PROPOSED AMENDMENTS TO THE ARBITRATION & CONCILIATION ACT, 1996

A

CONSULTATION

PAPER

MINISTRY OF LAW AND JUSTICE
GOVERNMENT OF INDIA

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Amendments to the Arbitration & Conciliation Act, 1996- A Consultation Paper

Introduction:

1. The Arbitration and Conciliation Act, 1996 enacted in 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Copy of the Act is annexed as Annexure-I. The Act is based on the Model Law adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The objects and basis of the said Act is to speedy disposal with least court intervention. Some of the objects, as mentioned in the Statement of Objects and Reasons for the Arbitration and Conciliation Bill, 1995 are as follows:

   (a) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

   (b) to minimise the supervisory role of courts in the arbitral process;

   (c) to provide that every final arbitral award is enforced in the same manner as if it were a decree of court.

2. In the year 2001, the Law Commission of India undertook a comprehensive review of the working of the said Act and recommended many amendments to the Act in its 176th Report submitted to the Government. Summary of recommendations made in the report is annexed as Annexure-II.

   The Government after considering the recommendations of the Report and after consulting the State Governments and certain institutions, decided to accept almost all the recommendations. Accordingly the Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha on 22nd December, 2003. A copy of the Bill is annueal herewith as Annexure-III.

   It may be stated that in July 2004, Government constituted a Committee under the Chairmanship of Justice Dr.B.P.Saraf to make in-depth study of the implications of the recommendations of the Law Commission made in its 176th Report and all aspects

relating to the Arbitration and Conciliation (Amendment) Bill, 2003. The report submitted by the said Committee is annexed as Annexure-IV.

3. The Bill was then referred to the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee after taking oral evidence of eminent advocates and the representatives from trade and industry, Public Sector Undertakings, representatives of this Department, submitted its report to the Houses of Parliament on 4th August, 2005. The Committee was of the view that the provisions of the Bill gave room for excessive intervention by the Courts in the arbitration proceedings and emphasized upon the need for establishing an institution in India which would measure up to international standards and for popularizing institutionalized arbitration. The Committee further expressed the view that since many provisions of the Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering the recommendations of the Committee. Copy of the report is annexed as Annexure-V.

4. In view of the large number of amendments recommended by the Committee and because many provisions of the Bill were contentious, the said Bill was withdrawn from the Rajya Sabha. At that time it was decided that a new legislation will be brought in Parliament after undertaking an in depth examination of the various recommendations of the Committee.

5. As we know that main purpose of the 1996 Act is to encourage an ADR method for resolving disputes speedy and without much interference of the Courts. In fact Section 5 of the Act provides, "Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (i.e. Part I), no judicial authority shall intervene except where so provided in this Part." However, with the passage of time, some difficulties in its applicability of the Act have been noticed. The Supreme Court and High Courts have interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which leads to conflicting views. Further, in some cases, courts have interpreted the provisions of the Act in such a way which defeats the main object of such a legislation. Therefore, it becomes necessary to remove the difficulties and lacunas in the Act so that ADR method may become more popular and object of enacting Arbitration law may be achieved.

6. The following sections of the Act and interpretation by courts have given rise to difficulties which require to be addressed:

(A) - Application of Part I- Section 2(2) –

(i) The 1996 Act covers both domestic arbitration (where both parties are Indian national) as well as international commercial arbitration where at least one party is not an Indian national. The Act of 1996 has been divided in three Parts. Part I entitled, "ARBITRATION" and there are 10 Chapters containing Sections 2 to 43. Part II entitled, "Enforcement of certain Foreign Awards" and contains Chapter I & II containing Sections 44 to 60. Chapter I of part II deals with "New York Convention Awards" and Chapter II deals with 'Geneva Convention Awards". Part III (Sections 61 to 81) deals with 'Conciliation'. Part IV (Sections 82 to 86) provides for Supplementary Provisions.

Section 2(2) provides for applicability of Part I. Existing Section 2 (2) reads as follows:

"Section 2(2): This part shall apply where the place of arbitration is in India."

(ii) There are conflicting views of the Courts in India about applicability of Part I in respect of International Commercial Arbitration where seat of arbitration is not in India. In a case before the Delhi High Court (Dominant Offset Pvt. Ltd. Vs. Adamouske Strojirny AS, (1997) 68 DLT 157) the petitioners entered into two agreements with a foreign concern for technology transfer and for purchase of certain machines. The agreement carried an arbitration clause which provided that the place of arbitration would be London and the arbitration tribunal would be International Chamber of Commerce in Paris. The parties having developed a dispute, a petition was filed in the High Court of Delhi with a prayer for reference to arbitration in terms of the Arbitration Clause for enforcement of the agreement. The Court extensively studied the provisions of the Act so as to see whether it was a matter coming under Part I of the Act. The Court held that Part I of the Act applies to International Commercial arbitration conducted outside India. The Court opined that Section 2(2) which states that "Part I shall apply where the place of arbitration is in India" is "an inclusive definition and does not exclude the applicability of Part I to those arbitrations which are not being held in India". The Court also held that the application under Section 11 for the appointment of arbitrators could be treated as a petition under section 8 for reference of the parties to arbitration. This decision was followed in Olex Focas Pvt. Ltd. Vs. Skodaexport Company Ltd. AIR 2000 Del.161. In this case the High Court allowed relief under Section 9 (interim measure by Court) and ruled -

> "A careful reading and scrutiny of the provisions of 1996 Act leads to the clear conclusion that sub-section (2) of Section 2 is an inclusive definition and it does not exclude the applicability of Part I to this arbitration which is not being held in India. The other clauses of Section 2 clarify the position beyond any doubt that this Court in an appropriate case can grant interim relief or interim injunction."

However, Court added that courts should be extremely cautious in granting interim relief in cases where the venue of arbitration is outside India and both parties are foreigners.

(iii) The Calcutta High Court in East Coast Shipping Vs. MJ Scrap (1997) 1 Cal. HN 444 took a different view and held that Part I of the Act would apply only to arbitrations where the place of arbitration is in India. In a subsequent decision of Division Bench of the Delhi High Court in Marriott International Inc.Vs. Ansal Hotels Ltd., AIR 2000 Del 377 (DB) Delhi High Court endorsed the view expressed by the Calcutta High Court. The Division Bench referred the another decision reported as Kitechnology N.V. Vs. Union Gmbh Plastmaschinen (1998) 47 Del. RJ 397 in which the Single Judge of Delhi High Court held that where none of the parties to the agreement was an Indian and the agreement was to be covered by German Law which provided arbitration to be held at Frankfurt, Section 9 of the Act will have no applicability and the Court will have no jurisdiction to pass an interim order in that matter.

(iv) A division Bench of the Calcutta High Court in White Industries Australia Ltd V. Coal India Ltd. held that an award published and rendered in accordance with ICC Rules in Paris (though the proceedings were held, for the convenience of the parties, in London) could be challenged in a proceeding initiated in a court in India under Section 34 of the Act since the contract between the parties stipulated that the "agreement shall be subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply". A division bench speaking through the Chief Justice A K Patnaik of Chhattishgarh High Court in Bharat Aluminium Company Limited v Kaiser Aluminium Technical Services, Inc. however took a contrary view.

(v) However, Supreme Court in the case of Bhatia International Vs. Bulk Trading (2002) 4 SCC 105 has held that in absence of the word 'only' in Section 2(2), part I of the Act would apply to arbitration held outside India, so long as the law of India governed the contract. The decision in Bhatia International though was not concerned with enforcement of arbitral award, certain principles laid down therein with regard to

application of the provisions contained in Part I of the Act in respect of arbitration proceedings that are held in Paris in accordance with the Rules of the International Chamber of Commerce (ICC), have far reaching consequences.

(vi) In Bhatia International the question was whether an application filed under Section 9 of the Act in the Court of the third Additional District Judge, Indore by the foreign party against the appellant praying for interim injunction restraining the appellant from alienating transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable. The Additional District Judge held that the application was maintainable, which view was affirmed by the High Court. The Supreme Court, reaffirming the decision of the High Court, held that an application for interim measure could be made to the courts of India, whether or not the arbitration takes place in India or abroad. The Court went on to hold that "the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to 'foreign awards'. The opening words of Sections 45 and 54, which are in Part II, read 'notwithstanding anything contained in Part I'. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II".

Supreme Court referred to similar provision in UNCITRAL Model law. Article 1(2) of the UNCITRAL Model Law reads as follows:

"(2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."

Supreme Court highlighted the word 'only' and observed as follows:

> "Thus Article 1(2) of the UNCITRAL Model Law uses the word "only" to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of that State. Significantly, in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in Section 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of Part I do not apply to arbitrations which take place outside India."

(vii) The Supreme Court observed that if the part I of the Act is not made applicable to arbitration held outside India it would have serious consequences such as (a) amount to

holding that the Legislature has left a lacunae in the said Act. There would be lacunae as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention. It would mean that there is no law, in India, governing such arbitrations.; (b) leave a party remediless in as much as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.

(viii) The Supreme Court made certain observations in respect of International commercial arbitration which take place in a non-convention country. The Court observed that international commercial arbitration may be held in a non-convention country. Part II only applies to arbitrations which take place in a convention country. The Supreme Court referred to the definition of international commercial arbitration which is defined in Section 2(f) of the Act and held that the definition makes no distinction between international commercial arbitration which takes place in India or those take place outside India. The Supreme Court also observed that Sections 44 and 53 define foreign award as being award covered by arbitrations under the New York Convention and the Geneva Convention respectively. Special provisions for enforcement of these foreign awards are made in Part II of the Act. To the extent part II provides a separate definition of an arbitral award and separate provision for enforcement of foreign awards, the provision in Part I dealing with these aspects will not apply to such foreign awards.

(ix) The court finally concluded that "the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply".

(x) Supreme Court also stated in their judgment that 1996 Act does not appear to be a well drafted legislation. In view of this Supreme Court observed that the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting the provisions in the different manner.

(xi) It may be mentioned that Supreme Court in the case of Shreejee Traco(I) Pvt. Ltd. Vs. Paper Line International Inc (2003) 9 SCC 79 considered the scope of part I of the Act in respect of appointment of an arbitrator under Section 11(4) in a case where the agreement provided that any disputes or claims would be submitted to arbitration in New York. The Supreme Court after referring Section 2(2) held, "on a plane reading of this provision it is clear that Parliament intended the provisions of Part I to be applicable where the place of arbitration is in India." The Supreme Court also held as follows:

> "So far as the language employed by Parliament in drafting sub-section (2) of Section 2 of the Act is concerned, suffice it to say that the language is clear and unambiguous. Saying that this Part would apply where the place of arbitration is in India tantamounts to saying that it will not apply where the place of arbitration is not in India. For the foregoing reasons it is held that the petition under Section 11(4) of the Act is not maintainable before the Chief Justice of India or his designate."

(xii) A two-judge bench of the Supreme Court[1], reiterating its decision in Bhatia International held that a award made in England through a arbitral process conducted by the London Court of International Arbitration, though a foreign award, Part I of 1996 Act would be applicable to such award and hence the courts in India would have jurisdiction both under Section 9 and Section 34 of the Act and entertain a challenge to its validity. It is of some significance that both in Bhatia International as well as in Venture Global Engineering case, the provisions under the Arbitration Act invoking the provisions contained in Part-I thereof had been initiated by foreign parties against the Indian parties, though the proceedings of the arbitration wee held abroad and the culmination of which undoubtedly are foreign awards.

(xiii) The factual background of the case was thus: Venture Global Engineering (VGE, a company incorporated in USA had entered into a joint venture with Satyam Computer Services (Satyam) to constitute an Indian company- Satyam Venture Engineering Company Limited (SVES).. The two companies had equal shares i.e. 50-50 in the joint venture (SVES). They had also entered into share holder's agreement, which inter alia provided that "the share holders shall at all times act in accordance with the Company Act and other applicable Act/Rules being enforced in Indian at any time". In February

[1] *Venture Global Engineering* v *Satyam Computers Services* 2008(1) SCALE 214.

2005, disputes arose between the parties, which were referred to sole arbitration of Mr. Paul Hannon, appointed by the London Court of International Arbitration and the award made in England, directed Venture to transfer its 50% shares in SVES to Satyam. Satyam filed a petition before the US District Court, Eastern District Court of Michigan for recognition and enforcement of the award, which was contested by Venture. Venture filed a Civil Suit in the Court of the First Additional Chief Judge, City Civil Court, Secunderabad, seeking a declaration for setting aside the award and for a permanent injunction on the transfer of shares under the award. The City Civil Court, though initially, granted an order of injunction, at the intervention of Satyam, finally rejected the plaint. An appeal was preferred by the Venture before the High Court of Andhra Pradesh, was also unsuccessful. Venture, therefore, approached the Supreme Court. Relying upon the decision in Bhatia International[2], contending inter alia that in terms of the declaration of law by Supreme Court, Part I of the Act would also apply to foreign awards and hence the courts in India had jurisdiction to entertain a challenge to the validity of the award and that in view or the over-riding provision contained in the Share Holder's Agreement, Satyam can not approach the US Courts for enforcement of the award. On behalf of the Satyam, it was contended that since, the award made in England thus was a foreign award, no suit or other proceedings can lie against such award in view of Section 44 of the Act and that an application for setting aside such an award under Section 34 of the Act could not lie in any event. A two-judge bench, which heard the case, felt that Bhatia International decided the principal issue namely that since the parties did not, by agreement, exclude the provision of Part-I of the Act from being made applicable to arbitration proceedings in England, the provisions of the Part-I would apply even to foreign award and hence the courts in India can entertain a challenge to the validity of such an award. Accepting the contentions of Venture, the court held:

> "That the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to hold that where such arbitration is held in India, the provisions of Part-I would compulsorily extent permitted by the provisions of Part-I. IT is also clear that even in the case of international commercial arbitration held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.

[2] 2002 4 SCC 105

We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act an there is no lacuna as such."

(xiv) The reason, which persuaded the court that a challenge to foreign award can lay in India, was the fact that an award, which is otherwise opposed to Public Policy of India and thus not enforceable even under the New York Convention, can be enforced, by a party by seeking its enforcement of such an award in another country. It is in view of such apprehension, the court observed:

> "In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in Indian through personal compliance of the judgment-debtor and by holding out the threat of contempt as its being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes – (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, it it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement."

(xv) The Supreme Court in Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd.,(2008) 10 SCC 308, while referring Bhatia International observed as follows:

> 37. The decision in Bhatia International case[1] has been rendered by a Bench of three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case.

(xvi) It is evident from the above discussion that there is no uniformity in judicial decisions in respect of applicability of Part I of the Act in respect of cases where the seat of arbitration is not in India. As per Bhatia Interenational (Supra) ans Satyam Computors, in cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, exclude all or any of its provisions. The result is that all the provisions of Part I including provisions relating to appointment of arbitrator (Section 11), challenge of arbitration award (Section 34) would also be applicable to International Commercial Arbitration where seat of arbitration is not in India. However, in view of the observations made by the Supreme Court in Shreejee Traco(I) Pvt. Ltd. Vs. Paper Line International Inc (2003) 9 SCC 79, no provisions of Part I would apply to cases where the place of arbitration is not in India.

(xvii) It may be stated that it is the broad principle in International Commercial arbitration that a law of the country where it is held, namely, the Seat or forum or laws arbitri of the arbitration, governs the arbitration. However, if all the provisions of Part I are not made applicable to International Commercial arbitration where the seat of arbitration is not in India, some practical problems are arising. There may be cases where the properties and assets of a party to arbitration may be in India. Section 9 of the Act which falls in Part I provide for interim measures by the Court. As per Section 9, a party may, apply to a court for certain interim measures of protection including for preservation, interim custody or sale of goods, securing the amount in disputes, detention, preservation or inspection of any property, interim injunction etc. If provision of Section 9 is not made applicable to International Commercial arbitration where seat of arbitration is not in India, a party may be out of remedy if the assets and property are in India. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts. These are cases where interim measures could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred.

(xviii) There is an another aspect which relates to enforcement of arbitration award rendered in a non convention country i.e. a country which is not signatory either to New York convention or to the Geneva convention. In Bhatia International Supreme Court referred to definition of International Commercial Arbitration provided in Section 2 (1)(f) and

held that the definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called "the convention country"). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Part II only applies to arbitrations which take place in a convention country.

(xix) In this regard we may point out that an award to be a 'foreign award' has to be made in the territory of a foreign State notified by the Central Government as having made a reciprocal provision for enforcement of New York Convention or Geneva convention. The Supreme Court in Badat & Co. v, East India Trading Co. (1964) 4 SCR 19 was dealing with a case that arose before the Foreign Awards (Recognition and Enforcement) Act, 1961 became applicable. The court held as follows.

> "Before we do so, it would be desirable to examine the position regarding the enforcement of foreign awards and foreign judgments based upon awards. Under the Arbitration Protocol and convention Act, 1937 (6 of 1937), certain commercial awards made in foreign countries are enforceable in India as if they were made on reference to arbitration in India. The provisions of this Act, however, apply only to countries which are parties to the Protocol setforth in the First Schedule to the Act or to Awards between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government being satisfied that the reciprocal provisions have been made, may, by notification declare to be parties to the Convention, setforth in the Second Schedule to the Act. It is common ground that these provisions are not applicable to the awards in question. Apart from the provisions of the aforesaid statute, foreign awards and foreign judgments based upon awards are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the common law on grounds of justice, equity and good conscience. 33. It will thus be seen that there is a conflict of opinion on a number of points concerning the enforcement of foreign awards or judgments, based upon foreign awards. However, certain propositions appear to be clear. One is that where the award is followed by a judgment in a proceeding which is not merely formal but

which permits of objections being taken to the validity of the award by the party against whom judgment is sought, the judgment will be enforceable in England. Even in that case, however, the plaintiff will have the right to sue on the original cause of action. The second principle is that even a foreign award will be enforced in England provided it satisfies mutatis mutandis the tests applicable for the enforcement of foreign judgments on the ground that it creates a contractual obligation arising out of submission to arbitration. On two matters connected with this there is difference of opinion. One is whether an award which is followed by a judgment can be enforced as an award in England or whether the judgment alone can be enforced. The other is whether an award which is not enforceable in the country in which it was made without obtaining an enforcement order or a judgment can be enforced in England or whether in such a case the only remedy is to sue on the original cause of action. The third principle is that a foreign judgment or a foreign award may be sued upon in England as giving good cause of action provided certain conditions are fulfilled one of which is that it has become final."

(xx) Thus it is well established that the awards rendered in countries with which India does not have reciprocal arrangements cannot be enforced in India as if it were a decree. Perhaps Badat's case was not brought to the notice of the court in Bhatia International v Bulk Traders S A case, which is why observations pertaining to non-convention countries came to be made. As stated above provisions of Part II which deals with enforcement of foreign award, is not and cannot be made applicable to an international commercial arbitration which takes place in non-convention country and where there is no reciprocal agreement between that country and Central Government. Not only this, foreign award must be given in one of those territories in respect of which reciprocal arrangement has been made. Section 44 of the Arbitration and Conciliation Act, 1996 defines the term 'foreign award". According to Section 44, an arbitral award is a foreign award if it is made in pursuance of an agreement to which New York Convention [reproduced in First Schedule to the Act] applies and made in a territory to which the New York convention applies on the basis of reciprocity.

(xxi) Section 44 reads as follows:

"44. Definition- In this Chapter, unless the context otherwise requires, 'foreign award' means an award of differences between persons arising out of legal relationships, whether

contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 —

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in First Schedule applied, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

(xxii) It may also be pointed out that Clause (3) of Article 1 of New York convention on the Recognition and Enforcement of Arbitral Awards permits the signing, ratifying or acceding State to declare on the basis of reciprocity that it will apply the convention made only in the territory of another contracting State. India has made reservation and declared that convention will apply only on the basis of reciprocity.

(xxiii) Therefore, when an International arbitral award is made in a country or territory in respect of which there is no reciprocal arrangement between Central Government and Government of that country, it cannot be enforced under the Arbitration and Conciliation Act, 1996. For the purpose of enforcement of such an arbitral award party has to file a civil suit in India.

(xxiv) It is part of the law of arbitration in several countries to allow a few provisions of their arbitration statutes to apply to international arbitrations held outside their countries. Section 2 (1) & (2) of the English Arbitration Act, 1996 reads as follows:

"2. Scope of application of provisions.- (1) The provisions of this Part apply where the seat of arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined-

(a) Section 9 to 11 (Stay of legal proceedings, & c), and

(b) Section 66 (enforcement of arbitral award."

(xviii) In order to remove the difficulties stated above, it is proposed to amend Section 2(2) of the Arbitration and Conciliation Act, 1996 as follows:

"(2) This part shall apply only where the place of arbitration is in India.

Provided that provisions of Sections 9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable and recognized under Part II of this Act."

(B) Amendment in Section 11-

(i) Section 11 of the Act provides for appointment of arbitrators. Sub Sections (4) to (12) deal with appointment of Arbitrator by the Chief Justice or any person or institution designated by him when the parties fail to appoint an Arbitrator or where the arbitration is to be held with three Arbitrators, and the two appointed Arbitrators fail to agree on the third Arbitrator within the stipulated time.

(ii) The scope and effect of these provisions had been the subject mater of several decisions rendered by the Supreme Court. In Adur Samia (P) Ltd Vs Peekay Holdings Ltd (1999) 8 SCC 572, a Bench of two learned Judges of the Supreme Court held that the Chief Justice or any person or institution designated by him acts in administrative capacity under section 11 of the Act and hence an order passed in exercise of such power, does not attract the provisions of the Article 136 of the Constitution.

(iii) A two Judge Bench referred the case in Adur Samia (P) Ltd Vs Peekay Holdings Ltd. for reconsideration to the Bench of three learned Judges. A three-judges Bench in Konkan Railway corp. Ltd. Vs Mehul Construction Co. (2000) 7 SCC 201 affirmed the view taken by the two-Judge Bench in Adur Samia (P) Ltd Vs Peekay Holdings Ltd., holding that the order passed by the Chief Justice or his designate under section 11 of the Act was an administrative order not amenable to the jurisdiction of the court under Article 136.

(iv) Subsequently, a Bench of two Judges in Konkan Railway Corp. Ltd Vs Rani Construction (P) Ltd., (2000) 8 SCC 159 referred to a larger Bench of the said decision of three Judge Bench for reconsideration. Thereafter, a Constitution Bench consisting of five learned Judges in Konkan Railway Corp. Ltd. Vs Rani Construction (P) Ltd. (2002) 2 SCC 388 affirmed the decision of the three-Judge Bench in Konkan Railway Corp. Ltd. Vs Mehul Construction Co. holding inter-alia that the order of the Chief Justice or his designate under section 11 nominating an Arbitrator is not a adjudicatory order and that neither the Chief Justice nor his designate acts as a Tribunal and hence any order passed by them

can not be a subject matter of appeal by Special Leave under Article 136. The Constitution Bench also held that since the Chief Justice or his designate is not required to perform any adjudicatory function and that, the order nominating an Arbitrator would be amenable to challenge under section 12 read with section 13 of the Act. Since the exercise of the power is purely administrative in nature, it does not contemplate a response from the other party and hence a notice to the opposite party is not necessary.

(v) Subsequently, the decision of the Constitution Bench has been reconsidered by the larger Bench consisting of seven-Judges in SBP Co. Vs. Patel Engineering Ltd (2005) 8 SCC 618. The Court overruled the decision in Konkan Railway Corp. Ltd. Vs Rani Construction (P) Ltd. (2002) 2 SCC 388 rendered by five learned Judges and held that the power exercised by the Chief Justice of the High Courts or the Chief Justice of India under Section 11(6) of the Act is judicial power and not an administrative power and that such power, in its entirety, could be delegated only to another Judge of that Court. The Supreme Court concluded as follows:

(a) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(b) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(c) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(d) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the

designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(e) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(f) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(g) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(h) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(vi) The Supreme Court held that the Chief Justice or the designated Judge will have the right to decide preliminary aspects as regards his own jurisdiction to entertain the request, existence of a valid arbitral agreement, the existence or otherwise of a live claim, the existence of the conditions for the exercise of the power and on the qualifications of the Arbitrator. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter nominating an Arbitrator but the order appointing an Arbitrator could be passed only by the Chief Justice or the designated Judge. Even designation of a District Judge as the authority under Section 11(6) of the Act was not warranted under the scheme of the Act. The order passed by the Chief Justice of the High Courts or by the designated Judge of that Court being a judicial order, is appealable under Article 136 of the Constitution to the Supreme Court but no such appeal would lie against the order made by the Chief Justice of India or a Judge of the Supreme Court designated

by him. Where the Arbitral Tribunal is constituted by the parties without taking recourse to Section 11 of the Act, the Arbitral Tribunal will have the jurisdiction to decide all the matters as contemplated by Section 16 of the Act.

(vii) The decision of the Supreme Court has rendered the provisions contained in sub-section (4), (5), (7), (8) and (9) of Section 11 with regard to appointment of Arbitrators by any person or institution designated by the Chief Justice of India and totally ineffective. It may be pointed out that question of appointment of arbitrator by the Chief Justice arises only when a party fails to appoint an arbitrator or where the two appointed arbitrators fail to agrees on the third arbitrators.

(viii) This is clearly contrary to the objective of the Act that is, to encourage litigants to take recourse to the alternative dispute resolution mechanism by Arbitration. Institutional Arbitration, throughout the world, is recognized as the primary mode of resolution of international commercial disputes. Institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate in the arbitration agreement to refer an arbitral dispute between them for resolution to a particular institution. When party have not named any institution or when they fail to an agreement on the name of any Institution, the Chief Justice instead of choosing an arbitrator may choose an Institute and the said institute shall refer the matter to one or more arbitrator from their panel. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration. The following advantages accrue in the case of institutional arbitration in comparison with ad hoc arbitration:

(1) In ad hoc arbitration, procedures will have to be agreed to by the parties and the arbitrator. This needs cooperation between the parties. When a dispute is in existence, it is difficult to expect such cooperation. In institutional arbitration, the rules are already there. There is no need to worry about formulating rules or spend time on making rules.

(2). In ad hoc arbitration, infrastructure facilities for conducting arbitration is a problem, so there is temptation to hire facilities of expensive hotels. In the process, arbitration costs increase. Getting trained staff is difficult. Library facilities are another problem. In institutional arbitration, the arbitral institution will have infrastructure facilities for conduct of arbitration; they will have trained secretarial and administrative staff. There will also be library facilities. There will be professionalism in conducting arbitration. The costs of arbitration also are cheaper in institutional arbitration.

(3). In institutional arbitration, the institution will maintain a panel of arbitrators along with their profiles. The parties can choose from the panel. It also provides for specialized arbitrators. While in ad hoc arbitration, these advantages are not available.

(4). In institutional arbitration, many arbitral institutions have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, it is scrutinized by the experienced panel. So the possibility of the court setting aside the award is minimum. This facility is not available in ad hoc arbitration. Hence, there is higher risk of court interference.

(5). In institutional arbitration, the arbitrator's fee is fixed by the arbitral institution. The parties know beforehand what the cost of arbitration will be. In ad hoc arbitration, the arbitrator's fee is negotiated and agreed to. The Indian experience shows that it is quite expensive.

(6). In institutional arbitration, the arbitrators are governed by the rules of the institution and they may be removed from the panel for not conducting the arbitration properly, whereas in ad hoc arbitration, there is no such fear.

(7). In case, for any reason, the arbitrator becomes incapable of continuing as arbitrator in institutional arbitration, it will not take much time to find substitutes. When a substitute is found, the procedure for arbitration remains the same. The proceedings can continue from where they were stopped, whereas these facilities are not available in ad hoc arbitration.

(8). In institutional arbitration, as the secretarial and administrative staff is subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from

the secretarial staff. Institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate in the arbitration agreement to refer an arbitral dispute between them for resolution to a particular institution. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration.

(ix) Institutions of international repute not only provide a time and cost effective mechanism but also enable the parties to resolve their disputes in a cordial and informal atmosphere of arbitration and continue their relationship even after such disputes have arisen. It has, therefore, become imperative to amend the law so as to bring it in conformity with the desired objectives underlying the statute. This proposal also fully accords with the recommendations made by the Parliamentary Committee.

(x) It is therefore proposed that Section 11 of the Arbitration and Conciliation Act, 1996 may be amended to the limited extent as follows:

(a) In sub-Section (4) in clause (b) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(b) In sub-Section (5) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(c) In sub-Section (6) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(d) For sub-section (7), following sub-section shall be substituted namely:-

(e) "A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the High Court or the person or institution designated by

it shall be final and no appeal including a letter patent appeal shall lie against such decision."

(f) In sub-Section (8) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(g) In sub-Section (9) for the words, " the Chief Justice of India or any person or institution designated by him" the words " the Supreme Court or any person or institution designated by it" shall be substituted.

(h) In sub-section (10) for the words, "The Chief Justice", the words, High Court" shall be substituted.

(i) In sub-Section (11), for the words, "the Chief Justice of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be", the words, "different High Courts or their designates, the High Court or its designate to which the request has been first made under the relevant sub-section shall alone be" shall be substituted.

(j) For sub-section (12) following sub-section shall be substituted, namely:-

"12(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to 'High Court" in those sub-sections shall be construed as a reference to the "Supreme Court".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal civil court referred in clause (e) of sub-Section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to that High Court."

(l) After sub-section (12), following sub-sections shall be inserted, namely:-

"(13) Notwithstanding anything contained in foregoing provisions in this Sections, where an application under this Section is made to the Supreme Court or High Court as the case may be for appointment of arbitrator in

respect of 'Commercial Dispute of specified value', the Supreme Court or the High Court or their designate, as the case may be shall authorize any arbitration institution to make appointment for the arbitrator.

Explanation:- For the purpose of this sub-section, expression 'Commercial Dispute" and "specified value" shall have same meaning assigned to them in the Commercial Division of High Court Act, 2009."

(14) An application made under this Section for appointment of arbitrator shall be disposed of by the Supreme Court or the High Court or their designate, as the case may be as expeditiously as possible and endeavour shall be made to dispose of the matter within sixty days from the date of service of notice on the opposite party."

(C)- Amendment in Section 12

(i) Section 12 deals with grounds of challenge to the appointment of an arbitrator while Section 13 deals with the challenge procedure. Section 12(1) provides that a person who is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing "any circumstances likely to give rise to justifiable doubts as to his independence or impartiality". Sub-section (2) of sec. 12 lays this responsibility on the arbitrator even during the course of arbitration proceedings. Sub section (3) of sec. 12 enables a party to challenge the arbitrator only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties. Sub section (4) refers to one's own appointed arbitrator and he can be challenged only for reasons of which he becomes aware after the appointment is made.

