A CRITIQUE OF POWER OF THE COURT TO REFER PARTIES TO ARBITARTION UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

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By

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DECLARATION

I declare that the dissertation entitled "A CRITIQUE OF POWER OF THE COURT TO REFER PARTIES TO ARBITARTION UNDER THE ARBITRATION AND CONCILIATION ACT, 1996" has been prepared by me under the guidance of Dr. Tarun Arora, Associate Professor, Department of Law, School of Legal Studies and Governance, Central University of Punjab, Bathinda. No part of this dissertation/thesis has formed the basis for the award of any degree or fellowship previously.

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CERTIFICATE

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ABSTRACT

A CRITIQUE OF POWER OF THE COURT TO REFER PARTIES TO ARBITARTION UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

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In the era of globalization a quick and effective resolution of the dispute has become important. Hence, the need for alternative dispute resolution mechanism was felt. Arbitration was found to be one of the preeminent dispute resolution mechanisms of resolving dispute internationally and nationally. The law on arbitration in India grew through the pages of history in the due course of time. Some ambiguities were noticed in the law related to arbitration in India that led to the enactment of the present Arbitration and Conciliation Act, 1996 which is based on the UNCITRAL Model Law. Section 8 of the Arbitration and Conciliation Act, 1996 enables the Court to refer the parties to arbitration. The judicial authority has the power to direct the parties to arbitration if an arbitration agreement is there between the disputants. The four major mandatory requirements under the Section felt are first, the presence of arbitration agreement; secondly, the action brought by one party against the other party, thirdly, the similarity between the subject matter of dispute and the agreement and lastly, the application accompanied by an original agreement or a duly signed certified copy. It reflects that Section 8 of the Arbitration and Conciliation Act, 1996 is peremptory in nature. Certain major elements have been construed with regard to

Section 8 of the Arbitration and Conciliation Act, 1996 while going through various judgments to analyze the approach of the judiciary. These are- the arbitrability of the dispute, applicability of arbitration in Civil Suit, maintainability of the Civil Suit, arbitral agreement and the validity of the arbitration clause, pre-requisite of the Arbitration agreement. Thus, the researcher here also seeks to analyze the role of Judiciary in promoting such peaceful and non- litigation method of settlement by referring the parties to arbitration.

Vriti Upadhyaya Dr. Tarun Arora

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Vriti Upadhyaya

TABLE OF CONTENTS

Sn.	CONTENTS		PAGE. No.
1.	Declaration		i
2.	Certificate		ii
3.	Abstract		iii
4.	Acknowledgement		v
5.	Table of Contents		vi
6.	Table of Cases		viii
7.	List of Abbreviations		xii
8.	Chapter 1	Introduction 1. Framework of the Study 2. Structure of the Study 3. Research Methodology	1-15
9.	Chapter 2	Review of Literature	16-28
10.	Chapter 3	Overview of the Indian Arbitration Framework In The Context Of International Arbitration Law	29-56
11.	Chapter 4	Judicial Exposition Of Power Of Court To Refer Parties To Arbitration 1. Concept of Arbitration 2. Advantage of Arbitration In Comparison with Traditional Jurisdiction 3. History of Arbitration in India 4. Arbitration and Conciliation Act, 1996 5. Nature and Scope of Section 8 of the Arbitration and Conciliation Act, 1996 6. Arbitrability of Dispute 7. Applicability of Arbitration in the Civil	57-121

		Suit 8. Maintainability of Civil Suit 9. Arbitral Agreement 10. Validity of Arbitration Clause 11. Pre-requisite of Arbitration Agreement	
12.	Chapter 5	Conclusion and Suggestions	122-127
13.	Bibliography		128-129

TABLE OF CASES

Sn.	CASES	P.No.
1.	*A.Ayyasamy* v. *A. Paramasivam & Ors,* 2016 10 SCC 386.	28, 64, 88
2.	*Atlas Export Industries* v. *Kotak & Co*., AIR 1999 SC 3286.	102
3.	*Atul Singh and Ors.* v. *Sunil Kumar Singh and Ors.,* (2008) 2 SCC 602.	108
4.	*Babrein Petroleum Co.* v. *P.J Pappu*, AIR 1966 SC 634: (1966) 1 SCR 461.	68
5.	*Bhagwan Devi* v. *Delhi Agricultural Marketing Board*, 2006 (3) RAJ 372.	90
6.	*Booz Allen and Hamilton Inc* v. *SBI Home Finance Ltd. and Ors,* 2011 5 SCC 532.	28, 69, 75, 88, 125
7.	*Canara Bank* v. *Nuclear Power Corporation Ltd,* 1995 Supp 3 SCC 81.	66
8.	*Chloro Controls (I) P. ltd* v. *Severn Trent Water purification Inc,* 2013 1 SCC 641.	81
9.	*Delhi Development Authority* v. *Jacksons Engineers Pvt. Ltd*., 1996 (Suppl) Arb LR 296 (Del) (DB).	91
10.	*Denel (Proprietary) Limited* v. *Ministry of Defence,* 2012 2 SCC 759.	25
11.	*District Panchayat, Bhavnagar* v. *Mahmad Haji Gafur & Co.,* AIR 1984 Guj 98.	90
12.	*Everest Lasson Ltd* v. *Jindal Expert Ltd.,* AIR 2001 SC 356.	36
13.	*Executive Engineer, Irrigation Division, Puri* v. *Gangaram Chhapolia,* 1984 (3) SCC 627.	113
14.	*Fair Air Engineers Pvt.* v. *NK Modi,* (1996)6 SCC 385.	67, 94
15.	*Food Corporation of India* v. *Indian Council of Arbitration,* AIR 2001 SC 2291.	36
16.	*Food Corporation of India* v. *Joginderpal,* AIR 1981 SC 2075.	62
17.	*Food Corporation of India* v. *Yadav Engineer and Contractor,* 1982 AIR 1302.	80
18.	*G. Tech & Ors* v. *Koulath Kareem,* MANU/KE/1346/2015.	75
19.	*General Manager, N.T.P.C* v. *A.P. Singh,* 2009 (2) RAJ 461 (Del).	68
20.	*Groupe Chimique Tunisien SA* v. *Southern Petrochemicals Industries Corporation Ltd.,* AIR 2006 SC 2422.	102
21.	*Gujrat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.,* 2008 4 SCC 755.	25
22.	*H. Srinivas Pai and Anr. vs. H.* v. *Pai (D) thr. L.Rs. and Ors,* 2010 12 SCC 521	77
23.	*Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS* v. *Sometal SAL,*	104

	(2010) EWHC 29 (Comm).	
24.	*Hari Shankar Singhania* v. *Gaur Hari Singhania,* JT 2006 (4) SC 251.	23
25.	*Hindustan Petroleum Corporation Ltd.* v. M/S. Pinkcity Petroleums, 2003 6 SCC 503.	28,62, 92, 118
26.	*I.T.I. Ltd., Naini, Allahabad* v. *District Judge, Allahabad and others,* AIR 1998 Allahabad 313.	41
27.	*Baron* v. *Sunderland Corporate,* (1966) 2Q B 56.	94
28.	*Indian Oil Corporation Ltd. and Ors.* v. *Raja Transport (P) Ltd.,* MANU/SC/1502/2009.	111
29.	*Inox Wind Ltd.* v. *Thermocables Ltd.,* AIR 2018 SC 349.	103
30.	*J.G. Engineers Pvt. Ltd.* v. *Calcutta Improvement Trust,* AIR 2002 SC 766.	40
31.	*Jagdiish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719	89
32.	*Jindal Viaynagar Steel* v. *Jindal Praxiar Oxygen Co. Ltd.,* 2006 (3) ARB LR 340 (SC).	23
33.	*Kaplana Kothari* v. *Sudha Yadav* AIR 2002 SC 404.	63
34.	*Konkan Railway Corporation Ltd.* v *Rani Construction Pvt. Ltd*, 2000 (7) SCC 201.	94
35.	*Krishan Radhu* v. *M/s Emaar Mgf Construction,* MANU/DE/3422/2016.	85
36.	*Life Insurance Corporation of India* v. *M.L. Dalmiya & Co*., AIR 1978 NOC 247 (Cal).	90
37.	*Luxmi township Limited* v. *Asif Iqbal Hussain and Ors,* MANU/WB/0640/2015.	78
38.	*M.D. Enterprise* v. *M/S. Whirlpool of India Ltd.,* MANU/WB/0924/2013.	65
39.	*M.M.T.C. Limited* v. *Sterlite Industries (India) Ltd.,* 1196 6 SCC 716.	120
40.	*M.R. Engineers and Contractors Pvt. Ltd.* vs. Som Datt Builders Ltd., 2009 7 SCC 696.	100, 104
41.	*Nimet Resource Inc* v. *ESSAR Steels,* AIR 2000 SC 3107	117
42.	*Northern Railway Administration* v. *Patel Engineering Co. Ltd*., 2008 (11) SCALE 500.	114
43.	*P. Anand Gajapathi Raju* v*. P.V.G. Raju*, (2000) 4 SCC 539.	63, 82, 94
44.	*P.N. Garg Engg. And Contractors* v. *State of U.P*., AIR 2007 All 154.	90
45.	*Peterson Farms Inc.* v. *C&M Farming Ltd.,* 2004 EWHC 121 (Comm).	25
46.	*Punjab State* v. *Dina Nath*, (2007) 5 SCC 28	89
47.	*Purushottam* v. *Anil and Ors*., MANU/SC/0504/2018.	119
48.	*Rajeev Maheshwari v. Indu Kochar,* 2011(3) CHN 680.	66
49.	*Ram Lal Jagan Nath* v. *Punjab State*, AIR 1966 P&H 436.	90
50.	*Rashtriya Ispat Nigam Limited,* 2006 (7) SCC 275.	28, 65, 72, 80, 83,

		124
51.	*Reserve Bank of India v. S.S. Investment Ltd,* AIR 1992 (2) SC 391.	49
52.	*Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson, (*1892) 1 QB 431.	67
53.	*Ruby Construction* v. *State of Bihar*, AIR 1993	90
54.	*S.N. Palanitkar* v. *State of Bihar,* AIR 2001 SC 2960.	68
55.	*Sankar Sealing Systems Pvt Ltd.* v. *Jain Motors Trading Co.*, AIR 2004 Mad 127.	91
56.	*SBP & Co.* v. *Patel Engineering Ltd & Anr,* (2005) 8SCC 618.	20,118
57.	*Sea Trade Maritime Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Limited, The Athena,* (2006) EWHC 2530 (Comm).	104
58.	*Shri Balaji Traders v. MMTC Ltd,* 1999 CLA 261.	66
59.	*SMS Tea Estates Pvt. Ltd*. v. *Chandmari Tea Company Pvt. Ltd.,* MANU/SC/0836/2011.	96
60.	*State of Rajasthan* v. *Construction Company,* AIR 1995 Arb.LR 1 (SC).	40
61.	*State of Rajasthan* v. *Nav Bharat construction company*., (2005) 11 SCC 197.	90
62.	*Sundaram Finance Ltd. & Ors v. T. Thankem,* MANU/SC/0177/2015.	81, 124
63.	*Sunderam Finance* v. *NEPC Ltd.*, 1999 2 SCC 479.	63
64.	*Tamil Nadu Electricity Board* v. *ST-CMS Electric Co. Private Ltd.,* 2008 1 Lloyds Rep 93.	25
65.	*Tarapore & Company* v. *Cochin Shipyards*, AIR 1984 SC 1072.	19
66.	*TDM Infrastructure Pvt. Ltd* v. *UE Development India Pvt. Ltd.,* 2008 14 SCC 271	37
67.	*The State of Bihar and Ors.* v. *Brahmaputra Infrastructure Limited and Ors.,* MANU/SC/0315/2018.	106
68.	*Union of India* v. *Surjeet Singh Atwal*, AIR 1970 SC 189 (1970) 1 SCR 531.	67
69.	*Unissi (India) Pvt Ltd* v. *Post Graduate Institute of Medical Education and Research,* MANU/SC/4495/2008.	116
70.	*Wellington Associates Ltd.* v. *Kirit Mehta*, (2000) 4 SCC 272.	91
	Y.L. E Services Pvt. Ltd v. *Silverline Business & Tech Park Pvt. Ltd*, AIR 2008 Kant 127.	89

LIST OF ABBREVIATIONS

Sn.	FULL FORM	ABBREVIATION
1.	Above Used	Supra
2.	All India Reporter	AIR
3.	Arbitration Law Reporter	Arb LR
4.	Article	Art.
5.	Calcutta	CAL
6.	Calcutta High Court Notes	CHN
7.	Calcutta Weekly Notes	Cal W N
8.	Code of Civil Procedure	CPC
9.	Company	Co.
10.	Corporate Law Advisor	CLA
11.	Delhi	Del.
12.	Delhi Law Times	DLT
13.	Edition	Edn.
14.	Indian Council of Arbitration	ICA
15.	Karnataka Law Journal	KarLJ
16.	Limited	Ltd.
17.	Madhya Pradesh	MP

18.	Manupatra	MANU
19.	Paragraph	Para
20.	Rajasthan	Raj.
21.	Same Source as Last Time	Ibid
22.	Scale	SCALE
23.	Supreme Court	SC
24.	Supreme Court Cases	SCC
25.	Supreme Court Reports	SCR
26.	United Kingdom	UK
27.	United Nations Commission On International Trade Law	UNCITRAL
28.	United States	US
29.	Volume	Vol.

CHAPTER I

INTRODUCTION

Framework of the Study

Mankind has been seen in conflict since the evolution of human society, there have always been disputes and differences. Dispute causes disruption in the peace and order, in the society and to maintain social order, the presence of social stability is the very essence that is required to be maintained. Hence, to make the social life peaceful, dispute resolution has become an indispensable process. Courts are playing a vital role in the purpose of delivery of justice as it has been observed that litigation has become self-torturing and an endless exercise as there is prolonged delay in litigation procedure. One major factor that has been recognised for the slow justice is the idea of "justice hurried is justice buried" and following this principle, the primary objective of rendering justice is been frustrated.[1] The administration of justice involves the protection of the innocent, punishment of the convicted person when found guilty and achieving a satisfactory resolution of the dispute. As there is rapid growth and rush of cases in the Court it has become important to overcome the much criticised delay in the delivery of justice and thus, the need for filtration of cases was required. Therefore, the judiciary has taken a bold move and measures to reduce the backlog and one such measure has been the adoption of the Alternative Dispute Resolution mechanism. There are various kinds of Alternative Dispute Resolution mechanism. It is an era of commercialisation and globalisation where international trade and practice takes place among differently nation due to which much complexity has aroused between the parties so in order to resolve such dispute arbitration acts as the most flexible method for resolving the disputes among the parties as compared to the traditional litigation method.

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[1] Need For An Alternative Dispute Resolution In India, *available at:* http://racolblegal.com/need-for-an-alternative-dispute-resolution-in-india/ (Visited on May 11, 2018).

Arbitration

Arbitration is well rooted in commercial practices and social life. The primary objective of arbitration is to deliver a fair and impartial solution to the dispute that has arisen between the parties without causing unnecessary delay or expenses. The parties get their dispute resolved by the intervention of a third person without getting it resort by the Court of law. It is a procedure where the disputes are resolved by approaching the Arbitral Tribunal. The tribunal consists of either one or three-arbitrator.[2] It is a private proceeding where experts are appointed and the tailor-made procedure makes it time-saving and less costly. An arbitrator is a chosen judge by the litigating parties themselves to settle the dispute. The decisions of the arbitrator are delivered through the award. The arbitral award is granted at the end of the proceeding. These awards are binding in nature and can only be challenged in exceptional circumstances.[3] The arbitration procedure by most of the branches of trade and industry are established within the professional bodies. The contemporary arbitration gives freedom to the parties to establish rules regarding the procedure as they deem appropriate. In arbitration, the arbitrator is compelled to determine the dispute in the context of certain rules instead of compromising the work that is a mediator's task. The arbitration forum is bound to the rules of the said organisation that organises the arbitration. It is flexible, cheaper, faster and easier in terms of providing access to justice.

Features of Arbitration-

1. Can be used voluntarily;
2. Private (unless a limited Court appeal is made);
3. Based on the applicable arbitration rules, perhaps less formal and structured than going to Court;
4. Generally fast and less expensive than going to Court based on the applicable arbitration rules;

[2] Arbitration, *available at:* http://www.dispute-resolution-hamburg.com/arbitration/what-is-arbitration/ (Visited on May 11, 2018).

[3] *Ibid.*

5. Each party will have the opportunity to present evidence and make arguments;
6. Can have the right to choose an arbitrator with special expertise;
7. A decision will be made by the arbitrator who can resolve the dispute and be final;
8. Arbitrator's award can be enforced by the Court;
9. If it is non-binding, the right to trial still exists.[4]

History of International Arbitration

Arbitration is generally defined as: "A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[5] The word commercial is used "to refer to transactions carried out by business entities in the course of their ordinary business."[6] Then, the overall expression "International Commercial Arbitration" is meant "to include an out-of-court resolution of disputes regarding transactions containing elements connected with two or more countries."[7] The flexibility provided by international arbitration is appealing for parties because of the important autonomy it grants them. Although several ways to settle a dispute can be listed, International Commercial Arbitration is the principal method of dispute settlement between parties, states and investors for disputes related to international trade, investments.[8] This appealing effect can mainly be explained by all the possibilities that are offered to parties. It requires Courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting States and it applies to arbitrations which are not considered as domestic awards in the State where recognition and enforcement is sought. Parties get benefit from international conventions to have a legal framework. There are several documents that govern

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4 Methods for Resolving Conflicts and Disputes, *available at*: http://www.okbar.org /public/Brochures /methodsForResolvingConflictsAndDisputes.aspx (Visited on May 12, 2018).

5 *Black's Law Dictionary*, 8th ed., p.112.

6 Giuditta Cordero Moss, *International Commercial Arbitration, Party Autonomy and Mandatory Rules* 45 (T. Ashehoug, 1999).

7 Andrew Barraclough and Jeff Waincymer, *Mandatory rules of law in international commercial arbitration*, (2005, MJIL, 205, 209).

8 Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* 1 (student version, OUP Oxford, 5th edn., 2009).

arbitration today. It is necessary to analyse some of the main treaties and laws in relation to international arbitration. There are two major treaties related to international arbitration.[9] First was the New York Convention, it was adopted by the United Nations Diplomatic Conference on June 10, 1958, and was implemented on June 7, 1959. In the conference, the Courts of states require the effect of the private agreement for arbitration and recognition and enforcement of arbitration awards. Another contract states the basic means for international mediation is widely considered, it applies to those arbitrators who are not considered home prizes in the state where recognition and enforcement are sought.[10] The second important treaty is the United Nations Commission on International Trade Law (UNCITRAL), it was accepted on June 21, 1985, in Vienna, Austria, the objective of this international agreement is to reduce discrepancies in international regulations. Thirty-six countries signed this treaty and in July 2006, the document was updated so that it could better meet the requirements of the arbitration nowadays. This international agreement is an ideal law that should be used as an example of the laws adopted by other countries.[11] Based on the Model Law, the law has been adopted in 80 States of the 111 jurisdiction.[12]

All the International Conventions contain the doctrine of party autonomy for the choice of the Substantive Law. Consequently, parties are free to choose the law being applicable to the matters arising between them. This doctrine aims at giving precedence to the choices of parties. However, the discretionary powers of the arbitrators combined with the growing mandatory rules that have to be applied crystallize the threats of parties concerning their autonomy for the choice of the

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[9] Igora M. Borba, *International Arbitration: A comparative study of the AAA and ICC rules* (2009) (Master's Theses), *available at:* https://epublications.marquette.edu /cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1019&context=theses_open (Visited on May 11, 2018).

[10] New York Arbitration Convention, *available at*: http:// www.newyorkconvention.org /new+york+convention+texts (Visited on May 11, 2018).

[11] *Ibid.*

[12] Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, *available at*: http://www.uncitral.org /uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Visited on May 11, 2018).

Substantive Law. The doctrine may be facing a crisis as the extent of autonomy of parties seems to decrease.[13]

On the European approach, the next relevant legal document is the European Conference on International Commercial Arbitration (1961), which applies to the settlement arbitration agreement to resolve disputes arising from international trade between physical or legal persons living in different contracting states.

The primary benefits of using international arbitration to resolve the dispute rather than the traditional Court case include:

1. It can resolve disputes more swiftly.
2. It can be less expensive than traditional Court litigation.
3. Provide better-quality justice, since many domestic Courts are overburdened, which does not always allow judges sufficient time to produce legal decisions of high quality.
4. Clients can play an active role in selecting an arbitrator.
5. International Arbitration is neutral. This is very important for cross-border transactions.
6. In certain countries, judges do not rule independently. In International Arbitration an award must be independently made, or it cannot be enforced.
7. In some cases, such as the investor-state dispute, the only solution is to infringe international arbitration legal rights.

The UNCITRAL Model Law on International Commercial Arbitration indicates the worldwide consensus on the aspects of arbitral process accepted by different states and it is designed to assist States in reforming and modernising their laws on the arbitral procedure.

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[13] Sunday A. Fagbemi, "The Doctrine Of Party Autonomy In International Commercial Arbitration: Myth Or Reality?", *available at:* https://www.ajol.info/index.php/jsdlp /article/viewFile /128033/117583 *(*Visited on October 5, 2017*).*

History of Arbitration in India

Arbitration in India has a long history. In ancient times, people often voluntarily used to gather their disputes in the group of intelligent men of a community. For the purpose of the compulsive resolution, they are called Panchayat. During British rule, a modern law was made in 1772 by the Bengal Regulations because it provided a reference by the Court to arbitrate with the consent of the parties in the lawsuit. By 1996, there were mainly three methods which were controlling arbitration in India- the Arbitration (Protocol and Convention) Act, 1937, the Indian Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.[14] The Arbitration Act, 1940 settled only with domestic arbitration. Under the Act, the tribunal required the intervention of the Court in all three stages of arbitration, i.e. during the proceeding period, before the context of the dispute, and after the award was passed. Before taking the cognizance of the dispute, an Arbitral Tribunal needed intervention in the Court to determine the arbitration proceedings in motion. It was necessary to prove the existence of an agreement and dispute. During the proceedings, Court intervention was necessary for the expansion of time to award.[15] In an effort to modernize the 1940 Act, the government enacted the Arbitration and Conciliation Act, 1996. Arbitration and Conciliation Act, 1996 is based on the UNICITRAL Model Law. The President launched the Arbitration and Conciliation Ordinance, 1996 on January 16, 1996, which was implemented from 25 January, 1996.[16] In the Indian context, the Arbitration and Conciliation Act, 1996 has been enacted with the main objectives being summarized as under:

1. To cover the international and commercial arbitration and conciliation.
2. Proper, efficient, provision for an intermediary process to meet specific arbitration requirements.
3. To see that the Arbitral Tribunal resides within the borders of its jurisdiction.

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14 *Ibid.*

15 ADR in India: Legislations and Practices, *available at*: https://www.lawctopus.com /academike /arbitration-adr-in-india/ (Visited on May 12, 2018).

16 Evolution of ADR (Alternative Dispute Resolution) in India, *available at*: http://adrandhra.blogspot.in/2013/07/evolution-of-adr-alternative-dispute.html (Visited on May 12, 2018).

4. To reduce the supervisory role of the Courts in the arbitration process.
5. To grant permission of an Arbitral Tribunal to use mediation, settlement or other.
6. To provide the final arbitral award because it would have been imposed by the Court.
7. To provide, for the purposes of the enforcement of foreign awards, each arbitral award made in the country, which is one of the two international conventions related to foreign arbitral awards, where India is a party, a foreign award will be considered.[17]

Kinds of Arbitration

***Ad-hoc* Arbitration:** *Ad-hoc* arbitration is not administered by any organisation and hence, the parties to the dispute determine all the aspects of arbitration such as the number of arbitrators to be appointed, the method that will be used for their appointment, the process of organising the arbitration etc. In *Ad-hoc* arbitration proceedings the parties need to also determine the rules and the applicability of law on the subject matter of the dispute and also the administrative assistance they require. The proceeding under *Ad-hoc* is fast, cheap, flexible from that of an administrative proceeding. As there is an absence of the administrative fee, it makes it a popular choice.[18]

Advantage of *Ad-hoc* Arbitration:

1. Flexibility;
2. Less expensive;
3. Control of the process;
4. Agreed procedures;
5. Ready-made arbitration rules.

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[17] Salient features of Arbitration and Conciliation Act, 1996, *available at:* https://www.iilsindia.com/blogs/2015/05/16/salient-features-of-arbitration-and-conciliation-act-1996/ (Visited on May 12, 2018).

[18] Ad Hoc and Institutional Arbitration, *available at*: http://www.legalserviceindia.com/article/l64-Ad-Hoc-and-Institutional-Arbitration.html (Visited on May 12, 2018).

Institutional Arbitration: An institutional arbitration is that in which a particular organisation with a permanent character recognizes the functions of intervention and administering the arbitration process, as provided by the rules of that institution. It is worth noting that these institutes do not arbitrate the dispute, it is the arbitrator who arbitrates, and hence the term of the arbitration institution is inappropriate and only the rules of the institute apply. Administrative charges are applicable while referring to institutional arbitration. But the administrative structure of the institute leads to taking more time and money those results in affecting the efficacy of the arbitral process.[19]

Advantage of Institutional Arbitration:

1. Availability of pre-established arbitration rules and proceeding;
2. Administrative assistance from institutions;
3. Appointment of arbitrator by the institution on the request of the party;
4. Physical facilities and support services for arbitral proceeding;
5. An established format that has proven workable in prior disputes.

Difference between the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996

BASIS OF DIFFERENCE	THE ARBITRATION ACT, 1940	THE ARBITRATION AND CONCILIATION ACT, 1996
Appointment of Arbitrator	To get the appointment of the arbitrator the aggrieved party has to approach the jurisdictional Civil Court under Section 8 or Section 20[20] of the Act.	If the parties fail to reach to any agreement or if they fail to agree on the arbitration within 30 days from the receipt of the request by one party, the Chief Justice can

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[19] Institutional and Ad hoc Arbitrations: Advantages and Disadvantages, *available at*: http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc-Arbitrations-Advantages-Disadantages-by-Sundra-Rajoo.pdf (Visited on May 12, 2018).

