public sector undertakings or statutory corporations, it has been customary all along to incorporate a clause in the contract that the arbitrator will always be an employee of the Government or of the Public Sector undertaking or statutory corporation, as the case may be. In fact, in some contracts it is said that if it is not a departments' employee, there will be no arbitration! It is pointed out that this method of appointing an employee as an arbitrator has to be done away with in view of sec.18 of the Act which speaks of "equal treatment" of parties. Section 18 reads as follows:

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"Section 18: Equal treatment of parties: The party shall be treated with equality and each party shall be given a full opportunity to present his case".

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The first part of the section speaks generally about equality and is independent of the second part which refers to equal opportunity during the course of arbitration.

It is true that under the law declared by the Supreme Court under the 1940 Act, if parties had with open eyes agreed that the employees of one them is to be an arbitrator then it was not permissible for the parties to challenge the arbitrator on the ground of lack of independence. (see Secretary vs. Muniswamy: 1988 Suppl SCC 651 and Nandyal Corporation Spinning Mills vs. K.V. Mohan: (1993(2)SCC 654). That was also the earlier English law.

But it is pointed out that in sec. 24 of the UK Act, 1950 there was a power granted to the Court to grant relief where it was felt that the arbitration is not or may not be impartial. Sec. 24(1) is as follows:

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“Sec. 24(1): Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality”.

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The ICC Rules require prospective arbitrator to disclose:

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“whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind and whether the nature of such relationship is such that disclosure is called for pursuant to....criteria ... (of such a nature as to call into question the arbitrator’s independence in the eyes of the parties.”

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Some statutes refer only to impartiality such as the 1996 UK Act while the Model Law in Art.12(2) refers to impartiality and independence. Section 12(1) of the Indian Act also refers to both of them.

Fouchard and others (see para 1028) point out that ‘impartiality’ is a state of mind while ‘independence is a situation of fact or law. Bias might, in some cases be a factor which affects an independent decision. To some extent they overlap each other.

Sec. 8 of the Swedish Arbitration Act refers to three aspects of ‘impartiality’:

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- (a) or otherwise may expect significant benefit or detriment, as a result of the outcome of the dispute.
- (b) Where the arbitrator is a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect significant benefit or detriment as a result of the outcome of the dispute.
- (c) where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has associated a party in the preparation or conduct of his case in the dispute.

French courts describe independence as follows: (see Fouchard and others, para 1029):

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“The independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a Judge, which excludes any relation of dependence, particularly with the parties. Further, the circumstances relied on to challenge that independence must constitute, 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.”

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In para 1030, the authors refer to case of an employee or paid consultant or a person who is paid for advice or technical assistance, cannot be treated as an independent arbitrator. They say that, in the

following situations, the arbitrators have not been held independent in several cases.

- (1) where, at the same time as the arbitral proceedings, an arbitrator was personally paid to provide advice or technical assistance to one of the parties to the arbitration.
  - (2) Where, at the time of signature of a submission agreement in which he was appointed as a replacement arbitrator, an arbitrator was acting as a paid consultant to a company of the same group as that of the parties to arbitration.
  - (3) Where the arbitrator was employed by a party on the day after he had made his award.
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The principle is based on a party's 'reasonable doubt' as to the arbitrator's independence or impartiality. The Model law uses the word 'justifiable doubts' (clauses (ii) of Art. 12). It is the justifiable doubt of the 'reasonable man'.

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In the Consultation Paper (Annexure II), it was suggested that so far as Government or Public Sector Undertakings or statutory Corporations are concerned, such provisions be not disturbed and that so far private parties are concerned, they should not be allowed to have their employees or consultants or persons having business connections with them as arbitrators. This distinction was based upon the fact that in private employment, the threat of some action by the employer looms larger than in the case of public servants.

Some of those who intervened in the debate on behalf of Government or Public Sector stated that such clauses must be allowed to continue. It was pointed out that in some organizations, the contractors stood to gain, as disclosed from statistics. It has also been alternatively suggested that officers from some other department of Government or the Public Sector organization can be allowed to be appointed as arbitrators. One objection to this latter alternative was that the reason for appointing those in the same department was to take advantage of their experience in that department. In the debate, there was, of course, consensus that in regard to private parties such clauses should not be allowed to operate.

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The Commission felt that so far as private parties are concerned they have greater control over their employees or consultants. In the public sector there are ample safeguards under the service rules and actions are also subject to judicial review by the High Court. A distinction between private parties and public sector is permissible. The Commission also felt that the provision making such clauses void should not apply to international arbitration where seat of arbitration is in India.

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After giving our earnest consideration to this question, we are of the view that so far as private parties are concerned, such clauses enabling employees or consultants or those having business connections to be arbitrators must be prohibited and any such clause in contracts between such parties must be treated as not enforceable except in the case of international arbitration in India.

It was no doubt suggested that Dutch law is more explicit and it permits a party to seek a court order, departing from an arbitration agreement which “gives one of the parties a privileged position with regard to the appointment of the arbitrators (see Art. 1028 of the Netherlands Code of Civil Procedure). Similarly, it was said that the German Arbitration Statute, which differs on this issue from the UNCITRAL Model Law, has adopted an equitable rule. Art.1034, para 2 of the ZPO states as follows:

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“If the arbitration agreement grant preponderant rights to one party with regard to the composition of the arbitral tribunal which places the other party at a disadvantage, the other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure. The request must be submitted at the latest within two weeks of the party becoming aware of the constitution of the arbitral tribunal. Section 1032 sub section 3 applies mutatis mutandis.”

(See 1998 Rev Arb. 291 and also 15. J of Int’nl Arb., 85(1998), 1. Int’nl Arb L.Rev 121 (1998) in this part, (see also Fauchard, 1999, no.464, 465).

Reference was made to Fouchard (see para 787) that even in the absence of specific provisions in the statute, such a clause giving special

rights to one party could be treated as opposed to due process or ‘public policy’ of the country where enforcement of such awards is sought. Number of cases have been cited in support. A principle of procedural public policy of a fair trial is applied, drawing the spirit from international conventions like Art.6 of the European Convention which refers to the fundamental right to a fair trial. Though the Convention applies only to courts, the spirit of it is kept in view by the courts while dealing with attacks against awards. No doubt, the ICCPR to which India is a party, also contains a similar principle of fairness to be adopted by courts.

At one stage, it was felt that the provision as in the German Law could be adopted. But, if a person is permitted to object to an employee etc. of the Government or public sector, etc., to be an arbitrator, then it was felt that in every case, objections are likely to be raised by filing application in Courts and there is every likelihood of most arbitrations involving such clauses in respect of these public bodies, being stayed by the Courts. So the Commission considered the question whether such clauses are to be treated as unenforceable even where the Government, or Public Sector Undertakings or statutory corporations, have included a clause in the agreements so as to have their own employees or consultants etc. as sole arbitrators. It was felt that the above bodies require some special treatment as already stated above, and that they cannot be placed in the same position as private parties. Private parties have greater control over their employees or consultants etc. In the case of Government and other bodies referred to above which come within the scope of Art. 12 of the Constitution, there are statutory rules under Art. 309 or other statutory regulations, which give protection to the employees. The right to take action against such employees etc. is also subject to judicial review. Hence it was felt that in the case of these bodies, such clauses need not be treated as unenforceable. Therefore, it has been decided that such clauses in the case of Government, Public Sector Undertakings or statutory corporations should not be made unenforceable. In any event, the existing provision of challenge under sec. 13 is always there and the aggrieved party can always avail of the same. But the order of the arbitral tribunal rejecting a plea of bias can be challenged only after the award is passed in cases of employees, etc. of Government and other bodies.

In the result, section 13 is not amended but a new section 10A is proposed to be added as stated below.

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2.7.2 After section 10 of the principal Act, the following section shall be inserted, namely:-

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“ **10A.** (1) Subject to the provisions of sub-section (2), where any arbitration agreement contains a clause enabling one of such parties to appoint his or its own employee or consultant or advisor or other person having business relationship with him or it, as an arbitrator, such a clause shall be void to that extent.

(2) The provisions of sub-section (1) shall not-

(a) apply to an agreement in international arbitration (whether commercial or not).

(b) render any clause, in an arbitration agreement which enables the Central or a State Government or a Public Sector Undertaking or a statutory body or statutory corporation or other public authority, as the case may be, to appoint its own employee or consultant or advisor or any other person having business relationship, as an arbitrator, void;”

2.7.3 In the context of proposed section 10A, consequent changes have been made in section 11 by the proposed sub-section (5A) in section 11.

2.8.1 **Appointment of arbitrators – Various issues under section 11:**

During discussions in the seminar, several issues were raised under section 11, i.e., whether the applications under section 11 are to be made to the 'Chief Justice of India' or to the 'Supreme Court' in the case of international arbitration; whether the applications under section 11 are to be made to the 'Chief Justice of the 'High Court' or the High Court' in case of purely domestic arbitration; in other words, should the appointment of arbitrators be made on, the administrative side or the judicial side? Whether there will be less scope for court intervention if the orders under section 11

are to be 'administrative'; these functionaries are acting as “persona designata”; or they can be deemed to be acting as persona designata so that even article 226 will not be available; will the stages of court intervention be less if the orders are to be made on the 'judicial side'? In case the orders under section 11 are to be on the judicial side, whether it will save time and costs of arbitration. Therefore, whether jurisdictional issues, if raised, should be decided by the Supreme Court or the High Court on the judicial side in the section 11 applications or there should be a discretion to refuse to deal with them. Whether there is any possibility of having a flexible provision in section 11 which will enable the Supreme Court or the High Court to decide jurisdictional issues only if they can decide, without undue delay, where the relevant documents are admitted and no oral evidence is necessary. Should the same flexible procedure as in the case of similar issues in action under section 8 not be inserted in section 11?

Another issue raised is with regard to the time schedules prescribed in sections 11(4) and (5). Should they be construed as mandatory? Whether time limits should be fixed under section 11(6) also?

These are the various issues that have been raised before us under section 11.

### **2.8.2 Orders under section 11: Whether administrative in nature:**

The question whether orders under Sec. 11 of the Act passed by the Chief Justice of India or of the Chief Justice of the High Courts or their nominees are administrative or not has come up before the Supreme Court in the Konkan Railway case no. 1 (AIR 2000, SCW 2960 = 2000 (7) SCC 201). The three Judge Bench held that the orders are administrative in nature.

In the Konkan Railway case No. II AIR 2000 SCW 3908 2000 (8) SCC 159, the question whether preliminary issues can be decided at the stage of Sec. 11 was referred for decision to a larger Bench. When that case came before a Constitution Bench (2001(4) SCALE 225), the five Judge Bench recorded the contentions of counsel on both sides that orders under Sec. 11 are administrative in nature. The court, however, issued notice to the learned Attorney General on the question whether preliminary issues raised by the parties could be decided at that stage on the administrative side.

Therefore, the position of law now is clear that orders passed by the Chief Justice of India or his nominee or of the Chief Justice of the High Court or his nominee under section 11 are administrative orders.

### **2.8.3 Preliminary or jurisdictional issues raised at sec. 11 stage – whether can be decided by an administrative authority.**

The question whether, at the stage of Sec. 11, if parties raise preliminary issues – such as (i) there is no dispute in existence because the contractor has given in writing that he has no claim, or (ii) the dispute relates to an excepted matter, or (iii) only departmental arbitrator should be appointed, or (iv) there is no arbitration agreement in existence, or (v) the arbitration agreement is null and void, or not valid or capable of enforcement. Whether they can be decided? This question is now before the Constitution Bench.

We may, however, point out in this connection that under the ICC Rules, 1998, the ICC Court appoints the arbitrators and the decision of the arbitrators appointed by it is to be submitted to the ICC Court for scrutiny. The ICC Court is a private body to which parties frequently resort for international arbitration. It is not a court of law established under any statute by any State. It is an institution which facilitates arbitration. Under Art. 6 (2), the ICC Court does go into the preliminary issues and if it is held that there is no arbitration or agreement under the ICC Rules of arbitration, it can refuse to appoint arbitrators. We may refer to Articles 6 (2) of the ICC Rules. It reads as follows:

“Art.6(2): If the Respondent does not file an answer as provided by Art. 5, or if any party raises one or more pleas concerning the existence, validity or scope of arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules of Arbitration of the ICC may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any Court having jurisdiction whether or not there is a binding arbitration agreement.”

Similarly, Redfern and Hunter in their book on arbitration (para 5.34) opined on the same point as follows:

“When any question is raised as to the jurisdiction of the arbitral tribunal a two stage procedure is followed. At the first stage, if one of the parties raises “one or more pleas concerning the existence, validity or scope of the agreement to arbitrate”, the ICC’s Court must satisfy itself of the prima facie existence of such an agreement (ICC Arb. Rules 6(2)). If it is satisfied that such an agreement exists, the ICC’s Court must allow the arbitration to proceed so that, at the second stage, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.”

Fouchard and others (1994) had also referred the same point in their book (para 854) as follows:

“Midway between those two views, a third interpretation is that in international arbitration, the Court should only verify that the clause is not patently void, as it would be unreasonable to require it to appoint an arbitrator where there is no indication that an arbitration clause exists. The Court should not be seen to automatically appoint arbitrators in cases where the arbitration clearly has no contractual basis and the award has no chance of being recognized in any jurisdiction.”

It is, therefore, clear that the ICC Rules and the opinion of jurists support the view that at the stage of Sec. 11, it is permissible to decide preliminary issues. There are considerable advantages if such issues are decided at that stage, in as much as a decision at that stage saves time and expense for the parties. As pointed by Fouchard and others, there is no question of an ‘automatic appointment’ of arbitrators, whenever an application is made for an appointment of arbitrators. The appointing authority normally considers if a case is made out for appointment of arbitrators and such a decision can be taken on undisputed facts available at that stage.

The Commission proposes here to refer to another important aspect of arbitration in India. It is not as if delays in arbitration in India are only on account of intervention by courts before the stage of the award. In the view

of the Commission, in most of the arbitrations in India, wherever there is delay before the award is passed, it is mostly because of delays on the part of the arbitrators and the counsel appearing in arbitrations. Arbitrations are taking years to be completed even under the new Act. One can understand a complaint of delays due to court intervention after the stage of the award under the old Act of 1940, i.e., because of Sections 16, 30 and 31 of the 1940 Act.

#### Delay in arbitration affecting the cost of arbitration.

Another more important aspect is the huge expense in arbitrations. While the Judges who decide cases in courts are paid by the State, the case of arbitrators is different. Parties have to pay fee to arbitrators also. Lawyers' fee is anyway there whether before courts or before arbitrators. These days fee payable to arbitrators is quite heavy. We have obtained the views of lawyers and arbitrators. But we have to take care of interest of the parties also.

Further it needs to be considered what happens if the appointment of arbitrators is to be automatic and if the appointing authority under Section 11 should consider nothing else.

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

If indeed it is a party's plea that there is no dispute that can be referred to arbitration (because the contractor has given a 'no claims' letter) or if it is the plea that the dispute is 'excepted' from arbitration or if a person says, he is not a party to the arbitration, or that the arbitration agreement is not in existence, these issues can normally be taken up only after at least five or six adjournments have taken place. By that time, quite a large amount of money

would become payable towards the arbitration fees or may have been paid. Therefore, the cost factor is also important for the parties and cannot be left out of consideration.

Lastly, if the Government or a public sector undertaking has clear documents to show that there is no dispute in existence or that the dispute relates to an ‘excepted item’, or if a person says, he is not a party to the arbitration agreement, there is no reason why an expensive procedure of arbitration should be invariably embarked upon. These aspects were highlighted in Redfern and others and have been referred to in our discussion under Section 8 on a similar issue (para 2.4.1). Therefore, we have to see that these issues are decided without undue delay at sec. 11 stage or sec. 8 stage and the inquiry into these preliminary issues does not lead to delay in appointment of arbitrators.

We shall presently go into with these aspects.

In fact, arbitrations arise in three categories of cases:

- (i) where parties on both sides agree upon the arbitrators or where the party authorized to unilaterally appoint an arbitrator, appoints an arbitrator under sec. 11;
- (ii) where parties move the Chief Justice of India or the Chief Justice of High Court under Sec. 11 for appointment because the parties are not able to agree;
- (iii) where in a pending suit or other proceeding, under sec. 8 the opposite party relies on an arbitration agreement.

In the later two situations, i.e., (ii) and (iii), the application for appointment is, to be made before the Judge and, in the opinion of the Commission, it is advantageous (- as before the “ICC Court”), if those issues are straightaway decided as preliminary issues – provided they can be decided without much delay - so that it could save lot of expense for the parties. This aspect highlighted by Fouchard has been referred to in our discussion under Section 8 on a similar issue.

2.8.4 Preliminary issues to be decided only if some conditions are satisfied (as in the case of section 8):

The Commission, therefore, proposes to take care to see that these issues are, if possible, decided at sec. 11 stage and also that there are no delays. The Commission is proposing a via media procedure as suggested at the Bombay seminar by several eminent Judges and as suggested by the Indian Merchants Chamber, Bombay. The procedure is like this. In case the jurisdictional issues can be decided on the basis of the documents which are not in dispute and if oral evidence is not necessary, and if the enquiry is not likely to take time, then in such cases alone, these issues can be permitted to be decided at the stage of sec. 8 or sec. 11 applications by the Court. If documents are in dispute or oral evidence is necessary or there is likelihood of delay, then the jurisdictional issues will also have to be referred by the judge to the arbitrators proposed to be appointed. Such a procedure will, in the view of the Commission, balance the avoidance of unnecessary expense on the one hand and avoidance of delays on the other.

The Commission has, therefore, felt that additional stringent conditions are to be attached to such situations – as done under section 8 -, such as those under sec. 32 (2) of the English Arbitration Act, 1996, namely that the Judge, if he wants to decide the preliminary issues, is to be satisfied that

- (i) the determination of the questions is likely to produce avoidable savings in costs;
- (ii) the application for decision of these issues was made without delay;
- (iii) there is good reason as to why these issues should be decided at that stage, and
- (iv) the decision on the issues is not likely to lead to delay.

Such a flexible provision which was proposed at the Bombay seminar will, in our view, squarely meet the objection about delays. If the point raised is simple and can be decided without oral evidence on the basis of the documents which are not in dispute, it is better the judge dealing with sec. 8 or 11 applications decides them at the threshold rather than leave these issues invariably in all cases to be decided by the arbitrators after six adjournments. There need not, therefore, be an automatic appointment of arbitrators whenever applications are filed under sec. 11 or sec. 8. The Commission is aware of the normal rates of fee charged by arbitrators for each hearing. Whether it is the case of a sole arbitrator or three arbitrators, the savings to the litigants is surely a matter which cannot be ignored.

Experience shows that if one party is the Government or a public sector undertaking, nobody bothers about the public monies which are spent towards expenses of arbitration. Once the delay part is taken care of as stated above, the above procedure will meet the ends of justice and there can be no serious objection to the procedure on the ground of delay.

Thus, with the flexible provision that is proposed, there can, therefore, be no objection if the preliminary issues are allowed to be decided, as in the ICC Court, at the stage of appointment under sec. 11 or at sec. 8 stage. The provisions which we have proposed in sections 8 (4) and (5) as also in sub-sections (13), (14) of section 11 (see para 2.8.15) are, in fact, an improvement even over the ICC Rules.

#### 2.8.5 Difficulties arising if preliminary issues are not to be decided under sec. 11 – Examples:

Before parting with the subject, in order to support the above procedure, we may refer to two or three decisions of the Supreme Court under the 1996 Act. In Wellington Associates Ltd. vs. Kirit Mehta (AIR 2000 SC 1379), at the stage of sec. 11 applications it was argued for the respondent that the relevant clause which was relied upon by the petitioner as being an arbitration clause was, on the face of it, not an arbitration clause, and that it only permitted parties to agree, in future, to go to arbitration. The Court straightaway held that the clause was not an arbitration clause and dismissed the sec. 11 application. The matter ended there. If such a simple issue were to be referred to the arbitrators and they should decide it after more than six adjournments, there would be unnecessary delay and expense.

Again in Datar Switchgear Case (AIR 2000 SCW 3925) = 2000 Suppl. (2) J.T. 226), the applicants' request under sec. 11 (6) to the opposite side for appointment of an arbitrator was not honoured and an arbitrator was appointed by the opposite party after considerable delay. Then the applicant filed a petition under sec. 11 seeking appointment by Court contending that the opposite party not having appointed an arbitrator within reasonable time, the said appointment was bad and therefore the Court could appoint an arbitrator under sec. 11. The opposite party contended that there was no time limit in sec. 11 (6) to take action upon a request for appointment of arbitrator and the periods fixed in sec. 11(4) and 11(5) were not applicable to sec. 11(6) and even otherwise, not mandatory. In such a case, if the Court were to automatically appoint an arbitrator ignoring the arbitrator appointed

initially by the opposite party, though belatedly, the question would arise as to which arbitrator would decide the case on merits. Such a case has arisen before the Delhi High Court as stated before us by a retired Judge of the Delhi High Court who is one of such arbitrators. We are referring to this case only to show that even if the Judge is dealing with the sec. 11 applications on the administrative side, some peculiar situations can arise requiring the Court to decide some issues before appointing an arbitrator.

In yet another case, Malayasian Airlines 2000(7) Scale 724, the filing of the application under sec. 11 by a power of attorney holder under a power of attorney which was not properly stamped as per Indian Stamp Act, was objected to. The applicant agreed to pay the penalty and stamp duty. An order had to be passed permitting parties to pay the duty and penalty before the concerned authority. It was not possible to straightaway appoint an arbitrator unless the issue of stamp duty was decided.

Like this, a variety of situations may arise where some decision on various issues which are raised at the stage of sec. 11 or sec. 8 becomes necessary.

But once we improvise a procedure which will steer clear of delays, as stated above, the Judge at the stage of sec. 11 can have power to decide the various issues and the objections on the ground of delay in arbitration will not hold good.

So far as delays in filing appeals etc., against orders in sec. 11 applications are concerned, we shall take up these questions separately. We shall demonstrate that the number of stages of court intervention are more if the order of the Judge is an administrative order rather than if it is a judicial order. Unfortunately, an indepth study of the various ramifications of this problem has not been made by those who pleaded before us for retention of the existing provisions. We shall shortly advert to those issues.

The result of the above discussion is that at the stage of sec. 11 applications, as under the ICC Rules, the Judge can be enabled to decide preliminary issues that may be raised. This would save lot of expense and time. However the procedure for decision on the issues should not be allowed to be abused. A flexible provision is to be made, as suggested at the Bombay seminar, that the Judge will embark on a decision on preliminary issues only if they can be decided on basis of the undisputed documents and

where no oral evidence is necessary, and if the Judge feels that the enquiry is simple enough and will not lead to delays and feels that this will save costs. Otherwise the Judge shall be bound to send these preliminary issues also to the arbitrators.

#### 2.8.6 The comparative advantages or disadvantages of the order under sec. 11 to be an administrative order or judicial order:

The Commission has received a large number of responses to the Consultation Paper. So far as sec. 11 is concerned, some suggested that the orders under sec. 11 should remain 'administrative' by retaining the words 'Chief Justice of India' or 'Chief Justice of the High Courts' or their nominees. Some others suggested that, if certain preliminary issues of jurisdiction could be settled at that stage (provided oral evidence was not necessary) the orders better be made on the judicial side by the 'Supreme Court' or 'the High Court', as the case may be. In particular, the latter suggestion came at the Bombay seminar organized by the Indian Merchants Chamber where several retired Judges and others participated. The Indian Merchants Chamber, in fact, gave a draft of the provision to be inserted in the place of the existing sec. 11.

The Commission was cautioned in the several responses to the Consultation Paper that it should not go by '1940 Act mindset' but has to keep the UNICTRAL Model in mind. At the end of the day, it appeared to the Commission that while the '1940 Act mindset' should not be there, one should also be receptive to other alternative suggestions, if such alternatives could be improvements on the UNCITRAL Model. Several countries which have adopted the Model Law, as the basis, have made some changes to suit their local needs. While we should not have the '1940 Act mindset', that does not mean we should have a closed mind and not try to improve on the Model Law. Thus for an objective consideration of what is best for the parties, who seek arbitration, neither an undue adherence to the '1940 Act mindset' nor an unnecessary anxiety to maintain 'UNCITRAL mind set' in its totality is desirable.

As we shall presently show, those who suggested that the '1940 Act mindset' is to be eschewed have not in fact, made any indepth study of the advantages and disadvantages resulting from adoption of one or the other alternatives. Those who assumed that there would be uncalled for court intervention if sec. 11 orders are made on the judicial side, appeared to the

Commission to have not gone into the matter in detail but had come to entertain such a view with some kind of preconceived notions. The Commission, therefore, felt it is necessary to examine in detail the practical advantages and disadvantages of the alternative suggestions.

We start with the principle accepted by the Supreme Court that the orders under sec. 11 by the Chief Justice of India or his nominee are 'administrative orders'. This is also the position with regard to orders under sec. 11 by the Chief Justices of the High Courts or their nominees.

After the Konkan Railways Case No.1 several writ petitions have been filed in the High Courts under Art. 226 of the Constitution of India questioning the orders of the Chief Justices of the High Courts or their nominees. Most of these writ petitions are filed by the State or public sector undertakings questioning the orders of appointment of arbitrator by the Chief Justice or his nominee. The points raised generally are –

- (i) that the dispute related to 'excepted' matters,
- (ii) that the contractor had signed a receipt for payment acknowledging that he has no more claims,
- (iii) only a departmental officer should have been appointed as the arbitrator or that there should be no arbitration if a departmental arbitrator was not to be appointed.

#### 2.8.7 Order of Chief Justice of India

Now, an administrative order of the Chief Justice of India or his nominee or an administrative order of the Chief Justice of the High Court or his nominee can as a matter of law, be subjected to judicial review under Art. 226. May be, an administrative order of a Judge cannot be straightaway challenged under Art. 136 but it can be challenged under Art. 226. But in Konkan Railway Case 1 it was accepted that if an arbitrator was not appointed, the parties could seek a writ of mandamus under Art. 226. In fact, before a mandamus is issued, the order of the Chief Justice has to be set aside and removed from the scene. Unless initially the administrative order not appointing an arbitrator is quashed or set aside, the question of issuing a mandamus does not arise.

If the order of the Chief Justice of India or the Chief Justice of the High Court is an order of an 'administrative authority', then sec. 5 of the Act

which prohibits any ‘judicial authority’ from intervening in the proceedings will not be attracted because the orders are passed by the Judge under sec. 11 on the administrative side. In any event, sec. 5 cannot prohibit an application under Art. 226. A single Judge’s judgment in a writ petition can be questioned before a Bench of two learned Judges and then the matter can go to the Supreme Court under Art. 136. Thus, after an order under sec. 11 by the Judge in the Supreme Court or the High Court, on the administrative side, there can be litigation starting with an application under Art. 226, going through three levels.

What is the position if these orders under sec. 11 are to be passed by the Court on the judicial side rather than by the Judge on the administrative side? Is it more advantageous?

Taking the case of an order under Sec. 11 in an international arbitration,- if the order is to be passed on the judicial side by the ‘Supreme Court’ (and not by the Chief Justice of India or his nominee on the administrative side), i.e., by a Bench of two or more Judges, there is no question of any writ petition under Art. 226 being thereafter filed in the High Court. In fact, the order of the ‘Supreme Court’ will become final and binding once for all. Obviously, the three levels of litigation, which are possible if the order is on the administrative side, are all avoided at once. This is certainly a better alternative.

Likewise, if as under the ICC Model, in the sec. 11 applications, the preliminary issues are to be decided on the judicial side, rather than on the administrative side, the decision of the Supreme Court on the jurisdictional issues will also become final at the sec. 11 stage itself and the three stages of further litigation against such orders before a single Judge under Art. 226, then before a Bench and then under Art. 136 are clearly avoided.

#### 2.8.8 Orders of the Chief Justice of High Courts

So far as cases of purely domestic arbitration between Indian nationals under sec. 11 are concerned, if the order is on the administrative side, it can be challenged under Art. 226 again before a Single Judge, then a Division Bench (since sec. 5 does not apply to administrative orders) and the Supreme Court under Art. 136 of the Constitution of India. If the order under sec. 11 is to be passed by the ‘High Court’ on the judicial side, then in as much as it is a judicial order under sec. 11 of the Act even if it is passed by a single

Judge of the High Court, there will be no appeal to a Division Bench because of sec. 5 which excludes appeal to a Division Bench which we are proposing to clarify by inserting an Explanation. The only stage for attack will be under Art. 136. If an order under sec. 11 is to be initially passed by a Division Bench as per the rules of procedure in some High Courts, again the only other remedy against it is the one under Art. 136. Thus, while the order is by a Judge on the administrative side, will be amenable to judicial review in a fresh writ petition under Art. 226 before a single Judge, a Division Bench and then the Supreme Court. The position if it is on the judicial side, is that there will only be one appeal under Art. 136. This is also advantageous.

Summing up the advantages, if the order under sec. 11 is on the judicial side, so far as international arbitration is concerned, all the three stages of further litigation are excluded and so far as purely domestic arbitrations between Indian nationals are concerned, instead of three stages, there is only one stage of attack under Art. 136.

The above discussion obviously proves that those, who consider that the existing position of the orders under sec. 11 being on the administrative side to be more advantageous, may not be fully aware of the aspect of advantages or disadvantages of two alternative. Therefore, in the view of the Commission, the applications under sec. 11 are to be made on the “judicial side” to the Supreme Court in cases of international arbitration in India and to the High Court in the cases of purely domestic arbitrations.

In fact, the UNCITRAL Model says that the applications under Art. 11 are to be before the ‘Court’. Other countries have also enacted laws on the basis of the UNCITRAL Model conferring power on ‘courts’ to decide these applications. (See Art 11(4) of the Model Law, Art. 11 of the Canadian Act 1985, Art. 11 of the Korean Act, 1999, Sec. 14 of the Swedish Act 1999 and Art. 11 in Schedule I of the New Zealand Act 1996).

In the view of the Commission, the recent Irish Act 1996 gives us the correct guidance. The Irish Act 1996 which enables the President of the High Court or his nominee to decide these and other applications says that the applications are to be made to the ‘High Court’ and it defines ‘High Court’ to mean the President of the Court or his nominee. It is clear that the applications are only on the “judicial side”.

The relevant provisions of the Irish Act, 1996 are as follows:

“Sec. 6: (1) The High Court is specified for the purposes of Article 6 and is the Court for the purposes of Article 9 and the Court of competent jurisdiction for the purposes of Articles 27, 35 and 36

2. The functions of the High Court under an article referred to subsection (1) and its functions under Sections 7, 11(7) and (9) and 14(1) shall be performed by –

- (a) The President of the High Court, or
- (b) Such Judge of the High Court as may be nominated by the President, subject to rules made in that behalf.”

In the light of the above, the Commission has proposed that sec. 11 be appropriately amended by substituting the words ‘Supreme Court’ for the words ‘Chief Justice of India’ and the words ‘High Court’ for the words ‘Chief Justice of the High Court’.

#### 2.8.9 Whether the Chief Justice of India or the Chief Justice of the High Court are ‘persona designata.

In one of the responses to the Consultation Paper, it was urged that the ‘Chief Justice of India’ and the ‘Chief Justice of the High Court’ are only acting as a ‘persona designata’ when they are exercising power under section 11 to appoint arbitrators and this they are doing in their ‘personal capacity’ and not in their official capacity and also not as constitutional functionary and that such orders are not amenable even to judicial review under any statute, (appellate or revisional)/or even under Art. 226 of the Constitution of India. If the Chief Justice of India or the Chief Justice of the High Court are not even administrative authorities but are passing orders under sec. 11 in their personal capacities, that may exclude a remedy even under Art. 226 of the Constitution of India.

The Commission, in fact, felt that if these authorities were acting as ‘personal designata’, it could even insert an Explanation in Sec. 11 that these authorities must be deemed to be exercising powers as ‘persona designata’ so that there would be no scope of court intervention even under Art. 226. Such a situation would be ideal and would be much better than a situation where the orders were treated as ‘administrative’ or even as ‘judicial’.

But the difficulty here is that the Supreme Court in Konkan Railway No. 1 has clearly held that the orders under Sec. 11 are “administrative” in nature and it has also held that a Writ of Mandamus could issue to the Chief Justice of India or the Chief Justice of the High Court or their nominees. It is, therefore, difficult to bring the orders down to a level of orders passed by these Judges in their private capacity.

Our attention was invited to the decision of the Supreme Court in Central Talkies Ltd. vs. Dwarka Prasad (AIR 1961 SC 606) and to the following passage therein:

“A ‘persona designata’ is a person who is pointed out or described as an individual as opposed to a person ascertained as a member of a class, or as filling a particular character (see Osborne’s Concise Law Dictionary, 4<sup>th</sup> Ed., p.253)”.

The Supreme Court observed:

“In the words of Schwabe CJ in Parthasaradhi Naidu vs. Kotewara Rao, ILR 47 Mad 369 (AIR 1924 Mad. 561) (FB), *personae designatae* are ‘persons selected to act in their private capacity as Judges’”

It is this latter passage that is relied upon to say that the Chief Justice of India or the Chief Justices of the High Courts are ‘persona designata’. But, in our view, the passage cannot help if one keeps in mind the reasons as to why in section 11 Chief Justice is designated as the authority to appoint arbitrators – namely that in their constitutional capacity, any appointment of arbitrator by them would inspire greater confidence.

In our view, it cannot be said that the ‘Chief Justice of India’ or the ‘Chief Justice of High Court’ is chosen to act under sec. 11 not in his capacity as a Judge but only in his private capacity as a Judge. In the opinion of the Commission, it is not possible to accept that the legislature chose the Chief Justice of India or the Chief Justice of the High Court in Sec. 11 de hors their Constitutional status as Judges of the superior courts. These high functionaries appear to have been specially chosen because of their office and the idea was to infuse greater confidence in the procedure for appointment of arbitrators and in particular, to assure foreign nationals or

companies who may be parties to international arbitration agreements (when the seat of arbitration is in India) about the independence and fairness of the arbitrators appointed by these high functionaries. In that background, it is difficult to accept that these high ranking judicial functionaries were chosen in Sec. 11 not in recognition of their Constitutional office. In the very case in General Talkies, the plea that the ‘District Magistrate’ was invested with powers under the UP (Temporary) Control of Rent and Eviction Act (3 of 1947) as persona designata was rejected.

2.8.10 Is it advantageous if the Chief Justice of India or Chief Justice of High Court is to be statutorily deemed to be ‘persona designata’?

The question then is whether even so, we can make a provision “deeming” the Chief Justice of India and the Chief Justices as ‘persona designata’ by adding an Explanation in Sec. 11. The Commission feels that this is indeed difficult. In the General Talkies case, the Supreme Court approved the judgment of the Full Bench of the Madras High Court in Parthasaradhi Naidu vs. Koteswara Rao(AIR 1924 Mad 369). That case concerned the vesting of powers on the District Judge as an Election Commissioner. The High Court held that the District Judge was not acting as a persona designata. It is revealed from a latter decision of a Division Bench of the same High Court in Mahabaleswarappa vs. Gopaldaswami Mudaliar (AIR 1935 Madras p. 673), that, after the 1924 decision, the Government of Madras made a deeming provision in Rule 1 (3) in the concerned Election Rules deeming the District Judge as a ‘persona designata’ and not acting in his official capacity. The new Rule was as follows:

“An Election Commission exercising jurisdiction under these rules shall be deemed to exercise such jurisdiction as a persona designata and not in his capacity as a Judge or other officer of government as the case may be”.

In spite of deeming provision, the Division Bench of the High Court held in Mahabaleswarappa’s case that this provision cannot help and that if by virtue of the functions exercisable by the District Judge under the Act, he was acting in a judicial capacity and not as a ‘persona designata’, he could validly make a complaint for purpose of Sections 195 and 476 of the Criminal Procedure Code (1898) and he would still be acting in a judicial

capacity. A similar view was taken by a Full Bench of Patna High Court in Dirji vs. Goabh, (AIR 1941 Pat. 65) where Chief Justice and Justices, Harries Fazl Ali, Manohar Lal and Fazl Ali observed that it was the functional aspect of a personal designata that was important and ‘where an officer of the court, say a District Judge, is called upon to decide a certain matter not as a District Judge, but as a ‘persona designata’, he may still be a court by reason of some special provision in the statute authorising him to decide the matter’.

Section 11 of the 1996 Act here uses the word ‘decide’ in sub-section (7). Therefore, on the same analogy, even if we make a deeming provision stating that the Judges in Sec. 11 are to be deemed ‘persona designata’ their orders will still be amenable to Art. 226, as decided in the Konkan Railway case No. I. That difficulty cannot be by-passed by merely describing an administrative authority as a ‘persona designata’. If a ‘judicial authority’ cannot be treated as a ‘persona designata’ by way of a deeming provision, then likewise, an administrative authority cannot also be converted into a person acting in a purely private capacity by making a deeming provision. Even after the said designation, the functional activity makes him to remain as an administrative authority (as per the principle decided in Konkan Railway No.I and as per the decision in Mahabaleshwarappa).

In addition, if the Chief Justice of India or the Chief Justice of the High Court is to decide certain preliminary issues under sec. 11 as is being done by the ICC Court under Art. 6 of the ICC Rules, 1998, then the question arises whether the Chief Justice can still be said to be acting in a purely personal capacity as a ‘persona designata’. Further, under the schemes framed by the Chief Justices of various High Courts in several States, the persons designated by the Chief Justices include judges of the High Court or the District Judges, depending upon the pecuniary value of the claims concerned. In these circumstances, it is difficult for the Commission to accept the plea that the Chief Justice of India or the Chief Justices of the High Court can, by statute, be deemed to be a persona designata, i.e., acting in a private capacity to keep him out of purview of Art. 226 altogether, when they appoint arbitrators or refer matters to another person or authority for such appointment.

There is a distinction between cases where under the arbitration agreement, the parties straightaway agree to move the International Chamber

of Commerce (ICC) or International Centre for Alternate Dispute Resolution (ICADR) or a Chamber of Commerce to appoint an arbitrator and cases under Sec. 11 where the statute empowers the Chief Justice of India or the Chief Justice of a High Court to appoint arbitrators and authorizes him further to designate another person or authority to appoint arbitrators. Thus if the statute has referred to these high constitutional functionaries to exercise these powers by virtue of their office as Judges of superior courts, it is difficult to accept the plea that they are persona designata.

For the aforesaid reasons, we have to accept that the Chief justice of India or the Chief Justices of High Courts in Sec. 11 cannot be treated as 'persona designata' and that even if a statutory fiction is created by deeming them to be 'persona designata', it will be difficult to take them out of their status as constitutional functionaries exercising administrative powers in view of what has been decided by Konkan Railway case No. I and, therefore, they cannot be kept out of the purview of Art. 226 of the Constitution.

Coming back to the main point, as already referred to, the position is that by changing the jurisdiction from purely administrative to judicial, a three level hierarchy of remedies can be avoided so far as international arbitration in India is concerned and Art. 226 will be totally avoided. So far as purely domestic arbitration between Indian nationals is concerned, from three levels of litigation, it will be reduced because of Sec. 5 and the Explanation proposed in Sec. 5 to a single level remedy under Art. 136. Thus the suggestion to retain these functionaries as administrative authorities or as persona designata is not advantageous to the litigant.

#### 2.8.11 Mandatory or directory nature of sec.11(4), 11(5) and 11(6):

A question has arisen whether the time limits in sec. 11(4) and 11(5) are mandatory and whether in sec. 11(6) time limits have to be prescribed.

Section 11(4) provides that if a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party or where two other appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the Chief Justice or any person or institution designated by him can pass orders regarding appointment of arbitrators.

Again there is a similar time limit in sec.11(5) which states that failing any agreement referred to in sec. 11(2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within 30 days from receipt of a request by one party from the other party to so agree, an appointment shall be made, upon a request from a party, by the Chief Justice or any person or institution designated by him.

Question has arisen whether the time limit of 30 days (which we propose to increase to 60 days) in sec. 11(4) and sec. 11(5) is mandatory? In Naginbai C. Patel vs. U.O.I. (1999 (2) Bom C.R: 1999(2) Arb, L.R.343), B. M.L. Ltd. vs. M.T.N.L. & others (2000(2) Arb. LR 190 (Del), the limit of 30 days prescribed in sec. 11(4) and (5) were held to be mandatory and if the party who received notice did not take action within 30 days of receipt of notice, it would forfeit its right to appoint an arbitrator under the contract. A similar view was taken in Sharma & Co. vs. Eng.-in-Chief, Army Hqrs. New Delhi (2000 (2) Arb LR 31 (AP) under sec.11(6). However, in Datar Switchgears Ltd. vs. Tata Finance Ltd. (2000(3) Arb. LR 447 (SC) = 200 Suppl.(2) J.T. 226), the Supreme Court dealt with a case under sec. 11(6) which did not prescribe any time limit, unlike sub sections (4) and (5) of section 11. The Court held that it was not necessary to decide whether the time limits under sec.11(4) and (5) were mandatory or not. It held that under sec. 11(6) in as much as no time limit was fixed in that sub section, the right to appoint an arbitrator vested in the opposite party was not forfeited even after 30 days, provided the appointment was made by the opposite party before the first party, i.e., the party which gave notice for appointment, had filed his application under sec.11.

It has been suggested (i) that so far sec. 11(4) and sec. 11(5) are concerned, the view of the High Courts is correct and that the 30 days period which we propose to increase to 60 days must be treated as mandatory (ii) that so far as sec. 11(6) is concerned, some time limit may be prescribed which again shall be mandatory. On the other hand, it was submitted by some of those who participated in the debate that the power under sec.11(4) and sec. 11(5) should not be treated as mandatory and no period should be prescribed under sec. 11(6).

We shall deal first with sections 11 (4) and 11 (5) and then with sec, 11 (6) separately:

### 2.8.12 Section 11 (4) and 11 (5):

It has been stated in a majority of cases that the party which receives a notice for appointment of an arbitrator does not send any reply for months altogether. If it is government department or public sector undertaking or a statutory corporation, no one wants to take any responsibility. The other party is thus put in a fix as to whether and when to approach the court under section 11. In fact, after the first party goes to court under section 11 then the above authorities claim that they have right to appoint their own employee as arbitrator. This type of conduct does not appear to be fair.

So far as sec. 11(4) and sec. 11(5) are concerned, the Commission is of the view that the period should be 60 days and should be treated as mandatory. It is, therefore, considered that a provision be made that if, after a request, arbitrators are not appointed within the prescribed time, the right to appointment, if any, conferred on the party to whom notice is issued, shall stand forfeited.

### 2.8.13 Section 11 (6):

Coming to sec. 11(6), the relevant provision is in three clauses and reads as follows:-

“Sec.11(6): Where under an appointment procedure agreed upon by the parties –

- (a) a party fails as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him, or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

But in Dattar Switchgear, the Supreme Court while dealing with section 11 (6) refuse to hold that there are any time limitation so far as

section 11 (6) is concerned. However, the party could take the measures referred to in section 11 (6) as long as the other party has not approached to the court under section 11. In regard to section 11 (6), Commission proposes that if the appointment procedure as agreed to, but no measures have been take under that procedure, are right to the said measures shall be deemed to have been waived. Commission is not proposing any other time limits.

A suggestion was also made at the Bombay seminar based on sec.17 of the English Act, 1996 to make a provision for treating an arbitrator appointed by one party as the sole arbitrator if the other party does not appoint its arbitrator. The Commission is not inclined to recommend any such provision. This situation is amply covered by sec.11(4)(a).

The proposed amendments to section 11 are stated below in para 2.8.15

2.8.14      Section 42 and Section 11:

In as much as the application under Section 11 is to the Supreme Court or the High Court on the judicial side, it is necessary to make a provision in Section 42 as to where the subsequent applications are to be filed. This is provided in proposed sub-section (5) of Section 42. Under that sub section, if the arbitration is in India and the property is in India, the subsequent applications are to be filed in the courts specified in proposed Section 2 (1) (e), i.e., the Prinicpal court in the District or in the city or on the original side of the High Court, depending on the pecuniary limits of the courts (see para 2.30.5 and 2.30.6).

2.8.15      Recommendations for recasting section 11:

In the light of the above, sec.11 is proposed to be recast as follows:

In section 11 of the principal Act,-

(a)      in sub-section (4),-

(i) in clauses (a) and (b), for the words “thirty days”, the words “sixty days’ shall be substituted;

(ii) for the words, “the appointment shall be made, upon request of a party by the Chief Justice or any person or institution designated by him.”, the following shall be substituted, namely:-

“the right to make such appointment shall be deemed to have been waived, if such appointment is not made within the said period and the appointment shall be made, upon request of a party or any person or institution designated by the High Court or any person or institution designated by it.”

(b) for sub-section (5), the following sub-sections shall be substituted, namely:-

“(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within sixty days from the receipt of a request by one party from the other party to so agree, then the right to make such appointment shall be deemed to have been waived, if such appointment is not made within the said period and the appointment shall be made by the High Court or any person or institution designated by it.”

(5A) Where the appointment procedure contained in the arbitration agreement becomes void under sub-section (1) of section 10A, the parties may agree to appoint an arbitrator within sixty days of a request from one of the parties:

Provided that where the parties fail to agree on an arbitrator within the said period of sixty days, the appointment shall be made, upon request of a party, by the High Court or any person or institution designated by it.”

(c) in sub-section (6)-

for the words, “ a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”, the following shall be substituted, namely:-

“and where such measures are not taken in accordance with the appointment procedure agreed upon by the parties, the right to take such measures shall be deemed to have been waived and a party may request the High Court or any person or institution designated by it to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

(d) in sub-section (7)-

- a. for the words, “ the Chief Justice or any person or institution designated by him”, the words “ the High Court or any person or institution designated by it” shall be substituted;
- b. after the word, brackets and figure “sub-section (5)”, the words, brackets, figure and letter “or sub-section (5A)”, shall be inserted.

(e) in sub-section (8) for the words “ The Chief Justice or any person or institution designated by him”, the words “ The High Court or any person or institution designated by it”, shall be substituted.

(f) for sub-section (9), the following sub-section shall be substituted, namely:-

“(9) In the case of appointment of a sole or third arbitrator in an international arbitration (whether commercial or not), the Supreme Court or the person or institution designated by it may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.”

(g) in sub-section (10)-

- c. for the words “The Chief Justice may make such scheme as he may deem appropriate ” the words “The High Court may make such scheme as it may deem appropriate,” shall be substituted;
- d. after the word, brackets and figure “sub-section (5)”, the words, brackets, figure and letter “or sub-section (5A)”, shall be inserted.

(h) for sub-section (11), the following sub-section shall be substituted, namely:-

“(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (5A) or sub-section (6) to different High courts or their designates, the High Court or its designate to whom a request has been first made under the relevant sub-section shall alone be competent to decide on the request.”

(i) for sub-section (12) the following subsections shall be substituted, namely.-

“(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10), arise in an international arbitration (whether commercial or not), the reference to “High Court” wherever it occurs in those sub-sections, shall be construed as a reference to the “Supreme Court”;

(b) Where the matters referred to in sub-sections (4), (5), (5A) (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to the “High Court” in those sub-sections shall be construed as a reference to the High Court within whose territorial limits the principal civil court or the court of the principal judge of city civil court referred to in clause (e) of sub-section (1) of section 2, as the case may be, is situated and where the High Court itself is the Court within the meaning of that clause, to that High Court.”

(13) Where an application is made to the Supreme Court or the High Court ,as the case may be, under this section by a party raising any question -

(a) that there is no dispute in existence;

(b) that the arbitration agreement or any clause thereof, is null

and void or inoperative;

(c) that the arbitration agreement is incapable of being performed;

(d) that the arbitration agreement is not in existence ;

then the Supreme Court or the High Court ,as the case may be, may, subject to the provisions of sub-sections (14), decide the same.

(14) If the Supreme Court or the High Court, as the case may be, considers that the questions raised under sub-section (13), cannot be decided because,

- i. the relevant facts or documents are in dispute; or
- ii. oral evidence is necessary to be adduced; or
- iii. the inquiry into these questions is likely to delay the reference to arbitration; or
- iv. the request for deciding the question was unduly delayed; or
- v. the decision on the question is not likely to produce substantial savings in costs of arbitration; or
- vi. there is no good reason as to why these questions should be decided at that stage,

it shall refuse to decide the said questions and shall refer the said questions also to the arbitral tribunal .”