(ii) Section 12 reads as follows:

"12. Grounds for challenge.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any

circumstances referred to in sub-section (1) unless they have already been informed of them by him."

(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason of which he becomes aware after the appointment has been made."

(iii) So far as sec. 12(1) is concerned, it is said that the "circumstances" which the arbitrator is to disclose are those which he considers relevant so as to raise a justifiable doubt as to his independence or impartiality. After all, the circumstances are mostly within his personal knowledge and unless there is an obligation to disclose all relevant facts, without limiting them to those which, in his view,. can raise justifiable doubts, there is likelihood of an unfair adjudication.

(iv) The earlier ICC Rules required the arbitrator to disclose:

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

Business or professional relationship or connection with subject matter of arbitration or its outcome or prior connection with some dispute have been treated as important matter to be disclosed by the arbitrators. It is a matter of propriety of Arbitrator. International Bar Association has approved guidelines on conflict of interest in International Arbitration. Copy of these guidelines are annexed as Annexure-VI. The Law Commission in its 176th Report recommended substitution of Section 12 (1) as follows:

"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other

kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality."

In view of this it is proposed to empower the Central Government to prescribe by rules guidelines on conflict of interest on the lines of IBA guidelines. Sub- Section (1) of Section 12 is proposed to be substituted as follows:

"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

(i) such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality; and

(ii) such other circumstances as may be provided in the Rules made by the Central Government in this behalf."

(D) Amendment in Section 28-

Section 28 deals with rules applicable to substance of the dispute. It reads as follows:

""28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India,—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,—

(i) the Arbitral Tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under sub-clause (ii) by the parties, the Arbitral Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The Arbitral Tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Supreme Court in Oil & Natural Gas Corpn. Ltd. v. Saw Pipes Ltd.,(2003) 5 SCC 705, considered a question whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 28 , which affects the rights of the parties. Under sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be — whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Supreme Court opined that reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. The Supreme Court finally held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34.

It may be pointed out that European Convention on Commercial, Arbitration that entered into force on April 21, 1961, in Article VII it is stated that, "the arbitrators shall into account of the terms of the contract and trade usages."

In order to overcome the situation arises due to Supreme Court decision in ONGC case, it is proposed to substitute Sub-section (3) of Section 28 as follows:

(3) In all cases, the arbitral tribunal shall take into account the terms of the contract and trade usage applicable to the transaction."

(E) Amendment in Section 31 (7)(b) regarding rate of interest:-

There are three stages of grant of interest in the arbitral proceedings under the Act- (i) pre reference; (ii) pendent lie and (iii) post award. Clause (a) of sub-section (7) of Section 31 empowers the arbitral tribunal to include in the sum for which award is made interest at such rate as it deems reasonable on the whole or any part of the money, for whole or any part of the period between the date on which the cause arose and the date on which award is made, provided (a) there is no agreement between the parties prohibiting the award of such interest by the arbitral tribunal; and (b) the arbitral award is for the payment of money. As provided in clause (b) of sub-section (7) of Section 31, unless the arbitral award otherwise directs, the rate of interest shall be 18 per cent per annum from the date of award to the date of payment. This is a salutary provision in the statute which is intended to deter parties from raising frivolous disputes by putting them on notice that interest on the amount directed to be paid is payable.

However the interest at the rate of 18% per annum in the present economic scenario appears to be too harsh. It would be reasonable to prescribe rate of interest 1% higher than current rate of interest rate fixed by the Reserve Bank of India. Therefore, it is proposed to substitute clause (b) of Sub-Section (7) of Section 31 as follows:

"(b) A sum directed to be paid by arbitral award shall carry interest at the rate of one percent higher then the current rate of interest from the date of award to the date of payment.

Explanation- The expression "Current rate of interest" shall have same meaning as assigned to it under clause (b) of Section 2 of the Interest Act, 1978."

(F) Amendment in Section 34 for providing meaning of "public policy of India" and for harmonising it with Sections 13 and 16.

Public Policy

(i) As per existing Section 34(2)(b)(ii) an arbitral award may be set aside by the Court if the arbitral award is in conflict with the public policy of India Section 34 provides that an arbitral award may be set aside by a court on certain grounds specified therein. The grounds mentioned in cl. (a) to sub-section (2) of section 34 entitles the court to set aside an award only if the parties seeking such relief furnishes proof as regards the existence of the grounds mentioned therein. The grounds are: (1) incapacity of a party ; (2) arbitration agreement being not valid ; (3) the party making the application not being given proper notice of appointment of arbitrator or of the proceedings or otherwise unable to present his case ; (4) the arbitral award dealing with the dispute not falling within the terms of submission to arbitration ; and, (5) composition of the tribunal or the arbitral procedure being not in accordance with the agreement of the parties.

(ii) Clause (b) of Sub-Section (2) of Section 34 mentions two grounds which are, however, left to be found out by the court itself. The grounds are : (1) the subject matter of the dispute not capable of settlement by arbitration that is to say, the disputes are not arbitrable; and (2) that the award is in conflict with the public policy of India. All these ground are common to both domestic as well as international arbitral awards.

(iii) The Supreme Court in the case of ONGC v Saw Pipes Ltd. Vs. (2003) 5 SCC 705 examined the scope and ambit of jurisdiction of the Court under section 34 of the Act. It was held that if the award is (a) contrary to the substantive provision of law, or (b) the provisions of the Act, or (c) against the terms of the contract, it would be patently illegal which could be interfered u/s 34. Supreme Court further held that phrase "public policy of India" use in Section 34 is required to be given a wider meaning and stated that the concept of public policy connotes some matter which concerns public good and the public interest. The award which is on face of it, patently in violation of statutory provisions cannot be said to be in public interest.

(iv) In ONGC v. Saw Pipes Ltd. reiterating several principles of construction of contract and referring to the contractual provisions which were the subject-matter of the arbitral award, the court ruled that "in the facts of the case, it can not be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act". Culling out the ratio from the decisions rendered under the 1940 Act, the court held:

> "It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; (b) it is also settled law that in a case of reasoned award, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; (c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally".

(v) The decision in ONGC case, though rendered by a bench of two Hon'ble judges, has far reaching consequences. Firstly, the decision construes the new Act, as, in its entirety (Sections 2 to 43), laying down only rules of procedures (vide para 8 of the judgment). It rules that "power and procedure are synonymous" and that "there is no distinction between jurisdiction/power and the procedure". Referring to Sections 24, 28 and 31 of the Act and construing the words "arbitral procedure" in Section 34(2)(v) (and after observing that all the provisions appearing in part I of the Act lay down arbitral procedure) it concludes that "the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be, on the face of it, illegal".

(vi) Construing the phrase "public policy of India" appearing in Section 34(2)(b)(ii), the court held that in a case where the validity of the award is challenged on the ground of being opposed to "public policy of India", an wider meaning ought to be given to the said phrase so that "patently illegal awards" could be set aside.

The court distinguished the earlier decision in Renu Sagar case on the ground that in the said case the phrase "public policy of India" appearing in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was construed which necessarily related to enforcement of foreign award after it became final. Though the court accedes that "it is for the Parliament to provide for limited or wider jurisdiction of the court in case where award is challenged", it still holds that, in its view, a wider meaning is required to be given to the phrase "public policy of India" so as to "prevent frustration of legislation and justice". Stating the reasons in support of its view the court held that "giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice".

(vii) This decision had been the subject matter of public debate and criticism in various fora. The Law Commission of India also suggested an amendment to the Act by insertion of Explanation II to Section 34 of the Act.

Accordingly in order to nullify the effect of above decision of the Supreme Court, it is proposed that the existing Explanation in section 34 be renumbered as Explanation 1 and after that Explanation as so renumbered the following Explanation shall be inserted.

> "Explanation II- For the purposes of this section "an award is in conflict with the public policy of India" only in the following circumstances, namely:-
>
> When the award is contrary to the-
>
> (i) fundamental policy of India; or
>
> (ii) interests of India; or
>
> (iii) justice or morality.'"

Harmonising Section 34 with Sections 13 and 16 –

It may be pointed out that Section 13 deals with the procedure for challenging an arbitrator. Sub-section (1) recognizes the freedom of the parties to agree on a procedure for challenging an arbitrator. Sub-Section (2) provides a supplementary procedure for challenging an

arbitrator. The reasons for such a challenge are exhaustively laid down in Section 12. As provided in sub-section (3), unless the arbitrator challenged under sub-section (2) withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on challenge. Sub-section (4) provides that if a challenge under any procedure agreed upon by the parties or under procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. However, as provided in sub-section (5) the party which challenges the appointment of the arbitrator may file an application for setting aside such an arbitral award in accordance with Section 34. Hence, until the arbitral award is made after the challenge to the appointment of arbitrator being unsuccessful, the party challenging the appointment of arbitrator cannot make any application to the Court in connection with challenge to the appointment of the arbitrator nor the court can entertain any such application. However in section 34 there is no specific mention of such a ground for setting aside an arbitral award.

Similarly as provided in Section 16, the arbitral tribunal may rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction can be raised as per sub-section (2) and a plea that the arbitral tribunal is exceeding the scope of its authority can be raised in terms of sub-section (3). As provided in sub-section (5), the arbitral tribunal can decide on these pleas and where the tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award. However, as per sub-section (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. An appeal lies under Section 37 against the order of the arbitral tribunal accepting the plea under sub-section (2) and (3) of Section 16. However, no appeal is provided against an order rejecting such plea. The only right that the petitioner has in such a case is to challenge the award under Section 34 after it is made.

The Law Commission in 176th Report considered the question whether it was desirable to provide for an appeal under section 37 to court against decision of the arbitral tribunal rejecting the plea of bias or disqualification under section 13. After due deliberation, the Law Commission was of the view that there should not be an immediate right of appeal under section 37 against the decision of the tribunal rejecting the plea of bias or disqualification under section 13.

The Law Commission in its 176th Report also considered the request from certain quarters for a right of appeal to the Court against an order of the arbitral tribunal rejecting the objections in regard to the existence or validity of the arbitration agreement under sub-sections (2) and (3) of section 16.

The Law Commission rejected the request for providing appeal against an order refusing a plea of want of jurisdiction.

Section 34 does not enable the parties to question the decision of the arbitral tribunal made under Section 13 (2) rejecting a plea of bias or to question the decision of the said tribunal made under Section 16 (2) or (3) rejecting a plea of want of jurisdiction on the part of the arbitral tribunal. Though the existence of these remedies was referred to in Sections 13 (5) and 16 (6), these remedies were not included in Section 34 and further the use of the word 'only' in section 34 (1) contradicted what was stated in sections 13 and 16. Therefore, the Law Commission, recommended insertion of a clarification in section 34 by way of an explanation that an applicant, while seeking to set aside the award, can attack the interlocutory order of the arbitral tribunal rejecting a plea of want of jurisdiction, as permitted by section 16(6).

In stead of insertion of another Explanation as proposed by the Law Commission, it would be appropriate to have a substantive provision in Section 34 for providing separate ground for challenging the arbitral award. Therefore, it is proposed to add following sub-clause (iii) in clause (b) of Sub-section (2) of Section 34-

"(iii) the application contains a plea questioning the decision of the arbitral tribunal rejecting –

(a) a challenge made by the applicant under sub-section (2) of section 13; or

(b) a plea made under sub-section (2) or sub-section (3) of section 16,";

(G) Insertion of new Section 34A-

Law Commission while suggesting amendment in Section 34 also recommended that in case of domestic arbitration, new ground for challenges viz. mistake appearing on face of award may be made available. Accordingly it recommended for inserting a new Section 34A.

It is desirable to provide some recourse to a party aggrieved by a patent and serious illegality in the award which has caused substantial injustice and irreparable harm to the applicant. It is a delicate task to strike a balance between two equally important but conflicting considerations, namely giving finality to the arbitral award and redressing substantial injustice caused by some patent and serious illegality in the award. As no tribunal is infallible, it is desirable to provide some recourse to a party who has suffered substantial injustice due to patent and serious illegality committed by the arbitral tribunal. It is true that whatever expression is used in the grounds of recourse to take care of such situation, the possibility of abuse thereof by a disgruntled party cannot be ruled out. However, one cannot lose sight of the ground realties.

There is no denying the fact that the overall scenario in the field of arbitration is not as ideal as it should be. As pointed by Lord Mustill, arbitration has become a business, often involving very large sums, and bringing in its train substantial monetary earnings for all concerned and there has been a concurrent decline in the standards of at least some of those who take part in it. It is no good wringing hands about this, for it is a fact to be faced, and part of facing is to recognise that some means must be found of protecting this voluntary process from those who will not act as they have agreed or as is expected of them. Here lies the need for providing some ground of recourse in case of patent and serious illegality causing substantial injustice.

In this context it may be necessary to refer to the case of Sikkim Subba Associates v. State of Sikkim (2001) 5 SCC 629, wherein the arbitrator awarded an astronomical sum as damages without any basis or proof of such damages as required by law in total disregard to the basic and fundamental principles, is a glaring example of misuse of power by the arbitrator and the need for some recourse at least in such extreme cases. In that case, the arbitrator made an award determining a sum of over Rs.33 crores with proportionate costs and future interest at the rate of 12% p.a. on the said amount as the amount payable by the State of Sikkim to the organizing agents of the lottery. The Supreme Court set aside the award on the ground of gross illegality. The grave nature of the illegality in the award in that case is evident from the following observations of the Supreme Court:

> "The arbitrator who is obliged to apply law and adjudicate claims according to law, is found to have thrown to the winds all such basic and fundamental principles and chosen to award an astronomical sum as damages without any basis or concrete proof of such damages, as required in law".
>
> * * *
>
> "Though the entire award bristles with numerous infirmities and errors of very serious nature undermining the very credibility and objectivity of the reasoning as well as the ultimate conclusions arrived at by the arbitrator, it would suffice to point out a few of them with necessary and relevant materials on record in support thereof to warrant and justify the interference of this Court with the award allowing damages of such a fabulous sum, as a windfall in favour of the appellants, more as a premium for their own defaults and breaches."
>
> * * *

"The manner in which the arbitrator has chosen to arrive at the quantum of damages alleged to have been sustained by the appellants not only demonstrates perversity of approach, but per se proves flagrant violation of the principles of law governing the very award of damages. The principles enshrined in Section 54 in adjudicating the question of breach and Section 73 of the Contract Act incorporating the principles for the determination of the damages, are found to have been observed more in their breach."

It is therefore proposes that that an additional ground of challenge, namely, "patent and serious illegality, which has caused or is likely to cause substantial injustice to the applicant" may be added as a ground for recourse in case of purely domestic awards. Accordingly, it is proposed to insert a new Section 34A as suggested by the Law Commission with some changes:

"34A. Application for setting aside arbitral award on additional ground of patent and serious illegality.-

(1) Recourse to a Court against an arbitral award made in an arbitration other than an international commercial arbitration, can also be made by a party under sub-section (1) of section 34 on the additional ground that there is a patent and serious illegality, which has caused or is likely to cause substantial injustice to the applicant.

(2) Where the ground referred to in sub-section (1) is invoked in an application filed under sub-section (1) of section 34, while considering such ground, the Court must be satisfied that the illegality identified by the applicant is patent and serious and has caused or is likely to cause substantial injustice to the applicant."

(H) SUBSTITUTION OF SECTION 36

Existing Section 36 deals with enforcement of an arbitral award. It reads:

> "36. 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."

Section 36, as it stands now, provides that the enforcement of the award will come to a stop upon the filing of an application under sub-section (1) of section 34 to set aside the award.

The Law Commission in their Report had observed that parties are filing applications to set aside the award even though there is no substance whatsoever in such applications and, to put a stop to this practice, proposed the amendment of section 36 by deleting the words which say that the award will not be enforced once an application is filed under sub-section (1) of section 34.

To give effect to the above recommendation of the Law Commission, the Amendment Bill of 2003 sought to substitute the existing section 36.That was is a very good provision. It will have a salutary effect on the expeditious execution of the awards. It provided that an award will be enforceable after the period fixed for filing applications under section 34 has expired, unless the court stays its enforcement. The court is vested with powers to refuse stay or grant stay subject to conditions. While granting stay, the court can impose conditions, keeping the scope of interference in applications under sub-section (1) of section 34 in mind. The manner of imposing conditions and interim measures has also been specified. Therefore, it is proposed to substitute Section 36 as follows:

"36. Enforcement of award.-

(1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of sub-sections (2) to (4), the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

(2) Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).

(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the Court may, subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:

Provided that the Court shall, while considering the grant of stay, keep in mind the grounds for setting aside the award.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant interim measures not only against the parties to the award or in respect of the property which is the subject-matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject-matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified, or vacated, as the case may be, by the Court subject to such conditions, if any, as it may, after hearing the affected parties, deem fit."

(I) Arbitration relates to Commercial Disputes of specified value-

In the Amendment Bill of 2003 it was proposed to insert a new chapter IXA, comprising sections 37A to 37F, to provide that every High Court shall, constitute an Arbitration Division in the High Court to deal, irrespective of pecuniary value, with the applications under sub-section (1) of section 34 to set aside awards under the principal Act, new and pending, and enforcement of awards under the principal Act, new and pending.

The object of that amendment was to avoid the present procedure at two levels, one in the subordinate courts (or original side of High Court) and another by way of appeal to or in the High Court. Now, by a separate law it is proposed to constitute Commercial Division in the High Court. In the said law it is also proposed that the said Commercial Division will also entertain applications under Section 34 and Section 36 and appeals under section 37 of the Arbitration and Conciliation Act, 1996 where the arbitration relates to "Commercial Disputes" of specified value. For this purpose, consequential amendment for amending definition of 'Court' in Section 2 of the Arbitration Act is also being amended. As the application under Section 34 would be filed before the Commercial Division of the High Court, appeal against order passed by the Commercial Division under Section 37 would lie before the Supreme Court. For this purpose, the Lok Sabha has passed the Commercial Division of High Courts Bill, 2009. Copy of the Bill is annexed as Annexure-VII.

J- Suggestion for Insertion of provision for implied arbitration agreement in commercial contract of high consideration value-

We have received a suggestion from certain quarters that after the judgment delivered by Seven Judge Bench of Supreme Court in the case of S.B.P. Company Vs. Patel Engineering Ltd.(2005) 8 SCC 618, a situation has arises to the effect that in the matter of appointment of arbitrator, the role of arbitration institution has become almost nil. As held by the Supreme Court in aforesaid case, the Chief Justice or the designated Judge would be entitled to seek only the opinion of an institution in the matter of nominating an arbitrator if need arises, but the order appointing arbitrator could only be that of the Chief Justice or the designated Judge. Supreme Court has further held that before appointing an arbitrator the Chief Justice or the designated Judge will have a right to decide certain preliminary issues including the issue of existence of a valid arbitration agreement.

Standing Committee of the Parliament in its report on the Arbitration and Conciliation (Amendment) Bill, 2003 has recommended to promote institutional arbitration.

In order to avoid raising of an issue of existence of a valid arbitration agreement and also to promote institutional arbitration, it has been suggested by certain persons that in respect of commercial contract of high threshold value, there should be a deemed arbitration clause in every such contract, unless the parties expressly and in writing agree otherwise. To achieve this object, insertion of following clause in the Arbitration and Conciliation Act, 1996 has been suggested:

(i) Unless parties expressly and in writing agree otherwise, every commercial contract with a consideration of specified value(Rs. 5 crore or more) shall deemed to have in writing specified arbitration agreement.

(ii) Specified Arbitration Agreement as referred in clause (i) shall contain following clause:

"All dispute s(except (here specify the excepted disputes, if any) arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of (here specify the name of the approved arbitral institution) by one or more of the arbitrators appointed in accordance with the said Rules."

(iii) Any arbitration agreement that differs from the said clause will stand modified along the lines of the specified arbitration agreement.

(iv) Where the parties have failed to mention the Approved Arbitral Institution, High court will authorize to an Approved Arbitral Institution to appoint arbitrator within 30 days of the reference made to it by either party for this purpose.

(v) In this Section "Commercial Contract" shall mean every contract involving exchange of goods or services for money or money's worth and includes carriage of goods by road, rail, air, waterways, banking, insurance, transactions in stock exchanges and similar exchanges, forward markets, supply of energy, communication of information, postal, telegraphic, fax and Internet services, and the like."

It may be pointed out that for inserting aforesaid provisions in the Arbitration & Conciliation Act, 1996, many provisions of the Act including Section 7 (which deals with arbitration agreement), Section 8, Section 2(1)(b) have to be amended.

Comments are invited on the feasibility and necessity of insertion of aforesaid provisions in the Act.

Comments are invited on aforementioned proposed amendments in the Arbitration & Conciliation Act, 1996. Any other suggestion regarding amendment in the said Act may also be sent within 30 days. The comments can be sent to Adviser to Union Minister for Law & Justice at vnathan@nic.in or to the following address

T.K.Viswanathan
Adviser to Minister for Law & Justice,
Ministry of Law & Justice
Room No 404 "A" Wing 4th Floor
Shastri Bhavan
New Delhi 110001.

ANNEXURE - I

THE ARBITRATION AND CONCILIATION ACT, 1996

(NO. 26 OF 1996)

[16th August, 1996.}

An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitralawards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

PREAMBLE

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules:

BE it enacted by Parliament in the forty seventh year of the Republic as follows:—

PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Arbitration and Conciliation Act, 1996.

(2) It extends to the whole of India:

Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.

Explanation.—In this sub-section, the expression "international commercial conciliation" shall have the samemeaning as the expression "international commercial arbitration" in clause (f) of sub-section (1) of section 2, subject to the modification that for the word "arbitration" occurring therein, the word "conciliation" shall be substituted.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

PART I — ARBITRATION

CHAPTER - I

GENERAL PROVISIONS

2. Definitions.—(1) In this Part, unless the context otherwise requires,—

(a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;

(b) "arbitration agreement" means an agreement referred to in section 7;

(c) "arbitral award" includes an interim award;

(d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

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

(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is–

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

(g) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the

estate devolves on the death of the party so acting;

(h) "party" means a party to an arbitration agreement.

Scope

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

(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to ever}' arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.

(5) Subject to the provisions of sub-section (4), and save in so far. as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto.

Construction of references

(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

(7) An arbitral award made under this Part shall be considered as a domestic award.

(8) Where this Part—

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.

(9) Where this Part, other than clause (a) of section 25 or clause (a) of sub-section (2) of section 32, refers to a claim, it shall also apply to a counter-claim, and where it refers to a defence, it shall also apply to a defence to that counter-claim.

3. Receipt of written communications.—

(1) Unless otherwise agreed by the parties,—

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a

reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.

4. 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.

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

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

CHAPTER II

ARBITRATION AGREEMENT

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 in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and 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) Notwithstandingthat an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

9. Interim measures by Court etc.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36. apply to a court —

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

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

(a) the pre'servation, 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 authorising 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 purpose of, and in relation to, any proceedings before it.

CHAPTER III

COMPOSITION OF ARBITRAL TRIBUNAL

10. Number of arbitrators.—(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him. or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or subsection (5) or sub-section (6) to the Chief Justices of different High Courts or, their designates, the Chief Justice or his designate to whom the requesthas been firstmade under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Ch ief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

12. Grounds for challenge.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circum-

stances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5). the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

14. Failure or impossibility to act.—(l)The mandate of an arbitrator shall terminate if—

(a) he becomes dejure or defacto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the

court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

CHAPER IV

JURISDICTION OF ARBITRAL TRIBUNALS

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

(a) an arbitration clause wh ich 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 th" scope of its authority is raised during the

arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

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

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

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

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

CHAPTER V

CONDUCT OF ARBITRAL PROCEEDINGS

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

19. Determination of rules of procedure.—(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872(1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

20. Place of arbitration.—(1) The parties are free to agree on the place of arbitration.

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

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

inspection of documents, goods or other property.

21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

22. Language.—(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

23. Statements of claim and defence.—(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

24. Hearings and written proceedings.—(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other

property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

26. Expert appointed by arbitral tribunal.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

27. Court assistance in taking evidence.—(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence.

(2) The application shall specify—

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,—

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

(4) The court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the court.

(6) In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

CHAPTER VI

MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS

28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country

shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

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

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

29. Decision making by panel of arbitrators.—(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

(2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

30. Settlement.—(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

31. 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 arbitrat'on 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.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties,—

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify— (i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation.—For the purpose of clause (a), "costs" means reasonable costs relating to—

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

32. Termination of proceedings.—(1) The arbitral proceedings shall be term inated by the final arb itral award or by an order of the arbitral tribunal under subsection (2)

(2) The arbitral tribunal shall issue an order for the termination of the arbitral

proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

33. Correction and interpretation of award; additional award.—(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shal 1 make the additional arbitral award with in sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

CHAPTER VII

RECOURSE AGAINST ARBITRAL AWARD

34. Application for setting aside arbitral award.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set ^side by the court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii), 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 or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arb itral award or, if a request had been made under section 3 3, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determ ined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

CHAPTER VIII

FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

35. 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.

36. 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.

CHAPTER IX

APPEALS

37. 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 of the arbitral tribunal—

(a) accepting the plea referred to 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 mis section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CHAPTER X

MISCELLANEOUS

38. Deposits.—(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.

39. Lien on arbitral award and deposits as to costs.—(1) Subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

(2) If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(3) An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral

ANNEXURE-II

SUMMARY OF RECOMMENDATIONS OF 176TH REPORT OF THE LAW COMMISSION OF INDIA ON THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2003.

The recommendations made by the Law Commission regarding additions, modifications and substitutions in the Arbitration and Conciliation Act, 1996 are being summarized as follows: -

(1) **Section 2(1)(e):** In the definition of the word "Court", the 'Court of the Principal Judge, City Civil Court in a city exercising original jurisdiction', is also proposed to be included.

(2) **Section 2(1)(ea):** This clause is proposed to be added and it defines 'domestic arbitration' on the same lines as the existing sub-section (7) of Section 2 which defines 'domestic award'. 'Domestic arbitration' will mean (i) where all parties are Indian nationals or (ii) where at least one party is not an Indian national, (i.e. where the arbitration is international in nature) whether the arbitration is commercial or not and the arbitration is in India. International arbitration in India shall be deemed to be 'domestic arbitration'. In sub-clause (3) a company incorporated in a country other than India has not been included.

(3) **Section 2(1)(eb):** This clause is proposed to be added and it defines 'international arbitration' as arbitration where at least one party is not an Indian national. This arbitration need not necessarily be commercial. In this definition also, in sub-clause (iii), a company incorporated in a country other than India has not been included. Reference to a company incorporated in a country other than India in this clause will fall within the meaning of the word "body corporate incorporated in any country other than India".

(4) **Section 2(1)(f):** This clause is proposed to be modified by defining 'international commercial arbitration' as 'international arbitration', which is commercial in nature.

(5) **Section 2(1)(fa):** This clause is proposed to be introduced. Under Section 8, when an action is filed before a 'judicial authority', the said authority has to refer the dispute to arbitration, if the respondent relies upon an arbitration clause. A definition of 'judicial authority' is therefore proposed to be included stating that 'judicial authority' includes any 'quasi-judicial statutory authority'. This word occurs in Section 8 and also in the amendments proposed in Section 5 and Section 42.

(6) **Section 2(2):** Section 2(2) is proposed to be amended by adding clauses (a) and (b). Section 2(2) states that Part - I of the Act applies to arbitration in India. That would mean that in the case of arbitration between Indian nationals and also where one party is not an Indian national, and where the place of the arbitration is in India, Part I of the Act will apply. While the UNCITRAL Model Law permits certain Articles like 8, 9, 35 and 36 to apply to arbitrations outside the Country, there is an omission in this behalf in the 1996 Act. Consequently, for example in the absence of availability of Section 9 in the case of

an arbitration outside India, the Indian party is unable to obtain interim measures from Indian Courts, before arbitration starts outside India. The absence of an express provision as stated above has led to conflicting judgments in the Delhi and Calcutta High Courts. It is proposed to allow Section 9 to the invoked whenever arbitration is outside India. Similarly, the provisions of Section 8, 27, 35 and 36 are proposed to be made available whenever arbitration is outside India. Almost all countries which have adopted the Model Law allow views of these provisions to arbitrations outside the country.

The proposed clause (a) of Section 2(2) states that Part – I of the Act applies to domestic arbitration in India and the proposed clause (b) states that Sections 8, 9, 27, 35 and 36 will be available for international arbitrations outside India.

(7) **Section 2(10):** This clause is proposed to be introduced to allow the Principal Courts referred to in Section 2(1)(e) to transfer matters before them to Courts of coordinate jurisdiction. This clause is proposed to get over some judgment of the High Courts which have stated that the Principal Court in Section 2(1)(e) cannot transfer matters to other Courts. This proposal will reduce congestion in the Principal Courts.

(8) **Section 5:** An Explanation is proposed to be added in Section 5 explaining the meaning of the words 'any other law for the time being in force', which occur in the non-obstante clause. The proposed Explanation states that the above words would include any intervention under

(a) Code of Civil Procedure, 1908 (5 of 1908);

(b) Any law providing for internal appeals within the High Court;

(c) Any law, which provides for intervention by a judicial authority in respect of orders passed by any other judicial authority.

In view of the proposed Explanation, all remedies of appeal or revision under the Code of Civil Procedure or appeals under the Letters Patent or under High Court Acts and all other remedies under special statutes against orders of a judicial authorities, get excluded.

(9) **Section 6:** Section 6, as it stands, states that, in order to facilitate the conduct of arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable arbitrator or person.

It is proposed to drop the words "or the arbitral tribunal with the consent of the parties", for the detailed reasons given in Chapter II

(10) **Section 7(4)(b):** This section is proposed to be amended by adding some words in clause (b) of sub-section (4), to include within the definition of 'arbitration agreement' an agreement by implication such as where one party sends a communication to another

party by the addition of including an arbitration clause in the proposed contract. Even though the party who receives the communication does not send a reply, his silence will be treated as amounting to acceptance of the arbitration clause. Which is accepted by the other party without demur. This clause is proposed to cover cases like 'brokers – notes', which contain arbitration clauses.