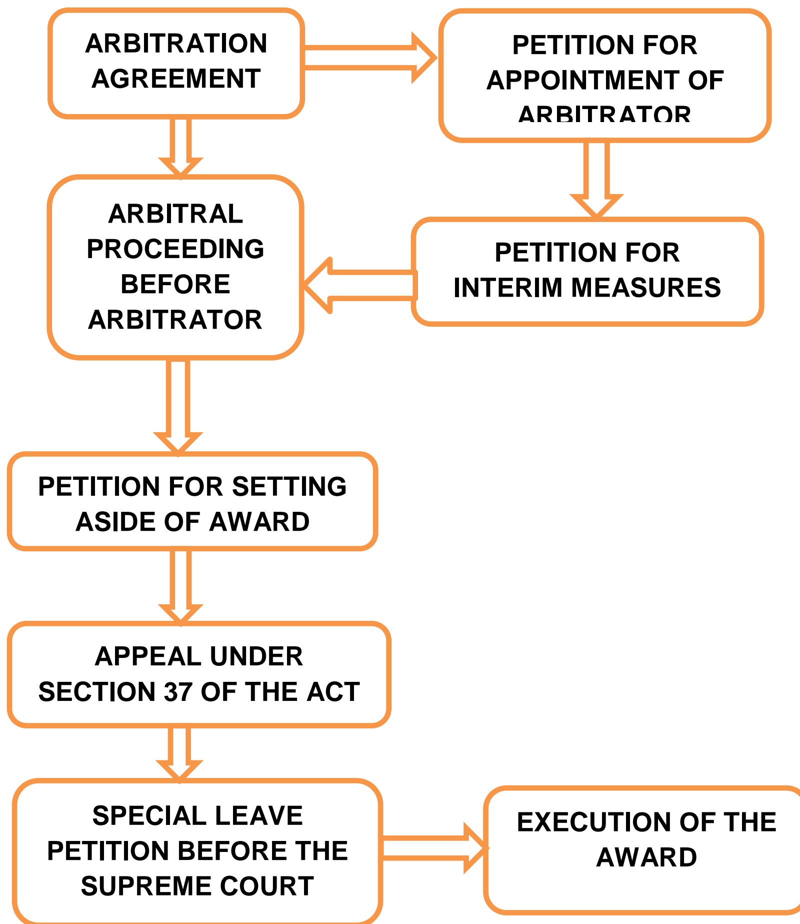
[20] Application to file in Court arbitration agreement- (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.
(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

		be moved for appointing an arbitrator either under Section 11 (5) or Section 11(6).
Challenge on the appointment of an arbitrator	The party aggrieved by the decision of the Civil Court regarding the appointment of an Arbitrator can directly approach the High Court invoking its revision jurisdiction under Section 115 of Code of Civil Procedure, 1908.	Failing any agreement for challenging an arbitrator between the parties, an aggrieved party under Section 13 has to send a written statement stating the reason for challenging the Arbitral tribunal. Under Section 13(5) the aggrieved party who has challenged the Arbitrator can approach the Court for setting aside such an arbitral award in accordance with Section 34 of the Act.
Power/ Jurisdiction of Arbitral Tribunal	On the specific question of law by the parties regarding the subject matter referred to the arbitrator the decision was binding on the parties. Similarly, the decision that was given by the Arbitrator regarding the jurisdiction was final if the parties had specifically vested the authority is the Arbitrator.	The Arbitral Tribunal shall decide on its own jurisdiction but if the Arbitrator has erred in deciding the jurisdiction and an award is made under Section 34, the decision can be challenged before any Court having appropriate jurisdiction.
Time limit for publishing award	The time for making an award was 4 month.	The time limit is not set for the Arbitral Tribunal to complete the proceeding and make award but comparatively the time has been reduced.
Award treated as decree	To make an award effective the Civil Court had to issue a decree	The Award automatically becomes a decree if it has not

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.
(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.
(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

	under Section 14 and Section 17.	been challenged.
Grant of Interest on award	It was governed under Section 29 where the Court decided the quantum.	Under Section 31(7) interest at the rate of two percent higher than the current rate of interest prevalent on the date of the award shall be charged.

Process of Arbitration



Role and Importance of Section 8 of the Arbitration and Conciliation Act, 1996

Section 8

Power to refer parties to arbitration where there is an arbitration agreement:

(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 to the arbitration agreement or any

person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

(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.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-Section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under Sub-Section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.[21]

Section 8 of the Arbitration and Conciliation Act, 1996 provides that the judicial authority, on the basis of the arbitration agreement between the parties, will direct the parties to go to arbitration. It also presents examples of conditions, which require perfection before context according to the terms of the 1996 Act.[22] If one party presents its case before the Civil Court for litigation despite the presence of the arbitration agreement, the other party can raise an objection. The Arbitration and Conciliation Act, 1996 says that before submitting its first statement on the content of the dispute, the party will have to raise such objection. However, once the opposite party gives the first statement the Court has to continue the case in the Court itself.

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[21] Section 8, the Arbitration and Conciliation Act, 1996.

[22] Madhu Sweta & Saurabh Bindal, Section 8 of the Arbitration and Conciliation Act, 1996: A Saving Beacon, *available at*: https://singhania.in/arbitration-and-conciliation-act-1996-Section-8/ (Visited on May 12, 2018).

While once the other party makes an application in the context of arbitration, the arbitrator can continue with arbitration and even can grant an arbitral award.

Therefore, the following four conditions have to be satisfied under this Section:

1. Presence of an arbitration agreement.
2. An action is brought by one party against the other party in the Court.
3. The subject matter of the dispute is similar to the subject matter contained in the arbitration agreement.
4. The application should be accompanied by an original arbitration agreement or a certified copy.

Thus, the language in Section 8 is peremptory in nature which means it precludes any question and it is unconditional. Where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided by the Court in the original action after such an application is made except to refer the disputes to an arbitrator.

STATEMENT OF THE PROBLEM

In the modern age of globalisation, the industrialisation has boomed up to a very high level resulting in a rapid increase in disputes between the parties. In context of arbitration proceedings, it has been observed that the Courts in few cases have turned down the application of the defendant under Section 8 of the Act to refer the matter to arbitration while in other cases the applications have been accepted by the Courts for referring it to arbitration. It has been found that the interference of Court is much than it should be in the arbitration matters. Thus, the researcher intends to analyse the power of the Court while referring the cases to arbitration.

OBJECTIVES OF THE STUDY

The primary aim of the researcher is to examine the significance of the arbitration proceedings in the resolution of disputes and providing relaxation to conventional forums.-

1. To evaluate the adequacy and effectiveness of Indian Arbitration Framework on the anvil of norms set out under International Arbitration Regime.
2. To examine the significance of Section 8 of Arbitration and Conciliation Act, 1996 in strengthening the foundation of Arbitration process and framework in India.
3. To analyse the approach of judiciary towards referring parties to the arbitration under Section 8 of the Arbitration and Conciliation Act, 1996.
4. To suggest the measures based on analysis of Judicial Approach towards Section 8 of the Arbitration and Conciliation Act, 1996 to make it more effective.

RESEARCH QUESTIONS

In order to achieve the objectives of the proposed research, an attempt shall be made to find out the answer to certain questions. These questions are nothing but the translation of objectives of research into concrete form. The researcher has framed following research questions to accomplish the study:

1. Whether Indian Arbitration Law is compatible with UNCITRAL for referring disputes to the Arbitration.
2. What are the grounds of rejection of the application under Section 8 of Arbitration and Conciliation Act, 1996 by the Courts?
3. What is the relevancy of jurisdiction of Civil Court in context of matters involving arbitration agreement or clause?
4. What is the impact of Judicial Approach towards referring the dispute to the Arbitrator?

SCOPE AND SIGNIFICANCE OF THE STUDY

As there is a rapid increase in disputes between parties, the traditional public forums are pressured under the weight of bulky and age old pending matters causing delay in timely justice; there is need to utilise the existing alternative to the disputes resolving mechanism. The present study aims to analyse the use, interpretation and construction of legislative provisions vesting the power in the Courts to refer the matters for arbitration. Since, the study is based on the elaboration of judicial approach through judgments; it would help to draw observations and conclusions as to the nature and requirements of the matters worth referring to the arbitration.

LIMITATIONS OF THE STUDY

This research work has a limited scope as it is concerned only with the approach of judiciary towards the power of the Court to refer parties to arbitration and the relationship between Indian arbitration and International arbitration. As the objective of the researcher is to analyse the judicial approach towards power of the Court to refer parties to arbitration and to come out with the conclusion that what principles Court has setup while referring the dispute and what are the lacunas that has to be filled up.

STRUCTURE OF THE STUDY

The research work is divided into V chapters. Chapter I is the introductory part. It contains definition, nature and importance of arbitration. The historical background of the international and national arbitration has been briefly discussed. Further, it contains research problem, research objective, limitation of study and research methodology.

Chapter II of this work deals with the literature review part where the researcher has briefly discussed about the various research done regarding the role of international arbitration in India and the role of judiciary while referring the dispute to arbitration and had arrived at a conclusion that no work has been done in the direction of analysing the role of judiciary while referring the dispute to arbitration.

Chapter III deals with the history of international arbitration and the scope of international arbitration. It further contains the comparison of the Arbitration and Conciliation Act, 1996 with the United Nation Commission on Trade Law (UNCITRAL)

Chapter IV deals with the scope and extent of Section 8 of the Arbitration and Conciliation Act, 1996. A detail discussion has been done with regard to the approach of judiciary towards Section 8 of the Act, 1996 through various judicial pronouncements.

Chapter V of the work is the Conclusion and suggestion part in which the researcher has given suggestion with regard to what amendment can be done in the Arbitration and Conciliation Act, 1996 in order to make it more easily accessible and transparent.

RESEARCH METHODOLOGY

The research is doctrinal in nature. The methodology applied in this research would be analytically and descriptively based upon the primary and secondary data. The researcher seeks to analyse:

1. The present legislative framework on Arbitration in India and Internationally.
2. The role of the judiciary in making clear provision regarding Court referring parties to arbitration on the basis of judgments of the Supreme Court, books, research papers, journals, articles, Act, conventions, online database etc.

The primary focus of this research would be upon the judgment of the Supreme Court available through the judgment reporters like AIR, SCC and online data base Westlaw, Indian Kanoon, Manu Patra, Hein-Online, SCC online etc.

CHAPTER II

REVIEW OF LITERATURE

The researcher, with an aim to discover the solutions of the problem stated above has consulted the work already done and studied the literature available on the topic. The researcher has reviewed following works:

Saturnino E Lucio (1986): the author has made an analysis of the scope of application and jurisdiction of the Model Law. According to the author, there are three major concepts on which the model law is based. Firstly, parties are having the freedom to conduct the arbitration. Secondly, freedom should be limited in order to prevent major defects in the arbitral procedure. Thirdly, arbitration is a procedure which takes place outside of the normal judicial system. The author states that the model law is an initial step and a major contribution towards the facilitation of international arbitration.[23]

V.S. Deshpande (1989): the author through his article has explained the various conditions while granting Award under Indian Arbitration Act, 1940. The author has pointed out that there is no error in unspeaking the award by the Arbitrator as he was a Court under Section 34 of Code of Civil Procedure and was under the implied duty to act according to the law but there should be reasonableness of the award. The author has pointed out through various cases whether the award should be set aside on the ground of an error of law on the face of it and came to a conclusion that even a wrong statement by the arbitrator was not a wrong statement of a proposition of law which was the basis of the decision of the award. He has made an analysis and has differentiated between arbitration agreement and parent contract, arbitration law and administrative law, a conclusion and a proposition law. The author has discussed the scope of arbitration clause and 'accepted matters' in Arbitration but failed to explain what matters cannot be referred to arbitration.[24]

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[23] Saturnino E Lucio, "The UNCITRAL Model Law on International Commercial Arbitration" 17 *ALR* 313 (1986).

[24] V.S. Deshpande, "Law of Arbitration" XXV *ASIL* 285 (1989).

Walter G. Semple (1993): the author has done a detail discussion on various provisional measures through International Arbitration Rules and The UNCITRAL Model Law. The article points out the differences between seeking interim measures of protection from a Court of law as permitted under Article 9 and from the arbitration tribunal as given under Article 17. The author concludes with an analysis that the Model Law has rendered an important service by clarifying and establishing important issues to the benefit of the legal systems of those countries which have adopted it.[25]

Jonathan Hill (1997): the author has pointed out that arbitration has been given a tremendous boost at international level when it comes to being a method for resolving commercial disputes which have connections with two or more countries. He further states that although the Model Law seeks to encourage States to modernize their arbitration laws has not been enacted by a very large number of countries. According to the author in the limited area of private international law, the 1996 Act is to be warmly welcomed.[26]

P C Rao (1997): the author strongly pleads for the promotion of Alternative Dispute Resolution System for the purpose of providing speedy and qualitative justice and to promote access to justice to all at a lesser cost. He analysed the scope for Arbitration in various fields such as Civil, Commercial, non-performance of the contract, Insurance, Banking, Intellectual Property Rights, Construction, Real Estates, Securities, Family Affairs, Matrimonial Disputes, Industrial and others. He pointed out that the Alternative Dispute Resolution is not a substitute but surely a supplementary one. For example, he identified in the matters relating to Constitution and the Criminal Law that there is no scope for the Alternative Dispute Resolution System. However, in the recent trends, the Criminal Law is also adopting this concept. According to him, the Lok Adalat has empowered to entertain cases relating to compoundable offences and cases relating to maintenance under Section 125 of Criminal Procedure Code. However, this aspect goes beyond the subject matter of the research. The author

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[25] Walter G Semple, "The UNICITRAL Model Law and Provisional Measures in International Commercial Arbitration" *IBLJ* (1993).

[26] Jonath Hill, "Some Private International Law Aspects of the Arbitration Act 1996" 46 *TICLQ* 274 (1997).

pointed out various advantageous arising out of successful adoption of Alternative Dispute Resolution System. The author stated that it is highly useful to understand each other concerned relating to the dispute. The author suggested that there are three things which are highly needful for the effective functioning of Arbitration mechanism in India. These are needed for good law, infrastructural facility and trained professionals including the lawyers relating to the first aspect that is good. The author highlighted that the Alternative Dispute Resolution is the only supplement to promote access to the justice as envisaged in the Constitution of India.[27]

Milon K. Banerji (1997): the author has emphasized on the relevance of the presence of the lawyers whether it is in arbitration or in the ordinary judicial proceedings and is meant by the dispute. He divided the disputes into three broad categories which are exclusively determined by the judiciary, disputes which can be determined by the arbitration and other disputes which can be determined either by the arbitration or by any other means of settlement. However, the author does not suggest anything to improve the efficacy of the arbitration specifically.[28]

F.S. Nariman (1997): the author has given more and specific focus to the Arbitration in general and International Commercial Arbitration in particular. The author expressed his grave concern that in judicial trend in India is not at all favourable for the development of International Commercial Arbitration. The development of International Commercial Arbitration is the need of the hour for the promotion of fast economic growth. The author recalled his experience relating to the Korean and US disputes destroying the confidence and the good faith and ethical behaviour of the Korean businessman. The author also stated that the Japanese attitude that they never prefer lawyers role in the business activities. He pointed out that many of the third world countries are feeling that arbitration has been imposed upon them. This attitude must change. The author strongly condemned the commercial attitude of the lawyers particularly the tendency of the losing party to ensure that the arbitration

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[27] P C Rao, *Alternative Dispute Resolution, What it is and how it works* , (Universal Law Publishing Company Private Limited, New Delhi, ed. 1997, Reprint 2012).

[28] Milon K. Banerji, *Arbitration Versus Litigation,* (Universal Law Publishing Company Private Limited, New Delhi, edn., 1997, Reprint 2012).

awards of the set aside by the domestic Courts if not possible to see that enforcement to getting delay is avoided. However, the author does not speak anything about non-commercial arbitration i.e., need of the hour to promote justice to the common man in the developing countries.[29]

Ayten Mustafayeva (2001): the author points out that the arbitration is contractual it is founded upon the common intention of the parties to that dispute. They are separate from the main contract of which it forms a part. This article aims to make an analysis on two aspects one is the validity of the contract and second is the validity of the arbitration clause. The author concludes with summarizing all the points that's says that arbitration agreement is accepted as a separate agreement and the concept of separability is essential.[30]

Adhipathi Sandeep (2003): the author in his work has explained how Arbitration is an effective alternative dispute resolution method. He has rightly explained the need for Interim Measures. The author in his work has done a comparative study of the Interim measures available in International Commercial Arbitration in different legal systems and the need for a harmonized structure.[31]

S.K. Chawala (2004): the book is dealing with the entire law relating to Arbitration and Conciliation and its application, practice and the procedural aspects prevailing in India. The author also compares the law of Arbitration prevailing in India and in the UK. The author's contribution relating to the application of decisions rendered by the UK Courts by the Indian Court in resolving the disputes under the law of Arbitration is highly noteworthy. The author discusses important cases decided by the Honourable Supreme Court of India relating to the Law of Arbitration, For Example, he cites the decision in the case of *Tarapore & Company* v. *Cochin Shipyards*.[32] The Court has rightly cautioned that whenever there is patent and latent ambiguity in the Indian Act,

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[29] F.S. Nariman, *Arbitration and ADR in India*, (Universal Law Publishing Company Private Limited, New Delhi, edn., 1997, Reprint 2012).

[30] Ayten Mustafayeva, "Doctrine of Separability in International Commercial Arbitration" 1 *BSULR* (2015).

[31] Adhipathi Sandeep, "Interim Measure in International Commercial Arbitration: Past, Present and *Future*" *UGA* (2003).

[32] AIR 1984 SC 1072.

the Court can resort to the English decisions. When the act is so clear and unambiguous then intention of the legislature should be ascertained within the four corners of the act. It should be strictly construed as per the languages used in that.[33]

Rajan and R. Desing (2005): the author has carried out a historical review on the origin and growth of arbitration in India. The author of this book has made an analysis on the arbitration in India with a brief history of International Commercial Arbitration. The author has concluded that arbitration method in India is suffering from fatal diseases such as slow, expensive, lack of infrastructural facilities, lack of adequate knowledge of potential parties, lack of institutional framework and contestants avoid finality. The author has suggested thirteen technical solutions such as the development of arbitration culture, infrastructural facilities, fast track arbitration awareness programs, teaching and training at law school and setting up more arbitration center, etc. as a for remedies for poor conditions on the working of arbitral process in India.[34]

A. Francis Julian (2005): the author through certain judgment made by the Supreme Court interpreted the provisions of the Arbitration Act, 1996 that has changed the law on judicial intervention in Arbitration Proceedings. The new interpretation given by the seven judge's bench of the Supreme Court in *SBP & Co.* v. *Patel Engineering Ltd.*[35] to Section 11 of the 1996 Act in the context of appointment of an arbitrator has laid down a new law in arbitration jurisprudence in India. The author has rightly discussed on one of the key issues in regard to the role of Court or judicial authority when a party initiates action ignoring the arbitration agreement while challenging the existence or validity of the arbitration agreement before it.[36]

Ali Yesilimark (2006): the author explained the provisional measures that can be granted by International Arbitration Institutions. He pointed out that the International Arbitration Tribunal should not depend upon the National Judicial Authorities for the

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33 S.K. Chawala, *Law of Arbitration Conciliation Practice and Procedure* (Eastern Law House, Lucknow, 2nd edn., 2004).

34 Rajan and R. Desing, *A Primer on Alternative Dispute Resolution (ADR)* 593-601 (Barathi law Publications, 1st edn., Jaipur, 2005).

35 (2005) 8 SCC 618.

36 A. Francis Julian, "Arbitration Law" XLI *ASIL* 23 (2005).

enforcement of interim measures. He made a thorough analysis of Article 36 of UNCITRAL Model Law on International Commercial Arbitration and Article 5 of the New York Convention. The author made a specific reference that only few National Laws provide mechanism for the enforcement of the Interim measures. The researcher would like to analyse and recommended that the Indian Law should also incorporate such a mechanism for effective enforcement of International Arbitration Institution.[37]

Dev Chopra (2008): the author of this article has examined the growth of judiciary in the last twelve year while working on the Indian Arbitration Act, 1996. The author has also focused on the negative role has been played by the Supreme Court that has prevented the growth of international trade and commerce. The researcher seconds with the conclusion drawn by the author that the interference of the Supreme Court is not minimal. The very purpose of the Arbitration and Conciliation Act, 1996 has been defeated.[38]

Sumeet Kachwaha (2008): the author states that without understand the real difference between recognition and enforcement, carried out a study entitled "Enforcement of Arbitration Awards in India". The author used both phrases together and did not make a distinction between them. According to the conclusion of this study, the recognition and enforcement of awards are of paramount importance for the success of arbitration in the international arena. This is well evidenced by the fact that the enforcement of awards worldwide is considered one of the primary advantages of arbitration but unfortunately, the Indian enforcement mechanism for foreign awards has thus been rendered inefficient, clumsy and uncertain. The most effective solution to the present problem would be just solved by an amendment to the Arbitration Act, 1996. Article 1(2) of Model Law on ICA should be added to the

[37] Ali Yesilimark, *Provisional Measures in International Commercial Arbitration*, (Kluwer Law Internationals, Netherlands, 2006).

[38] Dev Chopra, "Supreme Court's Role Vis a Vis Indian Arbitration and Conciliation Act, 1996", *available at*: http://works.bepress.com/dev_chopra/1/ (Visited on March 22, 2018).

Act, 1996 and notwithstanding the interventionist instincts and expanded the judicial review. Indian Courts do restrain themselves from interfering with arbitral awards.[39]

A.K. Ganguli (2010): the author in his work has put forward whether there should be two separate statutes governing arbitration- one for domestic arbitrations and the other dealing exclusively with international commercial arbitration. The author has rightly pointed out that the statute dealing with international commercial arbitration could be the legitimate adoption of the UNCITRAL Model Law and the statute dealing with domestic arbitration would, however, require considerable variations from the model law in view of the special requirement of domestic arbitrations. The researcher second with the thought of author that if domestic arbitration is to serve as an effective alternative dispute resolution mechanism, jurisdiction must be conferred on all Courts to deal with all aspects of arbitration from the appointment of an arbitrator to recourse against the arbitral award.[40]

S.S. Misra (2010): the author states that the present Arbitration Act, 1996 has sought to remove many serious defects with which the earlier Arbitration Act, 1940 suffered and at the same time, has also incorporated many modern concepts of arbitration which are universally accepted by most countries of the world. It may be reasonably concluded that the working of the Arbitration Act, 1996 would bring about qualitative improvement in the arbitration practice in India.[41]

Harpreet Kaur (2010): the author of this paper has evaluated the Arbitration and Conciliation Act, 1996 by the reform that took place by making a bifurcation into three segments. The first deals with how the Arbitration and Conciliation Act, 1996 has improved the Arbitration Process by interpreting and resolving the disputes regarding the ambiguities about the parliament intent. The second deals with how the process can be even more effective in expediting the process with a few revisions. Arbitration in India can further improve if the Arbitral Tribunal had a more active role in dispute resolution. Thirdly, by revising the act where only the institutional arbitration is allowed

[39] Sumeet Kachwaha, "The Arbitration Law of India a Critical Analysis" 1 *AIAJ* 105-26 (2005).

[40] A K Ganguli, "Arbitration Law", XLVI *ASIL* 31(2010).

[41] S.S. Misra, *Law of Arbitration & Conciliation in India with Alternative Dispute Resolution Mechanism* 33 (Central Law Agency, Allahabad, 2nd edn., 2010).

crucially for parties and attorneys to gain confidence in the legitimacy of the arbitration process. The author has quoted the remarks given by Justice D.A. Desai that, "The way, in which the proceedings under the 1940 Act are conducted and without an exception challenged in the Courts, has made lawyers laugh and legal philosophers weep. Although the 1996 Act can be improved in certain areas, it is still an improvement in the arbitration process over prior legislation".[42]

A.R Lakshmanam (2010): the author has come out with an outstanding compilation of series of Supreme Court judgments fostering the growth of alternative dispute resolution in commercial and business laws in the country. The first part traces the case laws on various aspects of arbitration law like the issue of appointment of the arbitrator by the Court etc. and the second part focuses on case law on business and commercial laws. Some of the remarkable judgments of the author include *Hari Shankar Singhania* v. *Gaur Hari Singhania,*[43] the author had held that family settlement must be treated differently from any other formal commercial settlement and as such settlement in the eyes of law ensure peace and good will among the family members. In *Jindal Vijaynagar Steel* v. *Jindal Praxiar Oxygen Co. Ltd*,.[44] It was held by the author that on the question of jurisdiction; the jurisdiction of the High Court under the letters patent appeal is different from the jurisdiction of Civil Courts under Section 20 of Code of Civil Procedure, 1908 and same rules cannot be between unlike. The author has discussed the case laws intelligibly and compositely making it interesting with relevant provisions of law.[45]

Bhartendu Yadav (2011): the author points out that, the purpose of Arbitration Act is to provide quick redressal to commercial disputes by private Arbitration. Quick and final resolution of any commercial dispute is necessary for smooth functioning of business and industry. This article aims to analyse the position of the Indian Arbitration Act, as to the finality of the resolution of disputes, when the parties choose

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42 Harpreet Kaur, "The 1996 Arbitration and Conciliation Act: A Step Towards Improving Arbitration" 6 *HBLJ* (2010).

43 JT 2006 (4) SC 251.

44 2006 (3) ARB LR 340 (SC).

45 A.R Lakshmanan, *ARBITRATION BUSINESS & COMMERCIAL LAWS* (Universal Law Publishing Company Private Limited, Delhi, 2010).

arbitration as the mode of dispute resolution and the role of Courts on such decisions.[46]

Trisha Mitra (2011): the author points out that, India is on the threshold of phenomenal growth in industries and commerce and it is but obvious that such a growth will be accompanied by a rise in commercial disputes. A statutory framework that ensures arbitration in India as a smooth and free process will go a long way in boosting this industrial and commercial growth in the country. However, it is of the opinion of the critic, legal luminaries and even business houses that the Supreme Court of India and the High Courts, in a slew of judgments, have failed to recognize and uphold the essence of the Act, which has led to confusing and faulty interpretations by the critics. The author of this article analyses the various judgments, its impact and the changes in store.[47]

S.C. Tripathi (2012): the author has done a comparative analysis of the old and new act regarding arbitration in India and has given an observation that the arbitration and conciliation act, 1996 is more comprehensive and that the Civil Court can intervene only where it so specifically provided in the Act. The author has also pointed out that it is unfortunate on the part of the Arbitration Act, 1940 that it gave enormous powers to Civil Courts with regard to arbitration proceedings.[48]

Sukumar Ray (2012): the author wrote about the advantages of *Adhoc* Arbitration and Institutional Arbitration but did not discuss the developments of Arbitrations that took place in the International arena. The author has compared The Arbitration Act, 1940 Act and The Arbitration and Conciliation Act, 1996. He pointed out that the institutional Arbitrational is more advantageous than the *Adhoc* Arbitration. The author

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[46] Bhartendu Yadav, "The Role of Courts in Arbitration the Role of Courts in Arbitration" 3 *IIAM* 2 (2011).