### 2.9.1 Grounds of challenge to the appointment of arbitrators – more details to be disclosed by proposed arbitrators: Section 12

Section 12 deals with grounds of challenge to the appointment of an arbitrator while sec. 13 deals with the challenge procedure.

Section 12(1) states that a person who is approached in connection with his possible appointment as an arbitrator shall disclose in writing “any circumstances likely to give rise to justifiable doubts as to his independence or impartiality”. Sub-section (2) of sec. 12 lays this responsibility on the arbitrator even during the course of arbitration proceedings. Sub section (3) of sec. 12 enables a party to challenge the arbitrator only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties. Sub section (4) refers to one’s own appointed arbitrator and he can be challenged only for reasons of which he becomes aware after the appointment is made.

While dealing with sec. 10A, the question of disqualification or rather lack of independence of named arbitrators, in cases where both parties are private parties and also where one of the parties is Government or a public sector undertaking or statutory corporation, has been considered separately in relation to clauses which enable the employee or any person having some business connection, to be appointed.

2.9.2 Now we shall advert to certain other aspects under section 12. So far as sec. 12(1) is concerned, it is said that the “circumstances” which the arbitrator is to disclose are those which he considers relevant so as to raise a justifiable doubt as to his independence or impartiality. After all, the circumstances are mostly within his personal knowledge and unless there is an obligation to disclose all relevant facts, without limiting them to those which, in his view, can raise justifiable doubts, there is likelihood of an unfair adjudication. In other words, sec. 12(1) can be made a little more specific as in the ICC Rules.

The earlier ICC Rules required the arbitrator to disclose:

“Whether there exists any past or present relationship , direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind.”

Business or professional relationship or connection with subject matter of arbitration or its outcome or prior connection with some dispute have been treated as important matter to be disclosed by the arbitrators. It would, therefore, be appropriate to remove the vagueness in Section 12 by adding some words in section 12(1). After such addition, the substituted section 12 (1) will read as follows:

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality.”

2.10.1 **Section 13 – Rejection of request for making a provision for appeal in section 37(2) against interlocutory orders of the arbitral tribunal rejecting a plea of bias or disqualification: proposed Explanation II in section 34(2)**

Though there were strong pleas for an interlocutory appeal under Section 37 (2), we have rejected this plea, as stated below. Of course, Explanation II is added in Section 34 (2) to clarify existing position.

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The main debate here is that section 13 must be brought into conformity with the Model Law and that if a plea of bias or disqualification of arbitrators is raised, it should be decided as a preliminary issue by the arbitrators and if the plea is not accepted, there should be an immediate right of appeal.

Where the arbitrator has accepted the plea of bias or disqualification, no application to the Court is contemplated and this is rightly so. There is no need to provide any appeal in as much as when the arbitrator himself agrees with the plea, he has only to withdraw.

Section 13(4) requires the continuation of arbitration proceedings in the event of the arbitral tribunal rejecting a plea of bias on grounds referred to in sec. 12. The remedy in sec. 13(5) is that the rejection of the plea by the arbitral tribunal can be questioned after the award, and it is said that this is not a fair procedure and may ultimately result in waste of money and time,

if the plea is upheld by the court ultimately. It is also pointed out that even though sec.13(5) contemplates an application to set aside the award after it is made to the Court under sec.34 out no such right to question the award on these grounds has been included in sec. 34. Sec. 34(2)(v), it is said, does not, meet the situation. Moreover, the word ‘only’ used in sec. 34 runs counter in respect of the provision under sec. 13(5). Therefore, section 34(2) is, to be amended to clarify existing position by adding Explanation II. A provision is proposed to be made in section 34 by way of Explanation to clarify that the applicant can question the order of rejection of the plea of bias by the arbitral tribunal as permitted by section 13(5). Though this remedy is mentioned in section 13(5), this is omitted in section 34. Further, the use of the word ‘only’ in section 34(2) has created a doubt.

It is, therefore, proposed to add an Explanation below section 34(2) as follows by way of clarification:-

In sub-section (2), the ‘Explanation’ shall be numbered as ‘Explanation 1’ and after the Explanation 1 so renumbered, the following Explanation shall be inserted ,namely:-

“Explanation.- II For the removal of doubts, it is hereby declared that while seeking to set aside an arbitral award under sub-section (1), the applicant may include the pleas questioning the decision of the arbitral tribunal rejecting –

- (i) a challenge made under sub-section (2) of section 13;
- (ii) the plea made under sub-section (2) or sub-section (3) of section 16.”

2.10.2 Now the question is whether it is desirable to provide for an immediate appeal to the Court under sec. 37 against the decision of arbitral tribunal rejecting the plea of bias or disqualification or whether such challenge can only be after the award? In case any challenge to the decision rejecting the plea of bias or disqualification is to be provided, should it be said in sec. 13(4) that pending the decision in the Court, the arbitral tribunal ‘may’ go ahead with the arbitral proceedings, by replacing the word ‘shall’.

The English Act, 1996 does not contain any provision for challenging an arbitral tribunal before the same tribunal and a decision thereon. On the

other hand it provides in sec.24 a procedure before the Court for removal of the arbitral tribunal. The Model Law and the 1996 Act do not provide any direct approach to the Court for removal of arbitrators.

The Model Law in Art. 13 provides for an immediate appeal against an interlocutory order of the arbitral tribunal rejecting a plea of bias or disqualification, while the said remedy is omitted in the 1996 Act in sec. 13 as well as in sub section (2) of sec. 37.

2.10.3 A plea that sec.13(4) is arbitrary or discriminatory in not providing for any appeal under sec.34 or sec.37, when the plea of bias or disqualification is rejected, has been negated in M. Mohan Reddy vs. UOI (2000(1) Arb L.R. 39 (AP)). A writ petition challenging the appointment of an arbitrator was held not maintainable in view of the procedure under the Act (See Punjab Elect. Board vs. Indane Ltd.) (2000(1) Pun L.R.4). The Bombay High Court has held in Kitiku Imports Trade Pvt. Ltd. vs. Savithri Metals Ltd. (1999(2) Ab. L.R. 405) that the only remedy where the plea of bias is rejected is to wait till the award is passed and then challenge the award and that the spirit and scheme of the Act is not to permit any immediate intervention by the Court for that would result in stay of proceedings. Of course, in Anup Tech. Equipment P. Ltd. vs. Ms. Ganpati Coop. Housing Society (AIR 1999 Bom 219) it was held by the same court that the arbitral tribunal's decision can be challenged under Art. 226. It is not possible for us to agree with this decision of Bombay High Court in Anup Technical Equipment (P) Ltd. case.

In various discussions on the Consultation Paper with retired Judges and lawyers, two extreme views emerged, one view stating that it would be waste of money and time if there is no immediate appeal and if the award is ultimately set aside. The other view, equally vehement, was that any immediate court interference would be abused by filing frivolous objections against the award. The first view is supported by the fact that there is a similar provision in the Model Law and there is also no provision for removal. Even sec.15 does not cover such a situation.

It is true, the Model Law provides in Art.13(3) an immediate right of appeal and the challenge to the arbitrator's decision on bias can be made in the Court within 30 days. It also says that the decision of the Court is not to be subject to further appeal. While the request in the Court is pending, the arbitral tribunal (including the challenged arbitrator) 'may' continue the arbitral proceedings and make an award. In the Consultation Paper

(Annexure –II), this provision was proposed to be added in sec.37 and also that the word ‘shall’ in sec.13(4) be replaced by the word ‘may’.

It has been suggested by the proponents of ‘no immediate appeal’ that even if the word shall is replaced by ‘may’ in sec.13(4) that may not solve the problem in as much as the arbitral tribunal may in most cases decide not to go ahead when its decision is under challenge. On the other hand, there have been articles in Indian legal journals strongly suggesting that ‘bias’ is so crucial a matter which cannot be allowed to remain unchallenged immediately.

It is true that several countries have adopted the Model Law providing immediate appeal against an order rejecting a plea of bias and also in using the word ‘may’ in relation to continuance of proceedings by the arbitral tribunal (See sec.1037(3) of German Arbitration Act, 1998, sec.13(2) of Schedule to the Australian Act, Art. 13(3) of the Canadian Act, 1985, Art. 13(3) of the Schedule to the Ireland Act, 1998, Art. 1393 of the first schedule of the New Zealand Act, 1999).

The UN Commission in its Report (1985) on the adoption of the Model Law also considered this question elaborately (see paras 121 to 134) and finally came to the conclusion that if the plea of bias is rejected, there must be an immediate appeal. It considered different alternatives. It considered (in para 122) the plea that if Art. 13(3) is deleted, it would ‘reduce the risk of dilatory tactics’. It also considered pleas that, at any rate, Art. 13(3) may be restricted to cases of a single arbitrator or a majority against whom a plea of bias was raised. Another suggestion was that it should be left to the tribunal whether to permit immediate Court intervention or not, when a plea of bias was refused. On the other hand, there were suggestions (para 123) that pending court decision, the arbitral tribunal should not be allowed to go ahead since such ‘continuation would cause unnecessary waste of time and costs if the court later sustained the challenge or that it should not go forward if the court granted a stay’. After considering all these suggestions the UN Commission observed that the ‘prevailing view, however, was to retain the system adopted in Art. 13 of the Model Law since it would strike an apparent balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding waste of time and money.

Before us reliance was also placed on the opinion of certain writers for providing an immediate appeal. Mr. Aron Broches, Kluwer in the Commentary on UNCITRAL Model Law, 1990 has no doubt said:

“At the Working Group’s fourth session, a resolution was adopted which, on the one hand, permitted immediate recourse to the Court, with the attendant risk that such recourse may be used a delaying tactic and, on the other hand, permitted (but did not oblige) the arbitral tribunal to continue the arbitral proceedings. This enables the tribunal either to limit the adverse effects on an unjustified challenge for dilatory purposes by continuing the proceedings, or to suspend the proceedings where it considers that the interest of the parties is best served by getting the challenge question out of the way rather than letting them run the risk of waste of time and money on an award which may ultimately be set aside under article 34.”

Adverting to the US procedure (which is not UNCITRAL except in some states) where immediate intervention in matters where a plea of bias is rejected, Redfern and Hunter say that there the procedure is unsatisfactory as parties are not allowed to challenge the decision till the award is made. They have mentioned this in para 4.65 referring to Florsynth Inc. vs. Rickhote (750 F.2d. 171(1984)), Hunt vs. Mobil Oil Corpn. (583F. Suppl.1092(1984)) and Morelite Construction Corp. vs. New York City District Carpenters benefit Funds, 748.F 2d.79 (1984), as follows:

“This means that a party with a valid objection to the composition of the tribunal would have to make an objection “on the record” and then wait until the end of the case before challenging the award (with the attendant waste of time and money if the challenge is successful)”.

In this context, they have suggested as follows (para 5.42):

“Usually the appropriate course for an arbitral tribunal is to issue an interim award on jurisdiction, if asked to do so. This enables the parties to know where they stand at an early stage; and it will save them spending time and money on arbitral proceedings that prove to be invalid.”

While the above argument in favour of providing an immediate appeal under sub section (2) of sec. 37 against an order of the arbitral tribunal

refusing a plea of bias or disqualification is strong and it will be rather unfortunate if one has to question the rejection of the plea only after the award is passed, the Commission feels that if an immediate appeal is provided, the party who wants to delay the arbitral proceedings will, in almost every case, file an objection before the arbitral tribunal pleading bias or other disqualification even at the commencement of the proceedings, and then file an appeal under sec. 37(2). There is indeed a lot of scope for abuse. Even if we say that pending the appeal, the arbitral proceedings may be continued, still the arbitral tribunal, in most cases, may be inclined to wait the result of the appeal. After due deliberation, the Commission is of the opinion that there should not be an immediate right of appeal under sec. 37 where the plea of bias or disqualification raised under sec. 13 is rejected by the arbitral tribunal. Hence, no amendment is contemplated in section 37(2) for the above situation arising under sec. 13.

#### 2.11.1 Termination of the mandate of an arbitrator: Sections 14 and 15:

Sections 14 and 15 deal with termination of the mandate of an arbitrator. It was suggested that a provision should be made for fixing their fee. This suggestion is accepted.

It has been suggested that in sec. 15(2), a provision regarding appointment of a substitute arbitrator within 30 days from the date of termination of the mandate of an arbitrator, may be fixed, unless the rules provide otherwise.

This suggestion is also accepted.

The proposed amendments in section 14 and 15 are as follows:

2.11.2 In section 14 of the Principal Act, after subsection (3), the following subsection shall be inserted, namely :

“(4) Where the mandate of the arbitrator has been terminated, the court may decide the quantum of fee payable to such arbitrator .”

2.11.3 In section 15 of the Principal Act,-

(a) in subsection (2) for the words “a substitute arbitrator shall be appointed”, the words “ a substitute arbitrator shall be appointed within a period of thirty days” shall be substituted;

(b) after sub-section (4) the following sub-section shall be inserted namely:-

“(5) Where the mandate of an arbitrator has been terminated, the court may decide the quantum of fee payable to such arbitrator.”

2.12.1 Section 16 - Request for a right of appeal in section 37(2) against an interlocutory order of the arbitral tribunal rejecting the pleas under sub-sections (2) and (3) of section 16 – rejected:

Section 16 of the 1996 Act is based on Art.16 of the Model Law but certain aspects of Art.16 of the Model Law have been omitted in the 1996 Act. The debate is on the question of inclusion of those aspects in sec.16 so as to bring the section into conformity with Art.16 of the Model Law.

Section 16 of the Indian Act 1996 reads as follows:

“Section 16: (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

- (a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- (b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

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

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

(5) The arbitral tribunal shall decide on a plea referred to in subsection (2) or subsection (3) and, where the arbitral tribunal takes a decision rejecting a plea continue with the arbitral proceedings and make an arbitral award.

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

The section is in two parts.

2.12.2 The first part relates to the power of the arbitral tribunal to rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement. The second one is that the arbitration clause is to be independent of the main contract and even if the main contract becomes null and void, the arbitration clause survives. The arbitrator under the 1940 Act too enjoyed power to decide upon his own jurisdiction, but under that Act, this power was implied as being recognized by law though there was no specific provision therefor.

2.12.3 So far as the second part of section 16 is concerned, it deals with the autonomy of the arbitration clause. The principle was somewhat accepted by the House of Lords in Heyman vs. Darwins 1942 AC 356 but the principle, more or less in terms of sec. 16(1) was accepted by the English Courts in Harbour Assurance Co. (UK) Ltd. vs. Kansa General International Insurance Co. Ltd. 1993 QB 701 as affirmed by the Court of Appeal in A..... Assurance Co. (.....) Ltd. vs. K..... Geneal International Assurance Co. Ltd. 1993(3) All E.R. 897.

In the Model law, Art.16 contains only three clauses. Clauses (1) and (2) thereof correspond to clauses (1) to (4) of sec. 16 of the Indian Act of 1996 but the Model law contains a further sub-clause (3) which reads as follows and which is absent in Sec.16 of the Indian Act of 1996. Clause (3) of Article 16 of the Model law reads as follows to the extent relevant to the present discussion :-

“16(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having

received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

The Indian Act of 1996 does not contain a similar provision. In section 16 enabling the arbitrators to decide the above issues as preliminary issues or for an immediate Court intervention if the plea is rejected, as in the Model Law. Under Sec.37(2)(a) of the Act, an appeal is provided to the Court only against an Order of the arbitrators accepting the pleas referred in Sec.16(2) or (3) but not where the said pleas are rejected, though the Model Law provides an immediate remedy even in cases where such pleas are rejected.

2.12.4 Further, in Sec. 16(5) of the Indian Act 1996, it appears that the word ‘shall’ governs the word ‘decide’ as well as the word ‘continue’ which means that even if an appeal is to be filed under Sec.16(6), i.e., (in case of rejection of the plea of jurisdiction), there will be no discretion left with the arbitrators to proceed or not to proceed with the arbitration. This, it is said, again goes contrary to the corresponding provision in the Model Law in Art.16(3). It is, therefore, suggested that it is necessary to further amend Sec.16(5) by using the words “it may” after the words “rejecting the plea” and before the words “continue with...”

It is, no doubt, true that the need for an immediate appeal was elaborately considered by the UN Commission in its Report on the adoption of the UNCITRAL Model (paras 157 to 163). It stated that the Commission adopted the principle that the competence of the arbitral tribunal to decide its own jurisdiction should be controlled by the Court. But there were divergent views as to the extent of control and the stage at which control was to be imposed (para 157). One view was that the remedy should be only after the award as this ‘would prevent abuse by a party for purposes of delay or obstruction of proceedings’ (para 158). The other view was that there should be instant appeal, by requiring leave of the Court initially or to adopt the method in sec.13(3), namely, “short time-period, finality of decision (of court), discretion to continue the arbitral proceedings and to render an award” (para 159). Yet another view was that, it was necessary to allow parties to instantly resort to the Court in order to obtain certainty on the important question of the arbitral tribunal’s jurisdiction” (para 160). The

UN Commission, “after deliberation”, decided to provide for instant control in Art. 16(3) along the lines of the solution provided in Art. 13(3).

One other interesting aspect may be noted here. The UN Commission felt that in case the arbitrators felt that they had no jurisdiction, there should be no further intervention by the Court and that Art. 5 would operate. But, the Indian Act of 1996 has provided an appeal under sec. 37(2) against an order of the arbitrators accepting the plea that they have no jurisdiction. In contrast, it omitted to provide an appeal as done under the Model law in cases where the plea of absence of jurisdiction was rejected.

Reliance is placed on the arbitration statutes of some other countries which provide an immediate appeal against an order rejecting a plea of want of jurisdiction of the arbitral tribunal under section 16. It is pointed out that, in fact, Sec.1040 of the German Act 1998 provides in Sub-Clause (3) for a preliminary ruling by the arbitrators and for an appeal to the Court; similarly article 16(3) of the Zimbabwe Act, 1996, Article 16(5) of the Korean Act 1999, Article 16(3) of the Irish Act 1998, Article 16(3) of the Canadian Act 1985 and Article 16 of the first schedule to the New Zealand Act 1996 permit the arbitrators to decide the jurisdictional issues as preliminary issues, with a right of appeal to the Court. The Model law and all these various Acts further provide that pending the decision by the Court, it will be open to the arbitrators either to proceed with the arbitration or not. All the statutes use the word ‘may’ in this context.

It has been pointed out by Alan Redfern & Martin Henry in their ‘Law & Practice of International Commercial Arbitration’ (1999) that the extent of court intervention permitted by various national laws varies in a large measure. The authors have expressed (para 9.36) as follows:

“The extent of Court intervention permitted by different states may be viewed as a spectrum. At one end of the spectrum are the states such as France, which exercise minimum control over international arbitral awards, and Switzerland, which allows non-Swiss parties to ‘contract out’ of controls altogether. In the middle of the scale, are grouped a considerable number of states that have adopted (either in full or with some modifications) the grounds of recourse laid down in the Model Law. At the other end of the spectrum are countries such as England, which operate a range of controls....”

They have referred (para 5.02), to the requirement of ‘public policy’ for such intervention which is as follows:

“On one view, it might be said that arbitrators should be given virtually unlimited powers, in order to encourage speed and effectiveness in the arbitral process; but the requirements of public policy, whether national or international, make some control necessary so as to ensure that the parties are not without recourse if there is wrongful conduct on the part of an arbitral tribunal. A single judge sitting in a court of first instance is usually subject to control by an appellate procedure. Although the modern trend is to allow decisions of arbitral tribunals to go unchallenged, so that they are effectively final and binding upon the parties, the need for some control over the way in which these decisions are reached is recognized by most, if not quite all, systems of law. In particular, it is considered important to ensure that an arbitral tribunal gives the parties a fair hearing and that it decides only matters within its competence or jurisdiction.”

The same authors further say that if an issue of jurisdiction is raised before the arbitral tribunal, it may pass an interim award (para 5.40):

“In many jurisdictions (England, Switzerland etc.), this interim award may be challenged immediately in the local courts. In some jurisdictions, a reluctant respondent can challenge the arbitral tribunal’s jurisdiction in the courts before any award has been issued (sec.32 of English Act). By these means a final decision on the issue of jurisdiction may be obtained at an early stage in the arbitral proceedings.

The system under which a national court is involved in the question of jurisdiction before the arbitral tribunal has issued a final award on the merits is known as ‘concurrent control’. The advantage of this system is that it enables the parties to know relatively quickly where they stand; and (unless the arbitral tribunal decides to continue with the proceedings pending a decision from the relevant court) they will save time and money if the arbitration proceedings prove to be groundless.”

It is true, as stated above, that if there is an immediate appeal as permitted by Model Law, such a procedure has its own advantages. The above authors point out that there are ‘broadly two arguments against concurrent control’. First, it is argued that recourse to the courts during the course of arbitral proceedings shall not be encouraged, since arbitral proceedings shall, so far as possible, be conducted without outside ‘interference’. Secondly, and more pragmatically, it is argued that to allow recourse to the courts during the course of an arbitration is likely to encourage delaying tactics on the part of a reluctant respondent. The authors say (5.40):

“This question was so much debated during the preparation of the Model Law. Finally, however, the solution of concurrent control was adopted” (Art.16)

Thus, the Model Law ultimately provided for an appeal against the interlocutory order of the arbitral tribunal rejecting a plea of want of jurisdiction.

2.12.5 The question then is as to whether sec.16 is to be amended in view of reliance on the above opinion of leading authors and hardship referred to.

After serious deliberation, the Commission has taken the view that if an immediate appeal is provided in section 37(2) as under the Model law against orders of the arbitral tribunal under section 16, rejecting an objection as to the tribunal’s jurisdiction, the provision is likely to be abused and even if it is said that pending an appeal before the court, the arbitral proceedings may go on, it is more likely that the arbitral tribunal may suspend its proceedings during that period. In view of the possibility of the abuse, if a right of appeal is provided against interlocutory orders, the Commission has decided not to give importance to the weighty arguments in favour of a right of appeal set out above. The remedy is only to make an application for setting aside the award after the award as provided under section 16(6).

It is, therefore, felt not proper to provide for any appeal against an order refusing a plea of want of jurisdiction. Sections 16 and 37(2) will remain unamended.

2.12.6 But in section 34, it is to be clarified by way of an explanation that the applicant, while seeking to set aside the award, can attack the interlocutory order of the arbitral tribunal rejecting a plea of want of jurisdiction, as permitted by section 16(6).

The proposed ‘Explanation II’ in section 34 is by way of clarification of what is provided in section 16(6). We have already referred to this Explanation in our discussion under section 13 in para 2.10.1.

2.13.1 **Section 17: Interim measures and powers of arbitral tribunal to be further amplified.**

Section 17(1) states that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measures of “protection” as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. Sub-section (2) states that the arbitral tribunal may require a party to provide “appropriate security” in connection with a measure ordered under sub section (1).

It will be seen that section 17(1) permits interim measures for ‘protection of the subject matter of the dispute and sec.17(2) deals with ‘appropriate security’, to be directed.

It has been suggested that an arbitral tribunal shall be vested with all the powers of a Civil Court and that any infraction of its orders must be allowed to be treated as ‘contempt’ of the arbitral tribunal liable to be punished straightway. It was suggested that powers to require a witness to attend and powers of injunction or appointment of receiver or attachment of third party’s property should be also granted with a condition that the tribunal could impose various penalties for violation of its directions.

This request appears to be clearly not permissible in law. As stated by Redfern and Hunter (1999) in para 1.40:

“...power to require the attendance of witnesses under penalty of fine or imprisonment or to enforce awards by attachment of bank accounts or the sequestration of assets, are powers which form part of the prerogative of the state. They are not powers that any state is likely to delegate to a private arbitral tribunal, however eminent or well-intentioned that arbitral tribunal may be. In practice, if it becomes

necessary for an arbitral tribunal to take coercive action in order to deal properly with the case before it, such action must usually be taken indirectly, through the machinery of the local courts, rather than directly, as a judge himself can do.”

The authors further elaborate (see para 5.07):

“The powers conferred upon an arbitral tribunal by the parties, whether directly or indirectly, fall short of the powers which may be exercised by a national court. A Court, which derives its authority from the state, has formidable coercive powers at its disposal to ensure obedience to its orders. An arbitral tribunal does not possess such powers. The parties cannot confer upon a private tribunal the coercive powers over property and persons that are conferred by the state upon a national court. In recognition of this fact, many systems of law supplement the powers of the arbitral tribunals”.

Hence, powers to impose punishment etc. cannot be conferred on arbitral tribunal.

Section 38 of the English Act, 1996 confers powers on the arbitral tribunal to (i) direct security for costs, (ii) issue directions with regard to subject matter of dispute in possession or under ownership of parties, (iii) as also for inspection, photographing, preservation, custody or detention of property- by the tribunal or by an expert or by a party (iv) ordering samples to be taken or observations be made of or experiment conducted on the property (v) direct party or witness to be examined on oath or affirmation and to administer the same (vi) issue directives to a party for preservation for purposes of any evidence in his custody or control. There can be no difficulty in enlarging sec.17 by adopting the various clauses of sec.38 of the English Act.

It may, however, be noted that under sec.9, the parties can approach the ‘Court’, even while the arbitration proceedings are going on, for necessary interim orders. So far as Court assistance is concerned, sec. 27 of the Act states that the arbitral tribunal or a party with the previous approval of the tribunal, may apply for assistance in taking evidence. Sec.27(5) permits penalties and punishments to be imposed by the court.

2.13.2 A suggestion has been made that the heading of this section may be changed, in as much as on a comparison with section 9, contentions

are being raised before the arbitral tribunals that it has all the powers to grant ‘interim measures’ which the court can grant under section 9. It has also been suggested that the powers of the arbitral tribunal to grant interim orders may be listed out in section 17.

These suggestions are accepted and section 17 is enlarged by adding certain extra powers similar to those listed in section 38 of the English Arbitration Act, 1996. The heading to the section is also altered.

2.13.3 Therefore sec. 17 can be amended on the following lines, by modifying its heading also:

**Interim directions by arbitral tribunal and other powers**

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“17. The arbitral tribunal may, pending arbitral proceedings, direct-

(a) at the request of a party to the arbitral proceedings, the other party to take steps for the protection of the subject matter of the dispute in the manner considered necessary by the arbitral tribunal; or

(b) a party, to furnish appropriate security in connection with the directions issued under clause (a); or

(c) a party making any claim, to furnish security for the costs of arbitration; or

(d) in relation to any property which is the subject matter of arbitral proceedings and which is owned by or is in the possession of a party to the proceedings –

(i) the taking of photographs, inspection, preservation, custody or detention of the property by the arbitral tribunal, by an expert or by a party for the purposes of inspection; or

(ii) the taking of samples from, or making of any observation, or conducting any experiment upon the said property; or

(e) a party or witness to be examined on oath or affirmation, and for that purpose administer, any necessary oath or direct the taking of any necessary affirmation, or

(f) a party to take steps for the preservation of any evidence in his custody or control which may be necessary for the purpose of the proceedings.”

#### 2.14.1 **Place of arbitration: Amendments proposed in Section 20:**

Section 2(2) of the 1996 Act states that Part 1 of the Act shall apply “where the place of arbitration is in India”.

Section 2(6) of the 1996 Act is also relevant in this context and reads as follows: -

“Sec. 2(6): Where this part, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution to determine that issue”.

Under Section 2(6), which corresponds to Article 2(d) of the Model Law, the parties may request an institution to fix the place of arbitration. The place of arbitration has to be fixed on the basis of Section 20 of the Act. But the point is whether, in arbitration between two Indian companies where the contract is to be executed in India, the parties or the institution can nominate a place outside India as the place of arbitration? This depends upon an interpretation of the provisions of Section 20 of the Act read with Section 2(2).

Section 20 of the Act as it now stands reads as follows:

“Sec. 20: (1) The parties are free to agree on the place of arbitration:

(2) Failing any agreement referred to in Sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2) the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties or for inspection of documents, goods or other property”.

Section 20 is in Part 1 of the 1996 Act and as stated in Section 2(2), Part 1 of the Act applies to all arbitrations in India, whether the arbitrations are international in nature or are purely domestic in nature, i.e., between Indian nationals.

On a literal construction of Section 20(1), it may appear that the parties to a contract, such as the one mentioned earlier, could agree for a place of arbitration outside India. But, as explained below, this is not permissible in as much as Section 2(2) controls Section 20(1). The combined effect of Section 2(2) and Section 20(1), has been explained in Dr.P.C.Rao’s commentary on the **Indian Arbitration and Conciliation Act, 1996** as follows at Page 83:

“Sub-Section (1) permits parties to select the place of arbitration. On the face of it, this sub-section may give an impression that this place could even be outside India. However Section 2(2) clearly states that Part 1 itself applies where the place of arbitration is in India, whether such arbitration is “international commercial arbitration or domestic arbitration””.

In other words, the legal position is as follows. Whether the arbitration is international in nature or is a purely domestic arbitration between Indian nationals, where Part I applies, the place of arbitration must be in India and there is no question of the parties or the institution to which they have referred the issue of the place of arbitration under Section 2(6), taking a decision that the place of arbitration will be outside India.

The confusion appears to have obviously arisen because of an unintended omission in Section 20(1) which does not contain the additional words “in India”, which have to be implied from section 2(2) and parties are misled into thinking that they are free to select a place of arbitration outside India. In the light of what is stated in the commentary by Dr.P.C.Rao in this regard (at page 83) with which the Commission fully agrees, the words “in India” are proposed to be added in section 20(1).

We therefore propose to remove the confusion or ambiguity and amend sub-section (1) of Section 20.

Sub sections (2) and (3) are converted into provisos so that, in case parties do not agree on the venue, the arbitral tribunal may not fix a place of arbitration outside India.

Under sec. 32 of the Amending Act, we propose to make this retrospective, provided the arbitral tribunal has not been appointed by the date of the commencement of this Act.

Section 20 is proposed to be amended as follows:

**Place of arbitration**

“**20.** (1) Subject to the provisions of sub-section (2), the parties are free to agree on the place of arbitration:

Provided that where the parties fail to agree, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Provided further that the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

(2) The place of arbitration shall be within India.”

2.15.1 **Amendment to section 23: Statement of claim, defence and rejoinder.**

It has been pointed out by several retired Judges who are conducting arbitrations that unless the arbitrators have control in speeding up the arbitral process, it is not possible to achieve the object of speedy arbitration and that, more often than not, the parties or those who represent them agree to have a series of adjournments and, once they agree, the arbitrators are not able to go contrary to such an agreement. This, it is said, is one of the main bottlenecks in the arbitral process today. They have, therefore, requested that in sub-section (1) of section 23, the words “agreed upon by the parties or” may be deleted as also the words “unless the parties have otherwise agreed as to the required elements of their statements”.

After careful consideration and keeping in mind the ground realities in our country and keeping in mind the expense to the parties on account of every adjournment where they have to pay their lawyers and also the arbitrators, the Commission has agreed to the above suggestion. It has also added that ‘parties shall abide by the time schedule so fixed by the arbitral tribunal, unless the tribunal extends the time’. The Commission thought fit to permit the claimant to file a rejoinder in respect of defence statement under section 23 (IA), the High Court has to prescribe rules in this behalf.

2.15.2 The Commission recommends that in section 23 for sub-section (1), the following sub-section shall be substituted, namely:

“(1) Within a period of time to be determined by the arbitral tribunal, the claimant shall state the facts in support of his claim, the points at issue and the relief or remedy sought, the respondent shall state his defence in respect of these particulars and the claimant may file his rejoinder, if any, and the parties shall abide by the time schedule so fixed by the arbitral tribunal, unless the tribunal extends the same.

(1A) The arbitral tribunal shall endeavour to expedite the arbitral process subject to such rules as may be made by the High Court in this behalf.”

2.16.1 **Amendments to section 24: Hearings and written proceedings:**

It has again been suggested by several retired Judges acting as arbitrators that in almost every arbitration in our country, at least, one party is interested in delaying the conduct of arbitral proceedings and for that purpose, number of adjournments are sought at the stage of adducing evidence. It has been pointed out that parties and their counsel in India, still think that an arbitral tribunal is like a court and raise all sorts of objections during the proceedings when oral evidence is being adduced. There is, it is suggested, no reason as to why the examination-in-chief of a witness should not be allowed to be completed by way of “evidence through affidavit” so that the oral evidence may be restricted to cross-examination and re-examination. Further, on some occasions, the counsel insist that the evidence be recorded in a ‘question and answer’ form leading to a lot of waste of time. The arbitrator is, in such a situation, helpless. It has been, therefore, suggested that more control is to be given to the arbitrators over the proceedings and provision be made enabling examination-in-chief by evidence through affidavit. Moreover, the time schedule fixed by the arbitrators, is never observed by the parties strictly.

The Commission, after careful consideration, has felt that, because of ground realities in India and the mindset of parties and counsel in thinking that the arbitral tribunal is like any other court, an amendment of sec. 24 is necessary omitting the words relating to agreement of parties in fixing the time schedule. The Commission has agreed to amend section 24 so as to incorporate these valuable suggestions. Sub-section (1) is amended and sub-section (1A) is added. It is also provided that parties will be bound by the time schedule fixed by the arbitral tribunal, unless it is extended. The procedure in this behalf is to be prescribed by the High Court as stated in sub-section (1) of section 24. In fact Redfern and Martin has pointed out (para 1.12.5):

“The large American Law firms continue to consider international arbitration as but one kind of litigation ..... among others. As a partner in a leading New York Law firm observed: “ Arbitration is considered by us to be an adjunct to ‘litigation’ – litigation in courts. It is simply a different forum”

2.16.2 The Commission recommends that, in section 24 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, and sub-section (1A), (1B) and (1C) shall be inserted:

“(1) Subject to such rules as may be made by the High Court in this behalf, the arbitral tribunal shall decide whether to hold oral hearings for presentation of evidence or for oral arguments or whether the proceedings shall be conducted on the basis of documents and other materials or to receive affidavit in lieu of oral evidence subject to the witness being questioned orally:

Provided that the arbitral tribunal may, at any appropriate stage of the proceedings, hold oral hearings for the purpose of presentation of oral evidence.

(1A) Subject to the provisions of sub-section (1), the arbitral tribunal shall, pass orders regarding various aspects of the procedure before it.

**(1B)** Without prejudice to the provisions of sub-section (1A), the power of the arbitral tribunal to pass orders include-

- a. the fixing of the time schedule for the parties to adduce oral evidence, if any;
- b. the fixing of the time schedule for oral arguments;
- c. the manner in which oral evidence is to be recorded;
  
- d. the power to decide whether the proceedings shall be conducted only on the basis of documents and other materials or the other manner in which the proceedings may be conducted .

**(1C)** The procedure determined under sub-section (1A) and the time schedule fixed under sub-section (1B) by the arbitral tribunal, shall be binding on the parties.”

#### 2.17.1 Powers to be granted to the arbitral tribunal to enforce its orders: Proposed Section 24A:

It has been brought to the notice of the Commission that some parties are not prompt in carrying out the various directions that are issued by the arbitral tribunal during the conduct of the arbitration proceedings under section 17, 23 and 24. It is pointed out that the types of default contemplated by sec. 25 of the Act are not exhaustive and, therefore, provision must be made to cover consequences for non compliance with

other types of default. It is also pointed out that unless powers to strike out pleadings or to exclude the irrelevant evidence or to award costs etc. are conferred on the arbitral tribunal, it is becoming difficult to deal with some recalcitrant parties. It has been suggested that the provisions of sub-sections (5), (6) and (7) of sec. 41 of the English Act, 1996, should be brought in so as to enable the arbitral tribunal to keep effective control and speed up the arbitral process. Such provisions will enable the arbitral tribunal in dealing effectively with some troublesome parties.

The Commission agrees that sec. 25, as it stands, provides only for situations where the claim statement is not filed or the defence statement is not filed in time or when the party fails to appear at the oral hearing or fails to produce documentary evidence. These situations may lead to the dismissal of the claim or the passing of an award on the basis of evidence before it. But it is necessary, in the opinion of the Commission, to provide for a procedure in case of non-compliance with other directions of the arbitral tribunal. The Commission, therefore, proposes to lay down the procedure in this behalf separately and these powers are to be exercised without prejudice to the procedure under the proposed sec. 25.

It is, therefore, proposed to grant special powers to the arbitral tribunal to first pass preemptory orders for compliance with the 'interim measures' ordered under section 17 or the various directions or time schedules fixed under section 23 for filing pleadings or under section 24 for adducing evidence. If such preempting orders as proposed, are still not complied with, the arbitral tribunal may pass orders imposing costs, or direct the striking out of pleadings or exclusion of some material relied upon or draw adverse inference.

It is expected that these additional powers, if given to the arbitral tribunal, will speed up the arbitral process and result in strict compliance with the orders of the arbitral tribunal.

The powers of the arbitral tribunal to enforce its orders are proposed to be brought under the new section 24A as stated below:

2.17.2        After section 24 of the principal Act , the following section shall be inserted, namely:-

**Powers of arbitral tribunal to enforce its orders passed under sections 17, 23 and 24**

“**24 A (1)** If without showing sufficient cause, a party fails to comply with any orders of the arbitral tribunal passed under Sections 17, 23 or 24, as the case may be, the arbitral tribunal may make a peremptory order to the same effect, prescribing such time for compliance as it considers appropriate.

(2) If a claimant fails to comply with a peremptory order passed under sub-section (1) in relation to a direction under clause (c) of sub-section (1) of Section 17 for furnishing security for costs of arbitration, the arbitral tribunal may make an award dismissing his claim.

(3) If a party fails to comply with any other peremptory order passed by the arbitral tribunal under sub-section (1), then the said tribunal may-

(a) make such order as it thinks fit as to payment of costs of the arbitral proceedings incurred in consequence of the non-compliance;

(b) direct that the party in default shall not be entitled to rely upon any allegations in his pleadings or upon any material which was the subject matter of the order;

(c) draw such adverse inference from the act of non-compliance as the circumstances justify;

(d) proceed to make an award on the basis of such materials as have been provided to it, without prejudice to any action that may be taken under Section 25.”

2.18.1 Procedure for enforcement of peremptory orders passed by the arbitral tribunal under sec. 17, 23 and 24 by the court: Provision proposed to prevent dilatory tactics: Sec.24B

Several retired Judges who have been dealing with arbitration matters have pointed that the absence of a procedure for enforcement of the ‘interim measures’ granted by the arbitral tribunal through the court and that this is creating serious problems and prejudice to parties in whose favour such orders are passed. The arbitrators feel helplessness sometimes. As at present, the only effective remedy is for the parties to move the court under sec.9 for interim measures pending arbitration. This may, no doubt, include seeking orders for enforcement of the interim measures granted by the arbitral tribunal. But the Commission was requested to make some special provision in this behalf as is provided in sec. 42 of the English Act, 1996.

The Commission has noticed that the Model Law does not contain any separate procedure to deal with this problem while the English Act, 1996, effectively deals with it in sec. 42 of that Act. But Indian conditions certainly require a special provision.

After due consideration of the lacuna, the Commission is of the view that it is appropriate to adopt the procedure as indicated in sec. 42 of the English Act 1996 with some modifications. We propose to omit clause (c) of sub-section (2) of sec. 42 inasmuch as the provisions proposed are to be always applicable. It is proposed to confer powers on the court to enforce the pre-emptive orders passed by the arbitral tribunal under section 24A (1) in respect of its earlier order under section 17A, 23 and 24. These powers of the court can be invoked by any of the parties to arbitration with the permission of the arbitral tribunal after notice to the other party/parties or even by the arbitral tribunal upon notice to the parties. These powers are obviously independent of any order that the court may pass under section 9. However, the orders passed under proposed sec. 34B for implementing the orders of the arbitral tribunal will obviously be subject to the orders that may be passed by the Court in appeal under clause (b) of sub section (2) of sec. 37.

2.18.2 We propose to insert Sec. 24B as follows:

Powers of the Court for enforcement of the preemptory orders of the arbitral tribunal:

“**24 B** (1) Without prejudice to the powers of the Court under Section 9, the Court may, on an application made by a party, make an order requiring the party to whom the order of the arbitral tribunal was directed, to comply with the preemptory orders of the arbitral tribunal passed under sub-section (1) of Section 24 A.

(2) An application under sub-section (1) may be made by-

(a) the arbitral tribunal, after giving notice to the parties, or

(b) a party to the arbitral proceedings with the permission of the arbitral tribunal, after giving notice to other parties.

(3) No order shall be passed under sub-section (1) by the Court, unless it is satisfied that the person to whom the order of the arbitral tribunal was directed, has failed to comply with it within the time fixed in the order of the arbitral tribunal or, if no time was fixed, within reasonable time.

(4) Any order passed by the Court under sub-section (1), shall be subject to such orders, if any, as may be passed by the Court on appeal, under clause (b) of sub-section (2) of Section 37.”

2.19 Law applicable to substance of dispute: Amendments to Section 28 proposed:

The questions under section 28, are (i) whether, when all the parties agree that the law applicable to the substance of the dispute would be foreign law, (ii) whether, in case the parties could refer the said question to an institution, it could have said that the law applicable to the dispute would be a foreign law?

Under Section 2(6) of the 1996 Act, which corresponds to Section 2(d) of the Model law, (already set out in our discussion under sec. 20(1)), the parties cannot ask the institution to decide the issue relating to the matters covered by section 28. This is clear from Section 2(6) which excludes section 28 from its scope and, therefore, the parties could not have referred to the institution any issue regarding the law applicable to the substance of the dispute. Obviously, even if the parties had made such a reference to the institution for deciding the applicable law, it would have refused to do so having regard to Article 2(d) of the Model law as well as Section 2(6) of the 1996 Act. In fact in Dr.P.C.Rao's commentary on the 1996 Act (see Page 47), it is clearly stated that such a question relating to the law applicable to the substance of the dispute could not be referred to a third party or to an institution for decision. This disposes of the second issue.

Coming to the first issue, we shall assume on the above facts, that the parties had agreed that a foreign law would apply to the contract. On that basis, we shall go into the question whether such an agreement could be made by the parties under the 1996 Act?

We can approach this problem from general principles of law and also on the basis of the conclusions arrived at in our discussion under sec. 20(1).

On the basis of general principles, the following appears to be the legal position. Leading writers have said that, as between citizens of the same country who enter into a contract for the purpose of executing works in that country, it is not permissible for them to agree that a law other than the law of that country would be applicable to the contract.

Russell on arbitration states (see Para 2.090) as follows:

“General: In arbitration between parties in England and Wales, the issue of the choice of law to be applied does not usually arise; unless there is some other provision, the arbitration will be subject in all respects to English law. However, the issue thus arises in every international arbitration and can be of fundamental importance.....”

The word “in all respects” is significant and has reference to the law applicable to the agreement of arbitration, to the substance of the main contract and also to the procedure before arbitral tribunal and the Court.

Redfern and Hunter state as follows, (see para 2.03);

“International Arbitration, unlike its domestic counterpart, will usually involve more than one system of law or legal rules”.

Therefore, if it is not an ‘international arbitration’, there is no question of choice of the law by agreement of parties. The word ‘choice’ implies that more than one system of law or legal rules are attracted.

Thus, on the fact stated above and upon general principles of law, if the arbitration is between Indian nationals with reference to a contract entered into in India for works to be executed in India, the Indian law alone can apply and not the foreign law.

Alternatively, we shall examine the position on the basis of the conclusions arrived at under sec. 20(1), in relation to the place of arbitration under sec.20. We shall try to find out if there is anything basically wrong with the words in sec. 28(1), namely, “where the place of arbitration is situated in India” used at the beginning of the said section. The use of the said words has indeed given an impression that there is an option, in the case of such purely domestic arbitrations between Indian nationals enabling them to select a place of arbitration outside India.

Section 28 of the Act reads as follows:

“Sec.28: The rules applicable to substance of dispute:

- (1) Where the plea of arbitration is situate in India –
  - (a) In an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India’;
  - (b) In international commercial arbitration –

- (i) the arbitral tribunal shall decide the dispute in accordance with the rule of law designated by the parties as assailable to the substance of the dispute;
- (ii) any designation by the ranks of the law or legal system of a given country shall be construed, unless otherwise agreed, as directly referring to the substantive law of other country and not its conflict laws rules;
- (iii) failing any designation of the law under sub-clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate, given all the circumstances surrounding the dispute.

(2) ... ..

.....

(3)... ..

In Dr.P.C.Rao’s commentary on section 28, it is stated as follows:

“Section 28 lays down the rules applicable to the substance of the dispute. It is applicable only when the place of arbitration is in India, be it domestic arbitration or international commercial arbitration. Freedom given to the parties under rule 2(6) is not available to the parties under Section 28”.

We have already referred to Dr.P.C.Rao’s Commentary on sec.20(1) (page 83) in our discussion under sec. 20(1). It was stated therein that, in the case of a purely domestic arbitration between Indian nationals, the place of arbitration cannot be outside India. However, in the passage extracted above (at page.96-97) the words: “ it is possible only when the place of arbitration is in India, be it domestic”, gives an impression that in the case of a purely domestic arbitration between Indian nationals, the place of arbitration can, in the alternative, be outside India. But, once it is clear from our discussion under sec. 20(1), relying on the commentary of Dr.P.C.Rao (at page.83), that in the case of purely domestic arbitration between Indian nationals, the place of arbitration under sec.20(1) cannot be outside India, it is obvious that the observations at page.96-97 of the book, as extracted above, require to be

properly understood in that light. Clause (1)(a) of sec.28 cannot, in our opinion, be governed by the opening words “Where the place of arbitration is in India”, in as much as these words give an impression that in respect of purely domestic arbitrations between Indian nationals, there can also be another alternative, viz., place of arbitration outside India. In this context, we may also refer to another passage from Dr. P.C.Rao’s commentary with regard to sec.28 (1)(a), (at page 97) where the author says that the Model Law does not have a clause like sec. 28(1)(a). Obviously, the Model Law which deals with international arbitration could not have a clause like Clause(1)(a) of sec. 28 which deals with purely domestic arbitration. That passage (at page 97) of the commentary, is as follows:

“clause (a) (of sub section (1)) provides that in domestic arbitration, the arbitral tribunal is required to decide the dispute in accordance with the substantive law of India. The parties and the tribunal have no choice in this regard. Since the Model Law deals with international commercial arbitration, there is no provision therein corresponding to sub section(1) of section 28”.

Thus, whether on general principles of law or on the basis of our conclusions while dealing with section 20(1), the words ‘where the place of arbitration is in India’ cannot be allowed to stand at the beginning of sec. 28(1)(a) so as to apply to purely domestic arbitration between Indian nationals.

It is, therefore, proposed to omit the words “Where the place of arbitration is situate in India,” from the opening part of sec.28 so that they will not govern sub section (1)(a) and so that , for the purpose of the said sub section (1)(a) dealing with purely domestic arbitration between Indian nationals, they do not give an impression that parties could alternatively agree for a place of arbitration outside India. It is proposed to confine the words “Where the place of arbitration is situate in India” to sub section 28(1)(b) which deals with “international arbitration” in India.

2.19.1 It is also necessary to make a formal amendment in sub-section (1) of section 28 in view of the proposed definitions of the terms “international arbitration” and “international commercial arbitration” in the proposed clauses (eb) and (f) respectively of sub-section (1) of section 2.

Accordingly, in section 28 of the principal Act, in sub-section (1), in clauses (a) and (b) for the words “international commercial arbitration”, the words “international arbitration (whether commercial or not)” shall be substituted.

2.19.1(A) In as much as this section treats an arbitration as an ‘international arbitration’ where a company incorporated in India may be under management and control exercised from outside India and such cases are now proposed to be covered by sections 28A, 28B and 28C which are on the lines of section 202 of Title 9 of the US Statute. We proposed to add sub-section (1B) in section 28. This aspect can be better understood on a reading of para 2.19.3 which deals with sections 28A, 28B and 28C.

In this context, we do not think it necessary to amend section 45 and 54 of Part II in as much as those sections refer to an agreement in sections 44 and 53, respectively. In section 28A, 28B and 28C, we have provided that the agreements between parties referred to in section 28A will not be covered by the New York and Geneva Conventions.