(11) **Section 8:** Several amendments are proposed in Section 8 as follows:

(i) **Section 8(1):** This sub-section is proposed to be amended by permitting, as under the UNCITRAL Model Law, judicial authority to decide certain preliminary questions which are raised by the respondent before filing the defense statement, so that the said issues can be decided before making a reference to arbitration.

(ii) **Section 8(1A):** This sub-section is proposed to be added to require the judicial authority to stay the action pending a decision on the preliminary issues of jurisdiction and subject to the outcome of a decision on those preliminary issues.

(iii) **Section 8(3):** Section 8(3) is proposed to be amended. As it stands now, the arbitral tribunal, if already appointed by the respondent, the arbitral tribunal can proceed with the arbitral proceedings, while the court is still dealing with the earlier application of the respondent seeking reference. The proposed amendment states that the continuance of such an arbitration proceeding will depend upon the decision of the judicial authority on the preliminary issues. In case it is decided by the judicial authority to reject the preliminary issues of jurisdiction and make a reference to another arbitral tribunal, the mandate of the earlier arbitral tribunal appointed by the respondent, shall cease.

(iv) **Section 8(4):** This sub-section is proposed to be added enabling the judicial authority to decide, subject to the proposed sub-section (5), the preliminary issues as to whether (a) there is no dispute in existence (b) the arbitration agreement is null and void or inoperative (c) the arbitration agreement is incapable of being performed (d) the arbitration agreement is not an existence.

(v) **Section 8(5):** This sub-section is proposed to be added to say that the judicial authority may not decide the above issues referred to in the proposed sub-section (4), if (a) the relevant facts or documents are in dispute or (b) oral evidence is necessary to be adduced or (c) enquiry into the preliminary questions is likely to delay reference to arbitration or (d) the request for a decision is unduly delayed or (e) the decision on the questions is not likely to produce substantial savings in costs of arbitration or (f) there is no good reason as to why these questions should be decided at that stage. Depending upon the above factors, the judicial authority shall either decide the issues or make reference to arbitration. The above conditions are imposed to see that frivolous jurisdictional issues are not raised at

the preliminary stage so as to delay the reference. At the same time, if the said issues can be decided easily and without oral evidence being adduced, they can be decided and will certainly save costs of arbitration.

(vi) **Section 8 (6):** This sub-section is proposed to be added to deal with situations arising out of, what is known as, a Scott v Avery clause. Under such a clause, a party cannot ignore an arbitration clause and file an action before a judicial authority and the clause requires the party to first obtain an arbitration award as a condition precedent for filing an action before the judicial authority. But there may be cases where the judicial authority decides that the arbitration agreement is null and void, inoperative or unenforceable or not in existence and in such a case, it is obvious that no award can be obtain as required by the clause. The proposed sub-section (6) states that in such situations referred to above, the condition precedent in the Scott v Avery clause need not be complied with.

(12) Section 8A and Explanation: This section is proposed to be introduced in view of the difficulty faced by the Supreme Court in the interpretation of Section 8 to cover arbitration agreements entered into during the course of a pending litigation. The Supreme Court, no doubt, held that the language of Section 8 could, with some difficulty, be extended to include such a situation. But the Supreme Court stated, in that case, that even if a reference is made at an appellate stage, such as by the High Court or Supreme Court, the objections to the award have to be filed only in the Principal District Court as defined in Section 2(1)(e). Such a procedure will obviously lead to a further litigation starting from the District Court, and is wholly undesirable. It has, therefore, become necessary to get over these problems by permitting objections to the award to be filed in the same Court which has made the reference.

An Explanation is proposed to be added to the new Section 8A to cover a situation which arose in a case before the Supreme Court. In that case the writ court referred parties to arbitration, in accordance with the agreement entered into by them, pending the writ proceedings. It is proposed therefore to provide for such a situation, enabling parties to go to arbitration in writ jurisdiction also, where they have disputes about their rights under the civil law. The proposed Explanation states that the word ‘legal proceeding’ in Section 8A will cover Writ Petitions also where civil disputes between parties are involved.

(13) Section 9

(i) This Section is proposed to be amended by restructuring it and bringing the latter part of the section which deals with the wider powers of the Court to the forefront and for relegating the enumerate powers of the Court to the latter part of the section. As the section now stands, it gives an impression that the powers of the Court which are referred to in the latter part of the section are as limited as those

in the earlier part of the section. This position is being clarified by dividing the existing section into sub-sections (1)to(3).

(ii) Sub-Sections (4) to (6) are proposed to be added to see that a party who obtains an interim order from the Court, does not refrain from taking steps to have an arbitral tribunal appointed. Otherwise, he would be reaping the benefits of the interim order without time limit. The proposed sub-sections (4) to (6) require the Court, while granting interim orders under Section 9 to further direct that the party must take steps within 30 days to have an arbitral tribunal appointed under Section 11, and that otherwise the interim order will stand vacated, unless the time is extended by the Court. It is also provided that if the party does not take such steps and if the interim order is vacated, the Court may pass such orders as to restitution as may be necessary, in the circumstances of the case.

(14) **Section 10 A:** This section is proposed to be introduced to see that a party (not being the Government or a public sector undertaking or a statutory authority), will not appoint its own employee, consultant or other person having common business interest, etc as an arbitrator. Such clauses in arbitration agreements shall be void to that extent. Further, it is provided that this provision does not apply to international arbitration agreements where the place of arbitration is in India.

(15) **Section 11:** Several amendments are proposed in Section 11. At the same time care is taken to see that reference to arbitration is not delayed.

(i) **Section 11 (4) to (12):** In these sub-sections, the proposal is to replace the words "Chief Justice of India" and the word "Chief Justice" by the words, "Supreme Court" and "High Court", so that the appointment of the arbitral tribunal is made on the judicial side. The advantages of such an amendment and certain mis-conceptions in regard to advantages under the existing Section 11, are discussed at great length in the report of the Commission and also by way of pointing out that under the UNCITRAL Model as well as in the new arbitration laws of various countries, the appointment is on the judicial side. Reference is also made the recent Act in Ireland which allows the High Court to make the appointment and defines the "High Court" as the President of the Court, meaning thereby that the appointment of the arbitral tribunal is made by the President of the High Court on the judicial side.

(ii) **Section 11(5A):** This sub-section is proposed to be introduced as a consequence of the proposed Section 10A dealing with Scott v Avery clauses where a party is not able to fulfill the condition precedent of obtaining an award before an action is filed under section 8 before a judicial authority. The reason is that if the arbitration agreement is found to be null and void etc., it is not possible to obtain

an award. In such cases, the parties are permitted under the proposed sub-section (5A), to avail of the procedure under Section 11 for appointment of arbitral tribunal because the arbitral agreement has been held to be null and void etc.

(iii) Section 11 (4),(5) & (6) proposed to be amended: These sub-sections are proposed to be amended are added as stated above, by stating that if a party to whom a request is made for appointment of an arbitral tribunal, does not choose to take any action to make an appointment, the said party must be deemed to have waived the right make the appointment. This provision has become necessary because several parties who receive notices for appointment of arbitral tribunal do not send any reply nor appoint an arbitrator and when the other party goes to Court under Section 11 seeking appointment, they rely on their prerogative to make the appointment. We also propose to increase the period from 30 days to 60 days to make the appointment in sub-sections (4) and (5). We have also proposed that if the appointment procedure as stated in sub-section (6) is not followed, the right to make the appointment under the procedure shall be deemed to have been waived.

(iv) **Section 11 (13), (14):** These two sub-sections are proposed to be introduced on the same lines as sub-sections (4) and (5) of Section 8, already referred to, thereby requiring the Supreme Court or the High Court, as the case may be, (in the case of an application under Section 11 in an international arbitration or a purely domestic arbitration between Indian nationals, in India), to decide preliminary issues as to whether (a) there is no dispute in existence, or (b) the arbitration agreement is null and void or inoperative, or (c) the arbitration agreement is incapable of being performed, or (d) the arbitration agreement is not an existence. However the above Courts need not decide these questions if: (a) relevant facts or documents are in dispute, or (b) oral evidence is necessary to be adduced, or (c) the enquiry into these questions is likely to delay the reference to arbitration, or (d) the requests for deciding the question was unduly delayed or (e) the decision on the question is not likely to produce substantial savings in cause of arbitration, or (f) there is no good reason as to why these questions should be decided at that stage. If the above Courts find that the preliminary questions are simple enough they may decide the same. Otherwise they shall refer these questions also to the arbitral tribunal. Thus sufficient care is taken to see that nobody takes undue advantage of the right to raise preliminary jurisdictional issues or to cause delay in the appointment of arbitrators. At the same time care is taken to see that parties do not incur unnecessary costs by being referred to arbitration.

(16) Section 12: This section is proposed to be amended to direct the proposed arbitrators to disclose in writing particular circumstances, within there peculiar knowledge, such as the existence of any past or present relationship, either direct or indirect, with any of the

parties or their Counsel, or facts as to any relationship, finacial business, professional, or other kind which can give rise to justifiable doubts as to their independents or impartiality.

(17) Section 14: This section is proposed to be amended to say that where the mandate of an arbitrator is terminated, the Court may decide the quantum of fee payable to him.

(18) Section 15: This section is proposed to be amended to say that the substitute arbitrator is to be appointed within 30 days and also that the Court will decide the fee payable to the arbitrator whose mandate has been terminated.

(19) Section 17: This section is proposed to be amended by adding some more powers to the list of powers that can be exercised by the arbitral tribunal, as contained in the English Act, 1996.

(20) section 20: Section 20(1) as it stands now states: "The parties are free to agree on the place of arbitration". Section 20 is in Part I of the Act and concerns arbitrations in India. Obviously, sec. 20(1) is subject to sec. 2(2) and for the reasons given in Chapter II, in the case of arbitrations to which Part I applies, the place can only be in India. In order to clear the misunderstanding and for the detailed reasons given in Chapter II, we propose adding the word 'within India' at the end of sec. 20(1) so that the place selected is restricted to India, and the other sub sections are converted into provisos, so that even in case parties disagree, the arbitral tribunal can select a place within India only.

(21) Section 23 (1): This sub-section is proposed to be amended by deleting the words which permit the parties to lay down the procedure or time schedule for filing the pleadings before the arbitral tribunal. Consequently it will now be for the arbitral tribunal to fix same. This amendment is proposed to expedite arbitration proceedings and to avoid parties or those who represent them agreeing and seeking unnecessary adjournments. It is further proposed to be provided that the procedure and time schedule as fixed by the arbitral tribunal for the purpose of filing pleadings, should be binding on the parties. This amendment has become necessary in view of the complaints by several arbitrators that in India parties or those who represent them agree for adjournments for no good reason, taking undue advantage of the existing provisions of Section 23 (1). Further, under section 23(1A), the High Court may prescribe rules for expediting the arbitration process under section 82. This amendment has become necessary in view of the peculiar conditions in India.

(22) Section 24(1): This sub-section is proposed to be amended by deleting the words which permit the parties or those who represent them from 215 agreeing to get the proceedings adjourned before the arbitral tribunal during the course of the evidence, without good reason. It is proposed to grant powers to the arbitral tribunal to fix the procedure as well as the time schedule for the evidence. It will be open to the tribunal to receive affidavit

evidence also, subject to any right of the parties to examine the deponent. The procedure and time schedule fixed by the arbitral tribunal shall be binding on the parties or those who represent them. This will also be subject to such rules as may be made by the High Court under section 82. This amendment has become necessary in view of the peculiar conditions in India.

(23) **Section 24A:** This section is proposed to be introduced to enable the arbitral tribunal, which has passed interim orders under section 17, 23, or 24, to have the said orders obeyed by the parties and in case of failure to obey, the tribunal can pass orders striking out pleadings or imposing costs or omitting material documents or by way of drawing adverse inference. There are similar provisions in the English Act 1996.

(24) **Section 24B:** This section is proposed to be introduced to enable the parties or the arbitral tribunal, (if need be), to approach the Court for the purpose of implementation of the interim orders passed by the arbitral tribunal under Sections 17, 23 and 24. But before the Court is approached, the arbitral tribunal is to pass a peremptory order on the same lines as the interim order. This provision has become necessary because several arbitrators have complained that they are helpless when 216 parties do not obey their interim orders. There is such a provision in the English Act of 1996.

(25) **Section 28(1), (1A), :** Section 28(1) as it now stands, opens with the words "where the place of arbitration is situated in India" and clause (a) deals with purely domestic arbitration and not international arbitration. As it now stands, it gives an impression that in the case of such a purely domestic arbitration between Indian nationals or Indian companies, a foreign law can be applied to the dispute under the contract. For the reasons given in Chapter II relating to sec. 20(1), there is no question of having a place of arbitration outside India in such cases. We have already proposed adding 'within India' at the end of sec. 20(1). With a view to remove the impression arising from the opening words in sec. 28(1), "where the place of arbitration is situated in India", namely, that there can be a place of arbitration outside India also, we propose to exclude the applicability of the said words from clause (a) of sub section (1). We accordingly, designate clause (a) as sub section (1) without the said words, and designate clause (b) as sub section (1A) and shift the above words to that sub section which deals with international arbitration.

(26) **Section 29:** Section 29 is proposed to be amended to say that the minority of opinion shall be appended to the arbitral award if made 217available within 30 days of the decision of the other arbitrators. If there is no majority view, the decision of the presiding arbitrator shall become the award.

(27) **Section 29A:** This section is proposed to be introduced fix time limits for passing of the award and also for speeding up the arbitral process. No provision was made in the 1996

Act fixing time limit for the passing of the award, on the ground that extension applications in the Court were not being disposed of early enough and that there were long delays. It is proposed to initially grant a period of one year, after commencement of the arbitration and also to permit parties to agree for extension upto a maximum of another one year. Thereafter, if there is further delay, the proceedings will stand suspended until an application is made in the Court, either by the parties or if the parties do not do so, until an application for extension is filed by the arbitral tribunal. The moment an application, is filed the arbitration proceedings can re-start. It is proposed to be provided that there will be no stay of the arbitration proceedings pending consideration of the application for extension of time and that, pending the application, the arbitral tribunal shall proceed with the arbitration proceedings. The Court shall extent the time for passing the award and shall fix the time schedule and further procedure, by taking into consideration the reasons for the delay, the conduct of the parties, the manner in which proceedings were conducted by the arbitral tribunal, the amount of money spent already towards fee and expenses, the extent of work that is already done and the extent of work that remains to be done. The 218 Court will passed orders from time to time till the award this passed. This provision has become necessary in view of the peculiar conditions prevailing in India even after the 1996 Act. Sub-section 8 of the proposed Section 29A requires that the first order on the extension application shall be passed within one month from the date of service on the opposite party. The 'future procedure' can be prescribed by the High Court by making rules under section 82.

(28) **Section 31A:** This section is proposed to be introduced requiring a photocopy of the arbitral award to be filed by the arbitral tribunal, along with the 'arbitral records' in the Principal Courts referred to Section 2(1)(e). The award is to be filed only for purposes of record. Parties can obtain certified copies of the photocopy of the award or other documents or of the arbitral proceedings. In case the records are called by any other Court, provision is made for sending the record to that Court. The preservation of records shall be governed by the prevailing rules applicable to other records preserved in the Court. The Court is to maintain a register of awards with the details mentioned in the section and other details has may be required by the rule making authority.

(29) **Section 34:** This Section deals with applications to set aside the award. The section is proposed to be amended to fill up certain omissions and also to provide for some consequential amendments 219 arising out of the proposed section 34A, regarding which details are given under serial No.30.

(i) **Sub-Section (1) of Section 34:** This sub-section is proposed to be amended by permitting the parties to include, in their application to set aside the award, the additional grounds proposed in Section 34 A in the case of purely domestic arbitration awards relating to Indian nationals.

(ii) **Explanation 2 below Section 34:** Section 34 does not enable the parties to question the decision of the arbitral tribunal made under Section 13 (2) rejecting a plea of bias or to question the decision of the said tribunal made under Section 16 (2) or (3) rejecting a plea of want of jurisdiction on the part of the arbitral tribunal. Though the existence of these remedies was referred to in Sections 13 and 16, these remedies were not included in Section 34 and further the use of the word 'only' in section 34 (1) contradicted what was stated in sections 13 and 16. This is being rectified by adding Explanation – 2 below sub-section 2 of Section 34, making it clear that the above decisions can be challenged before the court in the application under section 34(1).

(iii) **Sub-Section (1A):** We proposed to introduce sub-section (1A) in section 34 so that while filing an application to set aside the award, 220 the parties could annex a photocopy of the award in case the original award has not been supplied to the applicant.

(iv) **Sub-Section (5) and (6):** These sub-sections are proposed to be introduced to refer to the further procedure subsequent to sub-section (4), namely, after receipt of the order of the arbitral tribunal to which the award is remitted for rectification of the defects pointed out in the application filed under sub-section (1) of Section 34. The further procedure that is proposed is that parties can filed objections to the order of the tribunal passed upon such remission, and it is further provided that the Court can deal with the said objections also in the light of the grounds permissible under Section 34 and under the proposed Section 34A.

(30) **Section 34A:** In the case of purely domestic arbitrations, where an award is passed between Indian nationals, the parties are proposed to be given two more additional grounds of attack to be included in the application under sub-Section (1) of Section 34. These two additional grounds are (i) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law, and (ii) that the award has not given reasons though it was an award which was required to contain reasons, not being one by way of settlement or one where the agreement provided that reasons need not be given. 221

In the case of additional ground (i) referred to above, special conditions are imposed, namely, that the party must file an application seeking leave to raise the said ground and satisfy the Court prima facie that such a point was raised before the arbitral tribunal, that the point affects the rights of the parties substantially, and that it is proper to decide the question. The application under Section 34 (1) must specifically indicate the substantial question raised. Sub-section (3) of the proposed Section 34 A states that additional ground (i) will not be available where a specific question of law was referred to the arbitral tribunal.

(31) **Section 36(1):** (i) Section 36 as its stands now provides that the enforcement of the award will come to a stop upon the filing of an application under sub-section (1) of Section 34 to set aside the award. Parties are now filing such applications even though there is no substance whatsoever in such applications. Section 36 is therefore proposed to amended by designating the existing section as sub-section (1) and omitting the words which say that the award will not be enforced once an application is filed under sub-section (1) of Section 34.

(ii) **Sub-section (2):** This sub-section is being introduced to say that the mere filing of an application under sub-section (1) of Section 34 to set aside an award shall not amount to stay of the award unless the Court passes an order under the proposed sub-section (3). 222

(iii) **Sub-section (3) to (5):** These sub-sections are proposed to be introduced to enable the Court to stay the operation of the award subject to such conditions as it may deem fit, in the light of the limited grounds available under Section 34 and 34A. Under these sub-sections, the Court can pass orders against third parties or against property which is not the subject matter of arbitration, for the purpose of protecting the interests of the party in whose favour the award is passed.

(32) **Section 37A:** This section is proposed to be introduced to enable the Court to dismiss in limini, an application under sub-section (1) of Section 34 (application to set aside the award) or any appeal (whether a regular appeal or an appeal against an interim order of the tribunal), even before notice is issued to the opposite party. It is further proposed to provide that even in a case where notice is issued to the opposite party, the Court, at the time of the disposal of the above matters, will not interfere unless "substantial prejudice" is shown by the applicant or the appellant, as the case may be. It is further provided that all applications and appeals are to be disposed of within 6 months of service on the opposite party. These provisions are introduced to avoid applications and appeals being automatically registered and kept pending by the Registry and being kept pending for years together, in the Courts.

(33) **Section 42:** This section is proposed to be amended to refer to the forum for filing subsequent applications in all situations where the first of the applications is filed before a judicial authority under Section 8 or before any of the Courts referred to in Section 8 A or before the Supreme Court or the High Court under Section 11 seeking reference to arbitration. The various proposed sub-sections of section 42 refer separately to the Court before which the subsequent applications, such as applications under sub-section (1) of Section 34 for setting aside the award etc, have to be filed. Sub-section (1) of Section 42 is general, sub-section (2) refers to situations where the first application is filed before the Court in Section 2(1)(e), Sub-section (3) deals with the situations where the first

application is filed before a judicial authority under Section 8, sub-section (4) deals with situations where the first application is filed before any of the Courts referred to in Section 8A and Sub-section (5) refers to the situations where the first application is filed before the Supreme Court or the High Court under Section 11, seeking reference to arbitration.

(34) Section 42A: This section is proposed to be introduced to enable empanelment of arbitrators by the Chief Justice of India under a scheme to be framed by him subject to such conditions as he may specify.

(35) Section 42B: This section is proposed to be introduced to neutralise the effect of the Maharastra amendment of 1984 to Section 69 of the Indian Partnership Act which amendment disabled partners of an 224 unregistered firm to seek dissolution of the firm, settlement of accounts of the firm or realise the assets of the firm. Section 42B removes the disability in so far as it relates to the partners' right to seek the aforesaid relief's through arbitration proceedings.

(36) Section 43: Two amendments are proposed in Section 43.

(i) **Section 43(3):** This sub-section is proposed to be amended to declare the effect of the Contract (Amendment) Act 1996 which amended Section 28 of the Indian Contract Act. By that amendment to the Contract Act, the effect of what is known as the Atlantic clause, was neutralised by the Parliament. The amendment stated that if a clause in a contract had the effect of extinguishing a right if a particular step (e.g. giving of a notice of 30 days soon after the cause of action) is not taken by the party, such a clause will be void. Now sub-section (3) is proposed to be amended and it is stated that such clauses will be void and that further there will be no necessity for the parties to seek extension of time in a Court in respect of the period prescribed under the Limitation Act 1963, as is now provided in sub - section (3).

(ii) **Section 43(5):** This sub-section is proposed to be added to exclude the period covered by infructuous arbitration proceedings where the arbitral tribunal holds under section 16(2) or 16(3) that it has no jurisdiction or where such an order is affirmed on further appeals, or where in an application under Section 11 (13), the 225

Supreme Court or the High Court, as the case may be, holds that there is no arbitration agreement or that it is null and void etc. In such cases, if the party has to file a regular suit, under the proposed amendment, he will now be able to exclude the period covered by the arbitration proceedings.

(37) **Section 30 of the Amending Act –** amendment of section 82 of the principal Act: The High Courts are to make rules fixing the manner in which arbitral proceedings have to be conducted, proceedings to be held on continuous days and on each day from 10.30 AM to 4.00 PM or at least for five hours.

(38) **Section 31 of the Amending Act-** amendment of section 84 by insertion of a new sub-section (1A) : In this proposed sub-section (1A), the Central Government is empowered to make rules regarding the manner in which the fee of the members of the arbitral tribunal may be fixed and the procedure relating thereto, and regarding the other particulars required to be entered under clause (f) of sub-section (4) of section 31A. The guidelines regarding the fixation of fee in respect of purely domestic arbitrations between Indian nationals are also laid down.

(39) **CHAPTER XI (Sections 43A to 43D and Schedule IV) in Part I:** This chapter along with Schedule IV is proposed to be introduced in Part I of the Act, to deal with Fast Track Arbitration. The parties, if they agree unanimously that they opt for this type of arbitration, then, notwithstanding any provision in the contract, the arbitration will be 226 by a single arbitrator, and the procedure to be followed by him will be the procedure indicated in Chapter XI and Schedule IV of the Act. To the extent the procedure is not covered by the aforesaid provisions, the other provisions of Part I of the Act shall apply. The award is to be passed in six months from the date of constitution of the single member arbitral tribunal. In case it is not so passed, parties by consent can extend the period upto a maximum of three more months. In case the award is not passed within the period of six months and the further period agreed to by the parties, as stated above, the proceedings will stand suspended until either party applies for extension in the High Court or if the parties do not so apply, until the sole arbitrator applies for extension and thereafter the provisions of sub-sections (4) to (8) of Section 29A shall apply to enable the High Court to monitor the time schedule of the adjournments and other procedure, till the award is passed.

In so far as the filing of the pleadings and producing evidence before the arbitral tribunal, short periods of fifteen days for each step is provided. Other periods mentioned in the Act are reduced, so far as this chapter is concerned.

All subsequent applications like an application under sub-section (1) of Section 34 to set aside an award, have to be filed in the same High Court. 227

Provisions enabling the arbitral tribunal to implement its orders and provisions enabling the High Court to implement the orders of the arbitral tribunal, have been included in the proposed amendment.

Provision is also made to enable the arbitral tribunal to pass orders upon the default of the parties to comply with the time schedule or the procedure indicated by the arbitral tribunal.

This Chapter and the Schedule are a modified form of a normal Fast Track Procedure prescribed by other arbitral institutions with this difference, namely, that the upper time limit is not as rigid as in those procedures. The procedure under this chapter can be called an expedited arbitration procedure with a flexible upper limit controlled by the High Court.

By bringing in the High Court even at the first level, the initial approach to the District Court is eliminated. After the High Court, the further appeal, if any, will only be to the Supreme Court under Article 136 of the Constitution of India.

(39) Sections 32, 33 and 34 of the Amending Act: Section 32 is proposed to deal with "Transitory Provisions", Section 33 with "Time limits and speeding up the arbitral process" for pending arbitration proceedings under the 1996 Act, and Section 34 to deal with "Time limits and speeding up the arbitral process" in connection with pending arbitration proceedings under the 1940 Act. 228

(i) Section 32 of the Amending Act: The proposed amending Act being procedural in nature, it will apply to pending arbitration proceedings also, unless the said Act is made prospective. To achieve this, it is being provided in sub-section (1) of Section 32, that the amendments will, subject to the provisions of sub-sections (2) to (17), be prospective. In sub-sections (2) to (17), certain specific provisions of the proposed amending Act are made applicable to pending arbitrations, pending applications and awards already passed under the 1996 Act.

Sufficient care has been taken to see that only those provisions will apply which will speed up the entire arbitral process before the arbitral tribunal and before the Courts under Section 2(1)(e) or before the Appellate Courts upto the High Court.

The proposed section 37A is also made applicable to pending arbitration proceedings to enable the Courts to dismiss applications and appeals in limini or to dispose them of only if substantial prejudice is shown.

(ii) (a) Section 33 of the Amending Act: The proposed section 34 states that the arbitration proceedings pending before an arbitral tribunal appointed under the 1996 Act for more than three years should be completed within another year, failing which, the procedure enables the Court to fix the time schedule as stated in sub-sections (4) to (8) of Section 29A, till the award is passed. 229

(Even the proposed provisions in Section 23(1) and 24(1), and 24A are applied under Section 33 to pending proceedings under the 1996 Act).

All pending applications and appeals in the Courts arising out of the 1996 Act are to be disposed of in six months and all appeals against interim orders in three months, from the date of commencement of the amending Act.

Section 37A is also made applicable to pending arbitration proceedings to enable the Courts to dismiss applications and appeals in limini or to dispose them of only if substantial prejudice is shown.

(b) In the case of pending arbitration under the 1996 Act where three years have not expired by the date of commencement of the proposed amending Act, it is proposed that, on completion of that period, a further period of six months is to be granted for passing of the award, failing which the time schedule and procedure under sub-sections (4) to (8) of Section 29A as stated above will apply, till the award is passed.

(iii) Section 34 of the Amending Act: This section proposes that all arbitration proceedings which were started under the 1940 Act, if they have not been completed (unless there is a stay order) by the date of commencement of the amending Act, have to be completed within one year from such commencement failing which the time schedule and the procedure will be monitored by the relevant Court 230

under Section 2(c) or Section 21 of the 1940 Act, as the case may be by applying the provisions of sub-sections (4) to (8) of Section 29A till the award is passed.

If matters are pending before the arbitrators, the provisions of Section 23(1) and 24(1) and 24A and 24B shall apply to strengthen the hands of the arbitrators to fix the time schedules and to have their orders implemented or to get them implemented by the relevant Court mentioned above.

Pending applications in Court to make the award a rule of Court or pending objections to set aside the award and, pending appeals under Section 39, under the 1940 Act, have to be disposed of within one year of the commencement of the Act.

Appeals and revisions against interim orders and other applications where stay of arbitration proceedings is granted by Courts, have to be disposed of within six months from the date of commencement of amending Act.

Section 37A is also made applicable to pending arbitration proceedings to enable the Courts to dismiss applications and appeals in limini or to dispose them of only if substantial prejudice is shown.

(40) Section 36: This deals with insertion of Schedule IV in the main Act where Chapter XI is introduced in Part I to deal with Fast Track Arbitration.

ANNEXURE-III

(As introduced in Rajya Sabha
on the 22nd December 2003)

THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2003

A

BILL

to amend the Arbitration and Conciliation Act, 1996.

BE it enacted by Parliament in the Fifty-fourth Year of the Republic of India as follows:—

1. (1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2003.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act, and any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. In the long title to the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), after the words "domestic arbitration", the words "international arbitration," shall be inserted.

3. In section 1 of the principal Act, in sub-section (2), in the proviso, before the words "international commercial arbitration", the words "international arbitration," shall be inserted.

4. In section 2 of the principal Act,—

(a) in sub-section (1),—

(i) after clause (b), the following clause shall be inserted, namely:—

'(ba) "Arbitration Division" means an Arbitration Division of a High Court constituted under sub-section (1) of section 37A;';

(ii) for clauses (e) and (f), the following clauses shall be substituted, namely:—

'(e) "Court", in relation to—

(i) sections other than sections specified in sub-clause (ii), means—

(a) the principal Civil Court of original jurisdiction in a district; or

(b) the Court of principal judge of the City Civil Court of original jurisdiction in a city; or

(c) any Court of coordinate jurisdiction to which the Court referred to in sub-clause (a) or sub-clause (b) transfers a matter brought before it,

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

(ii) sections 34, 34A and 36, means the Arbitration Division;

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

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country,

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

(eb) "international arbitration" means an arbitration relating to

disputes arising out of legal relationships, whether contractual or not, where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

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

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

(b) for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) (a) Save as otherwise provided in clause (b), this Part shall apply where the place of arbitration is in India.

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

5. After section 2 of the principal Act, the following section shall be inserted, namely:—

"2A. The principal Civil Court of original jurisdiction in a district or the Court of principal judge of the City Civil Court of original jurisdiction in a city, as the case may be, may, from time to time, transfer any matter relating to any proceedings under this Act which is pending before it, to any Court of coordinate jurisdiction in the district or the city, as the case may be, for decision.".

6. In section 5 of the principal Act, the following Explanation shall be inserted at the end, namely:—

'Explanation.— For the removal of doubts, it is hereby declared that the expression "any other law for the time being in force" shall be deemed to include—

(a) the Code of Civil Procedure, 1908;

(b) any law which provides for internal appeals within the High Court;

(c) any enactment which provides for intervention by a judicial authority in respect of orders passed by any other judicial authority.'.