[47] Trisha Mitra, "Arbitration In India: Looking Ahead" 3 *IIAM* 2 (2011).

[48] S.C. Tripathi, *Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution* 10 (Central Law Publication, Allahabad, 6th edn., 2012).

has not discussed regarding the improvement of the efficacy of the Indian Arbitration System.[49]

A.K. Ganguli (2012): the author in his work has majorly discussed on the appointment of Arbitrator. He has pointed out that the essence of arbitration lies in the agreement between the parties to submit their differences for adjudication to a third person whose judgment they trust. The author through the landmark judgment in *Denel (Proprietary) Limited* v. *Ministry of Defence*[50] has rightly put of that to preserve the sanctity of the arbitration agreement and to hold the parties bound by their commitment to arbitrate if a party declines to nominate or appoint an arbitrator in terms of the arbitration clause, such party would forfeit its right to make an appointment once the other party moves an application under Section 11(66). According to the author, Court has clarified many concepts which had heretofore remained unanswered or ambiguous, but there still remain major areas where only the legislature can effectively shed a light.[51]

A.K. Ganguli (2013): the author has discussed the Jurisprudential approach to arbitration has according to him it has always been a challenge of the international community to achieve the twin objectives of competing interests firstly, to standardize enforceability of international arbitral award and secondly, to harmonize the different municipal approaches to substantive aspects of arbitration. The author through various landmarks judgments like T*amil Nadu Electricity Board* v. *ST- CMS Electric Co. Private Ltd.*[52]*, Gujrat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.*[53]*, Peterson Farms Inc.* v. *C&M Farming Ltd.*[54] has discussed the opinion of the Court regarding the act that would be seen as constituting interference with the jurisdiction of the Foreign Court. The author has pointed out that the economy in India has continued to grow by leaps and bound. As there will be increase in the inflow of reign investment and growth of the economy, disputes are bound to increase. The researchers

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49 Sukumar Ray, *Alternative Dispute Resolution with the Gram Nyayalayas Act* (Eastern Law House Calcutta, 2012).

50 (2012) 2 SCC 759.

51 A.K. Ganguli, “Arbitration Law”, XLVIII *ASIL* 27 (2012).

52 (2008) 1 Lloyds Rep 93.

53 (2008) 4 SCC 755.

54 [2004] EWHC 121 (Comm).

seconds with the opinion of the author that with the fertile occasions for Indian Courts to interpret and clarify the legal framework with respect to arbitration and introduce greater certainty and predictability in the law while at the same time also making it better harmonized with international practices.[55]

Ajay Kr. Sharma (2014): the author has rightly stated that when there would be excess of intervention by the National Courts then the whole purpose of arbitration process would get defeated by destroying its sanctity and benefits and it may lead to crumbling of the institution of arbitration in the country. Another point that has been raised by the author in this regard is that this problem may a cause serious problem with regard to International Commercial Arbitration. In this paper, the author has highlighted and made an analysis on the problem that is concerned with the nature of the power of the National Courts to intervene in the arbitration process and its scope, at all stages including, for its initiation and at the awards enforcement stage. The author through various judicial judgments given by the Supreme Court of India has done the analysis on how despite the inconsistency in the judicial approach attempts have been made time and again to adopt a non-interventionist judicial attitude displaying pro-arbitration bias, particularly in cases of ICA outside India.[56]

Vivek Vashi & Shreya Ramesh (2015): the author mentions that the arbitrability of fraud, in particular, has been the subject of nuanced discussion and conflicting authorities. Parties have resorted to citing fraud, collusion or malpractice in a bid to avoid or circumvent arbitration proceedings. However, Indian jurisprudence has taken great strides in the past year towards achieving parity with the International trends in respect of Arbitrability of fraud .While arbitration globally, has emerged to be a robust and proficient means of dispute resolution, its development in India has been guarded by the hasty interference of Courts and a series of conflicting line of authorities.[57]

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[55] A.K. Ganguli, "Arbitration Law", XLIX *ASIL* 29 (2013).

[56] Ajay Kr. Sharma, "Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act, 1996" 3 *IJAL* (2014).

[57] Vivek Vashi & Shreya Ramesh, "Arbitrability of Fraud in India" 8 *ILJ* (2015).

Shefali Roy (2015): the author focuses on the provisions vis-à-vis the divergence of jurisdiction between Courts and arbitral tribunals. It looks at the doctrine of *kompetenz-kompetenz*, which provides tribunals with the power to examine and determine its own jurisdiction. The conflicting issues which arise while deciding on the jurisdiction are considered liberally, postulating on the question of "Who decides?" in the second part, the article also evaluates the stance of law concerning the enforcement of foreign arbitral awards in India. The authors conclude with some suggestions pertaining to the overall structure of Arbitration Act while focusing primarily on the aspect of jurisdiction.[58]

Jawad Ahmad (2015): the author in his book has done the substantive analysis of the 2010 Rules. The book structures the rules according to overall themes organized under six Parts, thus offering a comprehensive take on the particular rule in question. An elementary outline of the UNCITRAL Arbitration Rules and their implication to international arbitration practice is also specified in the book. The author has pointed out that the book does not provide an extensive comparison between the UNCITRAL Arbitration Rules and other arbitral rules, legislation, and treaties. However, the book does reference these instruments to shed light on the Rules.[59]

D.R Dhanuka (2017): the author has discussed in great detail and sharp distinction has been made between criminal deception and a dispute merely alleging fraud not so serious, in context or decision on an application under Section 8 of Arbitration and Conciliation Act, 1996 and mandate a law directing judicial authority to pass order of reference to Arbitration while deciding application under Section 8 of the Act. The author through various judgments laid down that while deciding an application under Section 8 of the Arbitration and Conciliation Act, 1996, the Court is required to pronounce upon arbitrability or non- arbitrability of the dispute. The researcher agrees with the author that it is the need of the hour that all such matters be decided with

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58 Shefali Roy, "The Aspect Of Jurisdiction In Indian Arbitration – II" 7 *IIAM* 2 (2015).

59 Jawad Ahmad, "Review of the UNCITRAL Arbitration Rules—A Commentary (Second Edition) by David D. Caron and Lee M. Caplan" 33 *BJIL 294* (2015).

utmost expedition to prevent greed and selfishness of some parties to defeat and delay justice.[60]

Beside this, the researcher has gone through various landmark judgments: in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd. and Ors* (2011 5 SCC 532), *A. Ayyasamy* v. *A. Paramasivam & Ors*. (2016 10 SCC 386), *Hindustan Petroleum Corpn. Ltd* v. *M/S. Pinkcity Midway Petroleums (*2003 6 SCC 503), *Rashtriya Ispat Nigam Limited* v. *Verma Transport Company* (AIR 2006 SC 2800).

The researcher after going through the above available literature has found out that though, various research has been done in the field of arbitration nationally and internationally but still their remains a research gap in the this specific area of administering the power of the Court to refer parties to arbitration. Hence, the researcher through this study has tried to fill the research gap.

60 D.R. Dhanuka, "Disputes Involving Serious Allegations Of Fraud Amounting To Criminal Offences Whether Non- Arbitrable And The Civil Suit Is The Only Remedy In Such Matters As Contra-distinguished From Disputes Involving Bare Allegations Of Civil Fraud Which Are Arbitral When There Is An Arbitration Clause- Latest Case Law- Reported In 2016(5) Arbitration Law Reporter Page 326- Judgment of Hon'ble Supreme Court A Critical Study" 104 *AIR* 21(2017).

CHAPTER III

OVERVIEW OF THE INDIAN ARBITRATION FRAMEWORK IN THE CONTEXT OF INTERNATIONAL ARBITRATION LAW

Introduction

International Commercial Arbitration is not a new phenomenon but it has become more organized, scientific and clear in recent times. Arbitration was initially an expedient rather than being the principle. Traditionally it was viewed as quasi-judicial, religious, political character instead of a judicial proceeding. In the 19th century, it was recognised as a principle of justice. Therefore, it is the slowest, longest formal and permanent establishment. It evolved from the great efforts of the statesmanship as the present concept of arbitration as a principle was given by a supreme judicator of the nations. Arbitration has its existence long before when the law did not have its existence nor the Courts were established or principle of law was formulated.[61]

It had been stated that behind international law and arbitration lies the physical forces, and some compulsory process to ensure the performance of award and the observance of the law. For resolving disputes particularly commercial disputes, arbitration is the best available method all over the world. Arbitration cannot exist if no dispute arises. A valid legal arbitration agreement is required which means in the absence of valid arbitration agreement, a dispute cannot be submitted to arbitration and even if it is submitted the award will not be legally binding. The process of arbitration has been retarded by the spirit of military conquest, distrust of arbitral tribunal and adding to it by the unwillingness of ruling statement to forego the opportunity to increase the territory and power of their country.

Evolution of International Arbitration

International commercial arbitration began in England for the first time. Not much assistance was given by the Court or the parliament. An award made in England in arbitration between an English nation and a foreigner could be enforced in England

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[61] Roebuck, Derek, "Sources for the History of Arbitration: A Bibliographical Introduction" 14 *LCIA* 237–344 (1998).

by or against the foreigner in England. There were two major difficulties at that point in time.

The first was that in many countries an agreement to arbitration could be validly entered with regard to existing dispute by also called compromise and in those countries an agreement to arbitration all disputes that might arise in the future in connection with a contract was not valid. This difficulty with regard to the agreement was effectively eliminated for non- domestic arbitration agreement in the year 1923 by the Geneva protocol on arbitration clause adopted by the League of Nations.[62]

The second difficulty was with regard to the recognition and enforcement of foreign arbitral awards. Therefore, the League of Nations adopted the Geneva Convention for the execution of foreign arbitral awards after the protocol on the Arbitral Clause, in 1927 was adopted. The states that had signed the agreement agreed to implement the arbitral award in the field of any other contracting state in line with the 1923 protocol.[63]

Globalisation of Commercial Arbitration

From the Geneva Protocol of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, the globalisation of the international arbitration can be traced. As said by Fali S. Nariman[64] "these international instruments were largely ineffective. Therefore, they went through the League of Nations, which sponsored them". The ICC is a strong supporter of arbitration to resolve the international commercial dispute and therefore, has become the voice of the International business community. The ICC was established in 1919. And as there was a failure in the Geneva Convention it leads to the formation of a more effective mechanism. The three major developments were:

1. The New York Convention of 1958;
2. The UNCITRAL Arbitration Rules of 1976;
3. The UNCITRAL Model law of 1985.

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62 Dispute Settlement, International Commercial Arbitration, *available at:* http://unctad.org /en/Docs/edmmisc232add38_en.pdf (Visited on May 4, 2018).

63 *Ibid.*

64 Fali S. Nariman, International Arbitration in the Twenty-First Century: Concepts, Instruments and Techniques, *available at*: http: //www.tradelawdevelopment.com/index.php /tld/article /view/1%282%29%20TL%26D%20308%20%282009%29/30 (Visited on May 4, 2018).

The New York Convention: The New York convention is also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is one of the most important documents regarding the use of international arbitration and also its enforcement. Despite its being one of the oldest conventions, it is considered as the most important legal document of International Arbitration. The treaty was drafted by United Nations to recognize and enforce International Awards even if the procedure takes place in some other country. The importance lies in the having the award that was completed in another country validated in the country related to the private jurisdiction case. The convention was adopted on 10 June, 1958 came into force on 7 June, 1959 and was ratified by the United States in 1970. As of now in 2018, 159 nations had signed and ratified this important convention.[65]

The UNCITRAL Rules: The UNCITRAL rules were adopted on 26 April, 1976 for administering arbitral proceedings. These are a complex set of rules that cover all the aspect of the arbitral process that was adopted by most of the International and local institutions either with slight changes or in their core original form. These rules were considered to be acceptable under various economic systems as well as in various stages of development or operation, either common or civil law systems, UNCITRAL rules are optional for parties. This represents a viable and practical tool for the creation of *ad hoc* proceeding, which has received worldwide recognition as the original purpose is to address different areas of the arbitration process and include procedural rules and model arbitration clauses.[66]

The UNCITRAL Model Law, 1985: The Model Law on arbitration was another significant milestone that emerged in 1985. The rules led down in UNCITRAL Arbitration Rules were followed in the Model Law. The Model Law not only supports the arbitral process but extents by giving permission to the parties to conduct the arbitration as per their wish.[67] Redfern and Hunter state "*If the New York Convention propelled international arbitration onto the world stage, the Model law made it a star,*

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[65] Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), *available at:* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration /NYConvention_status.html (Visited on May 4, 2018).

[66] United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976.

[67] *Supra* note 60.

with appearances in states across the world."[68] A number of countries have adopted the model law outright, while many other countries have based their arbitration laws on it. The ideal Model law is only designed to regulate international commercial arbitration that a state which has enacted it may have a different law governing the domestic arbitration. If a state wishes to limit the freedom of the parties by the adoption of Model Law it would permit the State to offer a law of arbitration that meets the prevailing consensus on the procedures that will govern the international commercial arbitration.[69] Deficits in the original law led to a revision which was adopted as the Revised Model Law by the UN in Dec 2006 – the key changes in the revision include an allowance for the requirement of an arbitration agreement to be in writing to be elaborated in very broad terms.[70]

Nature and Scope of International Arbitration

The International Arbitration found its sources from the arbitration agreement. An analysis of the allocation of the jurisdiction between the State Court and the Arbitral Tribunal was necessary for the determination of the conditions of its enforcement. According to Article 2 (a) 'Arbitration' is defined as under-*"arbitration is the means by which the parties to dispute get the matter settled through the intervention of an agreed third person.*[71] In other words, arbitration is an optional private process that is carried out pursuant to an agreement to arbitrate the disputed matter.[72] Arbitration agreement shows a combination of procedure as well as contract connecting the foundational principle governing the law of contract and civil procedure. The third party to the dispute decides the subject matter of the dispute is the general idea of Arbitration. According to Webster Dictionary Arbitration can be defined "as the hearing and determination of a cause between parties in controversy, by a person or persons chosen by the parties. It states that arbitration may be done by one person, but it is usual to choose two or three called arbiters; or for each party to choose one,

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68 A Brief History of Commercial Arbitration, *available at*: https: // dynalex.wordpress.com /2012/12/28 /a-brief-history-of-commercial-arbitration/ (Visited on May 4, 2018).

69 *Ibid.*

70 *Ibid.*

71 Clause 2 (a), the Model Law, 1985.

72 S.C. Tripathi, *Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution* 28, (Central Law Publications, Allahabad, 6th edn.,2012).

and these to name a third, who is called the umpire. Their determination is called the award."[73]

The origin of arbitration comes from a Latin term '*arbitraer*' that means 'to judge'. It is important to point out that the third party so appointed to resolve the dispute should be neutral. The scope of the agreement decides the power of the arbitrator and it is the final decision by which the parties are bound and they cannot appeal.

Lord Mustill[74] presents his view on, the Convention of 1958 that:

> *This Convention has been the most successful international instrument in the field of arbitration and perhaps could lay claim to being the most effective instance of international legislation in the entire history of commercial law*.

An arbitration clause is an agreement by which two or more parties agree to be bound to submit some existing or future dispute to an arbitral tribunal. It is necessary that the parties should indicate the intention to go to the arbitral tribunal rather than a State Court when a dispute arose. The arbitration agreement creates a duty to resolve the dispute through arbitration by excluding the primary jurisdiction of the State Courts with respect to the law applicable.

Arbitration is a process by which different parties from different States can get their dispute resolved by a tribunal that is impartial as both the parties have agreed to resolve their dispute through a common agreement and the parties can choose their tribunal according to the specific need. Like there are chances that the parties to the agreement are from the same country but the procedure is taking place at another state and the other scenario could be that the arbitrator and parties are located in the same nation but the object of dispute is located in another State. Thus, when such occasion takes place the arbitration is considered internationally. It is important that the arbitrator so appointed should be competent to resolve the dispute and holds such qualification which is required and necessary.

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73 Webster's Encyclopaedia Unabridged Dictionary of The English Language, Gramercy Books: New York, a*vailable at*: http://www.hyperdictionary.com/dictionary/arbitration (Visited on May 3, 2018).

74 *Supra* note 68.

Arbitration is international if:

(a) The parties to an arbitration agreement have their places of business in different States at the time of the conclusion of that agreement; or

(b) One of the following is situated outside the State in which the parties have their place of business:

(i) The place of arbitration is determined according to the arbitration agreement;

(ii) Any of the place where a substantial part of the obligations of the commercial relationship will be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) The parties to the arbitration agreement have expressly agreed that the subject-matter of the dispute that is in the arbitration agreement is related to more than one country.[75]

As there is rapid growth in the technology, there is a clash of interest between parties causing dispute. Hence, international arbitration that is conducted all over the world provides quick, practical and economical settlement of cross-border disputes, the field lies at the interSection of the internationally-followed principle of law and tailor-made national legislation.

India is also a part of the tripartite comparison to facilities meaningful interaction between the model law, English legislation, and the India law. The Constitution of India under Article 51 (b) and Article 51 (c) provides that the state shall endeavour to foster respect for international law and treaty obligations in dealing with the organized people with on country and encourage settlement of international disputes by International arbitration is conducted all over the world as it provides quick, practical and economical method of dispute resolution.

The term International Commercial Arbitration carries the meaning as defined under the UNCITRAL model. It covers all matters arising from all relationships of a commercial nature, whether contractual or not.[76] The increasing use of arbitration for

75 Article 1(3), the Model Law, 1985.

76 UNCITRAL Model Law states Relationship of a commercial nature include, but are not limited to the following transactions: any trade transaction for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring; leasing;

the resolution of the international dispute has led to the development of more standardized international arbitration procedure making it more predictable and accessible particularly to new users.

ICA is a process where the private system of transnational dispute resolution proceeds with the involvement of the State.[77] But on the other hand, it is not an autonomous self-sustaining system but it is the one that intersects with the national legal system at various points in the arbitration process.[78] The challenge that is in front of international arbitration by litigating at the crossroads of common law and civil law tradition lies in the opportunity it takes to litigate each case to fashion procedural rule that best suits that particular proceeding and serves clients interest.[79] Hence, the two arbitrations will never be conducted exactly in the same way nor should they be so conducted as the best procedure and rules are those that properly reflect the need of the party based on particular fact and circumstances of each dispute.[80]

Arbitration Law in India

The Arbitration system is known from the time Panchayat system was there and the members of the Panchayat were elected on the basis of their status in the society. Before 1996, the law governing arbitration in India consisted mainly of three statutes:

(i) The Arbitration (Protocol and Convention) Act, 1937;

(ii) The Indian Arbitration Act,1940 and;

(iii) The Foreign Awards (Recognition and Enforcement) Act, 1961.

Based on the English Arbitration Act, 1940, the Indian Arbitration Act, 1940 was governing arbitration in India, and both the 1937 and 1961 acts were designed to

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construction of works; construction; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road.

77 Mohammed Muddasir Hossain, International Commercial Arbitration: The Need for Harmonized Legal Regime on Court Ordered Interim Measures of Relief, *available at*: https://tspace.library.utoronto.ca/bitstream/1807/33246/1/Hossain_Mohammed_M_201211_LLM_thesis.pdf (Visited on May 4, 2018).

78 Involvement of different national legal systems is often necessary at three critical stages: enforcing the agreement to arbitrate, supporting the effectiveness and fairness of arbitration proceedings, and recognizing and enforcing the arbitral award ultimately rendered.

79 Javier Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective," 5 *CJIL* 303 (2004).

80 *Ibid.*

implement foreign arbitral awards (1961 Act enacted the New York Convention of 1958). In an effort to modernize the old 1940 Act, the Arbitration and Conciliation Act, 1996 came into force on 22 August, 1996 with the primary objective to provide speedy resolution of the dispute with limited judicial intervention. The 1996 Act on arbitration consolidated and amended the law relating to arbitration, International Commercial Arbitration and Enforcement of Foreign arbitral Award.[81] There are few Acts such as Indian Contract Act, Foreign Award (Recognition & Enforcement) Act, 1961 that are relevant and applicable to arbitration to be specific on International Arbitration. The primary intention of the legislature in enacting the Arbitration & Conciliation Act 1996 to reduce excessive judicial intervention as the earlier Arbitration Act, 1940 suffered serious infirmities. Therefore Section 8 of the Act makes it mandatory on the part of the Court to refer the disputes to Arbitral Tribunal where arbitration agreement or arbitration clause is present.

In *Food Corporation of India* v. *Indian Council of Arbitration*[82] the Court held that the Arbitration and Conciliation Act, 1996 was brought into force to minimize the supervisory role of the Court in the arbitral process by appointing arbitrators of such qualification as specific to the subject matter in the dispute. Likewise in *Everest Lasson Ltd* v. *Jindal Expert Ltd*.[83] the Supreme Court held that through alternative dispute resolution system the dispute has to be resolved quickly and by incurring a lesser cost.

In case of International Commercial Arbitration taking place outside India, the law would be applicable only if the parties in the dispute have agreed to make their arbitration subject to the jurisdiction of law. The Arbitration and Conciliation Act, 1996 following the English Arbitration Law, 1996 covers both Domestic and International Arbitration. The main focus of the Arbitration and Conciliation Act, 1996 is on International Commercial Arbitration. But there is disparity among the international commercial arbitration and purely domestic or national arbitration as the 'nature of

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81 India: Evolution Of Arbitration in India, *available at*: http://www.mondaq.com /india/x/537190/Arbitration+Dispute+Resolution/Evolution+Of+Arbitration+In+India (Visited on May 4, 2018).

82 AIR 2001 SC 2291.

83 AIR 2001 SC 356.

dispute' and 'parties to dispute' are the two determinants on which the International Commercial Arbitration is based. Where one is holding objective value and the other one is holding subjective value. The domestic law either applies in both determinants or on any one of them.[84] It can be noted down that 1996 Act is a departure from the Model Law as it adopted the subjective criterion in enacting the statutory definition of International Commercial Arbitration that is given under Section 2(f).[85] In the case of *TDM Infrastructure Pvt. Ltd* v. *UE Development India Pvt. Ltd.*[86] the Supreme Court denied considering the application under Section 11 of the Arbitration and Conciliation Act, 1996 providing for the appointment of an arbitrator by the Chief Justice of India or his nominee in an international commercial arbitration, by simply concluding that it was not the case of International Commercial Arbitration. The Court held that the company that is incorporated in any other country than India is excluded from the said definition. The conclusion that is drawn is that an Indian subsidiary of a foreign corporation cannot seek to indulge in 'international commercial arbitration' under the 1996 Act with another Indian entity or individual.[87] A valid distinction has been made between the international and domestic arbitration but it can be overlooked as somewhere down the line they bring uniformity among International commercial arbitration and domestic arbitration.[88]

Arbitration under Arbitration and Conciliation Act, 1996 and UNCITRAL Model Law

Arbitration Agreement

An arbitration agreement is an optional agreement where two or more parties agree to get their disputes settled by one or more arbitrator and the subject-matter of the dispute holds an International character. The legal foundation of arbitration is the

[84] Ajay Kr. Sharma, "Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act, 1996" 3 *IJAL* (2014).
[85] *Supra* note 70.
[86] (2008) 14 SCC 271.
[87] *Ibid.*
[88] Saleh, Samir, "The *Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law"* 1 *AQL 198* (1986).

arbitration agreement. An arbitration agreement is written under most of the legal regimes, international treaties, and multilateral conventions. Though, at State level with common law jurisdiction, an oral arbitration agreement is also legally valid.[89] But if the Article 7(2) of Model Law, 1985 is taken into consideration then an arbitration agreement should be written and so far as the existence of the agreement is concerned it has been alleged by one party and not been referred by another party, it can be in any form. In the recent years, there is a wider interpretation of the written requirement of the arbitration agreement especially with the introduction of new and modern instruments for the communication purpose. The recent developments that have been made in the field of arbitration practice, an arbitration agreement can be concluded by data messages in Electronic Commerce. Therefore written requirement is said to meet if the agreement is included in an exchange of letters, telexes, telegrams or other means of telecommunication.[90] Section 7[91] of the Arbitration and Conciliation Act, 1996 is on the pattern of Article 7[92] of the Model Law. The Arbitration and Conciliation Act, 1996 makes it mandatory that all the arbitration agreement should be in writing. The Arbitration and Conciliation Act, 1996 is lacking by not

89 Indira Carr, *International Trade Law* 615 (Cavendish Publishing Limited, London, 3rd edn., 2005).

90 *Supra* note 21.

91 Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in-- (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication 1[including communication through electronic means] which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

92 Definition and Form of Arbitration Agreement - 1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. 2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

proving grounds by which foreigners have the capacity to enter into the contract. The existing law only indicates the conditions that have to be fulfilled by the parties. The arbitration clause is generally considered 'separate' or 'severable' from the main contract that is concluded by the parties, the Doctrine of Separability applies[93] which means that even if the main contract is invalid, the arbitration clause will still be held valid. It is the fundamental principle without which referral to arbitration will be unreliable. The Arbitration agreement contains a detail of an arbitration process, for example, the subject matter of arbitration, the procedure to be followed, and the substantive law that would be allowed. The fact that the basis of arbitration is contractual is not disputed 'an arbitrator's' power to resolve a dispute is found on the common intention of the parties to that dispute. An Arbitral Tribunal has the competence to rule on its own jurisdiction, subject to judicial review.[94]

Waiver of the Right to Object

According to Article 4 of the UNCITRAL Model Law[95] a party is estopped from later invoking non-compliance with a procedural requirement laid down in the arbitration agreement or non- mandatory provision of model law. The waiver should be effective on both, the phrase of arbitral proceeding and post-award stage involving recourse against the award.[96] Section 4 of the Arbitration and Conciliation Act, 1996[97] lays down that if a party derogates or the party does not observe and obey the provisions of the agreement and still in spite of non- compliance of the Act and/or the agreement proceeds to the agreement despite having a right to object has to actually raise an

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93 Ayten Mustafayeva, "Doctrine of Separability in International Commercial Arbitration" 1 *BSULR* (2015).

94 Article 16 (1), the Model Law.

95 Waiver of right to object- A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

96 Gerold Herrmann, UNCITRAL's Work Towards a Model Law on International Commercial Arbitration, 4 Pace L. Rev. 537 (1984).