2.19.2. It is, therefore, proposed to substitute sub-section (1), and (1A) for the existing sub section (1) of section 28 as follows.

**Section 28: “The rules applicable to the substance of dispute**

“(1) In an arbitration other than an international arbitration (whether commercial or not), the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(1A) In an international arbitration (whether commercial or not), where the place of arbitration is situate in India,

- (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
- (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the

substantive law of that country and not to its conflict of laws rules;

- (iii) failing any designation of the law under clause (i) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.”

We are proposing that the amended section be, to some extent, retrospective as stated in section 32 of the Amending Act, where an arbitral tribunal has not been appointed in pending proceedings.

#### 2.20.1 Minority view to be appended to award: Section 29:

(1) Sub-section of section 29 refers to the ‘decision’ of the arbitral tribunal, where it has more than one arbitrator. The decision is to be by a majority.

As pointed out in the Consultation Paper (Annexure –II), the law is that a decision of the minority is not to be treated as part of the award. But it was suggested that the minority view may be appended to the award passed by the majority. This would enable parties or a court of law to know the reasons for the dissent. There was consensus that such a provision can be added.

In order that the minority member may not unduly delay his opinion, a time limit of 30 days is proposed to be provided in section 29.

In a situation where there are more than two members in an arbitral tribunal and all of them differ in their opinion from one another and it is not possible to spell out the majority opinion of the arbitral tribunal. Then, the opinion of the presiding arbitrator of the arbitral tribunal is to be treated as the award of the arbitral tribunal. Such a provision is contained in ICC rules and we propose to add such a provision in section 29.

#### 2.20.2 Thus in section 29 of the Principal Act, after sub-section (2) the following sub-section shall be inserted :

“(3) The minority decision shall, if made available within thirty days of the receipt of the decision of the other members, be appended to the award.”

2.21.1 Time limits for completion of arbitral proceedings in India (both international and purely domestic) laid down:

Pending application for extension in Court, arbitration shall go on: Proposed section 29A:

This subject has gained utmost importance in view of the long delays and expense attached to arbitral awards in India. Under the 1940 Act, there was a provision of four months from date of entering on the reference, for passing of the award, (First Schedule, para 3) subject to parties seeking time from the court for extension. It applied to purely domestic arbitrations but it has been omitted in the present Act for purely domestic as well as international arbitration. The only reason for omission appears to be that frequent applications for extension in the Court added to long delays. But at the same time, it was not the policy of the new Act that awards can be delayed without any time limit.

But the omission of the provision for extension of time and therefore the absence of any time limit has given rise to another problem, namely, that awards are getting delayed before the arbitral tribunal even under the 1996 Act. One view is that this is on account of the absence of a provision as to time limit for passing an award.

Under clause 3 of Schedule I of the old Act of 1940, the award was to be passed within 4 months after the arbitrators ‘entered on the reference’ or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.

Section 28(1) of the old Act enabled the court to extend the period from time to time. Sub-section (2) of section 28 stated that any provision in an arbitration agreement whereby the arbitrator (or umpire) may, except with consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

In other words, parties, by consent, could extend time but not the arbitrators. This was the position under the old Act.

2.21.2 The Law Commission recommended in its 76<sup>th</sup> Report on Arbitration Act, 1940, inter alia, that a proviso should be inserted below section 28 so as to provide that no extension should be granted, allowing the making of the award for more than one year after the arbitrator's entering on the reference unless the court, for special and adequate reasons, to be recorded in writing, is satisfied that such an extension is necessary. Accordingly, it recommended the insertion of the following proviso below section 28:

“Provided that no extension shall be granted so as to allow the making of the award more than one year after entering on the reference, unless the court, for special and adequate reasons to be recorded in writing, is satisfied that such extension is necessary.”

The 76th Report also recommended in para 11.24, that in order to resolve the conflict in judgments as to what is the meaning of the words ‘entering on the reference’, an ‘Explanation’ be added as follows:

“Explanation: For the purposes of this paragraph, the arbitrators shall be deemed ‘to enter on the reference’ on the first date fixed by the arbitrators for the appearance of the parties before them for the purposes of arbitration.”

But, it is not necessary to adopt the above method of computation in view of the provision in sec. 21 of the 1996 Act defining the meaning of the words ‘commencement’ of arbitration proceedings as “the date on which a request for that dispute to be referred is received by the respondent”.

2.21.3 Question is whether any time limit is to be fixed. Of course, under ICC Rules, time limit of six months is prescribed for international arbitration but the Model law does not prescribe any time limit.

Art.24(1) of the ICC Rules, 1998 replacing Art. 18(1) of the old Rules, fixed a period of six months from the date of signature or approval by the International Court of Arbitration of the terms of reference. However, the International Court of Arbitration may “pursuant to a reasoned request from the arbitrator or if need be on its own initiative, extend the time limit if it decides, it is necessary to do so (Art. 24(2)). Where an excessive delay is

attributable to the arbitrators, the International Court of Arbitration may resort to the provisions of the Rules concerning the replacement of arbitrators, which apply where the arbitrators fail to perform their duties within the stipulated time limits (See Art. 12(2) of the 1998 ICC Rules replacing Art. 2(11) of the previous Rules).

For international arbitration, laws of several countries, like France, Dutch, Sweden and Swiss do not fix any periods. (No doubt, prior to 1999, the Swedish and Belgium laws provided six months for international arbitration).

Section 14(2) of the English Act, 1996 permits the Court to extend the time for making the award if the 'Court is satisfied that substantial injustice' would otherwise be done.

It was even suggested that certain modes of fee stipulations for each sitting, both for the lawyers and the arbitrators have also contributed to abnormal delays. It is high time that there should be a check at least at the end of two years by a Court of law. The 76<sup>th</sup> report of the Law Commission recommended for fixing maximum period for the court to extend time. But we do not want to fix any such limit. Power to grant extension can be given to the court and can be made strict so that awards can be passed faster. In fact, the provision in several countries is to grant such a residuary power to the Court without fixing any further upper limit.

The Commission is of the view that a time limit is necessary for international arbitration in India as also for purely domestic arbitration between Indian nationals in India, having regard to the long delays and huge expense involved in arbitration nowadays. The time limit can be more realistic subject to extension only by the court. Delays ranging from five years to even fourteen years in a single arbitration have come to the Commission's notice. The Supreme Court of India has also referred to these delays of the arbitral tribunal. The point here is that these delays are occurring even in cases where there is no court intervention during the arbitral process. The removal of the time limit is having its own adverse consequences. There can be a provision for early disposal of the applications for extension, if that is one of the reasons for omitting a provision prescribing a time limit, say one month. Parties can be permitted to extend time by one year. Pending the application for extension, we propose to allow the arbitration proceedings to continue.

In fact sec. 29A(4) reads as follows:

“(4) Pending consideration of the application for extension of time before the Court under sub section (3), the arbitration proceedings shall continue before the arbitral tribunal and the Court shall not grant any stay of the arbitral proceedings.”

2.21.4 It is, therefore, proposed to implement the recommendation made in the 76<sup>th</sup> Report of the Law Commission with the modification that an award must be passed at least within one year of the arbitrators entering on the reference. The initial period will be one year. Thereafter, parties can, by consent, extend the period upto a maximum of another one year. Beyond the one year plus the period agreed to by mutual consent, the court will have to grant extension. Applications for extension are to be disposed of within one month. While granting extension, the court may impose costs and also indicate the future procedure to be followed by the tribunal. There will, therefore, be a further proviso, that further extension beyond the period stated above should be granted by the Court. We are not inclined to suggest a cap on the power of extension as recommended by the Law Commission earlier. There may be cases where the court feels that more than 24 months is necessary. It can be left to the court to fix an upper limit. It must be provided that beyond 24 months, neither the parties by consent, nor the arbitral tribunal could extend the period. The court's order will be necessary in this regard. But in order to see that delay in disposal of extension applications does not hamper arbitration, we propose to allow arbitration to continue pending disposal of the application.

2.21.5 One other important aspect here is that if there is a delay beyond the initial one year and the period agreed to by the parties (with an upper of another one year) and also any period of extension granted by the Court, there is no point in terminating the arbitration proceedings. We propose it as they should be continued till award is passed. Such a termination may indeed result in waste of time and money for the parties after lot of evidence is led. In fact, if the proceedings were to terminate and the claimant is to file a separate suit, it will even become necessary to exclude the period spent in arbitration proceedings, if he was not at fault, by amending sec. 43(5) to cover such a situation. But the Commission is of the view that there is a better solution to the problem.

The Commission, therefore, proposes to see that an arbitral award is ultimately passed even if the above said delays have taken place. In order that there is no further delay, the Commission proposes that after the period of initial one year and the further period agreed to by the parties (subject to a maximum of one year) is over, the arbitration proceedings will nearly stand suspended and will get revived as soon as any party to the proceedings files an application in the Court for extension of time. In case none of the parties files an application, even then the arbitral tribunal may seek an extension from the Court. From the moment the application is filed, the arbitration proceedings can be continued. When the Court takes up the application for extension, it shall grant extension subject to any order as to costs and it shall fix up the time schedule for the future procedure before the arbitral tribunal. It will initially pass an order granting extension of time and fixing the time frame before the arbitral tribunal and will continue to pass further orders till time the award is passed. This procedure will ensure that ultimately an award is passed.

2.21.6 The Commission, therefore, proposes to prescribe such a procedure in a new section – Section 29A – which is stated as follows:

After section 29 of the principal Act, the following section shall be inserted:

Speeding up of proceedings and time limit for making awards

“ **29A** (1) The arbitral tribunal shall make its award within a period of one year after the commencement of arbitral proceedings, or within such extended period as specified in sub-sections (2) to (4):

(2) The parties may, by consent, enlarge the period specified in sub-section (1) for a further period not exceeding one year.

(3) If the award is not made within the period specified in sub-section (1) and the period agreed to by the parties under sub-section (2), the arbitral proceedings shall, subject to the provisions of sub-sections (4) to (6), stand suspended until an application for extension is made to the Court by any party to the arbitration, or where none of the parties makes an application as foresaid, until such an application is made by the arbitral tribunal.

(4) Upon filing of the application for extension of time under subsection (3), suspension of the arbitral proceedings shall stand revoked and pending consideration of the application for extension of time before the court under sub-section (3), the arbitral proceedings shall continue before the arbitral tribunal and the court shall not grant any stay of the arbitral proceedings.

(5) The Court shall, upon such application for extension of time being made under sub section (3), whether the time for making the award as aforesaid has expired or not and whether the award has been made or not, extend the time for the making of the award beyond the period referred to in sub-section (1) and the period agreed to by the parties under sub-section (2).

(6) The Court shall, while extending time under sub-section (5), pass such orders as to costs or as to the future procedure to be followed by the arbitral tribunal, after taking into account-

- (a) the extent of work already done;
- (b) the reasons for delay;
- (c) the conduct of the parties or of any person representing the parties;
- (d) the manner in which proceedings were conducted by the arbitral tribunal;
- (e) the further work involved;
- (f) the amount of money already spent by the parties towards fee and expenses of arbitration;
- (g) any other relevant circumstances,

and the Court shall pass such orders from time to time with a view to speed up the arbitral process, till the award is passed:

Provided that any order as to future proceedings passed by the Court shall be subject to such rules as may be made by the High Court in this behalf for expediting the arbitral proceedings.

(7) Parties cannot by consent, enlarge the period beyond the period specified in sub-section (1) and the maximum period referred to in sub-section (2) and save as otherwise provided in the said sub-sections, any provision in an arbitration agreement whereby the

arbitral tribunal may further enlarge the time for making the award, shall be void and of no effect.

(8) The first of the orders of extension under subsection (5) together with directions, if any, under subsection (6), shall be passed by the court, within a period of one month from the date of service on the opposite party.”

This procedure is proposed to be applied not only in future arbitrations under the 1996 Act but also with reference to pending arbitrations under the 1996 Act and also in respect of pending arbitrations under the 1940 Act and also under the Fast Track Arbitration. Provisions of sub sections (4) to (8) of the proposed sec. 29A are proposed to be applied to pending arbitrations under the 1996 Act (vide sec. 33 of the amending Act) and also to pending arbitrations under the 1940 Act (vide sec. 34 of the amending Act).

#### 2.22 Section 30: Settlement of disputes – Registration and Stamp duty

This section deals with ‘settlement’ of disputes. The arbitral tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement.

Some amendments were suggested to deal with cases of violation of Stamp and Registration laws which may be violated indirectly by entering into settlements in arbitration proceedings. But the Commission feels that the Court enforcing the awards under sec. 36 can deal with such questions.

#### 2.23 Interest under sec. 31(7)(b): 18% to be the upper limit - proposal rejected

Under sec. 31(7)(b) of the Act, it is stated that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum after the date of the award till date of payment.

It has been pointed out that this provision is creating great hardships in cases where the award is silent as to the rate of interest in as much as, in

all such cases, 18% interest becomes payable. It has been suggested that sec. 31(7)(b) be amended as to prescribe 18% as the upper limit.

The provision in section 31(7)(b) reads as follows:

"Section 31(7)(b): A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at such rate as may be fixed by the Court but not exceeding 18%"

Therefore, unless the award fixes a lesser rate, where the award is silent, 18% would apply. This is a special provision and is the reverse of section 34(2) of the Code of Civil Procedure, which says that if a decree is silent, interest from the date of decree is to be deemed as refused.

The provision in section 31(7)(b) is salutary and if this provision is not there, in the case of an award which is silent in regard to interest from the date of award till payment, the party who is to pay under the award can merrily use dilatory tactics and escape paying of interest.

Having regard to the very nature of the provision, deeming a rate of interest, it is not possible to say that 18% is to be the maximum. After due consideration, the Commission has felt that there is no justification for reducing the rate below 18%. Hence no amendment is necessary in section 31(7)(b).

2.24.1 Copy of the award to be filed in the 'Court' for purposes of record along with original arbitral records and courts to maintain register of awards: Proposed section 31A:

A new section 31A is proposed for the formal filing of copies of purely domestic awards in a Court of law for purposes of record. It is also proposed that the Principal Court of original jurisdiction in the district or the Court of the Principal Judge in a city, alone should be the Courts for purpose of filing of a copy of the award and of the arbitral record. These Courts alone are to maintain a register of awards. Even though under sec. 2(1)(e) the High Court in its original jurisdiction is also included, we do not think that the High Court should receive the copies of the award or the arbitral record nor need it maintain the register. In cases where the award is passed pursuant to a reference under sec. 11 by the High Court its original jurisdiction, because of the pecuniary value of the claim, the award passed in

such a case can be filed in the Principal Courts mentioned above based purely on territorial jurisdiction and not on the basis of pecuniary jurisdiction. In fact, an 'Explanation' is proposed to be added in sec. 31A to say that when an award is passed whether pursuant to a reference by a judicial authority under sec. 8, or by any of the Courts referred in sec. 8A or by the parties or by the High Court or by the Supreme Court under sec. 11 or pursuant to a Fast Track Arbitration, copy of all such awards should be filed in the Principal Courts mentioned above in a district or a city as the case may be.

The reasons for the proposed sec. 31A are as follows. Under the 1940 Act, the award had to be filed by the arbitrators in the 'Court' and the court would scrutinize the award before making it a rule of court. Further, once the award is filed in the court, there is little scope for tinkering with the date of the award or with the body of the award.

Under the 1996 Act, it is stated in sec. 36 that after the expiration of time for making an application to set aside the arbitral award under sec. 34, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil procedure 1908, in the same manner as if it were a decree of the court. It need not be filed in any court at all.

2.24.2 It has been pointed out that there must be some record of the award as originally passed and therefore photocopy of the award signed by the parties should be filed before the 'Court' as defined in section 2(1)(e), (except the High Court in its original jurisdiction) with the arbitrator's initials or signatures on each page. A register of the awards received from arbitrators is to be maintained by the court with a serial number and it must be ensured that all the pages of the award are duly stamped and initialed by the presiding officer of the court or a ministerial officer of the court. This would ensure the authenticity of awards and avoid any dispute as to the date or contents of the award as passed. The Central Government may make rules as to other aspects to be noted in the register to be maintained by the court. We have proposed provisions in section 42 as also in chapter XI relating to 'Fast Track Arbitration', that invariably the copies of the award shall be filed in the principal courts referred to in section 2 (1) (e). The awards passed pursuant to reference under section 8 or section 8A or section 11 are under Fast Track Arbitration are all to be filed in the Principal Court under section 2 (1) (e), i.e., even where the reference is made by the High

Court under section 11 or by the Supreme Court/High Court under section 8A or by the High Court in Fast Track Arbitration.

It is, therefore, proposed to add sec. 31A stating that once the award is made, a copy thereof signed and duly authenticated on each page by each of the arbitrators shall be filed in the Court. Here, four types of awards have to be kept in mind:-

- (i) Awards may be passed pursuant to references under section 8 made by judicial authorities.
- (ii) Awards may be passed pursuant to references under section 11 by the Supreme Court or High Court.
- (ii) Awards may be passed by arbitrators appointed by parties under section 16 without intervention of court.
- (iv) Awards may be passed pursuant to references made by any court under the proposed section 8A.
- (v) Fast Tack Awards made under section 43A

All these awards are to be filed before the ‘Court’ defined under section 2(1)(e) except the High Court in its original jurisdiction.

2.24.3 It is also proposed that the arbitral record is also to be filed in the court, together with a list of the records. The provisions applicable to the court record in respect of preservation of records will be applicable to the arbitral record so filed. The expression ‘arbitral’ record is proposed to be explained by way of ‘Explanation II’ proposed to be introduced below **section 31A(1)**:-

“Explanation II: An arbitral record shall include the pleadings in the claim filed by the parties, the documentary and oral evidence, if any recorded, pleadings in interlocutory applications and orders thereon, the proceedings of the arbitral tribunal and all other papers relating to arbitral proceedings.”

Therefore, it would be advantageous if all the awards are filed, for purposes of record in the Court under sec.2(1)(e) i.e. the Principal District Court or the court of the Principal Judge, City Civil Court (but not the High

Court in its original jurisdiction) within territorial whose jurisdiction a suit would have been filed, if the subject matter were a suit. This applies to all awards passed pursuant to an agreement or after appointment of arbitrators by the High Court or the Supreme Court under Section 11 or under Section 8 or under Section 8A.

2.24.4 After section 31 of the principal Act, the proposed section 31A shall be inserted as follows:

**Filing of a copy of the award and original arbitral records in the court for purposes of record and maintenance of register of awards**

“31A (1) A photocopy of the arbitral award duly signed on each page by the members of the arbitral tribunal together with the original arbitral records, shall be filed by the arbitral tribunal in the court within thirty days of the making of the award along with a list of the papers comprising the arbitral record.

Provided that where the High Court is the proper court within the meaning of clause (e) of sub-section (1) of section 2, then the award shall be filed in the principal Civil Court of Original Jurisdiction in a district or in the court of the principal judge of the city civil court of original jurisdiction in a city within whose territorial jurisdiction the subject matter of arbitration is situated (hereinafter referred to in this section as the said court).

Explanation.-1 For the removal of doubts, it is hereby declared that “arbitral award” in this section means the arbitral award whether passed pursuant to a reference made by a judicial authority under section 8, or by any of the courts referred to in section 8A, or by the parties or by the High Court or by the Supreme Court under section 11, or by the parties to a Fast Track Arbitration under section 43A.

Explanation.-2 For the purposes of this section, “arbitral records” shall include the pleadings in the claim filed by the parties, the documentary and oral evidence if any recorded, the pleadings in interlocutory applications, the orders thereon, the proceedings of the arbitral tribunal and all other papers relating to the arbitral proceedings.

(2) Where the arbitral tribunal fails to file the photocopy of the arbitral award and the arbitral records under sub-section (1), any of the parties may give notice to the arbitral tribunal to do so within a period of thirty days of the receipt of the notice, failing which, the party may request the said court to direct the arbitral tribunal to file the photocopy of the arbitral award and the arbitral records in the said court.

(3) Upon the filing of the photocopy of the arbitral award and the arbitral records under sub-section (2), the presiding officer of the said court or a ministerial officer of the said court designated by the said presiding officer, shall affix his signature with date and seal of the said court on each page of the photocopy of the arbitral award aforesaid and shall after verification, acknowledge receipt of the photocopy of the arbitral award and the arbitral records as per the list referred to in sub-section (1).

(4) The said court shall maintain a register containing , -  
 (a) the names and addresses of the parties to the awards;  
 (b) the date of the award;  
 (c ) the names and addresses of the arbitrators;  
 (d ) the relief granted;  
 (e ) the date of the filing of the award into the said court;  
 and  
 (f) such other particulars as may be prescribed.

(5) If any party makes an application, the court may grant a certified copy of the photocopy of the arbitral award or of the arbitral record or of the arbitral proceedings, as the case may be, in accordance with the rules of the court.

(6) The court may transmit the arbitral records for use in any proceedings for the setting aside of the arbitral award or for enforcement thereof.

(7) The procedure for return of original documents or for preservation of the arbitral records so filed shall be subject to such rules as may be applicable to the said court from time to time.

(8) The filing of the photocopy of the award under this section is only for purposes of record.

”

2.25.1 Section 34: Proposal to amend sub-section (1) and insertion of new sub-section (1A) regarding procedural modifications and further procedure after remission to arbitral tribunal under sec. 34(4) – proposal accepted by adding clauses (5) and (6) to Sec. 34 and the procedure to apply for grounds in sec. 34 and proposed sec. 34A.

We have seen that section 33 of the Act refers to correction of the award at the instance of the party or by the arbitral tribunal suo motu.

A question has been raised whether a separate provision is necessary for court to remit the award only after setting aside the same. This is not necessary, because section 34(4) contains an inbuilt procedure for such remission. But the procedure which is to be followed after the arbitral tribunal passes orders on such remission, has not been specified in sec. 34. Now we are proposing in sub-section (5) and (6), the remaining procedure after receipt of the response from the arbitral tribunal, as stated in detail below.

In Madan Mohan Agarwal vs. Suresh Agarwal AIR 1998 (MP) 212 = 1998(2) Arb. LR 166, a Bench of the Madhya Pradesh High Court held that if the arbitrator, on such request under sec.34(4) passed a fresh award, it must be taken that both awards have merged. Otherwise the award cannot be executed. The court felt once an order was passed under sec.34(4) by the court, the first award must be deemed to have remain suspended. No doubt, the Court tried to make some thing good in spite of an anomalous procedure in sec. 34(4).

Under section 34(4) of the Act, there is a provision for remission and the procedure is that the application under section 34(1) will be kept pending

till the arbitral tribunal sends its response to the Court. Section 34(4) states that the Court may, when it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by its order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. The objective of this provision is explained in Dr. P.C. Rao's commentary (page 117) as follows:

"The remission procedure was known even to the 1940 Act. The main difference between the remission procedure under sub section (4) of section 16 of the 1940 Act is that, whereas the 1940 Act conceived the remission procedure as an integral part of the procedure for setting aside the award. Prior to the invocation of the remedial procedure, the court will have to identify the remedial defects in the award and refer them to the arbitral tribunal. The tribunal has an option to resume the arbitral proceedings which get otherwise terminated under section 32 or, without such resumption, to take such other action as in its opinion will eliminate the grounds for setting aside the award. The tribunal is given 'an opportunity' to cure the defects. The court may extend this period of time. If nothing happens during the period given by the court or the action taken by the tribunal does not cure the defects, the court will have to set aside the award."

Even under the 1940 Act, the provision regarding remission was that under sub-section (2) of section 16, 'the arbitrator or the empire shall submit his decision to the Court.'

In other words, the application under section 34(1) to set aside the award is to be kept pending so that, in the mean time, the arbitral tribunal could send its decision to the Court. The position here is akin to the one under order 41 rule 25 CPC rather than one under order 41 rule 23 CPC.

2.25.2 However, there is a small procedural gap as to what should happen after section 34(4) is over. It is here that the Commission proposes to add to sub-section (5) and (6) as to what the arbitral tribunal is to do and for the aggrieved party to file objections and for the Court to dispose of the application filed under section 34(1) in the light of the response of the arbitral tribunal and the objections, if any, filed thereto.

Where such rectification procedure is retained in Section 34 (4) is applied to Section 34A grounds in cases of purely domestic arbitration also, same procedure as under Section 34 (5) and (6) will apply.

But, after the receipt of the order from the arbitral tribunal we propose that the Court may, while dealing with the application under sub section (1) of sec. 34, take action to consider the said order and any objections that are filed thereto, in the light of the grounds permissible under sec. 34 and the proposed sec. 34A. This will not, however, preclude the Court from exercising the powers under sub section (2) of the proposed sec. 37A and the procedure in sub section (3) of sec. 37A is also to be followed.

The Commission further recommends that the parties may be permitted to include, in their application to set aside the award, the additional grounds proposed in section 34A in the case of purely domestic arbitration awards relating to Indian nationals and while filing an application to set aside the award, the parties should annex a photocopy of the award in case the original award has not been supplied to the applicant. In this context, the Commission proposes to amend sub-section (1) of section 34 and insert a new sub-section (1A) below the proposed sub-section on the following lines to give effect to these recommendations:-

(a) for sub-section (1), the following sub-sections shall be substituted namely:-

“ (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award-

(a) in accordance with sub-section (2) and sub-section (3)  
; and

(b) in the case of an award made in an arbitration other than an international arbitration (whether commercial or not), in accordance with sub-section (2) and (3) and the additional grounds mentioned in section 34A:

(1A) An application for setting aside an award under sub-section (1) shall be accompanied by the original award:

Provided that where the parties have not been given the original award, they may file in the court, a photocopy of the award signed by the arbitrators.”

After sub-section (4) of section 34, the proposed sub-sections (5) and (6) shall be inserted, namely:-

“(5) Where the court adjourns the proceedings under sub-section (4) granting the arbitral tribunal an opportunity to resume its proceedings or take such other action and eliminate the grounds referred to in this section or in section 34A for setting aside the award, the arbitral tribunal shall pass appropriate orders within sixty days from the receipt of the request made under sub-section (4) by the Court and send the same to the court for its consideration.

(6) Any party aggrieved by the orders of the arbitral tribunal under sub-section (5), shall be entitled to file its objections thereto within thirty days of the receipt of the said order from the arbitral tribunal and the application made under sub-section (1) to set aside the award shall, subject to the provisions of sub-section (2) and (3) of section 37A, be disposed of by the court, after taking into account the orders of the arbitral tribunal made under sub-section (5) and the objections filed under this sub-section.”

**2.26.1**      Two Additional grounds for setting aside the award only in case of purely domestic arbitration between Indian nationals:  
Proposed section 34A

The provision is proposed to be confined to “purely domestic arbitration” between Indian nationals. The two grounds, as per our proposals, are (i) substantial error of law apparent on the face of award, (ii) absence of reasons. These two grounds are to be included in the application under Section 34 (1). For ground (i) a further separate application seeking is proposed, rigid conditions are laid for the grant of leave as is in the English Act of 1996.

Now, in the context of our proposals, the present applications for setting aside arbitral awards are to be filed, under sec. 34 only if (i) a party was under some incapacity or (ii) the arbitration agreement is not valid (iii)

absence of notice at time of appointment of arbitrators or of arbitral proceedings or was otherwise unable to present his case or (iv) if award deals with a dispute not contemplated or not falling within the terms of the submission, or it contains decisions on matters beyond the scope of the submission to arbitrators and (v) if composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of parties, or was not in accordance with Part I.

Clause (b) of sub-section (2) of section 34 refers to other aspects, viz., (i) the subject matter of dispute being not capable of settlement by arbitrator under the law for the time being in force and the arbitral award being in conflict with ‘public policy’ of India. ‘Explanation’ below sub-section (2) of section 34 states that an award will be in breach of ‘public policy’ if it is induced by fraud or bribery.

These are the grounds of attack permitted by section 34.

We have already stated that more supervision is necessary in case of purely domestic arbitration. Lord Mustill stated in Coppee – Lavalin SA/N.V vs Ken Ren Chemicals and Fertilisers Ltd. (In liquidation) 1994(2) All ER 449 at 466 (HC) as follows:

“Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the Court may be not only permissible but highly beneficial.”

Redfern & Hunter (3<sup>rd</sup> edn.) (para 1.18), speaking about purely domestic arbitration, pointed out:

“...some control (and even “supervision”) of the arbitral process by the local courts was considered desirable. By contrast, one of the major features of the Model Law (which was designed to provide for international commercial arbitration) is that it imposes strict limits on the extent to which a national court may intervene in the arbitration proceedings.”

(See also the views of the Law Commission of South Africa (set out in para 1.4 of this report)

During the discussions which took place after the release of the Consultation Paper (Annexure –II), it was therefore suggested that under the arbitration law grounds for attacking a purely domestic award could be slightly wider than those in international arbitration. It was, however, agreed that there should be no appeal on merits of the award as under the Code of Civil Procedure. But some jurists opined that, after all, arbitration was a matter of choice of the parties and there must be least court intervention and it was not necessary to make any changes to expand the provisions relating to recourse to the award, even in regard to purely domestic arbitration.

In the 2<sup>nd</sup> edition, while adverting to the need for stricter control in the matter of purely domestic arbitration, Redfern and Hunter stated (paras 14 and 15) as follows:

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

We shall take up these two grounds separately and examine if they can be added as additional grounds to set aside awards which are purely domestic between Indian nationals:

#### 2.26.2 (i) Substantial error of law apparent on the face of the award – proposed

Mere error of law was not a ground in purely domestic arbitration even under the old Act of 1940 unless it was apparent on the face of the award. It is not a ground in international arbitration and it is limited to ‘public policy’. The elaborate discussion in Renusagar Power Co. Ltd. Vs. General Electric /Co. AIR 1994 S.C. 860 explains why error of law cannot be included within the meaning of the words ‘public policy’. While treating ‘error of law’ as

being distinct from ‘public policy’, the New York Convention, 1958 referred only to ‘public policy’ as a ground of challenge and not error of law. The only exception was that under the head of ‘public policy’, the violation of certain fundamental policies was brought in. In Renu Sagar case, the Supreme Court therefore, refused to include ‘error of law’ as part of ‘public policy’. Exceptions were made in cases of violation of such laws like the FERA (see p 888) which were treated as part of ‘fundamental policy of India’ or ‘interest of India’. Charging interest on interest or damages on damages was not treated as violation of public policy of India. The ‘items’ permitted by Renusagar are restricted to -

- (i) Fundamental Policy of India
- (ii) Interest of India
- (iii) Justice or morality.

These alone are included in the meaning of the words ‘public policy’, apart from what is contained in the Explanation.

Suggestion has been made that the word ‘public policy of India’ must be defined and that the present Explanation in sec. 34(2) is not sufficient. Our attention is drawn to certain judgments of the High Courts, particularly one from Bombay, where a learned single Judge, after an elaborate judgment, has held that the above words are to be construed very liberally and would take within their fold, not only errors of law but all the grounds available under the 1940 Act. This decision has not accepted Renusagar and it says that questions of law and even questions of fact, can be reviewed by the Court. Concepts of public policy as including violation of article 14 were also relied upon to hold that any arbitrary decision of the tribunal would amount to violation of ‘public policy.’ The Commission finds it difficult to accept this view of the Bombay High Court but leaves it to be corrected by the judicial process. This aspect is proposed to be clarified by an Explanation in the proposed clause relating to error of law apparent on the face of the award, it is clearly stated that the question of law must arise after accepting the findings of fact as they are. This aspect is proposed to be clarified by an Explanation.

According to Redfern and Hunter, (see para 9.32) there is justification for not including errors of law as a ground of attack so far as international arbitration is concerned. They said:

“There is a belief that, so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if it is wrong, so long the correct procedures are observed. If a court is allowed to review this decision on the law or on the merits, the speed and above all, the finality of the arbitral process is lost.”

Russell (1999) says (7.0001) that it is easier to justify some role for the court in cases where the parties are from England and the arbitration is to follow the normal English rules of procedure.

Justice V.A. Mohta, in his recent commentary on the Arbitration and Conciliation Act, 1996 (see pp.250, 251) has referred to the divergent views on the question of court interference, in extenso. Reference is made to the view of Lord Mustill (quoted in an article by Shri Milon Benerjee in the book ‘Alternative Dispute Resolution’, by Dr. P.C. Rao) to the effect that error of law should be retained. Reference is made to another article by noted Jurist Sri F.S. Nariman in the same book that error of law should not be brought into the grounds of attack of the award in the new Act.

So far as ‘error of law’ apparent on the face of the award in respect of purely domestic awards between Indian nationals, the Commission is inclined to include this ground provided the error relates to a ‘substantial question of law’. This view is based to a large extent on section 28 of the Act and considerations for upholding the rule of law and public interest but at the same time restricting the time of appeal to ‘substantial question of law’.

Under section 28, the arbitral tribunal is not expected to deviate from the “substantive” law. If that be so, is there any justification for not including this ground in section 34? In the opinion of the Commission, there is none. The courts in India, including the High Courts and the Supreme Court, are to decide disputes in accordance with law. There is, therefore, no justification in placing the arbitral tribunal on a higher pedestal and allowing it to decide according to its own whims and fancies. Awards involving crores of rupees are passed against the State, the public sector undertakings and statutory corporations. For example, if the period of limitation for an action is three years and a claim is barred by ten years and still allowed by the arbitral tribunal, should the award be left alone? If huge damages are awarded in violation of section 73 of the Contract Act or there is violation of

other provisions of that Act or the Sale of Goods Act or Interest Act, should there be no remedy at all? If it does not follow a decision of the Supreme Court or wrongly ignores the decisions of the Supreme Court, can it not be corrected? In the opinion of the Commission, it is not possible to follow the Model Law by omitting this important ground of attack. However, this ground should be made available only for purely domestic arbitration between Indian nationals. (Of course, where a pure question of law is referred to the arbitral tribunal, this ground will not be available).

However, if error of law is to be added, it should be subject to rigid conditions as under section 69 of the English Act. While permitting this ground of 'error of law apparent on the face of the award', the Commission proposes to include very rigid standards as in section 69 of the English Act, 1996 such as (i) the error must be apparent on the face of the award and give use to a substantial question of law, (ii) its determination must necessarily affect the rights of one or more parties, (iii) the substantial question of law must have been raised before the arbitral tribunal, (iv) the party must identify the question of law clearly in the grounds, (v) separate leave must be obtained for raising the plea. These stringent conditions are among the various conditions fixed under English Law, following the decision of the House of Lords in the Nema Case (1982 AC 724) and the Antaios case, (1985 AC 191). At the stage of Section 34A to raise the above plea of error apparent on face of record, the court is to prima facie satisfy itself if these conditions are fulfilled.

As stated earlier, States impose and can impose greater supervision over purely domestic award in which all the parties are Indian nationals. We can give one more reason as to why different treatment is needed. In international arbitration, the parties generally approach recognized international institutions like the ICC which have a panel of expert arbitrators of international repute. The arbitrators by virtue of their selection to such an august panel are regarded very high and parties repose great confidence in them. It is not the same with purely domestic arbitration. It is not as if in all cases retired Judges of the Supreme Court or High Courts or other experts are appointed. In purely domestic arbitrations, even lay people are appointed. Again, in cases where Government or Public sector undertakings or statutory corporations are parties, there is provision for appointment of their employees as arbitrators. During the discussion on the Consultation Paper (Annexure-II), it was revealed that, in case where departmental officers are appointed as arbitrators, there was a feeling that

they mostly favour the private contractors. In some situations, they were unduly biased in favour of their employers. Therefore, purely domestic arbitration awards cannot always be placed on the same high pedestal as international arbitration awards.

2.26.3 The Commission is conscious that any provision granting an additional ground of review, even it be for purposes of purely domestic arbitral award, can be abused leading to delay in courts. That is why the Commission is imposing several rigid conditions in this behalf as stated earlier. At the same time, the Commission cannot ignore that a substantial number of arbitration cases involve Government, public sector undertakings and statutory corporations against which huge claims are made and awards passed. The monies involved here are all public monies. The Commission has kept in view that some awards against these bodies today are running into hundreds of crores. Therefore, some more supervision is definitely necessary so far as purely domestic awards between Indian nationals are concerned and we cannot rest content with the limited range of attack permitted in respect of international awards. At the same time, as stated above, we propose to take extreme care to see that the additional grounds are not abused. Therefore, we propose to insert section 34A after section 34 as follows:

**Additional grounds of challenge in case of certain awards**

“**34A.** (1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to the following additional grounds can be had in an application for setting aside an award referred to in sub-section (1) of section 34, namely:-

- (a) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law;
- (b) that the arbitral award is an award in respect of which reasons have to be given under sub-section (3) of section 31 but the arbitral award does not state the reasons.

(2) Where the ground referred to in clause (a) of sub-section (1) is invoked in the application filed under sub-section (1) of section 34,

the applicant shall file a separate application seeking leave of the court to raise the said ground:

Provided that the court shall not grant leave unless it is prima facie of the opinion that all the following conditions are satisfied, namely:-

- (a) that the determination of the question will substantially affect the rights of one or more parties;
- (b) that the substantial question of law was one which the arbitral tribunal was asked to decide; and
- (c) that the application made for leave identifies the substantial question of law to be decided and states relevant grounds on which leave is to be granted.

(3) Where a specific question of law has been referred to the arbitral tribunal, an award shall not be set aside on the ground referred to in clause (a) of sub-section (1).”

#### 2.26.4 Ground of absence of reasons – proposed: (purely domestic awards between Indian nationals).

The second additional ground which we propose to recommend, in the case of purely domestic arbitrations between Indian nationals is the one relating to domestic ‘absence of reasons’ in the award. While Section 31 (3) requires reasons to be given in the award (except in cases where parties otherwise agree that reasons need not be given or the award is one by settlement), no adequate provision is made in Section 34 in this behalf, if reasons are not given in the award. There is considerable divergence of opinion in the courts in different countries as to whether error of law would fall within the word ‘public policy’.

There has been lot of litigation under the old Act of 1940 which permitted unreasoned awards. But once the 1996 Act requires reasons to be given under Section 31 (3), there must be a provision for referring the matter

back to the arbitral tribunal under Section 31 (4) and for reasons to be given and then for objections to be filed under the proposed section 31 (5) and (6). Hence, this additional ground is also included in Section 34A. The ground is to be included in Section 34A applications.

These two additional grounds for purely domestic arbitration between Indian nationals are contained in the proposed Section 34A. To enable these grounds to be raised and to be rectified by the arbitral tribunal, Section 34A is also amended to cover these grounds.

2.26.5 It is proposed that Section 34A may be inserted after section 34 of the principal Act as follows:

**Additional grounds of challenge in the case of certain awards**

“**34A.** (1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to the following additional grounds can be had in an application for setting aside an award referred to in sub-section (1) of section 34, namely:-

(c) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law;

(d) that the arbitral award is an award in respect of which reasons have to be given under sub-section (3) of section 31 but the arbitral award does not state the reasons.

(2) Where the ground referred to in clause (a) of sub-section (1) is invoked in the application filed under sub-section (1) of section 34, the applicant shall file a separate application seeking leave of the court to raise the said ground:

Provided that the court shall not grant leave unless it is prima facie of the opinion that all the following conditions are satisfied, namely:-

(d) that the determination of the question will substantially affect the rights of one or more parties;

- (e) that the substantial question of law was one which the arbitral tribunal was asked to decide;
- (f) that the application made for leave identifies the substantial question of law to be decided and states relevant grounds on which leave is to be granted.

(3) Where a specific question of law has been referred to the arbitral tribunal, an award shall not be set aside on the ground referred to in clause (a) of sub-section (1).”

(3) Where a specific question of law has been referred to the arbitral tribunal, an award shall not be set aside on the ground referred to in clause (i) of sub-section (1).

2.26.6 **Section 34:** As stated earlier in para 2.25A, having dealt with the introduction of sec. 34A, we shall now deal with the consequential amendment in section 34 and also in regard to the insertion of the Explanation to cover the right of filing an application to set aside the award for rejection of a challenge under sub section (2) of section 13 and a plea under sub section (2) or (3) of sec. 16.

For sub-section (1) of section 34, the following sub-section shall be substituted namely:-

“ (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award-

(a) in accordance with sub-section (2) and sub-section (3)  
; and

(b) in the case of an award made in an arbitration other than an international arbitration (whether commercial or not), in accordance with sub-section (2) and (3) and the additional grounds mentioned in section 34A:

2.26.7 We also propose to add a formal clause as clause (1A) in sec. 34 enabling an application under sec. 34(1) to be filed on the basis of a photocopy signed by the arbitrators, if the original has not been given to the party, as follows:

(1A) An application for setting aside an award under sub-section (1) shall be accompanied by an original award:

Provided that where the parties have not been given the original award, they may file in the court, a photocopy of the award signed by the arbitrators.”

### **2.26.8 Explanation 2 below sec. 34(2):**

There appears to be an omission, as stated in our discussion under section 13 and 16 above in omitting in section 34 any reference to a right to file an application to set aside an award passed after rejecting the challenge under sub section (2) of section 13 and under sub section (2) or sub section (3) of section 16. As stated earlier the following Explanation 2 is added below sub section (2) of section 34:

“Explanation II: For the removal of doubts, it is hereby declared that while seeking to set aside an arbitral award under sub section (1), the applicant may include the pleas questioning the decision of the arbitral tribunal rejecting:-

- (i) a challenge made under sub section (2) of section 13;
- (ii) a plea made under sub section (2) or sub section (3) of section 16”

### **2.27 Proposal for inclusion of the ground of misconduct – Rejected.**

The ground of misconduct was used under the old Act of 1940 in sec.30 (a) – ‘the arbitrator must have misconducted himself or the proceedings’. These words have been construed by the Courts in India in a variety of ways. As pointed in State of Kerala vs. K. Kurian P. Paul (AIR 1992 Ker 180), the words include (i) defect in the procedure followed, (ii) committing breach and neglect of duty and responsibility (iii) acting contrary to equity and good conscience (iv) acting beyond the reference, (v) acting without jurisdiction, (vi) proceeding on an extraneous circumstances, (vii) ignoring material documents, (viii) bases the award on no evidence. Of course, corruption and bribery would also be included.

It would be seen that some of these grounds are indeed covered by section 34 of the 1996 Act – e.g. (i) party was under some incapacity (ii)

arbitration agreement was not valid under law (iii) applicant was not given proper notice of appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case (iv) award deals with a dispute 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 (v) composition of the tribunal and the arbitral procedure was not in accordance with the agreement of the parties (vi) subject matter of dispute was not capable of settlement by arbitration under the law for the time-being in force or (vii) the award is in conflict with 'public policy' of India – which includes fraud or corruption or violation of sections 75 or 81.

These grounds appear to the Commission to be sufficient and need not be further enlarged by the addition of the ground of 'misconduct'.

It is not, therefore, desirable to introduce a general ground of 'misconduct' for that would indeed open flood gates of litigation. After careful consideration of the matter, the Commission is not inclined to include 'misconduct' as a ground of challenge even in cases of purely domestic arbitration between Indian nationals.

## 2.28 Section 34A (continued)

Proposal for additional grounds in case of non correction of mistakes and non consideration of an issue referred to the arbitral tribunal, rejected on the ground that existing provisions provide adequate remedies:

The plea before us is that failure to deal with all the issues submitted for arbitration has not been made a ground. Section 33(4) permits parties to move the arbitral tribunal in this behalf and for the tribunal to pass an additional award. Such a provision is in Article 33(3) of the Model Law, Article 1708 of the Belgium Code, Article 106 of the Netherlands Act, 1986, Article 826 of the Italian Code and section 57(3)(b) of the English Act, 1990, Article 1058(1)(3) of the German Act and section 32 of the Swedish Act, 1999. Further failure to decide the issues submitted for decision, under the English Act, 1990 amounts to an 'irregularity' and section 68(2)(d) and permit an appeal, if the court considers it necessary to remedy the situation in the context of substantial justice. No doubt, there may be cases where the decision is implied in another finding or the award, looked at as whole, shows that the tribunal had not overlooked the issue. Or

the evidence may have been insufficient. It was suggested before us that in cases where the tribunal has not decided an issue submitted to it and refuses to deal with it in an application under section 33(4), the court must have to be given a discretion to call for a supplemental award containing reasons regarding the omitted issue, depending upon the circumstances of the case.

(b) The second suggestion is that under section 33(1), the party can request that arbitral tribunal to correct typographical errors or provide an interpretation and in case the arbitral tribunal does not properly respond, there must be a provision for appeal under section 34.

The suggestion for including these two extra items in section 34, referred to in (a) and (b) above, is not being accepted inasmuch as in 1996 Act does contain a provision to cover these two contingencies. A look at section 34(3) shows that the application to set aside the award is to be filed normally in 90 days and where the Tribunal has been requested under section 33 (i.e., under sub-section (4) of section 33 to decide an issue not decided or under sub-section (1) of section 33 to make corrections or give an interpretation), the 90 days time gets extended till the response is given by the arbitral tribunal to the request. In other words, after the tribunal gives its response, the objections for the said response can also be stated in the application filed under section 34(1). We, however, propose addition of the new sub-sections (5) and (6) of section 34, so that these objections can be considered by the Court, in the light of the grounds available under the Act.

That would mean that the aggrieved party can challenge the response of the arbitral tribunal to the requests under section 33(1) and (4), while moving the Court under section 34(1). These two contingencies are clearly covered by the existing provisions. Hence the request to include these two grounds relating to various types of mistakes is rejected as unnecessary.

#### 2.29.1 Section 36: Enforcement of award by the court – bottlenecks removed and provision made to impose conditions:

Enforcement of award is now not possible if any application to set aside the award is filed in time and is pending. This has created some problems.

Section 36 states that where the time for making an application to set aside the arbitral award under sec. 34 has expired, or 'such application

having been made, it has been refused', the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

The procedure under the 1940 Act of filing the award into court and for making it a rule of court is dispensed with under the new Act. Now the award need not be made a rule of Court. It can be straightaway enforced subject to some conditions. One is that if the period prescribed for filing an application to set aside the award has expired, the award can be enforced. But where such an application to set aside the award is pending, the enforcement of the award comes to a standstill, till the application is refused by the court, because of the language in section 3, set out above.

This provision in sec. 36 has come for certain abuse by persons against whom an award is passed. By filing an application to set aside the award, even in cases where there is no substance in the application, there is, so to say, an automatic stay of the award till such time the application is rejected. Thus, an application can be simply filed and the proceedings can be dragged on.

2.29.2 It has been suggested at the Bombay seminar and also by the Director General of Supplies & Disposals (DGS&D) that a party against whom an award is passed must be compelled to deposit award amount or furnish Bank guarantee therefore, as a condition for filing the application to set aside the award under section 34(1). This suggestion is not acceptable. The suggestion of the DGS&D obviously assumes that every award is in favour of the Government. When a drastic provision is to be made, one has to take care of the repercussions on parties other than the Government. In the opinion of the Commission, it will be fair to confer power upon the Court dealing with section 34(1) applications, to grant stay of operation of award subject to such conditions as the Court may deem fit in the circumstances of the case.

2.29.3 Another suggestion of the DGS&D that contractors should give a list of assets and undertake not to transfer their assets during the pendency of arbitration or enforcement proceedings is also not a fair provision. There are enough provisions in the Act like section 9 and section 17 to enable parties to obtain interim orders for securing the interests of either party. Hence this suggestion is also rejected.

2.29.4 Instead a proposal is to be made that the award is to remain enforceable but that the Court could impose conditions while granting stay of operation of the award. Conditions could mean deposit of the full amount or part thereof or Bank guarantee or attachment of assets, etc.

It is, therefore, proposed to drop the words “or such application having been made, it has been refused”, and add a second clause in sec. 36 to the effect that the filing of an application to set aside an award, does not ipso facto amount to stay of operation of the award and that pending the said application, the court can pass such interim orders as it thinks fit, including orders in relation to the property which is the subject matter of the award or other property or orders for deposit of the monies, either in whole or in part, payable under the award, to protect the interest of the party in whose favour the award is passed.

2.29.5 The proposal is therefore to renumber the existing provision as sub-section (1) and drop the following words from sec. 36

“or such application having been made, it has been refused”.