7. In section 6 of the principal Act, the words, ", or the arbitral tribunal with the consent of the parties," shall be omitted.

8. In section 7 of the principal Act, in sub-section (4), in clause (b), for the words "an exchange of letters", the words "any written communication by one party to another and accepted expressly or by implication by the other party, exchange of letters" shall be substituted.

9. In section 8 of the principal Act,—

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

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

(1A) The judicial authority before which an action is brought shall stay the action before it for the purpose of deciding any question raised before it under sub-section (4) and such stay shall be subject to the outcome of the order that may be made under sub-section (4) or sub-section (5).";

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

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

(i) a reference to arbitration cannot be made by virtue of its finding on any question referred to in clauses (a) to (d) of that sub-section; or

(ii) though a reference to arbitration has to be made, the proceedings are required to be conducted by a different arbitral tribunal.";

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

"(4) Where an application is made to the judicial authority by a party raising any question that—

(a) there is no dispute in existence; or

(b) the arbitration agreement or any clause thereof is null and void or inoperative; or

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

(d) the arbitration agreement is not in existence,

the judicial authority may, subject to the provisions of sub-section (5), decide the same and pass appropriate orders thereon.

(5) Where the judicial authority finds that any question specified in sub-section (4) cannot be decided for the reason that—

(a) the relevant facts or documents and the question are in dispute; or

(b) there is a need for adducing oral evidence from the question; or

(c) the inquiry into any such question is likely to delay reference to arbitration; or

(d) the request for deciding the question was unduly delayed; or

(e) the decision on the question is not likely to produce substantial savings in the costs of arbitration; or

(f) there is no good reason for deciding the question at that stage,

it shall refuse to decide the question and refer the same to the arbitral tribunal for decision.

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

10. After section 8 of the principal Act, the following section shall be inserted, namely:—

'8A. Without prejudice to the provisions of section 89 of the Code of Civil Procedure,

1908, where, at any stage of a legal proceeding in the Supreme Court or the High Court or the principal Civil Court of original jurisdiction in a district or the Court of principal judge of the City Civil Court of original jurisdiction in a city or any Court of coordinate jurisdiction or inferior in grade to the aforesaid Courts, as the case may be, all the parties to such proceeding enter into an arbitration agreement to resolve their disputes, then the Court in which the said legal proceeding is pending shall, on an application made by any party to the arbitration agreement, refer the dispute in relation to the subject-matter of the legal proceeding, to arbitration.

Explanation.— For the purposes of this section, "legal proceeding" means any proceeding involving civil rights of parties pending in any of the aforesaid Courts whether at the stage of institution or appeal or revision and includes proceeding involving civil rights instituted in a High Court under article 226 or article 227 of the Constitution or on further appeal to the Supreme Court.'.

11. For section 9 of the principal Act, the following section shall be substituted, namely:—

"9. (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before application is filed for its enforcement in accordance with section 36, apply to a Court for interim measures.

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

(3) In particular and without prejudice to sub-section (1), a party may apply to a Court—

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

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

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

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

(iii) the detention, preservation or inspection of any property or thing which is the subject-matter or 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 authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

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

(v) such other interim measure of protection as may appear to the Court to be just and convenient.

(4) Where a party makes an application under sub-section (1) for the grant of interim measures before the commencement of arbitration, the Court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of such direction.

(5) The Court may direct that if the steps referred to in sub-section (1) are not taken within the period specified in sub-section (4), the interim measure granted under sub-section (2), shall stand vacated on the expiry of the said period:

Provided that the Court may, on sufficient cause being shown for the delay in taking such steps, extend the said period.

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

12. In section 11 of the principal Act,—

(a) in sub-section (4),—

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

(ii) for the words "the appointment shall be made, upon request of a party by the Chief Justice or any person or institution designated by him", the words "the right to make such appointment shall be deemed to have been waived, and the appointment shall be made, upon request of a party by the High Court or any person or institution designated by it" shall be substituted;

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

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

(c) in sub-section (6), for the words " a party may request the Chief Justice or any person or institution designated by him", the words "and where no measures are taken for appointment of an arbitrator in accordance with the appointment procedure agreed upon by the parties, the right to take such measures shall be deemed to have been waived and a party may request the High Court or any person or institution designated by it" shall be substituted;

(d) in sub-section (7), for the words "the Chief Justice or the person or institution designated by him", the words "the High Court or any person or institution designated by it" shall be substituted;

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

(f) in sub-section (9), for the words "international commercial arbitration, the Chief Justice of India or the person or institution designated by him", the words and brackets "international arbitration (whether commercial or not), the Supreme Court or any person or institution designated by it" shall be substituted;

(g) in sub-section (10), for the words "The Chief Justice may make such scheme as he may deem appropriate ", the words "The High Court may make such scheme as it may deem appropriate" shall be substituted;

(h) in sub-section (11), for the words "the Chief Justice of different High Courts or their designates, the Chief Justice or his designate to whom the

request has been first made under the relevant sub-section shall alone be", the words "different High Courts or their designates, the High Court or its designate to which the request has been first made under the relevant sub-section shall alone be" shall be substituted;

(i) for sub-section (12), the following sub-sections shall be substituted, namely:—

'(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international arbitration (whether commercial or not) the reference to "High Court" in those sub-sections shall be construed as a reference to the "Supreme Court".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court or the Court of principal judge of the City Civil Court, as the case may be, referred in sub-clause (i) of clause (e) of sub-section (1) of section 2, is situate and, where the High Court itself is the Court referred to in that sub-clause, to that High Court.

(13) Where an application under this section is made to the Supreme Court or the High Court by a party raising any question specified to in sub-section (4) of section 8, the Supreme Court or the High Court, as the case may be, may, subject to the provisions of sub-section (14), decide the same.

(14) If the Supreme Court or the High Court, as the case may be, considers that the questions referred to in sub-section (13) cannot be decided having regard to the reasons specified in sub-section (5) of section 8, it shall refuse to decide the said question and refer the same to the arbitral tribunal.

(15) The Central Government may, after consultation with the Chief Justice of India, prescribe by rules made under this Act the manner in which fee of members of an arbitral tribunal be fixed and the procedure to be followed in relation to fixation of such fee.'.

13. In section 12 of the principal Act, in sub-section (1), for the words "any circumstances likely", the words "the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business,

professional, social or other kind or in relation to the subject-matter in dispute, which is likely" shall be substituted.

14. In section 14 of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) Where the mandate of the arbitrator is terminated, the Court may decide the quantum of fee payable to such arbitrator.".

15. In section 15 of the principal Act,—

(a) in sub-section (2), for the words "a substitute arbitrator shall be appointed", the words "a substitute arbitrator shall be appointed within a period of thirty days" shall be substituted;

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

"(5) Where the mandate of an arbitrator is terminated, the Court may decide the quantum of fee payable to such arbitrator.".

16. For section 17 of the principal Act, the following section shall be substituted, namely:—

"17. The arbitral tribunal may, pending arbitral proceedings,—

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

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

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

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

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

(ii) for samples to be taken from, or any observation to be made of, or experiment conducted upon, the property; or

(e) direct that a party or witness shall be examined on oath or affirmation, and may for

that purpose administer any necessary oath or take any necessary affirmation; or

(f) give directions to a party for the preservation of any evidence in his custody or control for the purposes of the proceedings.".

17. For section 20 of the principal Act, the following section shall be substituted, namely:—

"20. Where the arbitration is one under this Part, the place of arbitration shall be within India and in other cases the parties are free to agree on the place of arbitration:

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

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

18. In section 23 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:—

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

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

19. In section 24 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:—

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

Provided that the arbitral tribunal may, at an appropriate stage of the proceedings, hold

oral hearings for the purpose of calling for such oral evidence as it may deem necessary.

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

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

(a) the fixing of the time schedule for the parties to adduce oral evidence, if any;

(b) the fixing of the time schedule for oral arguments;

(c) the manner in which oral evidence is to be adduced;

(d) the decision as to whether the proceedings shall be conducted only on the basis of documents and other materials, or in any other manner.

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

20. After section 24 of the principal Act, the following sections shall be inserted, namely:—

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

(2) If a claimant fails to comply with a peremptory order made under sub-section (1) in relation to a direction specified in clause (c) of section 17, the arbitral tribunal may dismiss his claim and make an award accordingly.

(3) If a party fails to comply with any peremptory order made under sub-section (1), other than the peremptory order in relation to a direction specified in clause (c) of section 17, then the arbitral tribunal may—

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

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

matter of the order;

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

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

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

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

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

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

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

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

21. In section 28 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:—

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

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

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

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

22. In section 29 of the principal Act,—

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

"(1) Any decision of the arbitral tribunal in arbitral proceedings with more than one arbitrator shall be made by a majority of all its members:

Provided that where there is no majority, the award shall be made by the Presiding arbitrator of the arbitral tribunal.";

(b) after sub-section (2), the following sub-section shall be inserted, namely:—

"(3) The minority decision shall, if made available within thirty days of the receipt of the decision of the majority, be appended to the award.".

23. After section 29 of the principal Act, the following section shall be inserted, namely:—

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

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

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

(4) Upon filing of the application for extension or further extension of the period

under sub-section (3), the suspension of the arbitral proceedings shall stand revoked and pending consideration of the application by the Court under sub-section (5), the arbitral proceedings shall continue before the arbitral tribunal and the Court shall not grant any stay of the arbitral proceedings.

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

(6) The Court shall, while extending the time under sub-section (5), after taking into account,—

(a) the extent of work already completed;

(b) the reasons for delay;

(c) the conduct of the parties or of any person representing the parties;

(d) the manner in which proceedings were conducted by the arbitral tribunal;

(e) the further work involved;

(f) the amount of money already spent by the parties towards fee and expenses of arbitration;

(g) any other relevant circumstances which the Court may consider necessary,

make such order as to costs and as to the future procedure to be followed by the arbitral tribunal with a view to speed up the arbitral process till the award is made:

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

(7) The parties shall not by consent extend the period for making award beyond the period specified in sub-section (2) and save as otherwise provided in that sub-section, any provision in an arbitration agreement whereby the arbitral tribunal may further extend the time for making the award, shall be void and be of no effect.

(8) The first of the orders of extension under sub-section (5) together with directions if

any, under sub-section (6), shall be made by the Court, within a period of thirty days from the date of service of notice on the opposite party.".

24. In section 31 of the principal Act, in sub-section (7), for clause (b), the following clause shall be substituted, namely:—

"(b) A sum directed to be paid by an arbitral award shall carry interest at such rate as the arbitral tribunal deems reasonable from the date of award to the date of payment.".

25. After section 33 of the principal Act, the following section shall be inserted, namely:—

'33A. (1) A photocopy of the arbitral award duly signed on each page by the members of the arbitral tribunal together with the original arbitral records shall be filed by the arbitral tribunal in the Court within sixty days of the making of the award along with a list of the papers comprising the arbitral record:

Provided that where the High Court is the Court within the meaning of sub-clause (i) of clause (e) of sub-section (1) of section 2, then the award shall be filed in the principal Civil Court of original jurisdiction in a district or in the Court of principal judge of the City Civil Court of original jurisdiction in a city within whose local jurisdiction the subject-matter of arbitration is situate (hereafter in this section referred to as the said Court).

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

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

(2) Where the arbitral tribunal fails to file photocopy of the arbitral award and the arbitral records under sub-section (1), any of the parties may give notice to the arbitral tribunal to do so within a period of sixty days from the date of receipt of

the award failing which, the party may request the said Court to direct the arbitral tribunal to file photocopy of the arbitral award and the arbitral records in the said Court.

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

(4) The said Court shall maintain a register containing –

(a) the names and addresses of the parties to the award;

(b) the date of the award;

(c) the names and addresses of the arbitrators;

(d) the relief granted;

(e) the date of filing of the award into the said Court; and

(f) such other particulars as may be prescribed by rules made by the Central Government in this behalf.

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

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

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

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

26. In section 34 of the principal Act,—

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

"(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award –

(a) in accordance with sub-sections (2) and (3); and

(b) in the case of an award made in an arbitration other than an international arbitration (whether commercial or not) in accordance with sub-sections (2) and (3), and section 34A.

(1A) An application for setting aside an award under sub-section (1) shall be accompanied by the original award:

Provided that where the parties have not been given the original award, they may file a photocopy of the award signed by the arbitrators.";

(b) in sub-section (2),—

(i) in clause (b), after sub-clause (ii), the following sub-clause shall be inserted, namely:—

"(iii) the arbitral award is such which does not state the reasons as required under sub-section (3) of section 31.";

(ii) The Explanation shall be renumbered as Explanation 1 and after Explanation 1 as so renumbered, the following Explanation shall be inserted, namely:—

"Explanation 2.— For the removal of doubts, it is hereby declared that while seeking to set aside an arbitral award under sub-section (1), the applicant may include the pleas questioning the decision of the arbitral tribunal rejecting—

(i) a challenge made under sub-section (2) of section 13;

(ii) a plea made under sub-section (2) or sub-section (3) of section 16.";

(c) after sub-section (4), the following sub-sections shall be inserted, namely:—

'(5) Where the Court adjourns the proceedings under sub-section (4) granting the arbitral tribunal an opportunity to resume its proceedings or take such other action and eliminate the grounds referred to in this section or in section 34A for setting aside the award, the arbitral tribunal shall pass appropriate orders within sixty days from the receipt of the request made under sub-section (4) by the Court and send

the same to the Court for its consideration.

(6) Any party aggrieved by the orders of the arbitral tribunal under sub-section (5), shall be entitled to file its objections thereto within thirty days from the receipt of the said order from the arbitral tribunal and the application made under sub-section (1) to set aside the award shall, subject to the provisions of sub-sections (2) and (3) of section 37C, be disposed of by the Court, after taking into account the orders of the arbitral tribunal made under sub-section (5) and the objections filed under that sub-section.

Explanation 1.— Subject to clause (i) of sub-section (4) of section 42, for the purposes of this section and sections 34A and 36, the word "Court" means the Arbitration Division.

Explanation 2.— For the purposes of this section, clause (b) of sub-section (2) of section 48 and clause (e) of sub-section (1) of section 57, "public policy of India" or "Contrary to public policy of India" means contrary to (i) fundamental policy of India, or (ii) interests of India, or (iii) justice or morality.'.

27. After section 34 of the principal Act, the following section shall be inserted, namely:—

"34A. (1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to a court against an arbitral award on the additional ground that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law can be had in an application for setting aside an award referred to in sub-section (1) of section 34.

(2) Where the ground referred to in sub-section (1) is invoked in an application filed under sub-section (1) of section 34, the applicant shall file a separate application seeking leave of the Court to raise the said ground:

Provided that the Court shall not grant leave unless it is prima facie of the opinion that all the following conditions are satisfied, namely:—

(a) that the determination of the question will substantially affect the rights of one or more parties;

(b) that the substantial question of law was one which the arbitral tribunal was asked to decide or has decided on its own; and

(c) that the application made for leave identifies the substantial question of law to be decided and states relevant grounds on which leave is sought.

(3) Where a specific question of law has been referred to the arbitral tribunal, an award shall not be set aside on the ground referred to in sub-section (1).".

28. For section 36 of the principal Act, the following section shall be substituted, namely :—

"36. (1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of sub-sections (2) to (4), the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

(2) Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).

(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the Court may, without prejudice to any action it may take under sub-section (1) of section 37C and subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:

Provided that the Court shall, while considering the grant of stay, keep the grounds for setting aside the award in mind.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant interim measures not only against the parties to the award or in respect of the property which is the subject-matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject-matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified or vacated, as the case may be, by the Court subject to such conditions, if any, as it may, after hearing the affected parties, deem fit.".

29. In section 37 of the principal Act,—

(i) in sub-section (1), clause (b) shall be omitted;

(ii) after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) The procedure specified in sections 37C, 37D, 37E and 37F shall, in so far as may be, apply to appeals under sub-section (1) or sub-section (2).".

30. After Chapter IX of the principal Act, the following Chapter shall be inserted, namely:—

CHAPTER IX A

ARBITRATION DIVISION, JURISDICTION AND SPECIAL PROCUDURE

37A. (1) Every High Court shall, as soon as may be after the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, constitute an Arbitration Division within the High Court.

(2) The Judges of the Arbitration Division shall be such of the Judges of the High Court as the Chief Justice of that High Court may, from time to time, nominate.

Explanation.— For the purposes of this sub-section, "Judges" shall include Judges appointed under article 224A of the Constitution.

(3) Without prejudice to the provisions of section 37F, the Arbitration Division shall consist of one or more Division Benches of the High Court, as may be constituted by the Chief Justice of the High Court and such Bench or Benches shall dispose of every application, appeal or proceeding allocated to it.

(4) Every application under sections 34, 34A and 36 shall, on and from the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, irrespective of the value of the subject-matter, be filed in the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court and the said applications shall thereafter be allocated to the Arbitration Division of that High Court for disposal.

(5) Any appeal under clause (i), or clause (ii), or clause (iii) or clause (vi) of sub-section (1) of section 39 of the Arbitration Act, 1940 and any proceeding for execution of a decree based on an arbitral award under that Act shall, notwithstanding anything contained in that Act, irrespective of the value of the subject-matter, be filed, on and from the commencement of the Arbitration and Conciliation (Amendment) Act, 2003 in the High Court referred to in sub-section (4) and shall thereafter be allocated to the Arbitration Division of that High Court, for disposal in accordance with the provisions of the Arbitration Act, 1940.

37B. (1) Any application under section 34 or section 36 filed and pending in any Court subordinate to the High Court immediately before the commencement of the Arbitration and Conciliation (Amendment) Act, 2003 shall, on such commencement, stand transferred to the High Court having jurisdiction over such subordinate Courts and shall thereafter be allocated to the Arbitration Division of that High Court for disposal.

(2) Any application under section 34 or section 36 or appeal under clause (b) of sub-section (1) of section 37 filed immediately before the commencement of the Arbitration and Conciliation (Amendment) Act, 2003 and pending in the High Court shall, on and from such commencement, be allocated to the Arbitration Division of that High Court for disposal.

(3) Any appeal or proceeding referred to in sub-section (5) of section 37A pending in any Court subordinate to the High Court shall, on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, stand transferred to the High Court having jurisdiction over such subordinate Court and shall thereafter be allocated to the Arbitration Division of that High Court for disposal in accordance with the provisions of the Arbitration Act, 1940.

(4) Any appeal or proceeding referred to in sub-section (5) of section 37A, pending in the High Court shall, on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, be allocated to the Arbitration Division of that High Court for disposal in accordance with the provisions of the Arbitration Act, 1940.

37C. (1) The Arbitration Division, while dealing with an application under sub-section (1) of section 34, or any appeal referred to in sub-section (5) of section 37A, filed on and from the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, may, if it thinks fit so to do, and after fixing a date for hearing the applicant or his counsel and hearing him accordingly if he appears on that day, dismiss the application or appeal, as the case may be, without giving notice to the respondent, for reasons in brief to be recorded in writing, if there are no merits in the application or appeal.

(2) No award passed by the arbitral tribunal shall be set aside, on an application under sub-section (1) of section 34 or an appeal filed under sub-section (5) of section 37A unless substantial prejudice is shown.

(3) The provisions of sub-sections (1) and (2) shall also apply to applications under sub-section (1) of section 34, any appeal under section 37 or any appeal referred to in sub-section (5) of section 37A, pending on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, if no notice has been issued by the Court before such commencement.

37D. (1) Every application referred to in sub-section (1) of section 34 or section 36 shall be disposed of by the Arbitration Division within one year from the date of service of notice on the opposite party:

Provided that in case the Arbitration Division adjourns the proceedings under sub-section (5) of section 34, the period of one year shall be reckoned from the date of receipt of the order from the arbitral tribunal under that sub-section.

(2) Every appeal or proceeding for execution of decrees referred to in sub-section (5) of section 37A shall be disposed of within one year from the date of service of notice on the opposite party.

(3) Every application, appeal or proceeding referred to in sub-sections (1) to (4) of section 37B, pending on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, shall be disposed of within a period of six months from the date of service of notice on the opposite party or from such commencement, whichever is later.

37E. (1) The applicants or appellants in matters referred to in sub-sections (1) and (2) of section 37D shall, within sixty days from the date of service of notice on the opposite party, file paper books containing relevant documents including copies of oral evidence recorded , if any, and the opposite party shall likewise file a paper book within sixty days from the date of service of notice on such party.

(2) The applicants or appellants, in matters referred to in sub-section (3) of section 37D, and the opposite parties shall file paper books within sixty days from the date of service of notice on such parties or from the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, whichever is later.

(3) Within thirty days from the date of filing of the paper books, all parties to the proceedings shall file brief written submissions after exchanging copies of the same.

(4) Where any party fails to comply with the time limits referred to in sub-sections (1) to (3), the Arbitration Division may, if reasonable cause is shown, extend the time for a further period not exceeding thirty days, subject, however, to such order as to costs as it may deem fit.

(5) In all matters coming up before the Arbitration Division, time limit for arguments shall be fixed by the Arbitration Division in advance at the case management conference referred to in sub-section (2) of section 37F.

37F. (1) Save, where conditional orders are passed which may lead to disposal of the matter for default or ex parte, a single Judge sitting in the Arbitration Division shall deal with the fixation of time schedules and dates for the purposes of section 37E.

(2) For the purposes of sub-section (1), case management conferences may be held by the Judge referred to in that sub-section.".

31. For section 42 of the principal Act, the following sections shall be substituted, namely :—

'42. (1) Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part is made in any of the Courts referred to in sub-sections (2) to (7) or in the Court referred to in section 43E, then all subsequent applications [other than the applications referred to in sub-section (2) of section 33A] arising out of that agreement and the arbitral proceedings (hereafter in this section referred to as the subsequent application) shall be made in the same Court in which the application was made and in no other Court.

(2) Where an application is made in a Court within the meaning of sub-clause (i) of clause (e) of sub-section (1) of section 2, the subsequent applications shall be made in that Court and in no other Court.

(3) Where, in an action under section 8 pending before a judicial authority, an application is made seeking reference to arbitration with respect to an agreement, then the subsequent applications shall be made in the following manner, namely:—

(i) if the judicial authority is a Court within the meaning of subs-clause (i) of clause (e) of sub-section (1) of section 2, the subsequent application shall be made in the Court in which the application is made and in no other

Court;

(ii) if the judicial authority is a Court which is inferior in grade to the principal Civil Court of original jurisdiction in a district or the Court of principal judge of the City Civil Court exercising original jurisdiction in a city (hereinafter referred to as the principal Courts), as the case may be, the subsequent application shall be made in the said principal Court to which the Court where the application is made is subordinate and in no other Court;

(iii) if the judicial authority is a quasi-judicial statutory authority, the subsequent application shall be made in the principal Court within whose local limits the judicial authority is situate and in no other Court.

(4) Where, in a legal proceeding under section 8A before any of the Courts referred to in that section, an application is made seeking reference to arbitration with respect to an agreement, then the subsequent application shall be made in the following manner, namely:—

(i) if the application is made in the Supreme Court or in the High Court or in the principal Courts referred to in clause (ii) of sub-section (3), as the case may be, the subsequent application shall be made in the Court which made the reference and in no other Court;

(ii) if the application is made in a Court of coordinate jurisdiction or inferior in grade to the principal Courts referred to in clause (ii) of sub-section (3), as the case may be, the subsequent application shall be made in the principal Court from where the legal proceeding was transferred to such Court of coordinate jurisdiction or to which the said Court is subordinate, as the case may be, and in no other Court.

Explanation 1.—In this sub-section, the expression "legal proceeding" shall have the same meaning as assigned to it in the Explanation to section 8A.

Explanation 2.—For the removal of doubts, it is hereby declared that in the case of arbitral proceedings which have commenced pursuant to a reference made by the Supreme Court or the High Court under section 8A and award passed pursuant thereto, the reference to "Court" in this Part shall, except in sections 27 and 33A,

be construed as reference to the Supreme Court or the High Court, as the case may be.

(5) Where an application, seeking a reference to arbitration with respect to an agreement, is made under section 11 in the Supreme Court or in the High Court, as the case may be, the subsequent application shall be made in the Court within the meaning of sub-clause (i) of clause (e) of sub-section (1) of section 2 and in no other Court.

(6) Where an application is made to the High Court in accordance with section 34, section 34A, section 36 or sub-section (4) of section 37A or where an appeal is preferred in the High Court in accordance with sub-section (5) of section 37A, the subsequent application shall be made in that High Court and in no other Court.

(7) Where application or appeal transferred to the High Court pursuant to section 37B, all subsequent applications shall be made in that High Court and in no other Court.

42A. The Chief Justice of India may prepare a scheme, for constituting a panel of arbitrators to enable either the parties, or the Supreme Court or the High Court under section 11, or the judicial authority under section 8, or the Courts referred to in section 8A, or the parties under section 43A, as the case may be, to appoint arbitrators from such panel and subject to such conditions as may be specified by the Chief Justice of India in that scheme.

42B. Notwithstanding anything contained in any other law for the time being in force, it shall be permissible to initiate any proceedings under this Act, for the purpose of enforcement of any right under sub-section (3) of section 69 of the Indian Partnership Act, 1932 to seek—

(a) the dissolution of a firm;

(b) the settlement of the accounts of a dissolved firm; or

(c) the realisation of the property of a dissolved firm.'.

32. In section 43 of the principal Act,—

(a) sub-section (3) shall be omitted;

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

"(5) In computing the time specified in the Limitation Act, 1963 for the commencement of proceedings in relation to any dispute, the period between the commencement of the

arbitration and the date of the orders mentioned below, shall be excluded, namely:—

(a) an order of the arbitral tribunal accepting a plea referred to in sub-section (2) or sub-section (3) of section 16;

(b) an order under clause (a) of sub-section (2) of section 37 by the Court affirming an order under clause (a) or an order of the Supreme Court on further appeal, if any, affirming the last mentioned order;

(c) an order declaring an arbitration agreement as null and void or inoperative or incapable of being performed or as not in existence, passed by —

(i) the High Court under sub-section (13) of section 11 in the case of an arbitration, other than an international arbitration (whether commercial or not) or by the Supreme Court on further appeal;

(ii) the Supreme Court under sub-section (13) of section 11 in the case of international arbitration (whether commercial or not).".

33. After section 43 of the principal Act, the following sections shall be inserted, namely:—

'43A. (1) The arbitral proceedings pending on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003 before an arbitral tribunal —

(a) if such proceedings are pending for more than three years from the date of commencement of such proceedings, shall be completed within a further period of six months from the commencement of the Arbitration and Conciliation (Amendment) Act, 2003 or within such extended period specified in sub-sections (2) and (3);

(b) if such proceedings have not been pending for three years from the date of commencement of the proceedings, the proceedings shall be completed within a further period of one year reckoned from the date of expiry of three years of the commencement of the arbitral proceedings or within such extended period specified in sub-sections (2) and (3).

(2) If the award is not made within the further period of six months or one year, as the case may be, specified in sub-section (1), the arbitral proceedings shall, subject to the provisions of sub-section (3), stand suspended until an application for extension of time is made to the Court by any party to the arbitration or where

none of the parties has made an application as aforesaid until such application is made by the arbitral tribunal.

(3) The provisions of sub-sections (4) to (8) of section 29A shall, so far as may be, apply for the disposal of application referred to in sub-section (2), with a view to speed up the arbitral proceedings, till the award is passed.

43B. (1) The provisions of sections 6, 23 and 24 shall, so far as may be, apply to arbitral proceedings under the Arbitration Act, 1940, pending on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003 and shall override any provisions of the Arbitration Act, 1940 which are inconsistent with the said sections.

(2) In the case of non-compliance with any order passed by the sole arbitrator or arbitrators under the provisions of the Arbitration Act, 1940 or of orders passed under sub-section (1), the sole arbitrator or arbitrators, as the case may be, appointed under the Arbitration Act, 1940 may pass orders under section 24A.

(3) In the case of non-compliance with any peremptory order passed by the sole arbitrator or arbitrators, as the case may be, under sub-section (2), the Court, within the meaning of clause (c) of section 2 or section 21 of the Arbitration Act, 1940, as the case may be, may pass orders under section 24B.

(4) Where arbitral proceedings are pending on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, before the sole arbitrator or arbitrators appointed under the Arbitration Act, 1940, the proceedings shall be completed within a further period of six months from such commencement or within such extended period specified in sub-sections (5) and (6):

Provided that where the arbitral proceedings are stayed by order of a Court, the period during which the proceedings are so stayed shall be excluded while computing the said period of one year.

(5) If the award is not made within the further period specified in sub-section (4), the arbitral proceedings shall, subject to the provisions of sub-section (6), stand suspended until an application for extension of time is made by any party to the arbitration to the Court referred to in sub-section (3), by any party to the arbitration, or where none of the parties has made an application as aforesaid, until such an application is made by the sole arbitrator or arbitrators, as the case may be.

(6) The provisions of sub-sections (4) to (8) of section 29A shall, so far as may be,

apply for the disposal of the application referred to in sub-section (5).

(7) The provisions of this section shall have effect notwithstanding anything inconsistent therewith contained in sub-section (2) of section 85.

CHAPTER XI

SINGLE MEMBERS FAST TRACK ARBITRAL TRIBUNAL AND FAST TRACK ARBITRATION

43C. (1) The parties to an action before a judicial authority referred to in section 8, or a legal proceeding before any of the Courts referred to in section 8A, or to an arbitration agreement or to an application before the Supreme Court or the High Court under section 11, as the case may be, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their disputes resolved by arbitration in accordance with the provisions of this Chapter and the procedure specified in the First Schedule (hereinafter referred to as the Fast Track Arbitration).

(2) If the parties referred to in sub-section (1) agree to have the disputes resolved through Fast Track Arbitration, then the arbitral tribunal agreed to between such parties shall be called the Fast Track Arbitral Tribunal.

(3) Notwithstanding anything contained in the arbitration agreement—

(i) the Fast Track Arbitral Tribunal shall consist of a sole arbitrator;

(ii) the sole arbitrator shall be chosen by parties unanimously;

(iii) the fee payable to the arbitrator and the manner of payment of the fee shall be such as may be agreed between the sole arbitrator and the parties;

(iv) the procedure set out in the First Schedule (hereinafter referred to as the Fast Track Procedure) shall apply.