97 Waiver of right to object. —A party who knows that— (a) any provision of this Part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

objection without any delay or within time which is fixed to take such an objection. And any failure to take and raise the objection amounts to waiver to the right to object. The Supreme Court in *J.G. Engineers Pvt. Ltd*. v. *Calcutta Improvement Trust*[98] observed that the Respondents has not taken the objection regarding the non-arbitrability of the claim in front of the arbitrator and has been estopped from raising such an objection after having suffered the award. Further the Supreme Court has also made an observation that when an appellant knowingly submits to the arbitration proceeding after having full knowledge of the circumstance regarding which the objection can be filed but refrain from doing so hoping that maybe the decision turns out to be favourable shall be deemed to have waived his right to protest and any objection raised after the pronouncement of the award shall not affect the substance of arbitration.[99] The principle of waiver is the direct consequence of the prohibition of the inconsistent behaviour that is derived from the principle of good faith and fair dealing. Any objection raised in the later stage of the proceeding is considered inconsistent with its previous behaviour because silence is kept in connection with the waiver of the right of the object. The other side of the coin is whether the arbitral tribunal has not been followed, should take into account the circumstances of the case, including the nature of the provision, without any delay, due to inappropriate delay. It is important to note down that the right of waiver does not arise where there is an objection to the violation of mandatory provisions.[100]

Court

Article 9[101] reads as "*it is not incompatible with an arbitration agreement for a party to request, before or during Arbitral Proceeding, from a Court an interim measure of protection and for a Court to grant such measures*". The expression 'Court' is defined under Article 2 (f) as a body of organs of the judicial system of a State. Thus, Article 9 holds no limitation with regard to Court. It imposes no obligation on the Court of any state to grant an interim measure of protection. It establishes that when the arbitration

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98 AIR 2002 SC 766.

99 *State of Rajasthan* v. *Construction Company,* AIR 1995 Arb.LR 1 (SC).

100 Waiver of Right to Object, *available at*: https://www.trans-lex.org/970012/_/waiver-of-right-to-object/ (Visited on May 5, 2018).

101 UNCITRAL Model Law on International Commercial Arbitration 1985.

proceeding is being conducted according to the law of one State; recourse may be taken for an interim measure of protection to the Court of the different state where the Model Law applies. The parties to an International Arbitration have effective remedy not only in the country but in the country where those remedies are required and must be enforced.[102] In the Indian Perspective, the term Court has not been defined under the General Clauses Act or the Code of Civil Procedure but the definition of the Court is available in the Arbitration and Conciliation Act, 1996:[103]

> '*Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in the 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.*

Such definition of the Court has resulted in an inordinate delay in giving the judgment. The *I.T.I. Ltd., Naini, Allahabad* v. *District Judge, Allahabad and others*[104] is a landmark judgment where the issue raised was regarding the definition of the 'Court'. The analysis of this judgment can be made as under:

Facts of the case

Petitioner was a government of India undertaking that was engaged in the business of manufacture, sale, and supply of telephones and transmission equipment's, apparatus. And the respondent no. 3 was engaged in the supply of various components to petitioner as per the purchase and supply order issued from time to time. A dispute arose between them regarding overpayment that was made by the petitioner. The dispute was referred to arbitration for adjudication as there was an arbitration clause in the purchase order. The arbitrator was appointed and the reward was granted. The

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102 Walter G Semple, "The UNICITRAL Model Law and Provisional Measures in International Commercial Arbitration" *IBLJ* (1993).

103 Section 2 (1) (e), the Arbitration and Conciliation Act, 1996.

104 AIR 1998 Allahabad 313.

respondent was dissatisfied by the award and an application under Section 34 read with Section 16(VI) of the Arbitration and Conciliation Act, 1996 was filed. The Munsarim scribed a report saying that the application should be filed in the Civil Court however the District Judge overruled the objection and held that the application was rightly presented in the Court of District Judge and directed the application to be registered and transferred to Court of III Additional District Judge. The objection was raised before the III Additional District Judge and it was overruled as it was holding that the expression "but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes" as given under Section 2(e) of the Act, implies that in addition to the District Judge, there may be other principal Civil Courts of original jurisdiction in a district and Additional District Judge not being inferior in grade to the District Judge, comes within the purview of the term "Court" as defined in Section 2 (e) of the Act. The application was moved by the petitioner under Section 42 praying that the case should be remitted to the District Judge for disposal on the hypothesis that since the application for setting aside the award was moved under Part I of the Act in the Court of District Judge and hence that Court alone shall have jurisdiction over the arbitral proceedings and "the arbitral proceedings shall be made in that Court and in no other Court". In substance, the plea raised was that since M/s. K.V. Electronics has moved the application under Section 34 of the Act for setting aside the award in question in the Court of District Judge all subsequent arbitral proceedings would be held in that Court. The learned III Additional District Judge rejected the application.

Question of Law

Whether the Additional District Judge is a Court within the meaning of Section 2 (e) of the Arbitration and Conciliation Act, 1996?

Judgment

The term "Court" is defined in Section 2(e) of the Arbitration and Conciliation Act, 1996[105] and under Section 2(c) of the Arbitration Act, 1940.[106] A Small Causes Court was expressly excluded, except for the purpose of Section 21, from the purview of the term "Court" as defined in the said Act. The parliament had made the definition simple and clear by using the words "means", "Includes" and "does not include" in Section 2(e) of the Arbitration and Conciliation Arbitration Act, 1996. The Parliament has exhaustively explained the meaning of the term "Court" in that the word "means" is a term of restriction, while the word "includes" is a term of enlargement and when both the words "means" and "includes" are used together to define a thing, the intendment of the Legislature is to supply restricted meaning to the term of Court. The expression "but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes" used in Section 2 (e) of the Act, further restricts the meaning of the term "Court". The term "District Judge" is defined in Section 3 (17) of the General Clauses Act, 1897 as "the Judge of a principal Civil Court of original jurisdiction". As defined in Section 3 (17) of the General Clauses Act, 1897 the term "District Judge" is not included by the High Court in the exercise of its original jurisdiction, though the term "Court" used in the Act includes the High Court. Hence, it is clear from Section 3(17) of the General Clauses Act, 1897 that expression "Court of District Judge" and "the principal Civil Court of original jurisdiction in a district" is identical of each other. That means that the Court of Civil Judge may also be a Civil Court of original jurisdiction but it would not be "the principal Civil Court of original jurisdiction in a district". Hence it was concluded from the present case that the Additional District Judge was barred and did not have the

[105] "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 question forming the subject-matter of 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.

[106] "A Civil Court" having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit.

jurisdiction over arbitration cases on the District Judge will have such jurisdiction. The primary objective of the Arbitration and Conciliation Act, 1996 is to minimize the supervisory role of the Court in the arbitral process but still many cases are pending in the Court due to the lacuna in the definition as could be seen from the above case the if there are parameter and limitation regarding what ought to be the Court with respect to Arbitration.

Arbitral Proceeding

According to Article 18 of the UNCITRAL Model Law, the fundamental principle while conducting an arbitral proceeding is that that parties "shall be treated with equality and each party shall be given a full opportunity of presenting his case".[107] An arbitral proceeding is an alternate way for resolution of a dispute. It takes place on both national and international level. Arbitration being peremptory in nature parties agrees to arbitration as a way of resolving a potential dispute at the moment of contracting. There is a difference between arbitral proceedings at national and international level. The autonomy of will that is granted to the parties to dispute is an advantage in the international level but such incorporation on a national level may lead to misuse of such proceedings. The incorporation of an arbitral clause in the contract between the business companies and the consumer is one example.[108] Therefore, one of the advantage of an arbitration proceeding is the maintenance of good relationship among parties.[109] The Arbitration Act, 1940 for the first time set procedural rules for arbitration in India. The amendment of the Act introduced a set of procedural rules more in line with the rules accepted by the rest of the world. It is a well-established theory and practice of international law that arbitration is governed by the law of the place where it is held.[110] The first

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107 *Supra* note 87.

108 Lukáš Šlampa, *International arbitration procedure in theory and* (2010) (Unpublished Diploma Thesis, Mendel University).

109 PETROCHILOS, G. *Procedural law in International Arbitration* (Oxford University Press, Oxford, 1st edn., 2004).

110 COMPARATIVE OUTLOOK OF THE ENFORCEMENT OF UNCITRAL MODEL LAW IN INDIA AND UK, *available at:* http://shodhganga.inflibnet.ac.in /bitstream/10603/201576 /12/12_chapter%206.pdf (Visited on May 4, 2018).

formal step is that a claimant must take the commencement of the arbitration. The claimant has to consider the content of the notice of commencement and the time when that notice will be served.[111] According to Section 7 of the Arbitration and Conciliation Act, 1996 the Arbitral proceeding shall commence on the date on which a request has been made to refer to arbitration by the respondent. Hence it is clear that the date on which the notice for the appointment of the arbitrator is received by the respondent shall be the date from which the arbitration proceedings shall be deemed to be commenced. Same goes under Article 3(2) of the Model Law that the arbitral proceedings is deemed to have been commenced on the date the respondent receives a written notice of arbitration. The place of the arbitration plays a key role in the Arbitral process. Therefore, it is necessary for the disputants to provide for an express choice of the seat of arbitration in their agreement. One thing pointed out is that neither India nor the Model Law allows the suspension of arbitral proceeding in circumstances set out in law. The proceedings are interrupted in a situation like the death of one party, commencement of proceeding for forgery, loss of capacity of the party. Any action taken during such interruption shall be void.

Interim Measures

It is a temporary relief that is granted to the parties aimed to protect the parties' right till the time the final award has been granted when the dispute gets resolved.[112] It is an important tool for litigation; the authorities should issue interim measure in order to make arbitration an efficient platform for dispute resolution. The availability and handling of interim measures in international commercial arbitration have become one of the main issues in developing a

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111 Tweeddale, Andrew and Keren Tweeddale, *Arbitration of Commercial Dispute: International and English Law and Practice* 261 (Oxford University Press, Oxford, 2005).

112 Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty, a*vailable at*: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1022&context=ab (Visited on May 5, 2018).

legal setup for arbitration.[113] The major three issues to be dealt with while adjudicating interim measure in Arbitration is –

1. The power of the Court to grant the interim order;
2. The power of arbitrator to direct the interim relief;
3. The possibility that relies with the enforcement of the interim order that is granted by Tribunal.[114]

Article 17 of the UNCITRAL Model Law on International Commercial Arbitration[115] gives power to tribunal to grant interim relief but it may be noted down that Article 17(2) is not concern with the enforceability of such measure hence any state adopting the UNCITRAL Model Law of 1985 is free to provide the assistance to the Court in this regard.

Section 9 of the Arbitration and Conciliation Act, 1996[116] indicates that before or during the Arbitral Proceeding or at the time of the making of the arbitral

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113 Adhipathi Sandeep, "Interim Measure in International Commercial Arbitration: Past, Present and *Future*" *UGA* (2003).

114 *Ibid.*

115 Power of arbitral tribunal to order interim measures: (1) unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied, or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

116 Interim measures etc. by Court.—2[(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 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 authorising 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) 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

award or before it gets enforced under Section 36[117] the party can apply in the Court for an interim measure of protection. There is no Section in the Arbitration and Conciliation Act, 1996 that ensures the enforcement of the interim orders passed by the tribunal or the interim order is treated as an enforceable decree like that of a final award. The power of the tribunal is limited and any interim award that is granted has to be necessarily be merged with the final award for attaining enforceability.[118]

Neither the Model Law nor the Indian Law specifically provides for the modification and termination of interim measure and no reason could be found that why they do not allow such decisions. Apart from this, they also do not provide for an obligation of the party requesting the interim award to inform the tribunal about any material changes to the circumstances. Therefore, it can be considered as a shortcoming in both the laws.[119]

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purpose of, and in relation to, any proceedings before it. 1[(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under subSection (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. (3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-Section (1), unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

117 Enforcement.—(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-Section (2), such award shall be enforced in accordance with the provisions of 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 to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-Section (3), on a separate application made for that purpose. (3) Upon filing of an application under sub-Section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing: Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

118 Analysis of Interim measures u/s 9 and 17 of Arbitration and Conciliation Act,1996, a*vailable at:* https://www.caclubindia.com/articles/-analysis-of-interim-measures-u-s-9-and-17-of-arbitration-and-conciliation-act-1996-17637.asp (Visited on May 5, 2018).

119 Sorieul, Renaud, "UNCITRAL's Current Work in the Field of International Commercial Arbitration" 22 *JIA* 557-58 (2011).

Arbitral Award

The binding nature of the arbitral award is the fundamental concept of arbitration. When an award is made the arbitral proceeding tends to end. The award so made in the Arbitral Tribunal is on the basis of majority decision if more than one arbitrator is taking up that case. The definition of what constitutes an "award" or what is the difference between ''award" and other arbitration proceeding is neither defined under the national arbitration legislation nor the International Arbitration Convention despite the factor that it holds much importance.[120]

As per Article 31 of UNCITRAL Model Law on Arbitration[121] there are five essentials:[122]

1. An award must be in writing;
2. It must be signed by the arbitrator;
3. A statement of reason must be present on the basis of which the award was granted;
4. Date and place of the award of arbitration;
5. Delivery of award.

It gives rise to two exceptions:

1. An award was agreed on the terms;

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120 Umika Sharma, 'A COMPARATIVE ANALYSIS OF INDIAN, ENGLISH AND MODEL LAW ON VALIDITY OF ARBITRAL AWARDS AND RECOURSE AGAINST AN ARBITRAL AWARD' *IWJJP, available at:* http://jurip.org/wp-content/uploads/2016/12/Umika-Sharma.pdf (Visited on May 5, 2018).

121 *(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.*
(2) The award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30.
(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

122 *Supra* note 21.

2. Both the parties have given their consent.

Section 31 of the Indian Arbitration and Conciliation Act, 1996,[123] is not that concrete when it comes to the content and form of the arbitral award. It should be noted down that the award should be duly signed and be in writing. It does not prescribe any particular form of passing an award. Another factor where the Indian law is silent is when the majority cannot be achieved by the arbitrator as they are having a different opinion and also there is no umpire system provided in the Act but the Apex Court[124] held that appointment of the umpire in the case is justified and not illegal because there was disagreement between the two arbitrators and the award has to be granted.

The award is been granted as per the provisions of the Arbitration and Conciliation Act, 1996 as it holds a binding force being it the core fundamental concept of arbitration. Hence, the award so granted shall not be subject to appeal. Nevertheless, under the modern legal regime under Indian Law under

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123 Form and contents of arbitral award: (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
(2) For the purposes of sub-Section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.
(3) The arbitral award shall state the reasons upon which it is based, unless—
(a) the parties have agreed that no reasons are to be given, or
(b) the award is an arbitral award on agreed terms under Section 30.
(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be deemed to have been made at that place.
(5) After the arbitral award is made, a signed copy shall be delivered to each party.
(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.
(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole, or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
1[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.
Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of Section 2 of the Interest Act, 1978 (14 of 1978).] 2[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31A.

124 *Reserve Bank of India* v. *S.S. Investment Ltd*, AIR 1992 (2) SC 391.

certain circumstances, the appeal is being made possible before the enforcement of the award by the Court within a fixed period.[125]

Difference between Indian Arbitration law and UNICITRAL Model

Basis of Difference	**UNICITRAL Arbitration Rules**	**The Arbitration and Conciliation Act, 1996**
Commencement of arbitration proceedings	According to Article 3 (2), the Arbitral proceedings are deemed to have been commenced on the date the respondent receives a written notice of arbitration.	According to Section 21 of the Arbitration and Conciliation Act, 1996 the Arbitral proceedings in respect to a particular dispute is deemed to be commenced on the when it is received by the other party.
Place for Arbitration	According to Article 20, the place of arbitration shall be determined by the Arbitral Tribunal with regard to the circumstances of the case where the parties had not previously agreed regarding the place of arbitration.	According to Section 20 of the Arbitration and Conciliation Act, 1996 parties are free to choose the place of arbitration.
Rules	According to Article 35	According to the provisions

125 *Supra* note 21.

Applicable to Substance of Dispute	(1), the Arbitral Tribunal shall apply the rules of law that has been chosen by the parties. However, where the parties fails the Tribunal shall apply the law that it finds appropriate.	of Section 28 (2) and Section 28 (3) the Arbitration and Conciliation Act, 1996 the arbitral tribunal shall decide on the principles of *ex aequo et bono* or *as amicable compsiteur* only if the parties have expressly authorized to do so as well according to the terms and conditions of contract and trade usages.
Production of evidence	According to Article 27, The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.	According to Section 47 & 56 of the Arbitration and Conciliation Act, 1996, the party applying for the enforcement of a foreign award shall produce before the Court the original award or copy that is authenticated, the original agreement or duly certified copy or any other evidence as may be necessary at the time of the application.
Interim measures	According to Article 17, the interim measure may be granted to	According to Section 17 of the Arbitration and Conciliation Act, 1996, the

	either of the party as request made by the party to the tribunal. The interim measures may include preserving the assets and maintenance of the status quo that is pending while determining the dispute.	Arbitral Tribunal may order the party to take any interim protection in respect of the subject-matter of the dispute.
Appeal	The decision given by the Arbitral Tribunal shall be binding and shall be subject to no appeal.	According to the provisions of Section 37[126], Section 50[127] and Section 59[128] of the Arbitration and Conciliation Act, 1996, an appeal shall lie from the

[126] Appealable orders- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
(a) granting or refusing to grant any measure under Section 9;
(b) setting aside or refusing to set aside an arbitral award under Section 34.
(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—
(a) accepting the plea referred in sub-Section (2) or sub-Section (3) of Section 16; or
(b) granting or refusing to grant an interim measure under Section 17.
(3) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

[127] Appealable orders- (1) An appeal shall lie from the order refusing to—
(a) refer the parties to arbitration under Section 45;
(b) enforce a foreign award under Section 48, to the court authorised by law to hear appeals from such order.
(2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

[128] Appealable orders- (1) An appeal shall lie from the order refusing—
(a) to refer the parties to arbitration under Section 54; and
(b) to enforce a foreign award under Section 57, to the court authorised by law to hear appeals from such order.
(2) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

		following orders (and from no others) to the Court authorized by law to hear appeals from an original decree of the Court passing the order.
Enforceme nt of the	According to Article 35, an award shall be	According to Section 35[129], Section 36[130], Section 48[131],

129 Finality of arbitral awards.—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

130 Enforcement.—Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

131 Conditions for enforcement of foreign awards.— (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

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

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

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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

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

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.—Without prejudice to the generality of clause (b) of this Section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-Section (1) the Court may, if it considers it

awards	enforced when the copies of the award have been signed by the arbitrators and it has been	Section 49[132], Section 55[133], Section 57[134] and Section 58[135] of the Arbitration and Conciliation Act, 1996 if the Court is satisfied that the

proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

[132] Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

[133] Foreign awards when binding.—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

[134] Conditions for enforcement of foreign awards.—(1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that—

(a) the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) the subject-matter of the award is capable of settlement by arbitration under the law of India;

(c) the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) the enforcement of the award is not contrary to the public policy or the law of India.

Explanation.—Without prejudice to the generality of clause (e), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(2) Even if the conditions laid down in sub-Section (1) are fulfilled, enforcement of the award shall be refused if the Court is satisfied that—

(a) the award has been annulled in the country in which it was made;

(b) the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration: Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

(3) If the party against whom the award has been made proves that under the law governing the arbitration procedure there is a ground, other than the grounds referred to in clauses (a) and (c) of sub-Section (1) and clauses (b) and (c) of sub-Section (2) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

[135] Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

	communicated to the parties by the Arbitral Tribunal.	foreign award is enforceable then the foreign award shall be deemed to be a decree of that Court.
Recourse against arbitral awards	According to Article 34, recourse can be only done by an application for setting aside of the arbitral award. The party has to equip proof with the application and if the Court finds the subject-matter is not capable of settlement by arbitration or the award granted is against the public policy the arbitral award may be set aside. The application has to be made within three months.	According to Section 34 of the Arbitration and Conciliation Act, 1996, recourse to a Court against an arbitral award may be only by an application for setting aside such award for the given conditions under this Section within a period of three month and if the applicant proves that he was prevented from making such application then a further period of thirty days shall be granted.

The Arbitration and Conciliation Act, 1996 has given a broad definition to International commercial arbitration by facilitating various area of International business, investment, development and technology transfer. It has been observed that the Arbitration and Conciliation Act, 1996 is applicable to both domestic and international arbitration but the UNCITRAL Model Law is applicable only on International Commercial Arbitration. The Arbitral awards

and the agreements in India are in much more detailed way than they are in the Model Law. Competent Court has been given too much power particularly when there is a disagreement between the parties which is not favourable to international arbitration and this dilutes the confidence of foreign party in Indian arbitration system. The provisions regarding the Arbitration are been revised so that arbitration process doesn't get hindered and it get more aligned with the internationally accepted standard of Arbitration. Efforts have been taken towards strengthens the contractual feature of arbitration so that it becomes independent from the Indian judicial system and attracts more foreign parties to Arbitration by gaining their confidence.

CHAPTER IV

JUDICIAL EXPOSITION OF POWER OF COURT TO REFER PARTIES TO ARBITRATION

Concept of Arbitration

The dispute resolution process has a huge impact on the Indian economy and global perception of "doing business" in India. There are various forms of the "dispute resolution mechanism" arbitration, negotiation, conciliation, mediation, mini-trial etc., that has been explained in chapter one. An observation has been made that the difference among these alternative disputes resolution lies in the process and mode of dispute resolution. And arbitration has been found one of the best alternatives to resolve the dispute that is to do out of Court settlement. Arbitration is a non-judicial process for settlement of disputes where an independent third party that is an intermediary makes compulsive decisions which means an arbitral award is granted that is binding in nature. The third party is known as an arbitrator who is similar to a judge and holds expertise in the subject matter of the dispute.

In ***Halsbury's Laws of England,***[136] the term 'arbitration' has been defined as "The term 'arbitration' is used in several senses. It may refer either to a judicial process or to a non-judicial process. The judicial process relates to the existence, declaration, and enforcement of rights and liabilities, according to some recognised systems of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce, what in the arbitrator's opinion ought to be the respective rights and liabilities of the parties, and such a function is non-judicial. Conciliation is a process of persuading parties to reach an agreement, and is plainly not arbitration; nor is the chairman of conciliation boards an arbitrator".

Arbitration is different from traditional jurisdiction. The procedural rules are different and are more formal as for the purpose of presentation of their pieces of evidence and arguments parties have a deadline. Unlike in negotiation or mediation, a party

[136] 4th edn., vol. 2, para 502.

that has agreed upon arbitration cannot walk out of the procedure. Arbitration is intended to provide a final resolution for the dispute; it is not merely intended to mediate between parties or to conciliate them. Actually, the resolution of the arbitrators (the award) is binding and enforceable. Arbitration is a semi-judicial and more formal dispute resolution process whereby parties refer their dispute to an arbitrator, a qualified and independent third party, for determination. The rationale behind this dispute resolution process is that it is capable of diverting commercial disputes away from the legal system of specific jurisdiction to a self-regulated system. It is aimed at attracting business persons who wanted speedy, inexpensive dispute settlements but who were unwilling to abandon the benefits of legal counsel and the possibility of judicial review if disadvantaged in litigation.

Scope and Object of Arbitration

The basic object with which the arbitration law is designed is for speedy and inexpensive dispute resolution. An arbitration agreement is a contractual undertaking by which the parties agree to settle certain disputes by way of arbitration, rather than by litigation in Court. Broadly speaking, the arbitration clause triggers the "significant relationship test" it means that when there is significant relationship exist between the subject matter of the dispute and the contract that has an arbitration clause, the arbitration clause will apply on the parties on the subject matter would be referred to arbitration. The parties in order to prove the claim has to rely on the terms of the contract that has that arbitration clause in it.[137] The Arbitration being a composite form is somewhat different from the ordinary Court procedure and in the interest of justice, the interference of Court is minimized. To have a successful arbitration it is necessary to ensure that:

1. When the parties file an application for the appointment of an arbitrator to resolve the dispute, the arbitral tribunal should be constituted immediately so that the arbitration process commences without loss of time.

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137 Arbitration: scope and enforcement of "any dispute arising out of, or related to", *available at*: http://www.btlg.us/News_and_Press/articles/Arbitration-scope-Griggs%20v.%20Evans (Visited on May 14, 2018).

2. No interference should be there from the Court while the arbitral proceeding is going on so that arbitral award is granted as quickly as possible.
3. The pendency of the case should not affect will proceed with an application for an interim order. The relief should be granted if the arbitral tribunal deems fit and necessary.
4. After the award has been granted it should be enforced so that it does not turn out to be the starting point of the litigation procedure.[138]

The large spectrum that has been offered by arbitration is holding an advantage over the traditional litigation method that has been enlisted people. The scope and object with the arbitration were introduced in India for the dispersion of justice with efficiency has been discussed in the chapter below.

Advantages of Arbitration In Comparison With Traditional Jurisdiction

Arbitration comes furnished with certain features that make it an attractive alternative for dispute resolutions. They have been listed below:

Election of the arbitrators: Arbitration permits parties to select the arbitrator who will resolve their dispute. The likelihood of selecting the arbitrators becomes beneficial in disputes involving technical or distinct knowledge. The arbitrator's specialized knowledge resolves the dispute quicker and in a more economical manner, whereas the traditional judge may not have adequate knowledge to resolve the dispute.

Internationalization: Parties can choose any location for the arbitral proceedings. It carries importance when the disputes carrying international nature are brought where the parties reside in different nations.

Neutrality and Equality: The arbitrator that is appointed to resolve the dispute is a neutral person who is not partial with either of the party and delivers the award on the basis of the evidences present in front of him. The arbitration procedure that is carried

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138 Nature and Scope of Arbitration in India, available at: https://researchersclub.wordpress.com /2014/11/24/nature-and-scope-of-arbitration-in-india/ (Visited on May 14, 2018).

between the parties to resolve the dispute does not lean towards either of the party.[139]

Flexibility: Arbitration is flexible as it requires minimum formalities as compared to the traditional litigation method. The parties to the arbitration agreement are not tied with the formal norms that are required before and during the Court proceedings as an arbitral procedure can be tailored in each of the cases accordingly.[140]

Confidentiality: Arbitration is usually well thought-out to be a confidential procedure as the arbitration agreement normally implies confidentiality obligations in connection with all the information exchanged in the arbitral procedure.[141]

On the other hand, judicial procedures are public and the information related to it may be disclosed. The confidentiality of the arbitral proceedings may stimulate e-business transactions, as parties may feel more comfortable entering into business transactions if they know that in the event of a dispute, it will remain confidential. Parties at times wish to keep the information related to arbitration confidential as during the arbitration procedure the sensitive information is exchanged for a successful proceeding and leakage of such information to the public may cause financial or reputational damages to the company. It has been noted down that in English law the arbitration procedure usually takes place in private as per the agreement between the parties where the parties are bound by the decision that has been given by the arbitrator according to law and there it is enforceable too.[142] However, the parties may allow the publicity of an arbitral procedure to a certain extent. For instance, in the Netherlands, with the prior authorization of the parties,

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139 T. Schultz, G. Kaufmann-Kohler, D. Langer, & V. Bonnet, Online Dispute Resolution: The State of the Art and the Issues, E-Com Research Project of the University of Geneva, Geneva, 2001, *available at:* http://www.online-adr.org. (Visited on April 21, 2018).