2.29.6 It has been pointed out that award should not be allowed to be enforced unless they conform to the laws in force relating to stamp duty and Registration; unless of course part of the award is severable. Under the Act, the award becomes enforceable after 90 days. Pleas may be raised that once it has the force of a decree for purposes of Order 21, Code of Civil Procedure, it need not conform to the above laws. It will be for the execution Court under Order 21 CPC to deal with these objections. In the 1940 Act, there was no provision in respect of registration or stamp duty. The Commission is of the view that the Registration Act and the Stamp Act can take care of these problems as was the position under the old Act and the execution Court could take care of these objections.

2.29.7 For section 36 of the principal Act, the following section shall be substituted namely :-

**Substitution of section 36**

**23.** For section 36 of the principal Act, the following section shall be substituted, namely :-

**Stay of operation of award or its enforcement**

“36.(1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired then, subject to the provisions of sub-sections (2) to (4), the award shall be enforced under the Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were a decree of the court.

(2) Where an application is filed in the Court under sub section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a further application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub section (3).

(3) On the filing of the application referred to in sub section (2) for stay of the operation of the award, the Court may, without prejudice to any action it may take under sub section (1) of section 37A and subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing,

Provided that the Court, while considering the grant of stay, shall keep the grounds for setting aside the award in mind.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant ad interim measures not only against the parties to the award or in respect of the property which is the subject matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified or vacated, as the case may be, by the court subject

to such conditions, if any, as it may deem fit, after hearing the affected persons.”

2.29.8 Proposed section 37A: Scope of Courts’s powers of intervention in matters under sections 34 and 37A – Court can dismiss in limini or dismiss if substantial prejudice is not shown and matters to be disposed of within 6 months:

This is one of the most important amendments proposed.

The Commission wants to strengthen the appeal procedure by permitting dismissals in limini if there are no merits. Even after notice, substantial prejudice is to be shown for Court interference.

2.29.9 A general discretion is to be vested in the court to reject applications or appeals in limini. The proposal is that’s the court will not interfere in appeals before the award (under section 37 (2)) or after the award (under section 34) and can reject them in limini.

2.29.10 Proposal is also to require substantial prejudice to be shown for interferences. This provision is to apply both to purely domestic or international arbitrations. A provision for disposal of all applications and appeals under sections 34 and 37 within six months is also proposed, to expedite the Court proceedings. Of course, brief reasons have to be recorded, if the applications or appeals are dismissed in limini.

Where applications are filed challenging all awards coming under section 34 or appeals filed in respect of all orders of the arbitral tribunal referred to in section 37(2) or appeals filed in respect of orders of the Court in section 37(1), the following procedure will be adopted by the Court.

2.29.11 After section 37 of the principal Act, the section 37A shall be inserted, namely:-

**Insertion of new section 37A**

37A Substantial prejudice to be shown for intervention under 34 and 37 and appeals, applications etc to be disposed of within six months

“37A (1) The court referred to in sub-section (1) of section 34, while dealing with an application under that sub-section or the court referred to in sub-section (1) or sub-section (2) of section 37 while dealing with an appeal under any of those sub-sections, may , if it thinks fit so to do, and after fixing a day for hearing the applicant or appellant or his counsel and hearing him accordingly if he appears on that day, dismiss the application or appeal, as the case may be, without giving notice to the respondent ,for reasons in brief to be recorded in writing ,if there are no merits in the application or the appeal, as the case may be.

(2) No award passed by the arbitral tribunal shall be set aside on an application under sub-section (1) of section 34 and no order passed by the arbitral tribunal or by the court shall be set aside in an appeal under sub-section (1) or sub-section (2) of section 37, as the case may be, unless substantial prejudice is shown.

(3) Every application or appeal referred to in sub-section (1), shall be disposed of within six months from the date of service of notice on the opposite party:

Provided that, while dealing with an application under sub section (1) of section 34, if the court adjourns the proceedings under sub-section (5) of section 34, the period of six months shall be reckoned from the date of receipt of the order from the arbitral tribunal under that sub-section”

**2.30.1      Section 42: Filing of subsequent applications and jurisdiction of courts and sections 8, 8A and 11 – proposed Section 42 (1) to (4)**

This is one of the most important provision of the Act. But it has been left vague so far as applications filed under section 8 before a judicial authority or regarding applications filed under section 11. We proposed to clarify the sections so as to avoid doubts.

Section 42 requires that all subsequent applications in respect of any arbitration are to be filed in the same Court in which the first of such application was filed. There was a similar provision under the old Act of

1940. That did not present much difficulty because the definition of ‘Court’ in sec. © of that Act was very wide. But, in the present Act of 1996, the definition of ‘Court’ is very much restricted. Courts subordinate to the Principal Civil Court in a district or to the Court of the Principal Judge, City Civil Court in a city are excluded in section 2(1)(e). The word ‘Court’ does not also include courts of co-equal jurisdiction in the district or city concerned to which any matter might have been transferred from the Principal courts aforesaid. Further we have to provide for application before judicial authorities under Section 8 courts refer to in Section 8A and application under Section 11 clearly.

To cover these categories, Section 42 is to be amended suitably.

2.30.2 (i) General provision: Section 42 (1)

Section 42 (1) is a general provision stating that subsequent application will be filed as per sub-section (2) to (5). ‘Court’ is defined to mean the courts and judicial authorities in sub-section (2) to (5). Sub-section (2) deals with courts under Section 2 (1) (e).

2.30.3 (ii) Application under section 8 and section 42 (3)

We shall next deal with Section 8. Where an action is filed before a judicial authority and the respondent successfully pleads an arbitration clause and an arbitral tribunal is appointed. The ‘judicial authority’ is a court of original jurisdiction, i.e., the Section 2 (1) (e) courts. These situations present no difficulties. If an application seeking reference is filed in these courts, all subsequent applications including these under Section 34 will be filed in the court which entertained the first application.

So far as other courts of original jurisdiction under section 8 are concerned, they are the courts inferior to the Principal Courts in the district or city. If the said courts have appointed an arbitrator at the instance of the defendant, the subsequent application including those under section 34 have to be filed in the Principal Courts to which such courts are subordinate.

If the action is one in a quasi-judicial tribunal under section 8 where at the respondent instance, a reference is made to an arbitrator, the subsequent applications (including the one under Section 34) are to be made to the Principal District Court in the district or city, in whose territorial

jurisdiction, the judicial authority is located. These provisions are contained in the proposed Section 42 (3).

2.30.4 (iii) Application under section 8A and section 42 (4)

So far as Section 8A is concerned, the procedure is contained in the proposed Section 42 (4) with two Explanation.

Now under Section 8A, the reference to arbitrators is made in a pending suit, appeal or revision in the courts which may make reference are the trial courts or even appellate courts. Trial courts which exercise original jurisdiction may be (a) courts jurisdiction to the Principapl Court of Civil Jurisdiction in a district or court in a city subordinate to the courts of the Principal Judge, City Civil Courts; (b) the co-equal courts to the Principal Courts to which the above proceedings might have been transferred; (c) the above said Principal Courts in their original or appellate jurisdiction; (d) the High courts in original jurisdiction; (e) High courts in appellate or revision jurisdiction, (f) Supreme Court in appellate jurisdiction. Here the definition of ‘legal proceedings’ under Section 8A is to be kept in view.

The position under Section 42 will then be that where reference is made by the courts subordinate to the Principal courts in the district or city, or by courts of co-equal jurisdiction like the Principal Courts (i.e. on transfer of the matter) or where reference is made by the said Principal courts – in original/appellate jurisdiction, the subsequent applications under part I (including Section 34) are to be filed in the said Principal Courts.

However, if the reference is made by the Supreme Court or a High Court in original or appellate jurisdiction, subsequent applications are to be filed only in the High court or Supreme court, as the case may be. These aspects are set out in Section 42 (4) and the two Explanation.

2.30.5 (iv) Application under section 11 and section 42 (5):

So far as Section 11 is concerned, if the Supreme Court or the High Court have appointed arbitrators, then the subsequent applications including under Section 34 will have to be filed in accordance with section 2 (1) e) – i.e., based on the location of the subject matter in the jurisdiction of the Principal District Court in the district or the Principal Chief Judge, City

Civil Court or in the High Court original jurisdiction and depending on pecuniary jurisdiction. This is covered by Section 42 (5).

We have thus provided for all the contingencies in sub-section (1) to (5) of section 42. The existing section with same modifications has been renumbered as sub-section (1).

2.30.6 For section 42 of the principal Act the following section shall be substituted namely :-

**Proper court for filing subsequent applications**

“42. (1) Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to any arbitration agreement any application under this Part has been made to a court in accordance with sub-sections (2) to (5), then all subsequent applications (other than the applications referred to in sub-section (2) of section 31A) arising out of that agreement and the arbitral proceedings (hereinafter referred to in this section as the subsequent applications) shall be made in accordance with sub-sections (2) to (5) and in no other court.

(2) Where an application is made to a court within the meaning of clause (e) of sub-section (1) of section 2, the subsequent applications shall be made in that court and in no other court.

(3) If in a pending action under section 8 before a Judicial authority, an application is made, seeking reference to arbitration with respect to an agreement, then the subsequent applications shall be made in the following manner, namely:-

- (i) where the Judicial authority is a court within the meaning of clause (e) of sub-section (1) of section 2, the subsequent application shall be made in the said court in which the application is made and in no other court;
- (ii) where the Judicial authority is a Court which is inferior in grade to the principal Civil Court of original

jurisdiction in a district or the court of the principal Judge of the City Civil Court exercising original jurisdiction in a city (hereinafter called the principal courts), as the case may be, the subsequent application shall be made in the said principal Court to which the court where the application is made is subordinate and in no other court;

- (iii) where the Judicial authority is a quasi-judicial statutory authority, the subsequent application shall be made in the principal Court mentioned in clause (ii) within whose territorial limits the said authority is situated and in no other court.

(4) If in a legal proceeding under section 8A before any of the courts referred to in that section, an application is made seeking reference to arbitration with respect to an agreement, then the subsequent applications shall be made in the following manner, namely:-

- (i) where the application is made in the Supreme Court or in the High Court or in the principal Civil Courts mentioned in clause (ii) of sub-section (3), as the case may be, the subsequent application shall be made in the Court which made the reference and in no other Court;
- (ii) where the application is made in a Court of coordinate jurisdiction or inferior in grade to the Principal Civil courts mentioned in clause (ii) of sub-section (3), as the case may be, the subsequent application shall be made in the Principal Court from where the legal proceeding was transferred to such court of coordinate jurisdiction or to which the said court is subordinate, as the case may be, and in no other court.

Explanation 1.- In this sub-section, the expression “legal proceeding” shall have the same meaning assigned to it in the Explanation to section 8A.

Explanation 2.- For the removal of doubts, it is hereby declared that in the case of arbitral proceedings which have commenced pursuant to a reference made by the Supreme Court or the High Court under section 8A and awards passed pursuant thereto, the references to “court” wherever it is used in this Part shall, except in section 27 and section 31A, be construed as references to the Supreme Court or the High Court, as the case may be.

(5) If an application seeking reference to arbitration with respect to an agreement is made under section 11, in the Supreme Court or in the High Court, as the case may be, then the subsequent applications shall be made in the Court within the meaning of clause (e) of sub-section (1) of section 2 and in no other court.

2.31.1 Proposal for panel of arbitrators by the Chief Justice of India:  
Section 42A – accepted

It has been suggested that a scheme for empanelling arbitrators must be prepared by the Chief Justice of India. It has been suggested that under the scheme all retired judges of the Supreme Court shall be included and that a list will be prepared from among some of the retired judges of the High Court. The scheme may provide that they be paid such remuneration and allowances or prerequisites as the Chief Justice of India will determine for a contract period of (say) two years or so. The Chief Justice of India may decide the fixed remuneration is to be paid. During the period, those in the panel are available for being nominated as arbitrators. It will be for the Chief Justice of India to work and other details of the scheme. One suggestion is that parties need not pay fee to these empanelled arbitrators during the contract period.

The Commission recommends the insertion of the following new section 42A after section 42 of the principal Act:

2.31.2 After section 42 of the principal Act, the following section shall be inserted, namely:

**“42A Scheme for panel of arbitrators:**

The Chief Justice of India, may prepare a scheme, for constituting a panel of arbitrators to enable either the parties or the Supreme Court or the High Court under section 11 or the judicial authority under section 8 or the courts referred to in section 8A or the parties under section 43A ,as the case may be, to appoint arbitrators from such a panel subject to such conditions as may be specified by the Chief Justice of India in that scheme.”

2.32.1 Partnership Act: Maharashtra Amendment Act (29/84) – amendment to 1996 Act proposed by adding section 42B – accepted.

It was brought to the notice of the Commission that though several partnership agreements contain arbitration clauses, certain difficulties are being faced in Bombay because of sub clause (2A) introduced in the Partnership Act, 1932 by the Maharashtra Amendment by Act 29/84, in proceedings for dissolution of a firm or for accounts of a dissolved firm or for realization of its property, where the firms were not registered.

Section 69 of the Partnership Act, in so far as relevant, reads as follows:

“Section 69: Effect of non-registration:

- (1) No suit to enforce a right arising from a contract or conferred by this Act shall be initiated in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
- (2) No suit to enforce a right arising from a contract shall be initiated in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firm as partners in the firm.
- (3) The provisions of sub sections (1) and (2) shall apply also to a claim off or other proceeding to enforce a right arising from a contract, but shall not affect.-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm.

(b) "....."

Section 29 of the Maharashtra Amendment Act, 1984 prohibited any suit as is contemplated in sec. 69(3)(a) unless it be one filed by the legal representatives of a deceased partner. The said amendment also amended sec. 69(3) and substituted "sub section (1) and (2)" by the words "sub section (1), 2 and (2A)".

Now, section 69(2) creates a bar to suits to enforce a right arising from a contract or a right conferred by the Act, if it is instituted by an unregistered firm against third parties. Sub section (3) of sec. 69 applies the bar in sec. 69(2) to claims for set-off or "other legal proceedings" but it says that this shall not affect (a) suits for dissolution and accounts of dissolved firm or power to realize the property of a dissolved firm etc.

The word 'other legal proceeding' was constructed by the Supreme Court in Jagdish Chandra vs. Kajaria Traders AIR 1964 SC 1882 as including 'application for appointment of arbitrators' under section 8 (2) of the 1940 Act.

That means, normally, a proceeding, including one under the Arbitration Act, 1940 is not barred if it relates to dissolution of the firm or for accounts or for realization of its property, even if the firm is unregistered.

2.32.2 But, the difficulty is created by sub clause (2A) introduced in sec. 69 in Maharashtra. We have noticed that sec. 69(2) itself says that the bar does not apply to suits or proceedings for dissolution and accounts or to realize assets of dissolved firm. But sec. 69(2A) says that no suit for dissolution or accounts of a dissolved firm or any right or power to realize property of a dissolved firm can be claimed by a partner of an unregistered firm. The Maharashtra Amendment also amends sec. 69(3) stating that the provisions of sub-sections (1) and (2) and 2(A) of section 69 shall apply to suits for dissolution or for accounts or to the power of realizing property of such firms.

The effect of sec.69(2A) and the amended sec. 69(3) in Bombay is that the exception in the latter part of sec. 69(3) created under the Central Act in favour of permitting suits or other proceedings for dissolution of a firm, or for accounts or for realizing its property, has become nullified. In other words neither a suit nor even an application for arbitration under sec. 11 (nor an application in an action under section 8) can be filed if the purpose is to have the unregistered firm dissolved or its accounts finalized or for recovery from its property. Thus, in the state of Maharashtra alone such a disability has arisen. The 1996 Act has therefore become inapplicable in such cases.

This difficulty was placed before the Commission during the Bombay seminar and upon a consideration of the problem, the Commission is of the view that this disability has to be rectified, particularly when today the emphasis is on ADR procedures. The Commission is of the view that so far as partners of an unregistered firm are concerned, they must have the benefit of the 1996 set, for the limited purposes of obtaining dissolution of the firm for settlement of accounts of the unregistered firm or for realization of the property of the dissolved firm. In other respects, that is to say, except for purposes of the 1996 Act, section 69(2A) and 3 can remain. It appears to the Commission that these limited class of disputes inter-se partners should be allowed to be resolved under the 1996 Act notwithstanding the Maharashtra Amendment Act of 1984. This would obviate the need for passing a preliminary decree for accounts and then a final decree for accounts.

It is true that the provision of section 69 are intended to put pressure on partners to register that firm so that third parties could be put on notice about the partners and their shares in the firm and of facts concerning the firm. The Maharashtra Amendment was intended to put more pressure on parties to register their firm, or else they would not be able to get even, as amongst them, any dissolution of the firm or settlement of accounts nor could they release the property of the dissolved firm. In the opinion of the Commission, these provisions as amended in Maharashtra shall remain except for the limited extent of enabling arbitration and if that benefit is given, partners can go to arbitration for dissolution of an unregistered firm, or for settlement of accounts of a dissolved firm or for realization of the property of a dissolved firm.

It is therefore proposed to rectify this effect by adding section 42B. If Parliament makes a law in this field, the State Amendment shall automatically get superseded under the principle of repugnance.

2.32.3 The Commission recommends the insertion of a new section 42B after the proposed section 42A as stated above, to be inserted on the following lines:

**“42B Special provision relating to unregistered partnerships under the Indian Partnership Act, 1932 as amended by the Maharashtra Amendment Act 1984**

The provisions of the Indian Partnership (Maharashtra Amendment) Act 1984, (Maharashtra Act 29 of 1984) amending section 69 of the Indian Partnership Act, 1932 in its application to the State of Maharashtra, shall not affect the initiation of any proceedings under the Arbitration and Conciliation Act, 1996 for the purpose of enforcement of any right to seek-

- (a) the dissolution of the firm;
- (b) the settlement of the accounts of the dissolved firm; or
- (c) the realization of the property of the dissolved firm.”

2.34.1 Atlantic Clause: Explanation to be introduced under sec. 43(3) in view of the provisions of sec. 28 of the Contract Act 1872, as amended by Contract (Amendment) Act, 1996 making “time barring clauses” void.

A “time barring” clause is a familiar clause in several arbitration agreements. We shall give an example of such a clause – it says that a party must take some steps (such as issuing a notice for arbitration) to commence arbitration proceedings within a period of time fixed by the agreement failing which the claim itself would get barred or get extinguished. Such a clause was upheld in Atlantic Shipping Case, 1922(2) AC 250 and by our Supreme Court in Vulcan Insurance Co. Ltd. Vs. Maharaj Singh AIR 1976 SC 287. The Supreme Court upheld such a clause on the basis of sec. 28 of the Contract Act, 1872 as it stood then.

As long as such a clause was valid, the legislature tried to relieve against hardship. The English legislature in sec. 27 of the English Act, 1950 and sec. 12 of the recent English Act, 1996 and sec. 37(3) of the Indian 1940 Act and in sec. 43(3) of the 1996 Act, felt that such a premature extinguishment of the claim itself might cause hardship and should therefore be relieved against in cases of hardship by extending the period for filing actions in the court. To relieve hardship, the 1996 Act made a provision for extension of period of limitation by the Court as follows:

Sec. 43(3) reads as follows:

“Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.”

2.34.2 We shall refer to the subsequent development w.e.f. 8.1.99 pursuant to the 91<sup>st</sup> Report of the Law Commission, sec. 28 of the Contract Act, 1872 has been amended. The amendment to sec. 28 of the Contract Act, 1872 was made by the Contract (Amendment) Act, 1996, and came into force on 8.1.97, and a new sec. 28 was substituted. The statement of objects and reasons of the Amendment Bill reads as follows:

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“The Law Commission of India has recommended in its 97th Report that Section 28 of the Indian Contract Act, may be amended so that the anomalous situation created by the existing Section may be rectified:

It has been held by the Courts that the said Section 28 shall invalidate only a clause in any agreement which restricts any party thereto from enforcing his rights absolutely or which limits the time within which he may enforce his rights. The Courts, have, however, held that this Section shall not come into operation when the contractual term spells out an extinction of the right of a party to sue or spells out the discharge of a party from all liability in respect of the claim. What is

thus hit by Section 28 is an agreement relinquishing the remedy only, i.e. where the time-limit specified by Law. A distinction is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the right is valid. This approach may be sound in theory but in practice it caused serious hardship and might even be abused. It is felt that Section 28 of the Indian Contract Act of 1872 should be amended as it harms the interest of the consumer dealing with big Corporations and causes serious hardship to those who are economically disadvantaged. The Bill seeks to achieve the above objects.”

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Under clause (b) of the new sec. 28, it was declared that a clause in a contract which provides for an extinguishment of a right will also be void. The new sec. 28 reads as follows:

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“Sec. 28: Agreement in restraint of legal proceedings void,  
Every agreement -

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- (a) By which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may enforce his rights, or
  - (b) Which extinguishes the right of any party thereto, or discharge any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”
- 

(The Explanations to the new sec. 28 however permit arbitration of future as well as present disputes and are not relevant in the present contract.)

In view of the new sec. 28(b) of the Contract Act, if there is a provision in an arbitration clause which requires a party to take some steps to commence arbitral proceedings within a time fixed in the arbitration agreement, failing which the claim gets barred, such a clause will be void.

(See p.112 of the Commentary on the 1996 Act by Justice S.K. Chawla and p.113 of the commentary by Justice V.A. Mohta, that such

“time- bar clauses” have become void after the new sec 28 of the Contract Act was introduced w.e.f. 8.1.97.)

Consequently, if such a clause is void, then the question of seeking extension of time on the ground of hardship is no longer necessary. Thus, the provision in sec. 43(3) that a party can seek extension of time from a court of law to relieve hardship becomes redundant w.e.f. 8.1.97.

The Commission, while reviewing the position in the year 2001, if it does not take note of this change in the law in sec. 28 and if it allows sec. 43(3) to remain without amendments, it may lead to some doubts and given an impression that sec. 43(3) still survives even after the amended sec. 28 of the Contract Act, i.e. after 8.1.97.

2.34.3 It has therefore been decided to clarify the position by adding the following proviso below in sec. 43(3):

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“ Provided that after the commencement of Indian Contract (Amendment) Act 1996, any provision in the arbitration agreement which provides that any such claim shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, shall be void:

Provided further that the provisions of this sub-section shall be deemed to have no effect from the date of such commencement”.

**2.35.1** Section 43: Regarding application of the Limitation Act, 1963: Proposed sub-section (5) and (6) in section 43

A lacuna under sec. 43 was pointed out in the Bombay seminar. For purposes of the Limitation Act, 1963, sec. 43(4) now excludes the period spent in arbitration proceedings where the award is ultimately set aside.

2.35.2 But there are other situations where the arbitral agreement might be held to be not in existence or that it is null and void or invalid. Such issues can arise, before the stage of the arbitral award, at the stage of applications under sec. 11 of the Act before the Supreme Court or the High Court, in view of the flexible provision now proposed. If either of these two

courts hold that there is no agreement for arbitration or that it is null and void or inoperative or not capable of enforcement, there can be no arbitration. (The position is similar to sec. 33 of the old Act of 1940 in respect of which the Law Commission proposed in the 76<sup>th</sup> Report, a separate provision for excluding the period for purposes of the 1996 Act of Limitation).

2.35.3 Such a situation can also arise under sec. 16(2) and (3) of 1996 Act where the pleas of want of jurisdiction or the matter being beyond the scope of the arbitration clause, are accepted by the arbitral tribunal or affirmed on appeal by the Court. (If the pleas are refused, the matter can arise only after the award, which situation is covered by sec. 43(4). Hence we propose to add clauses (5) & (6) to cover such cases arising under sec. 11 and sec. 16(2) and 16(3). Under sec. 8 such a question does not arise because if the arbitration does not go on, the action under sec. 8 gets revived. It is not necessary to intervene in cases where no dispute is in existence.

2.35.4 The proposed amendments are as follows:

In section 43 of the principal Act, after sub-section (4) the following sub-section shall be inserted namely:-

“(5) In computing the time prescribed by the Limitation Act, 1963 (36 of 1963) for the commencement of proceedings in relation to any dispute, the period between the commencement of the arbitration and the date of the orders mentioned below, shall be excluded ,namely:-

(a) an order of the arbitral tribunal accepting a plea referred to in sub-section (2) or sub-section (3) of section 16

(b) an order under clause (a) of sub-section (2) of section 37 by the court affirming an order under clause (a) or an order of

the Supreme Court on further appeal, if any, affirming the last mentioned order.

(c) an order declaring an arbitration agreement as null and void or inoperative or incapable of being performed or as not in existence, passed by -

(i) the High Court under sub-section (13) of section 11 in the case of an arbitration other than an international arbitration (whether commercial or not) or by the Supreme Court on further appeal.

(ii) the Supreme Court under sub-section (13) of section 11 in the case of an international arbitration (whether commercial or not) where the place of arbitration is in India;

The discussion regarding insertion of provisos in sub-section (3) of section 43 of the principal Act, has already been done under para 2.7.1 (supra) of the report.

### 2.36 Supersession of arbitration agreement – plea for provision rejected

It was proposed in the Consultation Paper that a provision like sec.19 of the 1940 Act to supercede the arbitration agreement may be included. There was also a provision in proviso to section 25 of the 1940 Act. The English Act, 1950 contained similar provision in sections 24(2) and 25(2)(b). The court could declare that the arbitration agreement was to have no effect. This related to cases of fraud or where the arbitrators were removed by the court. Russel says (para 7.086) that this remedy was rarely

used (Property Investments (Development) Ltd. vs. Byfield Building Services Ltd. (1985) 31 Build LR 47 and that the remedy is not available under the 1996 Act. The court may fill a vacancy but it is for the parties to agree to terminate the arbitration agreement (sec. 23 of the English Act).

It appears that the procedure for challenging of an arbitrator (sec.13) or his failure or impossibility to act (sec.14) and the power of termination and substitution (sec.15) are sufficient remedies. Therefore, there is no need to have a provision for supersession of the arbitral agreement.

### 2.37 Provision to enable arbitrators to refer question of law to the court – rejected

A proposal was made in the Consultation Paper based on sec. 14(3) of the 1940 Act. Section 45 of the English Act enables the parties, with consent among themselves or with permission of the arbitral tribunal, to seek opinion of court on a question of law, if it is likely to save costs substantially.

It was suggested in the debate on the Consultation Paper that this may delay the arbitral process. The Commission is not in favour of any such provision being included.

### **2.38.1 Fast track arbitration: proposed 43A to 43D (chapter XI) in**

#### **Part I:**

In modern day arbitration system, there are various types of Fast Track Arbitration. Some are called ‘Fast Track Arbitration’, some others are called ‘accelerated arbitration’ and yet some others are called ‘expedited arbitration’ (see Vol. 10, (1993) Journal of International Arbitration p.69, “When Doctrines Meet – Fast Track Arbitration and the ICC experience” by Benjamin Davis and Others). What we have proposed in Chapter XI in sections 43A to 43D and Schedule IV is not a fully time bound Fast Track Arbitration but is one where initially a period of six months is provided by statute for the passing of award, which can be extended by the parties for another period of three months and thereafter, if the award is not passed, the procedure envisaged under sub sections (4) to (8) of sec. 29A, namely the High Court fixing the time schedule, is to be followed, till the award is

passed. Further we have provided that application to set aside the award should be filed in the High Court and not the Principal Courts mentioned in sec. 2(1)(e). Thus, one level of litigation in the Principal Courts is eliminated, as stated below.

Various arbitral institutions also provide for fast track arbitration in the rules framed by those institutions. Under this procedure, the parties may opt for fast track arbitration and request the arbitral tribunal, before the commencement of the arbitration proceedings to decide the reference in a fixed time-frame as agreed between the parties, according to the fast track arbitration procedure. For example, rules 43 to 57 of the Rules of Arbitration of the Indian Council of Arbitration; the International Centre for Alternative Dispute Resolution, New Delhi (ICADR) Fast Track Arbitration Rules, 1996; in London Court of International Arbitration Rules, article 9 deals with expedited formation; the Chartered Institute of Arbitrators Short Form Arbitration Rules, 1991; Chapter III of the China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules deals with summary procedure, amply lay down the governing of fast track arbitration by various institutions in the world. (see V.A. Mohta, The Arbitration and Conciliation Act, 1996, 1<sup>st</sup> Edn. 2001) Similarly, there is necessity to make a provision for fast track arbitration, details of which are set out in the Schedule to the Act. It is, therefore, proposed to insert a new section 19A after section 19, to enable the parties to opt for fast track procedure, as follows:

The provisions in the new proposed Section 43A are firstly that parties to a legal proceeding in a court or parties to an arbitration agreement have to agree to go to the Fast Track procedure for arbitration by a single named arbitration chosen by them. If they so agree, then the procedure in the schedule shall apply. The procedure in the arbitration agreement, if any, shall cease to apply and the procedure in the schedule will apply. If there is any aspect on which the scheduled is silent, then the provisions of the Act, so far as may be, will apply.

One other aspect in the schedule is that normally, arbitration should to completed in six months and application to set aside the award is to be filed in the High Court and not in the court under Section 2 (1) (e) and the High Court is to dispose of the matter within three months of service of notices on the opposite parties.

## 2.38.2 Insertion of new Chapter XI in Part I

28. After section 43 of the principal Act, the following Chapter shall be inserted, namely:

### **“ CHAPTER XI**

#### **Single Member Fast Track Arbitral Tribunal and Fast Track Arbitration**

- “43A. (1) The parties to an action before a judicial authority referred to in section 8 or a legal proceeding before any of the courts referred to in section 8A or to an arbitration agreement or to an application before the Supreme Court or the High Court under section 11, as the case may be, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their disputes resolved by arbitration in accordance with the provisions of this section, sections 43B to 43D and the procedure specified in the Fourth Schedule (hereinafter referred to as the Fast Track Arbitration).
- (2) If the parties referred to in sub-section (1) agree to have the disputes resolved through Fast Track Arbitration under that sub-section, then the arbitral tribunal agreed to between the said parties shall be called Fast Track Arbitration Tribunal.
- (3) Notwithstanding anything contained in the arbitration agreement-
- (i) the Fast Track Arbitral Tribunal shall consist of a sole arbitrator;
  - (ii) the sole arbitrator shall be chosen by parties unanimously;
  - (iii) the fee payable to the arbitrator and the manner of payment of the such fee shall be such as may be agreed between the sole arbitrator and the parties;
  - (iv) the procedure laid down in the Fourth Schedule (hereinafter referred to as the Fast Track Procedure) shall apply.

#### **“43B Other provisions of the Act to apply subject to modifications**

The other provisions of this Part, in so far as they are matters not provided in the Fourth Schedule, shall apply to the Fast Track

Arbitration as they apply to other arbitrations subject to the following modifications, namely:-

(a) references to ,

(i) “arbitral tribunal” shall, unless the context otherwise requires, be deemed to include references to the Fast Track Arbitral Tribunal; and

(ii) “court” shall be deemed to be references to the High Court , except in section 27 and section 31A;

(b) in sub-sections (1) to (4) of section 33, for the words “thirty days” wherever they occur, the words fifteen days shall be substituted;

(c) in section 34,

(i) in sub-section (3), for the words “three months” the words “thirty days” and for the words “ thirty days” the words “fifteen days” shall be substituted respectively;

(ii) in sub-section (5), for the words “sixty days” the words “thirty days” shall be substituted;

(iii) in sub-section (6) for the words, “thirty days” , the words “fifteen days shall be substituted;

(d) in section 37A, for the words “six months” the words “three months” shall be substituted.

(e) in sub-section (1) of section 37, the provision for appeal shall not apply to orders referred to in clauses (a) and (b) of sub-section (1) of section 37.

**“43C Proper court for filing subsequent applications**

Notwithstanding anything contained in this Part or in any other law for the time being in force but subject to sub clause (ii) of clause (a) of section 43B, where with respect to an arbitration agreement, any application is made or is required to be made before a ‘Court’ in the manner mentioned in this Part, such an application shall be made to the ‘High Court’ and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that High Court and in no other High Court.

### **High Court for purposes of this Chapter**

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43 D. The references to ‘High Court’ in sections 43B and 43C shall be construed as a reference to the High Court within whose territorial limits, the principal civil court or the court of the principal Judge of the City Civil Court referred to in clause (e) of sub-section (1) of section 2 ,as the case may be, is situated.”

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The Commission recommends the insertion of the following Fourth Schedule ( referred to as the Fast Track Arbitration) after the Third Schedule to the principal Act:

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After the Third Schedule to the principal Act, the following Schedule shall be inserted namely:-

**“The Fourth Schedule  
Fast Track Arbitration  
[See Part I, Chapter XI ]**

### **Constitution of Fast Track Arbitral Tribunal**

1. (1) For the purposes of Fast Track Arbitrations under sub-section (1) of section 43 A, the Fast Track Arbitral Tribunal shall be deemed to be constituted with effect from the date on which the parties after obtaining the consent of the sole arbitrator , agree in writing that the sole arbitrator shall be the Fast Track Arbitral Tribunal under subsection (1) of section 43A.
- (2) Parties shall communicate the said agreement to the sole arbitrator on the same day.

Procedure to apply from date of constitution of Fast Track Arbitral Tribunal

2. The procedure specified in this Schedule shall, with effect from the date of the constitution of the Fast Track Arbitral Tribunal, apply to all Fast Track Arbitrations under sub-section (1) of section 43 A.

Procedure

3. (1) Within fifteen days of the constitution of the Fast Track Arbitral Tribunal, the person who has raised the dispute (hereinafter referred to as the claimant) shall send simultaneously to the tribunal and the opposite parties (hereinafter referred to as the respondents)-
- (a) a claim statement containing the facts, the points in issue and the relief claimed;
  - (b) documentary evidence, if any, in support of his case;
  - (c) where reliance is placed on the testimony of any witness (including that of a party) a copy of the witness's affidavit in writing;
  - (d) where reliance is placed on the opinion of an expert, the particulars relating to that expert, his qualifications and experience, and a copy of his opinion;
  - (e) list of interrogatories, if any;
  - (f) application for discovery or production of documents, if any, mentioning their relevancy;
  - (g) full address, including e-mail or fax, telephone numbers, if any, of all claimants and of all the parties, for the purpose of expediting communication and correspondence;
  - (h) any other material considered relevant by the applicant;
- (2) The respondent shall, within fifteen days after receipt of the claim statement and the documents referred to in sub-paragraph (1), simultaneously send to the Fast Track Arbitral Tribunal as well as to the claimant, his defence statement, together with documentary evidence, witness testimony by affidavit (including that of a party) and expert opinion, if any, in support thereof, together with counter claims, if any, supported by documents.

- (3) The procedure specified in this Schedule shall apply to such counter claims as they apply to a claim.
- (4) Within fifteen days of the receipt of the defence statement or of the counter claims, the claimant shall send to the Fast Track Arbitral Tribunal and to the respondents his rejoinder and statement of defence to the counter claim.
- (5) Within fifteen days of the receipt of the defence statement to the counter claim, the respondent shall simultaneously send his rejoinder to the said statement, to the Fast Track Arbitral Tribunal as well as to the claimant.
- (6) In case discovery or production of documents is allowed, the parties shall be permitted to submit their supplementary statements, if any, to the Fast Track Arbitral Tribunal within a specified period and to simultaneously send copies thereof to each other.
- (7) The Fast Track Arbitral Tribunal shall decide the disputes on the basis of the pleadings and documents, affidavits of evidence, expert opinion, if any, and the written submission filed by the parties.
- (8) The Fast Track Arbitral Tribunal may permit any witness to be orally questioned and lay down the manner in which evidence shall be recorded or for receiving affidavits in lieu of oral evidence.
- (9) The Fast Track Arbitral Tribunal may otherwise permit oral evidence to be adduced, if it considers that any request for oral evidence by any party is justified or where the Fast Track Arbitral Tribunal itself considers that such oral evidence is necessary.
- (10) The Fast Track Arbitral Tribunal may, in addition, call for any further information or clarification from the parties in addition to the pleadings, documents and evidence placed before it.

### **Representation by Counsel**

4. The Fast Track Arbitral Tribunal shall permit the parties to appear and conduct the case personally or through their counsel or by any person duly authorized by the parties to represent them.

### **Written notes of arguments or oral arguments**

5. After the conclusion of the evidence, the Fast Track Arbitral Tribunal may direct all the parties to file their written notes of argument or may, at its discretion, in addition permit oral arguments and shall fix a time schedule therefor and may also restrict the length of oral arguments.

### **Conduct of proceedings**

6. (1) The Fast Track Arbitral Tribunal shall conduct its proceedings in such a manner that the arbitration proceedings are, as far as possible, taken up day after day, at least continuously for three days on each occasion.

(2) The Fast Track Arbitral Tribunal shall ordinarily fix the time schedule in such a manner, so that the proceedings may be conducted continuously from 10.30 A.M. to 1 P.M. and 2 p.m. to 4.30 p.m. every day

### **Parties to be bound by the procedure and time schedule**

7. The time schedule fixed under paragraphs (3) and (5) and the procedure specified under paragraph (6) by Fast Track Arbitral Tribunal, shall be binding on the parties.

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### **Consultation of experts**

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8. (1) At any time during the course of arbitration and before the passing of the award, the Fast Track Arbitral Tribunal may, at its discretion, if need be, consult any expert or technically qualified person or a qualified accountant for assistance in relation to the subject matter in dispute, at the expense of the parties, and shall communicate the report of the above said person to the parties to enable them to file their response.

(2) If the Fast Track Arbitral Tribunal thereafter considers on its own or on the request of parties that any clarification or examination of the above said persons referred to in sub-paragraph (1) or examination of any other person is necessary, it may call upon the said person to clarify in writing or to call him or such other person as a witness for necessary examination.

### **Procedure in cases of default by parties**

9. (1) In case there is default on the part of any party to adhere to the time limits specified in this Schedule or are fixed by the Fast Track Arbitral Tribunal or there is violation of any interim orders or directions of the Fast Track Arbitral Tribunal issued under section 17 or under this Schedule, the Fast Track Arbitral Tribunal may pass peremptory orders against the defaulting party giving further time for compliance including peremptory orders to provide appropriate security in connection with an interim order or direction.

(2) In case the Fast Track Arbitral Tribunal is satisfied that a party to the arbitration is unduly or deliberately delaying the arbitral proceedings, or the implementation of the peremptory orders, the Fast Track Arbitral Tribunal may impose such costs as it may deem fit on the defaulting party or may pass an order striking out the pleadings of the party concerned or excluding material or draw adverse inference against the said party and in case security for costs of arbitration is not furnished as required under sub paragraph (1), the claim may be dismissed.

(3) Without prejudice to the provisions of sub-paragraph (2), the Fast Track Arbitral Tribunal may dismiss the claim if the claimant does not effectively prosecute the arbitration proceedings or file the papers within the time granted or neglects or refuses to obey the peremptory orders of the tribunal or to pay the dues or deposits as ordered by the Fast Track Arbitral Tribunal:

Provided that failure to file a statement of defence to the claim statement or to the counter claim shall not by itself be treated as an admission of the allegations in the claim statement or in the counter claim, as the case may be.

(4) If the opposite party does not file its defence or does not effectively prosecute its defence or file the papers within the time granted or refuses to obey the peremptory orders of the tribunal, the Fast Track Arbitral Tribunal may make an ex parte award.

### **Fast Track Award to be passed in six months**

**10.** (1) The Fast Track Arbitral Tribunal shall pass an award within six months from the date of the constitution of the Fast Track Arbitral Tribunal or within such extended period as specified in sub paragraphs (2) to (4).

(2) The parties may, by consent, extend the period in subparagraph (1), by a further period not exceeding three months.

(3) If the Fast Track Arbitration Award is not made within the period specified under subparagraph (1) and the period agreed to by the parties under subparagraph (2), the arbitration proceeding shall, subject to the provisions of sub-paragraph (4), stand suspended until an application for extension is made to the High Court by any party to the Fast Track Arbitration or where none of the parties makes an application as foresaid, until such an application is made by the arbitral tribunal.

(4) The provisions of subsections (4) to (8) of section 29A shall, so far as may be, apply to the High Court for the disposal of application referred to in sub paragraph (3), till the award is passed.

### **Fast Track Award to contain reasons**

**11.** The Fast Track Arbitral Tribunal shall pass an award and give reasons for its award keeping in mind the time limit referred to in paragraph 10 unless it is agreed between the parties that no reason need be given or the award is based on settlement of disputes.

#### **2.39.1 Section 82 : High Court Rules**

It has come to notice of the Commission that most arbitrations are conducted in India in a casual fashion only for an hour or two and the matter simply adjourned. Further adjournments are request by lawyers or made by arbitrators on each occasion, for long period. Lawyers are busy with other work and arbitrators have also have other cases listed before them. The attitude of lawyers and arbitrators, has not changed very much even after the new Act of 1996.

It is proposed to enable the High Courts to make rules to compel arbitration to go on continuously from day to day at least for three or more days on each occasion and that on each day the proceedings go on from 10.30 a.m. to 4.30 p.m. with a break of one hour or carry on proceedings at least for 5 hours of each day.

In order that High Court may frame uniform rules, we proposed in section 82 that the Chief Justice of India may issue guidelines to all the High Courts in this behalf.

**2.39.3      Section 84: Provision proposed permitting rules to be made under section 84 in respect of fee to be fixed for arbitrators (purely domestic arbitration between Indian nationals).**

Number of suggestions have been made with regard to the fixation of fee, at any rate in respect of purely domestic arbitrations between Indian nationals.

**2.39.4**      It has been pointed out that in several cases fixation of fee in domestic arbitration, on daily basis or the basis of each session on a day or on hourly basis is resulting in considerable prejudice to the parties particularly when the arbitrations get prolonged over years. The Bombay seminar has brought about some suggestions. The provision suggested at the Bombay Seminar has been considered by us and we propose a modified version thereof. One method is to allow arbitrators to fix a lump sum. The other is to allow them daily fee basis provided they fix the maximum fee receivable. In either case, any further increase of the fee is to be by the Court only. We recommend the rules to be made on the basis of the following guidelines under section 84:

- “(a) At the first hearing of the arbitration proceedings or soon thereafter, the Arbitral Tribunal shall stipulate fees to be charged by the members of the arbitral tribunal.
- (b) The fee may be charged by each arbitrator on a lump sum basis covering the entire period up to the passing of the award.
- (c) The fee may be charged by the arbitrator on per day or per session on each day or the per hour basis subject to the arbitral arbitrator fixing an upper limit for the total fee payable to him.
- (d) Such lump sum as in cl.(a) or upper limit of fee as in cl.(b) shall not be liable to increase by any arbitrator except with the consent of the parties or upon orders to be passed by Courts upon application by all the members of the arbitral tribunal to the Court.
- (e) The Court while passing orders under clause (d) will keep in mind the work involved, the time taken, the manner in which the arbitration proceedings have been conducted, the conduct of the parties, the further work involved and the further time required, and other relevant factors.

We hope that as and when such rules are made, these will help in regulating the fee and will result in speedy disposal of arbitrations.

**2.39.5** Rules are also to be made in respect of particulars to be stated in the Register under Section 31A. It is therefore suggested that a provision for the same may be incorporated in the Act by inserting a new sub section (1A) in section 84 as follows:

“(1A) Without prejudice to the generality of provisions of sub section (1), rules may be made in respect of the following:

- (a) the manner in which the fee of the members of the arbitral tribunal may be fixed and the procedure relating thereto;

(b) the other particulars required to be entered in the register under clause (f) of sub-section (4) of section 31A.”

## **2.40 Miscellaneous items**

2.40.1 Section 36: A suggestion to enforce the award straight away at the place where the property of the respondent is situated – rejected

It has been suggested that there should be a provision enabling the award to be executed straightaway at places where the “judgment debtor’s” property is available.

This suggestion appears prima facie to be attractive if one keeps in mind the delay in the disposal of applications for transmission of execution applications. But, there can be serious practical difficulties. For example, let us assume that the award is passed in Bombay and the property against which execution is sought is in Calcutta. If the award is to be straightaway allowed to be executed at Calcutta what will happen if, within the time prescribed for filing an application to set aside the award, such an application is filed in Bombay? This will lead to parallel proceedings in two courts and to considerable confusion and may even result in serious prejudice to one party.

There was a view expressed during the discussion on the Consultation Paper that such execution may be permitted after the period for filing an application to set aside an award has expired. But, even then, in as much applications for setting aside awards can be after delay along with applications under sec. 5 of Limitation Act, 1964, there can still be the same problem.

Hence this proposal is not accepted.

2.40.2 A query:

It is pointed out that if there are three arbitrators, and one grants Rs. One crore, another Rs. 1.50 crores and third Rs.1.25 crores, what is to happen and that some provision is to be made to resolve similar issues.

This aspect does not present any difficulty. In the example given above, the majority decision would be Rs.1.25 crores (i.e. in view of the awards of Rs.1.5 crores and Rs.1.25 crores). We cannot provide legislation to cover all such possible eventualities.

#### 2.40.3 Removal of arbitrators: Suggestion rejected.

It has been suggested that the Act does not contain a provision for 'removal' of an arbitrator. Such a power it is said is necessary in case of purely domestic and ad hoc international arbitrations (i.e. non-institutional). A separate provision, it is suggested, is necessary for institutional arbitrations. We consider these procedures are suitable only for purely domestic arbitrations.

Section 24(1) of the English Act deals with removal of the arbitrator by the Court on the following grounds:

- “(a) that circumstances exist that give rise to justifiable doubts as to his impartiality.
- (b) that he does not possess the qualifications required by the arbitration agreement
- © that he is physically or mentally incapable of conducting proceedings or there are justifiable doubts as to his capacity to do so;
- (d) that he has refused or failed:
  - (i) properly to conduct the proceedings, or
  - (ii) to use all reasonable dispatch in conducting the proceedings or making the award,

and that substantial injustice has been or will be caused to the applicant, if he is not removed.”

A separate procedure, it is suggested, is necessary so far as institutional arbitration (domestic) is concerned. In these types of cases, unless the remedy before the concerned institution as per its rules are exhausted, remedy by Court cannot be permitted. Sec. 24(2) of the English Act covers such cases and reads as follows:

“Sec. 24: If there is an arbitral or other institution or person vested by the parties with power to remove the arbitrator, the Court shall not exercise its powers of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.”

Again Sec. 24(3) of the English Act enables the arbitration proceedings to go on pending an application. Sec. 24(4) deals with the fee payable to the arbitrator in case of such removal.

The ICC Rules, 1998 too make a provision for ‘removal’ by the ICC Court (which provision is not there in the Model Law), apart from removal upon challenge by the parties. While rule 12(i) deals with challenge by parties, Rule 12(ii) deals with the ICC Courts’ power of removal. These provisions read as follows:

Rule 12: (i) An arbitrator shall be replaced upon his death, upon the acceptance by the Court by the arbitrator’s resignation, upon acceptance by the Court of a challenge or upon the request of all the parties.

(ii) An arbitrator shall also be replaced on the Court’s own initiative when it decides that he is prevented by de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the rules or within prescribed time limit”.

It may be noted that clause (i) of the ICC Rules above mentioned also refers also to a situation where all the parties request for a change of the arbitrators.

Fouchard etc. (1999), support a provision for removal strongly in para 998 as follows:

“Although it is rarely applied, this provision is a powerful deterrent, and is perfectly justified. Although in their capacity as private Judges, arbitrators may enjoy a form of immunity vis-à-vis the parties, they remain contractually reliable for the proper performance of their functions to the institution which appointed them or confirmed their appointment. That institution could incur liability towards the parties

if it were established that it had been at fault or negligent in organizing and supervising the arbitration.”

We do not think any special provision for removal of arbitrators is necessary. Where a provision for challenge before the arbitral tribunal and then before the court is not there, such a provision may be necessary. But where, as in the 1996 Act, there is a provision of challenge before the Tribunal and then before the Court, there is no need to duplicate the procedure by including another procedure for removal.

#### 2.40.4 Interim Award: Suggestion to delete words rejected.

It has been suggested that the Act uses the words “interim award” in sec.2(1)(c), 31(6) and interim measure in sec.17 and 37(2)(d) etc. and this is confusing. It is said that the word “interim award”, it is said, was treated as confusing in the D.A.C. Report in England and was dropped.