43D. The other provisions of this Part, in so far as they are matters not provided in the First Schedule, shall apply to the Fast Track Arbitration as they apply to other arbitrations subject to the following modifications, namely:—

(a) the references to—

(i) "arbitral tribunal" shall, unless the context otherwise requires, be deemed

to include the Fast Track Arbitral Tribunal; and

(ii) "Court" shall be deemed to be the High Court, except in sections 27 and 33A;

(b) in section 33, in sub-sections (1) to (4), for the words "thirty days", wherever they occur, the words "fifteen days" shall be substituted;

(c) in section 34,—

(i) in the proviso to sub-section (3), for the words "three months" and "thirty days", the words "thirty days" and "fifteen days" shall respectively be substituted;

(ii) in sub-section (5), for the words "sixty days", the words "thirty days" shall be substituted;

(iii) in sub-section (6), for the words "thirty days", the words "fifteen days" shall be substituted;

(d) in section 37, in sub-section (1), the provision for appeal shall not apply to orders referred to in clauses (a) and (b) of sub-section (1) of section 37;

(e) in sub-section (1) of section 37D, for the words "one year", the words "six months" shall be substituted.

43E. Notwithstanding anything contained in this Part or in any other law for the time being in force but subject to sub-clause (ii) of clause (a) of section 43D, where with respect to an arbitration agreement, any application is made or is required to be made before a "Court" in the manner mentioned in this Part, such an application shall be made to the "High Court" and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that High Court and in no other High Court and shall be allocated to the Arbitration Division:

Provided that where reference under section 8A has been made for resolution of disputes under this Chapter by the Supreme Court, the subsequent applications shall be filed in the Supreme Court.

43F. The references to High Court in sections 43D and 43E shall be construed as a reference to the High Court within whose local limits, the principal Civil Court or the Court of principal judge of the City Civil Court referred to in sub-clause (i) of clause (e) of sub-

section (1) of section 2, as the case may be, is situated.'.

34. In section 44 of the principal Act, in clause (a), for the words "First Schedule", the words "Second Schedule" shall be substituted.

35. In section 47 of the principal Act, for the Explanation, the following Explanation shall be substituted, namely:—

'Explanation.— In this section and in all the following sections of this Chapter, "Court" means the Arbitration Division.'.

36. In section 50 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) An appeal shall lie from the order refusing to refer the parties to arbitration under section 45 to the High Court referred to in sub-section (4) of section 37A, and the said appeal shall thereafter be allocated to the Arbitration Division for disposal.".

37. In section 53 of the principal Act,—

(i) in clause (a), for the words "Second Schedule", the words "Third Schedule" shall be substituted;

(ii) in clause (b), for the words "Third Schedule", the words "Fourth Schedule" shall be substituted.

38. In section 56 of the principal Act, for the Explanation, the following Explanation shall be substituted, namely:—

'Explanation.— In this section and the following sections of this Chapter, "Court" means the Arbitration Division.'.

39. In section 59 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) An appeal shall lie from the order refusing to refer the parties to arbitration under section 54 to the High Court referred to in sub-section (4) of section 37A, and the said appeal shall thereafter be allocated to the Arbitration Division for disposal.".

40. After section 60 of the principal Act, the following Chapter shall be inserted, namely:—

"CHAPTER IIA

JURISDICTION OF ARBITRATION DIVISION OF HIGH COURT AND SPECIAL PROCEDURE FOR ENFORCEMENT OF FOREIGN AWARDS

60A. (1) Every application for the enforcement of foreign awards under Chapters I and II of this Part shall, on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, be filed in the High Court as referred to in sub-section (4) of section 37A and the said applications shall thereafter be allocated to the Arbitration Division for disposal.

(2) The applications for enforcement of foreign awards made under Chapters I and II of this Part and all appeals under sub-section (1) of section 50 or sub-section (1) of section 59 pending in any Court subordinate to the High Court shall, on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, stand transferred to the High Court having jurisdiction over such subordinate Court and shall thereafter be allocated to the Arbitration Division for disposal.

(3) The applications for enforcement of foreign awards under Chapters I and II of this Part and appeals under sub-section (1) of section 50 and sub-section (1) of section 59 and applications arising there from, pending in a High Court, shall, on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, be allocated to the Arbitration Division for disposal.

60B. (1) Every application referred to in sub-section (1) of section 60A shall be disposed of by the Arbitration Division within a period of one year of service of notice on the opposite party.

(2) Every appeal filed on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, under subs-section (1) of section 50 and sub-section (1) of section 59, on and from such commencement shall be disposed of by the Arbitration Division within a period of sixty days from the date of notice on the opposite party.

(3) The applications for enforcement of foreign awards referred in sub-sections (2) and (3) of section 60A and all appeals against orders refusing to enforce a foreign award under sections 48 and 57, pending on the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, shall be disposed of by the Arbitration Division within a period of six months from the date of allocation to the Arbitration

Division where notices have been served on the opposite parties on the date of such allocation, and within a period of six months from the date of service of notice on the opposite parties where notices have not been served on the opposite party on the date of such allocation.

(4) The appeals against orders refusing to refer the parties to arbitration under sections 45 and 54, pending on the commencement of the Arbitration and Conciliation(Amendment) Act, 2003, shall be disposed of by the Arbitration Division within a period of thirty days from the date of allocation to the Arbitration Division where notices have been served on the opposite parties on the date of such allocation and within a period of thirty days from the date of service of notices on the opposite parties where notices have not been served on the opposite party on the date of such allocation.

(5) The Arbitration Division while dealing with applications and appeals referred in sub-sections (1) and (3) shall, so far as may be, follow the same procedure as laid down in sections 37E and 37F.".

41. Section 82 of the principal Act shall be renumbered as sub-section (1) thereof and after sub-section (1) as so renumbered, the following sub-sections shall be inserted, namely:—

"(2) Without prejudice to the generality of the provisions of sub-section (1), rules may be made in respect of the following matters, namely:—

(a) the manner in which arbitral proceedings shall be conducted;

(b) the number of days for which the arbitral proceedings have to be conducted continuously on each occasion when an arbitral tribunal meets;

(c) the time schedule and the number of hours for which the arbitral proceedings have to be conducted on each day;

(d) the time schedule for the filing of the pleadings for purposes of sub-section (1A) of section 23;

(e) the time schedule in regard to the recording of evidence and submission of arguments for purposes of sub-section (1) of section 24;

(f) the time schedule as to the future procedure to be followed by the arbitral tribunal, referred to in sub-section (6) of section 29A.

(3) The Chief Justice of India may issue guidelines to the High Courts in relation to the matters referred in sub-section (2) and other procedure to be followed by the arbitral tribunal so that uniform rules may be made by all the High Courts.".

42. In section 84 of the principal Act, after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Without prejudice to the generality of the provisions of sub-section (1), rules may be made in respect of the following, namely:—

(a) the manner in which fee of the members of an arbitral tribunal may, after consultation with the Chief Justice of India, be fixed and the procedure relating thereto under sub-section (15) of section 11;

(b) the other particulars required to be entered in the register under clause (f) of sub-section (4) of section 33A.".

43. The First Schedule, Second Schedule and Third Schedule to the principal Act shall be renumbered as the Second Schedule, Third Schedule and Fourth Schedule and before the Second Schedule as so renumbered, the following Schedule shall be inserted, namely:—

"THE FIRST SCHEDULE

(See sections 43C and 43D)

FAST TRACK ARBITRATION

1. (1) For the purposes of Fast Track Arbitration under sub-section (1) of section 43 C, a Fast Track Arbitral Tribunal shall be deemed to be constituted on the date on which the parties, after obtaining the consent of the sole arbitrator to be appointed, agree in writing that the sole arbitrator shall be the Fast Track Arbitral Tribunal under sub-section (2) of section 43C.

(2) The parties shall communicate the said agreement to the sole arbitrator on the same day.

2. The procedure specified in this Schedule shall on and from the day of the constitution of a Fast Track Arbitral Tribunal, apply to the Fast Track Arbitration.

3. (1) Within fifteen days of the constitution of the Fast Track Arbitral Tribunal, the person who has raised the dispute (hereinafter referred to as the claimant) shall

send simultaneously to the Tribunal and the opposite party (hereinafter referred to as the respondent)—

(a) a claim statement containing the facts, the points at issue and the relief claimed;

(b) documentary evidence, if any, in support of his case;

(c) a copy of the witness's affidavit where reliance is placed on the testimony of any witness (including that of a party);

(d) a copy of the opinion, along with the particulars relating to the expert, his qualifications and experience where reliance is placed on the opinion of an expert;

(e) a list of interrogatories, if any;

(f) an application for discovery or production of documents, if any, mentioning their relevancy;

(g) full address, including e-mail or fax, telephone numbers, if any, of all claimants and of all the parties, for the purpose of expediting communication and correspondence;

(h) any other material considered relevant by the claimant.

(2) The respondent shall, within fifteen days from the receipt of the claim statement and the documents referred to in sub-paragraph (1), simultaneously send to the Fast Track Arbitral Tribunal as well as to the claimant, his defence statement, together with documentary evidence, witness's testimony by affidavit (including that of a party) and expert opinion, if any, in support thereof, together with counter claims, if any, supported by documents.

(3) The procedure specified in this Schedule shall apply to such counter claims as they apply to a claim.

(4) Within fifteen days from the receipt of the defence statement or the counter claims the claimant shall send to the Fast Track Arbitral Tribunal and to the respondent his rejoinder and statement of defence to the counter claim.

(5) Within fifteen days from the receipt of the defence statement or the counter claim, the respondent shall simultaneously send his rejoinder to the said statement or

claim to the Fast Track Arbitral Tribunal as well as to the claimant.

(6) In case discovery or production of documents is allowed, the parties shall be permitted to submit their supplementary statements, if any, to the Fast Track Arbitral Tribunal within the specified period and to simultaneously send copies thereof to each other.

(7) The Fast Track Arbitral Tribunal shall decide the disputes on the basis of the pleadings and documents, affidavits of evidence, expert opinion, if any, and the written submission filed by the parties.

(8) The Fast Track Arbitral Tribunal may permit any witness to be orally examined and lay down the manner in which evidence shall be recorded or for receiving affidavits in lieu of oral evidence.

(9) The Fast Track Arbitral Tribunal may otherwise permit oral evidence to be adduced, if it considers that any request for oral evidence by any party is justified or where the Fast Track Arbitral Tribunal considers that such oral evidence is necessary.

(10) The Fast Track Arbitral Tribunal may, in addition, call for any further information or clarification from the parties in addition to the pleadings, documents and evidence placed before it.

4. The Fast Track Arbitral Tribunal shall permit the parties to appear and conduct the case personally or through their Counsel or by any person duly authorised by the parties to represent them.

5. After the conclusion of the evidence, the Fast Track Arbitral Tribunal may direct all the parties to file their written notes of argument or may, at its discretion, permit oral arguments and shall fix a time schedule therefor and may also restrict the length of oral arguments.

6. (1) The Fast Track Arbitral Tribunal shall conduct its proceedings in such manner that the arbitral proceedings are, as far as possible, taken up on day-to-day basis at least continuously for three days on each occasion.

(2) The Fast Track Arbitral Tribunal shall ordinarily fix the time schedule in such manner that the proceedings are conducted continuously from 10.30 A.M. to 1 P.M. and 2 P.M. to 4.30 P.M. every day.

7. The time schedule fixed under paragraphs 3 and 5 and the manner of conducting proceedings and fixing the time schedule under paragraph 6 by the Fast Track Arbitral Tribunal, shall be binding on the parties.

8. (1) At any time during the course of arbitration and before the passing of the award, the Fast Track Arbitral Tribunal may, at its discretion, if need be, consult any expert or technically qualified person or a qualified accountant for assistance in relation to the subject-matter in dispute, at the expense of the parties, and shall communicate the report of aforesaid person to the parties to enable them to file their response.

(2) If the Fast Track Arbitral Tribunal thereafter considers on its own or on the request of parties that any clarification or examination of a person referred to in sub-paragraph (1) or examination of any other person is necessary, it may call upon such person to clarify in writing or to call him or such other person as a witness for necessary examination.

9. (1) In case there is default on the part of any party to adhere to the time limits specified in this Schedule or as fixed by the Fast Track Arbitral Tribunal or there is violation of any interim orders or directions of the Fast Track Arbitral Tribunal issued under section 17 or under this Schedule, the Fast Track Arbitral Tribunal may pass peremptory orders against the defaulting party giving further time for compliance including peremptory orders to provide appropriate security in connection with an interim order or direction.

(2) In case the Fast Track Arbitral Tribunal is satisfied that a party to the arbitration is unduly or deliberately delaying the arbitral proceedings, or the implementation of the peremptory orders, the Fast Track Arbitral Tribunal may impose such costs as itmay deem fit on the defaulting party or may pass an order striking out the pleadings of the party concerned or excluding material or draw adverse inference against the said party and in case security for costs of arbitration is not furnished as required under sub-paragraph (1), the claim may be dismissed.

(3) Without prejudice to the provisions of sub-paragraph (2), the Fast Track Arbitral Tribunal may dismiss the claim if the claimant does not effectively prosecute the arbitral proceedings or file the papers within the time granted or neglects or refuses

to obey the peremptory orders of the Fast Track Arbitral Tribunal or to pay the dues or deposits as ordered by the Fast Track Arbitral Tribunal:

Provided that the failure to file a statement of defence to the claim statement or to the counter claim shall not by itself be treated as an admission of the allegations in the claim statement or in the counter claim, as the case may be.

(4) If the opposite party does not file its defence or does not effectively prosecute its defence or file the papers within the time granted or refuses to obey the peremptory orders of the Fast Track Arbitral Tribunal, such Tribunal may make an ex parte award.

10. (1) The Fast Track Arbitral Tribunal shall make an award within six months from the date of its constitution or within such extended period specified in sub-paragraphs (2) to (4).

(2) The parties may, by consent, extend the period specified under sub-paragraph (1), by a further period not exceeding three months.

(3) If the award is not made within the period specified under sub-paragraph (1) or the period agreed to by the parties under sub-paragraph (2), the arbitration proceeding shall, subject to the provisions of sub-paragraph (4), stand suspended until an application for extension of time is made to the High Court by any party to the Fast Track Arbitration or where none of the parties makes an application as aforesaid, until such an application is made by the Fast Track Arbitral Tribunal.

(4) The provisions of sub-sections (4) to (8) of section 29A shall, so far as may be, apply for disposal of the application referred to in sub-paragraph (3), till the award is made.

11. The Fast Track Arbitral Tribunal shall make an award and give reasons therefor keeping in mind the time limit referred to in paragraph 10 unless it is agreed between the parties that no reasons need be given or the award is based on settlement of disputes.".

44. (1) The provisions of the principal Act, as amended by this Act, shall, subject to the provisions of sub-sections (2) to (19), be prospective in operation and shall not, in particular, apply to—

(i) any application made under sub-section (1) of section 8 of the principal Act by a party to the arbitration agreement before a judicial authority, or any

appointment made by the judicial authority under that section, before the commencement of this Act; or

(ii) any request made under section 11 of the principal Act to a party, or the Chief Justice of India or his designate, or the Chief Justice of a High Court or his designate, before the commencement of this Act; or

(iii) any appointment of arbitral tribunal made under section 11 of the principal Act by—

(a) the parties to the arbitration agreement;

(b) a party who is authorised under the arbitration agreement to make such appointment without the consent of the other party or parties to the arbitration agreement; or

(c) the Chief Justice of India or his designate or the Chief Justice of a High Court or his designate, before the commencement of this Act;

(iv) any award passed under the principal Act, before the commencement of this Act.

(2) The provisions of this Act shall, subject to the provisions of sub-sections (3) to (19), apply to the arbitration agreements entered into before the commencement of this Act, where no—

(i) request for appointment of arbitral tribunal; or

(ii) application for appointment of arbitral tribunal; or

(iii) appointment of arbitral tribunal, has been made under the principal Act, before the commencement of this Act.

(3) The provisions of clause (b) of sub-section (2) of section 2, as inserted in the principal Act by clause (b) of section 4 of this Act, shall apply to the applications made under section 8 of the principal Act before a judicial authority in a legal proceeding, or under section 9 of the principal Act before a Court, which are pending on the commencement of this Act in connection with the arbitrations of the nature specified in sub-section (2) of section 2 of the principal Act.

(4) The provisions of section 2A, as inserted in the principal Act by section 5 of this Act, shall apply to arbitral proceedings under the principal Act, pending before the

principal Courts referred to in that section, on the commencement of this Act.

(5) The provisions of section 6 of the principal Act, as amended by section 7 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal, on the commencement of this Act.

(6) The provisions of sub-sections (4), (5) and (6) of section 9, as substituted by section 11 of this Act, shall apply to all applications under section 9, pending in the Court on the commencement of this Act.

(7) The provisions of section 17 of the principal Act, as substituted by section 16 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal on the commencement of this Act.

(8) The provisions of sub-section (1) of section 20 of the principal Act, as substituted by section 17 of this Act, shall apply to arbitration agreements in relation to which requests for appointment of arbitral tribunal and applications for appointment of arbitral tribunal are pending decision on the commencement of this Act, if the arbitral tribunal has not been appointed on or before such commencement .

(9) The provisions of sub-section (1) of section 23 of the principal Act, as amended by section 18 of this Act, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal on the commencement of this Act, where the claim, defence or rejoinder statements have not been filed before the arbitral tribunal on or before such commencement.

(10) The provisions of sub-section (1) of section 24 of the principal Act, as amended by section 19 of this Act, and sub-section (1A) of section 24 of the principal Act, as inserted by that section, shall apply to arbitral proceedings under the principal Act, pending before an arbitral tribunal on the commencement of this Act, where oral evidence or oral arguments, as the case may be, have not been completed on or before such commencement.

(11) The provisions of section 24A, as inserted in the principal Act by section 20 of this Act, shall apply to the directions made under section 17, the time schedules determined under section 23 or the orders passed under section 24 by the arbitral tribunal, the principalAct before the commencement of this Act, where such directions, time schedules or orders have not been complied with on or before such

commencement by the party to whom they were directed or ordered.

(12) The provisions of section 28 of the principal Act, as amended by section 21 of this Act, shall apply to arbitration agreements in relation to which requests for appointment of arbitral tribunal and applications for appointment of arbitral tribunal are pending decision on the commencement of this Act, if the arbitral tribunal has not been appointed on or before such commencement .

(13) The provisions of sub-section (3) of section 29, as inserted in the principal Act by section 22 of this Act, shall apply to arbitral proceedings under the principal Act pending before the arbitral tribunal on the commencement of this Act, if awards have not been passed on or before such commencement.

(14) The provisions of section 29A, as inserted in the principal Act by section 23 of this Act, shall, subject to –

(a) sub-section (3) of section 43A and sub-section (6) of section 43B, as inserted in the principal Act by section 33; and

(b) sub-paragraph (4) of paragraph 10 of the First Schedule, as inserted in the principal Act by section 43, of this Act, apply to arbitration proceedings commenced on and from the commence-ment of this Act.

(15) The provisions of —

(i) section 34 of the principal Act, as amended by section 26; and

(ii) section 34A, as inserted in the principal Act by section 27, of this Act, shall apply to arbitration awards passed before the commencement of this Act which have not become final, and applications seeking leave under sub-section (2) of section 34A may be filed within a period of three months from the date of such commencement in the Arbitration Division in respect of pending applications under sub-section (1) of section 34 of the principal Act or in pending appeals in the Supreme Court .

(16) The provisions of section 36 of the principal Act, as substituted by section 28 of this Act, shall apply to all awards made under the principal Act pending enforcement on the commencement of this Act.

(17) The provisions of sub-sections (1) and (2) of section 37C, as inserted in the principal Act by section 30 of this Act, shall apply to applications under sub-

section (1) of section 34 of the principal Act and appeals under section 37 of the principal Act pending on the commencement of this Act, if no notice has been issued by the Court under sub-section (1) of section 34 or under section 37 of the principal Act before such commencement:

Provided that where the Court in such application or appeal has issued notice, the provisions of sub-section (1) of section 37C of the principal Act shall not apply.

(18) The provisions of section 42 of the principal Act, as substituted by section 31 of this Act, shall apply to subsequent applications which may be filed after the commencement of this Act.

(19) The provisions of sub-section (5) of section 43, as inserted in the principal Act by clause (b) of section 32 of this Act, shall apply to the orders referred to in that sub-section, if such orders are passed on or from the commencement of this Act, in arbitral proceedings under the principal Act, pending before an arbitral tribunal on such commencement.

STATEMENT OF OBJECTS AND REASONS

The general law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the existing Act) The Act, which is based on the UNCITRAL. Model Law on International Commercial Arbitration as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), applies to both international as as well as to domestic arbitration.

Ever since the commencement of this Act, resquests have been voiced for its amendment. The main problem with the existing Act was that UNCITRAL Model Law which was meant as a Model for International Arbitration was adopted also for domestic arbitration between indian parties in India. In several countries the laws of arbitration for international and domestic arbitration are governed by different statutes.

2. Some of the major shortcomings in the existing Act are as follows:—

(a) there is no provision for expediting awards or the subsequent proceedings in Courts when applications are filed for setting aside awards;

(b) for challenging an award an aggrieved party has to start again from the District Court;

(c) there is no provision enabling the Indian parties to obtain interim measures from

Indian Courts before a foreign arbitration could commence outside India,

(d) the language of sections 20 and 28 is such that multinational company, even if the entire contract had to be implemented in India, could stipulate that foreign law could apply or parties could have a foreign venue—a procedure which is inconsistent with the sovereignty of the laws of our country.

3. The Law Commission of India undertook a comprehensive review of the existing Act and made recommendations in its 176th Report. The Report also contains a draft Arbitration and Conciliation (Amendment) Bill, 2001: The Government, after inviting comments of the State Governments and certain commercial organisations, on the Report and draft Bill has decided to accept almost all the recommendations. In addition some suggestions made in a special seminar organized by the Law Ministry by the leading senior lawyers, jurists and representatives of commercial organisations have also been accepted.

4. Important features of the Bill are as follows:—

(i) to enable the judicial authority to decide jurisdictional issues, subject to strict rules, where an application is made before it by a party raising any jurisdictional question;

(ii) to empower the Courts to make reference to arbitration in case all the parties to a legal proceeding enter into an arbitration agreement to resolve their disputes during the pendency of such proceeding before it;

(iii) to provide for the appointment of arbitrators by the Chief Justice of the Supreme Court or the High Court or his nominees to be an apointment made on the judicial side with a view to prevent writ petitons being filed on the basis that it is an administrative order of the Chief Justice.

(iv) to provide that where the place of arbitration under Part I of the existing Act is in India, whether in regard to arbitration between Indian parties or an international arbitration in India and arbitration between Indian parties Indian law will apply.

(v) to provide for completion of arbitrations under the existing Act to be completed within one year from commencement of arbitration proceedings, but at the end of one year the Court will fix up a time schedule for completion of the proceedings until the award is passed.

(vi) to empower the arbitral tribunal to pass peremptory orders for implementation of interlocutory orders of the arbitral tribunal and in case they are not implemented, to enable the Court to order costs or pass other orders in default.

(vii) to provide for the Arbitration Division in the High Courts, and also for its jurisdiction and special procedure under Chapter IXA for the speedy enforcement of awards made under the Arbitration Act, 1940, the existing Act including awards made outside India;

(viii) to provide provisions for speeding up and completing all arbitrations under the existing Act, including those arbitrations pending under the repealed Arbitration Act, 1940 within a stipulated time.

(ix) to introduce a new Chapter XI relating to single member fast track arbitral tribunal wherein the filing of pleadings and evidence will be on fast track basis and award will have to be pronounced within six months and to specify procedure therefor in a new Schedule.

4. The Bill seeks to achieve the above objects.

ARUN JAITELY.

NEW DELHI;
The 19th December, 2003.

ANNEXURE-IV

SUMMARY OF RECOMMENDATIONS OF JUSTICE SARAF COMMITTEE REPORT ON IMPLICATIONS OF THE RECOMMENDATIONS OF THE LAW COMMISSION IN ITS 176th REPORT REGARDING AMENDMENT OF THE ARBITRATION AND CONCILIATION ACT, 1996AND THE AMENDMENTS PROPOSED BY THE ARBITATION AND CONCILIATION (AMENDMENT) BILL, 2003 (As introduced in the Rajya Sabha on 22 December, 2003) AND SUGGESTIONS AND RECOMMENDATIONS

PROPOSED AMENDMENTS IN SECTION 2

Section 2(1)(e) - "Court"

The Committee suggests that clause (e) may be redrafted as follows:

'(e) "Court", in relation to—

(i) sections other than sections specified in sub-clause (ii), means—

(a) the principal Civil Court of original jurisdiction in a district; or

(b) any Court of coordinate jurisdiction to which the Court referred to in sub-clause (a) transfers a matter brought before it, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; and

(ii) sections 34, 34A and 36, means the Arbitration Division of the High Court;'

The proposed section 37A which deals with the constitution of the Arbitration Division should be suitably modified to make it clear that it will be a division bench of not less than two judges of the High Court.

PROPOSED NEW DEFINITIONS OF DOMESTIC ARBITRATION, INTERNATIONAL ARBITRATION, AND INTERNATIONAL COMMERCIAL ARBITRATION

Section 2(1) (f)

The Committee is of the opinion that the application of the Act should not be extended to "non-commercial international arbitration," more so when the Act is designed exclusively for "domestic arbitration" and "international commercial arbitration".

The Committee agrees with the recommendation of the Law Commission that "international commercial arbitration" where the place of arbitration is in India, should be deemed to be "domestic arbitration".

The Committee also agrees with the reasoning and recommendation of the Law Commission to substitute the expression "association" for the expression "company".

However, for the limited purpose of giving effect to the recommendation of the Law Commission to substitute the expression "association" for "company", the existing definition of "international commercial arbitration" may be modified as below:

'(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country';

The Committee is of the opinion that the proposal to define "domestic arbitration" by insertion of a clause (ea) in sub-section (1) of section 2 of the Act may be retained.

PROPOSED DEFINITION OF JUDICIAL AUTHORITY

Section 2(1) (fa)

The Amendment Bill seeks to insert a clause (fa), to define the expression "judicial authority":

The proposed definition of "judicial Authority" is only with a view to incorporating the judicial interpretation of the expression into a formal definition. It may be retained.

PROPOSED SUBSTITUTION OF SUB-SECTION (2) OF SECTION 2

Scope of the Act

The proposed sub-section (2) of section 2, should be substituted by the following:

"(2) (a)Save as otherwise provided in clause (b), this Part shall apply where the place of arbitration is in India.

(b) Sections 9 and 27 of this Part shall apply also to international commercial arbitration where the place of arbitration is outside India or where such place is not specified in the arbitration agreement."

PROPOSED INSERTION OF SECTION 2A

The Committee suggests that the proposed section 2A should be substituted by the following:

"2A. The principal civil court of original jurisdiction in a district may, from time to time, transfer any matter relating to any proceedings under this Act which is pending before it, to any Court of coordinate jurisdiction in the district for decision."

PROPOSED AMENDMENT OF SECTION 5

The Committee, recommends the insertion of the following further Explanation to section 5 :

"Explanation.-For removal of doubts, it is declared that,

(i) any challenge to an arbitral award can be made only under section 34 of the Act within the specified time, only on the grounds set out therein, before the Arbitration Division and no other court or judicial authority shall entertain any challenge to an arbitral award or objections to its validity or enforceability on any ground whatsoever;

(ii) no court or judicial authority shall entertain any application for stay of arbitral proceedings on any ground whatsoever; and

(iii) any order passed by any court or judicial authority in contravention of section 5 of the Act shall be void and unenforceable**."**

PROPOSED AMENDMENT OF SECTION 6

On the recommendations of the Law Commission, the following words in the above section are sought to be deleted:

"or the arbitral tribunal with the consent of the parties,"

The Committee gave careful consideration to the above proposed amendment which appears to have been suggested by the Law Commission with a view to stopping the growing practice of conducting arbitral proceedings in expensive venues like five-star hotels.

The Committee is of the opinion that the above amendment is uncalled for. The Committee is, therefore, of the firm opinion that these are matters which should be left to the parties and the arbitral tribunal. No amendment as suggested by the Law Commission is called for.

PROPOSED AMENDMENT OF SECTION 7

The Committee suggests that the proposed amendment to section 7 may be dropped.

The Committee, however, feels that to take care of the modern innovations in communication technology and the increased use of email in commerce, the definition of "agreement in writing" in clause (b) of sub-section (4) of section 7 of the Act should be modified so as to include "other communication devices for physically separated parties which provide the recipient with a written record of the consent so transmitted".

AMENDMENT OF SECTION 8

The experience of the working of section 8 during the last nine years is quite satisfactory. There is no cogent reason to amend the same.

The Committee is, however, of the opinion that on a judicial authority referring the matter to arbitration, the legal proceedings should remain stayed. The Committee, therefore, recommends that section 8 may be modified suitably to make this position clear.

PROPOSAL TO INSERT A NEW SECTION 8A

This section seeks to deal with agreements for arbitration entered into after filing of suits before the courts. It is only a clarificatory provision in view of the decision of the Supreme Court in P. A. Raju v P.V.G. Raju (2000) 4 SCC 539. The Committee is of the view that in view of the above decision of the Supreme Court, the proposed section 8A is unnecessary. There is no need to insert it in the Act.

PROPOSED AMENDMENT OF SECTION 9

The amendment is good. It will check the possibility of abuse of interim order by a party. It should be accepted.

The Committee is, however, of the opinion that power should also be conferred on the court to make garnishee orders. For that purpose, the Committee suggests that clause (v) of sub-section (3) should be renumbered as clause (vi) and the following clause should be inserted as clause (v):

"(v) garnishee order prohibiting in case of debt, the creditor from recovering the debt and the debtor from making payment thereof until further order of the court;."

SUGGESTION FOR AMENDMENT OF SECTION 10

The Committee, suggests that for removal of doubts about the true meaning and purport of the proviso to sub-section (1) of section 10, the following Explanation should be added to the existing sub-section (1) of section 10 of the Act:

"Explanation: For the removal of doubts, it is hereby declared that the requirement that "such number shall not be an even number" is mandatory and not derogable".

PROPOSED AMENDMENT OF SECTION 11 AND THE SUGGESTION OF THE COMMITTEE FOR INCORPORATION OF A NEW SECTION 11A TO PROVIDE THE PROCEDURE OF APPOINTMENT

The Committee makes the following recommendations in regard to section 11:

(i) The existing scheme of section 11 should be retained.