140 St. John Sutton, David, et al, Russell on Arbitration, 23rd edition, Sweet & Maxwell Limited, London, 2007, p. 12.

141 Gabrielle Kaufmann-Kohler, Schultz, Thomas, Online dispute resolution, challenges for contemporary justice, Kluwer law international, 2004, p. 49.

142 Bernstein, “Handbook of Arbitration Practice”, 3rd ed., para 2.03, p.13.

awards are published without indicating the names of the parties involved in the Journal of Arbitration.[143]

History of Arbitration in India

India has had a long tradition of arbitration. According to Hindu law, one of the oldest known texts to be mentioned about arbitration is '*Brhadaranayaka Upanishad*'.[144] It tells about various types of arbitral bodies, in which 3 primary bodies namely 'Puga' local Courts, 'Sarnis' are those who are involved in a single business or profession and 'Kulas', who were members of social affairs; And all three of these bodies were known collectively as Panchayats. The members of the Panchayat were known as Panchas (the arbitrators of that time) used to resolve the dispute among the parties under a system, now we refer it as Arbitration.[145]

The modern era in India regarding arbitration law emerged through the Bengal Regulation Act, 1772. It was a result of a successful resolution of disputes amongst the parties by choosing the tribunal. Thereafter it was also promulgated to other presidency towns that were Bombay and Madras through the Bombay Regulations Act, 1799 and Madras Regulation Act, 1802. In the year 1834, the first legislative Council for India was formed followed by the first Indian Arbitration Act, 1899. The act was primarily based on the British Arbitration Act, 1889. Thereafter, in the year 1940 under the British Regime 'The Arbitration Act, 1940' came into force. It was applicable to the whole of India (together with Pakistan, Baluchistan).[146] That was further modified with an ordinance after the Independence. The Arbitration Act, 1940 was silent regarding the shortcomings that was inherent in the individual private contracts. The Act had rules that differed from one High Court to another High Court. There was no provision with regard to the resignation of the arbitrator when a misappropriate act

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143 Lazic, Vesna , "The Impact of Uniform Law on National Law: Limits and Possibilities – Commercial Arbitration in the Netherlands", Electronic Journal of Comparative Law vol. 13 (2009) nr. 2, p. 18.

144 India: Evolution of Arbitration in India, *available at*: http://www.mondaq.com/india/x/537190/Arbitration+Dispute+Resolution/Evolution+Of+Arbitration+In+India (Visited on April 22, 2018).

145 History of Dharmasastra, 1946 Vol. 3 p. 230.

146 The Arbitration Act, 1940 *available at:* http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk066en.pdf (Visited on April 24, 2018).

was done neither it had provision for appointment of a new arbitrator in case of death of a presiding officer. In *Food Corporation of India* v. *Joginderpal*[147] it was observed by the Supreme Court that the law of arbitration should be simple having less technicality and should hold more responsibility towards the actual reality and should play fair.[148] And this made the legislature think over the issues to amend the law. And therefore, to overcome these inadequacies and to bring uniformity in law across the nation it was required that the Arbitration Act, 1940 should be replaced and hence, as a result, the Arbitration and Conciliation Act, 1996 was enforced.

The Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996, has adopted the United Nations International Commission on International Trade Law, 1985 (UNICTRAL). The act has tried to bring changes in the Arbitration law and rectify the deficiencies that were present there in the Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 is a compilation on domestic arbitration, international commercial arbitration and enforcement of the foreign arbitral award and it also defines the law relating to conciliation. The Arbitration and Conciliation Act, 1966 followed two primary objectives. The first one was to make the legal regime by which it was surrounded to be united whereas; the second objective was to the efficiency in the arbitration by reducing the need for judicial intervention. The Act also lay down that the arbitral tribunal should give reasons for its arbitral award. The Arbitration Act, 1996 was a consolidated version of the 1940 Act which governed the domestic arbitrations, the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Award (Recognition and Enforcement) Act, 1961 and also governed interventional arbitral awards. The changes that were brought by the Arbitration and Conciliation Act, 1996 built up the entire preceding fifty five years on arbitration.[149] It was held in *Sunderam Finance* v.

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147 AIR 1981 SC 2075.

148 Legislative Development of Arbitration Legislations in India, *available at:* http://shodhganga.inflibnet.ac.in/bitstream/10603/129366/10/10_chapter%205.pdf (Visited on May 22, 2018).

149 Adjudicatory Method of Alternative disputes Resolution: Arbitration, *available at*: http://shodhganga.inflibnet.ac.in/bitstream/10603/10373/10/10_chapter%204.pdf (Visited on April 25, 2018).

NEPC Ltd.[150] that the provisions of the Arbitration and Conciliation Act, 1996 should be interpreted and elucidated independently as the reference of the old act would lead to misconception.

The Arbitration and Conciliation Act, 1996 was amended in the year 2015 and the salient features were regarding amending few Sections. For example amendment is Section 8 (Reference of parties to the dispute to arbitration) where Sub- Section (1) was amended envisaging that notwithstanding any judgment, decree or order of the Supreme Court or any other Court the judicial authority shall refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.[151] Another example is the amendment to Section 9 (Interim Measures) where it was envisaged that if the Court passes an interim measure for the protection under the Section before the commencement of arbitral proceeding then the arbitral proceeding will be commenced within 90 days from the date of such order. Recently the Union Cabinet has issued a press release for the Arbitration and Conciliation (Amendment) Bill, 2018 to clarify and primarily improve various provisions.[152]

Scope of Section 8

The language of Section 8 of Arbitration and Conciliation Act, 1996 is peremptory and the Court holds a legal duty to refer the parties to arbitration.[153] Beside this, an application has been made to the judicial authority to commence the arbitration proceeding and conclude by granting arbitral award.[154] This Section has been described as one of the pillars of the Act.[155] The provisions that are laid down under Section 8 of the Arbitration and Conciliation Act, 1996 and Section 34 of the

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150 (1999) 2 SCC 479.

151 India: Highlights Of Amendment To The Arbitration And Conciliation Act 1996 Via Arbitration Ordinance 2015, *available* at: http://www.mondaq.com /india /x /448666/Arbitration+Dispute+Resolution/Highlights+Of+Amendment+To+The+Arbitration+And +Conciliation+Act+1996+Via+Arbitration+Ordinance+2015 (Visited on May 14, 2018).

152 Arbitration and Conciliation (Amendment) Bill 2018, *available at*: https://corporate.cyrilamarchandblogs.com/tag/arbitration-and-conciliation-amendment-bill-2018/ (Visited on May 14, 2018).

153 *P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539.

154 *Kaplana Kothari* v. *Sudha Yadav* AIR 2002 SC 404.

155 Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, second edn, 2005 p. 88 para 2079.

Arbitration Act 1940 are different. Therefore, these two provisions one from the 1940 Act and the other from 1996 hold no application that will deprive the party of legitimately invoking the right to file an application under Section 8 of the Arbitration and Conciliation Act, 1996 and refer the dispute to arbitration. Sub Section (1) of Section 8 of the Arbitration and Conciliation Act, 1996 authorizes the judicial authority to refer the parties to arbitration where there is an arbitration agreement. The power that is given to the judicial authority comes into existence when a legal proceeding is filed before the judicial authority regarding a matter that is subject to an arbitration agreement. The party against whom proceedings are filed can make an application to the Court to refer the matter to arbitration as per the terms of the agreement. Such an application must be made by the party not later than, submitting the first statement on the substance of the dispute. The natural consequences of the provisions are that if an application is not made and party submits a statement on the substance of the dispute that would amount to acquiescence in the legal proceedings. The judicial authority would itself decide the dispute. The agreement as to arbitration becomes defeated.

Nature of Section 8

Applicability of arbitration in matters involving rights *in Personam*:

Arbitration agreements are applicable to matters that involve the personal right of the parties have formed a contract between them or are bound by the arbitration clause imposing a duty upon determinate persons. It is a kind of legal proceedings that is directed against the defendant personally. Where an action *in personam* is successful, the judgment may be enforced against all of the defendant's assets, real and personal, moveable and immoveable. In *A. Ayyasamy* v**.** *A. Paramasivam & Ors.,*[156] the Supreme Court made an observation that all the disputes that are related to rights *in personam* are considered to be amenable to arbitration and that all the disputes that are related to rights *in rem* are required to be adjudicated by Courts and public tribunals.

156 2016 10 SCC 386.

Per-emptory Nature:

The language in Section 8 is peremptory in nature which means it precludes any question and it is unconditional. Where there is an arbitration clause in the agreement, it is obligatory for Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided by the Court in the original action after such an application is made except to refer the disputes to an arbitrator.[157]

Contradiction with Written Statement:

Under Section 8 clause 1 of the Arbitration and Conciliation Act, 1996 the expression that is given is "the first statement on the substance of the dispute", that means a "Written Statement", that is required to file in terms of Order 8 Rule 1 of Code of Civil Procedure, 1908. Where the CPC may not strictly apply for the purpose of proceeding before judicial authorities or forums, it would mean and include the reply filed by the respondent in defense. According to The Supreme Court in *Rashtriya Ispat Nigam Limited* v. *Verma Transport Company*[158] held that, this expression must be contra-distinguish with the expression, "written statement".

Waiver of Right to invoke arbitration clause:

This right that has been granted under arbitration can be express or implied. Such a waiver has to be explicit so as to evade uncertainties about the intention of the party to waive their right. In the case of *M.D. Enterprise* v. *M/S. Whirlpool of India Ltd.*[159] it was said that arbitration is, by its very nature, consensual and it is open to a party to an arbitration agreement to waive the right to proceed in arbitration.

It is the duty of the Judicial Authority to find out on its part whether the party has waived his right to invoke the arbitration clause. If an application is submitted before

[157] *P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539.
[158] AIR 2006 SC 2800.
[159] MANU/WB/0924/2013.

filing the first statement on the substance of the dispute, the party cannot be said to have waived his right.

Third Party Involvement:

Where any person who is not a party to arbitration agreement impleaded in an action, the Judicial Authority first to scrutinize the interest of that person or a third party under Section 8 of Arbitration and Conciliation Act, 1996 applying rule of beneficial construction. If there is any interest found in relation to an arbitration agreement the reference cannot be denied.[160]

Applying the *ut res magis valeat quam pereat* in exceptional circumstances even a non-party to an arbitration agreement can be referred to arbitration by the Court. It is to uphold the validity of arbitration agreement.

Judicial Authority under Section 8

"Judicial Authority" denotes 'any Court, arbitrator, tribunal or similar body of any kind'.[161] The term has been used to broaden the scope and applicability of the provisions of the Act. The manifestation that is giving the impression under Sub-Section (1) has not been defined under the Act. What is defined under the Act is "Court" that is provided under Section 2(1) (e) of the Arbitration and Conciliation Act, 1996. In *Shri Balaji Traders* v. *MMTC Ltd*[162] the commission that has been setup under the Monopolies and Restrictive Trade Practices Act 1969, was considered the Judicial Authority. Similarly, the Company Law Board is also been considered a "Judicial Authority". It has been observed by Supreme Court in *Canara Bank* v. *Nuclear Power Corporation Ltd.*[163]

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160 *Rajeev Maheshwari* v. *Indu Kochar* 2011(3) CHN 680.

161 Judicial Authority*, available at*: https://www.lawinsider.com/dictionary/judicial-authority (Visited on October 6, 2017).

162 (1999) CLA 261.

163 (1995) Supp 3 Scc 81.

> A writ Court falls under the scope of the term "Judicial Authority". A writ Court would have to be continuously mindful of the existence of an arbitration clause and cannot work beyond it.[164]

The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2(1)(e) and not the Court to which an application under this Section is made. An application before a Court under this Section merely brings to the Court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement.

An application for stay of legal proceedings to a judicial authority before whom it is pending is an application under the Act to a judicial authority competent to entertain it. A party to arbitration agreement may choose to file suit in a Court which has no jurisdiction to go into the matter at all and merely because the defendant in such a suit has to make an application to that Court under this Section, it cannot be said that the Court, which otherwise has no jurisdiction in the matter, becomes a Court within the meaning of the Act.[165]

In *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*,[166] the Court of appeal dealing with the meaning of the word 'judicial' observed as below:

> The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a Judge or by Justices in Court or to administrative duties which need not be performed in Court, but in the respect of which it is necessary to bring to bear a judicial mind, that is, a mind to determine what is fair and just in respect of the matters under consideration.

In *Fair Air Engineers Pvt.* v. *NK Modi*[167] the Supreme Court held that the District Forum, the State Commission and the National Commission constitutes under the

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164 *East West Rescue Pvt Ltd* v. *Narender Singh, AIR 2009 NOC 35 (Del).*

165 *Union of India* v. *Surjeet Singh Atwal*, AIR 1970 SC 189 (1970) 1 SCR 531.

166 (1892) 1 QB 431 : (1891-94) All ER 429 (CA).

167 (1996)6 SCC 385.

Consumer Protection Act 1986 are all included in 'Judicial Authority' for the purpose Section 34 of the Arbitration Act of 1940.

> The existence of an arbitral clause in the agreement is accepted by both the parties as also by the lower Courts. If that be so, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred to arbitration. The Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case.[168]

An application to the Court before which the suit is pending is in no way recognition that the Court has jurisdiction to try the suit.[169] Filing of an application under this Section before the trial Court does not amount to submission to its territorial jurisdiction. Where a defendant makes an application that the Court should dismiss the suit, the applicant does not submit to the jurisdiction but in fact challenges the jurisdiction of the Court to try the suit.[170] In matters involving criminal proceedings by the Supreme Court in *S.N. Palanitkar* v. *State of Bihar*[171] held that merely because there is an arbitration clause in the agreement that cannot prevent criminal prosecution against the accused if an Act constituting a criminal offence is made out even *prima facie*.

Arbitrability of the Dispute

All the Civil Suits that fall under the jurisdiction of the Civil Courts can be referred to the Arbitration and Conciliation Act, 1996. Nowhere in the Arbitration and Conciliation Act, 1996, has it stated that only disputes that are contractual in nature can be referred to Arbitration. Therefore, the disputes that are arising out of tort, are related to the contract can also be adjudicated and referred to arbitration. However, there are

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168 *H.P. Corpn. Ltd* v. *Pinkcity Midway Petroleum's* AIR 2003 SC 2881.

169 *Babrein Petroleum Co.* v. *P.J Pappu*, AIR 1966 SC 634.

170 *General Manager, N.T.P.C* v. *A.P. Singh,* 2009 (2) RAJ 461 (Del).

171 AIR 2001 SC 2960.

certain disputes that cannot be referred to arbitration regarding this it was very well quoted by Russell that, “not all matter is capable of being referred to arbitration”.[172]

The three aspects of arbitrability, regarding the jurisdiction of the Arbitral Tribunal can be explained with the help of following judgments.

Booz Allen and Hamilton Inc.* v *SBI Home Finance Ltd. and Ors[173]

Nature of the Suit: Special Leave petition under Article 136 of the Indian Constitution against the judgment of the Bombay High Court.

Facts of the case

Capstone and RV Appliances respondent 2 & 3 are owners of the flat located at ‘Brighton’, Napien Sea Road, Mumbai. They have borrowed loan from SBI home finance ltd (Respondent-1) under a loan agreement. Under the two leave and license agreements Respondent 2 & 3 permitted the appellant to use their flat. A tripartite deposit agreement as entered Respondent 2 & 3 as first party, appellant as second party and respondent 1 as the third party. The Appellant has paid a refundable security deposit to Respondent 2 & Respondent 3 on the basis of the terms and conditions as mentioned in clause E of the said agreement. Out of 6.5 crosses, a sum of Rupees 5.5 crosses was directly paid to SBI on the direction of Respondent 2 & Respondent 3 towards the repayment of loan taken by them from Respondent 1. A loan taken by Respondent 2 was paid off but the loan taken by Respondent 3 was still outstanding however Respondent 2 becomes the guarantor for repayment of the amount due by Respondent 3. Clause 3 of the agreement furnished a preference to the appellant to carry on the license for a further period of two years on paying an additional deposit of Rupees 2 crosses. Clause (9) and Clause (10) of the agreement provided that when the license period would empire Respondent 2 & Respondent 3 will be jointly and severally liable to refund the deposit amount along with interest clause (16) of the deposit agreement had an arbitration clause where it was mentioned that in case of any dispute with respect to creation and enforcement of

[172] Russell on Arbitration, 22nd Ed. Para 2.007, p. 28.
[173] (2011) 5 SCC 532.

change, the dispute shall be referred to an arbitrator who shall be a retired judge of Mumbai High Court. A reference was made by Respondent 3 (RV appliances) to the board of industries and financial reconstruction under the sick industrial companies (special provision) Act, 1985 and hence one of the flat was taken over by the official liquidator. The appellant informed Respondent 2& 3 that he does not want to renew the license and would vacate the flat on delivery of the security amount so deposited. Further the appellant informed SBI (Respondent 1) and BFR by endorsing a copy of the said letter. As the was no confirmation from Respondent 2& 3 regarding the refund of the security amount, the appellant wrote a further letter stating it would continue to occupy the flat if the security was not refunded. As the loan amount due by RV Appliances was not paid Respondent 1 filed a mortgage suit against Capstone, appellant & RV Appliances. On the notice taken out by SBI interim relief was granted. The appellant filed a reply to the said notice, though the appellant did not file its written statement in the suit but later on prayed to refer the parties to arbitration as provided under Clause 16 of the deposit agreement but the SBI resisted the said application. The application was impugned by the High Court on the ground that Clause 16 did not cover the dispute which is the subject matter of the claim of SBI and that the appellant has lost the right to seek reference to arbitration. The order was challenged and special leave petition was filed.

Question of law

(i) Whether the subject matter of the dispute falls within the scope of the arbitration agreement?

(ii) Whether the first statement was submitted before the filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996?

(iii) Whether the application that has been filed under Section 8 of the Arbitration and Conciliation Act, 1996 is liable to be rejected on the ground that there was a delay of nearly 20 months after entering an appearance in the suit?

(iv) Is the subject matter of the dispute is 'arbitrable' that can be adjudicated by the arbitral tribunal and a reference can be made under Section 8 of the Arbitration and Conciliation Act, 1996?

Judgment

(i)Yes, the subject matter of the dispute falls within the scope of the arbitration agreement. The Clause 16 of the said agreement states that the in case where a dispute arises between the parties the same would be referred to arbitration. The disputes that are covered under the parameter are

a. Disputes regarding the formation of charge over the shares and flats;
b. Disputes regarding the implementation of the charge over the shares and flats and to release the sale proceeds;
c. Application of the sale proceeds in the direction of discharge of liability of Capston;
d. Disputes involving the exercise of the right of the Appellant to continue to occupy the flats until the complete dues as stated in clauses 9 and 10 of the deposit agreement are released by the Appellant.

SBI (Respondent no. 1) has filed a suit against the Respondent 2, Respondent 3 and Appellant to recover the mortgage amount due and also SBI has also sought the delivery of vacant possession. The enforcement of the charge/mortgage over the flat, the realization of sale proceeds therefrom and the right of the Appellant to stay in the possession till the entire deposit is repaid. These are all the matters that are specifically mentioned in Clause 16 of the agreement.

(ii)The Appellant has filed a detailed affidavit opposing the application for an interim injunction and also filed an application under Section 8 of the Act. Section 8 of the Act provides that a judicial authority before which an action is brought in a matter that is subject to arbitration shall refer the parties to arbitration not later than from the submission of their first statement. The High Court has held that the counter affidavit

that is filed by the defendant in a reply to the application for a temporary injunction should be considered as the submission of the first statement on the dispute and thus the Appellant's prayer for referring the parties to arbitration should not be accepted.

The question that therefore aroused was whether filing a counter to an application for the grant of temporary injunction can be considered as a submission of the first statement? It was observed that not only the filing of the written statement in a suit will be considered as ‘submission of a statement on the substance of the dispute’ but the filing any statement, application, an affidavit by the defendant shall be not be considered as written statement that was regarding getting a temporary injunction. To support this contention a case was referred. In *Rashtriya Ispat Nigam Ltd.* v. *Verma Transport Company*[174] the Court held that the expression 'first statement on the substance of the dispute' contained in Section 8 clause 1 of the Arbitration and Conciliation Act, 1996 is different from the expression 'written statement' and it should be decided by the Court whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause. It was further observed by the Court at an application for the temporary injunction by filing a counter would amount to subjecting oneself to the jurisdiction of the Court.

In the present case, a counter affidavit has been filed by the Appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) and it clearly stated that the reply by an affidavit was being filed for the limited purpose of opposing the interim relief. In this regard, it was upheld that in spite of, the absence of such disclaimer an application requesting to proceed with an interim injunction cannot be considered to be a submission of a statement on the dispute.

(iii)Section 8 states that the application should be filed before the submission of the first statement regarding the dispute though it does not prescribe any time limit for filing an application under the Section. A party who is willingly participating in the proceedings in the suit and subjects himself to the jurisdiction of the Court cannot,

174 2006 (7) SCC 275.

later on, deny and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether the party has waived his right to refer the dispute to arbitration and has subjected himself to the jurisdiction of the Court depending upon the conduct of that party.

In the present case, the plaintiff has filed an application for interim relief and appointment. An observation is been made that once a supplementary proceeding like this has been filed then the defendant loses the right to seek reference to arbitration. While the appointment of receiver was pending the talks were made with regard to out of Court settlement but when such talks failed the Appellant filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 before the filing of the written statement that could be considered to be a submission of a statement on the dispute. The High Court was not right in rejecting the application on the ground of delay.

(iv)To find out whether the subject matter of the suit is Arbitrable that is capable of being adjudicated by a private forum following grounds must be satisfied.

- Whether the dispute that has been brought to the arbitral tribunal is capable of adjudicating and settled by arbitration?

That means that with regard to the nature of the dispute whether it can be resolved by a private forum that is chosen by the part, or it will fall within the scope of the public forum.

- Whether the dispute will be covered under the parameter of an arbitration agreement?

That means the whether the disputes that have been enumerated or describes in the arbitration agreement that has to be decided by the arbitral tribunal can be decided by arbitration or they fall in the purview of ‘excepted matters’ that is not covered under the parameter of the arbitration agreement.

- Whether the parties to the dispute have referred the dispute to arbitration?

That means that whether the disputes fall under the ambit of the submission that has been made to the arbitral tribunal or they do not arise out of the statement of claim or counter claim that has made before the arbitral tribunal.

In the present case a list of the non-arbitrable disputes have been enlisted:

1. The disputes that are related to the rights and liabilities that arises or give rise to criminal offences;
2. All the matrimonial disputes that are related to divorce, judicial separation, restitution of conjugal rights, child custody;
3. The disputes that are related to guardianship matters;
4. Disputes that arise out of insolvency and winding up;
5. Disputes that are related to testamentary matters that are: a grant of probate, letter of administration or dispute related to succession certificate;
6. Disputes that are related to eviction or tenancy as they are governed by the special statutes as the tenant enjoy few statutory protections that have been granted against eviction.

And thus, an observation has been made by the Court that disputes having such kind of subject matter that has been enlisted above are not a subject matter of resolution by arbitration and will not be referred to arbitration.

In the present case, it has been pointed out by the Court that an agreement to sell or mortgage does not involve any transfer of right *in rem* rather it creates a personal obligation on the part of the party. Therefore, if specific performance is sought it amounts to fall in the parameter of Arbitrable disputes. If a mortgage suit has been brought up to be referred to arbitration a person who is not a party to the agreement but has interest in the property that has been mortgaged will be part of the arbitration agreement. It was duly submitted in the present case that merely because the

mortgage suit involves the passing of preliminary decrees and final decrees it does excludes itself from the parameter of arbitral disputes. It has been pointed out that the arbitral tribunal has the power to make interim awards while deciding certain aspects of this dispute. It was held in the present case that the present suit is for the purpose of the mortgage by sale and hence it should be tried by the Court and not by an arbitral tribunal as it will give rise to multiplicity of the proceeding and will defeat the very purpose of the law to render justice on time. Therefore, the Court upholds the dismissal of the application under Section 8 of the Arbitration and Conciliation Act, 1996 and hence, the appeal was dismissed.

In *G. Tech & Ors* v. *Koulath Kareem*,[175] the observation made by the Court was on the basis of the judgment of the *Booz Allen and Hamilton Inc.* v *SBI Home Finance Ltd. and Ors*[176] those cases where there exists an arbitration agreement or an arbitration clause that case needs to be referred to Arbitration. However, it was also laid down that where serious allegations are raised by the party seeking reference to the arbitration, the dispute cannot be referred to arbitration. In the present suit, the petitioners were the defendant in a suit that was regarding the dissolution of partnership and rendition of accounts and the plaintiff have instituted a suit making an allegation that the defendants' are accused in a criminal custody and were arrested. The Defendant made an application under Section 8 of the Arbitration and Conciliation Act, 19

96 for referring the dispute to arbitration as there was an arbitration clause in the partnership deed. The application was dismissed by the trial Court and there the defendant challenged the order under Article 227 of the Indian Constitution.[177] The

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[175] MANU/KE/1346/2015.

[176] 2011 5 SCC 532.

[177] Power of superintendence over all Courts by the High Court
(1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories interrelation to which it exercises jurisdiction
(2) Without prejudice to the generality of the foregoing provisions, the High Court may
(a) call for returns from such Courts;
(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts; and
(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts

contention that was raised by the petitioner was that the plaintiff had not produced any document to substantiate the allegations made against the defendants' and hence, the trial Court was not justified in holding that the dispute involved in the suit cannot be referred to arbitration and that the arbitrator cannot decide the dispute. The other contention that was raised by the plaintiff was that the petitioner had not produced the original arbitration agreement or the certified copy duly signed as contemplated in Section 8 Clause 2 of the Arbitration and Conciliation Act, 1996.

All the contentions raised by the respondent in the present case were accepted by the learned Single Judge made an observation that where serious allegations are raised against petitioners that are also the subject matter of the prosecution; the dispute cannot be referred to arbitration. It was further held that an application with regard to referring the dispute to arbitration should be accompanied by an arbitration agreement or with a duly signed certified copy. Thus, the original petition was dismissed by the Court.

Applicability of Arbitration in the Civil Suit

The arbitration not only covers dispute arising out of commercial and international commercial nature but also that are of civil nature as it has already been stated above. It should be noted down that the Code of Civil Procedure, 1908 is applicable to an arbitration agreement to the extent it has been provided in the Act. Section 89 of the code specifically mentions about the arbitration in certain Civil Suit.[178] The original

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(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such Courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor

(4) Nothing in this article shall be deemed to confer on a High Court power of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces.