We do not think it necessary to drop the word “interim award” from sec. 2(1)(c). For example, there may be cases where, an “interim award” can be straightaway be passed, having regard to the pleadings where is an admission of liability up to a particular amount of the claim. Then in such a case, an interim award can be passed straightaway in respect of the admitted amount instead of asking parties wait till all the issues are decided. The word “interim award” in sec. 2(1) (c) is, therefore, to be retained.

Again, decisions on preliminary issues under sec.13 and sec.16 by the arbitral tribunal (as proposed) can only be an ‘interim order’ of the tribunal. They are appealable only subject to in view of sec.5. Hence it is not likely that there will be any confusion by retention of the words ‘interim awards’ in sec. 2(1)(c).

In fact, different statutes use different expressions. For example, prior to 1998, Art. 21 of the ICC Rules of Arbitration drew a distinction between ‘partial’ and ‘definitive’ awards. The 1998 ICC rules similarly refer to them as ‘interim, partial and final’ awards (Act 2(iii)( see Fouchard para 1359). A final award would be one which terminates the proceedings and makes the arbitrators ‘functus officio’. The Dutch Court of Civil Procedure, Art. 1049 provides for a final award, a partial final award or an interim award.

2.40.5 Trade usages: suggestion to delete - rejected.

It has been suggested that the sec. 28(3) Act permits “trade usages” to be taken into account and that this provision is vague and has to be omitted. We do not think that this provision is vague. The ordinary Courts in our country do take into account trade usages while deciding commercial causes. In fact, in ‘commercial contracts’, trade usages do have great significance. These principles arising from ‘trade usages’ are part of the ‘lex mercatoria’.

See in this connection Art.7 of the European Convention, Art. 28(4) of the Model Law, Art. 1496 of French New Code of Civil Procedure, Art. 17(2) of ICC Rules, 1998 (Fouchard para 378, 1447, 1448) which all permit ‘trade usages’ to be taken into account. This proposal is rejected.

2.40.6 Whether there should be no two stages for deciding enforceability and execution under section 49 for enforcement of foreign awards: question is covered by Supreme Court judgement

This aspect is covered by the recent judgment of the Supreme Court in M/s Fuerst Day Lawson Ltd. v. Jindal Export Ltd., 2001 (3) SCALE p.708. Therefore, no fresh amendment is necessary. In the same application, both enforceability and execution, can now be decided.

A problem under section 49 has been raised. Section 49 which refers to enforcement of 'foreign awards' says:

"where the Court is satisfied that the foreign award is enforceable under the chapter, the award shall be deemed to be a decree of that Court".

First we shall refer to the change in the statutory provisions on this question. We shall then state why, in spite of the change, the suggestion is not feasible.

Under section 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961, the Court had to first pass an order directing the filing of the award and the Court had, therefore, to pronounce judgment in accordance with the award and then draw a decree. There were different stages under the 1961 Act. Section 6 of 1961 Act reads as follows:

"Section 6(1): Where the court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award."

(1) Upon the judgment so pronounced, a decree shall follow and no appeal shall be on such decree except in so far as the decree is in excess of it not in accordance with the award."

(Section 7 referred to the conditions for enforcement of foreign award)

There is no doubt a clear departure under section 49 of the Act from that procedure. According to Justice Mohta's Commentary (see p. 332), the present section 49 is a departure from section 6 of the 1961 Act.

2.40.7 On the question whether procedure under section 49 of the new Act is to be altered, the answer can only be in the negative.

In Western Shipbreaking Corpn. Vs. Clare Haven 1997(3) Guj. LR 1985, it was held by the Gujarat High Court that there was no difference between 'enforcement' and 'execution'. It was said that once the Court declared that the award was enforceable, separate proceedings were to be taken under the CPC for execution. This must obviously be so.

It is well settled that jurisdiction of Indian Court in regard to foreign decrees is to first to find out if the foreign decrees are enforceable. Sub-clause (3) of section 44A of the C.P.C. requires the Court to be satisfied that the decree conforms to clauses (a) to (f) of section 13. Foreign awards cannot be placed on a higher footing and they must also pass the test of enforceability as specified in section 48 before they are sought to be enforced or executed.

2.40.8 However, enforceability and execution can be dealt with by the court in the same application and two applications are not necessary. (M/s Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., 2001(3) SCALE p.708.

2.40.9 Interest at the stage of execution of award: suggestion rejected.

The Bombay High Court in Tueplas International Aria Pvt. Ltd. vs. Thaper Ispat Ltd. (AIR 1999 Bom 417) (2000(1) Arb. L.R. 230) held that there is a lacuna in the Act inasmuch as if the award does not provide for interest 'after the date of award', the Court cannot grant interest and that this

'lacuna has to be cured by the legislature' or that otherwise rules have to be framed by the High Court under section 82 of the Act.

This aspect has already been considered while dealing with section 31(7)(b). The Bombay view is not correct. In the case of ordinary suits, section 34 CPC enables the court to provide for interest from the date of judgment till payment. In a case where the Court is silent as to the grant of interest from the date of judgment till date of realization, it is deemed to be refused and the 'commercial contracts', trade usages do have great significance. These principles arising from 'trade usages' are part of the 'lex mercatoria'. We leave it to the judicial process to correct the Bombay decision.

See in this connection Article 7 of the European Convention, Article 28(4) of the Model Law, Article 1496 of French new Code of Civil Procedure, Article 17(2) of ICC Rules, 1998 (Fouchard para 378, 1447, 1448) which all permit 'trade usages' to be taken into account.

#### **2.40.10 State immunity: To be dealt with under separate law.**

A question of state immunity was raised. It is stated that sec. 86, 87A C.P.C. deal with state immunity.

Justice V.A. Mohta, in his Commentary on the Act (see pp 46 to p 53) has dealt with State immunity and also immunity of the instrumentalities of the State. The author has referred to the UK Act of 1978 (i.e. the State Immunity Act, 1978), the US Foreign Immunities Act 1976 and to the Draft Articles on State Immunity prepared by the International Law Commission. Reference is also made to the principles of waiver contained in Art.14 of the New York Convention and to the judgments of the High Courts in Far East Steamship USSR vs. Union of India: AIR 1973 Mad. 169; UOI vs. Owners of Vessel Hoegh Orchid and Their Agents of 1983 Guj. 34; and to sections 86, 87A CPC and to the Judgment of the Supreme Court in Veb Deutracht Seevederei Rostok (D.S.R. Lines), a Dept. of German Democratic Republic vs. New Central Jute Mills Ltd. 1994(1) SCC 282 and to Kenya Airways vs. Junibai B. Kheshwale AIR 1998 Bom 287. The author says that it is necessary to declare as to when and to what extent an arbitration clause to which a State or its instrumentality is a party, can give rise to an inference of waiver of State immunity in international commerce. Question is whether is there an arbitration clause in a contract by the State or its instrumentality;

it is to be deemed that it has waived its immunity. The author pleads for separate statutory provisions in this behalf. The author concludes:

“India needs an independent and exhaustive Act on State immunity specially in the context of acta jure gestionis, not only in the interests of certainty of law but also its expanding horizons of international trade and commerce. Even the Civil Procedure Code can be suitably amended. In fact, as far as international commercial arbitration is concerned, necessary provisions could have been made even in the new Arbitration Act. It is better late than never.”

Having regard to the importance of the topic and the fact that other countries have enacted separate statutes, the Commission is of the view that a separate statute has to be made on State immunity in all its aspects rather than one relating only to the subject of arbitration.

#### **2.41.1 Transitory provisions – limited retrospectivity given: Section 32 of the Amending Act**

The amending Act of 2001 being a procedural enactment, it will be retrospective under the general principles applicable to interpretation of statutes. But, it is not the intention of the Commission to give retrospective effect to all the provisions of the Amending Act. In fact, several provisions of the Amending Act, cannot be given retrospective effect. Hence it is stated in sec. 32 of the Amending Act that the Amending Act will be prospective except to the limited extent it is made retrospective.

Sub section (1) of 32 enforce says that the Act will be prospective and shall not apply to past requests or applications for appointment or appointments of arbitrators or awards already made before the commencement of this Act.

So far as “arbitration agreements” already entered into by the date of the Amending Act, it is stated that in sub section (2) of the Act that the Act will not apply if requests, applications for appointment or appointments have been made before the commencement of the Amending Act.

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Sub sections (3) to (17) refer to the limited circumstances and the limited extent to which the Amending Act applies. Some provisions apply to different types of “applications” which are pending at the commencement

of this Act; some provisions are applied to “arbitration proceedings” pending at the commencement of this Act but where no awards have been passed by that date. Some provisions are made application to “awards” passed after the commencement of this Act and where arbitration proceedings were pending at the commencement of the Act. Some provisions apply to orders passed after the Amending Act in pending arbitration proceedings.

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2.41.2 Section 32: The proposed section 32 of the amending Act is as follows

**Transitory provisions**

**32.** (1) Subject to the provisions of sub-sections (2) to (17), the provisions of the principal Act as amended by this Act shall be prospective in operation and shall not in particular apply to -

(i) any application made by a party to the arbitration agreement before the Judicial authority referred to in sub-section (1) of section 8 of the principal Act or to any appointment made by a judicial authority under that section before the commencement of this Act;

(ii) any request made to a party or to the Chief Justice of India or to the Chief Justice of a High Court under section 11 of the principal Act before the commencement of this Act;

(iii) any appointment of arbitral tribunal made before the commencement of this Act under section 11 of the principal Act by the parties to the arbitration agreement or any appointment made under the said section before the commencement of this Act by a party who is authorized under the arbitration agreement to make such appointment without the consent of the other party or parties to the arbitration agreement or any appointment made by the Chief justice of India or his designate or the Chief Justice of a

High Court or his designate before the commencement of this Act;

(iv) any award passed under the principal Act, before the commencement of this Act.

(2) Subject to the provisions of sub-sections (3) to (17), the provisions of this Act shall apply to arbitration agreements entered into before the commencement of this Act, where no-

(i) request for appointment of arbitral tribunal; or

(ii) application for appointment of arbitral tribunal; or

(iii) appointment of arbitral tribunal,

has been made under the principal Act, before the commencement of this Act.

(3) The provisions of clause (b) of sub-section (2) of section 2 as inserted in the principal Act, by clause (ii) of section 2 of this Act, shall apply to-

(i) applications made, before a judicial authority in a legal proceeding under section 8 of the principal Act or before a court under section 9 of the principal Act, which are pending at the commencement of this Act in connection with the arbitrations of the nature specified in sub-section (2) of section 2 of the principal Act;

(ii) awards arising out of arbitrations of the nature specified in sub-section (2) of section 2 of the principal Act passed before the commencement of this Act, for the purposes of their finality under section 35 of the principal Act and enforcement under section 36 of the principal Act.

(4) The provisions of sub-section (10) of section 2, as inserted in the principal Act by clause (iii) of section 2 of this Act shall apply to arbitral proceedings under the principal Act, pending before the principal courts referred to in that sub-section, at the commencement of this Act.

(5) The provisions of section 6 of the principal Act, as amended by section 4 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal, at the commencement of this Act.

(6) The provisions of sub-sections (4),(5) and (6) of section 9, as inserted in the principal Act, by section 8 of this Act, shall apply to all applications under section 9, pending in the court at the commencement of this Act.

(7) The provisions of section 10A as inserted in the principal Act, by section 9 of this Act, shall apply to arbitration agreements in relation to which, the requests for appointment of arbitral tribunal are pending decision at the date of the commencement of this Act, if the arbitral tribunal has not been appointed at the date of such commencement.

(8) The provisions of sections 17 of the principal Act, as substituted by section 14 of this Act shall apply to arbitral proceedings under the principal Act, before an arbitral tribunal, pending at the commencement of this Act.

(9) The provisions of sub-section (1) of section 20 of the principal Act, as substituted by section 15 of this Act, shall apply to arbitration agreements in relation to which, requests for appointment of arbitral tribunal and applications for appointment of arbitral tribunal, are pending decision at the date of the commencement of this Act, if the arbitral tribunal has not been appointed by the date of such commencement .

(10) The provisions of sub-section (1) of section 23 of the principal Act, as amended by section 16 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral

tribunal at the commencement of this Act, where the claim, defence or rejoinder statements have not been filed before the arbitral tribunal at the date of such commencement.

(11) The provisions of sub-section (1) of section 24 of the principal Act, as amended by section 17 of this Act and of sub-section (1A) of section 24 of the principal Act, as inserted by that section, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal at the commencement of this Act where oral evidence or oral arguments as the case may be, have not been completed at the date of such commencement.

(12) The provisions of section 24A, as inserted in the principal Act, by section 18 of this Act, shall apply to the orders of the arbitral tribunal, if any, passed under sections 17, 23 and 24 of the principal Act before the commencement of this Act, where such orders have not been complied with at the date of such commencement by the party to whom they were directed.

(13) The provisions of section 28 of the principal Act, as amended by section 19 of this Act, shall apply to arbitration agreements in relation to which, requests for appointment of arbitral tribunal and applications for appointment of arbitral tribunal are pending decision at the date of the commencement of this Act, if the arbitral tribunal has not been appointed by the date of such commencement.

(14) The provisions of-

(i) sub-section (3) of section 29, as inserted in the principal Act by section 20 of this Act;

(ii) section 31A, as inserted in the principal Act by section 22 of this Act;

(iii) section 34, as amended by section 23 of this Act;

(iv) section 34A, as inserted in the principal Act by section 24 of this Act,

shall apply to arbitral proceedings under the principal Act pending before the arbitral tribunal at the commencement of this Act, if awards have not been passed at the date of such commencement.

(15) The provisions of section 36 of the principal Act as amended by section 25 of this Act shall apply to all awards made under the principal Act pending enforcement at the commencement of this Act.

(16) The provisions of sub-sections (1) and (2) of section 37A, as inserted in the principal Act, by section 26 of this Act shall apply to applications under sub-section (1) of section 34 of the principal Act and appeals under section 37 of the principal Act pending at the commencement of this Act if no notice has been issued by the court under sub-section (1) of section 34 of the principal Act or under section 37 of the principal Act before the date of such commencement:

Provided that where notice has been issued by the court in such application or appeal, the provisions of sub-section (1) of section 37A of the principal Act shall not apply.

(17) The provisions of sub-section (5) of section 43, as inserted in the principal Act, by clause (b) of section 28 of this Act, shall apply to the orders referred to in that sub-section if such orders are passed after the commencement of this Act, in arbitral proceedings under the principal Act, pending before an arbitral tribunal at such commencement.

#### 2.42 Section 33 of the amending Act: Time limit for disposal of pending arbitrations, applications and appeals under the 1996 Act:

It has been brought to the notice of the Commission that several arbitrations which have started after 25.1.1996, when the ordinance which preceded the new Act was first passed by Parliament, are also not moving fast as expected. This was because the provisions of sec. 23 of the new Act which referred to the procedure for filing the pleadings and the provisions of sec. 24 which referred to the procedure for leading evidence, allowed the parties also to agree with regard to the time schedule. The arbitral tribunal, under the new Act, has not been able to assert itself and fix the time schedules both under sections 23 and 24 which could bind the parties or their representatives. The result is that a large number of arbitrations are pending before various arbitral tribunals. Under the 1996 Act, the statutes had not

provided any upper time limit for the completion of the arbitral proceedings and for the passing of the award. We have already mentioned why the time limit which was in existence under the old Act was not included in the 1996 Act, vide the discussion under sec. 29A of this Report. The provision of sec. 29A is now introduced are applicable to future references to arbitration after the commencement of the amending Act.

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It will be noticed from sub section (7) and sub section (8) of sec. 30 that amendments to sections 23 and 24 (which have removed the clauses relating to consent of parties for fixing the time schedule for filing pleadings and for leading evidence), and the new provisions to sec. 24A and 24B are proposed to be made applicable to pending arbitrations under the 1996 Act. But this by itself may not be sufficient to speed up the pending arbitrations under the new Act.

The Commission, therefore, felt that the provisions of sec. 29A have also to be applied to pending arbitration proceedings under the new Act of 1996, in case they have been pending for than three years by the date of commencement of this Act. Under the proposed sec. 33 of the Amending Act, the Commission feels that a further period of one year is to be granted for completion of pending arbitrations under the 1996 Act. This will be fair enough. In case the arbitrations under the new Act which are pending for more than three years as aforesaid and which will not be completed within the additional one year now granted, it would be a fit case where such arbitrations should be monitored and speeded up by the Court in accordance with the provisions of sec. 29A.

As already noticed, when an application for extension is filed in Court under sec. 29A, the arbitration proceedings shall continue and the Court shall not grant any stay of the arbitral proceedings.

There are also cases where after commencement of arbitration proceedings under the 1996 Act, the period of three years has not expired by the date of commencement of the proposed amending Act. In such a case, the Commission is of the opinion that after the expiry of three years from the date of commencement of the arbitration under the 1996 Act, there could be a further period of one year within which the arbitration is to be completed. Thereafter, the parties have to seek extension of time from the Court which will monitor the proceedings, by fixing time schedules till the award is passed, as provided in sub sections (4) to (8) of section 29A

With these objects in view we have proposed in section 33 of the Amending Act, fixing time limits for disposal of pending arbitrations, applications, and appeals under the 1996 Act.

2.42.1 The proposed sec. 33 of the Amending Act reads as follows:

**“33 Speeding up of all proceedings and time limit for passing awards under the Principal Act”**

(1). All arbitral proceedings pending at the commencement of this Act, before an arbitral tribunal appointed under the principal Act, for more than three years from the date of commencement of such proceedings, shall be completed within a further period of one year from the date of commencement of this Act, or within such extended period as specified in sub sections (2) and (3):

Provided that where a period of three years has not elapsed from the date of commencement of such proceedings at the date of commencement of this Act, the proceedings shall be completed within a further period of six months reckoned from the date of expiry of three years of the commencement of the arbitral proceedings or within such extended period as specified in sub sections (2) and (3).

(2) If the award is not made within the further period of one year or six months as the case may be, specified in sub section (1), the arbitral proceedings shall, subject to the provisions of sub section (3), stand suspended until an application for extension is made to the Court by any party to the arbitration or where none of the parties has made an application as aforesaid, until such an application is made by the arbitral tribunal.

(3) The provisions of sub sections (4) to (8) of section 29A, as inserted in the principal Act, by section 21 of this Act shall, so far as may be, apply for the disposal of application referred to in sub section

(2), with a view to speed up the arbitral proceedings, till the award is passed.

(4) Where applications under sub section (1) of section 34 of the principal Act as amended by section 23 of this Act and appeals under sub section (1) of section 37 of the principal Act, as the case may be, are pending before any of the Courts referred to in those sub sections, on the date of commencement of this Act, they shall be disposed of within six months from the date of such commencement.

Provided that while dealing with an application under sub section (1) of section 34 of the principal Act, if the Court adjourns the proceedings under sub section (5) of that section, the period of six months shall be reckoned from the date of receipt of the order from the arbitral tribunal under that sub section.

(5) Where appeals under sub section (2) of section 37 of the principal Act are pending before any Court, on the date of commencement of this Act, they shall be disposed of within three months from the date of such commencement.

**2.43.1 Section 34 of the amending Act: Time limit for disposal of arbitrations, applications and appeals pending under the Arbitration Act, 1940**

It has been brought to the notice of the Commission that several arbitrations which were commenced under the 1940 Act are still pending at the stage of arbitration or at the stage of application to make the award a rule of Court/objections to the award, or at the stage of appeals under sec. 39 of that Act or at the stage of appeals or revision applications under the 1940 Act or under the Code of Civil Procedure, 1908.

The Commission has felt that if arbitrations commenced under the 1940 Act have not been completed even after the commencement of 1996 Act from 25.1.1996, it will be necessary to speed up such arbitrations by the application of the provisions of sec. 23 and 24 of the 1996 Act, as proposed to be amended, and also by the application of sec. 24A and 24B which give powers to the arbitral tribunal and the Courts to see that their orders are obeyed by the parties promptly. It has therefore been proposed,

that notwithstanding anything inconsistent with the above provisions, in the 1940 Act, the above provisions should be applicable to arbitrations under the 1940 Act which will be pending on the date of the commencement of the proposed amending Act.

So far the time limit for completing the pending arbitrations under the 1940 Act is concerned, the Commission proposed that they should be completed within one year from the date of the commencement of the proposed amending Act or within such further time as may be granted by the Court in clause © of sec. 2 or sec. 21 of the 1940 Act, by the application of the provisions of sub section (4) to (8) of sec. 29A, as proposed to be inserted in the 1996 Act. In other words all pending arbitrations under the 1940 Act, if they are not completed in one year from the date of commencement of the proposed amending Act, it will be necessary for the parties or the arbitrators, to file applications in the above Court for extension of time, extension is to be granted in every case and the Court will fix the time schedule for completion of the proceedings and shall pass orders from time to time till the award is passed.

This is so far the pending arbitration proceedings under the 1940 Act are concerned.

Similarly, it has been noticed that several applications to make the awards passed under the 1940 Act a rule of Court/objections to the award are pending in the Court as defined under clause © of sec. 2 or under sec. 21 of the 1940 Act. Several appeals under sec. 39 of the 1940 Act are also pending in the Courts. It has been decided to see that they are disposed of within one year from the date of commencement of the proposed amendment.

So far as appeals or revision applications arising out of interim orders passed by the Courts which may be pending at the commencement of the amending Act, the Commission is of opinion that they should be disposed of in six months from the date of commencement of the proposed amending Act.

2.43.2 With these objectives in view, the Commission has proposed the following sec. 34 in the amending Act.

The section reads as follows:

**“34 Time limit for disposal and speeding up of arbitrations, applications and appeals under Arbitration Act, 1940 (10 of 1940)”**

(1) The provisions of sections 6, 23 and 24 of the Principal Act as amended respectively by sections 4, 16 and 17 of this Act, shall so far as may be, apply to arbitral proceedings under the Arbitration Act, 1940 (10 of 1940) (hereinafter called the “repealed Act”), pending at the commencement of this Act, and shall override any provisions of the repealed Act, which are inconsistent with the said sections.

(2) In the case of non-compliance with any order passed by the sole arbitrator or arbitrators under the provisions of the repealed Act or orders passed under sub section (1), the sole arbitrator or arbitrators, as the case may be, appointed under the repealed Act, may pass orders under section 24A of the Principal Act, as inserted by section 18 of this Act.

(3) In the case of non-compliance with any peremptory order passed by the sole arbitrator or arbitrators under sub section (2), the Court, within the meaning of clause (c) of section 2 or section 21 of the repealed Act, as the case may be, may pass orders under section 24B of the Principal Act, as inserted by section 18 of this Act.

(4) Where arbitral proceedings are pending before the sole arbitrator or arbitrators appointed under the repealed Act, at the commencement of this Act, the proceedings shall be completed within a further period of one year from the date of commencement of this Act, or within such extended period as specified in sub sections (5) and (6).

Provided that where the arbitral proceedings are stayed by order of a court the period during which the proceedings are so stayed, shall be excluded while computing the said period of one year.

(5) If the award is not made within the further period of one year specified in sub section (4), the arbitral proceedings shall, subject to the provisions of sub section (6), stand suspended until an application for extension is made to the Court referred to in sub section (3), by

any party to the arbitration, or where none of the parties has made an application as aforesaid, until such an application is made by the sole arbitrator or the arbitrators, as the case may be.

(6) The provisions of sub sections (4) to (8) of section 29A as inserted in the Principal Act, by section 21 of this Act, shall, so far as may be, apply to the Court referred to in sub section (3), for the disposal of the application referred to in sub section (5), with a view to speed up the arbitral proceedings, till the award is passed.

(7) Where applications to make the award a rule of court or objections are filed to set aside the award, under the repealed Act, or any other application or any appeal filed under section 39 of the repealed act, are pending before any Court referred to in sub section (3), on the date of commencement of this Act, they shall be disposed of within a period of one year from the date of such commencement, in accordance with the provisions of the repealed Act.

(8) Where any appeals or revision applications arising out of interim orders passed by the Courts referred to in sub section (3) are pending at the commencement of this Act, under the Code of Civil Procedure (5 of 1908) or under the repealed Act, in connection with arbitral proceedings arising under the repealed Act, or where the arbitral proceedings are under orders of stay, they shall be disposed of within a period of six months from the date of such commencement, in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) or the repealed Act, as the case may be.

(9) The provisions of this section shall have effect notwithstanding anything inconsistent therewith contained in sub-section (2) of section 85 of the principal Act.

### 2.43.3 Insertion of Fourth Schedule:

By section 35 of the Amending Act, Fourth Schedule has been inserted which deals with “fast track arbitration” which has already been extracted in para 2.38.2 immediately after sections 43A to 43D in Chapter 11 as newly inserted.

2.44. We have prepared “The Arbitration and Conciliation (Amendment) Bill, 2001” (**Annexure-I**) which brings out the amendments recommended in the existing Arbitration and Conciliation Act, 1996. A brief summary of the recommendations with amendments and with explanatory notes, is given in the next Chapter.

In this report, the Commission has kept in mind the broad principles of speedy arbitration and least court intervention. It has rejected a large number of suggestions in respect of further judicial intervention made at the time of the Consultation Paper and thereafter. It has made several special provisions for speedy disposal of the arbitration proceedings as well as Court proceedings. Only two additional grounds of attack are added so far as 'purely domestic arbitrations between Indian nationals' are concerned. The Part dealing with international arbitration has been left intact. It is hoped that the amendments will improve the state of arbitration in India and will remove the blot of delays.

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**CHAPTER III****SUMMARY OF RECOMMENDATIONS WITH EXPLANATORY NOTES**

The recommendations made in the previous Chapter regarding additions, modifications and substitutions in the Arbitration and Conciliation Act, 1996 are being summarized as follows: -

(1) Section 2(1)(e): In the definition of the word “Court”, the ‘Court of the Principal Judge, City Civil Court in a city exercising original jurisdiction’, is also proposed to be included.

(paragraph 2.1.2)

(2) Section 2(1)(ea): This clause is proposed to be added and it defines ‘domestic arbitration’ on the same lines as the existing sub-section (7) of Section 2 which defines ‘domestic award’. ‘Domestic arbitration’ will mean (i) where all parties are Indian nationals or (ii) where at least one party is not an Indian national, (i.e. where the arbitration is international in nature) whether the arbitration is commercial or not and the arbitration is in India. International arbitration in India shall be deemed to be ‘domestic arbitration’. In sub-clause (3) a company incorporated in a country other than India has not been included.

(paragraph 2.1.3A)

(3) Section 2(1)(eb): This clause is proposed to be added and it defines ‘international arbitration’ as arbitration where at least one party is not an Indian national. This arbitration need not necessarily be

commercial. In this definition also, in sub-clause (iii), a company incorporated in a country other than India has not been included. Reference to a company incorporated in a country other than India in this clause will fall within the meaning of the word “body corporate incorporated in any country other than India”.

(paragraph 2.1.3A)

(4) Section 2(1)(f): This clause is proposed to be modified by defining ‘international commercial arbitration’ as ‘international arbitration’, which is commercial in nature.

(paragraph 2.1.3A)

(5) Section 2(1)(fa): This clause is proposed to be introduced. Under Section 8, when an action is filed before a ‘judicial authority’, the said authority has to refer the dispute to arbitration, if the respondent relies upon an arbitration clause. A definition of ‘judicial authority’ is therefore proposed to be included stating that ‘judicial authority’ includes any ‘quasi-judicial statutory authority’. This word occurs in Section 8 and also in the amendments proposed in Section 5 and Section 42.

(paragraph 2.1.4)

(6) Section 2(2): Section 2(2) is proposed to be amended by adding clauses (a) and (b). Section 2(2) states that Part - I of the Act applies to arbitration in India. That would mean that in the case of arbitration between Indian nationals and also where one party is not an Indian national, and where the place of the arbitration is in India, Part I of the

Act will apply. While the UNCITRAL Model Law permits certain Articles like 8, 9, 35 and 36 to apply to arbitrations outside the Country, there is an omission in this behalf in the 1996 Act. Consequently, for example in the absence of availability of Section 9 in the case of an arbitration outside India, the Indian party is unable to obtain interim measures from Indian Courts, before arbitration starts outside India. The absence of an express provision as stated above has led to conflicting judgments in the Delhi and Calcutta High Courts. It is proposed to allow Section 9 to be invoked whenever arbitration is outside India. Similarly, the provisions of Section 8, 27, 35 and 36 are proposed to be made available whenever arbitration is outside India. Almost all countries which have adopted the Model Law allow views of these provisions to arbitrations outside the country.

The proposed clause (a) of Section 2(2) states that Part – I of the Act applies to domestic arbitration in India and the proposed clause (b) states that Sections 8, 9, 27, 35 and 36 will be available for international arbitrations outside India.

(paragraphs 2.1.5 & 2.1.7)

(7) Section 2(10): This clause is proposed to be introduced to allow the Principal Courts referred to in Section 2(1)(e) to transfer matters before them to Courts of coordinate jurisdiction. This clause is proposed to get over some judgment of the High Courts which have stated that the Principal Court in Section 2(1)(e) cannot transfer matters to other Courts. This proposal will reduce congestion in the Principal Courts.

(paragraph 2.1.2A)

(8) Section 5: An Explanation is proposed to be added in Section 5 explaining the meaning of the words ‘any other law for the time being in force’, which occur in the non-obstante clause. The proposed Explanation states that the above words would include any intervention under

- (a) Code of Civil Procedure, 1908 (5 of 1908);
- (b) Any law providing for internal appeals within the High Court;
- (c) Any law, which provides for intervention by a judicial authority in respect of orders passed by any other judicial authority.

In view of the proposed Explanation, all remedies of appeal or revision under the Code of Civil Procedure or appeals under the Letters Patent or under High Court Acts and all other remedies under special statutes against orders of a judicial authorities, get excluded.

(paragraph 2.2.1)

(9) Section 6: Section 6, as it stands, states that, in order to facilitate the conduct of arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable arbitrator or person.

It is proposed to drop the words “or the arbitral tribunal with the consent of the parties”, for the detailed reasons given in Chapter II

(paragraph 2.2.5)

(10) Section 7(4)(b): This section is proposed to be amended by adding some words in clause (b) of sub-section (4), to include within

the definition of ‘arbitration agreement’ an agreement by implication such as where one party sends a communication to another party by the addition of including an arbitration clause in the proposed contract. Even though the party who receives the communication does not send a reply, his silence will be treated as amounting to acceptance of the arbitration clause. Which is accepted by the other party without demur. This clause is proposed to cover cases like ‘brokers – notes’, which contain arbitration clauses.

(paragraph 2.3.2)

(11) Section 8: Several amendments are proposed in Section 8 as follows:

(i) Section 8(1): This sub-section is proposed to be amended by permitting, as under the UNCITRAL Model Law, judicial authority to decide certain preliminary questions which are raised by the respondent before filing the defense statement, so that the said issues can be decided before making a reference to arbitration.

(Paragraph 2.4.9)

(ii) Section 8(1A): This sub-section is proposed to be added to require the judicial authority to stay the action pending a decision on the preliminary issues of jurisdiction and subject to the outcome of a decision on those preliminary issues.

(Paragraph 2.4.9)

(iii) Section 8(3): Section 8(3) is proposed to be amended. As it stands now, the arbitral tribunal, if already appointed by the

respondent, the arbitral tribunal can proceed with the arbitral proceedings, while the court is still dealing with the earlier application of the respondent seeking reference. The proposed amendment states that the continuance of such an arbitration proceeding will depend upon the decision of the judicial authority on the preliminary issues. In case it is decided by the judicial authority to reject the preliminary issues of jurisdiction and make a reference to another arbitral tribunal, the mandate of the earlier arbitral tribunal appointed by the respondent, shall cease.

(Paragraph 2.4.9)

- (iv) Section 8(4): This sub-section is proposed to be added enabling the judicial authority to decide, subject to the proposed sub-section (5), the preliminary issues as to whether (a) there is no dispute in existence (b) the arbitration agreement is null and void or inoperative (c) the arbitration agreement is incapable of being performed (d) the arbitration agreement is not an existence.

(Paragraph 2.4.9)

- (v) Section 8(5): This sub-section is proposed to be added to say that the judicial authority may not decide the above issues referred to in the proposed sub-section (4), if (a) the relevant facts or documents are in dispute or (b) oral evidence is necessary to be adduced or (c) enquiry into the preliminary questions is likely to delay reference to arbitration or (d) the request for a decision is unduly delayed or (e) the decision on the questions is not likely to produce substantial savings in costs of arbitration or (f) there is no

good reason as to why these questions should be decided at that stage. Depending upon the above factors, the judicial authority shall either decide the issues or make reference to arbitration. The above conditions are imposed to see that frivolous jurisdictional issues are not raised at the preliminary stage so as to delay the reference. At the same time, if the said issues can be decided easily and without oral evidence being adduced, they can be decided and will certainly save costs of arbitration.

(Paragraph 2.4.9)

- (vi) Section 8 (6): This sub-section is proposed to be added to deal with situations arising out of, what is known as, a Scott v Avery clause. Under such a clause, a party cannot ignore an arbitration clause and file an action before a judicial authority and the clause requires the party to first obtain an arbitration award as a condition precedent for filing an action before the judicial authority. But there may be cases where the judicial authority decides that the arbitration agreement is null and void, inoperative or unenforceable or not in existence and in such a case, it is obvious that no award can be obtain as required by the clause. The proposed sub-section (6) states that in such situations referred to above, the condition precedent in the Scott v Avery clause need not be complied with.

(paragraph 2.4.9)

- (12) Section 8A and Explanation: This section is proposed to be introduced in view of the difficulty faced by the Supreme Court in the

interpretation of Section 8 to cover arbitration agreements entered into during the course of a pending litigation. The Supreme Court, no doubt, held that the language of Section 8 could, with some difficulty, be extended to include such a situation. But the Supreme Court stated, in that case, that even if a reference is made at an appellate stage, such as by the High Court or Supreme Court, the objections to the award have to be filed only in the Principal District Court as defined in Section 2(1)(e). Such a procedure will obviously lead to a further litigation starting from the District Court, and is wholly undesirable. It has, therefore, become necessary to get over these problems by permitting objections to the award to be filed in the same Court which has made the reference.

An Explanation is proposed to be added to the new Section 8A to cover a situation which arose in a case before the Supreme Court. In that case the writ court referred parties to arbitration, in accordance with the agreement entered into by them, pending the writ proceedings. It is proposed therefore to provide for such a situation, enabling parties to go to arbitration in writ jurisdiction also, where they have disputes about their rights under the civil law. The proposed Explanation states that the word 'legal proceeding' in Section 8A will cover Writ Petitions also where civil disputes between parties are involved.

(paragraph 2.5.2)

(13) Section 9

- (i) This Section is proposed to be amended by restructuring it and bringing the latter part of the section which deals with the wider

powers of the Court to the forefront and for relegating the enumerated powers of the Court to the latter part of the section. As the section now stands, it gives an impression that the powers of the Court which are referred to in the latter part of the section are as limited as those in the earlier part of the section. This position is being clarified by dividing the existing section into sub-sections (1) to (3).

(Paragraph 2.6.2)

- (ii) Sub-Sections (4) to (6) are proposed to be added to see that a party who obtains an interim order from the Court, does not refrain from taking steps to have an arbitral tribunal appointed. Otherwise, he would be reaping the benefits of the interim order without time limit. The proposed sub-sections (4) to (6) require the Court, while granting interim orders under Section 9 to further direct that the party must take steps within 30 days to have an arbitral tribunal appointed under Section 11, and that otherwise the interim order will stand vacated, unless the time is extended by the Court. It is also provided that if the party does not take such steps and if the interim order is vacated, the Court may pass such orders as to restitution as may be necessary, in the circumstances of the case.

(paragraph 2.6.2)

- (14) Section 10 A: This section is proposed to be introduced to see that a party (not being the Government or a public sector undertaking or a statutory authority), will not appoint its own employee, consultant or other person having common business interest, etc as an arbitrator. Such clauses in

arbitration agreements shall be void to that extent. Further, it is provided that this provision does not apply to international arbitration agreements where the place of arbitration is in India.

(paragraph 2.7.2)

(15) Section 11: Several amendments are proposed in Section 11. At the same time care is taken to see that reference to arbitration is not delayed.

(i) Section 11 (4) to (12): In these sub-sections, the proposal is to replace the words “Chief Justice of India” and the word “Chief Justice” by the words, “Supreme Court” and “High Court”, so that the appointment of the arbitral tribunal is made on the judicial side. The advantages of such an amendment and certain mis-conceptions in regard to advantages under the existing Section 11, are discussed at great length in the report of the Commission and also by way of pointing out that under the UNCITRAL Model as well as in the new arbitration laws of various countries, the appointment is on the judicial side. Reference is also made the recent Act in Ireland which allows the High Court to make the appointment and defines the “High Court” as the President of the Court, meaning thereby that the appointment of the arbitral tribunal is made by the President of the High Court on the judicial side.

(paragraph 2.8.15)

(ii) Section 11(5A): This sub-section is proposed to be introduced as a consequence of the proposed Section 10A dealing with Scott v Avery clauses where a party is not able to fulfill the condition

precedent of obtaining an award before an action is filed under section 8 before a judicial authority. The reason is that if the arbitration agreement is found to be null and void etc., it is not possible to obtain an award. In such cases, the parties are permitted under the proposed sub-section (5A), to avail of the procedure under Section 11 for appointment of arbitral tribunal because the arbitral agreement has been held to be null and void etc.

(paragraph 2.8.15)

(iii) Section 11 (4),(5) & (6) proposed to be amended: These sub-sections are proposed to be amended are added as stated above, by stating that if a party to whom a request is made for appointment of an arbitral tribunal, does not choose to take any action to make an appointment, the said party must be deemed to have waived the right make the appointment. This provision has become necessary because several parties who receive notices for appointment of arbitral tribunal do not send any reply nor appoint an arbitrator and when the other party goes to Court under Section 11 seeking appointment, they rely on their prerogative to make the appointment. We also propose to increase the period from 30 days to 60 days to make the appointment in sub-sections (4) and (5). We have also proposed that if the appointment procedure as stated in sub-section (6) is not followed, the right to make the appointment under the procedure shall be deemed to have been waived.

(paragraph 2.8.15)

(iv) Section 11 (13), (14): These two sub-sections are proposed to be introduced on the same lines as sub-sections (4) and (5) of Section 8, already referred to, thereby requiring the Supreme Court or the High Court, as the case may be, (in the case of an application under Section 11 in an international arbitration or a purely domestic arbitration between Indian nationals, in India), to decide preliminary issues as to whether (a) there is no dispute in existence, or (b) the arbitration agreement is null and void or inoperative, or (c) the arbitration agreement is incapable of being performed, or (d) the arbitration agreement is not an existence. However the above Courts need not decide these questions if: (a) relevant facts or documents are in dispute, or (b) oral evidence is necessary to be adduced, or (c) the enquiry into these questions is likely to delay the reference to arbitration, or (d) the requests for deciding the question was unduly delayed or (e) the decision on the question is not likely to produce substantial savings in cause of arbitration, or (f) there is no good reason as to why these questions should be decided at that stage. If the above Courts find that the preliminary questions are simple enough they may decide the same. Otherwise they shall refer these questions also to the arbitral tribunal. Thus sufficient care is taken to see that nobody takes undue advantage of the right to raise preliminary jurisdictional issues or to cause delay in the appointment of arbitrators. At the same time care is taken to see that parties do not incur unnecessary costs by being referred to arbitration.

(paragraph 2.8.15)

(16) Section 12: This section is proposed to be amended to direct the proposed arbitrators to disclose in writing particular circumstances, within their peculiar knowledge, such as the existence of any past or present relationship, either direct or indirect, with any of the parties or their Counsel, or facts as to any relationship, financial business, professional, or other kind which can give rise to justifiable doubts as to their independence or impartiality.

(paragraph 2.9.2)

(17) Section 14: This section is proposed to be amended to say that where the mandate of an arbitrator is terminated, the Court may decide the quantum of fee payable to him.

(paragraph 2.11.2)

(18) Section 15: This section is proposed to be amended to say that the substitute arbitrator is to be appointed within 30 days and also that the Court will decide the fee payable to the arbitrator whose mandate has been terminated.

(paragraph 2.11.3)

(19) Section 17: This section is proposed to be amended by adding some more powers to the list of powers that can be exercised by the arbitral tribunal, as contained in the English Act, 1996.

(paragraph 2.13.3)

(20) section 20: Section 20(1) as it stands now states: “The parties are free to agree on the place of arbitration”. Section 20 is in Part I of the Act and concerns arbitrations in India. Obviously, sec. 20(1) is subject to sec. 2(2)

and for the reasons given in Chapter II, in the case of arbitrations to which Part I applies, the place can only be in India. In order to clear the misunderstanding and for the detailed reasons given in Chapter II, we propose adding the word ‘within India’ at the end of sec. 20(1) so that the place selected is restricted to India, and the other sub sections are converted into provisos, so that even in case parties disagree, the arbitral tribunal can select a place within India only.

(paragraph 2.14.1)

(21) Section 23 (1): This sub-section is proposed to be amended by deleting the words which permit the parties to lay down the procedure or time schedule for filing the pleadings before the arbitral tribunal. Consequently it will now be for the arbitral tribunal to fix same. This amendment is proposed to expedite arbitration proceedings and to avoid parties or those who represent them agreeing and seeking unnecessary adjournments. It is further proposed to be provided that the procedure and time schedule as fixed by the arbitral tribunal for the purpose of filing pleadings, should be binding on the parties. This amendment has become necessary in view of the complaints by several arbitrators that in India parties or those who represent them agree for adjournments for no good reason, taking undue advantage of the existing provisions of Section 23 (1). Further, under section 23(1A), the High Court may prescribe rules for expediting the arbitration process under section 82. This amendment has become necessary in view of the peculiar conditions in India.

(paragraph 2.15.2)

(22) Section 24(1): This sub-section is proposed to be amended by deleting the words which permit the parties or those who represent them from

agreeing to get the proceedings adjourned before the arbitral tribunal during the course of the evidence, without good reason. It is proposed to grant powers to the arbitral tribunal to fix the procedure as well as the time schedule for the evidence. It will be open to the tribunal to receive affidavit evidence also, subject to any right of the parties to examine the deponent. The procedure and time schedule fixed by the arbitral tribunal shall be binding on the parties or those who represent them. This will also be subject to such rules as may be made by the High Court under section 82. This amendment has become necessary in view of the peculiar conditions in India. (Paragraph 2.16.2)

(23) Section 24A: This section is proposed to be introduced to enable the arbitral tribunal, which has passed interim orders under section 17, 23, or 24, to have the said orders obeyed by the parties and in case of failure to obey, the tribunal can pass orders striking out pleadings or imposing costs or omitting material documents or by way of drawing adverse inference. There are similar provisions in the English Act 1996.

(paragraph 2.17.2)

(24) Section 24B: This section is proposed to be introduced to enable the parties or the arbitral tribunal, (if need be), to approach the Court for the purpose of implementation of the interim orders passed by the arbitral tribunal under Sections 17, 23 and 24. But before the Court is approached, the arbitral tribunal is to pass a peremptory order on the same lines as the interim order. This provision has become necessary because several arbitrators have complained that they are helpless when

parties do not obey their interim orders. There is such a provision in the English Act of 1996.

(paragraph 2.18.2)

(25) Section 28(1), (1A),: Section 28(1) as it now stands, opens with the words “where the place of arbitration is situated in India” and clause (a) deals with purely domestic arbitration and not international arbitration. As it now stands, it gives an impression that in the case of such a purely domestic arbitration between Indian nationals or Indian companies, a foreign law can be applied to the dispute under the contract. For the reasons given in Chapter II relating to sec. 20(1), there is no question of having a place of arbitration outside India in such cases. We have already proposed adding ‘within India’ at the end of sec. 20(1). With a view to remove the impression arising from the opening words in sec. 28(1), “where the place of arbitration is situated in India”, namely, that there can be a place of arbitration outside India also, we propose to exclude the applicability of the said words from clause (a) of sub section (1). We accordingly, designate clause (a) as sub section (1) without the said words, and designate clause (b) as sub section (1A) and shift the above words to that sub section which deals with international arbitration.

(paragraph 2.19.2)

(26) Section 29: Section 29 is proposed to be amended to say that the minority of opinion shall be appended to the arbitral award if made

available within 30 days of the decision of the other arbitrators. If there is no majority view, the decision of the presiding arbitrator shall become the award.

(paragraph 2.20.1)

- (27) Section 29A: This section is proposed to be introduced fix time limits for passing of the award and also for speeding up the arbitral process. No provision was made in the 1996 Act fixing time limit for the passing of the award, on the ground that extension applications in the Court were not being disposed of early enough and that there were long delays. It is proposed to initially grant a period of one year, after commencement of the arbitration and also to permit parties to agree for extension upto a maximum of another one year. Thereafter, if there is further delay, the proceedings will stand suspended until an application is made in the Court, either by the parties or if the parties do not do so, until an application for extension is filed by the arbitral tribunal. The moment an application, is filed the arbitration proceedings can re-start. It is proposed to be provided that there will be no stay of the arbitration proceedings pending consideration of the application for extension of time and that, pending the application, the arbitral tribunal shall proceed with the arbitration proceedings. The Court shall extent the time for passing the award and shall fix the time schedule and further procedure, by taking into consideration the reasons for the delay, the conduct of the parties, the manner in which proceedings were conducted by the arbitral tribunal, the amount of money spent already towards fee and expenses, the extent of work that is already done and the extent of work that remains to be done. The

Court will passed orders from time to time till the award this passed. This provision has become necessary in view of the peculiar conditions prevailing in India even after the 1996 Act. Sub-section 8 of the proposed Section 29A requires that the first order on the extension application shall be passed within one month from the date of service on the opposite party. The ‘future procedure’ can be prescribed by the High Court by making rules under section 82.

(paragraph 2.21.6)

- (28) Section 31A: This section is proposed to be introduced requiring a photocopy of the arbitral award to be filed by the arbitral tribunal, along with the ‘arbitral records’ in the Principal Courts referred to Section 2(1)(e). The award is to be filed only for purposes of record. Parties can obtain certified copies of the photocopy of the award or other documents or of the arbitral proceedings. In case the records are called by any other Court, provision is made for sending the record to that Court. The preservation of records shall be governed by the prevailing rules applicable to other records preserved in the Court. The Court is to maintain a register of awards with the details mentioned in the section and other details has may be required by the rule making authority.

(paragraph 2.24.4)

- (29) Section 34: This Section deals with applications to set aside the award. The section is proposed to be amended to fill up certain omissions and also to provide for some consequential amendments

arising out of the proposed section 34A, regarding which details are given under serial No.30.

(paragraph 2.25.1)

- (i) Sub-Section (1) of Section 34: This sub-section is proposed to be amended by permitting the parties to include, in their application to set aside the award, the additional grounds proposed in Section 34 A in the case of purely domestic arbitration awards relating to Indian nationals.

(paragraph 2.25.2)

- (ii) Explanation 2 below Section 34: Section 34 does not enable the parties to question the decision of the arbitral tribunal made under Section 13 (2) rejecting a plea of bias or to question the decision of the said tribunal made under Section 16 (2) or (3) rejecting a plea of want of jurisdiction on the part of the arbitral tribunal. Though the existence of these remedies was referred to in Sections 13 and 16, these remedies were not included in Section 34 and further the use of the word 'only' in section 34 (1) contradicted what was stated in sections 13 and 16. This is being rectified by adding Explanation – 2 below sub-section 2 of Section 34, making it clear that the above decisions can be challenged before the court in the application under section 34(1).

(paragraph 2.10.1)

- (iii) Sub-Section (1A): We proposed to introduce sub-section (1A) in section 34 so that while filing an application to set aside the award,

the parties could annex a photocopy of the award in case the original award has not been supplied to the applicant.

(Paragraph 2.25.2)

(iv) Sub-Section (5) and (6): These sub-sections are proposed to be introduced to refer to the further procedure subsequent to sub-section (4), namely, after receipt of the order of the arbitral tribunal to which the award is remitted for rectification of the defects pointed out in the application filed under sub-section (1) of Section 34. The further procedure that is proposed is that parties can file objections to the order of the tribunal passed upon such remission, and it is further provided that the Court can deal with the said objections also in the light of the grounds permissible under Section 34 and under the proposed Section 34A.