(ii) On receipt of a request under section 11 for appointment of an arbitrator, the Chief Justice should be required either to exercise the power himself or to designate any person or institution in respect of such request, having regard to the nature of the controversy in the matter.

(iii) The requirement of framing of Schemes by the Chief Justices for dealing with matters under sub-section (4) or sub-section (5) or sub-section (6) may be dispensed with by inserting a new section in the Act to deal with matters relating to appointment of arbitrators under section 11.

To give effect to the above suggestions, the existing sub-section (10) of section 11 may be substituted by the following:

"(10) The matters entrusted to the Chief Justice by sub-section (4) or sub-section (5) or sub-section (6) shall be dealt with in the manner set out in section 11A."

The following new section may be inserted to provide the manner of dealing with matters entrusted to the Chief Justice under sub-section (4) or sub-section (5) or sub-section (6) of section 11:

"11A. Manner of dealing with applications under sub-sections (4), (5) and (6) of section 11-

(1) The request to the Chief Justice under sub-section (4) or sub-section (5) or sub-section (6) of section 11 shall be made in writing and shall be accompanied by –

(a) the original arbitration agreement or a duly certified copy thereof;

(b) the names and addresses of the parties to the arbitration agreement;

(c) the names and addresses of the arbitrators, if any, already appointed;

(d) the name and address of the person or institution, if any, to whom or which any function has been entrusted by the parties to the arbitration agreement under the appointment procedure agreed upon by them;

(e) the qualifications required, if any, of the arbitrators by the agreement of the parties;

(f) a brief written statement describing the general nature of the dispute and the points at issue;

(g) the relief or remedy sought; and

(h) an affidavit, supported by the relevant documents, to the effect that the condition to be satisfied under sub-section (4) or sub-section (5) or sub-section (6) of section 11, as the case may be, before making the request to the Chief Justice, has been satisfied.

(2) Upon receipt of a request under sub-section (1), the Chief Justice may either deal with the matter entrusted to him or designate any other person or institution for that purpose.

(3) Where the Chief Justice designates any person or institution under sub-section (2), he shall have the request along with the document mentioned in sub-section (1) forwarded forthwith to such person or institution and also have a notice sent to the parties to the arbitration agreement.

(4) The Chief Justice or the person or the institution designated by him under sub-section (2) may seek further information or clarification from the party making the request under this Scheme.

(5) Where the request made by any party under sub-section (1) is not in accordance with the provisions of this section, the Chief Justice or the person or the institution designated by him may reject the same.

(6) Subject to the provisions of sub-section (5), the Chief Justice or the person or the institution designated by him shall direct that a notice of the request be given to all the parties to the arbitration agreement and such other person or persons as are likely to be affected by such request to appear on the date and time fixed to assist the Chief Justice or the person or institution designed by him in the appointment of arbitrator.

(7) If the Chief Justice, on receipt of a complaint from either party to the arbitration agreement or otherwise, is of opinion that the person or institution designated by him under sub-section (2) has neglected or refused to act or is incapable of acting, he may withdraw the authority given by him to such person or institution and either deal with the request himself or designate another person or institution for that purpose.

(8) The appointment made or measure taken by the Chief Justice or any person or institution designated by him in pursuance of the request under sub-section (1) shall be communicated in writing to –

(i) the parties to the arbitration agreement;

(ii) the arbitrators, if any, already appointed by the parties to the arbitration agreement;

(iii) the person or the institution referred to in sub-section (1)(d);

(iv) the arbitrator appointed in pursuance of the request;

(9) All requests under this section and communication relating thereto which are addressed to the Chief Justice shall be presented to the Registrar of the Court, who shall maintain a separate register of such requests and communications.

(10) The party making a request under this section shall, on receipt of notice of demand from –

(i) the Registry of the Court, where the Chief Justice makes the appointment of an arbitrator or takes the necessary measure; or

(ii) the designated person or the institution, as the case may be, where such person or institution makes appointment of arbitrator or takes the necessary measure,

pay an amount of Rs.5000/- in accordance with the terms of such notice towards the costs involved in processing the request."

PROPOSED AMENDMENT OF SECTION 12

The Committee is, of the opinion that section 12 should not be amended as suggested by the Law Commission because such an amendment will open the flood-gates of litigation from the beginning to the completion of the arbitral proceedings and will be abused by the party who does not want the arbitration to proceed smoothly.

DESIRABILITY OF AMENDMENT OF SECTION 13

The Committee is in full agreement with the opinion of the Law Commission. Practical experience shows that there have been very few cases where awards have been set aside on the ground of bias or disqualification of the arbitrator. Moreover, stray and isolated instances of awards being set aside on such grounds cannot justify court intervention during the arbitral proceedings.

PROPOSED AMENDMENT OF SECTIONS 14 AND 15

There is no difficulty in accepting the suggestion for amendment of sub-section (2) of section 15 to fix a time limit for appointment of a substitute arbitrator.

Though the Committee is in agreement with the recommendation of the Law Commission that provision should be made for fixing the quantum of fees payable to the arbitrator in the case of termination of his mandate, it is of the opinion that the power of the court to fix the quantum of fees should be "subject to the agreement between the parties". Moreover, in a case where there is more than one arbitrator and the mandate of only one of them is terminated, in the absence of agreement between the parties, the power of fixing the fees of such arbitrator should be vested in the remaining members of the arbitral tribunal.

It may also be provided in the proposed sub-sections (4) and (5) that the Court may fix the fees only on an application of the arbitrator, or the parties or any one of them.

In the light of the above suggestions sections 14 and 15 may be modified.

DESIRABILITY OF AMENDMENT OF SECTION 16

The Committee is of the view that the decision the Law Commission is practical and based on ground realities. The Committee is also of the view that insertion of the new Explanation in section 34 proposed by the Law Commission will help in removing all doubts in regard to the availability of ground of challenge to the order of the arbitral tribunal rejecting the plea in regard to existence or validity of the arbitration agreement.

PROPOSED SUBSTITUTION OF SECTION 17

After elaborate discussions, the Committee arrived at a conclusion that section 17 of the Act should be redrafted on the lines of the draft article 17 of the UNCITRAL Model Law. The Committee is, however, of the opinion that it is not advisable to confer powers on the arbitral tribunal to order ex parte interim measures because there is a strong possibility of abuse of such power with the arbitral tribunal. Request for ex parte interim measures of protection should be made only to a Court under section 9 of the Act. Similarly, restoration of status quo also has far-reaching consequences and, therefore, this power should be exercised in appropriate cases only by the courts.

The Committee, therefore, recommends the substitution of existing section 17 by the following new section:

"(1) Unless otherwise agreed by the parties, the arbitral tribunal, at the request of a party, after notice to the other party, may, pending arbitral proceedings,-

(a) direct the other party to take steps of protection of the subject–matter of dispute in the manner considered appropriate by the arbitral tribunal;

(b) direct the other party to,-

(i) maintain the status quo pending determination of the dispute;

(ii) provide means of preserving assets out of which a subsequent award may be satisfied;

(iii) preserve evidence that may be relevant and material to the resolution of the dispute; or

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

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

(ii) for samples to be taken from, or any observation to be made of, or experiment conducted upon, the property.

(2) The party requesting interim measure of protection shall satisfy the arbitral tribunal that harm not adequately reparable by an award of damages is likely to result if the measure is not granted.

(3) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

(4) The requesting party shall promptly make disclosure of any material change in the circumstances based on which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

(5) The arbitral tribunal may modify, suspend, or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the tribunal's own initiative, upon prior notice to the parties."

SUGGESTION OF THE COMMITTEE FOR INSERTION OF A NEW SECTION 17A TO PROVIDE MACHINERY FOR ENFORCEMENT OF INTERIM MEASURES OF PROTECTION

The Committee suggests insertion of the following new section 17A in the Act for enforcement of the interim measures of protection ordered by the arbitral tribunal:

"17A. (1) An interim measure of protection ordered by an arbitral tribunal under section 17 of the Act shall be enforced upon application to the court, subject to the provisions of this section.

(2) The court may refuse to enforce an interim measure of protection, only, -

(a) at the request of the party against whom it is invoked, if the court is satisfied that:

(i) there is a substantial question relating to any ground for refusal;

(ii) the requirement to provide appropriate security in connection with the interim measure by the arbitral tribunal has not been complied with, or

(iii) the interim measure has been terminated or suspended by the arbitral tribunal, or

(b) if the court finds that the interim measure is incompatible with the powers conferred upon the court by law, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure without modifying its substance.

(3) Any determination made by the court on any ground in sub-section (2) shall be effective only for the purposes of the application to enforce the interim measure of protection. The court shall not, in exercising that power, undertake a review of the substance of the interim measure.

(4) The party who is seeking or has obtained enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or modification of that interim measure.

(5) The court may, if it considers it proper, order the requesting party to provide appropriate security, unless the arbitral tribunal has already made a determination with respect to security."

PROPOSED AMENDMENT OF SECTION 20

The Committee feels that the suggestion of the Law Commission that in case of the arbitration between two Indian parties the place of arbitration should be India, is a good suggestion. It should be accepted. It will put a check on the tendency of some of the Indian parties to have the place of arbitration outside India, despite the fact that the cost of arbitration is much less in India as compared to the cost of arbitration outside India, and the calibre and quality of some of the arbitrators in India is in no way less than the most reputed arbitrators abroad.

The Committee is, however, of the view that the proposed section 20 is not happily worded. This may lead to unnecessary confusion. To avoid the same, the Committee suggests that section 20 may be redrafted as under:

"20. In case of an arbitration other than an international arbitration within the meaning of clause (e) of sub-section (1) of section 2, the place of arbitration shall be within India and in other cases the parties are free to agree on the place of arbitration:

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

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

CONDUCT OF ARBITRAL PROCEEDINGS

(SECTIONS 18 TO 27)

The Committee is of the firm opinion that the principle of party autonomy should in no event be tampered with; otherwise arbitration will lose its efficacy as a dispute resolution mechanism.

PROPOSED AMENDMENT OF SECTIONS 23 AND 24 AND SUGGESTION OF THE COMMITTEE FOR INSERTION OF NEW SUB-SECTIONS (1A), (1B) AND (1C) IN SECTION 24

For the reasons set out above, the Committee is of the view that there are very serious implications of the proposed amendments to sections 23 and 24 and the same should be dropped.

The Committee, however, recommends the insertion of the following three sub-sections after the existing sub-section (1) of section 24:

"(1A) Subject to the provision of sub-section (1), the arbitral tribunal shall pass necessary orders regarding,

(*a*) the fixing of the time schedule for the parties to adduce oral evidence, if any;

(*b*) the manner in which oral evidence is to be adduced;

(c) the fixing of the time schedule for oral arguments;

(d) the fixing of the time schedule for making of the award;

(e) the fixing of the sitting fees of the arbitrator or arbitrators.

(1B) The time schedule and the procedure determined by the arbitral tribunal under sub-section (1A) shall, unless modified in consultation with the parties, be binding on the parties and the arbitral tribunal.

(1C) If the arbitral tribunal does not fix the time schedule or determine the procedure as provided in sub-section (1A) or does not comply with the same, any party to the arbitration may request the arbitral tribunal to do so, and in the event of the failure of the arbitral tribunal to fix the time schedule or determine the procedure within 30 days of the receipt of the application or to agree to comply with the timetable already fixed, the party may apply under sub-section (2) of section 14 to the court for the termination of the mandate of the arbitral tribunal and other consequential orders."

SUGGESTION OF THE COMMITTEE FOR INSERTION OF A NEW SECTION 24A TO PROVIDE FOR CONSOLIDATION OF PROCEEDINGS AND CONCURRENT HEARINGS

The Committee agrees with the views of the DAC and recommends insertion of the following new section in the Act for that purpose:

"24A.Consolidation of proceedings and concurrent hearings.

(1) The parties are free to agree,

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held, on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal shall have no power to order consolidation of proceedings or concurrent hearings."

PROPOSED INSERTION OF SECTIONS 24A AND 24B

On a careful consideration of the above sections and their implications on the party autonomy, the Committee is of the opinion that the proposed section 24A should be modified, on the lines of section 41 of the English Arbitration Act 1996, as below:

'Sub-sections (1), (2) and (3) of section 24A should be renumbered as (2), (3) and (4) respectively and the following new sub-section should be added as sub-sections (1):

"(1) Unless otherwise agreed by the parties, the following provisions shall apply."'

The Committee is of the opinion that the proposed section 24A may be accepted with the above modifications, and the proposed section 24B may be accepted in the same form as proposed.

Moreover, in view of the recommendations of the Committee to insert a new section 24A to provide for consolidation of proceedings and concurrent hearings, the proposed sections 24A and 24B may be renumbered as sections 24B and 24C.

PROPOSED AMENDMENT OF SECTION 28

The Committee suggests that, for the limited purpose of clarification, the existing sub-section (1) of section 28 may be substituted by the following:

"(1) (a)In an arbitration other than international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

(b) In an international commercial arbitration, where the place of arbitration is in India,—

(*i*) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(*ii*) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

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

PROPOSED AMENDMENT OF SECTION 29

There can be no objection in accepting the amendment subject to the following modifications :

"(i) The proposed proviso to sub-section (1) should be redrafted as under:

"Provided that where there is no majority on any issue, the decision of the Presiding Arbitrator on such issue shall be treated as the decision of the arbitral tribunal and form part of the award."

The Committee is also of the opinion that provision should be made for extension of the time for preparation of the minority decision up to two months, if asked for by the minority arbitrator.

The Committee also examined the possibility of making an award in the event of death of one of the arbitrator of a three-member arbitral tribunal, after the completion of hearing but before making the award, without appointment of a substitute arbitrator. The Committee is of the opinion that in such cases, if both the surviving arbitrators are of the unanimous opinion, they may make the award which shall be treated as an award of the arbitral tribunal binding on the parties. This will eliminate the delay in making the award as also the expenditure of fresh arguments before the reconstituted arbitral tribunal.

The Committee is of the opinion that with the above modifications, the proposed amendment to section 29 may be accepted.

PROPOSED NEW SECTION 29A TO FIX TIME LIMITS FOR COMPLETION OF THE ARBITRAL PROCEEDINGS

The Committee is, of the opinion that neither any time limit should be fixed as contemplated by the proposed section 29A nor should the court be required to supervise and monitor arbitrations with a view to expediting the completion thereof. None of these steps is conducive to the expeditious completion of the arbitral proceedings. Moreover, court control and supervision over arbitration is neither in the interest of growth of arbitration in India nor in tune with the best international practices in the field of arbitration. The Committee is of the opinion that with the proposed amendment the arbitral tribunal will become an organ of the court rather than a party-structured dispute resolution mechanism.

The Committee, therefore, recommends the deletion of the proposed section 29A from the Amendment Bill.

AMENDMENT OF SECTION 31

The Committee, recommends that the proposed amendment to modify the above provision should be dropped.

PROPOSED INSERTION OF SECTION 33A

It is still felt that this provision can be incorporated, it may be suitably modified and made subject to the agreement between the parties in this behalf. If the parties do not want to file the copy of the award and/or the records in the court, there is no ostensible reason to compel them to do so. In any event, if such a provision is incorporated, it should begin with the expression “unless otherwise agreed by the parties.”

Moreover, if this section is to be inserted, besides the modification suggested above, in the first Explanation to sub-section (1), the words and figures “or by the High Court or by the Supreme Court under section 11” should be deleted because no reference as such is made under section 11. Section 11 only provides the machinery for appointment of an

arbitrator or a third arbitrator in case of failure of the parties to appoint an arbitrator or of the two arbitrators to appoint the third arbitrator. Similarly, reference to section 8A and Fast Track Arbitration under section 43C would also become redundant in view of the recommendations of the Committee. The modified first Explanation, therefore, may read as under:

"*Explanation* 1. — For the removal of doubts, it is hereby declared that for the purposes of this section, "arbitral award" means the arbitral award whether passed pursuant to a reference made by a judicial authority under section 8, or by any other Court, or by the parties".

PROPOSED AMENDMENT OF SECTION 34 AND INSERTION OF A NEW SECTION 34A TO ADD TWO NEW GROUNDS OF CHALLENGE IN CASE OF PURELY DOMESTIC AWARDS

The Amendment Bill seeks to define the expressions " public policy of India" or "Contrary to public policy of India" to mean contrary to (*i*) fundamental policy of India, or (*ii*) interests of India, or (*iii*) justice or morality." The Committee is of the opinion that this amendment is in order. The Legislature can definitely define the expression to give it the meaning it intends to give. This will set at rest all controversies about the meaning, scope and ambit of the said expression. The Committee is, however, of the opinion that to avoid controversy, the existing Explanation below sub-section (2) and the newly proposed Explanation 2 below sub-section 6 may be merged.

The Committee agrees with the proposal contained in the Amendment Bill to provide that if the arbitral award does not state the reasons as required under sub-section (*3*) of section 31, that shall be a ground of challenge to an award under section 34 of the Act. The Committee also approves the insertion of the new Explanation in sub-section (3) of section 34 to declare, for removal of doubts, that while seeking to set aside an arbitral award under sub-section (*1*), the applicant may include the pleas questioning the decision of the arbitral tribunal rejecting (*i*) a challenge made under sub-section (*2*) of section 13 and (*ii*) a plea made under sub-section (*2*) or sub-section (*3*) of section 16.

The Committee does not agree with the recommendation of the Law Commission to add "error of law apparent on the face of award giving rise to substantial question of law" as a new ground for setting aside the award. The Committee is, however, of the opinion that it is desirable to provide some recourse to a party aggrieved by a patent and serious illegality in the award which has caused substantial injustice and irreparable harm to the applicant.

The Committee is, therefore, of the opinion that an additional ground of challenge, namely, "patent and serious illegality, which has caused or is likely to cause substantial

injustice to the applicant" may be added as a ground for recourse in case of purely domestic awards. Accordingly, the committee recommends redrafting of the proposed section 34A as under:

"34A.(1) In the case of an arbitral award made in an arbitration other than an international commercial arbitration, recourse to a court against an arbitral award on the additional ground that there is a patent and serious illegality, which has caused or will cause substantial injustice to the applicant, can also be had in an application for setting aside an award referred to in sub-section (*1*) of section 34.

(2) Where the ground referred to in sub-section (1) is invoked in an application filed under sub-section (1) of section 34, while considering such ground, the court must be satisfied that the illegality identified by the applicant is patent and serious and has caused or will cause substantial injustice to the applicant."

PROPOSED SUBSTITUTION OF SECTION 36

The Committee is of the opinion that this amendment may be accepted.

PROPOSED AMENDMENT OF SECTION 37

The above amendments are necessary in view of vesting of the powers under section 34, 34A and 36 in the Arbitration Division.

PROPOSED NEW CHAPTER IXA (SECTIONS 37A TO 37F) RELATING TO THE CONSTITUTION OF ARBITRATION DIVISION, ITS JURISDICTION AND SPECIAL JURISDICTION

The proposal for insertion of Chapter IXA in the Act is one of the most important features of the Amendment Bill. The Committee feels that it will go a long way in expediting disposal of appeals in arbitration matters and challenges to arbitral awards expeditiously. It will also afford an opportunity to the Chief Justices of the High Courts and the Chief Justice of the Supreme Court to entrust matters pertaining to arbitration to judges well-versed with the law and practice of arbitration and commercial laws.

The Committee is, however, of the opinion that the Explanation to sub-section (2) is unnecessary and should be deleted because it gives an erroneous impression that Arbitration Division is intended to be manned by retired judges.

The Committee is also of the opinion that for removal of all doubts, between the words "Division Benches of the High Courts" and the words "as may be constituted", the words "of not less than two judges" may be inserted.

Section 37F should, be deleted or modified suitably.

PROPOSED SUBSTITUTION OF SECTION 42

The above amendment is necessary in view of the amendments proposed by the Amendment Bill.

However, in the light of the recommendation of the Committee to retain the power of appointment under section 11 with the Chief Justice, sub-section (5) may be deleted from the above section.

Moreover, in view of the opinion of the Committee about the redundancy of section 8A, reference to that section in sub-section (4) and the Explanation thereto may be omitted.

PROPOSED NEW SECTION 42A FOR PREPARATION OF A SCHEME FOR PANEL OF ARBITRATORS

The Committee strongly feels that the proposed new section 42A may be dropped, as otherwise consensual arbitration will lose its basic characteristic and will be converted into a statutory forum or an organ of the court for resolution of disputes in the manner stipulated by the rules or Schemes framed under the Act by the Courts or the government rather than a party-structured private dispute resolution mechanism.

PROPOSED NEW SECTION 42 B

This amendment may be accepted.

PROPOSED AMENDMENT OF SECTION 43

The amendment is clarificatory in nature and may be accepted.

However, in view of the suggestions made by the Committee about the proposed amendment of section 11, clause (c) of sub-section (5) will become redundant and the same may be omitted.

PROPOSED NEW SECTIONS 43A TO 43D TO PROVIDE TIME LIMITS FOR PASSING AWARDS IN PENDING PROCEEDINGS

The Committee is not in favour of insertion of the above provisions for the same reasons which are given in support of the suggestion for deletion of section 29 A.

PROPOSED INSERTION OF NEW CHAPTER XI (SECTIONS 43C TO 43F & THE FIRST SCHEDULE) TO PROVIDE FOR SINGLE MEMBER FAST TRACK ARBITRAL TRIBUNAL AND FAST TRACK ARBITRATION

The Committee is of the firm opinion that it is neither feasible nor practicable for the courts to supervise and monitor “fast-track arbitration”. That function can be performed only by the arbitral institutions.

The Committee, therefore, suggests that the proposed Chapter XI (sections 43C to 43F) and the new Schedule may be dropped.

PROPOSED AMENDMENTS OF SECTIONS 47, 50, 53, 56 AND 59 AND INSERTION OF NEWSECTIONS 60A AND 60B IN PART II OF THE ACT

The above changes are consequential to the amendment of the definition of the "court" in clause (e) of section (2) (1) of the Act to mean "Arbitration Division," inter alia, for the purpose of section 36. The Committee agrees with the above proposals except the proposed amendment of section 53 to relocate the existing Schedules which may not be required in view of the suggestion of the Committee to omit the new Schedule which is sought to be inserted in the Act as Schedule I.

PROPOSED AMENDMENT OF SECTIONS 82 AND 84

For the reasons set out earlier in connection with the proposed amendment of sections 23, 24 and insertion of section 29A, the Committee is of the view that the above amendment may be dropped.

The Committee reiterates its views, which are reflected throughout the report, that court-structured and court-controlled arbitration is antithesis to arbitration. The era of such arbitrations effectively came to an end with the coming into force of the Act in 1996. The proposed amendment will take us back to that bye-gone era. The Committee, therefore, recommends that the above amendment may be dropped.

The Committee, therefore, recommends that in Section 84, the proposed clause (a) may be omitted. Clause (b), however, may be retained.

PROPOSED INSERTION OF A NEW SCHEDULE AND RELOCATION OF THE EXISTING SCHEDULES

While dealing with the proposed amendment to provide for fast track arbitration, the Committee has suggested that both the new Chapter XI and the Schedule should be omitted. In that view of the matter, the above amendment will not be required. Hence it may be dropped.

PROPOSED TRANSITORY PROVISIONS

These provisions may be modified suitably in the light of the suggestions of the Committee in this Report.

ANNEXURE-V

PARLIAMENT OF INDIA
RAJYA SABHA

DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE

ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE

NINTH REPORT

ON

THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2003

(PRESENTED TO THE RAJYA SABHA ON 4TH AUGUST, 2005)
(LAID ON THE TABLE OF THE LOK SABHA ON 4TH AUGUST, 2005)

RAJYA SABHA SECRETARIAT
NEW DELHI
AUGUST, 2005/ SRAVANA, 1927 (SAKA)

C O N T E N T S

COMPOSITION OF THE COMMITTEE (2004-05)

1. Shri E.M. Sudarsana Natchiappan —*Chairman*

RAJYA SABHA

2. Dr. Radhakant Nayak
3. Shri Balavantalias Bal Apte
4. Shri Ram Nath Kovind
5. Shri Ram Jethmalani
6. Dr. P.C. Alexander
7. Shri Tariq Anwar
8. Shri Raashid Alvi
9. Vacant
10. Vacant

LOK SABHA

11. Dr. Shafiqurrahman Barq
12. Smt. Bhavani Rajenthiran
13. Shri Chhatar Singh Darbar
14. Shri N.Y. Hanumanthappa
15. Shri Shailendra Kumar

16. Shri Dahyabhai V. Patel
17. Shri Brajesh Pathak
18. Shri Harin Pathak
19. Shri V. Radhakrishnan
20. Shri Vishwendra Singh
21. Shri Bhupendrasinh Solanki
22. Prof. Vijaya Kumar Malhotra
23. Kumari Mamata Banerjee
24. Shri S.K. Kharventhan
25. Shri Shriniwas D. Patil
26. Shri A.K. Moorthy
27. Shri Ramchandra Paswan
28. Vacant
29. Vacant
30. Vacant

SECRETARIAT

Shri Tapan Chatterjee, Joint Secretary

Shri Surinder Kumar Watts, Deputy Secretary

Smt. Sunita Sekaran, Under Secretary

Shri Vinoy Kumar Pathak, Committee Officer

INTRODUCTION

I, The Chairman of the Committee on Personnel, Public Grievances, Law and Justice, having been authorised by the Committee, present its Ninth Report relating to the Arbitration and Conciliation (Amendment) Bill*, 2003. The Bill seeks to amend the Arbitration and Conciliation Act, 1996.

2. In pursuance of the rules relating to the Department Related Parliamentary Standing Committee, the Hon'ble Chairman, Rajya Sabha referred** the Bill, as introduced in the Rajya Sabha on the 22nd December, 2003 and pending therein, to the Committee, for examination and report. Earlier when this Committee was not in existence, the Bill was referred to the Department Related Parliamentary Standing Committee on Home Affairs on the 8th January, 2004. Consequent upon the dissolution of the 13th Lok Sabha on the 6th February, 2004, the Committee was dissolved. The present Committee came into existence after bifurcation of the Department Related Parliamentary Standing Committee on Home Affairs on 20th July, 2004.

3. Keeping in view the importance of the Bill the Committee in its meeting held on the 23rd August 2004, decided to issue Press Communique to solicit views/suggestions from interested individuals/organisations/institutions on various provisions of the Bill.

4. In response to the Press Communique, 59 memoranda containing the suggestions were received by the Committee.

5. The Committee considered the Bill and heard a presentation by the Secretary, Legislative Department, Ministry of Law and Justice on the 10th September, 2004.

6. The Committee heard oral evidence of 36 (list at Annexure 'B') individuals/ organisations / institutions / experts including some Government Offices and PSUs, viz. MTNL, Railways Board, CPWD, HPCL, ONGC etc. who had been handling major arbitration cases. The Committee also heard the views of many eminent legal luminaries in Chennai and Hyderabad to have a better appreciation of the subject.Dr.Robert Briner, Chairman, International Court of Arbitration, International Chamber of Commerce, Paris also deposed before the Committee.

7. Contacts were established with the major international arbitration centres, namely the Singapore International Arbitration Centre, Hongkong International Arbitration Centre, the London Court of International Arbitration and International Court of Arbitration, Paris so as to collect information about the functioning of these Centres in the context of the idea mooted in the Committee on setting up institutionalized arbitration of world class standard. A proposal was also initiated to hold video conferencing between the members of the Committee and the authorities of major international arbitration centres to exchange views and ideas on the subject and also to have first hand information about functioning of institutionalized arbitration. Although the proposed video conferencing did not materialise due to constraints of time, SIAC, HKIAC, LCIA responded to the queries of the Committee. The Committee also sought Legislative Department's response on the suggestions made by the witnesses before the Committee.

8. During the course of consideration of the Bill, the Committee was informed on 20th January, 2005 that the Department of Legal Affairs, Ministry of Law and Justice had set up an in-house Committee, under the Chairmanship of Justice B.P. Saraf, retired Chief Justice of J & K High Court and a renowned expert in the field of arbitration, with representatives of the Department of Legal Affairs, Legislative Department and the International Centre for Alternate Dispute Resolution, New Delhi (ICADR) as members, to make an in-depth in-house study in order to examine fully the provisions of the

existing Arbitration and Conciliation Act, 1996 and the implications of the recommendations of the Law Commission made in its 179th Report on the said Act. Taking into account the sudden development in the Government's stand, the Committee decided to wait for submission of the Report of the Justice Saraf Committee on Arbitration which was expected by 31st January, 2005.

9. After submission of the said Report the Committee asked for comments of the Legislative Department, Ministry of Law and Justice on the recommendations contained in the Report of the Justice Saraf Committee.

10. While considering the Bill, the Committee took note of the following documents/information placed before it: -

(i) Background note on the Bill;

(ii) Model Law on International Commercial Arbitration (UNCITRAL);

(iii) 76th Report of Law Commission;

(iv) Report of Justice Saraf Committee on Arbitration;

(v) Legislative Department comments on the recommendations contained in the Report of Justice Saraf Committee;

(vi) Legislative Department's comments on the views/suggestions contained in the written memoranda received from various organisations/institutions/individuals/experts on the provisions of the Bill; and

(vii) Comments of the Legislative Department on the views/suggestions tendered before the Committee.

11. The Committee held 11 meetings to examine the Bill.

12. The Committee adopted the Report in its meeting held on the 28th July, 2005.

13. For the facility of reference and convenience, the observations and recommendations of the Committee have been printed in bold letters in the body of the Report.

New Delhi;
July 28, 2005

E. M. SUDARSANA NATCHIAPPAN
Chairman
Committee on Personnel, Public Grievances, Law and Justice

REPORT

A brief note on Alternative Dispute Resolution

Dispute resolution mechanism consists of resolution i) through courts and ii) through mechanisms other than courts. High litigation costs, time-consuming and complicated nature of lawsuits etc. discourage parties from approaching the courts of law. This has led to the widespread acceptance of alternative dispute resolution mechanisms. Arbitration, conciliation and negotiation are the important ingredients of such a mechanism .

Arbitration means a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard[1]. Conciliation means the adjustment and settlement of a dispute in a friendly, unantagonistic manner[2].

In the present context of market economy and the world emerging as a global village, the expeditious settlement and resolution of disputes between the parties has become necessary. Parties to a dispute opt for arbitration because of commercial prudence.

Advantages of arbitration

In the language of Lord Mustill, " The great advantage of arbitration is that it combines strength with flexibility. Strength because it yields enforceable decisions, and is backed by a judicial framework which, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose procedures which fit the nature of the dispute and the business context in which it occurs[3].