[178] Settlement of disputes outside the Court.- (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for—

(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat; or
(d) mediation.

jurisdiction of the Civil Court will not be barred. Although the arbitration proceeding does not necessarily require to follow the provisions of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 yet, it should be conducted in such a manner making pace with the fundamental principle of natural justice. As the principles that have been laid down in the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 cannot be overlooked.

These are a list of cases where the applicability of arbitration in Civil Suit has been referred to Arbitration as there was an arbitration agreement between the parties.

H. Srinivas Pai and Anr. vs. H.* v. *Pai (D) thr. L.Rs. and Ors[179]

Nature of the suit: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Karnataka High Court.

Facts of the case

A suit for partition was filed by the first Respondent in 1991. An application for stay of proceeding was filed by the Appellant under Section 34 of the Arbitration Act, 1940. The application was rejected on the ground that the appellant has acquiesced to Court's jurisdiction. An appeal and a revision were filed by the appellants they got rejected. As the suit was pending before the Court the appellant filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 that were dismissed by the trial Court. A revision was filed by the appellants that was referred by the single

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(2) Where a dispute has been referred—

(a) for arbitration of conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-Section (1) of Section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

[179] 2010 12 SCC 521.

Judge of High Court to a Division Bench but the application got rejected on the ground that the application so received by the Court was in respect of commercial agreement matters and international commercial matters whereas, the right claimed by the respondent in the original suit is of civil nature and hence, it does not attract the provisions of Section 1 clause 2 of the Act. A review petition was filed by the appellants' that was dismissed. A special leave petition was filed.

Question of law

Whether the Arbitration and Conciliation Act, 1996 is applicable on the Civil Suit?

Judgment

It was observed by the Court that the Arbitration and Conciliation Act, 1996 is applicable on the domestic arbitrations, international commercial arbitrations and conciliations and the applicability of the Act depends on the fact that whether there is an arbitration agreement and not on the nature of the dispute. Arbitration and Conciliation Act is not just bound to arbitrate commercial disputes but the non-commercial civil disputes are also covered under the parameter of the Arbitration and Conciliation Act, 1996. The Supreme Court has pointed out that the observation made by the High Court with regard to the present case that the Arbitration and Conciliation Act, 1996 will not be applied on 'civil disputes' rather it will be applicable only to 'commercial disputes' or disputes that are international commercial does not carry any valid ground.

However, the said observation of the Supreme Court is only in respect to the order passed by the High Court that 'Civil Suit' cannot be covered under the provision of Arbitration and Conciliation Act, 1996 and it will not affect the correctness of the order passed by the High Court that the application was already dismissed in 1995 and affirmed in appeal in the year 2000 and by the High Court in 2001 and has attained finality. The application filed by the appellant under Section 8 of the Arbitration and Conciliation Act, 1996 was rightly refused by the High Court and the trial Court.

***Luxmi Township Limited* v. *Asif Iqbal Hussain and Ors*.**[180]

Nature of the suit: Revision petition filed under Article 227 of the Indian Constitution against the judgment of Senior Division Bench of Siliguri District Court.

Facts of the case

Petitioner Company was granted a lease of 99 years of a land measuring 395 acres out of which 1059 acres were meant for construction purpose. Applications were invited from the intending purchase of residential flats by issuing brochure. The opposite party purchased a flat as per the brochure having term and conditions mentioned in it. On the delivery of possession, a registered deal of assignment was issued. The flat that has been assigned to them showed an open lawn in the front of it. Plaintiff claimed their right of common facilities and enmities within the residency and prayed for Injunction in front of the Court restraining any sort of construction in the front lawn the application was filed under Order 39 Rule 182 CPC, a temporary injunction was granted. An application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed by the Plaintiff constituted that the general term and condition arbitration clause was mentioned. An objection was filed by plaintiff as according to them defendant has submitted their first statement. And therefore application under Section 8 is not maintainable. The Court rejected the application of defendant. Revision application was filed by petitioner.

Question of law

(i)Whether by filing an objection to an interlocutory application does party loses its right to seek reference to arbitration in accordance with Section 8 of Arbitration and Conciliation Act, 1996?

(ii)Even if there is no provision for party referring the disputes to arbitration, whether such a course is possible under Section 8 of the Arbitration and Conciliation Act, 1996?

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[180] MANU/WB/0640/2015.

(iii)Whether the person (third party) who is not a party to an arbitration agreement can be impleaded in an action?

Judgment

(i)A party does not lose its right to seek reference to arbitration in accordance with Section 8 of the Arbitration and Conciliation Act, 1996. The Supreme Court while in support of this contention referred *Rashtriya Ispat Limited* v. *Verma Transport Company*[181] case where the Supreme Court held that filing a reply to the injunction application could not have been ground to refuse to entertain the plea taken by appellants that the suit should be referred to the arbitral tribunal. The Supreme Court further added that first statement on the subject matter of the dispute that is given under Section 8(1) of the Arbitration and Conciliation Act, 1996 must be contra-distinguished with the expression 'written statement' as it indicates that the party waived his right to invoke the arbitration clause. Also referring to the case *Food Corporation of India* v. *Yadav Engineer and Contractor*[182] it was held the merely appearing in and contesting interlocutory application cannot be said to be displaying an in ambiguous intention to acquiesce in the suit and waive the benefit of the arbitration agreement. Hence the impugned order in the application was quashed. In the following case, it was submitted by the senior council that the arbitration clause relied upon by the petitioner had no manner of application in respect of the cause of action of the suit and also wrote down that the dispute arose out of the violation of the building plan.

(ii)No, it is not possible under Section 8 of the Arbitration and Conciliation Act, 1996 as it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action or bifurcation of the suit between the parties who are parties to the arbitration agreement and other is possible. It would rather lay down a totally new procedure not contemplated under the Act. And if bifurcation with regard to the subject matter of a suit would have been allowed by the legislature, the legislature would have used appropriate language to permit it. Since, there is no such clue in the

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[181] 2006 (7) SCC 275.
[182] 1982 AIR 1302.

language, the action brought before the judicial authority would not be permissible. The effect of such dismissal under Section 8 would result in the increase in the cost of litigation, slow disposal of dispute and the parties to the suit would be more harassed and occasionally there is a possibility of conflicting judgments and order by two different forums.

(iii)The Judicial Authority should scrutinize the basis of the claim against such person (third party) on an application under Section 8 of Arbitration and Conciliation Act, 1996. If the cause of action of the visitor against such party who is not a party to the agreement flows from the right of the suitor against a party to the arbitration agreement the reference ought to be denied.

The rule of beneficial construction may apply in exceptional cases where while dealing with Section 45 of the Arbitration and Conciliation Act, 1996 even in certain circumstances a non- party to an arbitration in the case *Chloro Controls (I) P. ltd* v. *Severn Trent Water purification Inc.*[183] it was observed by the Supreme Court that even a non-signatory or a third party can be subjected to arbitration without his consent through it may only be in exceptional circumstances. Even parties who are not signatories to any arbitration agreement can pray for or be referred to arbitration provided they satisfy certain pre-requisites. The application shall be heard under Section 8 of the Arbitration and Conciliation Act, 1996 afresh and decide the same by a reasoned order in accordance with law.

Sundaram Finance Ltd. & Ors v. T. Thankem[184]

Nature of suit: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Kerala High Court.

Facts of the case

In a suit for information filed by respondent, it was prayed by the respondent to restrain the first and second defendant from illegally taking away from the possession

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183 (2013) 1 SCC 641
184 MANU/SC/0177/2015.

of the plaintiff or his employee the use and enjoyment of ambassador that was in possession of the plaintiff. The appellant filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 for the resolution of the dispute as the Court did not have jurisdiction to try the case and parties should be directed to process as under arbitration as given under clause 22 of the agreement but it was declined by the trial Court on the ground that the parties cannot take the shield of arbitration when the act is done against the public policy. The appellant approached High Court where it was held that the jurisdiction of the Civil Court is not completely ousted by Section 8 and Section 5 of the Arbitration and Conciliation Act, 1996 and also the general power of the Civil Court to grant interim relief including specific injunctive relief under Order XXXIX of Code of Civil Procedure, 1908.

Question of law

(i)Whether once the application was duly filed in terms of Section 8 of the Act before Civil Court will the jurisdiction of Civil Court would be ousted by Section 8?

(ii)Whether the bifurcation should be allowed that means partly referring to the subject matter of suit of arbitration?

Judgment

(i)It was held in *P. Anand Gajapathi Raju* v. *P.V.G. Raju (dead)*[185] that once there is an agreement to arbitration then considering the peremptory language of Section 8 of the Arbitration and Conciliation Act, 1996 the Court has to refer the parties to the arbitration. A further reference of *Hindustan Petroleum Corporation Ltd.* v. *Pinkcity Highway Petroleum*[186] was quoted where it was said that an agreement was between the parties before the Civil Court and a point referring the dispute to the arbitrator was present. In the present case, the agreement was signed and accepted by both the parties hence it becomes mandatory to refer the case to the Arbitrator so mentioned in the agreement. The consideration that should attract the attention is that the

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[185] 2000 4 SCC 539.
[186] 2003 6 SCC 503.

jurisdiction of the Civil Court should not be ousted rather than to see whether the Civil Court has jurisdiction or not.

(ii)No, such bifurcation should not be permitted as it would lead to the multiplicity of the decision and a sense of confusion will arise. Also, it would be difficult to given interpretation to the language of Section 8 as it would lead only and only delay in the procedure and bifurcation would be a mess and would be laying down a totally new procedure that has not been contemplated under the Arbitration and Conciliation Act, 1996. If such bifurcation would have been permitted then differently the legislation would have indicated the same. Hence bifurcation of the subject matter of an action brought before a judicial authority is not allowed. As such bifurcation would kill the motive for the purpose by which such alternative dispute mechanism was introduced resulting, as it would lead to nothing but the frustration of the procedure, increase in the cost of litigation and harassment to the parties.

Maintainability of Civil Suit

It can be explained with the help of following judgments

***Rashtriya Ispat Nigam Ltd* v. *M/s Verma Transport Company*[187]**

Nature of the suit: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Punjab and Haryana High Court.

Fact of the case

Appellant and respondent had entered into a contract for handling the storage of iron and steel materials of the appellant. The Appellant contended that one of the partners of the respondent firm has constituted many firms and has secured various other consignment agency contracts from the appellant that are there in other cities and has acquired a higher charge on a false plea. On the investigation that was conducted by the Central Bureau of Investigation a criminal case was initiated against Anil Verma and other officials of the appellant. The appellants stated that though Anil

[187] AIR 2006 SC 2800.

Verma was replaced with his family member as a partner but still continued to control the firms/companies. The appellant terminated the contract of the respondent and a show cause notice was issued to Anil Verma and the other officials regarding them being black-listed. A suit was instituted by the respondent for grant of interim injunction for restraining the appellants from black-listing them and the Civil Judge directed the parties to maintain status quo in regard to the status of the respondent. The appellant filed an application under Section 8 stating that the subject matter of the suit is not maintainable that was rejected by the Civil Judge. Revision application filed by the appellants was further rejected by the High Court on the ground that the application filed was not accompanied by the original arbitration agreement or a certified copy. Hence, the special leave petition was filed.

Question of law

(i) Whether existence of an arbitration agreement between the parties necessary for maintaining an application under Section 8 of the Arbitration and Conciliation Act, 1996?

(ii) Whether the suit is maintainable only when an action is brought by the parties before the judicial authority to refer suit to arbitration?

(iii) Whether merely filing an application before filing the first statement regarding the subject matter of the dispute will be held that the party has waived his right?

Judgment

(i) For maintenance of application under Section 8 of the Arbitration and Conciliation Act, 1996 the service of notice under the arbitration agreement is necessary. The High Court refused to interfere in the matter opining that no notice had been served by the chairman of the first appellant in terms of the arbitration agreement. The said stage was yet to be reached. What was necessary was the existence of an arbitration agreement.

(ii) Reference of the dispute in a suit to arbitration under Section 8 of the Act by the Judicial Authority is mandatory subject to the fulfilment of the conditions precedent. Section 8 confers a power on the judicial authority that he must refer the dispute which is the subject matter of an arbitration agreement pending before him. The said power shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute.

(iii) If merely an application is filed before actually filing the first statement on the substance of the dispute, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the Court. The expression "first statement on the substance of the dispute" enclosed in Section 8(1) of the Arbitration and Conciliation Act, 1996 is contra-distinguished from the expression "written statement". As it connotes that party to the arbitration agreement has waived his right to invoke the arbitration clause. What holds importance is whether the petitioner has filed his first statement on the subject matter of the dispute and if the first statement on the dispute has not be filed under Section 8 of the Arbitration and Conciliation Act, 1996 the application would not be held to wholly unmaintainable.

The Court held that the application filed by the Appellants under Section 8 of the 1996 Act was maintainable. The appeals are allowed with costs.

***Krishan Radhu* v. *M/s Emaar Mfg. Construction*[188]**

Facts of the case

A suit was instituted by plaintiff for seeking damages against the defendant company for the loss suffered consequently to the delay. The possessions of the two apartments were to be handed over to the plaintiff as per the said two identical worded agreements. The plaintiff has also instituted consumer complaint before the National Consumer Redressal Commission under the provisions of Consumer Protection Act, 1986. The plaintiff did not fall in the category of the consumer within the meaning of the expression used in the Consumer Protection Act, 1986 as a result

188 MANU/DE/3422/2016.

the National Consumer Redressal Commission has no jurisdiction to adjudicate upon the consumer complaint laid before it. Upon receiving the summon the defendant instead of filing a written statement moved the application under Section 8 of the Arbitration and Conciliation Act, 1996 stating that the two apartment buyers agreement on the basis of which the case has been brought contained the arbitration clause. The plea was rejected by the Joint Registrar as the right of the defendant to file the written statement was closed for the reason that the said period of 90 days granted under Code of Civil Procedure, 1908 has lapsed. It was challenged by the defendant and filed an appeal. The application filed under Section 8 and the original appeal was resisted by the plaintiff. Despite the opportunity given no reply was filed by the plaintiff.

Question of law

Whether the application would be accepted if the said period of filing a written statement has lapsed?

Judgment

Section 8 of the Arbitration and Conciliation Act, 1996 says that a party who wants action to be taken by the Judicial Authority as per the arbitration agreement has to apply not later than the date of submitting his first statement on the substance of the dispute and it should be accompanied with the original arbitration agreement or a duly certified copy. The language of this Section is peremptory in nature and therefore in cases where there is an arbitration clause in the agreements it is obligatory for the Court to refer parties to arbitration in terms of their arbitration agreement and nothing remains to be decided by the Court in the original action after such an application is made. Having regard to the plain meaning of the word employed in the pre-amendment on account of arbitration agreement clause contained in Section 8 (1), it appear that the party resisting on account of arbitration agreement the jurisdiction of the forum where the action is brought was permitted to apply for reference to arbitration even while submitting his reply or written statement. It was argued by the plaintiff that the provision of law contained in the amended Section 8 (1) would have

to be applied to the case since it is a matter of procedure to which the defendant stated that it is the pre-amended clause in Section 8 (1) which would apply for the reason the amendment Act itself made it clear that the amendment would have retrospective effect. The defendant has applied for the reference to arbitration before submitting his written statement and thus, there is nothing on which it can be argued that the defendant had submitted or acquiesced to the jurisdiction of the Civil Court. The plaintiff resisted the prayer under Section 8 of the Arbitration and Conciliation Act, 1996 arguing that the arbitration clause was not invoked before NCDRC either before, or in the course of reply filed in answer to the consumer complaint, the right to take recourse to arbitral proceedings has been forfeited or waived even before filing of the Civil Suit. The NCDRC is a forum created by the Consumer Protection Act, 1986 with the object to secure social purpose and to promote the facilities in a comprehending manner for settlement of issues involved in the consumer complaint and to assess the damages whereas the protection of the interest if the consumer is given predominance and departure made from the settled legal forums that are provided under the Code of Civil Procedure. It was conceded by the defendant to NCDRC that there was no reference made to arbitration clause nor was any prayer made to the said forum with regard to referring the parties to arbitration under Section 8 (1) of the Arbitration and Conciliation Act, 1996. It was held that order of the Joint Registrar striking off the defence of the defendant by closing its right to file written statement was uncalled for. The application under Section 8(1) of the Arbitration and Conciliation Act, 1996 having been filed, the existence of the arbitration agreement having been admitted rather filed in original by the plaintiff himself and the cause of action pleaded in the Civil Suit at hand covered all the requisites for an order by this Court referring parties to arbitration in terms of Section 8 of the Arbitration and Conciliation Act, 1996 are in place.

Thus, both the original appeal and application under Section 8 of the Arbitration

Exception to Arbitration

The Court has to examine the arbitrability of a dispute when an application has been filed under Section 8 of the Arbitration and Conciliation Act, 1996. This has become a

well settled in the Indian law. The Arbitration and Conciliation Act, 1996 does not in any way offer guidance for the determination of arbitrability of the subject matter that can be disputed in arbitration. Thus, in the absence of the clue or guidance by the Arbitration and Conciliation Act, 1996 the Supreme Court has invented a test to determine the arbitrability. Therefore, in the case of *Booz Allen & Hamilton Inc.* v. *SBI Home Finance*[189] for the very first time, the definition of "capable of being adjudicated by private forum" has been provided by the Court.

However, the Court in the case did not follow the Booz-Allen test in the case of *A. Ayyasamy* v*. A. Paramasivam*[190]for determining the arbitrability of fraud claims. It did not rely on the established principle that was set by Booz- Allen case rather it criticised it for being generic and not that much practical as it was not based on the principle of jurisprudence. Some exceptions on the basis of which the Court can refuse to refer the dispute to arbitration even when essentials of Section 8 are fulfilled are given below.

This are-

1. Where the Court finds the very serious allegation of fraud that makes a virtual case of criminal offence, or

2. Where allegations of fraud are so complicated that it becomes essential that such complex issues can be decided only by Civil Court on the appreciation of voluminous evidence, or

3. Where serious allegations of forgery/fabrication of documents in support of the plea of fraud, or

4. Where fraud is alleged against arbitration provision itself, or

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[189] (2011) 5 SCC 532.
[190] (2016) 10 SCC 386.

5. Where fraud alleged permeates the entire contract, including an agreement to arbitrate where fraud goes to the validity of contract itself or contract that contains arbitration clause or validity of arbitration clause itself.

Though the arbitration process is an expedient justice delivery system there are certain exceptions to arbitration, where to settle the dispute between the parties cannot be transferred for arbitration due to the gravity of the matter.

Arbitral Agreement

To refer the subject matter of the dispute to arbitration it is very important that an arbitration agreement should be in existence between the parties or an arbitration clause. No particular form of an arbitration agreement is requiring by the law. Though, the very essence is that the arbitration agreement should be writing. A state of mind will not be regarded as an agreement as the parties are not adjudicated on the basis of what is in mind but they are rather adjudicated by what is in written form. It is essential that the arbitration agreement must be legally valid and enforceable by law in accordance with Section 10 of the Contract Act.[191]

Where there is an absence of an arbitration agreement between the parties then the consent of all the parties should be taken for referring the dispute to arbitration.[192] Presence of an arbitration agreement or an arbitration clause equally amounts to referring the dispute to the arbitration. Few cases have been quoted below where the Courts have held that the clauses amount to "arbitration clause" and the clauses that "do not amount to arbitration clause".

The Courts have held that the in the following cases it shall be considered as arbitration clause:

1. Where the parties have agreed that if disputes arise between them in respect of the subject-matter of the contract, such dispute shall be referred to

191 Indian Contract Act, 1872, Section 10, 'What agreement are contracts — All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and a lawful object, and are not hereby expressly declared to be void.'

192 *Jagdish Chander* v. *Ramesh Chander,* (2007) 5 SCC 719.

arbitration and then such an arrangement would spell out an arbitration agreement.[193]

2. Where the agreement provides that the determination is to be accepted as a substitute for a judgment of the Court.[194]
3. Where a clause stated that ‘that if any dispute touching the effect and meaning of this agreement arises in between the parties, it shall be referred to the Chairman of the board whose decision shall be final and binding on the parties,’ it was held to be an arbitration clause.[195]
4. Where it is provided that in the matter of dispute, the case shall be referred to a certain authority whose order shall be final, it amounts to valid arbitration agreement.[196]
5. If a letter of acceptance mentioned that an agreement which was being drawn and would be entered into in due course and the agreement could be signed only after completion of the building, the agreement was held to be valid.[197]
6. Where the General condition of a contract provided that disputes concerning work or execution or failure to execute work whether arising during the progress of the work or after its completion or abandonment thereof shall be referred to a sole arbitrator, it would be termed as an arbitration clause.[198]

The Courts have held the following clauses not to amount to an arbitration clause:

Where a clause in a works contract provided that the decision of the Executive Engineer would be final on certain matters, it cannot be said to be an arbitration clause.[199]

1. If the clause in a contract provides that in case of any dispute arising out of a contract, the matter shall be referred to the concerned Court under whose jurisdiction the work is situated, it is not an arbitration agreement.[200]

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[193] *Punjab State* v. *Dina Nath*, (2007) 5 SCC 28.
[194] *Y.L. eServices Pvt. Ltd* v. *Silverline Business & Tech Park Pvt. Ltd*, AIR 2008 Kant 127.
[195] *Bhagwan Devi* v. *Delhi Agricultural Marketing Board*, 2006 (3) RAJ 372.
[196] *Ram Lal Jagan Nath* v. *Punjab State*, AIR 1966 P&H 436.
[197] *Life Insurance Corporation of India* v. *M.L. Dalmiya & Co.*, AIR 1978 NOC 247 (Cal).
[198] *P.N. Garg Engg. And Contractors* v. *State of U.P.*, AIR 2007 All 154.
[199] *District Panchayat, Bhavnagar* v. *Mahmad Haji Gafur & Co.,* AIR 1984 Guj 98.

2. A clause providing for the settlement of questions relating to specifications, design, quality and workmanship and other technical aspects by an officer of one of the parties, cannot be said to be an arbitration clause.[201]
3. A clause in an agreement for sale of goods provided that any dispute arising in relation to the agreement would be settled by arbitration of a neutral person agreed to by both the parties. In addition, it also provided that in case of litigation, Court, Court at 'C' would have exclusive jurisdiction. Held that the clause in the agreement was vague and uncertain and could not be said to be an arbitration clause and the expression 'neutral person agreed to by both' was uncertain and as to who would be the neutral person had been left to guesswork.[202]
4. An agreement providing that the parties 'may' agree to go in for a suit or they 'may' also go to arbitration is not an arbitration clause.[203]

Where the parties stipulated that 'Disputes shall be referred to arbitration if the parties so determine', *it eas not* an arbitration clause.[204]

Russell states that "An arbitration agreement is an agreement to submit present or future disputes. An arbitration agreement is, therefore, a contractual undertaking by two or more parties to resolve disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations".[205] No particular form is necessary but the words used for this purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility. It is not necessary that a formal word such as 'arbitration' is used but what is essential is that the parties should intend to make a reference or submission and should be *ad idem* in this respect.[206] Thus, when an agreement is entered into between the parties the parties with an understanding that all or certain disputes which have arisen or

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200 *Ruby Construction* v. *State of Bihar*, AIR 1993.
201 *State of Rajasthan* v. *Nav Bharat construction company*., (2005) 11 SCC 197.
202 *Sankar Sealing Systems Pvt Ltd.* v. *Jain Motors Trading Co.*, AIR 2004 Mad 127.
203 *Wellington Associates Ltd.* v. *Kirit Mehta*, (2000) 4 SCC 272.
204 *Jagdiish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719.
205 Russell on Arbitration, 22nd Ed., para 2.002, p. 26.
206 *Delhi Development Authority* v. *Jacksons Engineers Pvt. Ltd*. 1996 (Suppl) Arb LR 296 (Del) (DB).

which may arise between them shall be resolved in arbitration, it will be known as an arbitration agreement. Such an agreement may be a stand-alone document or may form part of the main contract.

Validity of Arbitration Clause

***Hindustan Petroleum Corporation* v. *M/s Pink City Midway Petroleum*[207]**

Nature of suit: Special Leave petition under Article 136 of the Indian Constitution against the judgment of Punjab and Haryana High Court.

Facts of the case

The appellant is a company carrying business of manufacture, sale and distribution of petroleum product. The respondent is one of the dealers appointed by the appellant to sell its petroleum product. There is a dealership agreement between them where clause 20 of the said agreement comply the respondent with all the terms and condition issued by the appellant. Another clause 30 of the same agreement empowers the appellant to stop the supply of its products to the dealer for the period appellant thinks fit for any breach in the condition of the agreement and clause 40 reads that in case of any dispute the matter would be referred to the sole arbitration.

In the said agreement it was also stated that the appellant to prevent mal-practices can conduct an inspection. The appellant while exercising the power of inspection found that there was short delivery of MS & HSD and dispensing units were tempered, based on such inspection report the appellant send a notice to the respondent & the respondent submitted a reply upon which the appellant not being satisfied suspended the sale for 30 days and levied penalty of Rupees 15000.

The respondent moved to Civil Court praying that the order passed by the appellant is illegal and arbitrary. The Civil Judge passed a stay on the suspension of supplies and agreed to the penalty to be paid by the respondent. The appellant in reply filed an

[207] 2003 6 SCC 503.

application under Section 8 read with Section 5[208] of the Arbitration and Conciliation Act, 1996 praying for referring the dispute to the arbitrator. The Civil Court dismissed the said application. A revision was filed by the appellant to the High Court. Thus, the appellant filed a Special Leave Petition.

Question of law

(i)What would be the role of the Civil Court when an argument is raised that an arbitration clause does not apply on the facts of the case?

(ii)Whether the power conferred under the agreement conflict in any manner with the statutory power under the Standards of Weights and Measures (Enforcement) Act, 1985?

(iii)Whether the revision petition is maintainable before the High Court under Section 115 of Code of Civil Procedure, 1908?

Judgment

(i)With regard to the first issue, the Court has pointed out that the provision has been provided under Section 16 of the Arbitration and Conciliation Act, 1996[209]. The matter

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

[209] Competence of arbitral tribunal to rule on its jurisdiction.—
(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of 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.
(4) The arbitral tribunal may, in either of the cases referred to in sub-Section (2) or sub-Section (3), admit a later plea if it considers the delay justified.
(5) The arbitral tribunal shall decide on a plea referred to in sub-Section (2) or sub-Section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

should be raised before the arbitrator who is competent to adjudicate upon the subject matter of the dispute and that the Civil Court should not embark with regard to the applicability of the arbitration clause. To support the contention the present Court has quoted a case regarding the power of the arbitrator under Section 16 of the Arbitration and Conciliation Act[210]. It was observed that the arbitral tribunal may rule on any objections with respect to the existence or the validity of the arbitration agreement. Thus, the Court should not have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in clause 40 of the Dealership Agreement as required under Section 8 and Section 16 of the Arbitration and Conciliation Act, 1996.