(Paragraph 2.25.2)

(30) Section 34A: In the case of purely domestic arbitrations, where an award is passed between Indian nationals, the parties are proposed to be given two more additional grounds of attack to be included in the application under sub-Section (1) of Section 34. These two additional grounds are (i) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law, and (ii) that the award has not given reasons though it was an award which was required to contain reasons, not being one by way of settlement or one where the agreement provided that reasons need not be given.

In the case of additional ground (i) referred to above, special conditions are imposed, namely, that the party must file an application seeking leave to raise the said ground and satisfy the Court prima facie that such a point was raised before the arbitral tribunal, that the point affects the rights of the parties substantially, and that it is proper to decide the question. The application under Section 34 (1) must specifically indicate the substantial question raised. Sub-section (3) of the proposed Section 34 A states that additional ground (i) will not be available where a specific question of law was referred to the arbitral tribunal.

(paragraph 2.26.3)

- (31) Section 36(1): (i) Section 36 as it stands now provides that the enforcement of the award will come to a stop upon the filing of an application under sub-section (1) of Section 34 to set aside the award. Parties are now filing such applications even though there is no substance whatsoever in such applications. Section 36 is therefore proposed to be amended by designating the existing section as sub-section (1) and omitting the words which say that the award will not be enforced once an application is filed under sub-section (1) of Section 34.
- (ii) Sub-section (2): This sub-section is being introduced to say that the mere filing of an application under sub-section (1) of Section 34 to set aside an award shall not amount to stay of the award unless the Court passes an order under the proposed sub-section (3).

(iii) Sub-section (3) to (5): These sub-sections are proposed to be introduced to enable the Court to stay the operation of the award subject to such conditions as it may deem fit, in the light of the limited grounds available under Section 34 and 34A. Under these sub-sections, the Court can pass orders against third parties or against property which is not the subject matter of arbitration, for the purpose of protecting the interests of the party in whose favour the award is passed.

(paragraph 2.29.7)

(32) Section 37A: This section is proposed to be introduced to enable the Court to dismiss in limini, an application under sub-section (1) of Section 34 (application to set aside the award) or any appeal (whether a regular appeal or an appeal against an interim order of the tribunal), even before notice is issued to the opposite party. It is further proposed to provide that even in a case where notice is issued to the opposite party, the Court, at the time of the disposal of the above matters, will not interfere unless “substantial prejudice” is shown by the applicant or the appellant, as the case may be. It is further provided that all applications and appeals are to be disposed of within 6 months of service on the opposite party. These provisions are introduced to avoid applications and appeals being automatically registered and kept pending by the Registry and being kept pending for years together, in the Courts.

(paragraph 2.29.11)

- (33) Section 42: This section is proposed to be amended to refer to the forum for filing subsequent applications in all situations where the first of the applications is filed before a judicial authority under Section 8 or before any of the Courts referred to in Section 8 A or before the Supreme Court or the High Court under Section 11 seeking reference to arbitration. The various proposed sub-sections of section 42 refer separately to the Court before which the subsequent applications, such as applications under sub-section (1) of Section 34 for setting aside the award etc, have to be filed. Sub-section (1) of Section 42 is general, sub-section (2) refers to situations where the first application is filed before the Court in Section 2(1)(e), Sub-section (3) deals with the situations where the first application is filed before a judicial authority under Section 8, sub-section (4) deals with situations where the first application is filed before any of the Courts referred to in Section 8A and Sub-section (5) refers to the situations where the first application is filed before the Supreme Court or the High Court under Section 11, seeking reference to arbitration.

(paragraph 2.30.6)

- (34) Section 42A: This section is proposed to be introduced to enable empanelment of arbitrators by the Chief Justice of India under a scheme to be framed by him subject to such conditions as he may specify.

(paragraph 2.31.2)

- (35) Section 42B: This section is proposed to be introduced to neutralise the effect of the Maharashtra amendment of 1984 to Section 69 of the Indian Partnership Act which amendment disabled partners of an

unregistered firm to seek dissolution of the firm, settlement of accounts of the firm or realise the assets of the firm. Section 42B removes the disability in so far as it relates to the partners' right to seek the aforesaid relief's through arbitration proceedings.

(paragraph 2.32.3)

(36) Section 43: Two amendments are proposed in Section 43.

(i) Section 43(3): This sub-section is proposed to be amended to declare the effect of the Contract (Amendment) Act 1996 which amended Section 28 of the Indian Contract Act. By that amendment to the Contract Act, the effect of what is known as the Atlantic clause, was neutralised by the Parliament. The amendment stated that if a clause in a contract had the effect of extinguishing a right if a particular step (e.g. giving of a notice of 30 days soon after the cause of action) is not taken by the party, such a clause will be void. Now sub-section (3) is proposed to be amended and it is stated that such clauses will be void and that further there will be no necessity for the parties to seek extension of time in a Court in respect of the period prescribed under the Limitation Act 1963, as is now provided in sub-section (3).

(paragraph 2.34.3)

(ii) Section 43(5): This sub-section is proposed to be added to exclude the period covered by infructuous arbitration proceedings where the arbitral tribunal holds under section 16(2) or 16(3) that it has no jurisdiction or where such an order is affirmed on further appeals, or where in an application under Section 11 (13), the

Supreme Court or the High Court, as the case may be, holds that there is no arbitration agreement or that it is null and void etc. In such cases, if the party has to file a regular suit, under the proposed amendment, he will now be able to exclude the period covered by the arbitration proceedings.

(paragraph 2.35.4)

- (37) Section 30 of the Amending Act – amendment of section 82 of the principal Act: The High Courts are to make rules fixing the manner in which arbitral proceedings have to be conducted, proceedings to be held on continuous days and on each day from 10.30 AM to 4.00 PM or at least for five hours.

(paragraph 2.39.1)

- (38) Section 31 of the Amending Act- amendment of section 84 by insertion of a new sub-section (1A) : In this proposed sub-section (1A), the Central Government is empowered to make rules regarding the manner in which the fee of the members of the arbitral tribunal may be fixed and the procedure relating thereto, and regarding the other particulars required to be entered under clause (f) of sub-section (4) of section 31A. The guidelines regarding the fixation of fee in respect of purely domestic arbitrations between Indian nationals are also laid down.

(paragraphs 2.39.3 and 2.39.4)

- (39) CHAPTER XI (Sections 43A to 43D and Schedule IV ) in Part I: This chapter along with Schedule IV is proposed to be introduced in Part I of the Act, to deal with Fast Track Arbitration. The parties, if they agree unanimously that they opt for this type of arbitration, then, notwithstanding any provision in the contract, the arbitration will be

by a single arbitrator, and the procedure to be followed by him will be the procedure indicated in Chapter XI and Schedule IV of the Act. To the extent the procedure is not covered by the aforesaid provisions, the other provisions of Part I of the Act shall apply. The award is to be passed in six months from the date of constitution of the single member arbitral tribunal. In case it is not so passed, parties by consent can extend the period upto a maximum of three more months. In case the award is not passed within the period of six months and the further period agreed to by the parties, as stated above, the proceedings will stand suspended until either party applies for extension in the High Court or if the parties do not so apply, until the sole arbitrator applies for extension and thereafter the provisions of sub-sections (4) to (8) of Section 29A shall apply to enable the High Court to monitor the time schedule of the adjournments and other procedure, till the award is passed.

In so far as the filing of the pleadings and producing evidence before the arbitral tribunal, short periods of fifteen days for each step is provided. Other periods mentioned in the Act are reduced, so far as this chapter is concerned.

All subsequent applications like an application under sub-section (1) of Section 34 to set aside an award, have to be filed in the same High Court.

Provisions enabling the arbitral tribunal to implement its orders and provisions enabling the High Court to implement the orders of the arbitral tribunal, have been included in the proposed amendment.

Provision is also made to enable the arbitral tribunal to pass orders upon the default of the parties to comply with the time schedule or the procedure indicated by the arbitral tribunal.

This Chapter and the Schedule are a modified form of a normal Fast Track Procedure prescribed by other arbitral institutions with this difference, namely, that the upper time limit is not as rigid as in those procedures. The procedure under this chapter can be called an expedited arbitration procedure with a flexible upper limit controlled by the High Court.

By bringing in the High Court even at the first level, the initial approach to the District Court is eliminated. After the High Court, the further appeal, if any, will only be to the Supreme Court under Article 136 of the Constitution of India.

(paragraph 2.38.2)

- (39) Sections 32, 33 and 34 of the Amending Act: Section 32 is proposed to deal with “Transitory Provisions”, Section 33 with “Time limits and speeding up the arbitral process” for pending arbitration proceedings under the 1996 Act, and Section 34 to deal with “Time limits and speeding up the arbitral process” in connection with pending arbitration proceedings under the 1940 Act.

(i) Section 32 of the Amending Act: The proposed amending Act being procedural in nature, it will apply to pending arbitration proceedings also, unless the said Act is made prospective. To achieve this, it is being provided in sub-section (1) of Section 32, that the amendments will, subject to the provisions of sub-sections (2) to (17), be prospective. In sub-sections (2) to (17), certain specific provisions of the proposed amending Act are made applicable to pending arbitrations, pending applications and awards already passed under the 1996 Act.

(paragraph 2.41.2)

Sufficient care has been taken to see that only those provisions will apply which will speed up the entire arbitral process before the arbitral tribunal and before the Courts under Section 2(1)(e) or before the Appellate Courts upto the High Court.

The proposed section 37A is also made applicable to pending arbitration proceedings to enable the Courts to dismiss applications and appeals in limini or to dispose them of only if substantial prejudice is shown.

(ii)(a) Section 33 of the Amending Act: The proposed section 34 states that the arbitration proceedings pending before an arbitral tribunal appointed under the 1996 Act for more than three years should be completed within another year, failing which, the procedure enables the Court to fix the time schedule as stated in sub-sections (4) to (8) of Section 29A, till the award is passed.

(Even the proposed provisions in Section 23(1) and 24(1), and 24A are applied under Section 33 to pending proceedings under the 1996 Act).

All pending applications and appeals in the Courts arising out of the 1996 Act are to be disposed of in six months and all appeals against interim orders in three months, from the date of commencement of the amending Act.

Section 37A is also made applicable to pending arbitration proceedings to enable the Courts to dismiss applications and appeals in limini or to dispose them of only if substantial prejudice is shown.

- (b) In the case of pending arbitration under the 1996 Act where three years have not expired by the date of commencement of the proposed amending Act, it is proposed that, on completion of that period, a further period of six months is to be granted for passing of the award, failing which the time schedule and procedure under sub-sections (4) to (8) of Section 29A as stated above will apply, till the award is passed.

(Paragraph 2.42.1)

- (iii) Section 34 of the Amending Act: This section proposes that all arbitration proceedings which were started under the 1940 Act, if they have not been completed (unless there is a stay order) by the date of commencement of the amending Act, have to be completed within one year from such commencement failing which the time schedule and the procedure will be monitored by the relevant Court

under Section 2(c) or Section 21 of the 1940 Act, as the case may be by applying the provisions of sub-sections (4) to (8) of Section 29A till the award is passed.

If matters are pending before the arbitrators, the provisions of Section 23(1) and 24(1) and 24A and 24B shall apply to strengthen the hands of the arbitrators to fix the time schedules and to have their orders implemented or to get them implemented by the relevant Court mentioned above.

Pending applications in Court to make the award a rule of Court or pending objections to set aside the award and, pending appeals under Section 39, under the 1940 Act, have to be disposed of within one year of the commencement of the Act.

Appeals and revisions against interim orders and other applications where stay of arbitration proceedings is granted by Courts, have to be disposed of within six months from the date of commencement of amending Act.

Section 37A is also made applicable to pending arbitration proceedings to enable the Courts to dismiss applications and appeals in limini or to dispose them of only if substantial prejudice is shown.

(Paragraph 2.43.2)

(40) Section 36: This deals with insertion of Schedule IV in the main Act where Chapter XI is introduced in Part I to deal with Fast Track Arbitration.

(Paragraph 2.38.2)

We recommend accordingly.

**(Justice B.P. Jeevan Reddy)**  
**Chairman**

**(Justice M.JagannadhaRao)**  
**Vice-Chairman**

**(Dr.N.M.Ghatate)**  
**Member**

**(Mr.T.K.Viswanathan)**  
**Member-Secretary**

Law Commission of India 176<sup>th</sup> Report on the Arbitration and Conciliation Act 1996

**ANNEXURE-I**

**THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001**  
**Arrangement of Clauses**

Clause No	
1.	Short title and commencement
2.	Amendment of section 2
3.	Amendment of section 5
4.	Amendment of section 6
5.	Amendment of section 7
6.	Amendment of section 8
7.	Insertion of new section 8 A
8.	Substitution of section 9
9.	Insertion of new section 10A
10.	Amendment of section 11
11.	Amendment of section 12
12.	Amendment of section 14
13	Amendment of section 15
14	Substitution of section 17
15.	Substitution of section 20
16.	Amendment of section 23

- 17 Amendment of  
section 24
18. Insertion of new  
sections 24A and 24B
19. Amendment of  
section 28
20. Amendment of  
section 29
21. Insertion of  
new section 29A

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22. Insertion of new section 31A
23. Amendment of section 34
24. Insertion of new section 34A
25. Substitution of section 36
26. Insertion of new section 37A
27. Substitution of section new sections  
for section 42
28. Amendment of section 43
29. Insertion new Chapter XI in Part I
30. Amendment of section 82
31. Amendment of section 84
32. Transitory provisions
33. Speeding up of proceedings and time  
limits for passing awards under the  
principal Act.
34. Speeding up of proceedings and time limits for  
passing awards under the Arbitration Act 1940.

***THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL,  
2001***

A BILL

to amend the Arbitration and Conciliation Act, 1996

Be it enacted by the Parliament in the Fifty-second Year of the Republic of India as follows:-

**Short title**

1. This Act may be called the Arbitration and Conciliation (Amendment) Act, 2001.

**Amendment of Section 2**

2. In section 2 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act),-

(i) in sub-section (1), for clauses (e) and (f), the following clauses shall be substituted, namely:-

“(e) ‘court’ means the principal Civil Court of original jurisdiction in a district, the Court of principal judge of the City Civil court of original jurisdiction in a city and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court or to such Court of the principal judge City Civil Court, or any Court of Small Causes;

(ea) ‘domestic arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, where none of the parties is-

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country,

and shall be deemed to include international arbitration and international commercial arbitration where the place of arbitration is in India;

(eb) ‘international arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, and where at least one of the parties is,-

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country:

(f) ‘international commercial arbitration’ means international arbitration considered as commercial under the law in force in India;

(fa) ‘judicial authority’ includes any quasi-judicial statutory authority;”.

(ii) for sub-section (2), the following sub-section shall be substituted, namely:-

- “(2) (a) This Part shall apply to domestic arbitration;
- (b) Sections 8, 9, 27, 35 and 36 of this Part shall apply to international arbitration (whether commercial or not) where the place of arbitration is outside India or is not specified in the arbitration agreement.”

(iii) after sub-section (9), the following sub-section shall be inserted, namely:-

“(10) The principal Civil Court of original jurisdiction in a district or the Court of the principal judge, City Civil Court exercising original jurisdiction in a city, as the case may be, may transfer any matter relating to any proceedings under the Act pending before it to any court of coordinate jurisdiction, in the district or the city, as the case may be, for decision from time to time.”.

### **Amendment of section 5**

**3.** In section 5 of the principal Act, the following Explanation shall be inserted at the end, namely :-

“Explanation.- For the removal of doubts, it is hereby declared that the expression ‘any other law for the time being in force’ shall always be deemed to include-

- (a) the Code of Civil Procedure, 1908 (5 of 1908);
- (b) any law providing for internal appeals within the High Court;
- (c) any enactment which provides for intervention by a judicial authority in respect of orders passed by any other judicial authority.”.

**Amendment of section 6**

4. In section 6 of the principal Act, the words”, or the arbitral tribunal with the consent of the parties,” shall be omitted.

**Amendment of section 7**

5. In section 7 of the principal Act, in sub-section (4), in clause (b), for the words “an exchange of letters”, the words “any written communication by one party to another and accepted expressly or by implication by the other party, an exchange of letters” shall be substituted.

**Amendment of section 8**

6. In section 8 of the principal Act,-

(a) for sub-section (1), the following sub-sections shall be substituted, namely,-

“(1) Subject to the provisions of sub-sections (4) and (5), a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, unless it has to decide any questions referred to in sub-section (4) as preliminary issues under that sub-section, refer the parties to arbitration.

(1A) The judicial authority before which an action is brought shall stay the action before it for the purpose of deciding the questions set out in sub-section (4) and the stay so granted shall be subject to the outcome of the orders that may be passed under the said sub-section and sub-section (5).”;

(b) in sub-section (3),the following proviso shall be inserted at the end, namely:-

“Provided that the arbitration proceeding so commenced shall stand terminated if the judicial authority, after hearing all the parties, passes an order under sub-section (4) to the effect that-

- (a) a reference to arbitration cannot be made because of its decision on any question referred to in clauses (a) to (e) of that sub-section; or
- (b) though a reference to arbitration has to be made ,the proceedings have to be conducted by a different arbitral tribunal.”;

(c) after sub-section (3), the following sub-sections shall be inserted, namely:-

“(4) Where an application is made to the judicial authority by a party raising any question -

- (a) that there is no dispute in existence;
- (b) that the arbitration agreement or any clause thereof is null and void or inoperative;
- (c) that the arbitration agreement is incapable of being performed;
- (d) that the arbitration agreement is not in existence ,

the judicial authority may, subject to the provisions of sub-section (5), decide the same.

(5) Where the judicial authority finds that the questions mentioned in sub-section (4) cannot be decided because-

- (a) the relevant facts or documents are in dispute; or
- (b) there is a need for adducing oral evidence; or
- (c) the inquiry into these questions is likely to delay reference to arbitration; or
- (d) the request for deciding the question was unduly delayed; or
- (e) the decision on the question is not likely to produce substantial savings in costs of arbitration; or
- (f) there is no good reason why these questions should be decided at that stage,

it shall refuse to decide the said questions and shall refer the same to the arbitral tribunal for decision.

(6) If the judicial authority holds that though the arbitration agreement is in existence but it is null and void or inoperative or incapable of being performed and refuses to stay the legal proceedings, any provision in the arbitration agreement that the award is a condition precedent for the initiation of legal proceedings in respect of any matter, will be of no effect in relation to the proceedings.”

**Insertion of new section 8 A**

7. After section 8 of the principal Act, the following section shall be inserted, namely:-

**Parties in pending legal proceedings may agree to seek arbitration**

“8A. Where at any stage of a legal proceeding in the Supreme Court or the High Court or in the principal Civil Court of original jurisdiction in a district or in the court of the principal judge of the City Civil Court of original jurisdiction in a city or any Court of coordinate jurisdiction or inferior in grade to such Principal courts, as the case may be, all the parties enter into an arbitration agreement to resolve their disputes, then the Court in which the said legal proceeding is pending shall, on an application made by any party to the arbitration agreement, refer the disputes in relation to the subject matter of the legal proceeding, to arbitration.

Explanation: For the purposes of this section, “legal proceeding” means any proceeding involving civil rights of parties pending in the courts mentioned in this section, whether at the stage of institution or at the stage of appeal or revision and includes proceedings involving civil rights instituted in the High Courts under article 226 and 227 of the Constitution of India or on further appeal, if any, to the Supreme Court.”

**Substitution of new section for section 9**

8. For section 9 of the principal Act, the following section shall be substituted, namely:-

**Interim measures, etc., by court**

“9. (1) 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 interim measures.

(2) The Court shall have the same powers for making orders under sub-section (1) as it has for the purpose of, and in relation to, any proceedings before it.

(3) In particular and without prejudice to sub-section (2), a party may apply to the court for any of the following, namely:-

(a) appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings;

(b) interim measure of protection in respect of any of the following matters, namely:-

(i) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(ii) securing the amount in dispute in the arbitration;

(iii) 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;

(iv)interim injunction or the appointment of a receiver.

(c) other interim measure of protection as may appear to the court to be just and convenient.

(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 the said order.

(5)The court may direct that if the steps referred to in sub-section (1) are not taken within the said period of thirty days specified under sub-section (4), the interim measure granted under sub-sections (2) and (3), 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.

(6) Where an order granting an interim measure stands vacated under sub-section (5), the court may pass such further orders as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section.”

#### **Insertion of new section 10A**

9. After section 10 of the principal Act, the following section shall be inserted, namely:-

#### **Employees, etc., not to be appointed as arbitrators in certain cases**

“ **10A.** (1) Subject to the provisions of sub-section (2), where any arbitration agreement contains a clause enabling one of such parties to appoint his or its own employee or consultant or advisor or other person having business

relationship with him or it, as an arbitrator, such a clause shall be void to that extent.

(2) The provisions of sub-section (1) shall not-

(a) apply to an agreement in international arbitration (whether commercial or not);

(b) render any clause, in an arbitration agreement which enables the Central or a State Government or a Public Sector Undertaking or a statutory body or a statutory corporation or other public authority, as the case may be, to appoint its own employee or consultant or advisor or any other person having business relationship, as an arbitrator, void;”

#### **Amendment of section 11**

**10.** In section 11 of the principal Act,-

(a) in sub-section (4),-

(i) in clauses (a) and (b), for the words “thirty days”, the words “sixty days’ shall be substituted;

(ii) for the words, “the appointment shall be made, upon request of a party by the Chief Justice or any person or institution designated by him.”, the words “the right to make such appointment shall be deemed to have been waived, if such appointment is not made within the said period and the appointment shall be made, upon request of a party or any person or institution designated by the High Court or any person or institution designated by it.”, shall be substituted

(b) for sub-section (5), the following sub-sections shall be substituted, namely:-

“(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within sixty days from the receipt of a request by one party from the other party to so agree, then the right to make such appointment shall be deemed to have been waived, if such appointment is not made within the said period and the appointment

shall be made by the High Court or any person or institution designated by it.

(5A) Where the appointment procedure contained in the arbitration agreement becomes void under sub-section (1) of section 10A, the parties may agree to appoint an arbitrator within sixty days of a request from one of the parties:

Provided that where the parties fail to agree on an arbitrator within the said period of sixty days, the appointment shall be made, upon request of a party, by the High Court or any person or institution designated by it.”

(c) in sub-section (6) for the words, “ a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”, the words “and where such measures are not taken in accordance with the appointment procedure agreed upon by the parties, the right to take such measures shall be deemed to have been waived and a party may request the High Court or any person or institution designated by it to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”shall be substituted;

(d) in sub-section (7)-

- (i) after the word, brackets and figure “sub-section (5)”, the words, brackets, figure and letter “or sub-section (5A)”, shall be inserted;
- (ii) for the words, “ the Chief Justice or any person or institution designated by him”, the words “ the High Court or any person or institution designated by it” shall be substituted;

(e) in sub-section (8) for the words “ The Chief Justice or any person or institution designated by him”, the words “ The High Court or any person or institution designated by it” shall be substituted;

(f) for sub-section (9), the following sub-section shall be substituted, namely:-

“(9) In the case of appointment of a sole or third arbitrator in an international arbitration (whether commercial or not), the Supreme Court or the person or institution designated by it may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.”;

(g) in sub-section (10)-

(i) for the words “The Chief Justice may make such scheme as he may deem appropriate ” the words “The High Court may make such scheme as it may deem appropriate,” shall be substituted;

(ii) after the word, brackets and figure “sub-section (5)”, the words, brackets, figure and letter “or sub-section (5A)”, shall be inserted;

(h) for sub-section (11), the following sub-section shall be substituted, namely:-

“(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (5A) or sub-section (6) to different High courts or their designates, the High Court or its designate to whom a request has been first made under the relevant sub-section shall alone be competent to decide on the request.”;

(i) for sub-section (12), the following sub-sections shall be substituted, namely.-

“(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10), arise in an international arbitration (whether commercial or not), the reference to “High Court” wherever it occurs in those sub-sections, shall be construed as a reference to the “Supreme Court”;

(b) Where the matters referred to in sub-sections (4), (5), (5A) (6), (7), (8) and (10) arise in any other arbitration, the reference to the “High Court” wherever it occurs in those sub-sections shall be construed as a reference to the High Court, within whose territorial limits the principal civil court or the court of the principal judge of city civil court referred to in clause (e) of sub-section (1) of section 2, as the case may be, is situated and where the High Court itself is the Court within the meaning of that clause, to that High Court.

(13) Where an application is made to the Supreme Court or the High Court ,as the case may be, under this section by a party raising any question -

- (a) that there is no dispute in existence;
- (b) that the arbitration agreement or any clause thereof, is null and void or inoperative;
- (c) that the arbitration agreement is incapable of being performed;
- (d) that the arbitration agreement is not in existence ,

the Supreme Court or the High Court ,as the case may be, may, subject to the provisions of sub-sections (14), decide the same.

(14) If the Supreme Court or the High Court, as the case may be, considers that the questions raised under sub-section (13), cannot be decided because,

- (a) the relevant facts or documents are in dispute; or
- (b) oral evidence is necessary to be adduced; or
- (c) the inquiry into these questions is likely to delay the reference to arbitration; or
- (d) the request for deciding the question was unduly delayed; or
- (e) the decision on the question is not likely to produce substantial savings in costs of arbitration; or
- (f) there is no good reason as to why these questions should be decided at that stage,

it shall refuse to decide the said questions and shall refer the same to the arbitral tribunal .”

### **Amendment of section 12**

**11.** In section 12 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:-

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject-matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality.”

**Amendment of section 14**

12. In section 14 of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely :-

“(4) Where the mandate of the arbitrator has been terminated, the court may decide the quantum of fee payable to such arbitrator .”

**Amendment of section 15**

13. In section 15 of the principal Act,-

(a) in sub-section (2), for the words “a substitute arbitrator shall be appointed”, the words “ a substitute arbitrator shall be appointed within a period of thirty days”shall be substituted;

(b) after sub-section (4), the following sub-section shall be inserted, namely:-

“(5) Where the mandate of an arbitrator has been terminated, the court may decide the quantum of fee payable to such arbitrator.”

**Substitution of new section for section 17**

14. For section 17 of the principal Act the following section shall be substituted, namely:-

**Interim directions by arbitral tribunal and other powers**

“17. The arbitral tribunal may, pending arbitral proceedings, direct,-

(a) at the request of a party to the arbitral proceedings, the other party to take steps for the protection of the subject matter of the dispute in the manner considered necessary by the arbitral tribunal; or

(b) a party, to furnish appropriate security in connection with the directions issued under clause (a);or

(c) a party making any claim, to furnish security for the costs of arbitration;  
or

(d) in relation to any property which is the subject matter of arbitral proceedings and which is owned by or is in the possession of a party to the proceedings –

(i) the taking of photographs, inspection, preservation, custody or detention of the property by the arbitral tribunal, by an expert or by a party for the purposes of inspection; or

(ii) the taking of samples from, or making of any observation, or conducting any experiment upon the said property; or

(e) a party or witness to be examined on oath or affirmation, and for that purpose administer, any necessary oath or direct the taking of any necessary affirmation, or

(f) a party to take steps for the preservation of any evidence in his custody or control which may be necessary for the purpose of the proceedings.”

#### **Substitution of new section for section 20**

**15.** For section 20 of the principal Act, the following section shall be substituted, namely:-

#### **Place of arbitration**

“**20.** (1) Subject to the provisions of sub-section (2), the parties are free to agree on the place of arbitration:

Provided that where the parties fail to agree, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties:

Provided further that the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

(2) The place of arbitration shall be within India.”

**Amendment of section 23**

**16.** In section 23 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:-

“(1) Within a period of time to be determined by the arbitral tribunal, the claimant shall state the facts in support of his claim, the points at issue and the relief or remedy sought, the respondent shall state his defence in respect of these particulars and the claimant may file his rejoinder, if any, and the parties shall abide by the time schedule so fixed by the arbitral tribunal, unless the tribunal extends the same.

(1A) The arbitral tribunal shall endeavour to expedite the arbitral process subject to such rules as may be made by the High Court in this behalf.”

**Amendment of section 24**

**17.** In section 24 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:-

“(1) Subject to such rules as may be made by the High Court in this behalf, the arbitral tribunal shall decide whether to hold oral hearings for presentation of evidence or for oral arguments or whether the proceedings shall be conducted on the basis of documents and other materials or to receive affidavit in lieu of oral evidence subject to the witness being questioned orally:

Provided that the arbitral tribunal may, at any appropriate stage of the proceedings, hold oral hearings for the purpose of presentation of oral evidence.

(1A) Subject to the provisions of sub-section (1), the arbitral tribunal shall, pass orders regarding various aspects of the procedure before it.

(1B) Without prejudice to the provisions of sub-section (1A), the power of the arbitral tribunal to pass orders shall include-

- (a) the fixing of the time schedule for the parties to adduce oral evidence, if any;
- (b) the fixing of the time schedule for oral arguments;
- (c) the manner in which oral evidence is to be recorded;

- (d) the power to decide whether the proceedings shall be conducted only on the basis of documents and other materials or the other manner in which the proceedings may be conducted .

(1C) The procedure determined under sub-section (1A) and the time schedule fixed under sub-section (1B) by the arbitral tribunal, shall be binding on the parties.” .

### **Insertion of new sections 24A and 24B**

18. After section 24 of the principal Act , the following sections shall be inserted, namely:-

### **Powers of arbitral tribunal to enforce its orders passed under sections 17, 23 and 24**

“24 A (1)If without showing sufficient cause, a party fails to comply with any orders of the arbitral tribunal passed under section 17,section 23 or section 24, as the case may be, the arbitral tribunal may make a peremptory order to the same effect, prescribing such time for compliance as it considers appropriate.

(2) If a claimant fails to comply with a peremptory order passed under sub-section (1) in relation to a direction under clause (c) of section 17 for furnishing security for costs of arbitration, the arbitral tribunal may dismiss his claim and make an award accordingly.

(3) If a party fails to comply with any other peremptory order passed by the arbitral tribunal under sub-section (1), then the said tribunal may-

(a) make such order as it thinks fit as to payment of costs of the arbitral proceedings incurred in consequence of the non-compliance;

(b)direct that the party in default shall not be entitled to rely upon any allegations in his pleadings or upon any material which was the subject-matter of the order;

(c ) draw such adverse inference from the act of non-compliance as the circumstances justify;

(d) proceed to make an award on the basis of such materials as have been provided to it, without prejudice to any action that may be taken under section 25.”

**Powers of the Court for enforcement of the peremptory orders of the arbitral tribunal:**

**24 B** (1) Without prejudice to the powers of the Court under section 9, the Court may, on an application made by a party, make an order requiring the party to whom the order of the arbitral tribunal was directed, to comply with the peremptory orders of the arbitral tribunal passed under sub-section (1) of Section 24 A.

(2) An application under sub-section (1) may be made by-

(a) the arbitral tribunal, after giving notice to the parties, or

(b) a party to the arbitral proceedings with the permission of the arbitral tribunal, after giving notice to other parties.

(3) No order shall be passed under sub-section (1), by the Court, unless it is satisfied that the person to whom the order of the arbitral tribunal was directed, has failed to comply with it within the time fixed in the order of the arbitral tribunal or, if no time was fixed, within reasonable time.

(4) Any order passed by the Court under sub-section (1), shall be subject to such orders, if any, as may be passed by the Court on appeal, under clause (b) of sub-section (2) of section 37.”

**Amendment of section 28**

**19.** In section 28 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:-

“(1) In an arbitration, other than an international arbitration (whether commercial or not), the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

(1A) In an international arbitration (whether commercial or not), where the place of arbitration is situate in India,

- (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
- (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
- (iii) failing any designation of the law under clause (i) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.”.

**Amendment of section 29**

**20.** In section 29 of the principal Act,-

(a) in sub-section (1), the following proviso shall be inserted at the end, namely:-

“ Provided that where there is no majority, the award shall be made by the Presiding arbitrator of the arbitral tribunal.” ;

(b) after sub-section (2), the following sub-section shall be inserted, namely :-

“(3) The minority decision shall, if made available within thirty days of the receipt of the decision of the other members, be appended to the award.”.

**Insertion of new section 29A**

21. After section 29 of the principal Act, the following section shall be inserted, namely:-

**Speeding up of proceedings and time limit for making awards**

“ 29A (1) The arbitral tribunal shall make its award within a period of one year after the commencement of arbitral proceedings, or within such extended period as specified in sub-sections (2) to (4).

(2) The parties may, by consent, extend the period specified in sub-section (1) for a further period not exceeding one year.

(3) If the award is not made within the period specified in sub-section (1) and the period agreed to by the parties under sub-section (2), the arbitral proceedings shall, subject to the provisions of sub-sections (4) to (6), stand suspended until an application for extension is made to the Court by any party to the arbitration, or where none of the parties makes an application as foresaid, until such an application is made by the arbitral tribunal.

(4) Upon filing of the application for extension of time under sub-section (3), suspension of the arbitral proceedings shall stand revoked and pending consideration of the application for extension of time before the court under that sub-section, the arbitral proceedings shall continue before the arbitral tribunal and the court shall not grant any stay of the arbitral proceedings.

(5) The Court shall, upon such application for extension of time being made under sub section (3), whether the time for making the award as aforesaid has expired or not and whether the award has been made or not, extend the time for making of the award beyond the period referred to in sub-section (1) and the period agreed to by the parties under sub-section (2).

(6) The Court shall, while extending the time under sub-section (5), pass such orders as to costs or as to the future procedure to be followed by the arbitral tribunal, after taking into account-

- (a) the extent of work already done;
- (b) the reasons for delay;
- (c) the conduct of the parties or of any person representing the parties;
- (d) the manner in which proceedings were conducted by the arbitral tribunal;
- (e) the further work involved;

(f) the amount of money already spent by the parties towards fee and expenses of arbitration;

(g) any other relevant circumstances,

and the Court shall pass such orders from time to time with a view to speed up the arbitral process, till the award is passed:

Provided that any order as to future proceedings passed by the Court shall be subject to such rules as may be made by the High Court in this behalf for expediting the arbitral proceedings.

(7) The parties cannot by consent, extend the period beyond the period specified in sub-section (1) and the maximum period referred to in sub-section (2) and save as otherwise provided in the said sub-sections, any provision in an arbitration agreement whereby the arbitral tribunal may further extend the time for making the award, shall be void and of no effect.

(8) The first of the orders of extension under sub-section (5) together with directions, if any, under sub-section (6), shall be passed by the court, within a period of one month from the date of service on the opposite party.”

#### **Insertion of new section 31A**

22. After section 31 of the principal Act, the following section shall be inserted, namely:-

#### **Filing of a copy of the award and original arbitral records in the court for purposes of record and maintenance of register of awards**

“31A (1) A photocopy of the arbitral award duly signed on each page by the members of the arbitral tribunal together with the original arbitral records, shall be filed by the arbitral tribunal in the court within thirty days of the making of the award along with a list of the papers comprising the arbitral record.

Provided that where the High Court is the proper court within the meaning of clause (e) of sub-section (1) of section 2, then the award shall be filed in the principal Civil Court of Original Jurisdiction in a district or in the court of the principal judge of the city civil court of original jurisdiction in a city within whose territorial jurisdiction the subject matter of arbitration is situated (hereinafter referred to in this section as the said court).

Explanation.-1 For the removal of doubts, it is hereby declared that 'arbitral award' in this section means the arbitral award whether passed pursuant to a reference made by a judicial authority under section 8, or by any of the courts referred to in section 8A, or by the parties or by the High Court or by the Supreme Court under section 11, or by the parties to a Fast Track Arbitration under section 43A.

Explanation.-2 For the purposes of this section, 'arbitral records' shall include the pleadings in the claim filed by the parties, the documentary and oral evidence if any recorded, the pleadings in interlocutory applications, the orders thereon, the proceedings of the arbitral tribunal and all other papers relating to the arbitral proceedings.

(2) Where the arbitral tribunal fails to file the photocopy of the arbitral award and the arbitral records under sub-section (1), any of the parties may give notice to the arbitral tribunal to do so within a period of thirty days of the receipt of the notice, failing which, the party may request the said court to direct the arbitral tribunal to file the photocopy of the arbitral award and the arbitral records in the said court.

(3) Upon the filing of the photocopy of the arbitral award and the arbitral records under sub-section (2), the presiding officer of the said court or a ministerial officer of the said court designated by the said presiding officer, shall affix his signature with date and seal of the said court on each page of the photocopy of the arbitral award aforesaid and shall after verification, acknowledge receipt of the photocopy of the arbitral award and the arbitral records as per the list referred to in sub-section (1).

(4)The said court shall maintain a register containing -

- (a) the names and addresses of the parties to the awards;
- (b)the date of the award;
- (c ) the names and addresses of the arbitrators;
- (d )the relief granted;
- (e ) the date of the filing of the award into the said court; and
- (f)such other particulars as may be prescribed.

(5) If any party makes an application, the court may grant a certified copy of the photocopy of the arbitral award or of the arbitral record or of the arbitral proceedings, as the case may be, in accordance with the rules of the court.

(6)The court may transmit the arbitral records for use in any proceedings for setting aside of the arbitral award or for enforcement thereof.

(7) The procedure for return of original documents or for preservation of the arbitral records so filed shall be subject to such rules as may be applicable to the said court from time to time.

(8) The filing of the photocopy of the award under this section is only for the purposes of record.

**Amendment of section 34**

**23.** In section 34 of the principal Act,-

(a) for sub-section (1), the following sub-sections shall be substituted namely:-

“ (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award-

(a) in accordance with sub-sections (2) and (3) ; and

(b) in the case of an award made in an arbitration other than an international arbitration (whether commercial or not), in accordance with sub-sections (2) and (3) and the additional grounds mentioned in section 34A.

(1A) An application for setting aside an award under sub-section (1) shall be accompanied by the original award:

Provided that where the parties have not been given the original award, they may file in the court, a photocopy of the award signed by the arbitrators.”;

(b) in sub-section (2), the Explanation shall be renumbered as Explanation 1 and after the Explanation 1 as so renumbered, the following Explanation shall be inserted ,namely:-

“Explanation.-2 For the removal of doubts, it is hereby declared that while seeking to set aside an arbitral award under sub-section (1) ,the applicant may include the pleas questioning the decision of the arbitral tribunal rejecting-

(i) a challenge made under sub-section (2) of section 13;

(ii) a plea made under sub-section (2) or sub-section (3) of section 16.”;

(c) after sub-section (4), the following sub-sections shall be inserted, namely:-

“(5) Where the court adjourns the proceedings under sub-section (4) granting the arbitral tribunal an opportunity to resume its proceedings or take such other action and eliminate the grounds referred to in this section or in section 34A for setting aside the award, the arbitral tribunal shall pass appropriate orders within

sixty days of the receipt of the request made under sub-section (4) by the Court and send the same to the court for its consideration.

(6) Any party aggrieved by the orders of the arbitral tribunal under sub-section (5), shall be entitled to file its objections thereto within thirty days of the receipt of the said order from the arbitral tribunal and the application made under sub-section (1) to set aside the award shall, subject to the provisions of sub-section (2) and (3) of section 37A, be disposed of by the court, after taking into account the orders of the arbitral tribunal made under sub-section (5) and the objections filed under this sub-section.”.

#### **Insertion of new section 34A**

24. After section 34 of the principal Act, the following section shall be inserted, namely:-

#### **Additional grounds of challenge in case of certain awards**

“34A. (1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to the following additional grounds can be had in an application for setting aside an award referred to in sub-section (1) of section 34, namely:-

- (a) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law;
- (b) that the arbitral award is an award in respect of which reasons have to be given under sub-section (3) of section 31 but the arbitral award does not state the reasons.

(2) Where the ground referred to in clause (a) of sub-section (1) is invoked in the application filed under sub-section (1) of section 34, the applicant shall file a separate application seeking leave of the court to raise the said ground:

Provided that the court shall not grant leave unless it is prima facie of the opinion that all the following conditions are satisfied, namely:-

- (a) that the determination of the question will substantially affect the rights of one or more parties;
- (b) that the substantial question of law was one which the arbitral tribunal was asked to decide; and
- (c) that the application made for leave identifies the substantial question of law to be decided and states relevant grounds on which leave is to be granted.

(3) Where a specific question of law has been referred to the arbitral tribunal, an award shall not be set aside on the ground referred to in clause (a) of sub-section (1).”.

**Substitution of new section for section 36**

25. For section 36 of the principal Act, the following section shall be substituted, namely :-

**Stay of operation of award or its enforcement**

“36.(1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of sub-sections (2) to (4), the award shall be enforced under the Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were a decree of the court.

(2) Where an application is filed in the Court under sub section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a further application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).

(3) On the filing of the application referred to in sub section (2) for stay of the operation of the award, the Court may, without prejudice to any action it may take under sub-section (1) of section 37A and subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:

Provided that the Court shall, while considering the grant of stay, keep the grounds for setting aside the award in mind.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant ad interim measures not only against the parties to the award or in respect of the property which is the subject matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified or vacated, as the case may be, by the court subject to such conditions, if any, as it may deem fit, after hearing the affected persons.”.

**Insertion of new section 37A**

26. After section 37 of the principal Act, the following section shall be inserted, namely:-

**Substantial prejudice to be shown for intervention under sections 34 and 37 and time limits**

“37A (1) The court referred to in sub-section (1) of section 34, while dealing with an application under that sub-section or the court referred to in sub-section (1) or sub-section (2) of section 37 while dealing with an appeal under any of those sub-sections, may, if it thinks fit so to do, and after fixing a day for hearing the applicant or appellant or his counsel and hearing him accordingly if he appears on that day, dismiss the application or appeal, as the case may be, without giving notice to the respondent, for reasons in brief to be recorded in writing, if there are no merits in the application or the appeal, as the case may be.

(2) No award passed by the arbitral tribunal shall be set aside on an application under sub-section (1) of section 34 and no order passed by the arbitral tribunal or by the court shall be set aside in an appeal under sub-section (1) or sub-section (2) of section 37, as the case may be, unless substantial prejudice is shown.

(3) Every application or appeal, referred to in sub-section (1), shall be disposed of within six months from the date of service of notice on the opposite party:

Provided that, while dealing with an application under sub section (1) of section 34, if the court adjourns the proceedings under sub-section (5) of that section, the period of six months shall be reckoned from the date of receipt of the order from the arbitral tribunal under that sub-section”

**Substitution of new section for section 42**

27. For section 42 of the principal Act, the following sections shall be substituted, namely :-

**Proper court for filing subsequent applications**

“42. (1) Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to any arbitration agreement any application under this Part has been made to a court in accordance with sub-sections (2) to (5), then all subsequent applications (other than the applications referred to in sub-section (2) of section 31A) arising out of that agreement and the arbitral proceedings (hereafter in this section referred to as the subsequent applications) shall be made to the same court and in no other court.

(2) Where an application is made to a court within the meaning of clause (e) of sub-section (1) of section 2, the subsequent applications shall be made in that court and in no other court.

(3) If in a pending action under section 8 before a Judicial authority, an application is made, seeking reference to arbitration with respect to an agreement, then the subsequent applications shall be made in the following manner, namely:-

- (i) where the Judicial authority is a court within the meaning of clause (e) of sub-section (1) of section 2, the subsequent application shall be made in the said court in which the application is made and in no other court;
- (ii) where the Judicial authority is a Court which is inferior in grade to the principal Civil Court of original jurisdiction in a district or the court of the principal Judge of the City Civil Court exercising original jurisdiction in a city (hereinafter called the principal courts), as the case may be, the subsequent application shall be made in the said principal Court to which the court where the application is made is subordinate and in no other court;
- (iii) where the Judicial authority is a quasi-judicial statutory authority, the subsequent application shall be made in the principal Court mentioned in clause (ii) within whose territorial limits the said authority is situated and in no other court.

(4) If in a legal proceeding under section 8A before any of the courts referred to in that section, an application is made seeking reference to arbitration with respect to an agreement, then the subsequent applications shall be made in the following manner, namely:-

- (i) where the application is made in the Supreme Court or in the High Court or in the principal Civil Courts mentioned in clause (ii) of sub-section (3), as the case may be, the subsequent application shall be made in the Court which made the reference and in no other Court;
- (ii) where the application is made in a Court of coordinate jurisdiction or inferior in grade to the Principal Civil courts mentioned in clause (ii) of sub-section (3), as the case may be, the subsequent application shall be made in the Principal Court from where the legal proceeding was transferred to such court of coordinate jurisdiction or to which the said court is subordinate, as the case may be, and in no other court.

Explanation 1.- In this sub-section, the expression “legal proceeding” shall have the same meaning as assigned to it in the Explanation to section 8A.

Explanation 2.- For the removal of doubts, it is hereby declared that in the case of arbitral proceedings which have commenced pursuant to a reference made by the Supreme Court or the High Court under section 8A and awards passed pursuant thereto, the references to “court” wherever it is used in this Part shall, except in section 27 and section 31A, be construed as references to the Supreme Court or the High Court, as the case may be.

(5) Where an application seeking reference to arbitration with respect to an agreement is made under section 11, in the Supreme Court or in the High Court, as the case may be, the subsequent applications shall be made in the Court within the meaning of clause (e) of sub-section (1) of section 2 and in no other court.

**Scheme for panel of arbitrators:**

**42A.** The Chief Justice of India may prepare a scheme, for constituting a panel of arbitrators to enable either the parties or the Supreme Court or the High Court under section 11 or the judicial authority under section 8 or the courts referred to in section 8A or the parties under section 43A, as the case may be, to appoint arbitrators from such panel and subject to such conditions as may be specified by the Chief Justice of India in that scheme.

**Special provision relating to unregistered partnerships under the Indian Partnership Act, 1932 as amended by the Maharashtra Amendment Act 1984**

**42B** The provisions of the Indian Partnership (Maharashtra Amendment) Act 1984, (Maharashtra Act 29 of 1984) amending section 69 of the Indian Partnership Act, 1932 in its application to the State of Maharashtra, shall not affect the initiation of any proceedings under the Arbitration and Conciliation Act, 1996 for the purpose of enforcement of any right to seek-

- (a) the dissolution of a firm;
- (b) the settlement of the accounts of a dissolved firm; or
- (c) the realization of the property of a dissolved firm.”

**Amendment of section 43**

**28.** In section 43 of the principal Act,

- (a) in sub-section (3), the following Explanation shall be inserted at the end, namely:-

“Explanation.- For removal of doubts, it is hereby declared that any provision in the arbitration agreement which provides that any such claim shall be barred unless some step to commence arbitral

proceedings is taken within a time fixed by the agreement, shall be deemed to be void from the date of commencement of the Indian Contract (Amendment) Act 1996.”.

(b) after sub-section (4), the following sub-section shall be inserted, namely:-

“(5) In computing the time prescribed by the Limitation Act, 1963 (36 of 1963) for the commencement of proceedings in relation to any dispute, the period between the commencement of the arbitration and the date of the orders mentioned below, shall be excluded ,namely:-

- (a) an order of the arbitral tribunal accepting a plea referred to in sub-section (2) or sub-section (3) of section 16;
- (b) an order under clause (a) of sub-section (2) of section 37 by the court affirming an order under clause (a) or an order of the Supreme Court on further appeal, if any, affirming the last mentioned order;
- (c) an order declaring an arbitration agreement as null and void or inoperative or incapable of being performed or as not in existence, passed by -

- (i) the High Court under sub-section (13) of section 11 in the case of an arbitration other than an international arbitration (whether commercial or not) or by the Supreme Court on further appeal;

- (ii) the Supreme Court under sub-section (13) of section 11 in the case of an international arbitration (whether commercial or not).”

## **Insertion of new Chapter XI in Part I**

29. After section 43 of the principal Act, the following Chapter shall be inserted, namely:-

### **“ CHAPTER XI**

#### **SINGLE MEMBER FAST TRACK ARBITRAL TRIBUNAL AND FAST TRACK ARBITRATION**

#### **Resolution of disputes through Fast Track Arbitration**

“43A. (1) The parties to an action, before a judicial authority referred to in section 8, or a legal proceeding before any of the courts referred to in section 8A, or to an arbitration agreement or to an application before the Supreme Court or the High Court under section 11, as the case may be, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their disputes resolved by arbitration in accordance with the provisions of this section, sections 43B to 43D and the procedure specified in the Fourth Schedule (hereinafter referred to as the Fast Track Arbitration).

