PROPOSED AMENDMENTS TO THE ARBITRATION & CONCILIATION ACT, 1996

A CONSULTATION PAPER

MINISTRY OF LAW AND JUSTICE
GOVERNMENT OF INDIA

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 annexed 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 subsection 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

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

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 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

[2] 2002 4 SCC 105

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. 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 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 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 International (Supra) and Satyam Computers, 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 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 set forth 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, set forth 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. 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 cannot 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:-

"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."

(e) 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.

(f) 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.

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

(i) 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."

(j) 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."

(v) 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**:

(i) 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."

(ii) 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.

(iii) 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 take into account of the terms of the contract and trade usages."

(iv) 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:

(i) 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.

(ii) 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.

(viii) 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

(ix) 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.

(x) 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.

(xi) 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.

(xii) 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.

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

(xiv) 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).

(xv) Instead 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:

(i) 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.

(ii) 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.

(iii) 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."

(iv) It is therefore proposed 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 subsection (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:

(i) 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."

(ii) 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.

(iii) 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.

(iv) 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 subsection (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 subsections (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:

(i) 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.

(ii) 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) <u>Suggestion for Insertion of provision for implied arbitration agreement in commercial contract of high consideration value</u>:

(i) 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.

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

(iii) 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 disputes 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."

(iv) 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.

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

8. 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:

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