The common experience is that alternative dispute resolution processes preserve or enhance personal and business relationships that might otherwise be damaged by the adversarial process.

The main advantages of arbitration are:

i) **Final, binding decisions**

A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. In arbitration, since both the parties agree to the terms and conditions, they are bound by the decisions. It depends ultimately on the goodwill and cooperation of the parties.

ii) International recognition of arbitral awards

Over 134 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. The Convention facilitates enforcement of awards in all contracting states.

iii) Neutrality

In arbitral proceedings, parties can place themselves on an equal footing in five key respects viz. place of arbitration, language used, procedures or rules of law applied, nationality and legal representation. Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.

iv) Specialized competence of arbitrators

Judicial systems do not allow the parties to a dispute to choose their own judges. But arbitration offers the parties the unique opportunity to designate persons of their choice as arbitrators, provided they are independent. This enables the parties to have their disputes resolved by people who have specialized competence in the relevant field.

v) Speed and economy

Arbitration is faster and less expensive than litigation in the courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve even by arbitration, the limited scope for challenge against arbitral awards, as compared with court judgements, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow.

vi) Confidentiality

Arbitration hearings are not public, and only the parties themselves receive copies of the awards. This is of great significance in commercially sensitive disputes.

Institutional or ad hoc arbitration

Parties opting for arbitration have a choice between designating an institution, such as the International Chamber of Commerce to administer it, or proceeding ad hoc outside an institutional framework. Institutional arbitration can handle large complex cases to small commercial and individual claims. They are decided by former judges, seasoned attorneys and such other professionals belonging to the specific field of dispute in question. This offers neutral, efficient and reliable dispute resolution. This offers parties the same quality outcomes they would receive in Court, but in less time and with less expense.

International arbitration institutions provide 'model clauses' so that the parties, while incorporating them in their contracts, can aid smooth progress of arbitration. They also provide for a definite fee schedule. They (i) determine whether there is a prima facie agreement to arbitrate; (ii) decide on the number of arbitrators; (iii) appoint arbitrators; (iv) decide challenges against arbitrators; (v) ensure that arbitrators are conducting the arbitration in accordance with their Rules and replace them if necessary; (vi) determine the place of arbitration; (vii) fix and extend time-limits; (viii) determine the fees and expenses of the arbitrators; and (ix) scrutinize arbitral awards.

In ad hoc cases, the arbitration will be administered by the arbitrators themselves. However, should problems arise in setting the arbitration in motion or in constituting the arbitral tribunal, the parties may have to require the assistance of a state court, or that of an independent appointing authority[4].

Legislative history of law of arbitration in India

Prior to the British rule, the laws in India were not codified. The age-old system prevalent in India was of making oral agreement to submit to arbitration and of making oral awards. In Panchayats, Panchas where chosen by virtue of their personal qualities of being fair-minded, impartial and knowledgeable. The panchayats were held in great veneration. They proceeded in an informal way, untrammeled by technicalities of procedure and laws of evidence. Also, arbitration was governed by social sanctions. But, the simple and informal system of arbitration

through the Panchayats, though useful, was ineffective to deal with the complexities arising out of advancement in social and economic spheres.

When the East India Company started taking over administrative control, the Presidency Governments in Bengal, Madras and Bombay enacted 'Regulations'. The Bengal Regulation XVI of 1793 authorised the courts to recommend to parties to a suit to submit the decision on matters in disputes which had already arisen to arbitration. Later, the Madras Regulation V of 1816 and the Bombay Regulation IV of 1827 were also made. They introduced substantial changes in the Panchayat system in the Presidency towns.

It was after the coming into existence of the Legislative Council of India in 1834 that the procedure of the Courts of Civil Judicature was codified by Act VIII of 1859. Sections 312 to 325 of the Act dealt with arbitration between parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. Section 312 of that Act enabled the parties to a suit to apply to the court, if they so desired, that an order be passed that the matters in dispute be referred to arbitration. The procedure for arbitration, making and filing of awards was also laid down in subsequent section. The provision for filing and enforcement of awards on such arbitrations was made in 1882 Act No. XIV.

In the Indian Arbitration Act, 1899 provision was made for arbitration of disputes that might arise in future. In 1925,the Civil Justice Committee recommended several changes in the arbitration law. On the basis of the recommendations by this Committee, the Indian legislature passed the Arbitration Act of 1940.

After the end of the Second World War in 1945, particularly after independence in 1947, the trade and industry received a great fillip and the commercial community became more and more inclined towards arbitration for settlement of their disputes, as against litigation in courts, which involved long delays and heavy expenses. With increasing emphasis on arbitration, there was more and more judicial grist exposing the infirmities, shortcomings and lacunae in the Act of 1940.

One of the problems faced in international arbitration related to the recognition and enforcement of an arbitral award made in one country by the Courts of other countries. This difficulty was sought to be removed through various international Conventions such as the Geneva Convention and the New York Convention. Since India was signatory to both the Conventions, the Arbitration (Protocol & Convention) Act, 1937 was enacted for enforcement of foreign awards made under the Geneva Convention, 1927 and the Foreign Awards (Recognition & Enforcement) Act, 1961 was enacted for enforcement of foreign awards under the New York Convention, 1958.

A number of enactments have been amended or repealed in recent years in India with a view to reforming the economy. It was felt that these reforms would remain incomplete if corresponding changes were not made in the law dealing with settlement of disputes. After India opened its economy and undertook several measures of economic reforms in the early 90's and after the development in the international trade and commerce, with the increasing role of GATT and later WTO, there was a spurt in trading in goods, services, investments and intellectual property. Disputes arose between the trading parties, which were diverse in nature and complex, involving huge sums. Such disputes required quick and amicable settlement since the parties could not tolerate the prolonged legal process in courts, appeal, review and revision.

A number of foreign investors, in particular, had expressed the view that they would not like to invest in India unless disputes arising out of their investments are settled abroad. Under the 1940 Act, the parties had to go to the court to make the awards final.

Interference by the law courts at the instance of one party or the other and a considerable delay in disposal of matters gave rise to demands to repeal the 1940 Act.

Thus it became imperative for India to devise a new legal regime relating to both domestic and international commercial arbitration. To attract the confidence of the international mercantile community in the context of growing volume of India's trade and our commercial relationship with the rest of the world after the new liberalization policy of the Government, the Arbitration and Conciliation Act, 1946 Act was passed. This Act is in harmony with the UNCITRAL Model Law on International Commercial Arbitration, 1985.

The Arbitration and Conciliation Act, 1996 repealed the Arbitration Act, 1940 as well as the other two Acts for enforcement of 'foreign awards'. Part II of the Act consolidates the two Acts for enforcement of 'foreign awards'. Part III of the Act provides for conciliation.

The basic features of the 1996 Act are (i) party autonomy (ii) minimum judicial intervention and (iii) maximum judicial support.

Background note on the Arbitration and Conciliation (Amendment) Bill, 2003.

Ever since the commencement of the 1996 Act, requests have been voiced for its amendment.

The main problem with this Act is that the UNCITRAL Model which was meant as a Model for international arbitration was adopted also for domestic arbitration between parties in India. In several countries, the laws of arbitration for international and domestic arbitration are governed by different statutes. Also, in many cases we have lost the letter and also the spirit, and in some cases, we have kept the letter, but lost the spirit of the UNCITRAL Model Law.

Since various anomalies were pointed out, the Law Commission of India undertook a comprehensive review of the Act and made recommendations in its 176th Report. The Report also contains a draft Arbitration and Conciliation (Amendment) Bill, 2001. The Government, after inviting comments of the State Governments and certain commercial organisations on the Report and the draft Bill, has decided to accept almost all the recommendations. In addition, some suggestions made in a special seminar organized by the Law Ministry by the leading senior lawyers, Justices and representatives of commercial organisations have also been accepted. On 22nd July, 2004, the Government of India, the Ministry of Law and Justice and the Department of Legal Affairs constituted a Committee to make in-depth study of the implications of the recommendations of the Law Commission of India contained in its 176th Report and all aspects relating to the Arbitration and Conciliation (Amendment) Bill, 2003 and make suggestions to the Government. The Committee, known as "Justice Saraf Committee on Arbitration" submitted its Report on 29th January, 2005.

OBSERVATIONS OF THE COMMITTEE ON THE ARBITRATION AND CONCILIATION(AMENDMENT) BILL, 2003.

The Committee on Personnel, Public Grievances, Law and Justice received valuable comments and suggestions from eminent organizations and individuals in the country and abroad. The Committee also heard prominent arbitrators, both legal and non-legal, prominent lawyers and representatives of public sector corporations.

The Committee, during its deliberations, expressed reservations on the following provisions in the Bill.

1) Clause 8 of the Bill provides that any written communication by one party to another and accepted expressly or by implication by the other party will also be treated as an arbitration agreement.

The Committee is of the considered view that this provision may have serious implications. The Committee agrees to the observations of Justice Saraf Committee in this regard that an arbitration agreement has the important effect of contracting out the right to go to the court. It deprives the parties of that basic right. Such an agreement should be only in some written form. It cannot be inferred by implication**.**

2) Clause 9 of the Bill seeks to amend section 8 of the Act.

The Committee is of the opinion that the proposed amendments enabling the judicial authority to decide on preliminary issues like the non-existence of any dispute, arbitration agreement being null and void, arbitration agreement being incapable of performance will give rise to prolonged litigation in Courts. This concern was also voiced by Dr. Robert Briner, Chairman, International Court of Arbitration, ICC, Paris, while deposing before the Committee. It will also effectively introduce court intervention at pre-arbitration stage and retard the arbitration process. This would defeat the main purpose of the 1996 Act which is minimisation of court intervention.

3) With respect to Clause 12 of the Bill, the Committee feels that to confer the power of appointment of arbitrator, in default of the parties or the agreed procedure, on the court, for determination of the issues arising in that connection on the judicial side is not a welcome step. In the present scenario of huge pendency of cases in the courts, it may take years to get the arbitrator appointed.

The Committee is of the opinion that if the parties are unable to appoint an arbitrator within the stipulated time, the power of appointment should not automatically devolve on the courts. But, if the parties apply for the appointment of an arbitrator, then the court can do so.

The Committee is of the view that thirty days time stipulated in the Act is more than sufficient for appointment of an arbitrator by the parties and there is no need to extend the same.

4) In respect of Clause 13 of the Bill, the Committee is in agreement with the view of Justice Saraf Committee that any attempt to elucidate the 'circumstances' is likely to provoke unnecessary time consuming challenge to the impartiality of the arbitrator on the ground that he had some relation of the type set out in the illustration with the parties or their lawyers. There is a high chance of abuse of such a provision by a party who wants to delay or derail the arbitration proceeding.

5) Clause 17 of the Bill provides that if the parties to arbitration are Indian nationals or companies, then the arbitration venue has to be in India. This proposed amendment is squarely against the principle of 'comity of nations' and 'curial law'. Also, its effect is to ignore the common law principle that parties are free to contract as they deem fit provided no provision is against public policy or in violation of any applicable law or procures a breach of any applicable law. Also, the argument that arbitration between domestic parties should be conducted only in India is diametrically opposite to the rationale for adopting the New York Convention. If arbitration outside India was acceptable at the time of adoption of the New York Convention, then it should be all the more acceptable now, given that India has come so far in the international arena[5].

6) The Committee opines that clause 18(1A) which states that the arbitral tribunal shall endeavor to expedite the arbitral process subject to such rules as may be made by the High Court in this behalf, is against the principle of party autonomy which is the pillar on which consensual arbitration rests. The Committee strongly feels that this provision enables court intervention which has to be minimised as far as possible.

7) Precedents prove that fixation of statutory time limit for completion of arbitral proceedings as proposed by clause 29 A (1) has seldom worked in India. The Committee feels that this provision will yield results only if consequences of non-compliance of such a time limit are provided for.

8) The Committee has noted that no reason is given in the Statement of Reasons for omission of Section 28.

9) Regarding the proposal for an Arbitration Division of the High Court in Part IX-A, the criticism put forward was that the Chief Justice has never even onceappointed any person or any institution as arbitrator. He, as a routine, appoints a sitting Judge of his own Court. This places professional arbitrators at a disadvantage. Entrusting a High Court Chief Justice or Chief Justice of India with the power to appoint arbitrator may lead to delay in the appointment. Though the Committee appreciates the concept of Fast Track Arbitration, it is of the view that it would not help in reducing delay**.**

In nutshell, the Committee is of the considered view that: —

a) The Bill, would:

i) lead not only to greater interference by Courts in the process of arbitration but also end up having arbitration being conducted under the supervision of the Courts;

ii) have the Courts sitting in judgement over the arbitrators before arbitration, during arbitration and after arbitration.

This was also the voice which resounded in the memoranda submitted to the Committee.

b) There was a broad consensus that the provisions analysed above, if accepted, will make the arbitral tribunal an organ of the court rather than a party-structured dispute resolution mechanism. Also, many amending provisions are likely to create confusion and unnecessary litigation. Bringing back court control and supervision in arbitration and the choice of the arbitrator subject to High Court rules and supervision and control of the court, is neither in the interest of growth of arbitration in India nor in tune with the best international practices. It was felt that they are contrary to the best international practices in the field of arbitration. Hence the Committee is of the view that the adoption of this Bill may hamper further development of international trade relations and diminish the confidence of the international community in the Indian system of arbitration.

<u>The necessity of institutionalised arbitration in India</u>.

As far as domestic arbitration in India is concerned, there are a large variety of tribunals created by the State under different statutes as alternative to the traditional court litigation, for settling various types of disputes such as labour disputes, service matters, antitrust matters, consumer protection, taxation, excise etc. In addition, there are Lok Adalats acting under the Legal Services Authorities Act, 1987, to deal with subjects like disputes arising out of the use of

electricity, telecommunications, insurance etc. So, the need of the hour is a system to deal with international arbitration.

The Committee feels that institutionalised arbitration in India can ensure that parties to international arbitration opt for India as the venue for arbitration. This was also advocated by the witnesses who deposed before the Committee, prominent among them being Shri. K. K. Venugopal, Senior Advocate, Supreme Court and Shri. A.K. Ganguly, Senior Advocate, Supreme Court.

The growing tendency to take undue advantage of court procedure to gain time and delay arbitration or implementation of award is certainly undesirable. If the court procedure is used in such a manner for the promotion of unfair objective, the remedy seems to be worse than the evil and the parties who entered into an arbitration agreement with a view to avoid the lengthy and expensive court procedure find themselves fighting a battle on both the fronts-in arbitration proceedings and in the court of law. This is indeed the fate of several arbitration proceedings in India today[6].

This situation has been best described in the words of Hon'ble Mr. Justice Desai of the Supreme Court of India:

"Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act... however, the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decision of the courts been clothed with 'legalese' of unforeseeable complexity[7]."

Non-resident Indians and Foreign Institutional Investors are entering the Indian market in a big way. The Indian law relating to international commercial arbitration has to be made responsive to these changes in the Indian economic scene. There is a need to harmonise the Indian law with the concepts on arbitration and conciliation of the legal systems of the world.

Arbitration is one of the services being paid handsomely at the global level. An arbitral institution with conscious office bearers can ensure that the proceedings are conducted in the interest of the parties. We have a number of small arbitration institutions all over the country, but none of them have the stature or the ability to attract or manage large arbitrations in India. At present, commercial disputes involving huge amounts of money are not arbitrated in India. They go out of India because of which we are losing huge amount of time, money, human resources and expertise.

Therefore, there is an urgent need for an institution in India which would match international standards. Shri D.M. Popat, Member, International Court of Arbitration, while deposing before the Committee, spoke in favour of institutionalised arbitration without the intervention of courts. We have got the tremendous advantage of having English as a working language throughout the country which can attract foreign parties. Moreover, we have a well versed Judiciary and an intelligent Bar. The setting up of an institution would not only save foreign exchange on arbitration taking place outside India, but also earn foreign exchange by undertaking international arbitration on behalf of Asian and Middle Eastern countries and other underdeveloped or developing countries.

The Committee appreciates the infrastructure raised by the International Centre for Alternative Dispute Resolution which is funded by the Government of India. The Committee

feels that this institution can be treated as a model institution of arbitration of international excellence.

The Committee feels that following are the pertinent issues which need urgent consideration. Also given are the recommendations of the Committee in respect of those issues:

1) The major issues in the arena of arbitration in India are the absence of accountability of arbitrators and huge pendency of cases. There are no rules as to who can be appointed as arbitrators, the fees to be paid to them, the action to be taken in case of their resorting to unethical practices, time limit for the making of an award, consequences of not making the award within the stipulated time limit etc. This has resulted in chaos in the field of arbitration in India.

   Many international parties are willing to choose Asian countries like India as the venue of arbitration because of lesser expenditure, especially in the context of foreign companies willing to invest in India and setting up of Special Economic Zones. But they are dissuaded from doing so because of the current situation in the arbitration field in India. Therefore, they opt for arbitration in countries like Singapore where there are prescribed rules and adequate infrastructure for institutionalised arbitration. This was stressed by Shri S.K. Dholakia, Senior Advocate, Supreme Court, while deposing before the Committee. If such a conducive atmosphere is created in India, international parties will opt for India as the venue for arbitration and India shall become a major player in the field of international arbitration.

In this scenario, the Committee recommends that the following provisions may be incorporated in the Arbitration and Conciliation Act, 1996: -

Addition of Schedules.

A Schedule which would provide for sole arbitration and *B Schedule* which would provide for institutionalised arbitration may be incorporated in the 1996 Act.

The A Schedule shall deal with sole arbitration which will be governed by Part I of the Act.

Since the Committee feels that the accountability of arbitrators has to be ensured, the Committee recommends that persons who would like to render their services as arbitrators should be registered as members of a professional institution or association such as the Bar Council of India, the Institute of Chartered Accountants, the Engineers' Association etc. The arbitrators shall be governed by the rules of the institution. This will ensure accountability of the arbitrators.

In order to avoid pendency of cases, the Committee is of the considered opinion that the following consequences may be provided for not disposing of the case within the stipulated time limit: the fees of the arbitrator should be withdrawn, or he should be blacklisted and no further case should be allotted to him. The institution may be given the powers to take stipulated action against a defaulting arbitrator. If the arbitrator is of the opinion that the delay is caused due to the fault of the parties, he should inform the same to the institution.

Part IA may be added in the Act which shall provide for a statutory autonomous permanent institution known as the Indian Arbitration Commission. It shall be presided over by the Chief Justice of India. Its members shall be one representative each of the Ministry of Law and the Ministry of Commerce and two representatives of recognised

professional bodies such as the Bar Council of India, the Institute of Chartered Accountants, the Engineers' Association etc. This Commission shall be vested with the powers to grant accreditation to professional institutions which come forward to render their services in the field of institutionalised arbitration. Accreditation will ensure that the institution is equipped with proper infrastructure such as buildings, modern information technology and communication systems, library for law books and books on other professional subjects for reference by arbitrators. The guidelines for granting accreditation shall be made public. This will ensure transparency of the accreditation process.

The B Schedule shall be governed by Part IA of the Act.

This Schedule may provide that any professional institution which is a candidate for accreditation under Part IA should meet the standards laid down by the Indian Arbitration Commission. Such an institution shall be an international centre of excellence. It shall frame its own rules that will govern the appointments, preparation of panel, fixing of fees, the conduct of arbitrators as well as that of the arbitration proceedings, the penalties in case of delay in settling disputes etc. Such rules shall be made public. This would provide not only familiarity to the international commercial community who have to look out for a proper arbitral venue for resolution but would also instil confidence in the minds of the public that this is a transparent and reliable institution. This will also ensure accountability of arbitrators.

A panel consisting of appropriate persons, competent and qualified to serve as arbitrators, conciliators and mediators or willing to serve in any other specialist capacity such as experts, surveyors and investigators shall be maintained by the institution. This list shall be made available to the public. The enrolment of arbitrators as members of this institution shall be made mandatory inorder to be included in the list. The awards made by the arbitrators shall be scrutinized by its in-house Apex Body. They shall be final and made public if agreed to by the parties to the arbitration.

The Committee is of the considered view that the advantage of providing for these in the Schedules is that the parties to arbitration, conciliation or mediation will be free to choose either of the fora. Under this scheme, the parties will be at the liberty to either opt for institutionalised arbitration which shall be governed by its own rules or opt for arbitration under the supervision of the court.

2) Another issue which was highlighted was that in various Public Sector Undertakings and Government Departments, the arbitration and conciliation proceedings are not properly regulated. There are no fixed rules for the conduct of arbitration proceedings. Also, the arbitrators are not properly equipped in terms of infrastructure like library and also in terms of knowledge of latest legal position. It is alleged that in some cases, the departmental officers work as arbitrators, to give an award against the same department or in favour of the government without proper appreciation of facts and law. It is further alleged that they even cause delay by colluding with the opposite parties. This discourages the stakeholders from opting for arbitration.

The Committee is of the view that the benefits of institutionalised arbitration shall be made available to Public Sector Undertakings and Government Departments also. This will put an end to the alleged unethical practices followed in such institutions at present. This can be ensured by incorporating necessary clauses in the contracts entered into by them with the stakeholders, which would bind them to go for institutionalised arbitration.

This shall be to the advantage of the public and the public institutions in terms of cost and expertise.

At the meeting of the Committee held on 8th June, 2005 there was a consensus (which has already been stated elsewhere in the Report) that the present Bill tends to allow greater intervention by the Courts than the 1996 Act. The Committee is of the opinions that since many provisions of the Bill are contentious, a fresh legislation may be brought. The Secretary, Legislative Department, gave a presentation before the Committee. The crux of his presentation was that this Bill leaves room for more judicial interference. He informed the Committee that since it might be difficult to move so many amendments, the Legislative Department would consider to withdraw this Bill and on the basis of the recommendations of this Committee, bring a fresh Bill. Therefore, the Committee did not take up clause-by-clause consideration of the Bill.

In view of the above, the Committee is of the considered view that the present Bill may not suffice in achieving the desired objectives. It recommends that Government may consider bringing in a fresh comprehensive legislation on the subject before Parliament, as expeditiously as possible.

[*] To be appended at printing stage.

[*] Published in the Gazette of India, Extraordinary Part-II, Section 2, dated the 22nd December, 2003.

[**] Rajya Sabha Parliamentary Bulletin Part-II (No. 41562) dated the 17th August, 2004.

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[1] Black's Law Dictionary, 6th edn. (1990), West Publishing Co., p.105.

[2] supra n.1at p. 289.

[3] O.P. Malhotra, The Law and Practice of Arbitration and Conciliation, 1st edn.(2002),p.80.

[4] www.iccwbo.org.

[5] Memorandum submitted by Dr. Peter Werner, Policy Director, International Swaps and Derivatives Association, Singapore.

[6] B.S. Patil, The Law of Arbitration, 3 rd edn., 1996, p.3.

[7] *M/s Guru Nanak Foundation* v. *M/s Rattan Singh & Sons*, A.I.R. 1981 S.C.2075(2076).

IBA Guidelines on Conflicts of Interest in International Arbitration

Approved on 22 May 2004 by the Council of the International Bar Association

Introduction

1. Problems of conflicts of interest increasingly challenge international arbitration. Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation. The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.

2. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.

3. It is in the interest of everyone in the international arbitration community that international arbitration proceedings not be hindered by these growing conflicts of interest issues. The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of 19 experts[1] in international arbitration from 14 countries to study, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality and independence and disclosure in international arbitration. The Working Group has determined that existing standards lack sufficient clarity and uniformity in their application. It has therefore prepared these Guidelines, which set forth some General Standards and Explanatory Notes on the Standards. Moreover, the

Working Group believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that, in the view of the Working Group, do or do not warrant disclosure or disqualification of an arbitrator. Such lists - designated Red, Orange and Green (the 'Application Lists') - appear at the end of these Guidelines?

4. The Guidelines reflect the Working Group's understanding of the best current international practice firmly rooted in the principles expressed in the General Standards. The Working Group has based the General Standards and the Application Lists upon statutes and case law in jurisdictions and upon the judgment and experience of members of the Working Group and others involved in international commercial arbitration. The Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration. In particular, the Working Group has sought and considered the views of many leading arbitration institutions, as well as corporate counsel and other persons involved in international arbitration. The Working Group also published drafts of the Guidelines and sought comments at two annual meetings of the International Bar Association and other meetings of arbitrators. While the comments received by the Working Group varied, and included some points of criticisms, the arbitration community generally supported and encouraged these efforts to help reduce the growing problems of conflicts of interests. The Working Group has studied all the comments received and has adopted many of the proposals that it has received. The Working Group is very grateful indeed for the serious considerations given to its proposals by so many institutions and individuals all over the globe and for the comments and proposals received.

5. Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in the light of comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).[3]

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection. The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation. The Working Group is also publishing a Background and History, which describes the

studies made by the Working Group and may be helpful in interpreting the Guidelines.

7. The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be comprehensive, nor could they be. Nevertheless, the Working Group is confident that the Application Lists provide better concrete guidance than the General Standards (and certainly more than existing standards). The IBA and the Working Group seek comments on the actual use of the Guidelines, and they plan to supplement, revise and refine the Guidelines based on that practical experience.

8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

Notes

1 The members of the Working Group are: (1) Henri Alvarez, Canada; (2) John Beechey, England; (3) Jim Carter, United States; (4) Emmanuel Gaillard, France, (5) Emilio Gonzales de Castilla, Mexico; (6) Bernard Hanotiau, Belgium; (7) Michael Hwang, Singapore; (8) Albert Jan van den Berg, Belgium; (9) Doug Jones, Australia; (10) Gabrielle Kaufmann-Kohler, Switzerland; (11) Arthur Marriott, England; (12) Tore Wiwen Nilsson, Sweden; (13) Hilmar Raeschke-Kessler, Germany; (14) David W. Rivkin, United States; (15) Klaus Sachs, Germany; (16) Nathalie Voser, Switzerland (Rapporteur); (17) David Williams, New Zealand; (18) Des Williams, South Africa; (19); Otto de Witt Wijnen, The Netherlands (Chair).

2 Detailed Background Information to the Guidelines has been published in Business Law international at BLI Vol 5, No 3, September 2004, pp 433-458 and is available at the IBA website www.ibanet.org

3 Similarly, the Working Group is of the opinion that these Guidelines should apply by analogy to civil servants and government officers who are appointed as arbitrators by States or State entities that are parties to arbitration proceedings.

Part I: General Standards Regarding Impartiality, Independence And Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding

until the final award has been rendered or the proceeding has otherwise finally terminated.

Explanation to General Standard -

(1) The Working Group is guided by the fundamental principle in international arbitration that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings. The Working Group considered whether this obligation should extend even during the period that the award may be challenged but has decided against this. The Working Group takes the view that the arbitrator's duty ends when the Arbitral Tribunal has rendered the final award or the proceedings have otherwise been finally terminated (eg, because of a settlement). If, after setting aside or other proceedings, the dispute is referred back to the same arbitrator, a fresh round of disclosure may be necessary.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person@s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator@s impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).

(c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrators impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

Explanation to General Standard 2:

(a) It is the main ethical guiding principle of every arbitrator that actual bias from the arbitrator's own point of view must lead to that arbitrator declining his or her appointment. This standard should apply regardless of the stage of the proceedings. This principle is so self-evident that many national laws do not

explicitly say so. See eg Article 12, UNCITRAL Model Law. The Working Group, however, has included it in the General Standards because explicit expression in these Guidelines helps to avoid confusion and to create confidence in procedures before arbitral tribunals. In addition, the Working Group believes that the broad standard of 'any doubts as to an ability to be impartial and independent' should lead to the arbitrator declining the appointment.

(b) In order for standards to be applied as consistently as possible, the Working Group believes that the test for disqualification should be an objective one. The Working Group uses the wording 'impartiality or independence' derived from the broadly adopted Article 12 of the UNCITRAL Model Law, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, to be applied objectively (a 'reasonable third person test'). As described in the Explanation to General Standard 3(d), this standard should apply regardless of the stage of the proceedings.

(c) Most laws and rules that apply the standard of justifiable doubts do not further define that standard. The Working Group believes that this General Standard provides some context for making this determination.

(d) The Working Group supports the view that no one is allowed to be his or her own judge; ie, there cannot be identity between an arbitrator and a party. The Working Group believes that this situation cannot be waived by the parties. The same principle should apply to persons who are legal representatives of a legal entity that is a party in the arbitration, like board members, or who have a significant economic interest in the matter at stake. Because of the importance of this principle, this non-waivable situation is made a General Standard, and examples are provided in the non-waivable Red List.

The General Standard purposely uses the terms 'identity' and 'legal representatives.' In the light of comments received, the Working Group considered whether these terms should be extended or further defined, but decided against doing so. It realizes that there are situations in which an employee of a party or a civil servant can be in a position similar, if not identical, to the position of an official legal representative. The Working Group decided that it should suffice to state the principle.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrators impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or

other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

(b) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned.

(c) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(d) When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) General Standard 2(b) above sets out an objective test for disqualification of an arbitrator. However, because of varying considerations with respect to disclosure, the proper standard for disclosure may be different. A purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure. The Working Group has adapted the language of Article 7(2) of the ICC Rules for this standard.

However, the Working Group believes that this principle should not be applied without limitations. Because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties' perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required. Similarly, the Working Group emphasizes that the two tests (objective test for disqualification and subjective test for disclosure) are clearly distinct from each other, and that a disclosure shall not automatically lead to disqualification, as reflected in General Standard 3(b). In determining what facts

should be disclosed, an arbitrator should take into account all circumstances known to him or her, including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.

(b) Disclosure is not an admission of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and Independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination or resigned. An arbitrator making disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether or not they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. The Working Group hopes that the promulgation of this General Standard will eliminate the misunderstanding that disclosure demonstrates doubts sufficient to disqualify the arbitrator. Instead, any challenge should be successful only if an objective test, as set forth above, is met.

(c) Unnecessary disclosure sometimes raises an incorrect implication in the minds of the parties that the disclosed circumstances would affect his or her impartiality or independence. Excessive disclosures thus unnecessarily undermine the parties' confidence in the process. Nevertheless, after some debate, the Working Group believes it important to provide expressly in the General Standards that in case of doubt the arbitrator should disclose. If the arbitrator feels that he or she should disclose but that professional secrecy rules or other rules of practice prevent such disclosure, he or she should not accept the appointment or should resign.