- (2) If the parties referred to in sub-section (1) agree to have the disputes resolved through Fast Track Arbitration under that sub-section, then the arbitral tribunal agreed to between the said parties shall be called the Fast Track Arbitration Tribunal.
- (3) Notwithstanding anything contained in the arbitration agreement-
  - (i) the Fast Track Arbitral Tribunal shall consist of a sole arbitrator;
  - (ii) the sole arbitrator shall be chosen by parties unanimously;
  - (iii) the fee payable to the arbitrator and the manner of payment of the fee shall be such as may be agreed between the sole arbitrator and the parties;
  - (iv) the procedure laid down in the Fourth Schedule (hereinafter referred to as the Fast Track Procedure) shall apply.

#### **Other provisions of the Act to apply subject to modifications**

43B. The other provisions of this Part, in so far as they are matters not provided in the Fourth Schedule, shall apply to the Fast Track Arbitration as they apply to other arbitrations subject to the following modifications, namely:-

- (a) the references to ,
  - (i) “arbitral tribunal” shall, unless the context otherwise requires, be deemed to include references to the Fast Track Arbitral Tribunal; and
  - (ii) “court” shall be deemed to be references to the High Court , except in sections 27 and 31A;
- (b) in section 33,in sub-sections (1) to (4), for the words “thirty days” wherever they occur, the words fifteen days shall be substituted;
- (c) in section 34,
  - (i) in sub-section (3), for the words “three months” the words “thirty days” and for the words “ thirty days” the words “fifteen days” shall respectively be substituted;
  - (ii) in sub-section (5), for the words “sixty days” the words “thirty days” shall be substituted;
  - (iii) in sub-section (6), for the words, “thirty days” , the words “fifteen days shall be substituted;
- (d) in section 37, in sub-section (1), the provision for appeal shall not apply to orders referred to in clauses (a) and (b) of sub-section (1) of section 37.
- (e) in section 37A, for the words “six months”, the words “three months” shall be substituted.”.

### **Proper court for filing subsequent applications**

**43C.** Notwithstanding anything contained in this Part or in any other law for the time being in force but subject to sub clause (ii) of clause (a) of section 43B, where with respect to an arbitration agreement, any application is made or is required to be made before a ‘Court’ in the manner mentioned in this Part, such an application shall be made to the ‘High Court’ and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that High Court and in no other High Court.

**High Court for purposes of this Chapter**

**43 D.** The references to ‘High Court’ in sections 43B and 43C shall be construed as a reference to the High Court within whose territorial limits, the principal civil court or the court of the principal Judge of the City Civil Court referred to in clause (e) of sub-section (1) of section 2 ,as the case may be, is situated.”.

**Amendment of section 82**

**30.** Section 82 of the principal Act shall be renumbered as sub-section (1) thereof and after sub-section (1) as so renumbered, the following sub-sections shall be inserted, namely:-

“(2) Without prejudice to the generality of the provisions of sub-section (1), rules may be made in respect of the following, namely:-

- (a) the manner in which the arbitral proceeding shall be conducted;
- (b) the number of days for which the arbitral proceedings have to be conducted continuously on each occasion when the tribunal meets;
- (c) the time schedule and the number of hours for which the proceedings have to be conducted on each day;
- (d) the time schedule for the filing of the pleadings for purposes of sub-section (1A) of section 23;
- (e) the time schedule in regard to the recording of evidence and submission of arguments for purposes of sub-section (1) of section 24;
- (f) the time schedule as to the future procedure to be followed by the arbitral tribunal, referred to in sub-section (6) of section 29A;

(3) The Chief Justice of India may issue guidelines to the High Courts in relation to the items referred in sub-section (2) and other procedure to be followed by the arbitral tribunal so that uniform rules may be made by all the High Courts.”

**Amendment of section 84**

**31.** In section 84 of the principal Act, after sub-section (1) the following sub section shall be inserted, namely:-

“(1A) Without prejudice to the generality of the provisions of sub-section (1), rules may be made in respect of the following, namely:-

- (a) the manner in which the fee of the members of the arbitral tribunal may be fixed and the procedure relating thereto;
- (b) the other particulars required to be entered in the register under clause (f) of sub-section (4) of section 31A.”

**Transitory provisions**

32. (1) Subject to the provisions of sub-sections (2) to (17), the provisions of the principal Act as amended by this Act shall be prospective in operation and shall not in particular apply to -

- (i) any application made by a party to the arbitration agreement before the Judicial authority referred to in sub-section (1) of section 8 of the principal Act or to any appointment made by a judicial authority under that section before the commencement of this Act;
- (ii) any request made to a party or to the Chief Justice of India or to the Chief Justice of a High Court under section 11 of the principal Act before the commencement of this Act;
- (iii) any appointment of arbitral tribunal made before the commencement of this Act under section 11 of the principal Act by the parties to the arbitration agreement or any appointment made under the said section before the commencement of this Act by a party who is authorized under the arbitration agreement to make such appointment without the consent of the other party or parties to the arbitration agreement or any appointment made by the Chief justice of India or his designate or the Chief Justice of a High Court or his designate before the commencement of this Act;
- (iv) any award passed under the principal Act, before the commencement of this Act.

(2) Subject to the provisions of sub-sections (3) to (17), the provisions of this Act shall apply to arbitration agreements entered into before the commencement of this Act, where no-

- (i) request for appointment of arbitral tribunal; or
- (ii) application for appointment of arbitral tribunal; or
- (iii) appointment of arbitral tribunal,

has been made under the principal Act, before the commencement of this Act.

(3) The provisions of clause (b) of sub-section (2) of section 2 as inserted in the principal Act, by clause (ii) of section 2 of this Act, shall apply to-

(i) applications made, before a judicial authority in a legal proceeding under section 8 of the principal Act or before a court under section 9 of the principal Act, which are pending at the commencement of this Act in connection with the arbitrations of the nature specified in sub-section (2) of section 2 of the principal Act;

(ii) awards arising out of arbitrations of the nature specified in sub-section (2) of section 2 of the principal Act passed before the commencement of this Act, for the purposes of their finality under section 35 of the principal Act and enforcement under section 36 of the principal Act.

(4) The provisions of sub-section (10) of section 2, as inserted in the principal Act by clause (iii) of section 2 of this Act shall apply to arbitral proceedings under the principal Act, pending before the principal courts referred to in that sub-section, at the commencement of this Act.

(5) The provisions of section 6 of the principal Act, as amended by section 4 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal, at the commencement of this Act.

(6) The provisions of sub-sections (4),(5) and (6) of section 9, as inserted in the principal Act, by section 8 of this Act, shall apply to all applications under section 9, pending in the court at the commencement of this Act.

(7) The provisions of section 10A as inserted in the principal Act, by section 9 of this Act, shall apply to arbitration agreements in relation to which, the requests for appointment of arbitral tribunal are pending decision at the date of the commencement of this Act, if the arbitral tribunal has not been appointed at the date of such commencement.

(8) The provisions of sections 17 of the principal Act, as substituted by section 14 of this Act shall apply to arbitral proceedings under the principal Act, before an arbitral tribunal, pending at the commencement of this Act.

(9) The provisions of sub-section (1) of section 20 of the principal Act, as substituted by section 15 of this Act, shall apply to arbitration agreements in relation to which, requests for appointment of arbitral tribunal and applications for appointment of arbitral tribunal, are pending decision at the date of the commencement of this Act, if the arbitral tribunal has not been appointed by the date of such commencement .

(10) The provisions of sub-section (1) of section 23 of the principal Act, as amended by section 16 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal at the commencement of this Act, where the claim, defence or rejoinder statements have not been filed before the arbitral tribunal at the date of such commencement.

(11) The provisions of sub-section (1) of section 24 of the principal Act, as amended by section 17 of this Act and of sub-section(1A) of section 24 of the principal Act, as inserted by that section, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal at the commencement of this Act where oral evidence or oral arguments as the case may be, have not been completed at the date of such commencement.

(12) The provisions of section 24A, as inserted in the principal Act, by section 18 of this Act , shall apply to the orders of the arbitral tribunal, if any ,passed under sections 17,23 and 24 of the principal Act before the commencement of this Act, where such orders have not been complied with at the date of such commencement by the party to whom they were directed.

(13) The provisions of section 28 of the principal Act, as amended by section 19 of this Act, shall apply to arbitration agreements in relation to which, requests for appointment of arbitral tribunal and applications for appointment of arbitral tribunal are pending decision at the date of the commencement of this Act, if the arbitral tribunal has not been appointed by the date of such commencement .

(14) The provisions of-

- (i) sub-section (3) of section 29 ,as inserted in the principal Act by section 20 of this Act ;
- (ii) section 31A , as inserted in the principal Act by section 22 of this Act ;
- (iii) section 34, as amended by section 23 of this Act;
- (iv)section 34A , as inserted in the principal Act by section 24 of this Act,

shall apply to arbitral proceedings under the principal Act pending before the arbitral tribunal at the commencement of this Act, if awards have not been passed at the date of such commencement.

(15) The provisions of section 36 of the principal Act as amended by section 25 of this Act shall apply to all awards made under the principal Act pending enforcement at the commencement of this Act.

(16) The provisions of sub-sections (1) and (2) of section 37A, as inserted in the principal Act, by section 26 of this Act shall apply to applications under sub-section (1) of section 34 of the principal Act and appeals under section 37 of the principal Act pending at the commencement of this Act if no notice has been issued by the court under sub-section (1) of section 34 of the principal Act or under section 37 of the principal Act before the date of such commencement:

Provided that where notice has been issued by the court in such application or appeal, the provisions of sub-section (1) of section 37A of the principal Act shall not apply.

(17) The provisions of sub-section (5) of section 43, as inserted in the principal Act, by clause (b) of section 28 of this Act, shall apply to the orders referred to in that sub-section if such orders are passed after the commencement of this Act, in arbitral proceedings under the principal Act, pending before an arbitral tribunal at such commencement.

**Speeding up of all proceedings and time limit for passing awards**

**33.** (1). All arbitral proceedings pending at the commencement of this Act, before an arbitral tribunal appointed under the principal Act, for more than three years from the date of commencement of such proceedings, shall be completed within a further period of one year from the date of commencement of this Act, or within such extended period as specified in sub sections (2) and (3):

Provided that where a period of three years has not elapsed from the date of commencement of such proceedings at the date of commencement of this Act, the proceedings shall be completed within a further period of six months reckoned from the date of expiry of three years of the commencement of the arbitral proceedings or within such extended period as specified in sub sections (2) and (3).

(2) If the award is not made within the further period of one year or six months as the case may be, specified in sub section (1), the arbitral proceedings shall, subject to the provisions of sub section (3), stand suspended until an application for extension is made to the Court by any party to the arbitration or where none of the parties has made an application as aforesaid, until such an application is made by the arbitral tribunal.

(3) The provisions of sub sections (4) to (8) of section 29A, as inserted in the principal Act, by section 21 of this Act shall, so far as may be, apply for the disposal of application referred to in sub section (2), with a view to speed up the arbitral proceedings, till the award is passed.

(4) Where applications under sub section (1) of section 34 of the principal Act as amended by section 23 of this Act and appeals under sub section (1) of section 37 of the principal Act, as the case may be, are pending before any of the Courts referred to in those sub-sections, on the date of commencement of this Act, they shall be disposed of within six months from the date of such commencement.

Provided that while dealing with an application under sub section (1) of section 34 of the principal Act, if the Court adjourns the proceedings under sub section (5) of that section, the period of six months shall be reckoned from the date of receipt of the order from the arbitral tribunal under that sub section.

(5) Where appeals under sub section (2) of section 37 of the principal Act are pending before any Court, on the date of commencement of this Act, they shall be disposed of within three months from the date of such commencement.

**Speeding up of all proceedings and time limit for passing awards under the Arbitration Act, 1940 (10 of 1940)**

**34.** (1) The provisions of sections 6,23 and 24 of the principal Act as amended respectively by sections 4, 16 and 17 of this Act, shall so far as may be, apply to arbitral proceedings under the Arbitration Act, 1940 (10 of 1940) (hereinafter called the “repealed Act”), pending at the commencement of this Act, and shall override any provisions of the repealed Act, which are inconsistent with the said sections.

(2) In the case of non-compliance with any order passed by the sole arbitrator or arbitrators under the provisions of the repealed Act or orders passed under sub section (1), the sole arbitrator or arbitrators, as the case may be, appointed under the repealed Act, may pass orders under section 24A of the principal Act, as inserted by section 18 of this Act.

(3) In the case of non-compliance with any peremptory order passed by the sole arbitrator or arbitrators under sub section (2), the Court, within the meaning of clause (c ) of section 2 or section 21 of the repealed Act, as the case may be, may pass orders under section 24B of the principal Act, as inserted by section 18 of this Act.

(4) Where arbitral proceedings are pending before the sole arbitrator or arbitrators appointed under the repealed Act, at the commencement of this Act, the proceedings shall be completed within a further period of one year from the date of commencement of this Act, or within such extended period as specified in sub sections (5) and (6):

Provided that where the arbitral proceedings are stayed by order of a court, the period during which the proceedings are so stayed shall be excluded while computing the said period of one year.

(5) If the award is not made within the further period of one year specified in sub section (4), the arbitral proceedings shall, subject to the provisions of sub section (6), stand suspended until an application for extension is made to the Court referred to in sub section (3), by any party to the arbitration, or where none of the parties has made an application as aforesaid, until such an application is made by the sole arbitrator or the arbitrators, as the case may be.

(6) The provisions of sub sections (4) to (8) of section 29A as inserted in the principal Act, by section 21 of this Act, shall, so far as may be, apply to the Court referred to in sub section (3), for the disposal of the application referred to in sub section (5), with a view to speed up the arbitral proceedings, till the award is passed.

(7) Where applications to make the award a rule of court or objections are filed to set aside the award, under the repealed Act, or any other application or any appeal filed under section 39 of the repealed Act, are pending before any Court referred to in sub section (3), on the date of commencement of this Act, they shall be disposed of within a period of one year from the date of such commencement, in accordance with the provisions of the repealed Act.

(8) Where any appeals or revision applications arising out of interim orders passed by the Courts referred to in sub section (3) are pending at the commencement of this Act, under the Code of Civil Procedure (5 of 1908) or under the repealed Act, in connection with arbitral proceedings arising under the repealed Act, or where the arbitral proceedings are under orders of stay, they shall be disposed of within a period of six months from the date of such commencement, in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) or the repealed Act, as the case may be.

(9) The provisions of this section shall have effect notwithstanding anything inconsistent therewith contained in sub-section (2) of section 85 of the principal Act.

**Insertion of new Schedule**

35. After the Third Schedule to the principal Act, the following Schedule shall be inserted namely:-

**“The Fourth Schedule  
Fast Track Arbitration  
[See Part I, Chapter XI ]**

**Constitution of Fast Track Arbitral Tribunal**

1. (1) For the purposes of Fast Track Arbitrations under sub-section (1) of section 43 A, the Fast Track Arbitral Tribunal shall be deemed to be constituted with effect from the date on which the parties after obtaining the consent of the sole arbitrator , agree in writing that the sole arbitrator shall be the Fast Track Arbitral Tribunal under sub-section (1) of section 43A.

(2) Parties shall communicate the said agreement to the sole arbitrator on the same day.

**Procedure to apply from date of constitution of Fast Track Arbitral Tribunal**

2. The procedure specified in this Schedule shall, with effect from the date of the constitution of the Fast Track Arbitral Tribunal, apply to all Fast Track Arbitrations under sub-section (1) of section 43 A.

**Procedure**

3. (1) Within fifteen days of the constitution of the Fast Track Arbitral Tribunal, the person who has raised the dispute (hereinafter referred to as the claimant) shall send simultaneously to the tribunal and the opposite parties (hereinafter referred to as the respondents)-

- (a) a claim statement containing the facts, the points in issue and the relief claimed;
- (b) documentary evidence, if any, in support of his case;
- (c) where reliance is placed on the testimony of any witness (including that of a party) a copy of the witness’s affidavit in writing;
- (d) where reliance is placed on the opinion of an expert, the particulars relating to that expert, his qualifications and experience, and a copy of his opinion;
- (e) list of interrogatories, if any;
- (f) application for discovery or production of documents, if any, mentioning their relevancy;
- (g) full address, including e-mail or fax, telephone numbers, if any, of all claimants and of all the parties, for the purpose of expediting communication and correspondence;

- (h) any other material considered relevant by the applicant;
- (2) The respondent shall, within fifteen days after receipt of the claim statement and the documents referred to in sub-paragraph (1), simultaneously send to the Fast Track Arbitral Tribunal as well as to the claimant, his defence statement, together with documentary evidence, witness testimony by affidavit (including that of a party) and expert opinion, if any, in support thereof, together with counter claims, if any, supported by documents.
- (3) The procedure specified in this Schedule shall apply to such counter claims as they apply to a claim.
- (4) Within fifteen days of the receipt of the defence statement or of the counter claims, the claimant shall send to the Fast Track Arbitral Tribunal and to the respondents his rejoinder and statement of defence to the counter claim.
- (5) Within fifteen days of the receipt of the defence statement to the counter claim, the respondent shall simultaneously send his rejoinder to the said statement, to the Fast Track Arbitral Tribunal as well as to the claimant.
- (6) In case discovery or production of documents is allowed, the parties shall be permitted to submit their supplementary statements, if any, to the Fast Track Arbitral Tribunal within a specified period and to simultaneously send copies thereof to each other.
- (7) The Fast Track Arbitral Tribunal shall decide the disputes on the basis of the pleadings and documents, affidavits of evidence, expert opinion, if any, and the written submission filed by the parties.
- (8) The Fast Track Arbitral Tribunal may permit any witness to be orally questioned and lay down the manner in which evidence shall be recorded or for receiving affidavits in lieu of oral evidence.
- (9) The Fast Track Arbitral Tribunal may otherwise permit oral evidence to be adduced, if it considers that any request for oral evidence by any party is justified or where the Fast Track Arbitral Tribunal itself considers that such oral evidence is necessary.
- (10) The Fast Track Arbitral Tribunal may, in addition, call for any further information or clarification from the parties in addition to the pleadings, documents and evidence placed before it.

#### **Representation by Counsel**

4. The Fast Track Arbitral Tribunal shall permit the parties to appear and conduct the case personally or through their counsel or by any person duly authorized by the parties to represent them.

**Written notes of arguments or oral arguments**

5. After the conclusion of the evidence, the Fast Track Arbitral Tribunal may direct all the parties to file their written notes of argument or may, at its discretion, in addition permit oral arguments and shall fix a time schedule therefor and may also restrict the length of oral arguments.

**Conduct of proceedings**

6. (1) The Fast Track Arbitral Tribunal shall conduct its proceedings in such a manner that the arbitral proceedings are, as far as possible, taken up day after day, at least continuously for three days on each occasion.

(2) The Fast Track Arbitral Tribunal shall ordinarily fix the time schedule in such a manner so that the proceedings may be conducted continuously from 10.30 A.M. to 1 P.M. and 2 p.m. to 4.30 p.m. every day

**Parties to be bound by the procedure and time schedule**

7. The time schedule fixed under paragraphs 3 and 5 and the procedure specified under paragraph 6 by Fast Track Arbitral Tribunal, shall be binding on the parties.

**Consultation of experts**

8. (1) At any time during the course of arbitration and before the passing of the award, the Fast Track Arbitral Tribunal may, at its discretion, if need be, consult any expert or technically qualified person or a qualified accountant for assistance in relation to the subject matter in dispute, at the expense of the parties, and shall communicate the report of the above said person to the parties to enable them to file their response.

(2) If the Fast Track Arbitral Tribunal thereafter considers on its own or on the request of parties that any clarification or examination of the above said persons referred to in sub-paragraph (1) or examination of any other person is necessary, it may call upon the said person to clarify in writing or to call him or such other person as a witness for necessary examination.

**Procedure in cases of default by parties**

9. (1) In case there is default on the part of any party to adhere to the time limits specified in this Schedule or are fixed by the Fast Track Arbitral Tribunal or there is violation of any interim orders or directions of the Fast Track Arbitral Tribunal issued under section 17 or under this Schedule, the Fast Track Arbitral Tribunal may pass peremptory orders against the defaulting party giving further time for compliance

including peremptory orders to provide appropriate security in connection with an interim order or direction.

(2) In case the Fast Track Arbitral Tribunal is satisfied that a party to the arbitration is unduly or deliberately delaying the arbitral proceedings, or the implementation of the peremptory orders, the Fast Track Arbitral Tribunal may impose such costs as it may deem fit on the defaulting party or may pass an order striking out the pleadings of the party concerned or excluding material or draw adverse inference against the said party and in case security for costs of arbitration is not furnished as required under sub paragraph (1), the claim may be dismissed.

(3) Without prejudice to the provisions of sub-paragraph (2), the Fast Track Arbitral Tribunal may dismiss the claim if the claimant does not effectively prosecute the arbitral proceedings or file the papers within the time granted or neglects or refuses to obey the peremptory orders of the tribunal or to pay the dues or deposits as ordered by the Fast Track Arbitral Tribunal:

Provided that failure to file a statement of defence to the claim statement or to the counter claim shall not by itself be treated as an admission of the allegations in the claim statement or in the counter claim, as the case may be.

(4) If the opposite party does not file its defence or does not effectively prosecute its defence or file the papers within the time granted or refuses to obey the peremptory orders of the tribunal, the Fast Track Arbitral Tribunal may make an ex parte award.

#### **Fast Track Award to be passed in six months**

**10.** (1) The Fast Track Arbitral Tribunal shall pass an award within six months from the date of the constitution of the Fast Track Arbitral Tribunal or within such extended period as specified in sub paragraphs (2) to (4).

(2) The parties may, by consent, extend the period in sub-paragraph (1), by a further period not exceeding three months.

(3) If the Fast Track Arbitration Award is not made within the period specified under sub-paragraph (1) and the period agreed to by the parties under sub-paragraph (2), the arbitration proceeding shall, subject to the provisions of sub-paragraph (4), stand suspended until an application for extension is made to the High Court by any party to the Fast Track Arbitration or where none of the parties makes an application as foresaid, until such an application is made by the arbitral tribunal.

(4) The provisions of sub-sections (4) to (8) of section 29A shall, so far as may be, apply to the High Court for the disposal of application referred to in sub paragraph (3), till the award is passed.

**Fast Track Award to contain reasons**

**11.** The Fast Track Arbitral Tribunal shall pass an award and give reasons for its award keeping in mind the time limit referred to in paragraph 10 unless it is agreed between parties that no reasons need be given or the award is based on settlement of disputes.”

**Consultation paper on review of working of the Arbitration and Conciliation Act, 1996**

**Arbitration & Conciliation Act , 1996**

**CHAPTER I**

**1.1 Broad framework of the Act of 1996 and certain drawbacks experienced in its working:-**

The Arbitration & Conciliation Act, 1996 which came into force on 22.8.96 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards (as also define the law relating to conciliation) and matters connected therewith or incidental thereto.

The Act is based on the Model Law (a set of 36 Articles) which was drafted by a working group of the UN and was finally adopted by the U.N. Commission on International Trade Law (UNCITRAL) on June 21, 1985. The Resolution of the UN General Assembly

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**See at the end summary of proposals**

recommended that all countries give due consideration to the Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial practice.

While the Model Law was thus drafted to govern all international arbitration, the Act of 1996 stated in its preamble that

“It is expedient to make law respecting arbitration and conciliation taking into account the aforesaid Model Law and Rules.”

And by sec.85 of the new Act, the old Arbitration Act, 1940 (relating to domestic arbitration) and also the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Award (Recognition and Enforcement) Act, 1961, (relating to international arbitration) were repealed, thus enabling the Act of 1996 to govern both domestic and international arbitration.

Part I of the Act entitled 'Arbitration' is general (and contains chapters I to X) while Part II deals with 'Enforcement of Certain Foreign Awards (and Chapter I thereof deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards).

Part III of the Act of 1996 deals with Conciliation with which we are not concerned in this Paper. Part IV deals with supplemental provisions.

The Act of 1996 contains three Schedules. The First Schedule refers to Convention on the Recognition and Enforcement of Foreign Arbitration Awards (see sec.44); the Second Schedule refers to the Protocol on Arbitration Clause (see sec.53)

and the Third Schedule to the Convention on the execution of foreign Arbitration Awards.

Although the Model Law does not take the form of a treaty, legislators who decided to review their arbitration laws since 1985 have all given 'due consideration' to the UNCITRAL Model Law.

Some countries adopted certain provisions of the Model Law, but considered that they could extend, simplify or liberalise the Model Law. Examples include the Netherlands in 1986 and Switzerland in 1987. Because of the specificity of their legal systems, Italy and England decided not to follow the Model Law closely. By March 31, 1999, a total of 29 countries (including Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Finland, Germany, Guatemala, Hungary, India, Iran, Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, the Russian Federation, Scotland, Sweden, Sri Lanka, Tunisia, Ukraine, Zimbabwe along with Hong Kong, 8 American States and all 12 Canadian provinces and territories) adopted legislation based to some extent on the UNCITRAL Model Law. (see website for updating: <http://www.un.or.at/uncitral>) (International Commercial Arbitration by Fouchasrd, Gaillard, Goldman, 1999, page 109, para 2.5)

The importance of this gradual process of harmonization is that court decisions applying Model Law, from all the countries that have adopted or adapted it, have been published since 1992. There is thus a growing body of case law concerning the interpretation of the Model Law (see CLOUT. Available on Website <http://www.un.or.at/uncitral> and CLOUT. XXII Y.B.Com. Arb. 297-300 (1997)(ibid p.109, para 2.5).

## 1.2 Representations for amendment of the Act

Ever since the Act of 1996 came into force on 22.8.96, demands have been voiced requesting amendments to the provisions of the 1996 Act, in so far as they related to Arbitration. It was considered by the Law Commission in 1998, that it would not be appropriate to take up amendments of the Act of 1996 in haste and that it would be desirable to wait and see how the courts would grapple with the situations that might arise.

Quite recently, representations have come before the Commission pointing out that in certain areas, the courts have found great difficulty in the interpretation or implementation of some of the provisions of the Act. It has been stated that in several cases, parties have been deprived of a right to seek prompt interim relief pending proceedings in international arbitration agreements, where the seat of arbitration is outside India. This, it is said, has resulted in the Indian parties not being able to obtain any interim orders before commencement of international arbitration or during or after conclusion of the proceedings, from Indian courts. In several cases the awards might ultimately remain only on paper, at the end of the day. This has led to conflicting judgments in the High Courts. Likewise divergent views have been expressed as to the stage at which jurisdictional issues could be decided and also as to whether orders of the Chief Justice of India or his nominee or that of the Chief Justice of the High Court or his nominee, as the case may be, appointing arbitrators – should be treated as administrative orders or as judicial orders. It has also been pointed out that where the arbitrator rejects objections relating to jurisdiction or rejects pleas of bias, by way of interim decision, no immediate right of appeal is provided and parties have to go ahead with the arbitration proceedings till the award is made. Even

thereafter, the objection relating to bias is not included in the list of grounds specified in Sec. 34 or under Sec. 37 (2). It has again been pointed out that while an appeal is permitted where the award deals with a dispute not contemplated by or not falling within the terms of the submission or matters beyond the scope of the submission for arbitration, no appeal is provided in a case where the arbitrator omits or refuses, in spite of an application under sec.33(4) to decide an issue which definitely arises out of the pleadings of the parties. Several other drawbacks have been pointed out in various representations. The Commission felt that the Bar, the litigants and other arbitral institutions might have experienced other difficulties and might be waiting for an opportune time to seek appropriate amendments.

In the light of the above, the Commission felt that now , five years after the enactment of the legislation, it was appropriate to review its working by obtaining further views from all concerned and propose the requisite amendments to the Act.

### **1.3 Objectives of the 1996 Act – speedy arbitration and least court intervention:-**

The 1996 Act was the result of recommendations for reform, particularly in the matter of speeding up the arbitration process and reducing intervention by the court. In Guru Nanak Foundation Vs. Rattan Singh (AIR 1981 SC 2075)(at 2076-77), the Supreme Court while referring to the 1940 Act observed that “the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep” in view of “unending prolixity, at every stage providing a legal trap to the unwary.” The Public Accounts Committee of the Lok Sabha had also commented adversely about arbitration in India (9<sup>th</sup> Rep. 1977-78 pp 201-202). The matter came up before the Law Commission in

its 76<sup>th</sup> Report, which recommended certain amendments, e.g., a proviso should be inserted in section 28 of the Act of 1940 forbidding in respect of the time for making the award an extension beyond one year, except for special and adequate reasons to be recorded.

In Food Corporation of India Vs. Joginderpal (AIR 1981 SC 2075)(at 2076-77), the Supreme Court observed that the law of arbitration must be ‘simple, less technical and more responsible to the actual reality of the situations’, ‘responsive to the canons of justice and fair play.’”

A reading of the 1996 Act shows that speedy arbitration and least court intervention are its main objectives. In fact sec.5 of the Act declares:  
 “Sec.5: Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (i.e. Part I), no judicial authority shall intervene except where so provided in this Part.”

This basic provision is found globally in the laws of all the countries which have adopted the UNCITRAL Model

The provisions as to waiving objections etc. contained in Sections 4, 12, 13(4), 16(5), 19(1) and 25 amply demonstrate that the objective is to see that the disputes are not unduly prolonged. In fact, the UNICTRAL Model, wherever it permitted intervention by court, by way of appeal, before the passing of the award, left it to the arbitrator, to proceed or not to proceed further. This was intended to see that the appeal proceedings are not allowed to be unreasonably delayed.

**1.4 Necessity to adhere to the objectives of speedy disposal and least court intervention.**

It is, therefore, necessary to bear in mind that the proposed amendments do not result in permitting parties to prolong the arbitration proceedings unnecessarily. While considering the need for amendments, the Commission has therefore not deviated from this main objective of the Act except to the extent that the UNCITRAL Model has itself permitted intervention, such as where issues going to the root of the arbitration proceedings are decided. While dealing with such exceptional issues, the Commission has also kept in mind the manner in which the new statutes in other countries, which have adopted the UNCITRAL Model either wholly or partly, tackled the issues and the manner in which they have balanced the objectives of least court intervention and the final disposal of preliminary questions which go to the root of the arbitration proceedings, by way of appeal to the court.

## CHAPTER II

### **2. Proposals on which views are invited**

#### 2.1 Does Section 5 of 1996 Act require any amendment ?

It has been pointed out that in Sec.5 of the Act which prevents intervention by the Court during the pendency of arbitration, the opening clause, “notwithstanding anything contained in other law for the time being in force” is not contained in the Model Law. We have already extracted Sec.5 in Chapter I under point 1.3.

Art.5 of the Model law reads thus:

“Art.5. In matters governed by this law, no court shall intervene except where so provided in the law”

We find that arbitration statutes in several countries are similar to Art.5 of the Model law and do not contain the words, “notwithstanding anything contained in other law for the time being in force”. See for example Art.5 of the Canadian Act 1986, Section 5 of the German Act 1998, Art. 6 of the Korean Act 1999, Art.5 of the Irish Act1998 and Art.5 of the Zimbabwe Act 1996 etc.,

While it is true that the non-obstante clause in Section 5 of the 1996 Act do not find place in Art.5 of the Model law and statutes in other countries, perhaps the same result is achieved by the words “except where so provided in the law”

The object of the “non-obstante” clause in Section 5 of the Indian Act appears to be by way of abundant caution and the addition of these words in Section 5 does not appear to make any difference.

**2.2. Whether section 8 should be confined to ‘courts’ by omitting the word ‘judicial authority’, and issues of jurisdiction arising under section 8 in suits and other proceedings where defendant/respondent relies upon an arbitration agreement.**

2.2.1 Section 8 of the 1996 Act reads as follows:-

“Sec.8(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party

so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section.(1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made”

Section 8(1) of the Act uses the word ‘judicial authority’. In Skypack Couriers Ltd. Vs. N.K.Modi, [2000] (5) SCC 294: 2000(3)Arb. Law Reporter 160, the Supreme Court of India assumed without finally deciding the question, that the consumer fora created under the Consumer (Protection) Act, are competent to refer disputes to arbitration. The court held that, even so, the consumer for a could not refer disputes for decision of third parties or experts and make such decisions, decrees nor could the fora deny the right to file objections.

Earlier, in M/s Fair Air Engineers Private Limited v. N.K. Modi, AIR 1997 SC 533 the Supreme Court dealt with sec. 34 of the 1940 Act and as to

whether the word 'judicial authority' in the said section could entertain a plea that the subject matter of dispute is covered by the arbitration agreement.

In case the words 'judicial authority' in sec.8 are to include the consumer fora or Debt Recovery Tribunals dealing with debts due to Bank or other quasi judicial tribunals and if they are to decide whether the disputes are to be referred to arbitration (or as proposed below, that they can decide disputes about whether the arbitration agreement is 'null and void, inoperative or not enforceable) then, it may indeed be necessary to decide which authority will decide the correctness of the decision or whether parties should resort to Art.227 of the Constitution of India or an appeal is to be provided under this Act. It is likely that if the word 'judicial authority' is to include quasi judicial tribunals, several other problems arise. It is therefore considered that instead, the word 'judicial authority' be replaced by the word 'court as in the Model Law and provide and Explanation under sec.8 that the word 'court' in this section shall mean the court in which the suit is filed.

It will also be noticed that in as much as Sec.8(3) of the Indian Act uses the word 'may' enabling arbitration proceedings to go on, it will be

open to the arbitrators either to go on or await the decision of the Civil Court. If in Sec.8(1) of the Indian Act the words “unless it finds the agreement is null and void, inoperative or incapable of being performed.” are introduced, it will be open to the arbitrators either to proceed with arbitration or not to proceed with arbitration pending the decision of the Civil Court on the question as to whether the arbitration agreement is “null and void or inoperative or not enforceable.”

In cases where suits are filed on the original side of the High Court normally a single Judge of the High Court can decide the question whether the arbitration agreement is null and void etc. But this may result in an appeal to a Division Bench and a further S.L.P. under Article 136 of the Constitution of India. It would therefore be advisable if, whenever such issues arise under Sec.8 on the original side of the High Court they are decided by a Division Bench of the High Court both in the case of domestic and international arbitrations.

Where suits are filed in courts subordinate to the High Court, the issues as to whether the arbitration agreement is null and void etc can first be

allowed to be decided by the same Court and an appeal could be provided to the High Court to be decided by a Division Bench of the High Court.

2.2.2 The next question is whether Sec.8(1) of the 1996 Act should contain the words, “unless it finds that the agreement is null and void, inoperative or incapable of being performed”

Art.8(1) of the Model law reads as follows:

“Art.8(1) A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null an void, inoperative or incapable of being performed.”

2) Where an action referred to in Para.1 of this article has been brought, arbitral proceedings may nevertheless be commenced or continued and award may be made, while the issue is pending before the Court.”

The words “unless it finds that the agreement is null and void, inoperative or incapable of being performed” are found not only in Art.8(1) of the Model law but in corresponding articles of the arbitration statutes in various countries which have adopted the Model law. See in this connection Sec.1032 of the German Act 1998, Article 9 of the Korean Act 1999, Art.8 of the Canadian Act 1986, Article 8 of the Zimbabwe Act 1996, and Sec.15 of the British Columbia Act 1996 on which the Indian Act 1996 is said to have been modelled. (See Dr.P.C.Rao’s Commentary on the Act at Page.9).

Further almost all the above statutes do not contain any provision for stay of the proceedings in the Civil Court pending a decision by the Court on the question whether the arbitration agreement is null and void or inoperative or not enforceable. However, the English Arbitration Act 1996 continues to have a provision similar to Sec.34 of the Old Indian Act of 1940. Sec.9 of the English Act 1996 reads as follows:

“Sec.9: A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counter-claim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the Court in which the proceedings

have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution proceedings.

(3) An application may not be made by a person before taking the appropriate procedural stay (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this Section, the Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the Court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings”.

The above Sec.9 of the English Act is applicable to an international as well as domestic arbitration. However, we may mention that Part II of UK Act which provides for certain modifications to the provisions in Part I in

their application to domestic arbitrations has not yet been brought into force.

Even so, we may refer to Sec.86 in Part – II, which reads as follows:

“S.86. (1) In section 9 (Stay of legal proceedings), sub-Section (4) (Stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.

(2) On an application under the Section in relation to a domestic arbitration agreement the Court shall grant a stay unless satisfied-

(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or

(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.

(3) The Court may treat as a sufficient ground under Sub-Section 2(b) the fact that the applicant is or was at any material time not ready and willing to do all things and necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration

(4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced”.

In the light of the above provisions of Sec.8 of the Indian Act and Article 8 of the Model law and Sections 9 and 86 of the U.K. Act 1996, the following important issues arise for consideration.

(A) The Supreme Court has decided in P.Anandagajapati Raju Vs. P.V.G.Raju 2000(4) SCC 539 = AIR 2000 SC 1086 that under Section 8(1) of the 1996 Act if a defendant in a suit pleads the existence of an arbitration agreement, it is mandatory for the Civil Court to refer the parties to arbitration inasmuch as the discretionary power vested in the Court under Section 34 of the Old Act of 1940 is no longer under the Act of 1996. Of course, in this case, the Supreme Court did not have the occasion to go into the question whether the expression “arbitration agreement” in Section 8 means a valid and enforceable agreement?

So far as English Act of 1996 is concerned, Sec.86 retains the discretionary power for domestic arbitration. It appears that otherwise under Sec.9 there is no discretion vested in the Court.

The first question therefore is whether the discretionary power of the Court which was available under section 34 of the Old Act of 1940 could be restored only so far as domestic arbitration cases are concerned as in England. In other words in a domestic arbitration the Court will not entertain the plea based on an arbitration clause raised by the defendant if he had not been ready and willing earlier for arbitration or if questions of fraud arise or if serious issues of fact or law arise etc. However so far as international arbitration is concerned, all countries which have followed the Model law make it mandatory for the Court to refer the disputes to arbitration if a plea is raised by the defendant on the basis of an arbitration agreement which is not null and void, inoperative or not enforceable. We can also retain the mandatory provision so far as international arbitration is concerned.

(B) The next question is with regard to the denial of the power under Section 8 (1) of the Indian Act to go into the questions as to whether the arbitration clause is “void or inoperative or not enforceable”. When such a power is granted to the Court under the Model law and when such a power is found in the arbitration statutes of almost all countries following the Model

law, there appears to be no good reason why such a power should be denied to the judicial authorities in India.

C) It will also be noticed that in as much as Sec.8(3) of the Indian Act uses the word 'may' enabling arbitration proceedings to go on, it will be open to the arbitrators either to go on or await the decision of the Civil Court. If in Sec.8(1) of the Indian Act the words "unless it finds the agreement is null and void, inoperative or incapable of being performed." are introduced, it will be open to the arbitrators either to proceed with arbitration or not to proceed with arbitration pending the decision of the Civil Court on the question as to whether the arbitration agreement is "null and void or inoperative or not enforceable."

D) In cases where suits are filed on the original side of the High Court normally a single Judge of the High Court can decide the question whether the arbitration agreement is null and void etc. But this may result in an appeal to a Division Bench and a further S.L.P. under Article 136 of the Constitution of India. It would therefore be advisable if, whenever such issues arise under Sec.8 on the original side of the High Court they are decided by a Division Bench of the High Court both in the case of domestic and international arbitrations.

E) Where suits are filed in courts subordinate to the High Court, the issues as to whether the arbitration agreement is null and void etc can first be allowed to be decided by the same Court and an appeal could be provided to the High Court to be decided by a Division Bench of the High Court.

2.3 Jurisdictional issues arising before the High Court and the Supreme Court in applications filed under Section 11 of the 1996 Act – question whether the Chief Justice of India or the Chief Justice of the High Court or their nominees act in an administrative capacity or a judicial capacity and whether issues of jurisdiction should be allowed to be decided at that stage or should be left to the arbitrators:-

Section 11 of the 1996 Act corresponds to section 8 of the 1940 Act. Under that section, the Supreme Court has held that the court has to refuse appointment of an arbitrator, if there is no arbitration clause in existence (M. Dayanand Reddy v. Andhra Pradesh High Court, 1993 (3) SCC 137), or if it is an excepted matter where the opinion of an officer or architect is to be final on the question (Bharat Bhushal Bansal v. UPSIC Limited, 1999 (2) SCC 168), or if no dispute is in existence

[Major (Retd.) India Singh Rekhi v. DDA AIR 1088 SC 1007). The position is also the same under section 20 of the 1940 Act. The question is whether under section 11, the court or the judge cannot decide the question merely because under section 16, the arbitrators are also conferred with the power of deciding these disputes. The question is whether section 16 is intended to apply to a situation where one party or both parties have themselves referred the matter to arbitration.

Section 11 of the 1996 Act requires the Chief Justice of India or the Chief Justice of the High Court or their nominees to deal with applications under Section 11 for appointment of arbitrators in situations where the parties are not able to agree upon such appointment. However the Model law in Art.11(4) contemplates the appointment of arbitrators by

“Court or other authority specified in Art.6”

Article 6 of the Model law reads as follows:

“Article 6. The functions referred to in Art.11 (3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ..... (Each state enacting this Model law specifies the Court, Courts or where referred to therein, other authority competent to perform these functions)”

A three Judge Bench of the Supreme Court of India has held, in Konkan Railway case-I (2000 (7) SCC 201) that the order under Sec.11 is an administrative order and further that the Chief Justice of India or the Chief Justice of the High Court or their nominees cannot decide any jurisdictional questions at that stage, because (i) Sec.16 has now conferred power on the arbitrator to decide questions of jurisdiction and (ii) the Model law requires speedy disposal of arbitration proceedings and therefore these jurisdictional issues should be decided only by the arbitrators.

Almost all countries which have adopted the Model law have stated in provisions corresponding to Sec.11 of the Indian Act 1996, that the power of appointment of arbitrators will be exercised by the 'Court'. See in this behalf Art.11 of the Canadian Act 1985, Art.11 of the Korean Act 1999, section 14 of the Swedish Act 1999 (which refers to the District Court) and Art.11 in schedule 1 of the New Zealand Act of 1996 etc.,

According to Dr.P.C.Rao's Commentary on the new Act (See Page 9) the Indian Act is based upon the British Columbia Act of 1996. Even the said Act uses the word 'Court' so far as the power of appointment of arbitrators is concerned.

It may also be pointed out that apart from the above statutes, the Arbitration Act in Ireland which is called Arbitration (International

Commercial) Act 1998 and which is also based on the Model law contains a provision similar to the one in Sec.11 of the Indian Act 1996, which can be said to indicate that the power of appointment of arbitrators is a judicial power. Section 6 of the Irish Act reads thus:

“Sec.6: (1) The High Court is specified for the purposes of Article 6 and is the Court for the purposes of Article 9 and the Court of competent jurisdiction for the purposes of Articles 27, 35 and 36.

(2) The functions of the High Court under an article referred to subsection (1) and its functions under Sections 7, 11(7) and (9) and 14(1) shall be performed by-

- a) The President of the High Court, or
- b) Such judge of the High Court as may be nominated by the President, subject to rules made in that behalf.”

The question arises whether the Sec.11 of the Indian Act 1996 should be appropriately amended on the model of the Irish Arbitration Act so as to clarify that the power of appointment of arbitrator, in the event of a difference between the parties, is a judicial power.

The question then arises whether whenever disputes as to jurisdiction are raised in answer to an application under Section 11, such disputes should be decided by the High Court and listed before a single Judge, be it the Chief Justice of India or the Chief Justice of the High Court or their nominees? The difficulty here is that a similar question may arise in an appeal under Article 136, wherein an order passed by the Chief Justice of the High Court or his nominee, is in question. Such an application would come before a Bench of two or more the judges in the Supreme Court. It is possible that an identical question of jurisdiction raised at Sec.11 stage in the Supreme Court in another case may be decided by the Chief Justice of India or his nominee. In other words, similar issues of jurisdiction may arise in international or domestic arbitrations, if the words in the arbitration clauses are similar, and lead to conflicting judgments. Another aspect is whether the decision of the Chief Justice of India or his nominee would be entitled to the same weight as that of a Bench of two or more learned judges of the Supreme Court for purposes of Article 141 of the Constitution of India?

In view of the above aspects, it is for consideration whether the issues of jurisdiction arising in an international arbitration should be referred by the Chief Justice of India or his

nominee, as and when such issues are raised by a respondent, to a Bench of two learned judges or more, initially, to decide the jurisdictional issues and whether they could also appoint an arbitrator, if no jurisdiction problem arises or if the issue is decided in favour of the applicant.

Similarly, in the High Court, the same question of jurisdiction may come before different nominees of the Chief Justice of the High Court in different cases and it is possible that divergent views may be expressed. Question therefore is whether the application under Section 11 could be listed before a Bench of more than one judge in the High Court and they could decide not only the question of jurisdiction but also as to who should be appointed as arbitrators.

It is possible in some cases that some oral evidence may be necessary to be adduced in the Supreme Court/High Court in section 11 applications where a party contends that there is no arbitration agreement or other disputed questions of facts are raised. In such an event, a provision can be made under section 11 that the court may have the evidence recorded before an Advocate Commissioner appointed by it.

The Irish Model, if it is adopted, then Section 11 applications will be decided in the High Court or the Supreme Court, as the case may be, by a Bench of more than one learned Judge. It would then mean that the Court is exercising judicial power and that it will also decide jurisdictional issues at that stage itself. Section 11 (6) is therefore to be amended and other relevant amendments, should be made in other subsections of Section 11.

So far as speedy disposal of Sec.11 applications is concerned, one view is that if the order under section 11 is treated as an administrative order, it , (whether it be order of the Chief Justice

of India or his nominee in an international arbitration or that of the Chief Justice of the High Court or his nominee in a domestic arbitration), would be amenable to judicial review under Article 226 before a single Judge of the High Court. In fact such a contention was raised in Konkan Railway Case No.II (2000 (8) SCC 159). There could then be an appeal to a Division Bench and then a further SLP under Article

136. One view is that this situation can be avoided if the order under Section 11, is allowed to be made by the ‘Supreme Court’ or the ‘High Court’ ( and providing that the matter will be decided by a Bench of more than one learned Judge). It will then be clear that the order is a judicial order whether jurisdiction questions are decided or not and whenever any appointment is made by the Bench of the Supreme Court or the High Court.

Any question of jurisdiction decided by the Supreme Court will be binding under Article 141, and will be a final order, without giving scope for further litigation on jurisdictional issues. If the jurisdiction question is decided by a Bench in the High Court, in domestic arbitration cases, then only one appeal would lie to the Supreme Court under Article 136. This would also shorten further litigation on jurisdictional issues and save time and expense before the arbitrators.

It may also be provided that Sec.11 applications may be placed before the concerned Bench of the Supreme Court or the High Court, as original applications under Sec.11, without mixing them up with other arbitration cases, so that they may get top priority for disposal.

It may therefore have to be considered whether the above procedure would solve the question as to whether power under Section 11 is judicial, whether at that stage jurisdictional issues can be decided and also whether such a procedure would save more time than if the order were to be treated as an administrative order, allowing a challenge under Article 226.

It is true that section 16 of the Arbitration Act of 1996 confers power on the arbitrators to decide various jurisdictional issues. One view is that even jurisdictional issues raised at Sec.11 stage should be decided only by arbitrators and not by the Court. It is true that for the first time such a specific power is given to the arbitrator under the new Act. It appears that the intention behind Section 16(1) is that such a power to decide jurisdictional issues should be exercised by the arbitrators whenever disputes go before them on being referred by the parties. If the matter straight away goes before the arbitrators, i.e., not by reference under Sec.11, the arbitrators can certainly decide the

jurisdictional issues and the decision on the said issues would always be amenable to correction Sec.34(2) (a) (ii) or (iv) of the Act. If the present position continues under section 11, what would happen is that the arbitrators would decide the question of jurisdiction; and if they accept the plea of lack of jurisdiction, their order would be amenable to appeal under section 37(2) (a). If, however, they reject the said plea, there is no provision for appeal and the party has to wait till the award is passed.

2.5 Jurisdictional issues arising before the arbitrators under Section 16 of the Act in cases where disputes are referred to arbitrators by one party to the dispute or/by both the parties, (without reference to the court).

As stated in Chapter-I the objective the 1996 Act is the same as that of the Model law in enabling the arbitration to move faster keeping intervention by the Court at the minimum.