As given in *Baron* v. *Sunderland Corporate*[211] it is necessary for an arbitration clause that each party shall argue to refer disputes to arbitration. It is an essential ingredient of an arbitration clause that either party may in the event of a dispute arising refers to it in the manner provided to the arbitration.

In the present case the respondent has agreed to all the clauses that were mentioned in the Dealership Agreement and hence, the matter should be referred to arbitration. Another contention to support it was given in the case of *Fair Air Engineers Pvt*. v. *NK Modi*[212] the Supreme Court held that the existence of an arbitration clause in the agreement is accepted by both the parties as also by the lower Courts. And as it is present the Court ought to have referred to arbitration considering the mandatory language of Section 8 of the Arbitration and Conciliation Act, 1996.

In another landmark judgment the Supreme Court has made an observation that the language of Section 8 is peremptory in nature. So, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided

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(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.

210 *Konkan Railway Corporation Ltd.* v *Rani Construction Pvt. Ltd*, 2000 (7) SCC 201.

211 (1966) 2Q B 56.

212 (1996)6 SCC 385.

in the original action after such an application is made except to refer the disputed to an arbitrator.[213]

In the present case the existence of an arbitral clause in the agreement is accepted by both the parties but what is thereof disputed by the respondent is the applicability and thus, it may be concluded that the Courts below ought to have referred the dispute to arbitration and the Civil Court should not embark upon an inquiry with regard to the applicability of the arbitration clause to the facts of the case.

(ii) With regard to the second issue raised the contention put forward by the counsel of respondent is that the investigation into such conduct as done by the dealer can only be conducted by an officer in a manner that has been specified in the Act and it is not open to the Appellant to arrogate to itself such statutory power of search and seizure by relying upon some contractual terms that are mentioned in the Dealership Agreement.

Another contention that was raised parallel was regarding disputes where penal consequences are present that it can only be tried by a Court of competent jurisdiction and cannot be decided by an arbitrator. With regard to such argument that was raised on behalf of the respondent it was put forward that the terms of the dealership Agreement, the respondent who is the dealer in the present case is under an obligation to faithfully, promptly and diligently observe and perform and carry out at all times all the directions, orders of the agreement. Clause 30 of the same agreement gives the right to the corporation to stop, suspend the petrol and diesel supply without prejudice to any other right or remedy available to the corporation under the agreement. Therefore, the right exercised by the appellant, in this case, is a contractual right and is independent of the statutory provisions in the various Acts that have been enumerated in Clause 20 of the Agreement. The power conferred under the agreement does not in any manner conflict with the Standard of Weight and Measures (Enforcement) Act, 1985. The power that is exercised by the appellant in such a situation is a contractual power under the agreement and not a statutory one.

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213 *P. Anand Gajapathi Raju & Ors* v. *P.V.G. Raju (Died)*, 2000 (4) SCC 539.

So, with regard to this, the conclusion that is drawn is that if the appellant is satisfied that the respondent is indulging in short supply or tampering with seals, it will be entitled to such action and same will be referred to arbitration as contemplated under clause 40 of the Dealership Agreement.

(iii) With regard to the last question involved regarding the maintainability of the revision petition before High Court under Section 115 of Code of Civil Procedure, 1908. The Civil Court has no jurisdiction to entertain a suit after an application under Section 8 of the Arbitration and Conciliation Act, 1996 is made. The trial Court by rejecting the application has failed to exercise jurisdiction vested in it amounting to failure of justice that may cause irreparable injury. The High Court in this came to a conclusion that its jurisdiction to entertain a revision petition would only be available if the order impugned is such that if it is allowed to stand it would be in that occasion the failure of justice against the party with respect to whom the said order was made. The High Court has relied upon certain judgments of the Court to draw such conclusion. But it must be noted down that the facts of the cases are different and hence it is not necessary that the same rule applies in each case. The High Court has erred in coming to the conclusion that the appellant was not entitled to the relief under Section 115 of Code of Civil Procedure, 1908.

The appeal filed by the Appellant in the Supreme Court under Special Leave Petition succeeded and the impugned orders of the Courts were set aside. The application filed by the Appellant under Section 8 and Section 5 of the Arbitration and Conciliation Act, 1996 was allowed. The trial Court was directed to refer the dispute pending before it to the arbitrator.

***SMS Tea Estates Pvt. Ltd.* v. *Chandmari Tea Company Pvt. Ltd.*[214]**

Nature of the suit: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Guwahati High Court.

Facts of the case

[214] MANU/SC/0836/2011.

The appellant granted a lease to Respondent. A lease deed was executed between the Respondent and Appellant under which Respondent granted a lease to the Appellant for a term of 30. Clause 35 of the said lease deed has an arbitration clause. Prior to the execution of the said lease deed, the Respondent had offered to sell the two Tea estates to the Appellant and he agreed to purchase them subject to detailed verification. The Appellant invested huge sums of money for improving the tea estates in the expectation that it would either be purchasing the said estates or have a lease for 30 years. The Respondent illegally evicted the Appellant from the two estates and took over their management. Aggrieved by the behaviour of the respondent the appellant issued a notice to refer the matter to arbitration but the Respondent failed to comply and he opposed the said application stating that the unregistered lease deed was invalid, unenforceable and not binding upon the parties as it was also not duly stamped. He contended that Clause 35 providing for arbitration, being part of the said lease deed, was also invalid and unenforceable. The Respondent simply denied by stating that they had agreed to sell the two tea estates to the Respondent. The learned Chief Justice dismissed the Appellant's application and held that the lease deed was compulsorily registrable under Section 17 of the Registration Act and Section 106 of the TP Act; and as the lease deed was not registered, no term in the said lease deed could be relied upon for any purpose and therefore Clause 35 could not be relied upon for seeking reference to arbitration. The High Court also held that the arbitration agreement contained in Clause 35 could not be termed as a collateral transaction, and therefore, the proviso to Section 49 of the Registration Act would not assist the Appellant. The said order was challenged and an appeal was filed by Special Leave Petition

Question of law

(i)Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

(ii)Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

(iii)Whether there is an arbitration agreement between the Appellant and Respondent and whether an Arbitrator should be appointed?

Judgment

(i)It has been given in Section 17(1)(d) of Registration Act and Section 107 of Transfer of Property Act that the leases of the immovable property from year to year can be made only by a registered instrument. An exception has been given under Section 49 of the Registration Act, 1908 that an unregistered document affecting immovable property may be received as evidence of a contract in a suit as collateral not been affected by registered instrument. Therefore, the arbitration agreement would remain modest for the purpose of resolution of disputes arising with reference to the deed of transfer. These principles have now found statutory recognition in Sub-Section (1) of Section 16 of the Arbitration and Conciliation Act, 1996 .An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore, having regard to the provision of Section 49 of Registration Act read with Section 16(1)(a) of the Arbitration and Conciliation Act, 1996, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

(ii)Section 33 of the Stamp Act, 1899 states that every person who is in-charge would impound the instrument that he has received that is not duly stamped which is chargeable. It is the duty of the officer to see that the instrument that has been received is duly stamped as required by the law in force in India when such instrument was executed or first executed. Of the same Act Section 35 says that the instruments that are not duly stamped are not admissible as evidence provided that it may be admitted as evidence on the payment of the duty with the penalty.

Therefore, when a lease deed is relied upon as containing the arbitration agreement, the Court should consider whether an objection is raised or not and the document is properly stamped or not. If is not properly stamped, it should be confiscated in the

manner as specified in Section 38 of Stamp Act. The Court cannot act upon such a document or the arbitration clause. If the document is not registered, but is compulsorily registrable, with regard to Section 16(1) (a) of the Arbitration and Conciliation Act, 1996 the Court can detach the arbitration agreement from the main document. The order for the appointment of arbitrators by the Chief requires an application under Section 11 of the Act to be complemented by the original arbitration agreement or a duly certified copy. If the Court comes to the conclusion that the instrument is not duly stamped, it has to confiscate the document and deal as per Section 38 of the Stamp Act.

(iii)Clause 35 of the lease deed had an arbitration clause in it which said that if any dispute arose between the parties then it shall be settled by arbitration and the government will be in Indian. Though the Arbitrator will have jurisdiction to decide any dispute touching upon the lease deed, as the lease deed is unregistered, the arbitration will virtually be a nonstarter. A party under such a deed may have the luxury of having an arbitrator appointed.

In the present case, the Appellant seeks arbitration in regard to three things

(a) For enforcing an alleged agreement of sale of two tea estates;

(b) For enforcing the lease for thirty years and;

(c) For recovery of amounts spent by it in regard to the estates on the assumption that it was entitled to purchase the property or at least have a lease of 30 years.

Hence, it is clear from the petition that the alleged agreement of sale was entered prior to the lease deed and there was no arbitration no arbitration agreement in regard to such agreement of sale and hence no arbitrator can be appointed in regard to any dispute in the lease deed.

This appeal is allowed and the order of the High court has been set aside and the subject matter is submitted to the Guwahati High Court to decide the issue and if the document is duly stamped then appoint an arbitrator.

***M.R. Engineers and Contractors Pvt. Ltd.* v. Som Datt Builders Ltd.**[215]

Nature of suit: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Kerala High Court.

Facts of the case

The Public Work Department, Government of Kerala was assigned the work of "Four Laning and Strengthening of Alwaye-Vyttila and Aroor-Cherthala and Strengthening of Vyttila to Aroor Section of NH 47 - N2 & N3 packages" that included the work of "Construction of Project Directorate Building for National Highway Four Laning Project at Edapally, Cochin" to the respondent. That means that the appellant was a sub-contractor of the respondent. The contract had a provision for arbitration that in case of dispute the matter shall be settled by the three arbitrators of the committee. The committee shall be composed where one arbitrator has been nominated by the Employer, the other one is nominated by the Contractor and the third one will act as the Chairman of the committee and not as umpire that shall be nominated by the Director-General, Ministry of Surface transport; Government of India. And that if either of the party fails to appoint his arbitrator then within 60 days after the receipt of the notice the Director-General, Ministry of Surface Transport, Government of India shall appoint arbitrators and the certified copies shall be furnished to both the parties. Apart from this a work order was issued where details with regard to the tender specifications and drawings were mentioned that has to be carried out where it was also mentioned that the sub-contract shall be carried out on the basis of the terms and conditions that are applicable on the main contract. The appellant alleged that they have informed the respondent that they have executed certain extra items on the instructions of PW Department and requested the respondent to make a claim on PW Department in that behalf. All the claims that arose were referred to arbitration and the award was made by the arbitrator. As the claim was not settled the appellant send a letter seeking reference of the disputes to arbitration. An application was filed under

215 2009 7 SCC 696.

Section 11 of the Arbitration and Conciliation Act, 1996 as Clause in the General Conditions. As the General Conditions of the contract was forming part of the contract between the PW department and the respondent provided arbitration that was imported into the sub-contract between the respondent and appellants. The appellant also argued that with regard to Section 7(5) of the Arbitration and Conciliation Act, 1996 the arbitration clause that was present in the main contract established an arbitration agreement between the respondent and appellant. All the claims and contentions were denied by the respondent. The application was rejected by the Chief Justice on the ground that the arbitration clause was not incorporated by reference in the contract between the respondent and appellant. Hence special leave petition was filed.

Question of law

(i)Whether an arbitration clause enclosed in the main contract would be incorporated in a sub-contract?

Judgment

(i)According to Section 7 of the Arbitration and Conciliation Act, 1996 an arbitration agreement is an agreement that is submitted by the parties regarding a dispute that may arise in future that constitutes a legal relation between them. It may be in a form of an arbitration clause in a contract or a separate agreement. The agreement should be in writing signed by both the parties. It has also been stated in this Section that if a document has been referred that contains an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference so made is for the purpose of inculcating that arbitration clause as a part of the contract.

Hence it is clear that the reference to the document in the contract should reflect the intention to incorporate the arbitration clause contained in the document into the contract rather than just a reference of the document. The language of Section 7(5) states that there should be conscious acceptance from both the parties. Though, the Act does not contain any guidelines regarding the conditions that need to be fulfilled

while referring a document containing an arbitration Clause into a contract in such situations where there is absence of statutory guidelines the normal rules of construction of contract would be followed. The Counsel for appellant relied on two decisions stating that even a general reference to the main contract in the sub-contract was sufficient to incorporate the arbitration clause in the main contract even if there was no special reference to arbitration clause was made. The two cases are as follow:

In *Atlas Export Industries* v. *Kotak & Co.*[216] the Court approved the decision of the High Court regarding rejecting the appellant's objection that there was no agreement in writing between parties that requiring the disputes being referred to arbitration in accordance with the arbitration rules of GAFTA holding that the arbitration clause from GAFTA Contract 15, was incorporated by reference into the contract. In another case *Groupe Chimique Tunisien SA* v. *Southern Petrochemicals Industries Corporation Ltd.*[217] the Court held that the purchase order that was placed by the respondents subject to Fertilizer Association of India terms that contained the arbitration clause. Therefore, the arbitration clause that is present in the Fertilizer Association of India terms would amount to constitute the arbitration agreement between the parties.

In the present case as it has been already stated above the work order shows that parties did not intend to incorporate the main contract entirely in to the sub contract that is the work order as it just stated that the intention is only to executed as per the terms and conditions in the main contract. The arbitration clause though an integral part of the contract is an agreement within the agreement. It is a collateral term of a contract that is independent and separate from its substantive terms. In the nonexistence of a perfect or precise sign that the main contract is totally including the arbitration agreement was intended to be made applicable to the sub-contract between the parties the arbitration clause in the main contract did not form part of the sub-contract between the parties. Hence the Court is of the opinion that the

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[216] AIR 1999 SC 3286.
[217] AIR 2006 SC 2422.

expression of the arbitration clause in the main contract makes it clear that it cannot be applied to the sub-contract that is between the contractor and sub-contractor. Secondly in the arbitration clause it has been mentioned that a committee compromising of three arbitrators shall be formed and such nomination has not been mentioned between the contractor and sub-contractor. It has been observed by the Court that the entire arbitration agreement between the employer and contractor was tailor-made and is wholly inappropriate and unsuitable in context of the dispute between the contractor and sub-contractor. The Court upheld that there is no arbitration agreement between the parties and it is unnecessary to examine the contention of the respondent that no dispute existed between the parties with regard to full and final settlement receipt that was executed by the appellant.

***Inox Wind Ltd.* v. *Thermocables Ltd*.**[218]

Nature of suit: Special Leave Petition under Article 136 against the judgment of Allahabad High Court.

Facts of the case

In this case, the appellant was a manufacturer of wind turbine generator and respondent was a wind power cables manufacturer. There were two purchase orders that were issued by the appellant to the respondent. The supply was according to the terms and conditions that were mentioned in the purchase order and the standard terms and conditions contained a clause relating to dispute resolution. In the clause, it was mentioned that in case of dispute the subject matter in the dispute would be resolved by a sole arbitrator according to the provision given in Arbitration and Conciliation Act, 1996. As per the records, all the terms and conditions were accepted by the respondent except the delivery period. The respondent supplied the cables as per the purchase order and it was found out by the appellant that the cables were cracked and hence forced the respondent to stop the supply and replace the damaged order. The appellant issued a notice proposing the name of the arbitrator as per the terms and Conditions. As there was an absence of any response from the

[218] AIR 2018 SC 349.

side of the respondent, the appellant moved the High Court of Judicature at Allahabad by filing an application under Section 11(6) of the Arbitration and Conciliation Act, 1996. The application was dismissed by the High Court stating that the arbitrator cannot be appointed as the appellant could not prove the existence of an arbitration agreement. Hence, the present appeal was made.

Question of law

(i) Whether the general words that are mentioned in the agreement were capable of incorporating an arbitration clause?

Judgment

(i)The reference to a standard form was ample for incorporation of the arbitration clause. This case is an exception to what was laid down in *M.R. Engineers and Contractors Pvt. Ltd.* v. *Som Datt Builders Ltd.*[219] as the Court holds a belief that a general reference to a consensual standard form is sufficient for incorporation of arbitration clause. In the case of *Sea Trade Maritime Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Limited, The Athena*[220] the dissimilarity between incorporation in a single contract case and a two contract was recognized. If s reference is made to a secondary document with regard to a contract between two parties and the secondary document is a contract where one of the parties is different from the parties in question, it is said to be a two contract case. In such a case to a general reference to an earlier contract would not be enough to incorporate the arbitration clause. Nevertheless, if the reference is made with regard to the standard terms that are there in the contract it will amount to single contract and the use of general words to incorporate the arbitration agreement by a reference shall be permissible. In this case as the reference was made with regard to standard form of the contract that was a single contract, Justice Langley held that the general words of incorporation would be sufficient to incorporate an arbitration clause. Another case of *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS* v. *Sometal SAL*[221] the question of

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[219] (2009) 7 SCC 696.
[220] (2006) EWHC 2530 (Comm).
[221] (2010) EWHC 29 (Comm).

incorporation of the arbitration clause from a primary contract by general reference into a secondary contract arose before the Queen's Division Bench. The difference in methodology between cases in which the parties incorporate the terms of a contract between the other parties or between one of them with a third party on the one hand and those in which they incorporate the standard terms on the other hand was noticed. Comprehensive categories where the parties attempt to incorporate an arbitration Clause were recognized by the Court. They are:

(1)A contract with standard terms is incorporated between A and B. These offers may be standard terms of a party set behind the letter or order, or for reference contained in another document, or the conditions contained in the rules of an organization, of which A or B or both are members, or they may be standard standards in a particular business or industry.

(2) A and B have a contract between them and the standard terms that has been adopted in present contract has been already agreed by both the parties earlier.

(3) Contract between A and B and they incorporated the terms agreed between A (or B) and C. The general example is reinsurance contracts involving the conditions of the primary layer of insurance; and the building or engineering sub-contract involving the conditions of the main contract or sub-sub contracts covering the terms of the sub-contract.

(4) A contract is incorporated between A and B where they are agreeing to the terms that has been agreed by C and D.

Justice Christopher Clarke pointed out that single contract cases falls within the category of 1 and 2 as a general reference would be adequate for incorporation of an arbitration clause from a standard form of contract. And two contract cases falls within the category 3 and 4 and it was further held that a stricter Rule has to be followed by insisting on a specific reference to the arbitration Clause from an earlier contract.

In the present case the purchase order that was issued by the appellant had a clause that the supply has to be as per the terms and conditions mentioned and it was duly

accepted by the respondent apart from the point regarding the delivery period. The dispute between the appellant and the respondent arose after the delivery of goods. The purchase order was a single contract and the general reference to the standard form is sufficient for incorporation of the arbitration clause even though it was not made by a trade association or a professional body.

In the present case the appeal was allowed and an arbitrator was appointed to adjudicate the dispute between the parties.

***The State of Bihar and Ors.* v. *Brahmaputra Infrastructure Limited and Ors.*[222]**

Nature of the suit: Special Leave Petition under Article 136 of Indian Constitution against the judgment of Patna High Court.

Facts of the case

The State is aggrieved by the appointment of arbitrator Under Section 11(6) of the Arbitration and Conciliation Act, 1996 on the ground that the Act is excluded by the Bihar Public Works Contracts Arbitration Tribunal Act, 2008. The Section 8, 9, 22 of the State Act were to be noticed. The relevant portion of clause 25 of the agreement stated that the arbitration should be conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment. Thus the appeal was filed against the order directing the appointment of an arbitrator.

Question of law

Whether Section 4(3) (b) of State Act is unconstitutional?

Judgment

It was found that the scheme of Section 8, Section 9 and Section 22 of the State Act showed that in the absence of an agreement regarding the applicability of the Central Act, the State Act applies to work on the contract and in the present case there was

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[222] MANU/SC/0315/2018.

an arbitration agreement between the parties and the central act would therefore be applied not the state act. Thus, the appeal was dismissed. The respondent also submitted that Section 4(3) (b) of the State Act is patently unconstitutional because the tenure of the chairman and other members that are mentioned under the scheme is inconsistent with the constitutional scheme as Section 4(1) provides three year tenure or till the age of 70 years whichever is earlier. It has been observed by the Court that Arbitral tribunal performs a quasi-judicial function and the termination of the chairman and other members cannot be a pleasure within the term stipulated. The termination of the member by the party to the dispute would interfere directly with the impartiality expected from such member. The said provision is found arbitrary and contrary to the Rule of Law and hence the provision is declared unconstitutional.

Applicability

Section 8 of the Arbitration and Conciliation Act, 1996 would be applicable only if the following conditions are satisfied.

1. That there should be an arbitration agreement in existence;
2. That action has been brought to the Court by one party to the arbitration agreement against the other party;
3. The subject-matter of the Dispute should be same as the subject-matter of the arbitration agreement;
4. That the other party before he submits his first statement of the substance of the dispute, moves the Court for referring the parties to arbitration; and
5. That along with the application the disputed party has to file either the original arbitration agreement or a duly certified copy.

Pre-requisite of Arbitration Agreement

Arbitration has been defined as a mode of settlement of a dispute by the choice of the parties as they have made an arbitration agreement or in their agreement, they have made an arbitration clause. Therefore, the presence of an arbitration agreement or an arbitration clause is a pre- requisite that has to be fulfilled to refer the dispute to

arbitration. However, the cases where all the requisites that are required in an arbitration agreement are fulfilled but specifically it has been not named as 'arbitration' can also are referred to arbitration. The following cases have been referred:

***Atul Singh and Ors.* v. *Sunil Kumar Singh and Ors*[223]**

Nature of suit: Special Leave Petition under Article 136 of the Indian constitution against the judgment of the Patna High Court.

Facts of the case

A suit was filed by the appellants against the defendant no 3 and 5 others for a declaration that the reconstituted partnership deed is illegal, void and without jurisdiction. A declaration was also sought that the plaintiffs are the heirs of Late Shree Rajendra Prasad Singh and will continue as partners till the extent of his share. Apart from this is was also prayed that decree for the rendition of accounts of the firms should be passed and the defendants should be directed to pay the plaintiff the share in the profit as well as interest and the principal amount of the unsecured loan advanced by the firm. A further relief for grant of an ad-interim injunction restraining the respondents from misusing the funds was sought beside the appointment of a receiver till the time the suit is pending for the purpose of managing the firm. An ex-parte was proceeded against all the defendants except defendant no. 2 has he appeared before the trial Court and the defendant no. 2 filed an application for giving time to file a written statement and also filed an application for rejecting the plaint under Order VII Code of Civil Procedure, 1908. The application got dismissed so further the defendant no. 2 moved an application for referring the dispute for arbitration where it was conceded by the counsel that the said application is not maintainable. Despite the service of summon defendant no. 3 son of defendant no. 2 did not appeared for trial hence, the Court directed to proceed ex-parte against him. An application was filed by defendant no. 3 to set aside the order after more than 5 years of passing of the ex-parte against him. On the concession made by the plaintiff

[223] (2008) 2 SCC 602.

the order to proceed *ex-parte* was set-aside. Defendant no. 3 filed an application under Section 34 of the Arbitration Act, 1940 to refer the matter to arbitration in view of the arbitration clause in the agreement dated in the year 1989. A supplementary application was filed by the defendant no. 3 to avoid the confusion to treat the application file by him as under Section 8 of the Arbitration and Conciliation Act, 1996. The petition was opposed by the plaintiff appellants on the ground that Shree Rajendra Prasad Singh was not party to the partnership deed that was executed in the year 1992 as it was illegal and void and that it cannot be referred to arbitration on the ground that it can only be decided by the Civil Court. Defendant no. 3 challenged the order passed by filing a Civil Revision Petition and it was allowed by the High Court but no specific order with regard to referring the matter to arbitration was made.

Question of law

(i)Whether arbitration would be applicable on partnership deed and on the plaintiffs who are not parties to an arbitration clause in the partnership deep?

(ii)Whether fresh order referring the dispute to arbitration can be passed when neither original arbitration agreement nor duly certified copy has been filed with the application?

Judgment

(i)The counsel from the appellants' side has submitted that they have claimed two reliefs in the suit. The first one was regarding that a declaration should be reconstituted stating that the partnership deed was illegal, void and without jurisdiction. And the second claim regarding the rendering of accounts of all transactions depends upon the first relief that has been asked for. The Counsel also submitted that Shree Rajendra Prasad Singh or the plaintiffs were not parties to the partnership deed and hence no application can be filed under Section 8 of the Arbitration and Conciliation, Act, 1996. The counsel has also submitted that the dispute can only be referred to Civil Court and the relief cannot be granted by the arbitrator.

Hence, the High Court has committed a manifest error of law in setting aside the order of the trial Court and by allowing the revision petition filed by defendant no. 3.

(ii)The counsel has submitted that the application is not maintainable under Section 8 of the Arbitration and Conciliation Act, 1996 as there was non-compliance of Sub-Section 2 of Section 8 as the application filed by defendant no. 3 was not accompanied by an original arbitration agreement or a duly certified copy, therefore, the filed application is ought to be rejected on this ground. To which the counsel from the respondent side has stated that the claim by them was for rendering accounts as Shree Rajendra Prasad Singh was a party to the partnership deed and the deed contained an arbitration clause. And therefore according to the counsel for respondent, the High Court has rightly referred the dispute for arbitration.

The Court has made reference to Section 7[224] and Section 8[225] of the Arbitration and Conciliation Act, 1996 to find out whether the parties had complied with the provisions set out with regard to the given Section. The Court has observed that according to Section 8 of the Arbitration and Conciliation Act, 1996 an arbitration agreement should be in existence and the grounds for what constitutes as an arbitration

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[224] 7. Arbitration agreement. - (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained-
(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract
8. Power to refer parties to arbitration where there is an arbitration agreement - (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, arbitration may be commenced or continued and an arbitral award made.

agreement has been provided under Section 7 of the Arbitration and Conciliation Act, 1996. Here, neither Shree Rajendra Prasad Singh nor the plaintiffs are found parties to the partnership deed and no document could be found with the initials of Shree Rajendra Prasad Singh or the plaintiffs with regard to the clause relating to arbitration and therefore, Section 8 would not apply to any dispute concerning with the said partnership deed and the matter cannot be referred to arbitration. Apart from this, the Court has also pointed out that while the supplementary petitions were filed by the defendant no. 3 none of them were accompanied by the original agreement or duly certified copy and hence it was the non- compliance of Section 8 (2) of the Arbitration and Conciliation Act, 1996.