(d) The Working Group has concluded that disclosure or disqualification (as set out in General Standard 2) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act or whether a challenge by a party should be successful, the facts and circumstances alone are relevant and not the current stage of the procedure or the consequences of the withdrawal. As a practical matter, institutions make a distinction between the commencement of an arbitration proceeding and a later stage. Also, courts tend to apply different standards. Nevertheless, the Working Group believes it important to clarify that no distinction should be made regarding the stage of the arbitral procedure. While there are practical concerns if an arbitrator must withdraw after an arbitration has commenced, a distinction based on the stage of arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) If, within 30 days after the receipt of any disclosure by the arbitrator or after a

party learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, die party is deemed to have waived any potential conflict of interest by the arbitrator based on such facts or circumstances and may not raise any objection to such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in General Standard 2(d), any waiver by a party or any agreement by die parties to have such a person serve as arbitrator shall be regarded as invalid.

(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in die waivable Red List, exists. Neverdieless, such a person may accept appointment as arbitrator or continue to act as an arbitrator, if die following conditions are met:

(i) All parties, all arbitrators and the arbitration institution or odier appointing audiority (if any) must have full knowledge of die conflict of interest; and

(ii) All parties must expressly agree diat such person may serve as arbitrator despite die conflict of interest.

(d) An arbitrator may assist die parties in reaching a settlement of die dispute at any stage of die proceedings. However, before doing so, die arbitrator should receive an express agreement by die parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest diat may arise from die arbitrator@s participation in such process or from information diat die arbitrator may learn in die process. If die assistance by die arbitrator does not lead to final settlement of tile case, die parties remain bound by their waiver. However, consistent widi General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of die arbitration proceedings.

Explanation to General Standard 4:

(a) The Working Group suggests a requirement of an explicit objection by the parties within a certain time limit. In the view of the Working Group, this time limit should also apply to a party who refuses to be involved.

(b) This General Standard is included to make General Standard 4(a) consistent with the non-waivable provisions of General Standard 2(d). Examples of such circumstances are

described in the non-waivable Red List.

(c) In a serious conflict of interest, such as those that are described by way of example in the waivable Red List, the parties may nevertheless wish to use such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. The Working Group believes persons with such a serious conflict of interests may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well established in some jurisdictions but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires signature. In practice, the requirement of an express waiver allows such consent to be made in the minutes or transcript of a hearing. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective if the mediation is unsuccessful. Thus, parties assume the risk of what the arbitrator may learn in the settlement process. In giving theirexpress consent, the parties should realize the consequences of the arbitrator assisting the parties in a settlement process and agree on regulating this special position further where appropriate.

(5) Scope

These Guidelines apply equally to tribunal chairs, sole arbitrators and party-appointed arbitrators. These Guidelines do not apply to non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws.

Explanation to General Standard 5:

Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards should not distinguish among sole arbitrators, party-appointed arbitrators and tribunal chairs. With regard to secretaries of Arbitral Tribunals, the Working Group takes the view that it is the responsibility of the arbitrator to ensure that the secretary is and remains impartial and independent.

Some arbitration rules and domestic laws permit party-appointed arbitrators to be non-neutral. When an arbitrator is serving in such a role, these Guidelines should not apply to him or her, since their purpose is to protect impartiality and independence.

(6) Relationships

(a) When considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether disclosure should be made, the activities of an arbitrator@s law firm, if any, should be reasonably considered in each individual case. Therefore, the fact that the activities of the arbitrators firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.

(b) Similarly, if one of the parties is a legal entity which is a member of a group with which the arbitrator@s firm has an involvement, such facts or circumstances should be reasonably considered in each individual case. Therefore, this fact alone shall not automatically constitute a source of a conflict of interest or a reason for disclosure.

(c) If one of the parties is a legal entity, the managers, directors and members of a supervisory board of such legal entity and any person having a similar controlling influence on the legal entity shall be considered to be the equivalent of the legal entity.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to use the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration. In the opinion of the Working Group, the arbitrator must in principle be considered as identical to his or her law firm, but nevertheless the activities of the arbitrator's firm should not automatically constitute a conflict of interest. The relevance of such activities, such as the nature, timing and scope of the work by the law firm, should be reasonably considered in each individual case.The Working Group uses the term 'involvement' rather than 'acting for[1] because a law firm's relevant connections with a party may include activities other than representation on a legal matter.

(b) When a party to an arbitration is a member of a group of companies, special questions regarding conflict of interest arise. As in the prior paragraph, the Working Group believes that because individual corporate structure arrangements vary so widely an automatic rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies should be reasonably considered in each individual case.

(c) The party in international arbitration is usually a legal entity. Therefore, this General Standard clarifies which individuals should be considered effectively to be that party.

(7) Duty of Arbitrator and Parties

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so on its own initiative before the beginning of the proceeding or as soon as it becomes aware of such relationship.

(b) In order to comply with General Standard 7(a), a party shall provide any information already available to it and shall perform a reasonable search of publicly available information. (c) An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.

Explanation to General Standard 7:

To reduce the risk of abuse by unmeritorious challenge of an arbitrator's impartiality or independence, it is necessary that the parties disclose any relevant relationship with the arbitrator. In addition, any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that, applying the general standard, might affect the arbitrator's impartiality and independence. It is the arbitrator or putative arbitrator's obligation to make similar enquiries and to disclose any information that may cause his or her impartiality or independence to be called into question.

PART - II

Practical Application of the General Standards

1. The Working Group believes that if the Guidelines are to have an important practical influence, they should reflect situations that are likely to occur in today's arbitration practice. The Guidelines should provide specific guidance to arbitrators, parties, institutions and courts as to what situations do or do not constitute conflicts of interest or should be disclosed.

For this purpose, the members of the Working Group analyzed their respective case law and categorized situations that can occur in the following Application Lists. These lists obviously cannot contain every situation, but they provide guidance in many circumstances, and the Working Group has sought to make them as comprehensive as possible. In all cases, the General Standards should control.

2. The Red List consists of two parts: 'a non-waivable Red List' (see General Standards 2(c) and 4(b)) and 'a waivable Red List' (see General Standard 4(c)). These lists are a non-exhaustive enumeration of specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts fcee General Standard 2(b)). The non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such a situation cannot cure the conflict. The waivable Red List encompasses situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List Is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).

4. It should be stressed that, as stated above, such disclosure should not automatically result in a disqualification of the arbitrator; no presumption regarding disqualification should arise from a disclosure. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person's point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator's impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act. He or she can also act if there is no timely objection by the parties or, in situations covered by the waivable Red List, a specific acceptance by the parties in accordance with General Standard 4(c). Of course, if a party challenges the appointment of the arbitrator, he or she can nevertheless act if the authority that has to rule on the challenge decides that the challenge does not meet the objective test for disqualification.

5. In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

6. The Green List contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. In the opinion of the Working Group, as already expressed in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes of the parties.'

7. Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List, even though they are not specifically stated. An arbitrator may nevertheless wish to make disclosure if, under the General Standards, he or she believes it to be appropriate. While there has been much debate with respect to the time limits used in the Lists, the Working Group has concluded that the limits indicated are appropriate and provide guidance where none exists now. For example, the three-year period in Orange List 3.1 may be too long in certain circumstances and too short in others, but the Working Group believes that the period is an appropriate general criterion, subject to the special circumstances of any case.

8. The borderline between the situations indicated is often thin. It can be debated whether a certain situation should be on one List of instead of another. Also, the Lists contain, for various situations, open norms like significant'. The Working Group has extensively and repeatedly discussed both of these issues, in the light of comments received. It believes that the decisions reflected in the Lists reflect international principles to the best extent possible and that further definition of the norms, which should be interpreted reasonably in light of the facts and circumstances in each case, would be counter-productive.

9. There has been much debate as to whether there should be a Green List at all and also, with respect to the Red List, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy. With respect to the first question, the Working Group has maintained its decision that the subjective test for disclosure should not be the absolute criterion but that some objective thresholds should be added. With respect to the second question, the conclusion of the Working Group was that party autonomy, in this respect, has its limits.

1. Non-Waivable Red List

   1.1 There Is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.

   1.2 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.

1.3 The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

1.4 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

2.1. Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator has previous involvement in the case.

2.2. Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

2.2.3 A close family membef of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3. Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate[5] of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.5 The arbitrator's law firm had a previous butterminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. Orange List

3.1. Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.[6]

3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

3.2. Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.

3.2.2 A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.

3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.

3.3. Relationship between an arbitrator and another arbitrator or counsel.

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers[7].

3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personafriendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spendconsiderable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

3.4. Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

3.4.4 If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.

3.5. Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.

3.5.3 The arbitrator holds one position in an arbitration institution with appointing authority over the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1. Previously expressed legal opinions

4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

4.2. Previous services against one party

4.2.1 The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

4.3. Current services for one of the parties

4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

4.4. Contacts with another arbitrator or with counsel for one of the parties

4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.

4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have

previously served together as arbitrators or as co-counsel.

4.5. Contacts between the arbitrator and one of the parties

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.

4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.

A flow chart is attached to these Guidelines for easy reference to the application of the Lists. However, it should be stressed that this is only a schematic reflection of the very complex reality. Always, the specific circumstances of the case prevail.

Notes

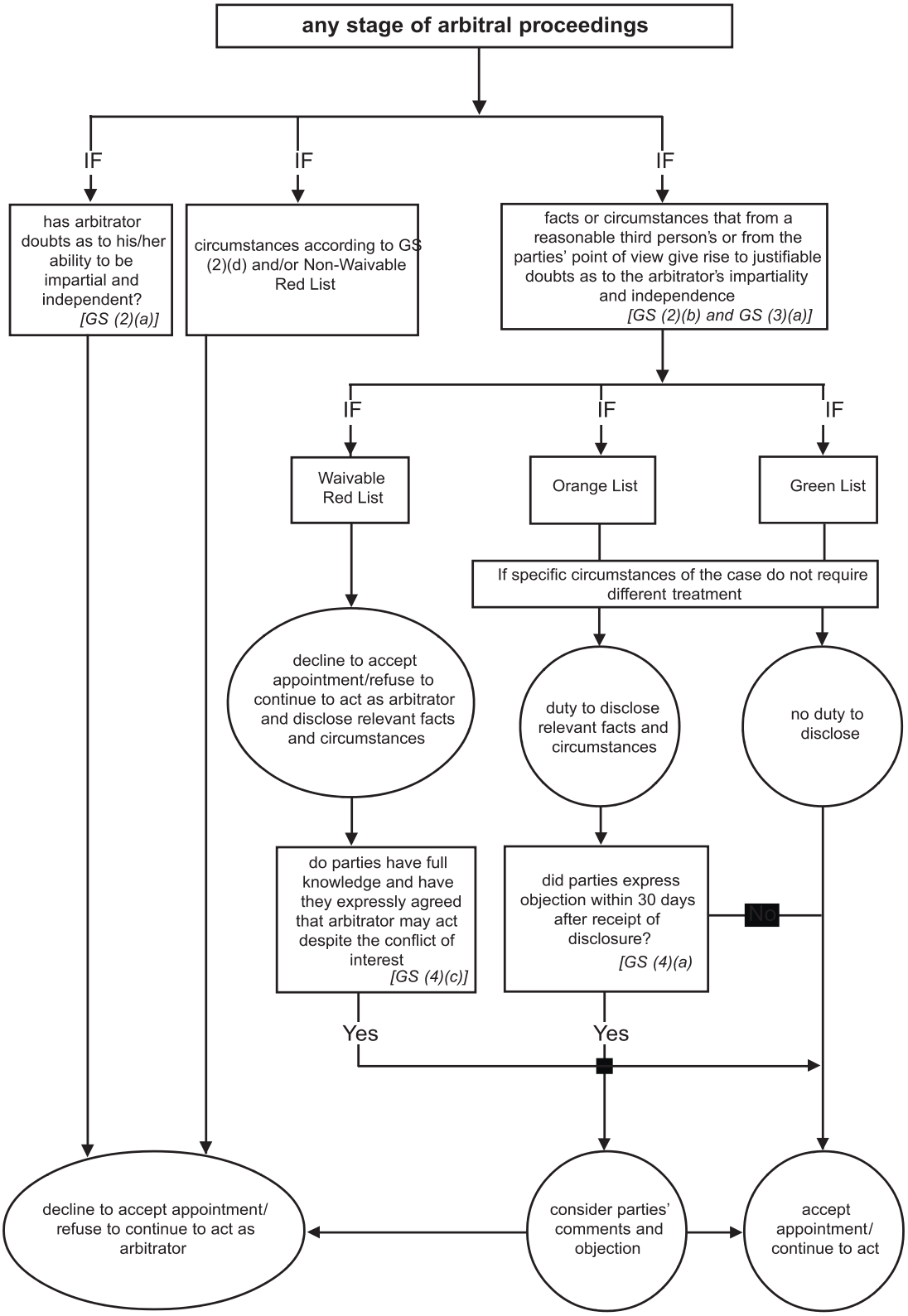
4 Throughout the Application Lists, the term 'close family member[1] refers to a spouse, sibling, child, parent or life partner.

5 Throughout the Application Lists, the term 'affiliate' encompasses all companies in one group of companies including the parent company.

6 It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.

7 Issues concerning special considerations involving barristers in England are discussed in the Background Information issued by the Working Group.

Flow chart IBA Guidelines on Conflicts of Interest in International Arbitration



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BILL

to provide for the constitution of a Commercial Division in the High Courts for adjudicating commercial disputes and for matters connected therewith or incidental thereto.

(As passed by Lok Subha)

ANNEXURE –VII

Bill No. **139-Cof2009**

THE COMMERCIAL DIVISION OF HIGH COURTS BILL, 2009

A

BILL

to provide for the constitution of a Commercial Division in the High Courts for adjudicating commercial disputes and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Sixtieth Year of the Republic of India as follows:—

CHAPTERI

PRELIMINARY

Short title, extent and commencement

1. (l) This Act may be called the Commercial Division of High Courts Act, 2009.

2. It extends to the whole of India, except the State of Jammu and Kashmir.

3. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different High Courts and for different provisions of this Act and any reference in any such provision to the High Court or to the commencement of this Act shall be construed as a reference \o that High Court or the commencement of that provision:

Provided further that no notification under this sub-section shall be issued in relation to a High Court unless the Centra! Government has consulted the Chief Justice of the concerned High Court and the concerned State Government or State Governments.

Definitions.

2.(l) In this Act, unless the context otherwise requires,—

(a) "commercial dispute" means a dispute arising out of ordinary transactions of merchants, bankers and traders such as those relating to enforcement and interpretation

of mercantile documents, export or import of merchandise, affreightment, carriage of goods, franchising, distribution and licensing agreements, maintenance JT and consultancy agreements, mercantile agency and mercantile usage, partnership, technology development in software, hardware, networks, internet, website and intellectual property such as trademark, copyright, patent, design, domain names and brands and such other commercial disputes which the Central Government may notify.

Explanation I.— A dispute, which is commercial, shall not cease to be a JO commercial dispute merely because it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or for taking any other action against immovable property.

Explanation II.—A dispute which is not a commercial dispute shall be deemed to be a commercial dispute if the immovable property involved in the dispute is used /A in trade or put to commercial use.

Explanation III.— An application under section 34 or section 36 or an appeal under section 3 7 of the Arbitration and Conciliation Act, 1996 shall be deemed to be a 26 of 1996. commercial dispute if the amount in dispute or claim relates to a specified value;

(b) "Commercial Division" means the Commercial Division in a High Court^-C constituted under section 3;

(c) "High Court" has the meaning as assigned to it in clause (14) of article 366 of the Constitution;

(d) "notification" means a notification published in the Official Gazette and the expression 'notify' with its cognate meanings and grammatical variations shall be 2*5" construed accordingly;

(e) "specified value" has the meaning as assigned to it in section 7.

(2) Any reference in this Act to the Code of Civil Procedure,

1908 or any provision 5 of 1908 thereof which is not in force in any area to which this Act applies shall be construed to have a reference to the corresponding enactment or provision thereof in force in such area.

(3) Words and expressions used herein and not defined but defined in the Code of Civil Procedure, 1908 shall have the meanings assigned to them in that Code. 5 of 1908.

CHAPTER II

CONSTITUTION AND JURISDICTION OF COMMERCIAL DIVISION OF HIGH COURTS

Constitution of Commercial Division of High Courts.

3. (/) A High Court may, by order, constitute a division to be called the "Commercial Division" of that High Court having one or more Division Benches.

(2) The Judges of the Commercial Division shall be such of the Judges of the High Court as the Chief Justice of that High Court may, from time to time, nominate.

Jurisdiction of High Court and allocation of matters to Commercial Division

4. (l) Notwithstanding anything contained in any law for the time being in force, after the issuance of an order under sub-section (/) of section 3 by a High Court, all suits relating to commercial disputes of specified value shall be filed in the High Court and such suits shall be allocated allocated to the Commercial Division of that High Court.

(2) All execution proceedings, arising out of the suits referred to in sub-section (/) and arising out of the matters specified in sections 11 and 12, shall be disposed of by the Commercial Division of the High Court.

Explanation.— For the purposes of this section, "High Court" means the High Court exercising jurisdiction over the court of ordinary civil jurisdiction in which the suit or application could have, but for the provisions of this Act, been filed.

26 of 1996 5. (l) Notwithstanding anything contained in the Arbitration and Conciliation Act, 1996, after issuance of an order under sub-section (/) of section 3 by a High Court,— Jurisdiction and procedure of commercial Division in arbitration matters.

(a) all applications under sections 34 and 36; and

(b) all appeals under clause (a) of sub-section (l) or sub-section (2) of matters, section 37, of that Act relating to commercial disputes of specified value shall be filed in the High Court *IP* and every such application or **appeal,** as the case may be, shall be allocated to the Commercial Division of that High **Court.**

26 of 1996 (2) Every application under section 34 or section 36 of the Arbitration and Conciliation Act, 1996 relating to commercial disputes of specified value, pending in any Court subordinate to a High Court immediately before the issuance of any order under sub- section (/) of section 3 shall stand transferred to the High Court and shall thereafter be allocated to the Commercial Division of that High Court.

26 of 1996 (3) Every application under section 34 or section 36 or an appeal under section 37 of the Arbitration and Conciliation Act, 1996 relating to commercial disputes of specified value, pending in the High Court immediately before the issuance of an order under sub-section (l) of section 3, shall, on the issuance of such order, be allocated to the Commercial Division of that High Court.

(4) Every application or appeal referred to in this section shall be disposed of by the Commercial Division as expeditiously as possible and endeavour shall be made to dispose of the matter

within one year from the date of service of notice on the opposite party.

(5) The applicants or appellants in respect of the matters referred to in sub-section (l) shall, within sixty days from the date of service of notice on the opposite party, file paper books containing relevant documents including copies of oral evidence recorded, if any, and the opposite party shall likewise file a paper book within sixty days from the date of service of notice on such party.

(6) The applicants or appellants in respect of the matters referred to sub-section (2) and the opposite parties shall file paper books within sixty days from the date of service of notice on such parties or from the date of issuance of the order under sub-section (/) of section 3, whichever is later.

(7) Within thirty days from the date of filing of the paper books, all parties to the proceedings shall file brief written submissions after exchanging copies of the same.

(8) Where any party fails to comply with the time limits referred to in sub-sections (5) to (7), the Commercial Division may, if reasonable cause is shown, extend the time limit for a further period not exceeding thirty days, subject, however, to such order as to costs as the Commercial Division may deem fit.

Exclusion of jurisdiction of Commercial Division.

6. Notwithstanding anything contained in section 4, the Commercial Division of a High Court shall not entertain or decide any suit, application or revision application or proceeding relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

CHAPTER III

SPECIFIED VALUE AND ITS DETERMINATION

Definition of specified value

7. (1) For the purposes of this Act, "specified value", in relation to a matter before a High Court, means such value of the subject matter of the commercial dispute in a suit, appeal or application which is not les than five crore rupees or such higher value as the Central Government may, in consultation with the government of the State or States to which the jurisdiction of the High Courts extends, notify.

(2) Every notification issued under sub-section (1) shall be laid, as soon as may be after it is made, before each Hourse of Parliament.

Determination of specified value of subject matter of commercial disputes in suit.

8. (1) The specified value of the subject matter of the commercial dispute in a suit or appeal or application shall be determined in the following manner, namely:—

(a) where the relief sought in a suit, appeal or application is for recovery of money, the money sought to be recovered in the suit or appeal or application inclusive of interest, if any, computed up to the date of filing of the suit, appeal or application, as the case may be, shall be taken into account for determining such specified value;

(b) where the relief sought in a suit or appeal or application relates to movable property or to a right therein, the market value of the movable property as on the date of filing of the suit, appeal or application, as the case may be, shall be taken into account for determining such specified value;

(c) where the relief sought in a suit, appeal or application relates to immovable property or to a right therein, the market value of the

immovable property, as on the date of filing of the suit, appeal or application, as the case may be, shall be taken into account for determining specified value;

(d) where the relief sought in a suit, appeal or application relates to any other intangible right, the market value of the said rights as estimated by the plaintiff shallbe taken into account for determining specified value;

(e) where the counter-claim is raised in any suit, appeal or application, the value of the subject matter of the commercial dispute in such counter-claim as on the date of the counter-claim shall be taken into account.

(2) Where, in a suit, application, revision application or appeal filed in a High Court, or transferred to the High Court in accordance with the provisions of this Act or pending before the High Court, a dispute arises as to whether the subject matter of such suit, application, revision application or appeal, as the case may be, is a commercial dispute or not or such commercial dispute is of specified value or not, then, the said dispute shall be "2P decided by the Commercial Division of that High Court.

(3) Where the Commercial Division of a High Court upon reference to it under subsection (2) and after hearing the parties comes to conclusion,—

(a) that the subject matter is a commercial dispute and the value of the subject matter in the commercial dispute in a suit, appeal or application is equal to the specified value so as to fall within the pecuniary jurisdiction of the Commercial Division, the suit, appeal or application (together with the counter claim, if any) shall be dealt with by the Commercial Division of the High Court;

(b) that the value of the subject matter in commercial dispute in a suit, appeal or application is less than the specified value and does not fall within the preliminary jurisdiction of the Commercial Division, the suit, appeal or application (together with the counter claim, if any) shall remain where it is pending before such conclusion of the High Court.

(4) The manner of valuation and determination of the subject matter of commercial dispute in a suit, appeal or application under this Act shall override any provision for *fy valuation of the subject matter of any suit under any law for the time being in force.

CHAPTER IV

PROCEDURE TO BE FOLLOWED BY COMMERCIAL DIVISION OF HIGH COURTS

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9. (1) Except to the extent otherwise provided by or under this Act, the Commercial Division of a High Court shall follow the procedure specified in the Code of Civil Procedure, 1908. Fast Track Procedure to be followed by Commercial Division of High Court

(2) Notwithstanding anything contained in sub-section (/), the following procedure shall be followed by the Commercial Division of every High Court, in respect of the subject matter of commercial dispute of specified value in a suit which is filed on or after the commencement of this Act, namely:—

(a) the plaintiff shall file along with the plaint,—

(i) the documents on which he sues or relies;

(ii) as many copies of the plaint and documents referred to in this

clause as to the number of defendants;-

(iii) an affidavit containing his statement in examination-in-chief;

(iv) affidavits containing statements of other witnesses in examination-in- chief;

(v) brief issues that are likely to arise;

(vi) list of interrogatories, if any;

(vii) application for discovery and production of documents, if any, 2-C maintaining their relevancy;

(viii) such other material as the plaintiff may consider necessary;

(ix) full address, including e-mail, fax and telephone number of all the claimants and defendants to the extent known to the plaintiff;

(b) the plaintiff shall furnish along with the plaint, requisite fee for service of summons on the defendants;

(c) where the plaintiff has furnished electronic mail addresses of the defendants, he shall be directed by the Commercial Division, without any prejudice to the procedure for delivery of summons referred to in Order V of the Code of Civil Procedure, 1908, to send the summons along with the copy of the plaint to the defendant by electronic " mail;

(d) the defendants shall, within a period of one month from the date of receipt of the copy of the plaint along with all the relevant

documents, file his written statement along with all documents except copies of plaint referred to in clause (a);

(e) the defendants shall, along with the written statement, also file counter- 3.T" claim, if any, along with all documents except the copies of plaint or documents referred to in clause (a);

(f) the defendants shall, along with the written statement, also file counterclaim, if any, along with all documents, except the copies of plaint, referred to in clause

(g) the defendants shall also send, copies of written statement and all documents filed along with the written statement, to the plaintiff;

(h) the plaintiff shall, at the time of trial, file affidavit containing evidence in examination-in- chief of other witnesses, if any; the plaintiff may, within fifteen days of service of the written statement, apply to the Commercial Division for granting leave for filing of rejoinder;

(i) the plaintiff may, within fifteen days of service of the written statement, apply to the Commercial Division for granting leave for filing of rejoinder;

(j) the plaintiff shall file rejoinder within one month from the date of the order of the Commercial Division granting leave to file such rejoinder;

(k) where the Commercial Division allows any application for discovery of documents, plaintiff and the defendants, as the case may be, shall be permitted to file supplementary statements, within a

period as may be specified by the Commercial 3 Division.

(3) For the purposes of recording of statement in cross-examination and re-examination of parties and witnesses, the Commercial Division may appoint an advocate of not less than twenty years standing at Bar or a Judicial Officer not below the rank of Senior Civil Judge as Commissioner.

(4) In a case before the Commercial Division,—

(a) all parties shall file written submission before the commencement of oral submission;

(b) the time limits for making submissions (including oral submission) shall be fixed in advance, at the case management conference.

(5) The Commercial Division shall, within thirty days of the conclusion of argument, pronounce judgment and copies thereof shall be issued to all the parties to the dispute through electronic mail or otherwise.

Case management conference and examination of witnesses

10. (1) Save as otherwise provided under this Act, a single judge sitting in the Commercial Division may—

(a) hold one or more case management conferences;

(b) fix a time schedule for finalisation of issues, cross-examination of witnesses, filing of written submission and for oral submission;*r*

(c) provide for record of evidence in cross-examination and re-examination;

(d) appoint commissioner for recording of cross-examination or re-examination provided any order for the purpose of

fixing limits which may lead to the disposal of the matter for default or *ex parte,* shall be passed by a Bench of two Judges.

(2) Any objection as to the admissibility of any evidence may be recorded by single judge but shall be decided by the Bench of two Judges sitting in the Commercial Division.

CHAPTERV

TRANSFER OF PENDING SUITS, APPLICATIONS OR PROCEEDINGS TO COMMERCIAL DIVISION OF THE HIGH COURT

Transfer of suits, applications or other proceedings from courts subordinate to a High Court to such High Court.

11. All suits, applications or proceedings relating to commercial disputes of specified value pending in the courts subordinate to a High Court shall, on the issuance of an order under sub-section (/) of section 3, stand transferred to the High Court having jurisdiction over such courts and shall thereafter be allocated to the Commercial Division of such High Court.

allocation of suits, applications or other proceedings pending in a High Court to its Commercial Division.

12. The following suits, applications or proceedings in which the subject matter of commercial dispute is equal to specified value and pending in every High Court shall, on the issuance of an order under sub-section (/) of section 3, be allocated to its Commercial *^0* Division, namely:—

(i) all suits wherein subject matter of the commercial dispute in such suit is of specified value;

(ii) all appeals against decrees by courts subordinate to the High Court wherein subject matter of the commercial dispute in such appeal

is of specified value;

(iii) appeals against a judgment of a single judge on the original side of the High Court wherein subject matter of the commercial dispute in such appeal is of specified value;

(iv) appeals against orders passed in interlocutory applications in suits, by courts subordinate to the High Court, wherein subject matter of the commercial dispute in such appeal is of specified value;

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(v) revision applications filed under section 115 of the Code of Civil Procedure, 1908, for setting aside interlocutory orders of the courts subordinate to the High Court, wherein subject matter of the commercial dispute in such revision application is of specified value;

(vi) applications under article 226 or article 227 of the Constitution filed for setting aside or quashing the interlocutory orders passed by courts subordinate to the High Court, wherein subject matter of the commercial dispute in such application is of specified value.

CHAPTER VI

MISCELLANEOUS

Appeal to Supreme Court

13. (1) In respect of suits of the category referred to in sub- section (/) of section 4, section-5, section 11 and clause (/) of section 12, an appeal shall lie to the Supreme Court against any decree passed by the Commercial Division.

(2) *A*n appeal shall lie to the Supreme Court against the orders of the Commercial "Division referred to in clauses *(a)* to *(w)* of Rule 1 of Order XLIII of the Code of Civil Procedure, 1908.

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Explanation.— In this section, the word "decree" shall

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include all decrees which are to be treated as decrees for purposes of Rule 4 of Order XXI, Ruie 58 and Rule 103 of Order 5 of 1908. XXI of the Code of Civil Procedure. 1908.

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14. The decrees or orders passed by the Commercial Division shall be executed by the said Division and the provisions of the Code of Civil Procedure, 1908 relating to execution of decree or order shall, so far as may be, apply to the Commercial Division.

Execution of decrees or orders.

15. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Application of other laws not barred.

16. Save as otherwise provided, the provisions of this Act shall have effect. notwihstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Act to have overriding effect.

17. The High Court may, by notification, make rules for carrying out the provisions of Power of High Court to make rules.

Power to High Court to make rules.

18. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty:

Power to remove difficulties.

Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament. Amendment

Amendment of Act 26 of 1996

19. In the Arbitration and Conciliation Act, 1996,—

(a) in section 2, in sub-section (/), for clause (e), the following clause shall be substituted,

namely:— *iT"*

'(e) "Court", in relation to,—

(i) sections other than sections specified in sub-clause (//'), means—

(a) the principal Civil Court of original jurisdiction in a district,

or

(b) any Court of co-ordinate jurisdiction to which the Court referred to in sub-clause (a) transfers a matter brought before it, and includes the High Court in exercise of its original 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 ; and

(ii) sections 34, 36 and 37 where the arbitration is relating to commercial disputes of specified value, means the Commercial Division of the High Court constituted under sub-section (/) of section 3 of the

Commercial Division of High Court Act, 2009.'.

(b) in section 37, in sub-section (/), in clause *(b)*, the following proviso shall be *")-€* inserted, namely:—

"Provided that where the arbitration relates to a commercial dispute of specified value, the appeal shall lie to the Supreme Court in accordance with the provisions contained in section 13 of the Commercial Division of High Courts Act, 2009.".