It must, however, be noted that the Model law contains a balance between such an objective and also immediate Court supervision. The Model law recognises the need to have jurisdictional issues finally decided as preliminary issues and with a right of appeal then and there. It also provides that when the jurisdictional issues are raised before the Court there should be

no stay but that it should be left to the arbitrators whether to stay the proceedings or to go on with the arbitration. This procedure does not enable parties to file a frivolous appeals and it will not enable the appellant to unduly delay the disposal of the appeal. The arbitrators will have sufficient control to see that the appeal process is not used for dilatory purposes. That is how the Model law achieves a balance between speedy disposal of arbitration and prompt supervision and control by the Court.

In the Indian Act, 1996 the difficulties have arisen because undue emphasis has been laid on speedy disposal than even what the Model law intends and no provision is made for decision on preliminary issues which go to the root of the matter resulting in a quick and prompt decision on those issues before the arbitrator as well as in the Appellate Court.

Question for consideration is whether the Arbitration Act 1996 should be appropriately amended in regard to Sec.16 (and also in regard to Sec.13) so as to bring it on par with the Model law in all its respects. In fact almost all countries which have followed the Model law have allowed, in provisions corresponding to Sec.13 and 16, jurisdictional issues to be decided as preliminary issues with an immediate right of appeal and so far as stay is concerned they leave it to the arbitrators either to go on with the arbitration or not, depending upon the manner in which the unsuccessful party is pursuing the appeal.

Under Section 16, arbitrators have been conferred with power to decide their own jurisdiction which includes the power to rule on any objection as to the existence or validity of the arbitration agreement. Such a power was not specifically conferred on the arbitrators under the 1940 Act. Sec.16 of the Indian Act 1996 corresponds to Art.16 of the Model law. Every country which has adopted the Model law has conferred such powers on the arbitrators. This principle is called the principle of Competence, i.e., competence to decide one’s own competence.

Section 16 of the Indian Act 1996 reads as follows:

“Section 16: (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

- (a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2).....

(3).....

(4).....

(5) The arbitral tribunal shall decide on a plea referred to in subsection (2) or subsection (3) and, where the arbitral tribunal takes a decision

rejecting the plea, it may, continue with the arbitral proceedings and make an arbitral award.

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

When we come to the Model law, its Art.16 contains only three clauses. Clauses 1 and 2 thereof correspond to clauses 1 to 4 of sec. 16 of the Indian Act of 1996 but the Model law contains a further sub-clause (3) in Article 16 which reads as follows and which is absent in Sec.16 of the Indian Act of 1996. Clause (3) of Article 16 of the Model law reads as follows:

“16(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

As stated earlier, the Indian Act of 1996 does not contain a provision in Section 16 enabling the arbitrators to decide the above issues as preliminary issues as in the Model Law. Further though the sub-clause (6) of Sec16 of the Indian Act enables the aggrieved party to make an application to set aside the final award, which is passed after

rejecting the jurisdictional points, no specific provision is made in Sec.34, or Sec.37 of the Act providing an appeal immediately, in case the objection as to the jurisdiction is rejected. Under Sec.37 (2) (a) of the Act, an appeal is provided to the Court ,only against an Order of the arbitrators accepting the pleas referred in Sec.16(2) or (3) but not where the said pleas are rejected.

In Sec.16(5) of the Indian Act 1996, it appears that the word ‘shall’ governs the word ‘decide’ as well as the word ‘continue’ which means that even if an appeal is filed under Sec.16(6), there is no discretion left with the arbitrators not to proceed with the arbitration. This goes contrary to the corresponding provision in the Model Law in Art.16(3). It is therefore necessary to amend Sec.16(5) by using the words “it may” after the words “rejecting the plea” and before the words “continue with....”

In fact Sec.1040 of the German Act 1998 provides in Sub-Clause (3) for a preliminary ruling by the arbitrators and for an appeal to the Court; similarly article 16 (3) of the Zimbabwe Act, 1996, Article 16(5) of the Korean Act 1999, Article 16 (3) of the Irish Act 1998, Article 16(3) of the Canadian Act 1985 and Article 16 of the first schedule to the New Zealand Act 1996 permit the arbitrators to decide the jurisdictional issues as preliminary issues, with a right of appeal to the Court. The Model law and all these various Acts further provide that pending the decision by the Court, it will be open to the arbitrators either to proceed with the arbitration or not. All the statutes use the word ‘may’ in this context. That would ensure that frivolous appeals are not filed and also that the appeals are not unnecessarily allowed to be prolonged. Such a provision will take care to see that there is no undue delay in the arbitration process and that the arbitrators have

control over the parties who have filed the appeal so as to ensure that the appellants do not unreasonably prolong the appeals. In this context the following observations by Mr. Aron Broches, Kluwer in the Commentary on UNCITRAL Model Law are useful:

“At the Working Group’s fourth session, a resolution was adopted which, on the one hand, permitted immediate recourse to the Court, with the attendant risk that such recourse may be used as a delaying tactic and, on the other hand, permitted (but did not oblige) the arbitral tribunal to continue the arbitral proceedings. This enables the tribunal either to limit the adverse effects of an unjustified challenge for dilatory purposes by continuing the proceedings, or to suspend the proceedings where it considers that the interest of the parties is best served by getting the challenge question out of the way rather than letting them run the risk of waste of time and money on an award which may ultimately be set aside under article 34.”

The U.K. Act of 1996, however, deals with the problem in a different manner. When jurisdictional issues arise before the arbitrators, the parties have the choice to have the matters decided by the arbitrators and allow them to pass the award also and then to file an appeal, or the parties may by mutual consent approach the court for a decision on the question of jurisdiction. It is also permissible for the parties to approach the court with the permission of the tribunal, i.e., in a situation when all the parties do not agree for such reference. Section 32 of the English Act, 1996, deals with the

question of ‘Determination of preliminary point of jurisdiction’ and says in sub-section (2) as follows:

“Sec.32(2): An application under this section shall not be entertained unless-

- a) it is made with the agreement in writing of all the other parties to the proceedings, or
- b) it is made with the permission of the tribunal and the court is satisfied-
  - i) that the determination of the question is likely to produce substantial savings in costs,
  - ii) that the application was made without delay and
  - iii) that there is good reason why the matter should be decided by the Court.”

It is therefore to be decided whether the Indian Act 1996 is to be amended enabling the arbitrators to decide jurisdiction issues as preliminary issues as in the Model law with an immediate right of appeal and also with a discretion vested in the arbitrators either to proceed with the arbitration or not. Alternatively, it is to be considered whether the provisions of Sec 32 (2) of the U.K.Act of 1996 are to be followed?

2.6. Sections 12 and 13 and questions relating to Bias and Qualifications of arbitrators – whether the decision of the arbitrator rejecting the plea of Bias and lack of qualifications should be decided as preliminary issues with a right of appeal or whether they can be challenged only after the award?

As stated earlier in para 1.3, it becomes necessary to balance speedy disposal of arbitration and the final disposal of issues which go to the root of the matter. This principle requires that issues of bias and disqualification of the arbitrators are decided as preliminary issues with a right of appeal immediately and again leaving it to the discretion of the arbitrators whether to grant stay or not. The provisions of Sec.13 have to be brought in conformity with the Model law which maintains a reasonable balance between speedy disposal of arbitration proceedings and immediate decision on issues of bias and disqualification, so that time and money could be saved. The arbitrators are to be given discretion to go ahead with the arbitration proceedings pending appeal so that they will have control as to the manner in which the appellant is conducting his case in the appeal preferred by him against the order rejecting the plea of bias or disqualification.

In fact, in the absence of a provision for immediate appeal against rejection of a plea of bias of the arbitrator, parties have resorted to Art.226

of the Constitution of India and it appears that a learned Single judge of the Bombay High Court has held in Anuptech Equipments Pvt Ltd. Vs. Ganapathi Co-operative society Ltd (AIR 1999 Bombay 219) that a writ would lie to quash the decision or order of the arbitrator inasmuch as it cannot be equated with an award. If an appeal is provided in Sec.34 or Sec.37 of the Act to the Court, there will then be no question of moving the High Court in writ jurisdiction.

Sections 12 and 13 of the 1996 Act read as follows:-

“Section 12 Grounds for challenge:

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.
- (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.
- (3) An arbitrator may be challenged only if –
  - a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

b) he does not possess the qualifications agreed to by the parties,

(4) A party may challenge an arbitrator appointed by him or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

### Section 13 Challenge procedure

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the

arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.”

As stated earlier, Section 13 of the Indian Act provides that issues relating to bias and qualification of the arbitrator be decided as preliminary issues by the arbitrator. But there is no provision for filing an appeal immediately in the Court, and side by side enabling the arbitrator to proceed with the arbitration as in Section 16(5). On the other hand the aggrieved party has to wait till the award is passed and he can challenge the decision only after the award. This is one problem. The second problem is that though Section 13(5) permits the decision to be challenged in the Court, there is no specific provision in Section 34 or 37 of the Act enabling an objection or appeal to be filed challenging the decision of the arbitrator rejecting the plea of bias or disqualification. The defect here is similar to the one under Section 16(6).

The Model law provides in Art.13(4) for an immediate right of appeal and also says that pending appeal arbitration proceedings ‘may’ go on. On the other hand the word “shall” is used as in Sec13(4) of the Indian Act.

Section 1037 (3) of the German Arbitration Act, 1998 also provides for an immediate right of appeal to the Court and says that in the meantime the arbitrators ‘may’ continue the proceedings and make an award. Art.13(3) of the Zimbabwe Arbitration Act, 1996 also provides for a right of appeal and says that meantime the arbitrators ‘may’ go on with the proceedings. Similarly article 13(2) of schedule 2 to the Australian Act, Article 13 (3) of the Canadian Act 1985, Article 13(3) of the Schedule to the Ireland Act 1998, Article 13(3) and the first schedule of the New Zealand Act 1999 also use the word ‘may’ and give discretion to the arbitrators to go ahead with the arbitration pending decision of the Court on the question of bias or disqualification.

It is therefore necessary to provide an appeal under Section 37 against the decision made by the arbitrators under section 13 (4). It is also necessary to provide an immediate appeal to the Court rather than ask the parties to wait till the award is passed. For that purpose the word ‘shall’ in section 13(4) has to be substituted by the word ‘may’ so that pending a decision by the Court an appeal against the preliminary decision of the arbitrator on the question of bias and disqualification, it would be within the discretion of the arbitrators whether to proceed further with the arbitration proceeding or not.

2.7. Interim measures under Section 9 in international arbitration where the place of arbitration is outside India and also allowing civil court under section 8 to deal with such arbitrations by amendment of Section 2(2).

Under Section 2(2) of the 1996 Act, it is stated that Part I applies where the place of arbitration is in India. Section 9 of the Act which is in Chapter II of Part I, therefore, got excluded thereby precluding the Court from granting any interim orders in case of international arbitration where the seat of arbitration is outside India.

Section 9 would otherwise permit a party either before or during arbitral proceedings or at any time after making of the award (but before it is enforced under Section 30)– to apply to the Court for various interim orders.

Section 2(2) has led to considerable litigation in courts in cases of international arbitration where the seat of arbitration is outside India. For example, before the arbitrators are appointed, it may indeed become necessary to obtain interim orders in India. But the absence of a provision has required parties to move the Courts in the country in which the seat of arbitration is located. This may involve considerable delay if one of the parties to the contract is in India. Similarly, at the stage of execution of an international award rendered at a seat outside India, the Indian Courts are not able to grant any relief by way of interim orders in India. A provision enabling Indian Courts to grant interim orders in international arbitrations where the seat of arbitration is outside India is therefore necessary.

Delhi High Court has rendered conflicting judgments. In FAO (O.S.3/2000) a Division Bench in Olex Focas Pty Ltd Vs. Skodaexport Co. Ltd (AIR 2000 Delhi 161) held on the basis of section 2(5) and other provisions that interim orders could be granted in such cases but in Marriott International Inc (2000 (3) Arb. Law Reports 369), a Division Bench took the opposite view that no interim orders could be granted in the case of international arbitration outside India. In the Calcutta High Court it was held in East Coast Shipping Limited Vs. M.J.Scrap Ltd. 1997(1) C.H.N.444 that interim relief could be granted but a Division Bench in Kaventers Agro Limited Vs. Seagram Co Ltd (APO 449, 498/97 dated 27-1-98) took an opposite view and SLP was dismissed. It has therefore become necessary to remedy the law in this respect.

In all arbitration statutes passed by various countries covering both international and domestic arbitrations, care has been taken to make not only Article 9 of the Model law (relating to interim measures) to be applied to international arbitrations held outside the country in question but care has also been taken to apply Sections 8, 35 and 36 of the Model law to international arbitrations outside that country. In section 2(2) of the Act even section 9 has not been excepted.

In fact section 8 of the Model law relates to suits being filed in India in which a defendant may take plea that there is an arbitration agreement which has provided that the arbitration is to take place outside India. In such a case, it will be necessary to allow the Indian Court to decide the questions arising under section 8.

This is necessary inasmuch as there may be international arbitrations which contemplate the seat outside India but not covered by Part – II of the Indian Act 1996. Part II is confined to New York Convention and Geneva Convention Awards. For

example, if it is not a case of commercial arbitration or where the agreement is not in writing or where one of the parties belongs to a country which is not a signatory to the said Conventions, it will be necessary to say in Sec.2 (2) that not only section 9 but Section 8 of Part I shall apply whenever a suit is filed in a Civil Court in India and the defendant pleads an international arbitration agreement where the seat of arbitration is outside India and the case is not covered by Part-II of the 1996 Act, the Civil Court could deal with the matter under Sec.8.

In the Zimbabwe Arbitration Act 1996 para 2 of the preamble and, Sub-Para 3(2) state that sections 8, 9, 35 and 36 of the Model Law will apply to international arbitrations held outside Zimbabwe. The Korean Act 1999 provides in Article 2 that Section 9 and 10 of the Act and also Articles 37 and 39 of the Act (corresponding to Articles 8,9 35 and 36 of the Model law) apply to international arbitrations held outside Korea. Section 7 of Newzealand Act 1996 also makes Sec 8,9, 35,36 of the first schedule (corresponding to Articles 8,9,35,36 of the Model law) to international arbitrations held outside New Zealand. In Article 1 of the Canadian Act 1986 Sub-clause (2) provides that Articles 8,9,35 and 36 of the Code (corresponding to Articles 8,9,35,36 of the Model law) will apply to international arbitrations held outside Canada. Similarly section 7 of the Arbitration (international commercial) Act 1998 Ireland permits the grant of interim measures in relation to international arbitration agreements.

We shall deal with Art.35 and 36 of the Model law and Sec.2(2) of the Indian Act in the succeeding paras.

It is, therefore, obvious that Sec 2(2) of the Act which makes Part I of the Indian Act to apply only to arbitrations within India should be modified by permitting resort to Sections 8,9 (also 35, 36 ) to international Arbitrations outside India not covered by Part II.

2.8. Whether Sections 35 and 36 of the Indian Act should also be made applicable to international arbitrations outside India (other than those covered the New York convention 1958 and the Geneva convention 1924 in Part – II )?

International arbitrations are covered under the 1996 Act in Part –II. So far as “enforcement” is concerned, Chapter – I of Part –II deals with New York Convention 1958 awards. Section 44 in Part-II refers to New York convention award and defines ‘foreign award’ as an award made on differences arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after 11-10-1960, in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies. Similarly Section 53 which applies to Geneva convention awards defines a ‘foreign award’ as an arbitral award in regard to differences relating to matters considered as

commercial under the law in force in India made after the 28-7-1924, in pursuance of an agreement for arbitration to which the Protocol set forth in the Second schedule applies.

The First schedule refers to New York convention on the recognition and enforcement of foreign arbitral awards. The Second schedule refers to the Geneva Convention and the Protocol. The Third schedule refers to Geneva Convention.on the execution of foreign arbitral awards.

If the recognition and the execution of the New York convention awards and Geneva convention awards is covered by Part –II of the Indian Act of 1996 and would cover such international awards passed outside India, what is the position of other international awards passed outside India which are not covered by the New York convention or the Geneva Convention, in regard to their recognition and enforcement?

As stated earlier in para 2.6 while dealing with Sec.2(2) and Sec.8, there may be arbitrations with a seat outside India and not covered by Part – II of the 1996 Act such as where the international arbitration agreement is not a commercial agreement or where the agreement is not in writing or where one of the parties belongs to a country which is not a signatory to the New York and Geneva Conventions.

Would it not then be necessary to apply Sec.35 and 36 of Part –I Of the Indian Act which deal respectively with binding nature and enforcement of awards if such international awards are made outside India and not covered by the New York and Geneva conventions? Is it not for this reason that several countries apply not only Sec.8 and 9 of the Model law but also Art.35 and 36 of the Model law to international arbitration with seat outside the country, to such arbitration agreements. Should it therefore be clarified in Sec.2(2) of the Indian Act that Sec.8 and 9 and also Sections 35 and 36 shall apply to international arbitrations outside India?

Most of the statutes of the countries stated earlier also apply Art.8,9,35 and 36 of the Model law to arbitrations with seat outside their country as also where the seat of arbitration is not yet determined or agreed to. It is therefore necessary to amend Sec.2(2) to cover such situations also.

The English Act 1996 makes provisions in a more detailed fashion not only applying provision corresponding to Art.8,9,35 and 36 of the Model law (i.e., Sec.9 to 11 and 66) but also Secs.43 and 44 of the English Act which respectively deal with ‘securing the attendance of witnesses’ (corresponding to Sec.27 of the Indian Act) and ‘the courts power exercisable in support of arbitration proceedings’.) It contains other

important provisions. For convenience we shall set out sub-clauses 1 to 4 of sec.2 of the English Act

“Sec.2(1) The provisions of this part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside, England and Wales or Northern Ireland or no seat has been designated or determined -

- a) Sections 9 to 11 (stay of legal proceedings etc) and
- b) Section 66 (enforcement of arbitral awards)

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined –

- a) Section 43 (securing the attendance of witnesses), and
- b) Section 44 (Court powers exercisable in support of arbitral proceedings)

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland or that when designated or determined, the seat is likely to be outside England and Wales or Northern Ireland makes it inappropriate to do so.

(4) The court may exercise the power conferred by any provision of this part not mentioned in Subsection (2) or (3) for the purpose of supporting the arbitral process where -

- a) no seat of the arbitration has been designated or determined, and
- b) by reason of a connection with England and Wales or Northern Ireland, the court is satisfied, it is appropriate to do so.

(5) Section 7 (Separability of arbitration agreement) and section 8 (Death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.”

Question is whether the above provision should also be brought into Sec.2(2).

The English Act further contains a provision defining the ‘seat of arbitration’. Question is whether such a provision should be introduced in the Indian Act so as to avoid disputes as to the seat of arbitration? Section 3 of the English Act reads as follows:

“ Section 3 In this part the ‘seat of the arbitration’ means the juridical seat of the arbitration designated –

- a) by the parties to the arbitration agreement or

- b) by any arbitral or other institution or person vested by the parties with powers in that regard or
- c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties agreement and all the relevant circumstances.

2.9. Should not the Act contain a provision enabling a Court before which a suit or other proceeding is pending, to refer the disputes to arbitration by subsequent agreement of parties or should such arbitration agreement always precede the commencement of action before the Court ?

Under Section 21 of the Act of 1940 there was specific provision enabling a court to refer disputes to arbitration, pending suits or proceedings. In fact in several cases the trial courts or after long years of litigation, the High Court or the Supreme Court have been referring matters to arbitration because of agreement of parties with a view to shorten further litigation. The absence of such a provision has given rise to serious difficulties.

The Supreme Court had occasion to deal with a civil proceeding which came up from the High Court in appeal in P.Anandagjapathi Raju Vs. P.V.G.Raju (2000 (4) SCC 539 = AIR 2000 SC 1086). In another case, the High Court had appointed an arbitrator in a writ petition where damages

were claimed against the Tamil Nadu Electricity Board on account of death by electrocution. Reference to arbitration was made by the court after the 1996 Act and award was passed which became a decree. It was sought to be attacked in appeal to the Supreme Court. The Board contended that the High Court could not have appointed an arbitrator by relying upon article 21 and 226 of the Constitution. This contention was rejected following the judgment in P.Anandgajapathy Raju's case (Tamil Nadu Electricity Board v. Sumathy (2000) (4) SCC 543=AIR 2000 SC 1603). The Supreme Court held that Section 8 of the Act applied not only to arbitration agreements entered into before the commencement of the suit or proceeding but also those entered into pending suit or other proceedings.

To the above extent the problem was solved but the Supreme Court still held that under section 2(1) (e) of the 1996 Act the award decree could be questioned only before the Court in which a suit for the relief could have been filed. The result was that litigation would start afresh, from the 'Court' as defined in Sec. 2(1)(e) and then move on to the High Court and Supreme Court.

In the above case decided by the Supreme Court, the aforementioned above procedure became necessary in view of the definition of Court section 2 (e) of the Act. In fact under the 1940 Act, in Sec 21 there was specific

provision for reference to arbitration in pending suits and Sec.2(c) of the said Act excepted Sec.21 from the definition of the “Court” so that the challenge to the award could be made in the same Court which had referred the matter to arbitration.

Therefore it appears that for purposes of domestic arbitration, it is necessary to enact Sections 21 to 25 of the 1940 Act with suitable modification and also to except the said provision from Section 2 (e) of the new Act of 1996 which defines the “Court”.

In fact Sec.36 of the British Columbia Arbitration Act, 1996 (which Dr.P.C.Rao says in his commentary on Page 9 was followed while preparing the Indian Act) makes a provision for reference by Court to arbitrators on the basis of a subsequent arbitration agreement. Section 36 of that Act reads as follows:

“Section 36 Reference by Court order,

(1) The Court may order at any time that the whole matter, or a question of fact arising in a proceeding, other than a criminal proceeding, be tried before an arbitrator agreed by the parties if

(a) all parties interested, and not under disability, consent,

(b) the proceeding requires a prolonged examination of documents or a scientific or local investigation that cannot, in the opinion of the

court, conveniently be made before a jury or conducted by the court through its other ordinary officers, or

(c) the question in dispute consists wholly or partly of matters of account.

Sections 37 to 43 make ancillary provisions in connection with Section 36 of the said Act.

2.10 Whether Sec 34 (or Section 37) of the Act is to be amended by providing a right of appeal (not only in respect of interim orders under Section 13 and 16) but also in other cases and if so whether such fresh grounds should cover both domestic and international arbitrations.

In the previous paragraphs while referring to the decisions of the arbitrator under section 13 and 16 it has already been pointed out that Section 34(2) or sec.37 should be amended suitably providing a right of appeal in those situations. The said amendment would apply to both International and domestic arbitrations.

It has been pointed out that supervision by the Court in the case of international arbitrations should be kept at the minimum as in the Model law but that so far as domestic arbitration is concerned, supervision could be more intense having regard to the lack of qualification as also experience of

arbitrators in India who are not necessarily always judges or lawyers or experienced businessmen. Reference in this connection can be made to Redfern and Hunter (Law and Practice of International Arbitration 2<sup>nd</sup> Edition pages 14, 15) as follows:

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

It is, therefore, necessary to provide additional supervision by the Court by way of appeal in case of domestic arbitration but at the same time limiting the supervision of international arbitration awards to the minimum. It is permissible to have “firmer control” on domestic arbitration awards, as pointed out in the above passage.

We shall now refer to certain additional grounds of appeal which may have to be provided in Sec.34 or 37.

2.10.1 Sec.34 (2) (iv) provides for filing objections only in case the award deals with a dispute 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. It is however to be noticed that in case a dispute is referred or arising between the parties is not decided by the arbitrator, there is no provision therefor in Sec.34. No doubt Sec.33 (4) provides that within 30 days of the receipt of the award , the aggrieved party can ask the arbitrator to make an additional award as to claims presented but omitted from the award. But this may not be a sufficient remedy. In case the arbitrator refuses to accept the contention in his decision under Sec.33(4), no remedy is provided under Sec.34. Therefore, there is need to make a specific provision for filing objections in this behalf.

It is true that the Model law as well as several other statutes of other countries do not deal with this aspect. Nonetheless we can make a provision in our Act.

The above provision in Sec.34 should obviously apply to both domestic and international arbitrations.

2.10.2 Though Sec.34(2) (iv) provides a ground of objection in regard to an award on a dispute not contemplated by or not falling within the terms of the submission or if it contains decisions on matter beyond the scope of the submission to arbitration, it does not specifically cover all the aspects

referred to in Sec.16 of the Act which enable the arbitrator to decide his own jurisdiction, including objections as to the existence or validity of the agreements.

It is therefore necessary, as already stated in the earlier chapters to provide a specific appeal in respect of decisions of the arbitrator under Section 16 of the Act.

This amendment should apply to international awards also.

2.10.3. Though Sec.31(3) of the Act requires reasons to be given,( unless otherwise agreed or there is a settlement), Sec.34 does not specifically cover a case where no reasons are given in regard to each dispute. Among the various clauses in Sec.34 (2) (a), sub clause (iv) alone deals with a challenge to the award by the party but does not cover this aspect. It is therefore necessary to provide such a ground for setting aside the award under section 34.

This objection should apply to international awards also.

2.10.4 “Misconduct” of arbitrators whether factual or legal has not been made a specific ground. Sec.34(2) (a) (iii) covers only few facets of violation of natural justice. Section 34(2) (a) (iv) deals with a situation where the arbitrator decides disputes which do not arise or are beyond the scope of his authority. Under Section 34 (2) (b) (ii) fraud and corruption are no doubt included within the scope of violation of public policy of India and that could be a ground for a Court to set aside the award. The Supreme Court of India has held that non application of mind by the arbitrator such as his not considering the relevant evidence, would amount to misconduct [Dandasi Sahu Vs. State of Orissa (AIR 1990 SC 1128)]. There may be others kinds of misconduct also as interpreted by the

courts in India. It is said that Indian arbitrators excluding judges and lawyers and experienced businessmen -- , cannot be treated at par with arbitrators in international arbitrations.

Hence “misconduct” is to be included as a ground of Appeal in Sec.34 or 37, so far as domestic arbitrations are concerned.

The English Act 1996, instead of using the word ‘misconduct’ uses the word ‘serious irregularity’ as a ground for setting aside the award. The irregularities are set out in Section 68 (2) which are as follows (applicable to domestic and international arbitrations).

- a) failure by the tribunal to comply with Sec.33(General duty of tribunal)
- b) the tribunal exceeding its powers (otherwise than by the exceeding its substantive jurisdiction (See Sec.67)
- c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties
- d) failure by the tribunal to deal with all the issues that were put to it.
- e) Any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers
- f) Uncertainty or ambiguity as to the effect of the award
- g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy
- h) Failure to comply with requirements as to the form of the award or

- i) Any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

In Sec.68(3) provision is made either to remit the award in whole or in part or set aside the award in whole or part or declare the award of no effect, in whole or in part.

Question is whether ‘misconduct’ should be defined to include some or all the above features.

It is however suggested that “misconduct” may be included as a specific ground in Sec.34, both in respect of domestic as well as international. arbitration is concerned. In England, ‘serious irregularity’ in Sec.68 covers both domestic and international arbitrations.

2.10.5 Under Section 16 (1) (c) of the 1940 Act, an award could be set aside and the matter remitted to the arbitrators if “an objection to the legality of the award is apparent upon the face of it”. So far as Sec.34 of the present Act is concerned, error of law apparent on the face of the award is not a made a ground for setting aside the award.

Even though under section 16(1)© of the Act of 1940, an award could be set aside and remitted where an objection to the legality of the award is apparent upon the face of it but under section 30 of the Act of 1940, an

explicit ground for setting aside of award, namely, “error of law apparent on the face of the award” was not statutorily inducted, yet it has been judicially recognized as a ground for setting aside the award.

Again an exception has been engrafted by the judge-made law to the above principle. The Calcutta High Court ( **B.K. Dhar(P) Ltd vs UOI**, AIR 1965 Cal 424 ) while relying upon Hodgkinson & Absalom cases (1857) 2 CB (NS) 189 and (1933 AC 592) respectively, held: “It is essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision... in the former case, the court can interfere if and when any error of law appears on the face of the award, but in the latter case, no such interference is possible.... when the submission is on a specific question of law and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the courts, and in lieu thereof to submit that question to the decision of a tribunal of their own, such decision cannot be questioned.”

In the **Upper Ganges Valley Electricity Supply Company Limited v. UP Electricity Board**, AIR 1973 SC 683, while referring to AIR 1971 SC 696, the court held that “it is, therefore, plain that the appellant’s

application for setting aside the award can succeed only if there is an error of law on the face of the award.” Similarly, in **Coimbatore District P.T. Sangam v. Balasubramania Foundary** AIR 1987 SC 2045, it was held that an award can only be set aside where there is an error on its face and not mistake of fact committed by the arbitrator.

In **M/s Allen Berry & Company v. Union of India**, AIR 1971 SC 696, the Supreme Court referred to *Hodgkinson Vs. Fernie*, 1857 (3) CB (NS) 189 observations to the following effect:

“Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact.... The only exceptions to that rule are, cases where the award is the result of corruption or fraud and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award.”

The court was empowered to remit the award where an objection to the legality of the award is apparent upon the face of it. Accordingly, there is necessity to explicitly incorporate a ground for setting aside the arbitral award under section 34(2)(a) of Act of 1996, to the following effect:

“(vii) that unless agreed to by the parties to refer the question of law to be decided by the arbitrator, in so far as domestic arbitration is concerned, where there is an error of law apparent on the face of award or upon some paper accompanying and forming part of the award in respect of disputes which are referred to an arbitrator in the decision of which a question of law becomes material.”

It may be necessary therefore to include this ground so far as domestic arbitration is concerned.

A further question is whether error of law will come within the meaning of the words “ public policy of India referred to in Sec.34(2)(b)(ii)?

So far as Sec.34 (2) (b) (ii) is concerned, it refers to public policy of India. According to the Judgment of the Supreme Court in Renu Sagar Power Company Limited Vs. General Electric Company (AIR 1994 SC 860 at Page 888) it is stated that an award would not be contrary to the public policy of India merely because it is contrary to law. This conclusion is arrived at on a comparison with Art.1(e) of Geneva convention and Section 7(1) of the Protocol and Convention Act 1937 which use the words ‘law of the country’ in addition to public policy of the country. Such words are not found in the New York Convention which came up for consideration in the Renusagar. The Model law and Sec.34 (2) (b) (ii) use only the word ‘public policy of India’ and do not refer in

addition to violation of 'law of the country'. Hence the Supreme Court decided that public policy of India would not include errors of law but would only include

1. Fundamental Policy of India
2. interest of India
3. justice or morality.

In the facts of that case, violation of FERA and violations of orders of the Delhi High Court were treated as violations of "public policy of India". Charge of interest on interest and damages on damages were not treated as violation of "public policy of India".

It is therefore necessary to consider whether an error of law apparent on the face of the award is to be treated as ground of objection under section 34 (2) so far as domestic arbitration is concerned.

### 2.11 Power of the court to give opinion on question of law

Section 14(3) of the 1940 Act provided that 'where the arbitrators or umpire state a special case under clause (b) of sec.13, the court, after giving notice to the parties, and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award. Here the arbitrators make the application to the court.

There is no corresponding provision in the 1996 Act. It is desirable that a similar provision is made in the present Act.

### 2.12 Modification and Remission

Under sec.15 of the 1940 Act there was a provision for modification of award – if a part of the award appeared to be upon a matter not referred or where the award was improper in form or contained an obvious error or a clerical or an accidental slip or omission.

Under Section 33(1)(a) of the 1996 Act, a provision is made for correction of errors of clerical and computational errors or errors of a similar nature, but no such power is given to the court, as was done by Section 15 of the Act of 1940.

The question is whether a right to appear or a right to file objection should be given against an order under section 33.

### 2.13. **Power to supersede arbitration:**

Under the old Act, sec.19 permitted the court to supercede the arbitration agreement itself in certain situations – such as, where an award has become void under sec.16(3) or has been set aside. Under sec.16(3) an award remitted under sub-section (1) of section 16 becomes void on failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed. Sometimes, if the named arbitrators are guilty of serious

misconduct, the court have decided that it would not be desirable to remit the case for arbitration. In such cases, under the old Act, the reference itself could be superseded leaving it open to the parties to go for a suit.

The 1996 Act does not contain any provision for superseding the arbitration clause. The English Act does not also contain any provision. Question is whether it is necessary to have a provision for supersession of the reference.

#### 2.14 **Minority dissenting view of arbitrator**

Under sec.31(2) of the 1996 Act, it is stated that the signatures of the majority of the members shall be sufficient “so long as the reason for any omitted signature is stated.” Sec.29(1) states that, unless otherwise agreed, any decision of the arbitral tribunal with more than one member, shall be made by a majority of all its members.

This raises the question whether an arbitrator who is in a minority could avoid signing the award. It appears appropriate that section 31 9(2) may be amended providing that the dissenting member shall be entitled to submit his dissenting opinion and the same shall be treated as an annexure to the award. If the dissenting opinion is annexed to the award, the court before whom the may be questioned, will have the benefit of the dissenting opinion as well.

It appears to be settled law, at any rate in international arbitration, that a dissenting opinion is not part of the award and, if given, it remains on record only as a part of information, (see Fouchard etc. 1999 page 1403) unless the arbitration rules provide otherwise. In ICC. arbitration, the dissenting opinion is not examined by by the International Court of Arbitration under Art. 27 of the Rules, as the court takes the dissenting opinion only a piece of information.

Thus, the existing provisions appear to be sufficient and no amendment appears to be necessary.

**2.15 Filing of awards before a court for purposes of record (section 31 to be appropriately amended) and the court while enforcing the award – decree under section 36, to scrutinize if the award had complied with the relevant laws relating to stamp duty and registration.**

Under the 1940 Act, the award had to be filed by the arbitrators in the ‘Court’ and the court would scrutinize the award before making it a rule of court, to ensure that the award complied with provisions relating to stamp and registration. Further,

once the award was in the court, there was little scope for tinkering with the date of the award or the body of the award.

Under the 1996 Act, it is stated in sec.36 that after the expiration of time for making an application to set aside the arbitral award under sec.34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure 1908, in the same manner as if it were a decree of the court. It need not be filed in any court at all.

It has been pointed out that there must be some record of the award is originally passed before a court or other authority and a registration of the awards received from arbitrators is to be maintained with a serial number and that it must be ensured that all the pages of the award shall be duly stamped and initialed by the presiding officer of the court or a ministerial officer of the court. This would ensure the authenticity of awards and avoid any dispute as to the date or contents of the award as passed. Hence sec.31 may be amended appropriately.

So far as the enforcement of the award under sec. 36 of the Act, a point has been raised that unless it conforms to the

relevant provisions of the stamp laws and registration, the court should not enforce the same. It has also been pointed out that if the award has to comply with the stamp and registration laws then, merely because the statute allows it to be enforced as if it were a decree of the court, that does not mean that it need not comply with the stamp and registration laws applicable to or at the stage of the award.

Here, it may be seen that initially the arbitrators pass an award. It is only after the time limits mentioned in sec.36 are over or the application for setting aside the award is referred that it becomes enforceable as decree. Hence in sec.36 it may be clarified by way of amendment that for purposes of enforcement of the award as decree, the court will scrutinize whether, as an award it conforms to the stamp and registration laws and compliance to those laws will be a condition precedent for enforcement of the decree.

**2.16 Independence or Bias or Disqualification of named arbitrator: relationship with one of the parties to the contract and revocation of authority**

It is today a very common feature of contract in Government/Public Sector that in the event of differences arising between a contractor and the Department, the Department can appoint one of its officers as an arbitrator. Such a provision has been held to be valid by the Supreme Court, Secretary Vs. Muniswamy 1988 Suppl SCC 651 and (Nandyal Corp. Spinning Mills Vs. K.V. Mohan) 1993 (2) SCC 654. That was also the earlier English law.

But in sec. 24 of the UK Act, 1950 there was a power granted to the Court to grant relief where the arbitrator was not impartial. Sec. 24(1) stated as follows:

“Sec.24(1): Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator as named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.”

The ICC Rules require prospective arbitrator to disclose:

“whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind and whether the nature of such relationship is such that disclosure is called for pursuant to ..... criteria ..... (of such a nature as to call into question the individual’s independence in the eyes of the parties.”

Some statutes refer only to impartiality such as the 1996 UK Act while the Model Law in Art.12 (2) refers to impartiality and independence. Section 12(1) of the Indian Act also refers to both of them.

Fouchard and others (1999) (see para 1028) point out that ‘impartiality’ is a state of mind while ‘independence’ is a situation of fact or law. Bias might, in some cases be a factor which affects an independent decision. To some extent they overlap each other. Sec. 8 of the Swedish Arbitration Act refers to three aspects of ‘impartiality’:

- 1) when the arbitrator or a person closely associated to him is a party, or otherwise may expect significant benefit or detriment, as a result of the outcome of the dispute.
- 2) where the arbitrator is a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect significant benefit or detriment as a result of the outcome of the dispute.
- 3) where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has associated a party in the preparation or conduct of his case in the dispute.

French courts describe independence as follows: (ibid para 1029)

“The independence of any arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a Judge, which excludes any relationship of dependence, particularly with the parties. Further, the circumstances relied on to challenge that independence must constitute, through the existence of mutual or intellectual links, a situation which is liable to affect

the judgment of the arbitration by creating a definite risk of bias in favour of a party to arbitration.”

In para 1030, the Fouchard and others say that, in the following situations, the arbitrators have been held not independent in several cases.

- (1) where, at the same time as the arbitral proceedings, an arbitrator was personally paid to provide advice or technical assistance to one of the parties to the arbitration.
- (2) Where, at the time of signature of a submission agreement in which he was appointed as a replacement arbitrator, an arbitrator was acting as a paid consultant to a company of the same group as that of the parties to arbitration.
- (3) where the arbitrator was employed by a party on the day after he had made is award.

The principle is based on a party’s ‘reasonable doubt’ as to the arbitrator’s independence or impartiality. The Model law uses the word ‘justifiable doubts’ (Art. 12(ii)). It is the justifiable doubt of the ‘reasonable man’.

In the domestic arbitration in US (and as accepted by AAA Commercial Arbitration Rules), if each party is to appoint an arbitrator, they are not treated as neutral and principle of independence is applied only to non-neutral arbitrators. In other countries, this view as well as an opposite view are prevalent. However, in international arbitration, even if each party appoints an arbitrator, they must remain neutral and independent (ibid. paras 1043, 1044).

The above principles are parts of the ethical rules in various countries

“... commentators point to the pressure placed on party – appointed arbitrators nominated by governments, and advocate removing the requirement of independence and impartiality, so that the parties should be free to appoint partisan arbitrators if they wish.”

We shall confine ourselves to domestic arbitration. A view is expressed that in Government or Public sector undertaking or government company or statutory corporations, one may permit the existing system of departmental officer conducting the arbitration.

So far as other parties (not being Government or public sector corporation), the question is whether, as in the case of the above bodies, same procedure is to be applied or whether private parties should be totally debarred from appointing their officers or those having business connections with them. In the latter case, such a differentiation where both are private parties may be permissible in law, inasmuch as the employees of private corporations or bodies do not have the same security of tenure and statutory protection as is available to the employees of the Government and the public sector corporations.

Suggestion is that the challenge procedure in sec. 13 will apply subject to the above procedure.

#### **2.17 Time limits for completion of domestic arbitration and guidelines in respect of fee stipulations**

Under the 1940 Act, there was a provision of four months from date of extending a reference, for passing of the award, (First Schedule, para 3) subject to parties seeking time from the court for extension. The court could extend time under sec. 28. This applied to domestic arbitrations.

The Commission recommended in its 76<sup>th</sup> Report on Arbitration Act, 1940 inter alia that the proviso should be inserted below section 28 so as to provide that no extension should be granted so as to allow the making of the award more than one year after the arbitrator's entering on the reference unless the court, for special and adequate reasons, to be recorded in writing, is satisfied that such extension is necessary. Accordingly, it recommended the insertion of the following proviso below section 28:-

“Provided that no extension shall be granted so as to allow the making of the award more than one year after entering on the reference, unless the court, for special and adequate reasons to be recorded in writing, is satisfied that such extension is necessary.”

In the 1996 Act, there is no time limit fixed for the passing of the award either for domestic or international arbitration.

Question is whether, so far as domestic arbitrations are concerned, any time limit is to be imposed. (Of course under ICC Rules, time limits are prescribed even for international arbitration but the Model law does not prescribe any time limit.)

From the point of view of the parties, in any type of arbitration, the question of time is important. Parties expect arbitrations to be completed early enough and that they do not suffer the same delays as in courts. But experience shows that there are, by and large, more cases of delayed arbitrations in our country. The fixation of sitting fee for each day (or different sessions on same day) for the arbitrators has to some extent come under serious public criticism. So far as the counsel appearing before the arbitrators are concerned, their conduct does not fall for direct consideration under the Arbitration Act but may be governed by other laws. But, once the arbitrators' fee structure is allowed to pass through certain broad guidelines, it is hoped the arbitrators will be able to control the adjournments that may be sought by the lawyers appearing before them.

Section 31(8) of the 1996 Act which refers to the matters to be specified in an award, reference is made to 'costs' of an arbitration "to be fixed by the arbitral tribunal. The Explanation below that provision refers to the following:-

- (i) 'fee and expenses of the arbitrators and witnesses'
- (ii) legal fees and expenses
- (iii) any administrative fees or
- (iv) other expenses.

Sec. 39(2) of the 1996 Act (corresponding to old sec.38(1) refers to 'lien on arbitral award and deposit as to costs'. Section 39(1) provides a lien for unpaid 'costs'. Under sec. 39(2), the courts can have the 'demanded costs' deposited into court by the party, and pay the said amount of costs to the arbitral tribunal. The payment to the arbitral tribunal can be restricted to the amount 'the court may consider reasonable' and balance can be refunded to the party. Sub clause (4) of sec. 39 permits the court to make such orders as it thinks fit respecting the costs of arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

The ICC and LCIA have fixed rules in regard to payment of fee for arbitrators. The ICC rules are based on time spent, the complexity of the dispute and relevant circumstances and percentages of the value of the subject matter as fixed in Appendix 3 of ICC Rules. LCIA rules are based on time spent.

Russell suggests (1999) (para 4.094) a method for the arbitrators to fix fee as follows:

"... to agree to a lump sum for the whole arbitration, but if a case does not proceed to an award, disputes could arise over the arbitrator's right to payment: or, if the case goes on much longer than expected, the arbitrator's rate of remuneration can decline considerably."

In para 4.097, Russell says, ‘excessive fee’ charge has been held to be ‘misconduct;

Suggestions could therefore be made as to how the scale or rate of fee for the arbitrators can be fixed depending upon the extent of reasonable progress of the case and as to how payment of fee can be reduced if the case does not progress fast and where the parties are not responsible for the adjournments.

We also recommend that the Code of Ethics for the arbitrators and the lawyers appearing before the arbitral tribunals, be evolved, so far as the domestic arbitrations are concerned. Such a Code will help reduce unreasonable delays in concluding arbitral proceedings and would help expedite the proceedings. Such a Code should be made an appendix to the Act. Suggestions are invited in this behalf.

### **Summary of Proposals**

1. While proposing amendments to the Arbitration & Conciliation Act, 1996 it is felt necessary to adhere to the objectives of speedy disposal and least court intervention, which were the crucial aspects of the Act. However, where the Act has omitted to incorporate certain provisions of the Model Law, it is proposed to bring the Act in conformity with the Model Law. On that basis, so far as international arbitration is concerned, the provisions of Model Law are more or less adopted. However, in regard to domestic supervision, the proposals include a stricter supervision by court. The following are the proposals:
  2. Section 5 of the Act does not need any amendment (para 2.1).
  3. In section 8, the word 'judicial authority' should be replaced by the word 'court'. The words "unless it finds the agreement is null and void, inoperative or incapable of being performed" to be included so as to bring sec.8(1)

in conformity with Art.8 of Model Law. In sec. 8, 'court' means the 'court' in which suit is filed. Appeals to lie to Division Bench of High Court from the decision of the court.

4. In sec.11, the words 'Chief Justice of India or his nominee' should be replaced by the words 'Supreme Court' thereby meaning 'Bench of two or more learned Judges of the court'. The words 'Chief Justice of High Court or his nominee' should be replaced by the words 'High Court' thereby meaning a 'Bench of two more more learned Judges of the court'. This will bring sec.11 in conformity with Model Law which uses the word 'court'. This will clarify that power that is exercised under section 11 is a judicial power. The Supreme Court and High Court to clear off jurisdictional issues if raised at the stage of section 11 itself. If oral evidence is necessary, before the said courts, evidence is to be obtained by appointing Advocate Commissioners.
5. In sec.16, the Act permits arbitral tribunal to decide questions of their own jurisdiction, including objections

as to the existence or validity of the arbitration agreement. Arbitral tribunal's decision on preliminary issues to be allowed to be questioned before court, within 30 days, even where the arbitrators have "rejected" the plea. The right to object to the decision "rejecting" the preliminary jurisdictional issues to be included in section 34 or section 37. In section 16(5), the word 'shall' should be replaced by the word 'may'.

6. In sections 12 and 13, decision of the arbitrators on preliminary issue of bias or disqualification "rejecting" the plea to be also subject to objections to court under section 34 or 37. In section 13(4), the word 'shall' should be replaced by the word 'may'.
7. Provision under section 9 (interim measures) in Part I should be made applicable even to foreign arbitration when the seat of arbitration is outside India. This will bring the Act in conformity with laws elsewhere which are based on Model law.
8. Provision under sections 8, 38 and 39 also to apply to foreign arbitration where seat of arbitration is outside

India and where such arbitrations are not covered by Part II (New York or Geneva Convention Awards). Whether other provisions in English Act 1996 to support foreign award are to be introduced? Should there be a definition of 'seat of arbitration'?

9. A provision similar to sec.21 of the 1940 Act, enabling any court (before which a suit or other proceeding is pending) to refer the parties to arbitration even if such an agreement is subsequent to the commencement of the suit or proceeding, should be introduced. Provision to be made for challenging the award passed on such reference, in the same court. This will enable all courts, including High Court/Supreme Court to refer issues to arbitration, if parties so agree during the proceedings and deal with the correctness of the award in the same court (on grounds mentioned in sec. 34 and sec. 37) rather than give a fresh lease of life to the litigation.
10. S.34 (Sec.37) should be amended by providing (1) a right to object to the preliminary decision of the arbitral tribunal under sec.16 whether the tribunal accepts or

rejects the jurisdictional pleas; (2) a right to object to the preliminary decision of the arbitrator under sec.13 whether the tribunal accepts or rejects the plea.

11. Sec.34 (or sec.37) to provide for objections to be filed where the arbitral tribunal omits to decide certain questions referred and conferring a power to remit the matter to the arbitral tribunal.
12. Sec.34 (or sec.37) should provide for objections to be filed if award does not contain reasons in regard to any dispute and seek a supplement award containing reasons.
13. 'Misconduct' should be included as a specific ground of attack in sec.34 (or sec.37). Whether it should apply to domestic as well international arbitration?
14. 'Error of law apparent on the face of the award' should be included as a specific ground in sec.34 (or sec. 37) (except where a specific question of law is referred to the arbitrators) but only in cases of domestic arbitration.
15. Provision enabling arbitrators to refer a question of law to the court should be included.

16. Provision for modification or remission of award should be included.
17. Power should be granted to court to supersede arbitration (in cases of domestic arbitration only).
18. Minority view should be appended to the award for information.
19. All awards should be filed in the 'court' for purposes of record by amending sec.31, so that authenticity of awards is taken care of.
20. Awards to be executable by court under section 36 only if they conform to laws relating to stamp duty/registration.
21. Employees of one of the parties should not be arbitrators, except in cases where they are employees of Govt. or Public Sector undertakings or corporations.
22. Whether upper time limit should be provided for completing arbitration proceedings, subject to extension by court only for special reasons, so far as domestic arbitrations are concerned?

23. Whether and what guidelines should be prescribed for fixation of fee of arbitrators and what special Code of Ethics is to be introduced to govern the arbitrators and lawyers appearing before arbitrators?