Therefore, the dispute cannot be referred to arbitration as it is clear non- compliance with the mandatory provision of Section 8 (2) of the Arbitration and Conciliation Act, 1996. Thus, the Appeal was allowed.

Indian Oil Corporation Ltd. and Ors. **v.** ***Raja Transport (P) Ltd.***[226]

Nature of the suit: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Uttrakhand High Court.

Facts of the case

The appellant appointed the respondent as its dealer for the retail sale of petroleum products. Clause 69 of the said agreement provided for settlement of disputes by arbitration which stated that any dispute or a difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this Agreement shall be referred to the sole arbitration of the Director, Marketing of the Corporation or of some officer of the Corporation who may be nominated by the Director Marketing and the dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the contract relates or that in the course of his duties or differences. The appellant terminated the dealership of the respondent on the recommendation of its Vigilance

[226] MANU/SC/1502/2009.

Department. The respondent filed a suit for a declaration that the order of termination of dealership dated 6.8.2005 was illegal and void and for a permanent injunction restraining the appellant from stopping the supply of petroleum products to its retail outlet. An application was filed by the appellant under Section 8 of the Action read with Order VII Rule 11 of Code of Civil Procedure, 1908 praying the suit to be rejected and the matter should be referred to Arbitrator. The Civil Judge allowed the application directing the parties to refer the matter to arbitration within two months with a direction that appellant shall not stop supplies to the respondent for a period of two months.

The appellant challenged the order and filed an appeal as they were directed to continue the supply for two months and on the other hand, the respondent also challenged the order and filed an application under Section 9 of the Act seeking an interim injunction against the appellant. The appeals were dismissed but the application under Section 9 was allowed and directed the appellant to not stop the supply of petroleum products to respondent for a period of two months and directed the parties to refer to Arbitration as per the agreement between them. Respondent issued a notice against appellant that it would not be fair treatment or justice if the Director or any of his employees will act as an arbitrator as it would be contrary to the fundamental principle of natural justice. A notice was circulated by the respondent to the appellant to mutually agree upon an independent arbitrator for which the appellant submitted that it was contrary to the direction given to refer the dispute to the arbitrator as per the agreement. The respondent filed an application under Section 11(6) of the Act praying for the appointment of an independent arbitrator to decide the dispute relating to the validity of the termination of the dealership. The application was allowed and a retired High Court Judge was appointed as a sole arbitrator instead of the person named in the Arbitration Agreement. The said order was challenged and a Special Leave Petition was filed.

Question of Law

(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or impartially?

(ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?

(iii) Whether respondent herein had taken necessary steps for appointment of the arbitrator in terms of the agreement, and the appellant had failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?

Judgment

(i) If a party has full knowledge and comprehension of the provision of the contract that it has an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator then he cannot later on refuse and state that the terms are not favourable. Every party to the agreement is bound by the entire agreement once signed unless it is impossible to perform or is void being contrary to the provisions of the Act. The arbitration clause is packages which may provide for what disputes are Arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause. To support this contention it was laid down in *Executive Engineer, Irrigation Division, Puri* v. *Gangaram Chhapolia*[227], that for considering the validity of appointment of the Arbitrator where the arbitration required that the disputes shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. The respondent against it raised a point

[227] 1984 (3) SCC 627.

of appointment of an independent and impartial arbitrator having regard to the Arbitration and Conciliation Act, 1996 that the basic principle of natural justice which is no man should be judged in his own cause and an arbitration agreement to the extent it nominates an officer of one of the parties as the arbitrator, would be invalid and unenforceable. To which it was submitted that what was implicit under the old act is made explicit in the new Act in regard to impartiality, independence and freedom from bias. The decisions under the old Act on this issue are therefore not irrelevant when considering the provisions of the new Act. There is no bar under the new Act as with regard to the appointment of an employee of a government/ statutory corporation as an Arbitrator. Section 11(2) provides that parties are free to agree upon a procedure for appointment of arbitrator/s. and in Section 11(6) it is provided that where a party fails to act, as required under the procedure prescribed, the Chief Justice or his designate can take necessary measures. Section 11(8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator but it is intended to be used keeping in view the terms of the arbitration agreement. There can, however, be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject matter of the dispute. However, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Hence the assumption so made by chief justice was wrong that the employee would be partial and bias.

(ii) Where the appointing authority does not appoint the arbitrator after the request made by the party or where the arbitrator so mentioned in the arbitration agreement or the arbitration clause is not qualified enough then the Chief Justice or his designate can appoint an arbitrator of his choice. If the arbitration agreement provides for arbitration by a named Arbitrator, the Courts should normally give effect to the provisions of the arbitration agreement. But as clarified by *Northern Railway*

Administration v. *Patel Engineering Co. Ltd*.[228] where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the Arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent Arbitrator in accordance with Section 11(8) of the Act. The condition in the arbitration agreement that "it is also a term of this contract that no person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as an Arbitrator." Such a condition interferes with the power of the Chief Justice and his designate under Section 11(8) of Act to appoint a suitable person as arbitrator is appropriate cases. Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act. But the position will be different where the arbitration agreement names an individual as the Arbitrator.

(iii) In the present case the respondent has approached the Chief Justice alleging that he had acted as per the terms and conditions that were already stated and signed by both the parties to the agreement and the appellant has failed to act as required under the appointment procedure. Therefore, the respondent invoked the power of the Chief Justice under Section 11(6) the point which has to be considered here is that whether the appellant had failed to follow the appointment procedure. Considering this it was found that the respondent went to Civil Court instead of referring the dispute to the arbitrator as per the arbitration agreement. It was on the part of the appellant who approached the Court to refer the matter to arbitration and so it was granted. But there was no direction by the Court to appoint an independent arbitrator contrary to the terms of the arbitration agreement. The respondent failed to refer it to the arbitrator as mentioned in the arbitration agreement. Therefore, it was the respondent who failed to act in terms of the agreed procedure and not the appellant. In fact, as the Arbitrator was already identified, there was no need for the respondent to ask the appellant to act in accordance with the agreed procedure. On

[228] 2008 (11) SCALE 500.

the other hand, the respondent ought to have directly referred the disputes to the Director (Marketing) of the appellant corporation in terms of the arbitration agreement.

The Chief Justice erred in having proceeded on the basis that the respondent had performed its duty in terms of the arbitration agreement in seeking reference to arbitration and that the appellant had failed to act in the matter and therefore, there was justification for appointing an independent arbitrator. The appellant is therefore entitled to succeed on both the points. The appeal is, therefore, allowed. The Director (Marketing) of the appellant Corporation is appointed as the sole arbitrator to decide the disputes between the parties.

***Unissi (India) Pvt Ltd* v. *Post Graduate Institute of Medical Education and Research*[229]**

Nature: - Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Chandigarh High Court.

Facts of the case

A tender was floated by PGI and it contained an arbitration clause. An offer was made by Unissi which was accepted by PGI. The purchase was made and on the delivery of equipment to PGI, the acceptance was given. PGI demanded the execution of an agreement containing arbitration clause and so the appellant signed such document and sent it to PGI but the same could not be acquired from PGI. No payment was made by PGI on delivery of equipment on the appellant uplifted the equipment from PGI and it was found that appellant could not resale the same equipment's as they were in use by PGI and were mishandled. Appellant served notice on respondent but no reply was received and the technical committee did not approve the purchase and installation of equipment and thus, a letter was issued to appellant that the tender was rejected. It was alleged by PGI that no arbitration agreement was executed between the parties hence; no requirement of appointing an arbitrator arises. The appellant

[229] MANU/SC/4495/2008.

filed an application before additional district Court, it got rejected. Special Leave Petition was filed against the order of Additional District Judge, Chandigarh.

Question of Law

1. Whether there exists an arbitration agreement that was executed between the parties and is the appointment of arbitrator required?

2. Whether the special leave petition filed is maintainable?

Judgment

(i)For considering this question we must know what are an arbitration agreement and its essentials. According to Section 7 of Arbitration and Conciliation Act, 1996, arbitration agreement means an agreement by parties to submit to arbitration all or certain disputes which have arises or which may arise between them in respect of a defined legal relationship whether contractual or not. It may be in a form of an arbitration clause in a contract or in the form of a separate agreement. It shall be in writing, signed by both the parties in exchange of letter, relax, telegram or other means of telecommunication which provide a record of the agreement. In the present case the tender document itself contained an arbitration clause and it was accepted by the PGI and hence the delivery and installation were done by the appellant. The service/ installation report of the machines was duly signed on behalf of PGI and hence there was a valid arbitration agreement between the parties. The PGI used the machines for a year so impliedly they showed their consent by making such acceptance and usage of the machines. The tender document indicated certain condition of the contract contained an arbitration clause. All the request of Section 7 of the Arbitration and Conciliation Act, 1996 were satisfied. In *Nimet Resource Inc.* v. *ESSAR Steels*[230] the Court has observed that, if a contract is in writing and the reference is made to a document containing arbitration clause as part of the transaction, it would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there have been some transactions between the parties

230 AIR 2000 SC 3107.

and the existence of the arbitration agreement is in the challenge, the proper course for the parties is to throughout such question under Section 16 of the Act and not under Section 11 of the Act.

Therefore considering the above aspect of the matter the conclusion drawn is that although no formal agreement was executed the tender document indicating certain conditions of contract contained an arbitration clause.

(ii)With regard to the second contention, the Indian legal system has taken all the requisite steps to ensure that no one is ever subjected to injustice even by the Court of law. A special leave petition may be filed before Supreme Court if the party is aggrieved by an order or judgment of the lower Court or High Court. The urgency of the matter has to be established to sustain the special leave petition before Supreme Court. Special leave petition is maintainable is both civil and criminal matter with reference to the case *SBP & Co.* v. *Patel Engineering Ltd & Anr*[231] the clear indication in the judgment is made that is against the order passed by the Additional District Judge, the special leave petition under Article 136 of the Constitution of India[232] is maintainable by the Court also in the case of *Hindustan Petroleum Corporation* v. *M/s Pink City Midway Petroleum*[233] the special leave petition was maintainable as it was found that the trial Court was committed an error in coming to the conclusion that the arbitration clause found in the dealership agreement does not apply to a dispute of nature which was pending in the suit before the learned civil judge. In the present case, the special leave petition is maintainable under Article 136 of the constitution of India as against the order passed by the additional district judge.

231 (2005) 8SCC 618.

232 Special leave to appeal by the Supreme Court-(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India
(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces.

233 2003 6 SCC 503.

The appeal as allowed and the impugned order was Act a side. The chief justice of the High Court of Chandigarh shall appoint the arbitrator in accordance with law to resolve the dispute between the parties.

Purushottam* v. *Anil and Ors.[234]

Nature: Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Bombay High Court.

Facts of the case

An agreement is between the Appellant and Respondent and Clause 15 of the said partnership agreement was an arbitration clause that in case of any dispute the matter shall be referred to the arbitrator with the provision of Indian Arbitration Act, 1940. A suit was filed by the Respondent in the Court of civil judge for declaration, damages, accounts and permanent injunction against the appellant. The appellant filed an application under Section 8 of Arbitration and Conciliation Act, 1996 to refer the dispute to the arbitrator as it was mentioned in the partnership agreement under Clause 15. The application was rejected on the ground that the content of Clause 15 was vague as nothing in it was mentioned regarding the selection of the arbitrator and the dispute did not form the subject-matter of agreement within the meaning of Section 8 of the Arbitration and conciliation act, 1996. The appellant further filed a revision application in the high Court. The High Court rejected the application. Hence special leave petition was filed.

Question of law

(i)Whether there is an Arbitration Agreement between the parties?

(ii)Whether 1996 Act or 1940 Act would govern the relationship between the parties was so fundamental that mistakes in that behalf would invalidate the entire arbitration Clause?

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[234] MANU/SC/0504/2018.

Judgment

The respondent submitted that in the present case the partnership Agreement was entered by the party after the enforcement of the Arbitration and Conciliation Act, 1996 and the clause 15 of the said agreement had made a point that in case of dispute the matter should be referred to arbitrator in accordance with the provision of Indian Arbitration Act, 1940. And as there is a fundamental mistake on the part of the appellant it invalidates the entire arbitration clause. And with regard to the arbitrability of the dispute, it was observed that there was a fraud of the dispute is not arbitral as it includes coercion, undue influence, and misrepresentation on the part of the appellant.

(i)It was observed that as per Section 7 of the Arbitration and Conciliation Act, 1996 the basic requirements for an arbitration agreement between the parties were satisfied.

Hence there was an arbitration agreement between both the parties.

(ii) According to Section 85 of the Arbitration and Conciliation Act, 1996 the repealed enactment would continue to apply in regard to the arbitral proceedings that were commenced before the 1996 Act and after the 1996 Act. According to *M.M.T.C. Limited* v. *Sterlite Industries (India) Ltd*[235] it was found that what was crucial was the date of commencement of the arbitral proceeding and if the commencement is after the 1996 Act then the provisions would be governed as were the 1996 act. The fundamental requirement is the presence of an arbitration agreement in writing.

It was observed by the Court in the present case that the reference to "Indian Arbitration Act" or to "arbitration under act 1940" is of no consequence and the matter will still be governed under the 1996 Act. That means that an incorrect reference or recital regarding the applicability of 1940 Act would not render the entire arbitration agreement invalid.

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[235] (1196) 6 SCC 716.

Thus, the judgment and order passed by the High Court were set aside and the appeal was accepted. The parties have to appear before the trial Court for effectuating the arbitration agreement.

To sum up it can be said that the main objective of the Arbitration and Conciliation Act, 1996 was to provide a speedy and effective dispute resolution mechanism for the existing judicial system. But analysing the behaviour of the Courts in arbitration it has been observed that the system has failed in achieving the objective so set by them.

The present arbitration system in India is still suffering from many shortcomings and has lacunas in it. Therefore, it has failed to achieve the quality of arbitration that was quick and cost- effectiveness to resolve commercial disputes. Although the huge access to international commercial transactions has a noteworthy increase in the commercial disputes still the arbitration practice is lagging behind. Arbitration in India is still evolving.

CHAPTER V

CONCLUSION & SUGGESTIONS

Conclusion

From the ancient history to the modern era, it has been observed that whenever two people get along for trade or business, it gave rise to misunderstanding and conflicts. Therefore, a quick and effective resolution of the dispute became more important. Hence, apart from the traditional litigation method for the purpose of speedy resolution of dispute the concept of alternative dispute resolution mechanism emerged. Among the various alternative dispute resolution mechanisms, arbitration was found to be one of the preeminent dispute resolution mechanisms of resolving dispute internationally and nationally. There were two major treaties related to international arbitration that are New York Convention, 1958 and United Nations Commission International Trade Law Rules, 1985. In India, arbitration is not a new notion as it was prevailing from the Vedic phase. The oldest transcript that indicates arbitration is "Brhadaranayaka Upanishad". The law on arbitration in India grew through the pages of history in the due course of time. Some ambiguities were noticed in the law related to arbitration that led to the enactment of the present Arbitration and Conciliation Act, 1996 which is based on the UNCITRAL Model Law. The Arbitration and Conciliation Act, 1996 is giving broader scope to the International commercial arbitration.

In context of Research Question 1, the compatibility of Indian Arbitration Law with UNCITRAL Model Law for referring the disputes to arbitration, it has been observed that the Arbitration and Conciliation Act, 1996 has given a broad definition to International commercial arbitration by facilitating various area of International business, investment, development and technology transfer. It has been observed that the Arbitration and Conciliation Act, 1996 is applicable to both domestic and international arbitration. The provision for appeal is explicitly mentioned in the Arbitration and Conciliation Act, 1996 but no such provision is proved under the UNCITRAL Model Law. Efforts have been taken towards strengthens the contractual

feature of arbitration so that it becomes independent from the Indian judicial system and attracts more foreign parties to Arbitration by gaining their confidence.

In context of Research Question 2, the grounds of rejection of application under Section 8 of the Arbitration and Conciliation Act, 1996, it has been observed that the application would be rejected if no arbitration agreement exists between the parties and if the application has not been filed with an original arbitration agreement or a duly certified copy of the agreement seeking reference to arbitration. It has been pointed out that disputes having above two elements would still be rejected if they are of non-arbitral nature. These are disputes that arise from criminal offences, disputes that arise from family matters for example- divorce, judicial separation, restitution of conjugal right, child custody, disputes that arise from guardianship matters, disputes involving insolvency and winding-up, disputes related to testamentary matters, disputes related to tenancy. Judiciary has identified certain area in which Court cannot refer parties for arbitration as these grounds are not been explicitly mentioned in the Arbitration and Conciliation Act, 1996.

In context of Research Question 3, the relevancy of jurisdiction of Civil Court in context of matters involving arbitration agreement or arbitration clause, it has been observed that arbitration as a procedure for resolution of dispute depends heavily on the Court of law for both domestic and international arbitration. Section 2(1) (e) of the Arbitration and Conciliation Act, 1996 has defined that with regard to arbitration other than the international commercial arbitration, the principle Civil Court of original jurisdiction in a district has the jurisdiction to decide the question forming the subject-matter of the arbitration, if the same had been the subject-matter of suit. Though, under the Act the “Court” has been defined still there remains lacuna that exactly which Court they are referring to. Under Section 16 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal is competent to rule on its jurisdiction with respect to the existence or validity of the arbitration agreement. Thus, the involvement of Civil Court is delaying the procedure and killing the objective of arbitration to deliver speedy justice.

In context of Research Question 4, the impact of Judicial Approach towards referring the dispute to the Arbitrator, it has been observed that the judicial approach has surfaced an astonishing change in dealing with arbitration. As a mean of ADR, Section 8 was introduced for alternative remedy available, but with the huge pendency of cases there is no doubt it has become an additional remedy. This journey from alternative to additional has been a remarkable one. The main objective of the Arbitration and Conciliation Act, 1996 was to provide a speedy and effective dispute resolution mechanism for the existing judicial system. But analysing the behaviour of the Courts in arbitration it has been observed that the system has failed in achieving the objective so set by them. The shift of the approach in judicial opinion has also been supported with reasonable volumes of legal research around the globe.

In context of the research objectives it has been found that there are four major mandatory requirements under the Section 8 that is first, the presence of arbitration agreement, secondly, the action is brought by one party against the other party, thirdly, the similarity between the subject matter of dispute and agreement and lastly, the application accompanied by an original agreement or a duly signed certified copy. This means that Section 8 of the Arbitration and Conciliation Act, 1996 is peremptory in nature and the proceeding commences only when an application has been made to the judicial authority for referring the dispute to arbitration attached with the original arbitration agreement. The basic drive of this Section 8 is to bring in the notice of the Court that the subject- matter of the action before it is the subject-matter of an arbitration agreement. Certain major elements have been construed with regard to Section 8 of the Arbitration and Conciliation Act, 1996 while going through various judgments to analyse the approach of the judiciary. These are- the arbitrability of the dispute, applicability of arbitration in Civil Suit, maintainability of the Civil Suit, arbitral agreement and the validity of the arbitration clause, pre-requisite of the Arbitration agreement.

With respect to the arbitrability of the dispute, it has been found from the analysis that the Act is silent regarding this ground as it does not enlightened that what subject-matter are Arbitrable. No parameters have been set. It was through the judicial

pronouncement in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd. and Ors* (2011 5 SCC 532) that the grounds for what amounts to arbitral subject matter and non- arbitral subject-matter that can be adjudicated by a private forum has been laid down.

In the case, *H. Srinivas Pai and Anr.* v*. H. Pai (D) thr. L.Rs. and Ors*, (2010 12 SCC 521), the question with regard to the applicability of arbitration in Civil Suit was answered. The observation that was made by the Court was that the Arbitration and Conciliation Act, 1996 is applicable on domestic arbitration, international commercial arbitration and conciliation. The judiciary upheld that the presence of an arbitration agreement is a pre-requisite neither the nature of the dispute decides whether the arbitration is applicable to it or not. Hence, the Civil Suit is to be adjudicated by arbitration.

Another important question that arises was whether partly referring the subject-matter to arbitration should be allowed where the Supreme Court held that the bifurcation will lead to the multiplicity of decision making it more chaos and slow and under Code of Civil Procedure, 1908 dual proceeding on the same subject matter is not permitted.[236]

With regard to the maintainability of the Civil Suit in the landmark judgment, *Rashtriya Ispat Ltd* v*. M/s Verma Transport Company* (AIR 2006 SC 2800) it has been observed that there are four aspects for that has to be satisfied for the maintainability of the suit. The first aspect is the existence of an arbitration agreement. The second aspect is the service of notice from the party that they want to refer the matter to arbitration. The third aspect is the reference of the dispute by the Judicial Authority and the last aspect is that there should be the submission of the first statement on the substance of the dispute. No suit shall be maintainable if any of the above-mentioned aspects has not been fulfilled. Though, in the year 2016 in *Ayyasamy* v. *A. Paramasivam* (2016 10 SCC 386), the Supreme Court listed disputes that the Court can refuse to refer to arbitration even though all the mandatory conditions have been fulfilled. The

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[236] *Sundaram Finance Ltd. & Ors* v. *T. Thankem,* MANU/SC/0177/2015.

Supreme Court also laid down that apart from having the set parameter the intensity in each case would be ground to choose whether to refer to arbitration or not.

It has been observed that in all the cases the presence of an arbitration agreement is a mandate and in the absence of the arbitration agreement or arbitration clause the parties are not entitled to refer to arbitration for the resolution of dispute but it has been observed that the Court has the power to direct the case to arbitration even in the absence of the arbitration agreement when the Court deems fit. The only things required is that the consent of the parties should be taken else the litigating case could not be switched to arbitration. It has been observed that judiciary is interfering more in the arbitral disputes resulting in slow justice and discarding the aim of arbitration proceeding to deliver speedy justice with less monetary consumption.

The Arbitration and Conciliation Act, 1996 and the UNCITRAL Model Law, 1985 gives great autonomy to parties while at the same time both expect the parties to be treated equally and given a full chance to present their case properly. The Indian Arbitration and Conciliation Act,1996 prescribes more safeguards for the parties through the principle of natural justice that are applicable to all the Tribunals and because these rules are binding in nature on all the arbitration in Indian unlike UNCITRAL where the provisions are optional and will apply only when the parties agree to those procedures to apply. They are less adversarial, less formal, and flexible with the adoption of simpler procedures. Arbitration does not follow any formal rules of evidence. The findings are limited to some documents, with no interrogatories or depositions; in addition, there is a requirement that the procedure and the award confirm the requirement of public interest. Hence, a balance should be maintained between Indian and International Arbitration. The Arbitration Act, 1996 should be in lieu of International Commercial Arbitration Law. With continuing popularity of arbitration, it will for sure serve as an efficient Alternate Dispute Redressal Mechanism. The present requirement is the inculcation of the culture of arbitration within the bar, the bench, and arbitral community.

Suggestions

1. "Arbitration" is not been defined in the Arbitration and Conciliation Act, 1996. The definition that is provided under Section 1(1) (a) is based on Article 2 (a) of the Model Law. Indian legislature should confine the scope of the definition so that the confusion could be avoided.
2. The definition of "Court" under the Arbitration and Conciliation Act, 1996 is carrying uncertainty and it has created a serious difficulty for the legal fraternity in India. A new definition of the term "Court" should be inserted.
3. A separate Court should be established for setting arbitration, especially for International Commercial Arbitration. (It has been proposed in the Arbitration and Conciliation (Amendment) Bill, 2018).
4. "International Arbitration" is not been defined under the Arbitration and Conciliation Act, 1996. Instead of it "International Commercial Arbitration" has been defined under Section 2 (1) (f) of the Arbitration and Conciliation Act, 1996. An amended definition should be proposed that covers arbitration of non-commercial nature also.
5. "Arbitrability" has not been defined in the Act. The parameters have been set through cases and as the nature of the dispute varies it becomes difficult to apply the principle laid down in one case on another case. Hence, an appropriate definition should be added in the Act.
6. A separate law for domestic and international matters should be there.
7. A Section or a clause should be added in the Act regarding the "enforceability of the arbitral award".
8. There should be minimal interference on the part of the Courts but the finding has reflected that there is excess intervention of the Court in arbitral proceeding. The Court is outraging the power granted to them. Thus, the Arbitration and Conciliation Act, 1996 should be amended accordingly to limit the power of the Court.

BIBLIOGRAPHY

Books

Rao P.C., *Alternative Dispute Resolution, What it is and how it works* (Universal Law Publishing Company Private Limited, New Delhi, edn. 1997).

Chawala S.K., *Law of Arbitration Conciliation Practice and Procedure* (Eastern Law House, Lucknow, 2nd edn., 2004).

Banerji K. Milon, *Arbitration Versus Litigation* (Universal Law Publishing Company Private Limited, New Delhi, edn., 1997, Reprint 2012).

Ray Sukumar, Alternative Dispute Resolution with the Gram Nyayalayas Act, 2008, (Eastern Law house, Calcutta, 2012).

Nariman F.S., *Arbitration and ADR in India* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, edn. 1997, Reprint, 2012).

Tripathi S.C*., Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution* 10 (Central Law Publication, Allahabad, 6th edn., 2012).

Websites

www.manupatrafast.com

www.heinonline.org

www.supremecourtofindia.nic.in

www.jstor.org

www.westlawindia.com

Acts

The Arbitration Act, 1940

The Arbitration and Conciliation Act, 1996.

Indian Evidence Act, 1872.

Code of Civil Procedure, 1908.

UNCITRAL Model Law, 1985.

Articles

A. Francis Julian, "Arbitration Law", XLI *ASIL* 23 (2005).

Sumeet Kachwaha, "The Arbitration Law of India a Critical Analysis" 1 *AIAJ* 105-26 (2005).

Harpreet Kaur, "The 1996 Arbitration and Conciliation Act: A Step Towards Improving Arbitration" 6 *HBLJ* (2010).

A K Ganguli, "Arbitration Law", XLVI *ASIL* 31 (2010).

Trisha Mitra, "Arbitration In India: Looking Ahead" 3 *IIAM* 2 (2011)

A K Ganguli, "Arbitration Law", XLVIII *ASIL* 27 (2012).

A K Ganguli, "Arbitration Law", XLIX *ASIL* 29 (2013).

Vivek Vashi & Shreya Ramesh, "Arbitrability of Fraud in India" 8 *ILJ* (2015).

Shefali Roy, "The Aspect of Jurisdiction In Indian Arbitration – II" 7 *IIAM* 2 (2015).

Jawad Ahmad, "Review of the UNCITRAL Arbitration Rules—A Commentary (Second Edition) by David D. Caron and Lee M. Caplan" 33 *BJIL 294* (2015).